



October 29, 2010

Filed via www.regulations.gov (Docket No. ITA-2010-0006)

Office of Intellectual Property Rights
International Trade Administration
Department of Commerce

Re: Government Programs To Assist Businesses Protect Their Intellectual Property Rights (IPR) in Foreign Markets: Request of the International Trade Administration's Office of Intellectual Property Rights, Department of Commerce, 75 Fed. Reg. 60408 (September 24, 2010), Regulations.gov Docket Number ITA-2010-0006

The International Intellectual Property Alliance (IIPA) is pleased to provide this Written Submission in response to the U.S. Department of Commerce's September 24, 2010 request inviting public input and participation in shaping government programs for protecting the intellectual property rights of U.S. businesses in foreign markets. We applaud the Department of Commerce for conducting this comprehensive review of existing U.S. Government efforts to educate, guide, and provide resources to U.S. businesses doing business in foreign markets and encountering difficulties enforcing their intellectual property rights in those markets. We note the importance of this review, as it is being conducted in coordination with the Intellectual Property Enforcement Coordinator ('IPEC') to implement certain action items in the 2010 Joint Strategic Plan on Intellectual Property Enforcement submitted to Congress by the IPEC. The copyright industries greatly appreciate the U.S. government's continuing efforts in promoting better copyright awareness, protection, and enforcement, and for its involvement in copyright reform and enforcement and enforcement training efforts. We wish to assist the Department in its stated goal "to improve efforts to support U.S. businesses facing barriers related to intellectual property rights protection and enforcement in overseas markets."

Addressing IP theft and market access barriers inures to the benefit of the U.S. economy. With the health and competitiveness of the U.S. economy still fragile in the wake of the financial crisis, it is striking that the U.S. copyright industries remain one of the few industry sectors capable of outpacing the rest of the economy in producing new jobs and returning revenue to our country when it needs it most. The degree to which we reach this capability is dependent upon the extent to which piracy and market access barriers can be reduced. Over the last several years, the "core" U.S. copyright industries have added new workers to our economy at two to three times the rate of the economy as a whole. Today, one out of every 20 workers is employed in the copyright industries, and more than one in ten workers are in jobs that are in, or depend on, the "core" copyright industries.¹ Most of these industries generate over half their revenue from outside the

¹ In July 2009, IIPA released the latest update of our economic report, *Copyright Industries in the U.S. Economy: The 2003-2007 Report*, prepared by Stephen Siwek of Economists Inc. This report details the economic impact and contributions of U.S. copyright industries to U.S. Gross Domestic Product, employment, and trade. The core copyright-based industries in the U.S. continue to be major contributors to the U.S. economy. For example, this data show that the "core" U.S. copyright industries accounted for an estimated \$889.1 billion or 6.44% of the U.S. gross domestic



U.S. and that revenue contributes to the creation of U.S. jobs. The copyright industries also contribute significantly to our innovation economy and to national productivity and competitiveness as a whole. In 2007, these industries accounted for over 22% of economic growth, clearly showing that the creative industries are a key driver of growth and productivity in the U.S. economy. Notwithstanding these successes, the copyright industries suffer enormous losses around the world as a result of the theft of their works or lost opportunities due to market access impediments in a number of key markets. This substantially reduces their revenue, directly impacting U.S. employment.

The primary challenge these industries face globally is that many of our trading partners have not yet established and employed effective and deterrent enforcement mechanisms to combat piracy. The key contributing factors to massive copyright piracy and high piracy levels include: (1) the failure to provide expeditious, non-burdensome, and non-costly enforcement procedures that are accessible to all right holders, (2) the failure to provide deterrent remedies and sanctions, whether civil, administrative, or criminal; (3) the lack of modern legal structures that provide effective tools to law enforcement and the judiciary to deter piracy especially in the digital era; and, in some cases, (4) the denial of greater market access for copyright products on an open and non-discriminatory basis.²

The Bottom Line: the health and competitiveness of the U.S. economy depends on a thriving copyright sector that creates jobs and exports. The growth of the U.S. copyright industries and their future competitiveness is dependent on our trading partners lowering barriers to market entry – providing free and open markets – while offering meaningful, high-level copyright protection and significantly more effective policies and tools to enforce that protection.

Below are IIPA's specific comments in response to several of the fourteen questions and information requests posed by the Department of Commerce.

