"VIOLATIONS OF INTELLECTUAL PROPERTY RIGHT: HOW DO WE PROTECT AMERICAN INGENUITY?"

HEARING

BEFORE THE

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"VIOLATIONS OF INTELLECTUAL PROPERTY RIGHT: HOW DO WE PROTECT AMERICAN INGENUITY?"

WEDNESDAY, OCTOBER 13, 1999

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INTERNATIONAL
ECONOMIC POLICY AND TRADE,
COMMITTEE ON INTERNATIONAL RELATIONS,
Washington, D.C.

The Subcommittee met, pursuant to call, at 1:30 p.m., in room 2172, Rayburn House Office Building, Hon. Ileana Ros-Lehtinen [Chairwoman of the Subcommittee] presiding.

Ms. ROS-LEHTINEN. [presiding] The Subcommittee will come to order. Thank you so much for your patience, both the witnesses and the visitors today.

In much the same way that the Eli Whitney's cotton gin is credited with igniting the Industrial Revolution, intellectual property industries are propelling us into a new age of discovery and growth. According to the report, "Copyright Industries in the U.S. economy," the core copyright industries accounted for $278 billion in value added to the U.S. economy, or almost 4 percent of the GDP. For all copyright industries, the report cites that the total value added amounted to close to $434 billion, or almost 6 percent of GDP.

The core industries grew at nearly twice the annual growth rate of the U.S. economy as a whole between 1987 and 1996. Employment in these industries grew at close to 3 times the level in the overall economy. Further, they accounted for an estimated $60 billion in foreign sales and exports in 1996—a 13 percent gain over the previous year.

The American formula for excellence and success in the area of intellectual property is one many would like to emulate. Unfortunately, some across the world are seeking to repeat the U.S. experience through stealing, pirating, counterfeiting, and other unauthorized uses of American products.

The impact of piracy on the U.S. economy is widespread. As industry leaders have stated: "Piracy puts breaks on the development of the national producers, generates tax evasion, reduces the creation of employment on the part of American companies, and provokes serious losses for the national economy."

The pervasiveness of this infringement, despite the growth of the copyright industries, is resulting in significant losses worldwide. The International Intellectual Property Alliance estimated that, in

1998, losses were about $5 billion for business applications; over $3 billion for entertainment software; almost $2 billion for the motion picture industry; and close to $2 billion for the record and music industries. Focusing on just two countries, the Pharmaceutical Research and Manufacturers of America reports that its members companies lose over $1 billion annually.

Intellectual property rights issues continue to be at the heart of U.S. relations with industrialized countries such as Japan and the European Union members; allies such as Russia, and Israel; as well as developing countries in Latin America, Asia, and the Middle East. Violations of intellectual property rights are a direct infringement on free trade, as it creates distortions in the market and creates parallel black market systems, which, in the end, will hurt, not just the United States but the global economy as a whole. In turn, as a Finnish copyright specialist has argued, the global phenomena of intellectual property industries "can only be dealt with by a global approach and, where necessary, by global rules."

One agreement considered by experts to be a good first step was the Uruguay Round (WTO) Agreements on Trade Related Aspects of Intellectual Property Rights (TRIP's) which took effect in January 1996. It established international obligations for the protection and enforcement of intellectual property rights, and established enforcement and dispute settlement mechanisms. However, there were still issues relating to protection of intellectual content in cyberspace, loopholes regarding duplication of sound recordings, and other challenges posed by global networks that needed to be addressed.

In December 1996, the World Intellectual Property Organization Diplomatic Conference concluded negotiations on two multilateral treaties-one, to protect copyrighted material in the new digital environment and another, to provide stronger international protection to performers and producers of phonograms. The implementing legislation was passed last year.

Nevertheless, the differences in deadlines for implementation of international requirements and the failure of our trading partners to effectively address the issue, translate into an escalation of violations and the creation of an environment where piracy is becoming rampant. Our enforcement, monitoring, and investigative agencies—some of which are represented here today—are doing an outstanding job within the limitations imposed by the pervasiveness and magnitude of the problem.

The Intellectual Property Law Enforcement Coordination Council, established by a Fiscal Year 2000 treasury/postal appropriations Bill will certainly help as enforcement of intellectual property is coordinated domestically and internationally among the U.S. Federal agencies, as well as foreign entities.

But more needs to be done on the preventive side of the equation. I look forward to the recommendations of our witnesses today as we search for a cure to this growing epidemic.

[The statement of Ms. Ros-Lehtinen appears in the appendix.]

Ms. ROS-LEHTINEN. I am very proud to introduce our first witness, Mr. Raymond Kelly, who is the Commissioner of the U.S. customs service. I thank him for being here today and for the opportunity to participate earlier in the demolition of counterfeit CD's.

As a Customs Commissioner, Mr. Kelly directs over 19,000 employees responsible for enforcing hundreds of laws and international agreements, which protect the American public. Prior to this prestigious appointment, Commissioner Kelly served as the Under Secretary for enforcement at the Treasury Department. Commissioner Kelly brings to the position more than 30 years of experience and commitment to the public service. A former marine who served in combat in Vietnam, he was part of the team investigating the World Trade Center bombing in 1993, the year in which he was recognized as New York State's official of the year.

Because of the delay and the constraints on the Commissioner's schedule, we will be submitting questions in writing, Commissioner, to Customs upon the conclusion of the testimony. I will excuse you, because I know that you have other commitments, and we thank you for being here today, Commissioner. Thank you. We will enter you statement in full in the record.

STATEMENT OF RAYMOND KELLY, COMMISSIONER, U.S. CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

Mr. KELLY. Thank you very much, Madam Chairwoman. Thank you for the opportunity to testify.

Throughout its long history, the United States Customs Service has protected the Nation from the harmful effects of unfair and predatory trade practices. In recent years, we have taken on the rising threat against intellectual property rights.

IPR theft hurts not only our national economy but the world economy as well. This crime is already costing industry approximately $200 billion a year in lost revenue and nearly 750,000 jobs.

In Fiscal Year 1998, the Customs Service seized almost $76 million worth of counterfeit and pirated merchandise and conducted 484 criminal IPR investigations. China and Taiwan were the source countries for nearly half of all the merchandise seized.

In just the first half of Fiscal Year 1999, we seized over $73 million of pirated merchandise and conducted 505 criminal IPR investigations. Again, China and Taiwan accounted for 56 percent of this seized merchandise. Motion pictures, computer software, and music were the products that were illegally copied the most.

Our investigations have shown that organized criminal groups are heavily involved in trademark counterfeiting and copyright piracy. They often use the proceeds obtained from these illicit activities to finance other, more violent crimes.

These groups have operated with relative impunity. They have little fear of being caught for good reason. If apprehended, they face minimal punishment. We must make them pay a heavier price.

Customs continues to raise awareness of the importance of protecting our intellectual property rights. This past summer, our Fraud Investigations Division sponsored two conferences on methods to recognize and investigate IPR violations. Our agency teamed up with private industry and trade associations to provide advanced training for approximately 200 Customs special agents and inspectors. Twenty special agents from the Federal Bureau of Investigation were also included in this training.

Our Federal law enforcement agencies are stepping up to the challenge, but we can't do it alone. We need international cooperation. We need the help of our foreign partners.

Accordingly, we have conducted training for customs and Federal police officers in nine different countries. We also provided training to six additional foreign law enforcement agencies under the auspices of the International Law Enforcement Academy in Bangkok, Thailand.

U.S. customs has also forged a close working relationship with those industries most affected by IPR violations. We are working with these corporations to train personnel at airports, seaports, mail facilities, land borders, and other locations where foreign imports are received on ways to spot counterfeit merchandise.

Our partners in this effort have included the Interactive Digital Software Association, the Motion Picture Association of America, the Recording Industry Association of America, the Software Publishers Association, Lucas Arts, Microsoft, Novell, Nintendo, Sega, and Sony Entertainment.

In recent months, we have contacted major pharmaceutical manufacturers to learn about their IPR concerns. As a result, we have developed training for our Customs officers to help them identify shipments of imported pharmaceuticals that violate manufacturers' IPR rights as well as Food and Drug Administration regulations.

Customs mandate now extends to the borderless world of cyberspace as well. The Internet has opened up vast new opportunities for legitimate business and criminal smugglers alike. In this new environment, our traditional enforcement remedies simply won't suffice.

U.S. industries, particularly those involved in computer software, motion pictures, and sound recordings, are at great risk from Internet piracy. Cyber criminals are difficult to track with a few simple keystrokes from a computer anywhere in the world, they can ship stolen trademarks, traffic pirated music, or download copyrighted software.

U.S. customs is tackling this new breed of criminal on a variety of fronts. Our main weapon in this fight is the Customs Cybersmuggling Center, or C–3, located in Fairfax, Virginia. The center is devoted to combating Internet crime, including IPR violations.

Currently, this center is conducting about 100 investigations involving the sale of counterfeit goods through the Internet. With the help of Congress, we have expanded the center, and we will continue to devote our resources to its important work.

President Clinton included the protection of intellectual property rights in his 1998 international crime control strategy. Customs, along with the FBI, Co-Chair a working group charged with implementing the IPR strategy and strengthening the enforcement of IPR laws.

Members of this group include the Departments of Treasury, Justice, and State, the Patent and Trade Office, the Copyright Office, the U.S. trade Representative, the Central Intelligence Agency, and the National Security Council.

