

Testimony of

Stephen M. Pinkos

Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the U.S. Patent and Trademark Office

May 25, 2005

STATEMENT OF STEPHEN M. PINKOS

DEPUTY UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DEPUTY DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE COMMITTEE ON THE JUDICIARY SUBCOMMITTEE ON INTELLECTUAL PROPERTY United States Senate

"Piracy of Intellectual Property"

MAY 25, 2005

Chairman Hatch, Ranking Member Leahy, and Members of the Subcommittee: Thank you for this opportunity to appear before you to discuss international intellectual property (IP) piracy and counterfeiting problems and the Department of Commerce's role in protecting IP abroad. Secretary Gutierrez is keenly aware of the increasing significance of IP protection for American businesses and innovators and has made combating piracy and counterfeiting a top priority for the entire Department. As Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office (USPTO), I am dedicated to marshalling U.S. government efforts to reduce the toll that IP theft takes on American IP owners. I am very appreciative of the Subcommittee's interest in addressing additional ways to protect U.S. IP owners' assets, and I commend you for holding today's hearing on IP piracy and counterfeiting, with an emphasis on China and Russia. Scope of Global IP Piracy and Counterfeiting Problem Increasingly, both the United States and our trading partners are relying on IP to drive economic growth. This is because competitive success in a market economy depends more and more on the IP assets held by an institution -- from the skills of its employees to the results of its latest research. IP-based businesses, such as the software and entertainment industries, now represent the largest single sector of the U.S. economy. According to the International Intellectual Property Alliance, U.S. copyright industries continue to lead the U.S. economy in their contributions to job growth, gross domestic product (GDP), and foreign sales/exports. Between 1977 and 2001, the U.S. copyright industries' share of the GDP grew at an annual rate more than twice as fast as the rest of the U.S. economy. In 2002, the U.S. "core" copyright industries' activities accounted for approximately 6 percent of the U.S. GDP

1

(\$626.6 billion).¹ In 2002, the U.S. copyright industries achieved estimated foreign sales and exports of \$89 billion, leading all major industry sectors, including motor vehicles (equipment and parts), aircraft and aircraft parts, and the agricultural sector.² Unfortunately, the economic benefits of capitalizing on intellectual property rights (IPR) have captured the attention of pirates, organized crime, and terrorists. The global criminal nature of IP piracy has effects in other areas as well. As former U.S. Attorney General John Ashcroft reported: "In addition to threatening our economic and personal well being, intellectual property crime is a lucrative venture for organized criminal enterprises. And as law enforcement has moved to cut off the traditional means of fund-raising by terrorists, the immense profit margins from intellectual property crimes risk becoming a potential source for terrorist financing." USPTO and DOC Efforts to Combat Problem Given these threats to U.S. economic interests and our national security, the USPTO and our colleagues in the Department of Commerce are working hard to curb IP crime and strengthen IP enforcement in every corner of the globe. Indeed, former Secretary Evans heavily emphasized this issue, and Secretary Gutierrez has indicated it is a top priority for the entire Department. Because American IP owners compete in a global marketplace, we must expand our efforts to promote IP protection internationally. We must make sure that American IP owners have sufficient knowledge and legal tools to fight piracy and counterfeiting. We also must provide foreign countries technical assistance on drafting and implementing effective IP laws and promoting the effective enforcement of IP rights. American Inventors Protection Act of 1999 The passage of the American Inventors Protection Act of 1999 (AIPA) (P.L. 106-113) set the stage for the USPTO to advise the President, through the

Secretary of Commerce, and all Federal agencies, on national and international IP policy issues, including IP protection in other countries. USPTO is also authorized by the AIPA to provide guidance, conduct programs and studies, and otherwise interact with foreign IP offices and international intergovernmental organizations on matters involving the protection of intellectual property. Our established Offices of International Relations and Enforcement carry out the functions authorized by the AIPA. These include (1) working with Congress to implement international IP treaties; (2) providing technical assistance to foreign governments that are looking to develop or improve their IP laws and systems; (3) training foreign IP officials on IP enforcement; (4) advising the Department of State and the Office of the U.S. Trade Representative (USTR) on drafting/reviewing of IP sections in bilateral investment treaties and trade agreements; (5) advising USTR on intellectual property issues in the World Trade Organization (WTO); and (6) working with USTR and industry on the annual review of IP protection and enforcement under the Special 301 provisions of the Trade Act of 1974. The USPTO also represents the United States in United Nation bodies, such as the World Intellectual Property Organization (WIPO), to help set the international standards for IP protection and enforcement.

1 "Copyright Industries in the U.S. Economy: The 2004 Report," Stephen E. Siwek, Economists Inc., prepared for the International Intellectual Property Alliance. "Core" industries include: newspapers, publishing, recording, music, motion pictures, radio, television broadcasting and computer software. 2 "Id.