1. Describe your level of familiarity with intellectual property rights in general and intellectual property rights in foreign markets in particular.

The International Intellectual Property Alliance (IIPA) is a private sector coalition formed in 1984 to represent the U.S. copyright-based industries in bilateral and multilateral efforts to improve international protection of copyrighted materials. IIPA comprises seven trade associations, each representing a significant segment of the U.S. community. These member associations represent over 1,900 U.S. companies producing and distributing materials protected by copyright laws throughout the world — business software (operating systems, Internet

provides data on the estimated average annual compensation for a worker in the core copyright industries: \$73,554 in 2007. Finally, estimated 2007 foreign sales and exports of the core copyright industries increased to at least \$126 billion, leading other major industry sectors. The report also details results for the "total" copyright industries, which includes the core industries along with additional sectors involved in distribution.

² For more specifics on appropriate enforcement mechanisms sought by IIPA in an effective copyright regime, see IIPA's 2010 Special 301 Submission, at International Intellectual Property Alliance (IIPA), *Special 301: Comments regarding the Identification of Countries Under Section 182 of the Trade Act of 1974: Request for Public Comment ("Special 301")*, and *Request to Testify at the Public Hearing*, 75 Fed. Reg. 2578 (January 15, 2010), Feb. 18, 2010, at <http://www.iipa.com/pdf/2010SPEC301COVERLETTER.pdf>; and IIPA, *Comments of the International Intellectual Property Alliance to the Office of the Intellectual Property Enforcement Coordinator (IPEC)*, 75 Fed. Reg. 8137 (Feb. 23, 2010), March 24, 2010, at <http://www.iipa.com/pdf/IIPASubmissionToIPEC032410.PDF>, pp. 5-9.



enabling software, browsers, search engines, office productivity software, database management software, green technology enabling software, security software and mobile technologies); entertainment software (interactive games for video game consoles, handheld devices, personal computers, and the Internet); theatrical films, television programs, home videos and digital representations of audiovisual works; musical compositions, recorded music, CDs, and audiocassettes; and textbooks, trade books, reference and professional publications and journals, in both print and electronic media.

IIPA members have a deep appreciation of the important role IP rights play in their businesses' viability and their ability to successfully compete overseas. IIPA has been engaged in over 100 countries throughout the world for the past 26 years, monitoring copyright legal and enforcement developments, participating in law reform and enforcement reform-related efforts, and engaging in advocacy efforts. IIPA member associations and their member companies maintain enforcement staff and enforcement programs in many markets and are active in utilizing available civil, criminal and administrative remedies in many of those markets.

2. *Identify specific challenges businesses, including SMEs, face in protecting their intellectual property rights abroad.*

Piracy harms the U.S. creative industries and the U.S. economy

“Piracy” as we know it today increasingly occurs in more sophisticated ways of using or supplying to users copyright materials without authorization, in addition to the simple duplication and sale of content on physical media in retail shops or on the streets. One example of this is the unauthorized use of software within businesses – organizational end-user piracy of business software – the principal and most damaging form of piracy to the business software industry, which represents a more than \$30 billion global problem for U.S. software companies. Another example affecting all of the copyright industries is Internet piracy. The Internet and mobile networks, which have transformed the way we work, learn and play, have unfortunately also been used by a large number of services and users to steal, or to make money from the theft of, music, movies, games, books and journal articles, software and other copyrighted works. Such piracy comes in myriad forms, from P2P file sharing, deeplinking sites, BitTorrent sharing, cyberlockers used unlawfully, web bulletin boards, and other similar services. Internet piracy is by far the greatest priority issue for the music industry, which faces a global Internet piracy problem estimated at 95%. For business-to-business content providers, unauthorized use of their content is a growing problem as customers increasingly demand delivery of products and services in digital formats.

One of the greatest concerns to the motion picture industry is camcording piracy, in which movies are stolen right off the screen, often just as they open or prior to their opening theatrically. Once the illegal camcord copy is made, “release groups” employ the Internet to move the pirate camcorded copies onto the Internet for onward distribution or for factory or recordable disc duplication to get the product to consumers who do not want to wait or pay for the legitimate version. The book publishing industry continue to be plagued by the unauthorized photocopying



of books, principally on and around university campuses and with a focus on scientific, technical and medical textbooks. Illegal digitizations of their works and online piracy is a rapidly growing problem for the industry. The entertainment software industry suffers from a myriad of issues of increasing sophistication, including the manufacture, sale and distribution of circumvention devices used to make and play infringing copies of games, the establishment of pirate online servers for popular multiplayer games, and end-user piracy of their products in Internet café settings.

