

Questions of Senator Tom Coburn, M.D.
“Oversight of the Office of the Intellectual Property Coordinator”
United States Senate Committee on the Judiciary
June 28, 2010

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1. During the hearing, Senator Hatch asked you what your annual budget is, but I did not hear you provide an exact answer. What is your budget for the salaries and expenses of your office?

- a. How many staff have you hired to-date?

I have hired a confidential assistant and the Departments of Justice, Homeland Security, and Commerce have generously provided four temporary detailees.

- b. What do you anticipate your FY2011 budget to be? What is the basis for that request?

In FY 2011, the OMB funding level was maintained at the FY 2010 level of \$176,000. Also, similar to FY 2010, OMB will absorb the additional costs for office space, some travel, and a confidential assistant in FY 2011.

2. Which country is the biggest violator of American intellectual property rights and laws? Why?

There are several countries of key concern. However due to the scale and scope of manufacturing, its industrial policies and its potential as an export market, it is fair to say that China raises a particularly troubling set of issues. Through public outreach including numerous meetings and the review of public responses to the Federal Register Notice issued by my office, many different industry sectors raised China as their country of top concern, including specific cases of patent and trademark infringement of manufactured products, consumer products, pharmaceuticals, and high tech goods that could pose serious health and safety concerns.

As highlighted in United States Trade Representative's (USTR) 2010 Special 301 Report, while the U.S. Government is encouraged by some positive steps taken by the Chinese government, such as an increase in civil intellectual property cases in the courts, the United States is still concerned with high levels of intellectual property theft in China, a non-deterrent enforcement regime, and domestic policies that may disadvantage U.S. rightholders, such as a number of China's indigenous innovation measures. Further, China is the primary exporter of intellectual property-infringing goods (based on U.S. and EU border enforcement statistics) and, as such, exerts an extremely negative influence over U.S. interests in other markets.

- a. I realize your Joint Strategic Plan outlines the fourth critical component of the strategy as enforcing our rights internationally. However, I believe individual

countries pose different threats to our rights that necessitate specific responses. In your role as Intellectual Property Enforcement Coordinator (IPEC), what do you plan to do, specifically, to address the problems created by the country you indicated above as the biggest violator of our rights?

Addressing intellectual property infringement abroad, including in China, is a significant part of our enforcement efforts.

Specifically, the Strategic Plan puts forth action items aimed at reviewing and improving our efforts to support U.S. companies overseas, and in particular in China, developing a strategy to address foreign-based websites including those in China, using all the available tools of trade policy as well as our market access and trade agreement compliance efforts to address the intellectual property related challenges that place U.S. businesses at a competitive disadvantages in China, and in other markets as a result of Chinese exports, and coordinating personnel in China responsible for intellectual property enforcement.

- b. How should that response differ from the U.S. response to violations by other countries which may create different and more nuanced problems related to American intellectual property protection?

The U.S. response to intellectual property infringement by other countries is tailored based on the specific concerns posed by these countries. In addressing these concerns, the U.S. Government utilizes all available tools of trade policy, including bilateral dialogues and problem-solving, communicating U.S. concerns clearly through reports such as the Special 301 Report, proactively monitoring and seeking improvement in foreign government compliance with intellectual property provisions in existing trade agreements, committing our trading partners to protect American intellectual property through trade agreements currently under negotiation, such as the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans-Pacific Partnership, and, when necessary asserting our rights through the World Trade Organization dispute settlement process.

Furthermore, the Strategic Plan establishes action items to enhance foreign law enforcement cooperation and to better coordinate personnel stationed overseas as well as international capacity building and training. These steps will help tailor the U.S. response and ensure that countries of concern are given the priority, time, and resources necessary to strengthen intellectual property enforcement.

- c. According to its October 2009 Report to Congress, as part of its requirements under the PRO-IP Act of 2008, the FBI, Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) are “conducting an extensive domain analysis” which “will identify the most significant organizations and individuals posing the greatest threat to the intellectual property of the United States.” The Report states “this joint effort will serve as the foundation of the United States Government’s law enforcement investigative strategy for IPR.”

- i. What is the status of this “domain analysis?” If it is complete, will you forward that information to this committee?