2

National Intellectual Property Law Enforcement Coordination Council (NIPLECC) The USPTO serves as the co-chair of the National Intellectual Property Law Enforcement Coordination Council (NIPLECC), which is tasked with coordinating domestic and international intellectual property law enforcement. NIPLECC was launched in 1999 to ensure the effective and efficient enforcement of intellectual property in the United States and worldwide. NIPLECC's coordination activities ensure that government enforcement efforts are consensus-based and non-duplicative. NIPLECC has developed a comprehensive database that includes all recent IP law enforcement training provided by the U.S. government and many associations to developing and least developed nations. It is also developing legislative suggestions to improve domestic IP laws related to enforcement. We look forward to continuing our efforts in NIPLECC. Strategy Targeting Organized Piracy (STOP) Further, the Strategy Targeting Organized Piracy (STOP) Initiative, which has been developed over the last year, is the most comprehensive U.S. government-wide initiative ever advanced to demolish the criminal networks that traffic in fakes, stop trade in pirated and counterfeit goods at America's borders, block bogus goods around the world, and help small businesses secure and enforce their rights in overseas markets. I will discuss this important initiative in more detail later. Enforcement Training and Technical Assistance The USPTO provides a variety of IP enforcement training and technical assistance activities. These programs are designed to foster respect for IP, encourage governmental and right holders' efforts to combat infringement, and promote best practices in the enforcement of IPR. Our technical assistance and capacity building initiatives grew out of a desire to promote IP protection and assist developing countries in meeting their obligations under the WTO's Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement. In addition, we have responded to an increasing number of requests by foreign governments for such training and technical assistance activities. Our efforts have had positive results in some countries, measured by decreasing levels of IP piracy and counterfeiting, and the implementation of stronger legal protections in many of the countries in which we have provided such training. Still, much work remains, including in China and Russia, where IP theft has not decreased. Today, our efforts are aimed at: (1) assisting developing and least developed countries to meet international standards in the protection and enforcement of IP; and (2) assisting administrative, judicial, and law enforcement officials in addressing their enforcement issues. Trade-Related Aspects of Intellectual Property Rights Agreement (TRIPs) At the conclusion of the Uruguay Round in 1994, the resulting TRIPs Agreement presented WTO members with new obligations and challenges. The TRIPs Agreement sets minimum standards of protection for the various forms of IP and requires WTO members to provide for "enforcement procedures ... that permit effective action against any act of infringement of intellectual property rights." The TRIPs Agreement includes detailed provisions on civil, criminal and border enforcement measures designed to provide the owners of IP with the tools to protect and enforce their rights. Today, Developing Countries obligations' under the TRIPs Agreement have fully

3

entered into force. Least Developed Countries have until 2006 to comply with the bulk of the provisions, including the enforcement obligations. Over the last several years, the USPTO has assisted countries around the world in establishing adequate enforcement mechanisms to meet their obligations under the TRIPs Agreement. In bilateral negotiations, we work closely with USTR to seek assurances from our trading partners of even higher levels of IP enforcement than those set forth in the TRIPs Agreement. We provide technical advice through the annual Special 301 process, the GSP review, the TRIPs Council review of implementing enforcement legislation, and in the

negotiation of free trade agreements (FTAs). Our approach to the on-going FTA negotiations has been to build upon the TRIPs Agreement. In other words, our negotiating position is that these trade agreements should follow a "TRIPs Plus" format by, among other things, expanding the minimum standards set out in the TRIPs Agreement. For example, by incorporating provisions of the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, the FTA updates copyright protections and enforcement for the digital environment. In our advisory capacity, we will continue to work with the Department of State and USTR to conclude FTAs that reflect the level of protection and enforcement of IP rights in the United States. Intellectual Property Issues and USPTO Approach in China and Russia Due to the rapid increases in piracy and counterfeiting in China and Russia, we recognize that U.S. companies face enormous IPR protection and enforcement challenges in these countries and that their losses are mounting daily. At the same time, the pressures of the competitive global marketplace, criminal elements, and protectionist and non-tariff barriers, make these challenges increasingly more sophisticated. That is why the USPTO's team of experts has developed comprehensive work-plans to address the rising IP problems facing these countries. While the USPTO does not have the lead on trade policy issues, which is the mandate of USTR, we have devoted significant resources to making progress in improving China and Russia's IPR regimes for our industries, right holders and this Administration. The Bush Administration understands that IP is a vital component of our nation's economy and that this Administration's focus on combating global piracy and counterfeiting has produced a solid track record of real results. The STOP Initiative, which I mentioned earlier and will discuss in more detail later, is a continuation of these efforts by providing additional tools to protect American workers from counterfeiters and pirates who are robbing billions of dollars from the U.S. economy. China The U.S. has long been concerned about IP protection dating back to the founding of our country. For example, Gilbert Stuart's Athenaeum portrait of George Washington was replicated without authorization by a Philadelphia merchant, who was later sued for copyright infringement. Our first engagement with China on IP dates back to the early 20th century. In early 1903, at the end of the Qing dynasty, the U.S. government entered into the first bilateral agreement between China and the United States to protect IP. Our first commercial agreements in the 1970s with the People's Republic of China contemplated that China improve its IP system. Our current Ambassador to China, Clark Randt, was involved in some of these early negotiations. 4