Traditional forms of physical piracy still cause major problems for many of the copyright industry sectors. Factory production of optical disc products, CDs, DVDs, CD-ROMs containing pirated software, movies, games, music and books, remains prevalent in many markets although over time it has been overtaken by local “burning” of CDs, DVDs, and CD-ROMS, often with content obtained from the Internet. The software and music industries continue to suffer from the unauthorized loading of software or music on computers, phones or other mobile devices at the point of sale, (in the software context known as “hard disk loading”). Factory piracy of entertainment software in cartridge format, produced primarily in Asia and exported to dozens of markets, afflicts the entertainment software industry.

Because piracy harms both foreign but also domestic producers and distributors of intellectual property, the existence of strong legal frameworks and effective enforcement mechanisms benefit not only the U.S. economy but also local economies. Examples abound and it is well-documented that failure to reduce piracy costs local economies dearly and eliminates high-paying jobs, tax revenues, and contributions to GDP. It is important to take into account the enormous economic harm caused to local right holders and their support network as well as to the U.S. and global economy, and conversely, the economic benefits to be derived by strong copyright laws and effective enforcement mechanisms available to all stakeholders.

The inexorable connection between market access barriers and piracy

In the experience of IIPA and its member associations and companies, there is a strong connection between a country's ability to foster the entry of legitimate product quickly and efficiently into the market, and its ability to combat piracy effectively. Policymakers should make the reduction of market access impediments a key component of ongoing efforts to combat piracy. Restrictions on the distribution of legitimate products, impediments to the establishment of companies involved in the creation, manufacture or distribution of such products, the imposition of prohibitively high tariffs and taxes on legitimate products entering the country, and/or the application of burdensome, time-consuming or discriminatory censorship provisions, invite piracy (often pre-release) and curb the competitiveness of legitimate products and services. Pirates gain market share when the introduction of new legitimate products is unreasonably delayed, whether through lengthy content review periods, or through specialized packaging, stickering or distribution requirements. As a result, illegal operations, which simply ignore such requirements, move to take advantage of any temporary product voids by speeding pirated copies to market. This creates an informal but highly lucrative exclusive distribution window for pirates that is in turn highly damaging for right holders and their authorized distributors. Delays in legitimate



release can be particularly damaging to “hit-based” businesses that depend on strong initial sales of a relatively small number of highly popular products to recoup investments made in other, less immediately successful ones.

IIPA is also increasingly concerned about policies that mandate particular technologies for government procurement, rather than allowing agencies to purchase the products in the global marketplace that best fit their needs, as well as policies that attempt to use market access leverage to compel transfers of IP. For example, over the past several years, China has been rolling out a series of policies aimed at promoting “indigenous innovation.” The apparent goal of many of these policies is to develop national champions by discriminating against foreign companies and compelling transfers of technology. We urge U.S. officials and their counterpart national policymakers to scrutinize and eliminate market access barriers as a matter of the highest priority. IIPA also encourages the U.S. government to work with foreign governments to enhance the transparency of regulatory procedures which will facilitate small and medium sized enterprises’ ability to successfully participate in overseas markets.

3. *In what countries or regions do businesses need the most assistance protecting their intellectual property rights? In responding please prioritize any countries identified.*

In IIPA’s 2010 Special 301 report, we analyzed the copyright law and enforcement problems in 39 countries/territories, and recommended 35 of them for placement on the Priority Watch List or Watch List, or for monitoring under Section 306 of the Trade Act of 1974.³ That list can act as a useful starting point of priority territories and issues of concern, flagged by IIPA for U.S. government attention and engagement. In addition to the annual Special 301 filings in which IIPA participates with a comprehensive filing of copyright law and enforcement developments in these various countries, IIPA also weighs in, where appropriate, in other instances, including the upcoming Special 301 out-of-cycle review on “notorious markets” to assist the U.S. government in evaluating progress and the need for continued U.S. government assistance in addressing piracy in those markets, and as an adjunct to the Special 301 process. There is a continued need for enhanced U.S. assistance in other markets as well, particularly developing countries where there may be a lack sufficient capacity to meaningfully protect copyright, both for their own nationals and for U.S. copyright owners. We suggest that the Department of Commerce, as a part of its review and in conjunction with other agencies, review conditions in developing countries to determine whether U.S. assistance in capacity building could be valuable in creating better conditions for creators, thereby encouraging economic development, cultural diversity and the rule of law.