I would also like to take this opportunity to announce the opening of the National Intellectual Property Rights Coordination Cen-

ter. The center, based at Customs headquarters here in Washington, will synchronize the joint efforts of our Federal agencies in IPR investigations. Investigative personnel from Customs and the FBI will provide the core staffing for the center. Other interested agencies have been invited to participate.

The main objective of the center will be to eliminate duplication of investigative efforts between agencies and to coordinate multinational investigations. The center will provide one-stop service for industry to raise potential violations of IPR law. It will centralize intelligence gathering, including data and information collected by foreign government agencies and disseminate intelligence where needed.

We will also utilize the 44 Customs mutual assistance agreements we have signed with our international partners to help in our IPR efforts. These agreements provide for the free exchange of information and assistance in areas of mutual concern. The IPR Coordination Center will tap our attache offices worldwide to gain intelligence under the mutual assistance agreements for IPR investigations.

This center will begin limited operations within 30 days. Additional funding has been requested in our Fiscal Year 2001 budget to provide adequate staffing and resources.

Madame Chairwoman, with the continued support of the Congress, U.S. customs will remain a force in the battle against IPR piracy. Every day we gain in fighting those who subvert legitimate commerce and destroy livelihoods by stealing the creative works of others. Ever day we build new partnerships to help us in this battle.

But as much as we have done, we need to do more. IPR crime is an increasing global threat. We need to educate consumers on the dangers of counterfeit and pirated goods. U.S. customs look forward to working with the Congress to raise public awareness of the IPR threat and to enhance the defense of our cultural and commercial interests. The fact is, IPR crime affects more than those whose copyrighted works are stolen. In some way, it affects us all.

With your consent, I would like now to offer a brief demonstration of our work on this important front. This demonstration is being conducted U.S. customs special agent Del Richburg. Special Agent Richburg is currently assigned to the Customs Cyber Crime Center in Newington, Virginia, and he specializes in IPR investigations.

[The prepared statement of Mr. Kelly appears in the appendix.]

STATEMENT OF DEL RICHBURG, SPECIAL AGENT

Mr. RICHBURG. Thank you, Commissioner Kelly.

Madam Chairwoman, I would like to show several Internet which demonstrate IPR violations. The web sites were captured earlier in the week, but we will be viewing the sites as if they are live.

This first site is called the Software Depot. It is located in Russia and offers pirated business software for sale. As you can see in the questions and answers area, they even let you know up-front they are located in Moscow, Russia.

One of the issues—one of the problems with this web site is that it looks very professional. It gives the appearance of a legitimate software site, so the average consumer may not realize they are purchasing pirated software from this site.

How would an investigator or the public know that the products offered on this site are pirated? One of the first clues is this word here "warez." It is here again, and located several other areas on this web site. The word "wares" is an accepted word on the Internet for pirated software.

This area of the web page, serials, it is an area where you can download en mass serial numbers for software. Serial numbers for software are normally not offered until you purchase software. They are not available for mass download.

If we actually look at the type of products that the Software Depot offers, you will note they have an extensive list of software—Adobe Complete, the super bundle they are offering for $99. That is a ridiculously low price. Some of the software that they offer easily runs into the thousands of dollars.

They offer mixed compilations, meaning the software that they offer is software from competing companies. You may see a Microsoft product with a competing software, for example, and that is just not going to happen on a legitimate software site.

Another example of Internet piracy involves music piracy in the popular in MP3 format. MP3 pirated music can be located on many areas of the Internet. One of the areas we are going to look at is the World Wide Web. This is a popular common search engine called scour.net. It is a multimedia search engine, and it allows you to locate MP3 music. You would simply type in either the name of the song or the name of the musical group you are interested in and click search, and it will locate all of the occurrences on the World Wide Web of that particular song or group.

In this particular case I searched for the Dire Strait song Sultans of Swing. As you can see here, there is 441 pages where this particular song occurs. There is about 10 songs per page. That is well over 4,000 songs.

Then if we continue, you would simply click on the song you want to download, and the song is now downloading. This is called the URL. This is an interesting piece on the software. What it is, is it is an address. It is the address where this site is located at. One of the first steps an investigator would take if we were to look into this site would be to run a common search, a trace program. We are running the program, this trace software, and it is telling us that this particular site is located in Chicago. It is on a university server. What has happened in this particular case, more than likely, is a student has probably placed his content on the university server without the university's consent.

If we continue on, we will see that the download is in progress—it is at 6 or 7 percent. In less than a minute, we would have downloaded the song. Now, if we wanted to hear that recording in MP3 format, you would hear a near-CD quality version of that Dire Strait song. We will go ahead and play that song and get an idea of the quality.

We will fast forward a little bit. You see it is a near-CD quality sound of that song.

Obviously, there is literally thousands of these types of sites on the Internet, thousands. In the interest of time, I only showed a few today.

Thank you for your interest.

Ms. ROS-LEHTINEN. Thank you so much, Commissioner. Thank you for that presentation, and we apologize again to all of our witnesses for the delay. The Export Promotion Act is on the floor today, which is of extreme interest to our Trade Subcommittee, and that is where most of our Members are. If you see C–Span, you will see them all on the floor talking. I got in early and left so I could Chair this meeting, but that is where we are, and we apologize to all of you today.

We will submit our questions in writing to you, Commissioner. We thank you so much——

Mr. KELLY. Thank you, Madam Chairwoman.

Ms. ROS-LEHTINEN [continuing]. For being with us and for the presentation that you made.

Mr. KELLY. Thank you. We have some items on the table over there that have been confiscated by Customs Service. They are all manifest IPR violations.

Ms. ROS-LEHTINEN. Thank you so much. We will take a look at those.

Mr. KELLY. Thank you very much.

Ms. ROS-LEHTINEN. Thank you.

We are very proud to now present our second panel, headed by Ambassador Richard Fisher, the Deputy United States Trade Representative with primary responsibility for Asia, Latin America, and Canada. Ambassador Fisher also serves as vice Chairman of the Board of Directors of the Overseas Private Investment Corporation, and we were just discussing your bill a few minutes ago.

Ambassador FISHER. Thank you.

Ms. ROS-LEHTINEN. Before joining the USTR, Ambassador Fisher was managing partner of Fisher Ewing Partners and Fisher Capital Management. He was Executive Assistant to the Secretary of the Treasury during the Carter Administration and was founding Chairman of the Dallas Committee on Foreign Relations, among many other distinguished groups, and we thank Ambassador Fisher for being with us today.

We will then also hear from Mr. Todd Dickinson, the Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks. Prior to these distinguished assignments, he served as counsel with a Philadelphia-based law firm and as chief counsel for Intellectual Property and Technology at Sun Company. Commissioner Dickinson is responsible for managing the agency's growth and ensuring quality products and services.

Among the initiatives implemented during his tenure as head of the agency was the launching of the Quality Council to provide guidance in aligning PTO with established quality criteria. Commissioner Dickinson also established the Office of Independent Inventor Programs aimed toward inventors working for themselves or for small businesses.

We thank Mr. Dickinson as well as Ambassador Fisher, and we thank you mostly for your patience today. Thank you. We will be glad to enter your statements in full in the record. Thank you.

You are recognized now.???

???[The prepared statement of Mr. Richburg, Kelly appears in the appendix.]

STATEMENT OF HON. RICHARD FISHER, DEPUTY U.S. TRADE REPRESENTATIVE

Ambassador FISHER. Madame Chair, you eloquently summarized the economics of piracy in your opening statement. The value of intellectual property rights, however, goes well beyond its present economic value. A system of strong intellectual protection is referred to by the Commissioner in his presentation just now is fundamental to ensure that artists and inventors and scientists and even the group Dire Straits are rewarded for their work and thus incentivized to push the envelope of artistic creativity and scientific advancement in the future.

To paraphrase Thomas Edison, "The greatest machine ever invented is the human mind." Our commitment is to intellectual property rights, that is to products of the American mind, at home and abroad as a foundation of our ability to create the manufacturing successes, the distribution systems, the computer programs, the medicines, the defense systems, and the films and recordings of music of the future.

In a sense, the intellectual property of the American economy is like a warehouse of ideas. For people to walk into that warehouse and be able to steal from it is no more tolerable than the theft of goods, and this is why we at the U.S. Trade Representative's Office place such an emphasis on ensuring that our trading partners pass, enforce, and continue to enforce laws that ensure respect for our property rights, our intellectual property rights.

Among our most effective bilateral tools, Madam Chair, in combating piracy is the annual Special 301 review mandated by Congress in the 1988 Trade Act. Publication of the Special 301 list warns the country of our concerns, and, importantly, it warns potential investors in that country that their intellectual property rights are not likely to be satisfactorily protected.

In many cases, these actions lead to permanent improvement in the situation. Bulgaria, for example, was once one of Europe's largest sources of pirated CD's. We worked through the 301 process to raise awareness of the problem in Sophia, and Bulgaria has, at this point, almost totally eliminated pirate production.

China is another example where we used both the listing and actual retaliation to win bilateral intellectual property agreements in 1995 and 1996. As a result, China has a relatively functioning system which protects copyrights much more effectively than ever before, and, importantly and recently, in March, the China State Council followed our example here in the United States in issuing a directive to all government ministries mandating that only legitimate software be used in government and quasi-government agencies.