Unfortunately, problems persist and our concerns about IP enforcement in China continue to grow. Despite China's membership in the WTO and its requirement to comply with the TRIPs Agreement, as well as a series of bilateral commitments made over the past 10 or more years, the lack of effective IP enforcement in China is a major problem for U.S. business interests, costing billions of dollars in lost revenue and perhaps tens of thousands of U.S. jobs. While China has done a generally good job of creating laws to comply with its WTO commitments, IP enforcement problems remain pervasive. These problems run the gamut from rampant piracy of movies and business software to counterfeiting of consumer goods, electrical equipment, automotive parts, and pharmaceuticals. I was very pleased that Secretary Gutierrez stated the following during his confirmation hearing with respect to intellectual property rights: "We actually lived through this as a food company, ironically, where we found that our brand was actually being copied and used in some markets and obviously without any authorization. One of the great assets that we have as a country is our brands, our technology. I think this is a matter to focus on. I think it is a big issue." Secretary Gutierrez also cited IP protection as a key issue in U.S. trade ties with China, and he has reiterated his commitment to addressing this issue to me. IP Problem in China Estimates from the computer software and automotive parts industries are illustrative of the scope of the problem. The software industry estimates that more than 90 percent of all software installed on computers in China in 2003 was pirated.³ The automotive parts industries estimate that counterfeit automotive parts production costs the industry billions of dollars in lost sales. China is a leader in counterfeit goods in this industry. In the automotive arena, most counterfeiting involves parts that need to be replaced frequently, such as oil filters, headlamps, batteries, brake pads, fan belts, windshields, and spark plugs. For example, DaimlerChrysler, BMW, Audi, Volvo, Mitsubishi, and Toyota report that even though a factory in Guangdong Province has been raided three times in a two-and-a-half-year period, it has been allowed to continue making windshields stamped with their brand names for sale in the world market. One industry group estimates that legitimate automotive companies could hire 210,000 more employees if the counterfeit auto parts trade is eradicated.⁴ According to the World Health Organization (WHO), 10 percent of the medicines in the world are counterfeit, with China being one of the main centers of counterfeit production. Rudolph Giuliani offered the following testimony before a Senate Committee in June of last year: "An August 30, 2002, Washington Post story cites the Shenzhen Evening News in reporting that an estimated 192,000 people died in China in 2001 because of counterfeit drugs. Another news story reported that as much as 50 percent of China's drug supply is counterfeit (Investor's Business Daily dated October 20, 2003)."⁵ 3 Ibid. Key Findings: BSA and IDC Global Software Piracy Study. 4 Motor and Equipment Manufacturers Association, September 2003.

5 See Statement of Rudolph W. Giuliani before the Senate Government Affairs Committee, Permanent Investigations Subcommittee, Oversight Hearing on Safety of Internet Drugs (July 16, 2003).

While no definitive statistics exist on total U.S. job losses attributable to IP piracy and counterfeiting in China, there is no doubt piracy and counterfeiting deprive the government of billions of dollars of much needed tax revenue, cost thousands of jobs, and injure the domestic software industries. China's Enforcement Issues The Chinese IPR enforcement environment today is complicated by a variety of different Chinese and foreign interests, including Chinese industrial policies, trade policies, the interests of foreign investors, and the interests of Chinese domestic enterprises. In this environment, our right holders increasingly look to adequate enforcement of criminal IPR laws in implementation of China's WTO commitments as a key to reducing counterfeiting and piracy rates in China. China, it should be noted, does not lack for quantitative enforcement. Each year, tens of thousands of enforcement actions are undertaken. However, these actions are typically pursued by administrative agencies, which impose non-deterrent penalties. This Administration has been pressing China to impose prison sentences and/or stiffer fines on violators of IPR since fines and other penalties imposed are too modest and provide little or no deterrence. In December 2004, two branches of China's government - the Supreme People's Court and Supreme People's Procuratorate (prosecutor) issued a new "Judicial Interpretation" for criminal IPR infringements. The new Interpretation expanded the scope of violations punishable by prison sentences by lowering the value threshold necessary to initiate a prosecution, but on the enforcement side took a significant step backwards with respect to violations committed by repeat offenders. The new Interpretation was also deficient in many other areas of concern to industry and foreign governments, including, for example, coordination among China's civil and administrative systems as well as the relationship with other IP laws. Furthermore, the new Interpretation complicated matters by allowing infringing goods to be valued based on their street value, not their legitimate value, thus sanctioning declarations by the infringer as a measure for determining whether or not Chinese valuation thresholds were met dictating prosecution. Equally disconcerting was that unfinished or offsite products were exempt in assessing that value. Many of the challenges that China encounters are at least partially due to deficiencies in its own system, including extensive corruption, local protectionism, and lack of interagency coordination. Some of the issues we have raised with Chinese colleagues include: the use of mandatory sentencing guidelines for IPR crimes; support for specialized IPR courts which have greater independence from local financing and control; establishing appropriate procedures for investigation, prosecution, and conviction of IPR criminals; and effectively addressing trans-border IPR crime, as well IP crime committed over the Internet. It is important to recognize that there is a Chinese domestic constituency also seeking enhanced IPR protection and enforcement, and that pirates and counterfeiters do not necessarily discriminate against Americans or just against Americans lacking political influence. As the economy grows, domestic interest in IP, particularly in the more developed cities on China's seaboard, is increasing dramatically. China's deficient IP protection and enforcement hinders Chinese software engineers, inventors, and movie producers who have to struggle with a severely deficient domestic market as their principal source of income. Chinese IP owners have become increasingly vocal proponents of stronger IP protection. One indication that IPR is attaining increased domestic importance is the number of trademark applications received by the Chinese Trademark Office (CTO). For the past two years, the CTO received more trademark applications than any country in the world. The State