³ These countries and their categories are: Priority Watch List - Argentina, Canada, Chile, Costa Rica, India, Indonesia, Mexico, People’s Republic of China, Philippines, and Russian Federation; Watch List - Belarus, Brazil, Egypt, Greece, Hungary, Israel, Italy, Kazakhstan, Kuwait, Lebanon, Malaysia, Pakistan, Peru, Poland, Romania, Singapore, Spain, Tajikistan, Thailand, Turkey, Turkmenistan, Ukraine, Uzbekistan, and Vietnam; 306 Monitoring - Paraguay; Countries Deserving Special Mention - Hong Kong, Saudi Arabia, Switzerland, and Taiwan.



4. *Which specific types of intellectual property (copyrights, trademarks, patents, trade secrets) present the most challenges to SMEs? Should U.S. government programs focus on specific areas of intellectual property protection?*

IIPA's focus is on copyright, and as such, we believe there is a continued need to ensure that copyright issues, including law reform and enforcement, and market access barriers related to copyright-based industries, receive adequate coverage as part of U.S. government assistance programs.⁴ We note that SMEs are prevalent in all copyright sectors—including notably the film, music, entertainment software and publishing sectors. Reforms lowering barriers to entry in these sectors, and thereby expanding the markets for such works, will have a pronounced effect on SMEs, independent companies, and individual creators.

5. *Suggest particular outreach, programs or assistance that the government can provide that would help U.S. businesses overcome those challenges.*

IIPA supports continuation and expansion of U.S. technical assistance, for example, those provided under the following kinds of programs: 1) copyright law or copyright policy-based visitor programs such as those administered by the U.S. State Department's International Visitor Leadership Program (IVLP); 2) IP enforcement (policy-based) training programs such as those administered by the U.S. Patent and Trademark Office's GIPA Program or the Department of Justice's Overseas Prosecutorial Development and Training (OPDAT) Program; 3) IP enforcement (performance-based) programs such as those administered by the U.S. State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL); 4) policy-based IPR overseas placement programs, such as the State Department/U.S. Patent and Trademark Office IPR Attaché Program; and 5) law-enforcement operational programs such as the U.S. Department of Justice's Intellectual Property Law Enforcement Coordinator (IPLEC) Program.⁵

Each of these types of program has a particular role to play. The importance of results-based programs like the IPLECs cannot be overstated, since those programs provide tangible, immediate benefits to copyright owners seeking to enforce their rights in important markets. At the same time, the visitor programs and training programs (such as IVLP and GIPA) provide a broad array of foreign government officials, and in the case of the IVLPs, even some private foreign businesspeople, with opportunities to learn about the U.S. IP system and learn about IP issues as they play out in their countries and the U.S.

A critical resource for the U.S. copyright industries are U.S. embassies. In part, U.S. embassies serve as a megaphone for U.S. economic priorities articulated in Washington. President Obama has stated that the Administration will “aggressively protect intellectual

⁴ Of course, it should also be noted that IIPA's members' companies also experience trademark counterfeiting as well as patent infringements abroad, to varying degrees.

⁵ The U.S. Trade Representative's 2010 Special 301 Report contains a list under “Capacity Building” of “opportunities for the U.S. Government to work collaboratively with trading partners to address” piracy which includes many of these programs, as well as others, such as the Department of Homeland Security's (DHS) bureau of Customs and Border Protection (CBP) and bureau of Immigrations and Customs Enforcement (ICE) and the Department of Commerce's Commercial Law Development Program (CLDP), which provides training to foreign lawmakers, regulators, judges, and educators seeking to improve the legal environment for doing business in their countries, including on IPR. See United States Trade Representative, *2010 Special 301 Report*, April 30, 2010, at http://www.ustr.gov/webfm_send/1906, pp. 8-9.



property.” Our embassies and our Ambassadors should engage local media and government officials on the importance, and benefits, of protecting and enforcing intellectual property rights. Ambassadors in countries identified in the Special 301 Report should likewise be instructed to ensure that intellectual property remains a high priority in their post’s Mission Strategic Plan.