Through the FBI-led Intelligence Fusion Group, the National Intellectual Property Rights Coordination Center (IPR Center) assembled a team solely dedicated to conducting a National/International Domain Threat Assessment. The team collaborated on a baseline intelligence assessment, established Health and Safety field threat tasking packages and will deploy teams of analysts and agents to Delhi and Beijing for the aforementioned in-country intellectual property domain assessment.

To complete the National/International Domain Threat Assessment, the dedicated team will intake, process, and analyze information from a variety of sources such as IPR Center investigative and seizure data, field threat tasking packages, Delhi and Beijing in-country threat information, open source reporting, industry input, existing data base information, intelligence products, and previous intellectual property related studies. The current target for completion of this assessment is November 30, 2010.

- ii. What countries and organizations did the analysis show as the “greatest threat” to U.S. IP? Do you agree with that assessment? Why or why not?

The goal of the National/International Domain Threat Assessment is to determine the countries and organizations presenting the “greatest threat” to U.S. intellectual property. The current target for completion of this assessment is November 30, 2010.

- iii. Was there any disagreement among FBI, ICE and CBP regarding the countries and organizations that should receive the most scrutiny?

The National/International Intellectual Property Domain Threat Assessment is a collaborative IPC Center joint product. The ranking and prioritization of threats will be the judgment of the combined agencies.

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3. During the hearing, I asked you which agencies have made the most progress in strengthening intellectual property enforcement. You generally commented that all of the key agencies have shown a great deal of commitment. I am glad to hear that, but I also realize one of the reasons Congress passed this legislation and created your position was because more coordination among agencies was needed in order to better protect and enforce American intellectual property rights. So, I want to know whether you believe there is any improvement needed within particular agencies in order to make intellectual property enforcement a priority, and the implementation of your Plan’s six categories of focus an attainable goal. Please respond.
- a. Do any agencies need to improve internal efforts to prioritize intellectual property enforcement? Why or why not? If so, which ones?
 - b. What are your recommendations to those agencies that need improvement?
 - c. Have these agencies been given a timeline in which to implement those recommendations?

Federal agencies that are responsible for enforcing intellectual property rights have made significant progress on coordination and prioritization in recent months. For instance, the Department of Justice (DOJ) has re-launched their Intellectual Property Enforcement Task Force which is being chaired by the Deputy Attorney General and is coordinating intellectual property efforts within the Department. U.S. Immigration and Customs Enforcement (ICE) of the Department of Homeland Security continues to host the National Intellectual Property Rights Coordination Center (IPR Center), which coordinates intellectual property theft investigations across 11 different agencies and with two international partners (INTERPOL and the Government of Mexico). ICE has also created 22 state and local partnerships nationwide to more effectively investigate these crimes at the local level.

With that said, my office will constantly assess ways to improve coordination and prioritization of intellectual property enforcement across the U.S. Government. I believe that all of the relevant agencies support and are firmly committed to implementing the Strategic Plan. I will report back to you in December about the progress we have made. In the meantime, the Administration is committed to implementing this Strategic Plan and we have already started that work.

4. Do you believe there is a connection between intellectual property theft and criminal activity? How?

Yes. Criminal infringement of intellectual property inflicts significant economic harm on rightholders, decreases incentives for artists, authors, and technological innovators, erodes confidence in the marketplace, defrauds consumers, and can pose serious dangers to the public's health and safety. The lucrative nature of intellectual property crime has also made it an attractive target for organized crime groups seeking to use such illicit proceeds to fund other illegal activities.

- a. What role do you believe the Justice Department should play in combating criminal IP activity?

DOJ has two roles, one as criminal investigators (primarily handled through the Federal Bureau of Investigation (FBI)) and the second as criminal prosecutors (primarily handled through the U.S. Attorneys' Offices and DOJ's Computer Crime and Intellectual Property Section (CCIPS)).

First, the law enforcement personnel within DOJ, primarily the FBI, have a strong role in investigating intellectual property crimes. The FBI will soon have 51 Special Agents focused exclusively on intellectual property crimes (20 one of which are in the process of being put in place) and it has additional Special Agents who also work intellectual property cases. Although the FBI is not the only law enforcement agency that investigates intellectual property crimes, its focus on those cases is important as we move forward to implement the Strategic Plan.