That said, we do of course have continuing concerns in China. Pirate production is down, but imports from other pirate havens are increasing in that country, and restrictions on market access have hindered our ability to replace pirate products with legitimate

goods in many cases. As in all our IPR work, continuous follow-up and review is essential for success as it is elsewhere.

In 1999, Madam Chair, we reviewed—or we have reviewed 72 countries in our Special 301 review, with 54 countries recommended for specific identification and 2 subject to sector 306 monitoring. In this review, we focused on 3 major issues: First, we are working to ensure full implementation of the World Trade Organization commitments on intellectual property, a subject I will expand upon in just a moment; second, we are addressing new issues raised by the rapid advance of technology, in particular, the control of piracy and newly developed optical media, for example, music and video CD's and software CD–Roms, and we have made some significant success on this issue over the past year with Hong Kong and Malaysia being cases in point; and, third, we have mounted a major effort to control end user software piracy; that is, the unauthorized copying of large numbers of one or two illegally obtained, or perhaps legally obtained, programs in particular by government agencies around the world.

We have used the example set by Vice President Gore's announcement of a U.S. Executive Order mandating the use of only authorized software by U.S. Government agencies to win similar commitments from Colombia, Paraguay, the Philippines, Korea, Thailand, Taiwan, and Jordan, in addition to China, which I referred to earlier. Spain and Israel are actively considering such decrees.

The bilateral negotiations are and will remain central to our efforts to improve copyright standards worldwide. However, as time has passed, our trading partners have begun the positive effect of stronger standards in their own home countries, and this allowed us to make a fundamental advance with the TRIP's agreement, which you referred to in your introduction to today's hearing.

This required that all WTO members pass and enforce copyright patent and trademark laws and give us a strong dispute settlement mechanism to protect our rights. This agreement will soon be fully in force. The Uruguay Round, which you referred to, Madam Chair, granted developing countries until January 1 of the year 2000 to implement most provisions, including copyright protection for computer software. as we approach 2000, we are working to ensure that developing countries are taking steps to ensure that they will meet their obligations.

In the interim, we have been aggressive and successful in using WTO dispute settlement procedures to assert our rights in 13 specific cases stemming from the very first TRIP's-related dispute settlement case against Japan in 1996. The more recent cases include one with Portugal for failing to apply TRIP's levels of protection to existing patents; another against Pakistan and India for their failure to provide a so-called mailbox and exclusive marketing rights for pharmaceutical products; a third case with Denmark and another with Sweden over the lack of ex parte civil search procedures; one with Ireland for their failure to pass a TRIP's-consistent copyright law; one with Greece dealing with their rampant broadcast piracy; with Argentina over exclusive marketing rights data protection for agricultural chemicals; with Canada for failing to provide a 20 year patent term in all rather than certain specific cases, and

with the EU regarding regulations governing geographical indicators.

These cases, Madam Chair, illustrate the range of issues that are involved in using WTO settlement procedures and processes to protect American property rights.

In the year ahead, we expect to be equally active. As part of our annual Special 301 report, we announced that USTR would conduct a Special 301 out-of-cycle review of developing countries toward full TRIP's compliance this December, and we are hopeful that many instances of less than full implementation can now be resolved through consultations. If not, we are prepared to address the problems through dispute settlement proceedings beginning in January where necessary.

In fact just last week, I met in Buenos Aires with the economic advisers to the three leading Presidential candidates. I told them that unless the Argentine Congress provides the wherewithal to address our concerns regarding pharmaceutical piracy and patent piracy between now and year-end, their government, to be elected next month, may well be subject to a TRIP's suit early next year.

At the same time, Madam Chair, our negotiations on the accession of 32 economies to the WTO offer us a major opportunity to improve intellectual property standards worldwide. The economies applying to enter the WTO include a number of countries in which our intellectual property industries have experience very significant piracy problems over the years, as you may seen in this morning's paper. For example, Jordan is keen on stressing progress on this front as part of their WTO accession effort in order to attract investment to the kingdom. In each case, we consider acceptance of the WTO requirement for passage and enforcement of modern intellectual property laws a fundamental condition of entry and accession to the WTO.

Our overriding objective at the moment is to secure full and timely implementation of the TRIP's agreement by all WTO members and to broaden this to new members. WTO's so-called built-in agenda includes a review of the TRIP's agreement scheduled to begin after implementation, and this will help us build consensus for the next steps at the WTO. We foresee the possibility of improvements to the TRIP's agreement in due course. Among other things, we believe that it will important to examine and ensure that standards and principles concerning the availability, scope, the use, and enforcement of intellectual property rights are adequate and effective, and are keeping pace with the rapid changing technology, which we just saw illustrated, including further development of the Internet and digital technologies.

We also expect that once members have the benefit of experience gained through full implementation of the agreement, we will want to examine and ensure that members have fully attained the commercial benefits which were intended to be conferred by the TRIP's agreement and the protection it affords. In any event, no consideration will be given or should be given to the lowering of standards in any future negotiations.

Looking forward, Madam Chair, we are giving careful consideration to our options for protecting intellectual property associated with rapidly evolving new technologies and the fast developing in-

formation society. For example, we are consulting with United States industry to develop the best strategy to address problems such as Internet piracy. We began an effort to address this issue through the multilateral negotiations under the auspices of the World Intellectual Property Organization, or WIPO, which you referred to in your opening statement. This resulted in the signature of two 1996 WIPO copyright treaties, which will help raise the minimum standards of copyright protection around the world particularly with respect to Internet-based delivery of copyrighted works.

With the recent approval by the U.S. Senate of these treaties, the Administration is committed to work with industry to encourage ratification of these treaties by other signatories as soon as possible.

Madam Chairwoman, intellectual property protection is one of our most important and challenging tasks. To protect U.S. intellectual property rights is to protect the product of the American mind. It protects America's comparative advantage in the highest-skill, highest-wage fields. It helps to ensure that the extraordinary scientific and technical progress of the past decades continues and accelerates in the years ahead and all of woman and mankind prospers from it.

Congress, through the passage of the Special 301 law, through the passage of the Digital Millennium Copyright Act implementing the WIPO treaties, and through hearings such as this deserves great credit for bringing public focus to these issues, and we thank you for it. USTR has worked very closely with the responsible Committees over the years, and we look forward to continuing that effort together in the years ahead.

Thank you, Madam Chair and Members of the Committee. Be happy to answer any questions you have and happy to turn this over to my friend, the Commissioner.

[The prepared statement of Ambassador Fisher appears in the appendix.]

Ms. ROS-LEHTINEN. Thank you so much, Mr. Ambassador.

Mr. Commissioner, we will also include your full statement into the record.

STATEMENT OF Q. TODD DICKINSON, ACTING ASSISTANT SECRETARY OF COMMERCE AND ACTING COMMISSIONER OF PATENTS AND TRADEMARKS

Mr. DICKINSON. Thank you very much, Madam Chairman and Members of the Committee.

Let me start by commending you for holding this hearing on the protection of intellectual property. Echoing what my colleague, Ambassador Fisher, and Commissioner Kelly said, I firmly believe that no issue is more important in shaping the future growth and development of our economy and the global economy than to the development and the maintenance of an effective intellectual property protection system.

Within our national intellectual property system, the Patent and Trademark Office is basically responsible for examining and granting patents and registering trademarks. We also serve an important policymaking role. Specifically, the PTO is the primary adviser in the Administration and Congress on all domestic and inter-

national IP matters, including the international agreements. To that end, we work closely with our colleagues here at USTR and Customs and the U.S. copyright office, the Departments of State and Justice and other Federal agencies to secure and expand protection of U.S. intellectual property throughout the world.

As part of that international effort, we and our colleagues within the Administration engage in policy consultations and educational programs with our foreign counterparts. The goal is not only to convey the advantages of effective intellectually property enforcement systems, including full compliance with the TRIP's agreement, but also to promote understanding of the critical role that intellectual property protection plays in building strong and vital economies.

Our educational programs and discussions regularly take place here in Washington and abroad; in fact, just last week the PTO and the World Intellectual Property Organization's Asia bureau Cosponsored a study program of the enforcement of IP rights for customs officers from 12 Asian countries. Next month, we will hold another enforcement program with intellectual property officials from over 15 other nations.

The PTO traditionally consults with other Federal agencies on intellectual property related enforcement activities. I am very pleased that Congress has recently gone further and formally initiated a new interagency coordination effort. The law, which creates the National Intellectual Property Law Enforcement Coordination Council, signals a strong commitment on behalf of the United States to improve the coordination of domestic and international intellectual property law enforcement among Federal and foreign entities.

The Council, which is Co-Chaired by us at the PTO and the Assistant Attorney General for the Criminal Division, also includes the USTR, State Department, the Department of Commerce, and the Customs Service. It is directed to consult with the register of copyrights on copyright-related issues and reports annually no its activities to the President and the House and Senate Committees on Appropriations and the Judiciary. We look forward to working with our colleagues on this new, important effort.

Securing effective patent protection as expeditiously as possible is critical to all U.S. industries but particularly the pharmaceutical, computer, and other high-technology sectors. On that point, Madam Chair, I can report that the U.S. patent business is booming. Patent applications are up 25 percent in just the last 2 years; almost 50 percent since the start of the Clinton Administration. In the fiscal year that just ended, we received nearly 270,000 patent applications.