Intellectual Property Office is also growing rapidly and receives some of the highest number of filings for patent applications worldwide. Growing domestic interest in IP protection and enforcement may be of small comfort to U.S. industry when the impact of piracy and counterfeiting on U.S. industry appears to be growing. U.S. Government statistics show a worsening situation. For example, USTR's 2004 Special 301 Report states that during 2003, 66 percent of all of the IPR-infringing goods seized at the U.S. border came from China.⁶ Many industries also increasingly suspect that the Chinese government, by restricting market access, is providing free rein for counterfeiters, pirates, and criminals to exploit the void created by the lack of legitimate products. Many U.S. companies also complain of industrial policies that help create conditions for production of infringing products. Counterfeit Viagra, for example, dominates the Chinese market, while the legitimate product has been hampered by market access restrictions. Pirated movies appear in the Chinese market long before censors have approved the legitimate product. Other high-tech companies complain of standards setting, such as in wireless networking technology, which limits introduction of legitimate products or mandates technology transfer. USPTO's Efforts in China Under the direction of this Administration, the USPTO has been working extensively to reduce piracy and counterfeiting activity in China. First, we provide technical support to all agencies of the U.S. Government that are addressing these issues, including USTR, the Department of Commerce/International Trade Administration (ITA), the U.S. Department of Justice, the Department of Homeland Security, and the State Department. The USPTO has an established team of experts on Chinese IP matters, which includes IP attorneys with detailed knowledge and background on patents, trademarks, copyrights, enforcement issues, and WTO/WIPO issues. Our cooperation with

other U.S. government agencies extends beyond the trade agenda to providing support on strategies and to addressing transnational crime and transnational trade in counterfeit goods, as well as other issues. TRIPS review. For example, we take an active role in the annual review of China's TRIPS commitments at the WTO, including primary responsibility for drafting many of the TRIPS-related questions. Three USPTO officials attended China's WTO review last year. We also actively participate in the APEC Intellectual Property Experts Group, which plays a constructive role in developing regional standards for IP, including cooperation on enforcement matters. Further IP initiatives in China supported by the USPTO are described below. IP attorney at U.S. embassy. For two summers, with the active support of U.S. Ambassador Clark Randt, we stationed one of our IP enforcement attorneys, who is fluent in Mandarin, in our embassy in Beijing to help with IP enforcement issues in the region. Last fall, the USPTO was proud to continue this support by detailing this individual as attaché to the U.S. Embassy in Beijing for a three-year appointment to continue our Government's efforts to combat piracy and counterfeiting. This is the first time the USPTO has sent an official abroad for an extended period of time to assist in improving IP protection in a specific country, which highlights the seriousness of IP violations in China. Having an attaché stationed in China has enhanced the USPTO's ability to work with

http://www.ustr.gov/Document_Library/Reports_Publications/2004/2004_Special_301/2004_Special_301_Report_Section_306.html.