The national creative industries studies published by the World Intellectual Property Organization and supported in part by U.S. government funding deserve special mention here. These studies provide a valuable tool to foreign government counterparts seeking to show the tangible connection between intellectual property rights protection and their country’s economic development. They also assist legislators form the policy basis for good legislation in the area of copyright protection, and provide a tool to lawmakers and officials alike in justifying devotion of the necessary resources it takes to protect intellectual property rights in an increasing complex policy environment. Full U.S. funding for the continuation of these studies is critical to seeing that the good work by WIPO continues on behalf of these countries.

6. *Describe your familiarity with or use of current U.S. Government services and tools related to IPR protection and enforcement in foreign markets, and assess their usefulness and/or gaps.*

Please see answer to 5 immediately above.

U.S. government assistance is critically important to spreading the word about the importance of intellectual property rights protection, and copyright in particular. This protects U.S. economic interests and assists foreign governments to effectively grow their creative industry sectors and hence their economies. It is imperative that U.S. government activities to promote better copyright enforcement overseas receive adequate funding, and that those engaged in carrying out these efforts receive strong political support from their parent agencies and from the Administration.

The efficiencies that can be realized through improved planning, coordination and funding of agency activities also underscores the need for, and return on investment from, fully funding the IPEC’s office. Adequate funding for this important office is critical to the U.S. government being able to achieve greatest efficiency from coordinated agency activities. The IPEC also serves an important function in delivering a consistent and persuasive message to foreign governments: copyright protection and enforcement are critical, both to U.S. interests, and to countries interested in promoting innovation and generating economic growth.

Some examples of gaps in agency activities and funding include: 1) under-coverage of the IPEC Program); 2) the need to better integrate the IPR Attachés into the operations of the posts where they are stationed, in a manner that conveys the high priority accorded to strong copyright protection and enforcement; and 3) the need for an IP attaché at the OECD.

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9. *Identify specific existing programs provided by the U.S. Government or governments of other countries that have been particularly effective at assisting U.S. businesses with protecting their intellectual property rights in foreign markets (including, if possible, specific examples illustrating the effectiveness of those methods).*

Please see the response to 5 above for a non-exhaustive discussion of U.S. government programs. IIPA's Special 301 submission letter and individual country reports mention many anti-piracy programs as well as education and public awareness programs in foreign countries. In our country reports, for example, we note the establishment of the National Council to Combat Piracy in Brazil and the NCCP's issuance of an action plan to combat piracy, the creation in Greece of a department at the Ministry of Citizen's Protections focusing on economic and cyber crimes, including IPR, and the continued activity by the Cyber Crime and Intellectual Property Rights Bureau in Lebanon, as examples of a few anti-piracy programs that can, if combined with deterrent results, effectively lower piracy. The IIPA report also cites enforcement actions against particularly egregious instances of organized piracy, e.g., by the Fiscal Police and DA's offices in Italy, the Economic and Cyber Crime Division of the Royal Thai Police, Turkish Police, Mexican Police and military personnel, Polish Police, Australian Police, Argentine Coast Guard, and Brazilian and Indian officials, as well as important enforcement actions against those illegally dealing in devices which circumvent technological protection measures undertaken by the Hong Kong Customs & Excise and the IPR branch of the Singapore Police (IPRB). IIPA also recognizes the importance of public education and public awareness, and notes foreign government programs established in Mexico, for example, by its department of intellectual property (IMPI), in the UK, France, and elsewhere, aimed at raising awareness of copyright and discouraging piracy.

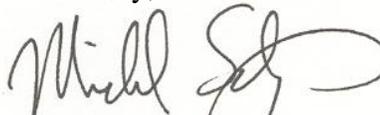
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11. *What additional role(s) should the government play in assisting businesses with the protection of their intellectual property rights abroad?*

Please see answers to 5 and 6 above.

IIPA appreciates the opportunity to provide this Written Submission to the Department of Commerce's Office of Intellectual Property Rights, International Trade Administration.

Sincerely,



Michael Schlesinger