To handle the rapid growth in patent applications and to address our customers' concerns, we have hired in the last 2 years more than 1,600 new patent examiners. At the same time, we are expanding staff training and aggressively automating our operations to improve the efficiency and the quality of our service.

Our international efforts on patent protection include ongoing consultations with our international partners through the Patent Cooperation Treaty and the Patent Law Treaty as well as with our trilateral partners, the European and the Japanese patent offices.

The culmination of these efforts will streamline the procedures for and—for filing for and maintaining patent protection throughout the world. We also look forward to the day when there is a complete international regime for patent protection, the so-called global patent.

With respect to our trademark operations, we are also experiencing significant growth. Trademark are up nearly 25 percent in this year alone. Our efforts in this area include hiring more trademark examiners, promoting electronic filing, and improving our searchable data base.

On the international front, we expect that the implementation of the Trademark Law Treaty this November will substantially aid U.S. trademark owners by simplifying and harmonizing requirements for acquiring and maintaining a trademark registration in member countries.

While our publishing, computer software, information, and entertainment industries continue to face serious challenges in terms of piracy and infringement in foreign markets, progress is being made to promote international cooperation in the protection of intellectual property in the global economy. For example, the Digital Millennium Copyright Act, passed by the Congress and signed into the law by the President last October, implements the WIPO copyright treaties mentioned by Ambassador Fisher.

They were recently negotiated by my predecessor, Commissioner Lehman, and it was my pleasure to join Secretary Daley in depositing our instruments of ratification for these new treaties last month in Geneva. These treaties will help ensure that other nations provide copyright protection for electronic commerce at a level equivalent to the protection provided under U.S. law. We are working to encourage other nations to ratify and implement them.

As we prepare to enter the next millennium, the PTO will continue its efforts to secure and expand protection of U.S. intellectual property throughout the world. With some hard work and good will, we are confident that we can buildup on existing systems so that they can reflect the realities of a new marketplace, one that is increasingly electronic and global. This task is not without its challenges, Madam Chairman, but we believe our Nation's ever-evolving IP systems will continue to serve our citizens well during the next century and beyond. Thank you.

[The prepared statement of Mr. Dickinson appears in the appendix.]

Ms. ROS-LEHTINEN. We thank you so much for joining us as well.

Commissioner Dickinson, your office will be Co-Chairing the new Enforcement Council. Can you tell us what progress has been made in the establishment of that Council? What recommendations has the industry provided, and what are some of the specific goals that you wish to achieve through this Council?

Mr. DICKINSON. Thank you, Madam Chairman. The legislation which established this Council just passed and was recently signed by the President, so we are in the very early stages. I did speak actually just this morning with my Co-Chair, Assistant Attorney General Robinson, and we will shortly issue an invitation to our colleagues on the Council to come to the very first meeting, and we are looking very much forward to that. We have our staffs turning

their attention to the various matters that the Council would take up——

Ms. ROS-LEHTINEN. What are your expectations to come with this?

Mr. DICKINSON. Are expectations, frankly, are fairly high. We believe that one of the key benefits from this is to have the kind of coordination activities which have not heretofore formally existed, and I am hopeful that the kind of—perhaps some of the redundancies and overlap that may have existed before will be streamlined and that we will have the opportunity to work together to come up with new creative ways of dealing with these issues, because, as Commissioner Kelly indicated and Ambassador Fisher indicated and others certainly do, this is an extraordinarily growing problem and one we need to take a coordinated approach to.

Ms. ROS-LEHTINEN. Ambassador Fisher, if you could address that as well.

Ambassador FISHER. Just a comment on this idea and the importance of having a unified view and eliminating overlap. One of the most difficult problems we have with enforcement overseas is that intellectual property protection cuts across several cabinet portfolios or ministries in any one country. For example, if we look at CD piracy in Brazil, a lot of these CD's are stamped out in Macao; their shipped across the Pacific Ocean; they actually enter into Brazil from a small country that borders it to the north on donkey back. A recording artist like Susha, for example—one of my favorites; one of my wife's least favorites, by the way—is denied her hard earned earnings in Brazil. Then you find out, of course, that tax authorities are bringing on finance revenue. It is a border and customs issue; it is a law enforcement issue, and so on, which the Commissioner well knows.

We have had tremendous difficulty in getting countries to understand that trade ministers cannot in and of themselves effect the kind of enforcements necessary to implement the laws that they are beholden to, internationally or bilaterally or the agreements that they have made. I want to also just add that it is important that we get other countries and use our own example for other countries as we have with the Vice President's issuance of orders on software for legitimate software to be used; set an example for others, and then expect to hold their feet to the fire.

Mr. DICKINSON. Madam Chairman, if I could elaborate just a little bit, I concur with what Ambassador Fisher said. We consult bilaterally regularly, and very recently was in Europe, in Geneva, with the WIPO governing bodies. Many of the European countries approached us about this—the establishment of this Council, because they would like to emulate it. This is an issue which they would like to bring back to their own countries. We are at the forefront, and we are to be congratulated for doing that.

Ms. ROS-LEHTINEN. That is great. Commissioner, how will the $50 million reduction in the CJS appropriations bill affect PTO's processing capabilities?

Mr. DICKINSON. Thank you, Madame Chairman, for that question. The budget process is a difficult one, as I think we all understand, particularly this year, and I know Congress is taking—has seen it as a particularly challenging one in this cycle. The House-

passed version would take $51 million our of our request and place it into what is called a carryover.

One of the issues which concerns our customers and our constituents the most is that the fees which they pay—and we are the only fully fee-funded agency in the Federal Government; we don't receive any taxpayer dollars whatsoever, just the fees that are paid to do the work that we do—those constituents, as you can imagine, when they pay those fees, small inventors in particular, are concerned that those fees get taken away for other governmental purposes.

The impact of that $51 million can be very significant. We are studying that question now, but it looks like we may have to slow down or possibly stop the hiring of new examiners, hiring new judges on our boards, the backlogs and pendancies that we have may increase significantly, and when we are in a regime now where your term for a patent runs from the day you file it as opposed to the day it issues, each day longer we take to examine an application is 1 day less that somebody gets on their term. It would be a shame, I think, if this led to a significant or any reduction in the amount of a term that a patent owner is entitled to.

Ms. ROS-LEHTINEN. Thank you. Ambassador Fisher, in some cases, violation of intellectual property rights are accompanied by market access issues whereby a lengthy regulatory approval process not only discriminates against our American products but if affords the opportunity for stealing of research data. How can this problem be addressed?

Ambassador FISHER. You point to a very important part of this exercise, which is the systems that are set up, for example, I referred to the mailbox system before when we are applying for a patent to be applied in a country to make sure that while it is in the system, first, it will progress through the system; second, while it is in the system, we will be granted exclusive marketing rights, and, again, the perfection of TRIP's and of WIPO will assist us tremendously in this process.

We know when we are being robbed. Our industry is diligent; our industry reports whether it is in the visual or optical media or the pharmaceutical industry to us, and we use every tool we can as I refer to in my testimony and at greater length in my written testimony, Congresswoman, to make certain that we can use the full effect of our own laws, and, for example, under the 301 sections that I mentioned earlier.

Again, this is not a seamless process. It is not easy to put your finger in every single leak in the dike, but we use every effort we can to make sure that while we are awaiting approval or once something is approved that, indeed, our intellectual property is protected, our rights are upheld, and we seek to perfect this as we go through time.

Ms. ROS-LEHTINEN. USTR has authority under the generalized system of preferences to deny GSP benefits to nations that aren't providing adequate and effective protection of intellectual property rights. Does USTR plan to aggressively use this authority?

Ambassador FISHER. We do, and we have.

Ms. ROS-LEHTINEN. You had mentioned that you had already discussed some of these items with other ministers in Argentina, you

had mentioned. What progress have we made in other countries, and do they believe us when we say that we are going to exercise the authority?

Ambassador FISHER. I think they definitely believe us, without a doubt. Let me give you an interesting case that I raised last week in Latin America, because it shows you again the breadth of this problem. It deals with Ecuador. The intellectual property protection is provided for varieties for flowers. We have heard reports from Ecuador that a judge has arbitrarily canceled all the varietal flower registrations and patents of United States and foreign flower breeders in Ecuador. Many of these varieties are not indigenous to Ecuador, but the growing climate is quite attractive. So science has been brought to bear and patents have been provided and protection had been in place for these various varieties and the registration of those varieties. It is being threatened by a court ruling. This is a perfect example of a country where we have significant leverage. We will see how this court case works its way through the system. We have raised our protests. Whether it is through GSP or other means, tools that we have are meaningful to these countries in providing access to our market, and if need be—and we have not been shy, Congresswoman, as you know—we are perfectly willing to use those tools in order to enhance our leverage in cases such as these.

I mention this only because it is a rather bizarre and interesting case. It shows you the breadth and reach of intellectual property. But, again, here is a case where we will see how it goes. It is now being reviewed by a higher court. We will see if our interests are being upheld, and in this case and in other cases, we can use the tools that you mentioned, and this is a very powerful tool particularly with regard to countries that want access to our markets that are in lesser stages of development but where the principle still needs to be applied.

Ms. ROS-LEHTINEN. Let us hope so. Thank you so much.

Mr. Chabot?