7

Chinese government officials to improve IP laws and enforcement procedures in addition to assisting U.S. businesses to better understand the challenges of protecting and enforcing their IPR in China. Meetings with Enforcement Officials and Other Influences. One of the greatest challenges in China is ensuring that localities fully enforce national laws. To that end, the USPTO has held meetings with numerous local copyright, trademark, judicial, police, and prosecutorial enforcement officials throughout China to ensure that local officials fully understand their international obligations. We have hosted numerous delegations at the USPTO, with the objective of addressing this challenge. We have also worked with U.S. non-governmental organizations in support of rule of law efforts and training programs, including a Temple University program and Franklin Pierce Law School's annual summer program on intellectual property law in Beijing for American and Chinese law students. Training. Recent efforts in China that we have supported include: training on criminal IPR with the support of the British Government and China's Ministry of Public Security; training on patent data protection and patent linkage with the State Intellectual Property Office and State Food and Drug Administration; training on "business methods patents" with the State Banking Regulatory Commission, State Council Legislative Affairs Office and the Development Bank of China; training with the World Customs Organization on border measures and criminal IPR; participation in Chinese sponsored programs on IP protection in Shanghai and on IPR strategies for multinational companies in Beijing; and a joint U.S. Semiconductor Industry Association and Chinese Semiconductor Industry Association training program on IPR in high tech industries, to name but a few. Bilateral meetings with trade groups. We have also participated in a range of bilateral meetings and consultations with visiting U.S. trade associations such as the Intellectual Property Owners, U.S. Information Technology Office, Research and Development Pharmaceutical Association of China, Quality Brands Protection Committee, American Bar Association, International Federation of Phonographic Industries, Motion Pictures Association, Entertainment Software Association, Business Software Association, Association of American Publishers, U.S. Chamber of Commerce, to name just a few. We have also worked with some of these organizations to host enforcement conferences in such major cities as Beijing, Shanghai, Guangzhou, Wuhan, Nanjing, and Chengdu. Both domestically and in Beijing, we have provided briefings for visiting congressional and judicial delegations, and we have provided training for State Department and Commerce Department officials at our various consulates, including participation at a regional training program in Hong Kong sponsored by the Economic Bureau of the State Department. Working with the Department of Commerce's Technology Administration and the International Intellectual Property Institute, we have provided technical assistance on copyright protection in Dalian and Shenzhen. Public relations efforts. The USPTO continues to work through our own office of public affairs and the public diplomacy offices of the Embassy and consulates on providing an informed perspective on IP matters to the Chinese public and Chinese decision makers. Additionally, we are supporting State Department efforts to provide informational materials on U.S. IP practices to the Chinese public. We have also had several meetings at Chinese Universities. Under Secretary of Commerce for Intellectual Property and Director Jon W. Dudas delivered a talk at Qinghua University, one of China's leading law and engineering institutions, on IP protection. In addition, my staff has delivered presentations at Sichuan Normal University Law Faculty, Qinghua Law Faculty, People's

8

University and other institutions, as well as appearing on several television shows and being featured in newspaper articles. Supporting Businesses and Working with Law Enforcement in China Apart from these advocacy and training

efforts, we are involved in developing practical strategies to support our businesses in handling problems in China. We have worked extensively with the Commerce Department on improving methods for handling business complaints involving unfair IP practices in China and have become involved with the STOP Initiative whereby we handle complaints involving IP, many of which involve China. We have worked on two leading programs associated with the U.S. Embassy involving IP: a "toolkit" on IP matters for U.S. businesses on the Embassy's website, and the "IPR Roundtable" that the Ambassador hosts each year. Meetings in China. We have held meetings at the Canton Trade Fair to discuss IPR enforcement and complaints filed. We continue working with ITA, the American Bar Association, and many other organizations to provide better assistance to U.S. small and medium businesses. USPTO attorneys have been meeting with other foreign missions and trade associations to exchange ideas on innovative ways to promote better protection of IPR in China. Training programs for American businesses. We have participated in training programs for our business people in the United States, to better enable them to forcefully address the IPR challenges they experience in China and, when necessary, bring well-founded complaints to our attention. Typically in conjunction with the Department of Commerce, members of our China team have participated in programs in such cities as: Cincinnati, Ohio; Grand Rapids and Pontiac, Michigan; Charlotte, North Carolina; Miami, Florida; Minneapolis, Minnesota; Wichita, Kansas; St. Louis, Missouri; New York City and Long Island, New York; Waterbury, Connecticut; Boston, Massachusetts; Providence, Rhode Island; Portsmouth, New Hampshire; Fresno, San Jose and San Francisco, California; Salt Lake City, Utah; and Washington, D.C. A major focus of these efforts has been to address problems of small and medium enterprises, although larger enterprises have also benefited from participation in many of these programs as well. Workshops about China. In addition to our work with the Department of Commerce, our China team is planning to roll out a series of intensive China workshops and seminars in several cities throughout the United States in 2005-2006. The first of these seminars is planned for Detroit, Michigan, in June. The program will provide companies with information about several useful topics, ranging from an overview of the IP protection and enforcement environment in China, specific information on how to file patent and trademark applications in China, how to use China's administrative and judicial systems to enforce IPR, and useful tips about how to locate and hire a local company to investigate IP infringement in China. Another activity, as part of our ongoing efforts to assist U.S. businesses and IP owners in protecting their rights overseas, includes a seminar on the Chinese criminal justice system for IP offenses that we held in February of this year. The seminar introduced the Chinese criminal justice system to U.S. industry, government agencies, IP owners, and legal practitioners and included information on the recently amended Judicial Interpretation so they may better understand the system and use this information to their full advantage to combat counterfeiting and piracy. We sponsored a follow up program in April of this year. 9