Second, DOJ prosecutors are responsible for filing criminal cases alleging intellectual property infringement. DOJ has a number of prosecutors who focus on intellectual property enforcement. CCIPS, in Washington, D.C., has 14 attorneys dedicated to intellectual property enforcement. Moreover, DOJ has more than 220 Computer Hacking and Intellectual Property (CHIP) Unit attorneys stationed at the 94 U.S. Attorney's Office throughout the country, with at least one CHIP Assistant U.S. Attorney at each office (although most of these CHIP attorneys do not work full time on intellectual property cases). DOJ's prosecutors thus play a strong role in intellectual property enforcement and will continue to do so.

DOJ and other federal law enforcement agencies are aware of the dangers posed by involvement of organized crime in counterfeiting and piracy, and have taken steps to better understand and address the links between intellectual property theft and organized crime. For example, DOJ sought to ensure that prosecutors and agents involved in intellectual property investigations and prosecutions are coordinating their efforts with agents and prosecutors targeting organized crime, including sharing investigative intelligence and collaborating to develop cases and provide cross training. DOJ has incorporated intellectual property crime into its existing International Organized Crime Strategy and has assigned a prosecutor to serve as counsel to the Organized Crime Intelligence and Operations Center (IOC-2). DOJ's Criminal Division, FBI, DHS, and other relevant participating federal agencies are coordinating their efforts through IOC-2 and working to

ensure that critical intellectual property-related intelligence and case information is contributed to its data pool.

- b. Do you believe it is carrying out its responsibilities in this area effectively? Why or why not?

I believe that DOJ has been effective in investigating and prosecuting intellectual property cases and I hope that that effectiveness will further increase under the Strategic Plan. For example:

- In May 2010, DOJ and DHS announced the results of Operation Network Raider, a domestic and international enforcement initiative targeting the illegal distribution of counterfeit network hardware manufactured in China. The initiative resulted in 30 felony convictions and more than 700 seizures of counterfeit Cisco network hardware and labels with an estimated retail value of more than \$143 million. The operation was a joint initiative by the FBI, ICE and U.S. Customs and Border Protection (CBP) working with the U.S. Attorneys' Offices around the country, the Criminal Division's Computer Crime and Intellectual Property Section and the National Intellectual Property Rights Coordination Center. The Operation included a 51-month prison sentence for a Saudi Arabian citizen who sold counterfeit Cisco products which were meant to be used by the U.S. Marine Corps to transmit troop movement, relay intelligence, and maintain security at a military base west of Fallujah, Iraq. The Operation also included a 30-month prison sentence for a defendant who ran a company in Shenzhen, China, which distributed counterfeit Cisco products in the U.S.*
- As part of an Online Commercial Counterfeiting and Piracy Auction/Website Initiative, DOJ obtained more than 40 convictions, including: (1) a conviction for conspiring with others in China to traffic in counterfeit cancer drugs and pharmaceutical products which resulted, in January 2009, in a sentence of 78 months in prison; (2) two convictions for operating an Internet-based DVD importation and distribution business which resulted, in May 2010, in sentences of 121 months in prison and 94 months in prison; and (3) a conviction for selling pirated software to hospitals which resulted, in July 2009, in a sentence of 46 months in prison.*
- In June 2010, DOJ obtained a conviction in a large-scale counterfeiting case involving imported counterfeit goods from China. The defendants imported more than 300,000 counterfeit luxury goods with an estimated value of more than \$100 million and operated eight factories. The defendants are awaiting sentencing.*
- In June 2010, the U.S. Attorney's Office for SDNY and DHS announced the seizure of seven domain names for websites allegedly distributing infringing movies and television shows. One of the websites, Movies-Link.tv, is the 258 most popular website in the world and has approximately 3.3 million visitors per month.*

5. How much does your office plan to be involved in policy development in the area of intellectual property?

My office is responsible for coordinating the Administration's policy development on intellectual property matters related to enforcement. We are leading the efforts to develop, in coordination with relevant agencies and other White House offices, new policies and approaches to combating infringement. Similar to the way in which we developed the Strategic Plan, we will continue to coordinate closely with all relevant agencies and offices and ensure a transparent, inclusive process as we work toward developing those policies and implementing the Strategic Plan.