Mr. CHABOT. Thank you. I will be brief with my questions. I just noticed some of the knock-off goods over here, the counterfeit items, and my son, my 10 year old, is thoroughly caught up in this Pokemon craze, and if he saw that peekachoo sitting down there, even though it is fake, I am sure he would want me to take it home with me. For the parents, those that have kids, they are familiar with peekachoo and all the rest of these things. If you don't have kids that age, you don't have a clue as to what I am talking about.

I just have one question and that is that do the penalties imposed under international agreements offer sufficient cost to violators to deter the piracy, and are penalties and remedies sufficient to compensate the rightholder or are there changes that should be made?

Ambassador FISHER. Congressman, we expect that they are. Again, as I mentioned in my prepared statement, also my spoken statement, one of the things we will be evaluating with regard to TRIP's, for example, is to make sure that the implementation of TRIP's, and particularly as it kicks in for all countries on 1–1–2000—the developing nations are then enveloped by this discipline—is to have a review to make sure that we indeed are seeing

the commercial interest or the interests of our intellectual property producers are indeed being protected and that the system holds water, so to speak.

I am sure there will always be critics that we are not being adequately compensated. We have labored mightily to make sure that we are. I can tell you that the reaction to using tools like GSP but also the direct penalties that we can bring to bear using our laws and implementing these international rules and regulations have been effective, and I think we just need to continue to monitor the situation and make sure that they stay effective.

Mr. CHABOT. Thank you. I yield back the balance.

Ms. ROS-LEHTINEN. Thank you.

Mr. Hoeffel? Thank you.

Thank you so much, gentlemen. We appreciate your patience. We will be voting on the OPIC bill in about an hour, so let us see how we do.

Thank you so much.

Mr. DICKINSON. Thank you.

Ms. ROS-LEHTINEN. Our third panel leads off with Mr. Jeremy Salesin who is the director of Business Affairs and general counsel for Lucas Arts Entertainment Company. Mr. Salesin advises company management on a full range of business, corporate, and legal issues. In addition to handling Lucas Arts patent, copyright, trademark, and other intellectual property related issues, he negotiates and documents business arrangements and strategic alliances in the areas of development, distribution, manufacturing, marketing, and licensing. Prior to joining Lucas Arts in November 1996, Mr. Salesin was vice president, Business Affairs, general counsel, and secretary of Sanctuary for Woods Multimedia Corporation.

He will be followed by Mr. Charles Caruso and Mr. Salvatore Monte who are the guest of the Ranking Member, Mr. Menendez, and Mr. Hoeffel of Pennsylvania is going to be introducing them for us, because Mr. Menendez is on the floor handling our bill.

Thank you so much.

Mr. HOEFFEL. Thank you, Madam Chairman, and it is a pleasure to stand in for Mr. Menendez today to introduce Mr. Charles Caruso from Merck & Company, the international patent council. Mr. Caruso represents Merck in various United States and international organizations and conferences for the protection of intellectual property rights. He also reviews and monitors those issues around the world and counsels members of Merck's law department regarding those developments.

Merck employs 5,000 scientists and has spent nearly $2 billion since 1998 for research and development covering nearly every major field of therapeutic research, representing about 10 percent of all U.S.-based pharmaceutical companies in that area, and, Madam Chairman, employed 10,000 people in my district and are a very good corporate neighbor as well.

Mr. Caruso holds a juris doctor degree in law from Rutgers; has been a patent attorney and a member of the bar since 1976.

Mr. Salvatore Monte, President and owner of Kenrich Petrochemicals, of Bayonne, New Jersey; I gather, a personal friend of Mr. Menendez', and he would be here except he is leading the debate on the floor of the House at the moment. Mr. Monte has

championed the need for our Government to challenge the Japanese Government to adhere to international treaty obligations for the protection of intellectual property rights by ending the notorious practice of patent flooding.

As an inventor, Mr. Monte has patented and developed several globally used chemicals, including chemical titanites—I hope I said that right—in the early 1970's. In an attempt to expand in 1980, Mr. Monte contacted a Japanese firm to manufacture and distribute his invention and was required to share his formula with the Japanese. Now, 20 years and millions of dollars in losses later, at least 40 Japanese patents have been based upon Mr. Monte's licensed technology. I understand in 1990, Congresswoman Helen Bentley first spoke about the problems faced by Kenrich Petrochemicals. At that point, Kenrich represented—or, rather, had 90 employees, and now is down to 30, if this information is correct. Mr. Monte, obviously fighting hard against the negative impact on his company by the patent flooding that has occurred to him.

Thank you for the opportunity, Madam Chairman, to introduce our—a few of our constituents.

Ms. ROS-LEHTINEN. Thank you so much. That is an incredible story. We look forward to that testimony.

Mr. Salesin? All of your statements will be entered in full in the record. Thank you.

STATEMENT OF JEREMY SALESIN, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, LUCAS ARTS ENTERTAINMENT, ALSO REPRESENTING THE INTERACTIVE DIGITAL SOFTWARE ASSOCIATION

Mr. SALESIN. Thank you, Madam Chairwoman and distinguished Committee Member. I want to thank you for the opportunity to testify——

Ms. ROS-LEHTINEN. If you could perhaps move the mic just a little bit closer.

Mr. SALESIN. I want to—is that on? There we go.

As you said, my name is Jeremy Salesin. I am the general counsel of Lucas Arts Entertainment Company. You may know Lucas Arts as the producer of dozens of best-selling entertainment software games with titles such as Rogue Squadron and most recently the games based on Star Wars Episode I, the Phantom Menace.

I am testifying today on behalf of the Interactive Digital Software Association, which is the trade association that represents the publishers of entertainment software for video consoles, computers, and the Internet.

In 1998, U.S. entertainment software publishers had $5.5 billion in U.S. sales. Furthermore, the U.S. entertainment software industry and other core copyright industries are collectively responsible for over $60 billion in foreign sales and exports, more than any other industry sector. That is the good news. The bad news is that intellectual property piracy threatens the continued health of my industry.

Piracy has cost us over $3 billion in losses in 1998 alone. That is right. An industry with $5.5 billion in U.S. sales has lost over $3 billion due to piracy. What is more, in many otherwise promising markets, such as China, Argentina, Brazil, Turkey, and Thai-

land, the piracy rate is in excess of 90 percent, meaning that virtually all entertainment software sold is pirated. I might add, these piracy numbers are conservative. They don't actually include losses due to Internet piracy, which are very hard to measure.

Some anecdotes about piracy of Lucas Arts titles can demonstrate this reality. We have not released a single game this year that was not available in a pirate version on the Internet within a week of arriving on store shelves. In some cases, the products are even available on the Internet before they reach stores. In addition, with each new release of one of our games, it is common to find that individuals have burned on their home CD burners 20 or 30 copies and put them up for a dutch auction on auctionsites such as eBay or Yahoo.

Lucas Arts also released two games to coincide with the May release of the Phantom Menace film, and, within days, in Hong Kong, you could get a three-pack—two games and the film—on VCD for a mere $15.

Some of the level of piracy has actually led my industry to change its method of producing games where, before, we would release a U.S. version, and then we would release foreign versions. Now, we will actually develop and localize the title completely for all the languages in countries that we feel are major markets, and then release it simultaneously in order to avoid pirating in many of the foreign markets. Even that doesn't help a great deal.

The vast majority of entertainment software piracy occurs outside the United States and is increasingly dominated by organized crime rings. The crime syndicates have become so big that they market their own brands. For instance, the Players Ring, operating out of Southeast Asia, stamps its CD's with its own logo, which often replaces the trademarks of the true game publishers. These international crime rings mass produce and assemble pirated entertainment software in countries such as China, Bulgaria, Macao, and Taiwan, and ship through nations such as Paraguay and Panama that have spotty customs enforcement, and, finally, sell, in addition to these countries, in places like Russia, Brazil, Argentina, and Indonesia, among others.

This pervasive illegal trade in U.S. entertainment software effectively bars my industry from entering many markets. We simply cannot compete with pirates who sell entertainment software at a mere fraction of our break even price.

With this breadth and depth of entertainment software piracy, the question remains, what can be done? I believe there are a number of things Congress and the U.S. Government can do to help us control this piracy. First, as we discussed a little bit earlier with the U.S. Trade Representative, nations that are a source of major piracy and in particular those identified in the annual Special 301 report as providing inadequate and ineffective protection of intellectual property, should not be given preferential trade benefits under the Generalized System of Preferences Program. Currently, the GSP Program provides USTR discretionary authority to withhold GSP benefits from nations that fail to provide adequate and effective protection of intellectual property. But unlike the Special 301 statute, the GSP Program does not define this phrase. If Congress harmonizes the definitions, it may provide the USTR with

much clearer guidance that Congress intends countries listed under Special 301 to be denied the GSP benefits.

A second thing which Congress can do is to continue to support the criminal prosecution of intellectual property theft. This is vital, because many pirates are effectively judgment proof, and because intellectual property theft is widely perceived to be a minor and victim less crime. In a move that my industry welcomed and applauded, the Department of Justice, the U.S. customs, and other Federal agencies recently announced a Federal initiative to prosecute intellectual property crimes, and we have talked about that some today. Through the exercise of its oversight and appropriations role, Congress should ensure that the executive branch remains committed to this IPR initiative and has the resources to pursue it.