Our China team has supported a number of programs to advise our companies on how to file a criminal IPR case in China. These programs have already been held in Guangzhou, Beijing, and Hong Kong with an additional program planned for Shanghai. In addition, we provide support to our own law enforcement authorities where possible on IP criminal matters. For example, we have supported the Joint Liaison Group on criminal justice cooperation in its efforts to facilitate better criminal IPR cooperation, and joined in training programs run by a number of different government agencies on criminal IPR matters. Our China team works closely with the Customs Attaché and Legal Attaché at the U.S. embassy as well as the Bureau of International Narcotics and Law Enforcement at the State Department on these matters. More United States Government Efforts in China. Like Secretary Gutierrez, former Secretary of Commerce Evans believed in the strong enforcement of our trade laws and took innovative and proactive measures to strengthen the enforcement and compliance of our trade agreements. During his tenure, he tasked Commerce agencies, such as USPTO and the new Investigations and Compliance Unit within ITA's Market Access and Compliance Group, to coordinate their efforts to vigorously pursue allegations of IPR violations wherever they occur, especially in China. Delegations to China. In 2003, then-Commerce Secretary Evans led a mission to China and highlighted China's lack of IPR enforcement. The Secretary met with high-ranking Chinese officials and reiterated a continuing concern -- that effective IPR protection requires that criminal penalties for IP theft and fines are large enough to be a deterrent, rather than a business expense. As a follow-up to the October 2003 trip, Under Secretary and Director Jon W. Dudas led two delegations in 2004 for consultations with senior officials at China's patent, trademark, copyright, and other IP agencies. Our delegation also met with U.S. companies facing IP issues in China. The primary focus of these trips was to further the Administration's goals of improving the IP environment for U.S. companies doing business in China, and specifically of addressing widespread counterfeiting and piracy. We discussed several issues, including the need for improved criminal, civil, and administrative enforcement, the need for protecting copyrights over the Internet and China's accession to the WIPO Internet Treaties. In January 2005, Under Secretary Dudas traveled to Beijing as part of a second Evans-led delegation. He was fortunate to be able to meet with Chinese Premier Wen Jiabao and Vice Premier Wu Yi to discuss concerns over China's enforcement of IPR of American businesses. Ambassador Randt also hosted the third roundtable on Intellectual Property Rights, which was

attended more than 250 government officials and business and industry representatives from the USPTO, the European Union, Japan, and China's IP agencies. In addition to providing the luncheon keynote address during the January roundtable, Under Secretary Dudas announced the USPTO's new plans for IP technical assistance for Chinese IP-related agencies. He was pleased that the USPTO's offers of cooperative assistance were well received, and we are in the process of implementing these as well. U.S.-China Joint Commission on Commerce and Trade (JCCT) Working Group on IPR In an effort to address problems in China, the U.S. and China created a "working group on IPR" that resulted from the April 2004 session of U.S.-China Joint Commission on Commerce and Trade. We are pleased that Under Secretary Dudas co-chairs this working group with Deputy U.S. Trade Representative Josette Shiner.

1
0
.

Through the JCCT and other avenues, the U.S. hopes to continue to work closely with China to improve the situation for U.S. rights holders. During the April 2004 session of the JCCT, China presented an action plan designed to address the piracy and counterfeiting problems faced by U.S. companies. Under the plan, China committed to: (1) significantly reduce IPR infringement levels; (2) issue a judicial interpretation for criminal enforcement of IPR cases by end of year; (3) conduct nation-wide enforcement campaigns; (4) ratify and implement the WIPO Internet Treaties as soon as possible, and (5) agree to establish an IPR working group under the JCCT. In line with the JCCT mandate, the working group will seek to ensure that China significantly reduces IPR infringement to levels consistent with standards required by WTO rules. Challenges and Recommendations concerning China While our trips to China have been well received, and we are pleased to note a continuing and increasing awareness among Chinese officials of the importance of IP protection and enforcement, we have not yet seen significant progress on most of the key issues. These issues include enhanced criminal enforcement, a deterrent administrative enforcement system, protecting copyrights over the Internet, and stopping the export of counterfeit goods. We are also interested in other developments, such as China's efforts to develop an IPR Strategic Plan for development of its IP assets, other industrial policy goals, legislative efforts to draft a Civil Code that may include IPR, and general rule of law efforts that could significantly affect the protection of IPR over the long run. While we fully recognize that China needs to make drastic improvements in its IPR system to ensure that our right holders are fairly protected, we should not underestimate the steps that our businesses and government can take to reduce the risks of piracy and counterfeiting. The USPTO will continue working with small and medium-sized companies on how best to protect their valuable IP rights in China. One particular example is for companies to register all their trademarks promptly in China, especially their Chinese language trademarks. Given the fast pace of China's economic development and the huge volume of trademark applications in China, companies should file for their marks early in their marketing cycle. Globalization means that competitors can retrieve information about products not yet introduced in their country from a U.S. company's web site. Counterfeiting and piracy also originates from employees, agents, or distributors who have taken confidential information to engage in a competing operation. China's practice regarding protection of trade secrets by former employees who have signed non-compete agreements is different from the United States. We will continue to educate companies on how best to protect their intellectual property rights. It is especially important we encourage our industries to work with us and the other U.S. agencies involved in improving China's IP protection and enforcement environment by: urging the fair and transparent implementation of China's IPR system; fully exploiting this system; providing us with detailed information on its deficiencies in order to reduce future risks of such activities; and supporting our bilateral and multilateral efforts to reduce the impact of these problems. Russia As indicated by the listing of Russia as a priority watch list country in the 2005 Special 301 Report, copyright piracy in Russia is of serious concern. In 2004, industry estimates that more than \$1.7

1
1
.