- a. Will that focus more on domestic or international intellectual property enforcement? Why?

It is difficult to distinguish between domestic and international intellectual property enforcement because advancements in technology and the global nature of the supply chain mean that enforcement efforts domestically can impact infringement overseas and enforcement overseas can have positive domestic effects. We will prioritize and focus on both domestic and international enforcement in areas of greatest concern to our economy and the country.

6. How does your Joint Strategic Plan address the different needs within the intellectual property industry, particularly since different companies have different business models?

The Strategic Plan is a comprehensive strategy for the United States Government and the U.S. economy. In developing the Strategic Plan, my office sought and considered input from a wide range of different sectors of the American economy, including software, music, film, videogame, photography, publishing, semiconductor, pharmaceutical, medical device, union, manufacturing, apparel, telecommunications, information technology, high technology, bio technology, consumer product, aviation and automotive industries. As implementation of the Strategic Plan proceeds, we will coordinate within the Administration and with private sector stakeholders to ensure maximum effectiveness of our efforts.

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7. Do you believe there should be a balance in your Plan and its implementation between enforcing intellectual property rights, and also recognizing the need to promote, rather than stifle, innovation that leads to new technologies?

I believe that the Strategic Plan is balanced. The Strategic Plan advances U.S. intellectual property enforcement efforts consistent with our laws, which have traditionally balanced the desire to promote innovation and creativity with the public interests. Strong enforcement of U.S. intellectual property laws does not detract from the balance but rather is a critical element. In addition, strong intellectual property enforcement is one important driver of innovation and creativity in our economy.

- a. Can you comment on the Administration’s views on this?

The Administration’s views, as set forth in the Strategic Plan, are to aggressively enforce American intellectual property rights, consistent with the laws that Congress enacted and principles of fair use. One of the reasons that the U.S. is a global leader in innovation and creativity is our early establishment of strong legal mechanisms to provide necessary economic incentives required to innovate. By the same token, fair use of intellectual property can support innovation and artistry. Strong intellectual property enforcement efforts should be focused on stopping those stealing the work of others, not those who are appropriately building on it.

- b. What do you anticipate your role to be in ensuring there is an adequate balance between enforcement and strong limitations and/or exceptions to spur innovation?

Our focus is on combating infringing activities, not clamping down on innovation that is legal and legitimate. In the crafting of the Strategic Plan, I met with innovators who depend on the fair use doctrine to hear their concerns directly. I will continue to meet with representatives of sectors across the U.S. economy to ensure that all interests are considered.

8. Have you examined, in detail, the newly re-constituted IP Task Force within the Justice Department? Do you believe it has been effective in coordinating IP enforcement and prosecution within the various divisions of the Justice Department? Why or why not?

I have had the opportunity to work closely with DOJ’s Intellectual Property Task Force in developing the Strategic Plan. The Task Force is chaired by Acting Deputy Attorney General Gary Grindler and is made up of high-level DOJ officials, such as Associate Attorney General Thomas Perrelli, Assistant Attorney General Tony West (Civil Division) and Assistant Attorney General Lanny Breuer (Criminal Division). The Task Force is working to strengthen DOJ’s intellectual property enforcement efforts in a number of ways,

including increasing coordination with state, local, and foreign enforcement partners, and it will continue to monitor and coordinate overall intellectual property enforcement efforts at DOJ.

My office is supportive of efforts that aim to increase U.S. Government coordination and effectiveness related to intellectual property enforcement. I have continued to be impressed by DOJ's commitment to fighting intellectual property infringement. As the Task Force was recently formed in February, I look forward to its contributions to strengthening U.S. intellectual property enforcement and to reporting back to you about its efforts as part of the implementation of the Strategic Plan. Similarly, DOJ will report on the Task Force activities in its annual Attorney General report to Congress.