Finally, Congress should support and encourage the continued efforts to make meaningful international agreements protecting intellectual property rights. Congress should encourage the executive branch to aggressively press developing nations, which have already had a 5 year transition period to meet their obligations, to fully implement the WTO agreement on trade related aspects of intellectual property rights by January 1, 2000. There should not be any additional grace period.

Likewise, Congress should encourage the Administration to continue to aggressively press other signatories to ratify and implement the World Intellectual Property Organization copyright treaty.

I could recite the economic tax and consumer damage caused by piracy, both in the United States and abroad, but I want to focus on what I think is the most important issue for us, which is that this activity hurts the creators of the intellectual property. The creative process is injured, and the founders of this Nation provided specific protection for intellectual property in the U.S. Constitution, because they recognized that the creative spirit provides great benefits to society but needs an environment in which it can flourish, and piracy destroys the spirit and poisons the environment for these creators. It is for this reason, above all others, that Congress must vigilantly adhere to its constitutional directive to protect intellectual property.

Thank you.

[The prepared statement of Ms. Salesin appears in the appendix.]

Ms. ROS-LEHTINEN. Thank you so much.

Mr. Caruso?

STATEMENT OF CHARLES CARUSO, INTERNATIONAL PATENT COUNSEL, MERCK & COMPANY, INCORPORATED

Mr. CARUSO. Good afternoon, Madam Chairwoman and Congressman, and thank you for the opportunity to speak with you today about the very important issue of the need to protect American intellectual property rights abroad.

I am Charles Caruso, the international patent counsel for Merck. We are a U.S. research-intensive pharmaceutical company with operations worldwide, focusing on the discovery, manufacturing, and marketing of important medicines that treat, prevent, and cure disease. I would like to briefly summarize my written testimony.

Merck employs about 5,000 scientists, and, as the Congressman noted, will spend more than $2.1 billion on research and development in 1999. This investment has yielded impressive results. Since January 1995, Merck has introduced 15 new medicines, an unprecedented number. Merck's commitment to research will also bring new medicines and vaccines to patients in the future.

Some promising new treatments currently in Merck's research pipeline are for the treatment of cancer, depression, infection, osteoarthritis, and pain. As a major discoverer of vaccines, Merck is currently researching vaccines for the prevention of HIV infection, and human papilloma virus, a major cause of cervical cancer.

As Merck's international patent counsel, I am keenly aware of the link between our ability to invest in research and intellectual property, especially patent protection. Strong patent protection is of fundamental importance to the pharmaceutical industry, because drug research is highly risky, time-consuming, and expensive. But many pharmaceuticals can be pirated abroad for a fraction of the research and development cost.

To encourage risk and innovation, a patent provides an exclusive right to an invention for a limited time period. The evidence demonstrates the direct relationship between strong patent protection and pharmaceutical innovation. Because of its strong patent laws, the United States is the world leader in drug development.

In a 1988 World Bank study, it was estimated that about 65 percent of drug products would not have been introduced without adequate patent protection. Try to imagine modern health care without 65 percent of the medicines that are available today.

This hearing is particularly timely as the United States and other members of the World Trade Organization are preparing for the WTO Ministerial in Seattle later this year. Thanks to the leadership of Congress and the executive branch, especially the U.S. Trade Representative, the United States has led the fight for strong intellectual property protection around the world.

Two issues are of immediate concern to our industry: the implementation of existing intellectual property agreements, especially TRIP's, and, second, the possible attempts by some WTO members to weaken the TRIP's agreement, particularly as it relates to pharmaceuticals.

On the implementation issues, the pharmaceutical industry is facing its own millennium bomb which might explode on January 1, 2000. We are concerned that a large number of developing countries will not meet their international obligations to enact TRIP's consistent intellectual property laws by January 1, 2000.

The second issue concerns the likely attempt by some countries to define a WTO trade agenda designed to weaken TRIP's and to create broad exemptions targeted at pharmaceutical patents. As I have described, there is a fundamental link between international property protection and pharmaceutical innovation. If the intellectual property foundation of the pharmaceutical industry is threatened, the result will be fewer medicines and vaccines for patients everywhere.

I urge this Subcommittee and the Congress to provide as much support as possible to the U.S. Government negotiators in Seattle to resist any and all attempts to reopen the TRIP's agreement for

the purpose of diminishing its standards. By protecting innovation, patents protect innovative medicines from foreign piracy and preserve incentives for research leading to tomorrow's discoveries.

Thank you for the opportunity to testify and for holding this hearing on this highly important topic.

[The prepared statement of Mr. Caruso appears in the appendix.]

Ms. ROS-LEHTINEN. Thank you, Mr. Caruso, and we would like to now hear from Mr. Salvatore Monte, and he is accompanied by Lieutenant General Sumner who is here as an expert witness if needed, and the General is a friend of Congressman Dana Rohrabacher, so we welcome both of you today.

Thank you, Mr. Monte?

STATEMENT OF SALVATORE MONTE, PRESIDENT, KENRICH PETROCHEMICALS, INCORPORATED

Mr. MONTE. Thank you, Madam Chair. Thank you, Congressman Menendez, where ever you are, and, Mr. Hoeffel, for stepping in for him.

General Sumner will finish off my remarks, but I would like to thank you for this invitation to testify today on a subject that has come to dominate my life and my wife's, Erica's, life for the last quarter of a century.

Thanks to Congressman Menendez' effort in having us here at this hearing today, we have renewed hope that the Government will see to it that Ajinomoto of Tokyo, Japan pays the price for stealing intellectual property and that we can have our case tried in the U.S. Federal court where it belongs and not in Tokyo where our State Department believes will be treated fairly in a rigged judicial system that allows corrupt practices such as patent flooding.

Now, you have my prepared statement, which highlights how the large $6 billion Japanese company, like Ajinomoto, goes about stealing from an American inventor, an entrepreneur like me, by violating intellectual property rights that are supposed to be protected by a contract written under the laws of the United States of America, protected by a United States and worldwide patent portfolio of 220 patents, and protected by registered trademarks, even in Japan.

Ajinomoto stole my invention technology to provide 1,000 new jobs to Japan while Kenrich was driven into chapter 11 and went from 90 to 30 employees. I brought some show and tells, patents and documents, that are in front of me here so that you can understand why this is a $250 million business for Ajinomoto and still growing, a business that I developed through my inventions and which they are gathering all the benefits of it.

Our titanium-based molecules form a chemical bridge between the inorganic and organic world. We are the titanium in the Wilson titanium golf ball. We are responsible for the continuous wear performance of Revlon and Cover Girl makeup. We are in everything that is high-tech coming out of Japan—the magnetic recording media, the Fuji audiotape. In the United States alone there are three patents by Fuji, TDK, and Sony on covering magnetic recording media, and I got the word from Taiwan that they made a deal that Fuji's patent would dominate. Canon has our technology in

their patents, and they have 32 European patents alone, one in Germany that runs 132 pages long.

I have here also a U.S. patent issued to Xerox on digital photocopier toner based on a gamma ferric oxide imported from Japan from Toda Chemicals, and the gamma ferric oxide is treated with a 0.5 percent of my invention technology called Ken-React, KR 38S.

Here is how it works. I was forced to license the product to Ajinomoto in Japan. Ajinomoto then makes the KR 38S on the license, sells it Toda Chemicals in Japan. They treat the chemical on the gamma ferric oxide. They give it to Xerox researchers in the United States They come up with a new and improved, best-ever digital computer. They file a U.S. patent. They buy the stuff from Toda—they buy the chemical from Toda, the gamma ferric oxide. Ajinomoto sells the KR 38S. Ajinomoto doesn't report the sale to Kenrich. We can't get in and audit their books. We tried two and a half years, spent $62,400 with Arthur Andersen, and the net result is we get zero royalties.

I also have here a U.S. patent issued at the time—filed at the time we went chapter 11, and Gordon Sumner here—General Sumner is here to explain how we lost $10 million in lyco 12 sales because of the collusion with the Japanese and top-level Pentagon officials.

I would like to count some of the ways that Ajinomoto uses the Japanese mercantile system to steal our intellectual property, and they use patent flooding as one of their techniques. Japan is a closed market; you really can't sell into it. I didn't want to contract in Japan. I had to have a contract if I wanted to do business. I could go on about how that occurred, but what they did is they forced me into dumping down my 43 products that I was importing through a trading company into 15 on the pretension that they were going to register those 15, and that would cost a lot of money. I found out after I spent $1,700 that we are not registered in Japan, and only 2 of the 15 chemicals ever got registered. The whole process was a sham. There is here a kereitsu report which shows you all the interlocking of the Japanese kereitsus and how because of they work together they can patent flood and use interlocking arrangements so that Nippon Soda, Tokyoma Soda, Mitsui Mining and Smelting, Kuake, and Fine Chemicals, all in cooperation with Ajinomoto, can knock off my patents.

When you mentioned that there were 40 patents issued, those were only the ones issued to Ajinomoto. There are literally 600 flooded patents on my title fossfatal titinates alone which are used in the magnetic recording media and in videotapes. The USTR has an annual report on foreign trade barriers. Japan has the largest section. Everything that Ajinomoto did to us is mirrored in that report. We have been going on with this case for 9 years.