billion in losses occurred in Russia.⁷ Due to poor enforcement, industry calculates more than \$7 billion in losses to the copyright industries in the last eight years. Estimated copyright piracy levels in the Russian Federation in 2004 were estimated by industry at 80 percent for motion pictures, 66 percent for records and music, 87 percent for business software, and 73 percent for entertainment software. The production of optical media in Russia far exceeds legitimate demand. According to industry, in the last three years, the number of optical disc plants that manufacture and distribute optical media has more than doubled. In the past four years, production capacity of optical media in Russia has nearly tripled. Issues in Russia While the Russian government has made significant progress in improving the legal framework for IP protection, current laws and regulations in the Russian Federation have not had a significant impact on controlling illegal optical disc production. Although raids and seizures at optical disc plants increased last year, in most cases, according to industry, plants continue to operate after the raids and little

meaningful action is taken against the plant operators. These raids did not have an appreciable effect on reducing optical disc piracy, especially in cases where effective prosecution by the Procuracy were lacking. Industry reports that piratical product seized from raids sometimes returns to the market. The lack of effective criminal enforcement of IP theft in the Russian Federation is a concern. The involvement of organized crime in the manufacture, distribution and exportation of piratical entertainment software is also of concern. The banning of street sales, including kiosks of audio and audiovisual products, was encouraging, initially; but industry reports that the prohibition is not regularly enforced and that pirated music compact discs continue to be available on the streets. In 2004, the industry reported that 1,300 administrative raids against music pirates were undertaken, resulting in numerous administrative actions. The average administrative penalty in these cases was approximately \$50. This level of fines cannot be considered a deterrent to piratical activity. The majority of administrative actions involving storeowners and sellers averaged \$200. Unfortunately, industry reports that the supply and distribution sources are rarely pursued. Effective enforcement of IPR at the borders of the Russian Federation is in need of improvement as well. Industry indicates that piratical optical media was forensically identified as being exported from Russia to over 25 countries. Russian steps to reform and deficiencies Last year, Russia took some steps in reforming its laws for compliance with the 1992 U.S.-Russian bilateral trade agreement. For example, Russia did amend its laws on trademarks, appellations of origin, patents, designs for integrated circuits, plant varieties, computer software, and databases. Serious concerns remain about Russia's denial of national treatment for protection of geographical indications (GIs). Further, significant shortcomings remain with Russia's trademark laws, especially provisions dealing with geographical indications. There do not seem to be any provisions in the Russian law that ensures that the principles of priority and exclusivity are preserved for trademarks and geographical indications. These rights are required under the TRIPs Agreement, which requires that owners of trademarks established prior to a later in time GI should be able to assert the exclusivity of their prior rights.

1

7 <http://www.iipa.com/rbc/2005/2005SPEC301RUSSIA.pdf>

2

.

IPR Initiatives concerning Russia USPTO continues to provide capacity building assistance to the Russian Federation focusing on the enforcement of IPR. In December 2001, we hosted the United States-Russia Intellectual Property Rights Enforcement program in Washington in cooperation with the Commercial Law Development Program. The conference was attended by Russian officials representing various government agencies involved in the enforcement of intellectual property rights in Russia. The conference included a discussion of judicial administration issues involving IPR, discovery, interim measures and damages in civil infringement cases, arbitration, deterrent criminal penalties and border measures. In November 2002, we cosponsored and participated in a United Nations Economic Commission for Europe seminar in Moscow on IPR enforcement in Russia. The seminar was attended by Russian government officials representing the State Duma and the Ministries of Defense, Culture, Education, and Science. This summer, USPTO will be co-sponsoring a three-day workshop in St. Petersburg on border enforcement of IPR in coordination with the International Intellectual Property Institute, U.S. Customs and Border Protection and Russian Customs. In addition, the U.S. Embassy in Moscow has had ongoing collaboration with relevant Russian entities to provide training to the Russian law enforcement agencies and the Procuracy on IPR enforcement. The Embassy sponsored a series of seminars last year, both in Moscow and in the regions, and plans to offer more training this year. With U.S. copyright industries losing more than \$1 billion a year to copyright piracy in Russia, we look forward to increased effective enforcement efforts in Russia. We continue to urge the closure of plants producing illegal optical discs, increased raids and prosecution of optical disc piracy, and the adoption and implementation of an effective optical media regulation and enforcement regime. Moreover, any organized crime involvement in counterfeit goods and piratical works must be addressed through increased investigative efforts and stronger criminal penalties. The Russian government must also strengthen its border enforcement, combat counterfeiting and piracy, and address deficiencies in its intellectual protection laws. We have enjoyed a cooperative working relationship with the Russian Federal Service on Intellectual Property, Patents, and Trademarks headed by Boris Simonov, and we continue a productive dialogue with him and the Russian law enforcement agencies on ways to improve Russia's IP record. However, for our efforts to be truly effective in reducing IP violations in Russia, we need genuine commitment from all levels of the Russian government to view this as a priority problem and take meaningful steps to combat it. The Global STOP Initiative We are pleased to discuss with you the STOP Initiative, the most comprehensive intergovernmental agency initiative ever advanced to smash the criminal networks that traffic in fakes, stop trade in pirated and counterfeit goods at America's borders, block bogus goods around the world, and help small businesses secure and enforce their rights in overseas markets. There are several important features of the STOP Initiative that I'll mention: Hotline and Website 1