9. During the hearing, I asked you for an updated report on the number of intellectual property enforcement cases the Justice Department has filed. You said you would get back to me with this information in a written response. I would also like for you to respond to the following, in addition to that request.
 - a. In its October 13, 2009 Report to Congress, the Justice Department noted that it brought 197 cases related to intellectual property crime in 2008, which led to 242 defendants being convicted and sentenced on IP charges. However, this was a decrease from the number of cases charged (217) and defendants sentenced (287) in 2007. Could you respond, in detail, as to why this decrease occurred after four years of consistent increase in cases charged and defendants sentenced?

Although there was a decrease in the number of intellectual property cases charged and defendants sentenced in 2008, the number of prosecutions and convictions were relatively close to the levels of 2007. To the extent that there was a decrease, it paralleled the decrease in case referrals from the investigative agencies.

As intellectual property crime has become more complex, so have the related investigations and prosecutions. In that regard, the number of cases referred by investigative agencies and the resulting number of cases charged can provide an incomplete picture of the overall trend of criminal enforcement efforts. DOJ has worked to consistently improve the quality of criminal cases it pursues.

With the support of Congress, DOJ received funding for 51 new FBI agents dedicated to investigating intellectual crimes, as well as funding for 15 new CHIP AUSAs who will prosecute both intellectual property and computer crimes. DOJ anticipates that with these important added resources, the number of investigations and case referrals will increase in quantity and quality over time, and that should result in a corresponding increase in prosecutions.

- b. As the October 2009 report did not provide statistics for 2009 or 2010, please provide information on the investigative matters received by AUSAs, defendants charged, cases charged and defendants sentenced for 2009 and to-date in 2010.

As compiled by DOJ's Executive Office of United States Attorneys, the FY 2009 (October 1, 2008-September 30, 2009) statistics requested are as follows:

Investigative matters received: 285

Defendants Charged: 235

Cases charged: 173

Defendants Sentenced: 223

As compiled by the Department's Executive Office of United States Attorneys, the FY 2010 to-date (October 1, 2009 - June 30, 2010) statistics requested are as follows:

Investigative matters received: 298

Defendants Charged: 188

Cases charged: 132

Defendants Sentenced: 151

Please keep in mind that some convictions reflected as occurring in a particular fiscal year may result from cases filed in earlier years.

- c. Do you believe the Justice Department is adequately investigating, prosecuting and sentencing individuals and organizations who violate civil and criminal IP laws? Why or why not?

For the description of whether DOJ is adequately addressing criminal violations, please see answer 4.b above.

*Although civil violations of intellectual property laws in the U.S. continue to be enforced mainly through civil lawsuits by rights holders, DOJ has pursued efforts in support of civil measures, enforced by CBP, designed to detect and seize infringing goods upon attempted importation into the U.S. and, in appropriate cases, to levy fines against the importers. For example, DOJ successfully appealed an adverse district court decision in *United States v. Able Time*, in a case involving the attempted importation of watches bearing counterfeit trademarks. On remand, DOJ obtained a jury verdict against the importers of counterfeit goods.*

10. What is your assessment of the IPR Center at the Department of Homeland Security? Do you believe it has been effective in coordinating IP enforcement within DHS? Why or why not?

The IPR Center is a commendable effort to help increase the efficiency and effectiveness of the U.S. government's intellectual property law enforcement efforts.

As to your question, the IPR Center provides a means for two DHS components, ICE and CBP, to coordinate their intellectual property enforcement nationally, including large-scale operations. The coordination of their national efforts has led to large-scale operations such as Holiday Hoax, Spring Cleaning, Global Hoax, and In Our Sites.

We want to highlight the fact that the IPR Center is a multi-agency center that coordinates efforts beyond DHS. It helps coordinates enforcement across federal agencies. Currently, the IPR Center has the participation of two international partners (INTERPOL and the Government

of Mexico) and 11 federal agencies/offices, only two of which are part of DHS: (1) U.S. Army, Major Procurement Fraud Unit (newly added in June 2010); (2) U.S. Department of Commerce, International Trade Administration; (3) U.S. Department of Commerce, U. S. Patent and Trademark Office; (4) U.S. Department of Defense, Defense Criminal Investigative Service; (5) U.S. Department of Health and Human Services, Food and Drug Administration, Office of Criminal Investigations; (6) DHS, CBP; (7) DHS, ICE; (8) U.S. Department of Justice, Federal Bureau of Investigation; (9) General Services Administration, Office of Inspector General; (10) Naval Criminal Investigative Service; and (11) U.S. Postal Inspection Service. I look forward to working with the IPR Center to ensure that it helps increase cooperation, and thereby minimizes duplication and waste, in law enforcement efforts across federal agencies.