Publicly, when Congresswoman Bentley gave a speech on the House floor on October 1, 1990 attacking Ajinomoto for what they were doing to us, within 6 weeks, the Daitchi Kangi Bank, which Ajinomoto's kereitsu bank, bought my bank through CIT, and they called my notes and put us into a credit squeeze that put us into chapter 11. That is the hard ball they play. With Japan, business is war, and CIT gained control of my accounts receivable financing, my customer list, and reduced my sales from $12 million, to $6 mil-

lion in 6 months; caused me to knock off 60 people, and reduce my sales force from 9 people to 1 person.

We lost the lyco 12 business that I had spent from 1982 to 1990 developing with the U.S. Army through a defeat of our Public Law 85–804 bid in 1981. A phone excuse was given that capasi could replace the lyco 12, and that has since been proven to be a lie. We have a report into the Chairman of the Joint Chiefs of Staff and the Inspector General of the Army, and General Sumner talked to the Inspector General this morning.

I have other stuff I could tell you that just goes on and on about trademark stealing, but you asked me today to comment on patent flooding. The ludicrous part of this whole exercise is that we talk about globalization of intellectual property laws and patent laws, and we still have this dichotomy of the Japanese filing valid U.S. patents according to the doctrine of equivalent, and then in their own country they patent flood to beat the band, and the allow themselves to play both sides of the street, and I don't understand how we can tolerate any kind of globalization or harmonization of intellectual property laws as it relates to patents unless we address primarily the issue of patent flooding, because that is the vehicle by which they undermine every effort you have in order to gain effect of your intellectual property.

Specific to Kenrich, we have a bill in the Congress right now which we would like to have that would right some of the wrongs of a 1985 Supreme Court decision called Mitsubishi *v.* Soler that will enable Kenrich to bring our Ajinomoto case away from where it is now in the Japanese Arbitration Association in Tokyo—and that is another story—back into U.S. Federal court where we can establish case law on patent flooding and right some of the wrongs that are going on.

I have other ideas, but I really would like to turn the balance of my time over to General Sumner so he can make some comments for me. Thank you for having me here today, and I would be pleased to answer questions in detail. There is a lot of stuff I have here I could talk about.

[The prepared statement of Mr. Monte appears in the appendix.]

Ms. ROS-LEHTINEN. Thank you so much, and it is certainly a tragic story. Thank you, Mr. Monte, for sharing that with us.

General Sumner?

STATEMENT OF LIEUTENANT GENERAL GORDON SUMNER

General SUMNER. If I can this on—can you hear me all right?

All right. Over the past 56 years, I have had the opportunity to testify before the House, and I appreciate the opportunity, Madam Chair, to do this, and other Members of the Committee.

I can't think of a subject that is more important, not only to the country but to the national security of the country than this subject today. I have been involved in this particular case for some over 10 years now, and I would make the point that the wealth of this Nation is not found in the smokestacks in the industrial base; it is our intellectual property. That is the wealth of the Nation, and if we don't begin to understand this, then the young people sitting here in this room are going to find that the country is going on to the ash heap of history, because we are going to be overtaken by

people that are not necessarily our friends nor do they have the same view or value system that we have.

As an old soldier, I became particularly outraged as I watched what was happening, and we pick on the people oconus, overseas, the other countries. We have the same pirates here in this country doing the same thing. They found out that the Japanese could get away with it—"Why don't we do here?" They have done it. They have taken Sal's patents and refiled them. They were under security restrictions. They took those security restrictions away, and I have talked to the Inspector General of the Army about this at length.

But we really have a major problem here, and one of the products that Mr. Monte has developed is used in the insensitive high explosives. The insensitive high explosives are important not only to the conventional forces but also very important to the nuclear forces. Now, we have just gone through a whole bruha up in Los Alamos, and, incidentally, my company, I have over 100 of what I call the coneheads, and I think Sal would qualify. These are chemists, physicists, computational experts, et cetera. They have looked at his products, and the Los Alamos National Laboratory looked at it, and said, "This is important for the insensitive high explosive we use in our nuclear weapons."

It is not only just the cosmetics, and it is not just the tapes and the superficial things; it is the basic science that is being put at risk here. When someone like Sal Monte figures out a way to bond organic and inorganic materials, this is a worldwide application, and it has very important national security implications.

I sit here and listen to the words of the Administration, and it is not only this Administration, it is past Administrations. The words are great, but when it gets down to the point where you have a real case to go to court, our State Department steps in and says, "Oh, no, we can't hazard our relationships with an important trading partner over some little company up in New Jersey." Of course, they don't understand what it is all about in the first place. But it leaves the little entrepreneur hanging out to dry. If you look back at the history of the last 10 years—and this is not to take anything away from Merck or any of the other major Fortune 500 companies—it has been the little entrepreneur with the bright idea who is going to change the world, and the first thing you know is his idea is stolen, and what does that tell the young people sitting here in this room? Boy, you better be careful.

I don't see the executive branch of this Government—and I said back over several Administrations—doing anything about it. It is up to the Congress to do something about this and let the judiciary get their teeth in this, and let us bite somebody, and bite them hard; make it happen.

I appreciate the opportunity, again——

Ms. ROS-LEHTINEN. Thank you.

General SUMNER [continuing]. To talk to this group——

Ms. ROS-LEHTINEN. I agree. We are here to bite.

Thank you so much, General; we appreciate it.

General SUMNER [continuing]. I hope we can make something happen. Thank you.

Ms. ROS-LEHTINEN. Thank you so much.

Mr. MONTE. Thanks, General.

Ms. ROS-LEHTINEN. I would like to ask whoever would like to respond, in the worst violating countries, we have seen that there could be parallel economies at work; that is, illegal, international trade coinciding with its legitimate counterpart, and does illegal trade tend to dominate in those cases? What has been your experience, and do you believe that this actually demonstrates that the Government is actually complying being part of this problem in it involvement, corruption, or at the very least neglect, and do you agree or disagree that piracy could only be in place in these countries where there is no political will to end it?

Mr. SALESIN. Yes, I would like to take a—attempt to answer that question. One of the issues facing the pharmaceutical industry is this issue of parallel trade where goods that are sold in one country are exported from that country and reimported in another country, and that has basically been a serious problem. Intellectual property is designed to give access to a single market, so the United States patent protects the market of the United States; the Canadian patent protects the Canadian market. This concept of parallel trade runs counter to that territorial theory of patent protection.

One of the problems that the pharmaceutical industry has faced is that counterfeit goods ride on the back of parallel traded goods. In fact, what we have seen through a investigative inquiry that we have undertaken, something called a pharmaceutical initiative, parallel trade is the door by which counterfeit goods enter into trade, so there is an attempt to pass these counterfeit goods off as legitimate goods.

The problem we face is basically one of parallel trade, and a concomitant problem is counterfeiting. That is something the United States does not want to confront in any legislation in the United States to allow parallel trade is something that is contrary to the public health interests of the people of our country.

General SUMNER. Could I make a comment on that, Madam Chair?

Ms. ROS-LEHTINEN. Yes, General.

General SUMNER. I think a perfect example of this is Panama where you have the free trade zone at Colon and this parallel trade he is talking about where it moves from one country into a free trade zone, and because Panama is such a small country and because you can really focus on that, I think it is worth looking into. The Panamanian Government—the past Panamanian Government, not the new government, I think has been fully a partner in this conspiracy.

Ms. ROS-LEHTINEN. Thank you. Mr. Monte?

Mr. MONTE. I have some problems that are like Merck's, but unique in their own way. You understand that if you go into market a chemical in today's global economy, there is an environmental awareness as to the toxicological effect of that chemical. You have to disclose the chemical structure. Once you disclose the chemical structure, you have told an intelligent scientist how to make it. Before you disclose the chemical structure, you have to file your patent position.

The way the patent laws are set up on a global basis, you file in the United States, then you PTC it, and you follow within the

year, filing it internationally, which today means a position of at least 72 countries. The simplest idea, you are in for $75,000 just on international patent filings. You speak about me being a small guy, on my last invention, which was making clear plastic permanently anti-static, I spent over $110,000 just on the intellectual property position, haven't got a cent out of it yet.

The problem I have is that I have to—once I disclose the chemistry of the molecular structure of you achieve this anti-static effect, the Japanese copy it, they put it into their plastic. You go prove that your stuff is in there when they patent flood around it. You do a forensic analysis of it with atomic absorption, and you chemically destroy the product in the analysis, so you come up with the arid phosphato group, the arid sulphano group, but is it yours or is it the 600 different patents flooded around it? That is the issue. That is the problem. How in the hell do you defend that? How do you go at that, and how do you stop them from exporting to all of the other countries?

Everything—I mean, we code indium oxide and make indium oxide functional. What the hell is indium oxide? It is what makes flat panel screens possible, and this demonstration you saw from the Department of Commerce is what indium oxide does. My stuff is on the indium oxide. You don't make flat panel screens in the United States of America; you make them in Southeast Asia. They come out of Japan or on the Japanese companies in other Southeast Asian countries. My stuff is in all that stuff. I don't get anything out of that.

How do you police that? How do you control it when they are allowed to patent flood, they are allowed to have this sham of having their intellectual property people in Japan take these small patent and build around your patents, and then when they come over to the United States the play the game by the United States rules, and we allow this parallelism to go on? They can play the game properly if they are forced to. They are not forced to, so why should they change? They have got a mercantile system, a fortress Japan. You can't get at them in their own judicial system. You can't win in Japan. You can't win in Japan.