First, the USPTO participates heavily in this initiative by managing a hotline, 1-866-999-HALT, established by the Department of Commerce to help business protect their IPR at home and

overseas. The goal of the hotline is to empower U.S. business to secure and enforce their IPR by providing them the information they need to secure their patents, copyright and trademarks, and to enforce these rights here in the U.S. and abroad. Callers receive information from IP attorneys with regional expertise on how to secure patents, trademarks, and copyrights, and on the enforcement of these rights. Businesses and innovators now have access to a place to learn more about the risks of global piracy and counterfeiting and how to protect their IP rights in both individual countries and in multiple countries through international treaties. In addition, we have established a link from our USPTO website to www.stopfakes.gov on the Department of Commerce's website, which provides in depth detail of the STOP Initiative.

No Trade in Fakes Program The Department of Commerce is in charge of another important component of the STOP Initiative, the no-trade-in-fakes program that is being developed in cooperation with the private sector. This is a voluntary, industry-driven set of guidelines and a corporate compliance program that participating companies will use to ensure their supply chains and retail networks are free of counterfeit or pirated goods.

Increasing and Communicating Enforcement The STOP Initiative will raise the stakes for international IP thieves by more aggressively pursuing perpetrators of IP crimes and dismantling criminal enterprises. STOP also seeks to increase global awareness of the risks and consequences of IP crimes through public awareness campaigns, and creating and operating a website publicizing information about international criminal IP enforcement actions.

Building Coalitions The ultimate success of the STOP Initiative involves building coalitions with many of our like-minded trading partners, such as Japan, the United Kingdom, and France, who have all recently launched similar initiatives. We are seeking to continue working with our partners in the G-8, Organization for Economic Cooperation and Development (OECD) and the Asia-Pacific Economic Cooperation (APEC) forum. Cooperation on new initiatives to improve the global intellectual property environment is essential to disrupting the operations of pirates and counterfeiters.

International Outreach A delegation of U.S. officials from seven federal agencies, including myself, recently kicked-off our international outreach effort to promote STOP internationally. Last month we visited various capitals in Asia generating much interest and fruitful discussions. On each leg of the trip, U.S. officials shared information on our efforts to combat the theft of inventions, brands and ideas. This first leg abroad is advancing our commitment by enlisting our trading partners in an aggressive, unified fight against intellectual property theft. Outreach to Asia will be followed by visits to other capitals later in the year, for example, next month we plan on visiting Europe. We have tentatively planned that countries receptive to cooperation on STOP will be invited to attend a meeting in Washington, D.C. (likely in the fall of 2005) designed to formalize their participation and finalize a work plan.

1

4

Future STOP Activities The USPTO has several future planned activities supporting our initiatives under STOP. The first involves our public outreach efforts. In addition to our China-related workshops and seminars for 2005-2006, my staff will also be embarking on an educational road show to various cities in the United States to educate small- and medium-sized business on what IPR are, why they are important, and how to protect and enforce these rights domestically and internationally. The first of these workshops took place earlier this week in Salt Lake City, Utah, and already, we have found an enormous amount of interest in the program. We will replicate this program in other cities throughout several regions of the U.S. in the coming months. We continue to work in WIPO to seek to simplify, streamline, and improve the cost efficiency of the trademark application process across borders to provide more efficient and less burdensome systems for right holders. We will continue to work closely with the IP community, STOP team, and you to promote a legislative agenda that is designed to meet the huge challenge of combating piracy and counterfeiting. Tougher enforcement of our international trade laws is necessary for the growth of our economy and the creation of new jobs. In order to fully implement the STOP Initiative, it may be necessary to reassess current legislation.

Conclusion Mr. Chairman, the requirements on the Department of Commerce and USPTO's expertise in the international arena have grown dramatically in the last few years. These demands will continue to increase in the next few years, along with our obligations to meet our core patent and trademark examination functions. As we look to the future, however, let me conclude on a positive note. Although by all accounts counterfeiting and piracy appear to be growth "industries," there have been some recent successes in attacking the problem. Between 2001 and 2002, the software industry estimates that software piracy in Indonesia decreased from 89 percent to 68 percent. In South Africa, it fell from 63 percent to 36 percent. The motion picture industry has reported a decrease in piracy levels in Qatar from 30 percent in 2001 to 15 percent in 2002. In Bahrain, there have been dramatic and systemic improvements in IP protection and enforcement over the past few years. These include the signing of numerous international IP conventions and the virtual elimination of copyright piracy and counterfeiting in retail establishments. There is some reason for optimism. I remain hopeful that with the continued

support and partnership of the Subcommittee, we will be able to do even more to provide American businesses and entrepreneurs with the IP knowledge and protection they need. Clearly, in terms of the economy and national security, much is at stake. That is why our dedicated team of experts will continue to work tirelessly to protect American products all around the globe. Thank you very much. 1