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11. The PRO-IP Act of 2008 authorized \$10 million per year for 5 years for the FBI to hire additional agents to support the Computer Crime and Intellectual Property Section (CCIPS) and Computer Hacking and Intellectual Property Crime Unit (CHIP) of the Justice Department. According to the FBI’s October 2009 Report required by the PRO-IP Act, the FBI received \$8 million--\$6.4 million went toward personnel hiring and \$1.4 million went toward equipment, training and other purchases.

- a. Because of your unique position to oversee the operations of all agencies involved in intellectual property enforcement, do you believe the FBI appropriately used the funds Congress appropriated to it and assigned agents to the units most in need of additional support for IP enforcement? Why or why not?

With respect to the funds Congress appropriated to the FBI, the FBI conducted a review of its strategic and operational efforts to address intellectual property crimes. These efforts led to the strategic disbursement of resources to expeditiously identify and effectively investigate the highest priority persons and organizations threatening intellectual property, including the assignment of agents to the units most in need of additional support for intellectual property enforcement.

FY 2009 IP Enhancement

Through funding received in the FY 2009 Appropriation, and in accordance with the PRO-IP Act, the FBI designated 31 agents to work intellectual property investigations:

- *26 Field Office agents were placed in 20 Field Offices with CHIPs units as follows:*
 - - *Atlanta (2)*
 - *Baltimore (1)*
 - *Boston (1)*
 - *Chicago (1)*
 - *Dallas (1)*
 - *Detroit (1)*
 - *Kansas City (1)*
 - *Los Angeles (2)*
 - *Memphis (1)*
 - *Miami (2)*
 - *New York (2)*
 - *Newark (1)*
 - *Philadelphia (1)*
 - *Pittsburgh (1)*
 - *Sacramento (1)*
 - *San Antonio (1)*
 - *San Diego (1)*
 - *San Francisco (2)*
 - *Seattle (1)*
 - *Washington D.C. (2)*

- *5 FBI Headquarters (FBIHQ) Agents:*
 - *Three FBIHQ agents were assigned to the IPR Center to conduct investigations and de-conflict matters with partner agencies.*
 - *Two FBIHQ agents were designated as HQ Program Managers to provide strategic guidance, tactical assistance, develop intelligence, and oversee the field office intellectual property programs, agents, and investigations.*

The 31 intellectual property agents received three days of intellectual property training in September 2009, which included strategic programmatic briefings, DOJ-CCIPS prosecutorial guidance, briefings from the following IPR Center partner agencies: CBP, FDA, ICE, the U.S. Postal Inspection Service, and the U.S. Patent and Trademark Office. The training included current and historical case studies and presentations from industry representatives.

FY 2010 IPR Enhancement

In the FY 2010 Appropriation, the FBI received funding for 20 additional investigators dedicated to intellectual property matters:

- *Additional intellectual property Agents were assigned to enhance intellectual property Squads in four field offices:*
 - *Los Angeles (2)*
 - *New York (4)*
 - *San Francisco (4)*
 - *Washington D.C. (4)*
- *Additional intellectual property Agents to five field offices:*
 - *Chicago (1)*
 - *Detroit (1)*
 - *Houston (2)*
 - *Miami (1)*
 - *Sacramento (1)*

In September 2010, the FBI will conduct advanced training for agents working intellectual property matters in all field offices with DOJ CHIPS units, and will provide intellectual property basic training to agents designated as intellectual property coordinators in the remaining field offices.

Non-personnel related funding is also being utilized for undercover purchases of evidence, destruction of seized counterfeit goods, equipment purchases, and advanced training to develop subject matter experts in intellectual property investigations.