What have you got left? You come here to the Congress and you talk about it, and you talk about it, and you talk—I have been talking about it for 10 years. When am I going to get what is coming to me? When are we going to change the law that we have asked—Congressman Menendez has put together, Senator Torricelli has Co-sponsored? All you got to do is pass the law and get on with it, and we will get this thing straightened out in U.S. Federal court. We have got everything ready to go. I have got 37 boxes of file data like this that proves that I have been screwed, and I don't get a chance to talk about it. We just talk about principles, and the State Department comes down and testifies against me. I don't get it.

Ms. ROS-LEHTINEN. Do you believe that American interests in international intellectual property rights are being sacrificed in order to sustain or expand commercial relations with these violator countries, whether it is Japan, China, Russia?

Mr. MONTE. And it started with Zenith and TV screens, and it goes on. All of it coming out of South Korea have my stuff on it. We don't control the video technology of manufacturing. Even Ze-

nith now makes their tubes in Mexico. We are funneling out all that high-tech stuff offshore. In automotive it is following the path of least cost of manufacturer. If you want to talk to Mattel, you don't go anywhere in the United States. You don't go to Fisher Price up in Buffalo; you go to Tiajuana. That is the way it works.

Ms. ROS-LEHTINEN. I would like to recognize former Congresswoman Helen Bentley in the audience. I know that Mr. Monte had recognized——

Mr. MONTE. My champion.

Ms. ROS-LEHTINEN [continuing]. In his statement. Thank you so much, Helen, for being with us.

Mr. Hoeffel?

Mr. HOEFFEL. Thank you, Madam Chairman. I didn't recognize Congresswoman Bentley. It is an honor to see you, and congratulations for taking up Mr. Monte's case.

I want to thank all of the panel for being here to talk about intellectual property right problems.

Mr. Monte, I had a prepared question here to—that suggested that you wanted to—that the State Department, at least, wanted you to take more legal action in Japan——

Mr. MONTE. Yes.

Mr. HOEFFEL [continuing]. But from what you are saying, you don't want to do that. You want to come back to Federal U.S. district court.

Mr. MONTE. The problem with my issue is that you glaze over with all the detail—they say the devil is in the details. We negotiated a 1980 contract. Darby & Darby was my attorney. Burt Lewin, an excellent chemical engineer—the patent is filled with all the boilerplate that any genius can put into it from American patent and intellectual property law.

In the agreement, you have two levels. It is written under the laws of the United States, you have two levels: the Federal court jury trial, and you have arbitration. You put arbitration in as a clause, because not every disagreement you anticipate is going to be a Federal court jury trial level, and arbitration is cheaper so you put it in. According to the Japanese, you put it in according to the 1952 United States–Japan bilateral trade agreement on arbitration. That is 1980.

1985, Mitsubishi and Chrysler have a fallout on an agreement. It goes to arbitration. The American company, Chrysler, loses. Chrysler says, "Screw it. It is an American contract, American law." They take it to the U.S. Federal court. They win the case. The Japanese Mitsubishi says, "That is not fair. Every time we have an arbitration and we lose with a U.S. Federal Government contract, we lose because of double jeopardy before an American jury. We think that is patently unfair. Arbitration clauses should be binding." In the Mitsubishi-Soler case the Supreme Court ruled on a split decision that arbitration is now binding in all contracts.

So, ex-post fact, 5 years later, I am now bound by this Supreme Court decision, so now I have to have my case before arbitration. I am in chapter 11. I am telling everybody we can pay back everything we owe the creditors if we would just get our money from Ajinomoto. They say, "How are you going to prove that?" We have got to audit the books, right? The Federal bankruptcy judge orders

a budget of $40,000 to conduct an audit. We get Arthur Andersen to agree that the could do it in Tokyo without conflict.

Two and a half years later, $62,400, we don't get a certified statement. We have no clue as to what the books are of Ajinomoto. They give us all kinds of garbage excuses that are really insults to your intelligence like they don't have computers that can handle it; they didn't split the contracted goods separate from their own reports, so they would be——

Mr. HOEFFEL. Let me ask you this: Where can you best defend your rights?

Mr. MONTE. In U.S. Federal court. So, what happened was we—Donald Diner from O'Connell & Hanna at the time decided, "OK, let us go to arbitration. Let us just focus on the fact that we spent $62,400. Let us do an audit. We have a right to an audit." We conducted the audit; we spent the money; we didn't get an audit; our contract has been violated. It is pretty clear, right? We won the argument before the American Arbitration Association, but they said because it concerned an audit—concerns the books of Ajinomoto, they are a $6 billion company, we are going to move the venue to the JAA in Japan and Tokyo, because you mutually respect each other's venue. By the way, we found out last year that the panel was two Japanese in New York City out of three, and I lost 2 to 1 on the vote.

Now I am supposed to go to Tokyo, and I said, "Hell, I am not going to Tokyo. This is my invention. It is a U.S. invention under U.S. law, governed by U.S. law, and I am going to Tokyo to defend myself?" I said I wasn't going to go and Congressman Menendez put together a bill that looked this oversight of Mitsubishi-Soler, and said, "OK, let us get this oversight corrected and open up a 6 month sunset provision to allow me to into Federal court."

We had it all set up last year before the Intellectual Subcommittee—Judicial Committee on Intellectual Property to do that. The State Department stepped in and said it would be terrible to Japanese-U.S. trade relations to have this ad hoc bill passed, and it would be disharmonious to our relationship, and I have been stymied ever since.

Mr. HOEFFEL. All right. I understand.

Mr. MONTE. You understand? I mean, that is the explanation.

Mr. HOEFFEL. Thank you for the explanation.

Let me ask Mr. Caruso, I assume Merck has the same kinds of problems that Kenrich Company faces in Japan—you must have them all over the world. How do you avoid them, if you do, and do you have this—does Merck have advice for smaller American companies on how to deal with this?

Mr. CARUSO. We deal with these issues of enforcement of intellectual property rights on a worldwide basis, and it is, frankly, a very difficult task. Part of it includes education of people in the country to recognize the benefits of intellectual property protection. We are—through this TRIP's agreement, through the World Trade Organization, I think the United States is involved in a massive global education campaign to get people to recognize the benefits of intellectual property and how that drives that innovation.

That is very good for the long-term, but the question is what happens in the short-term? The answer is there is you need to em-

ploy local counsel to enforce your intellectual property rights and to vigorously do the job to get the protection that your entitled to. Merck—we have had some experiences that have turned out in a positive way; we have had other experiences, particularly in some of the European countries where we have had primarily process patents, not product patents, covering the pharmaceutical product. Because we were limited to methods of manufacturing, the local companies say, "We don't use your method of manufacturing. We use an alternate one." The question became, "What method do you use? Have the court reveal to us what manufacturing method is utilized." We have been in litigation in Slovenia for 6 years, and the court still has not forced the third party copier to reveal what manufacturing process he uses.

We have enforcement problems. The answer is vigorously enforce your rights; get local counsel; utilize the U.S. Government to help assist you, and continue the education efforts.

Mr. HOEFFEL. Of course, the only drawback with that if you are a very small company is it costs a lot of money.

Mr. MONTE. Oh, boy, does it.

Mr. HOEFFEL. Right. One quick question for Ms. Salesin—thank you, Mr. Caruso. Mr. Caruso led into my question by talking about education and letting people know. Does the entertainment industry have a particular ability to help here? I understand the problems you have with pirating, but of course you guys have a wonderful ability to educate and so forth. Can the entertainment industry be of help to the Government in educating and trying to correct this?

Mr. SALESIN. As an association, we certainly are trying to education people through our web site, through our programs in foreign countries, with the foreign licensees trying to make people understand that the piracy of our property is not a victim less crime, that people really do need to get some return out of their efforts or else jobs will be lost, as you see. We have, in a sense, the exact same problem, but we are trying to educate. I don't know. If you are asking us whether we can help, I am sure we will be willing to try to help.

Mr. HOEFFEL. Some television ads in American would go a long way toward educating our constituents and us regarding the problem, and obviously that costs money, but you guys have the money, and you have got the talent and the spokes people that could really grab public attention.

Mr. SALESIN. I would say that our association is looking at an education campaign. It is not a simple thing to do. A lot of people don't really understand that when they copy a piece of software, especially given the U.S. market if you are talking about educating in the United States, that that is a crime, that people do get hurt, and it is a very expensive undertaking to try to educate the entire United States on that point.

Mr. HOEFFEL. Certainly the first obligation is ours as a Government, but I think the entertainment industry could certainly help.

Mr. SALESIN. I think one aspect of education that we are trying, frankly, is to bring an enforcement case in the United States on the civil side to try to educate people that there really are victims, and we have done that as an association, but in attempting to do that,

we also would like the help of the Government in bringing criminal actions, which are much more effective because they get much more coverage; they have much better law enforcement opportunities to seize and to search people's residences and things like that. So, we do need the Government's help. We also are trying to do it on our own.

Mr. HOEFFEL. Very good.

Madam Chairman, thank you.

Ms. ROS-LEHTINEN. Thank you so much.

Mr. Sherman?

Mr. SHERMAN. Thank you, Madam Chairman. Thanks for having these hearings. Obviously we need to reorient our foreign policy establishment. As Madam Chair has heard me say before, their attitude tends to be that we would like the honor of defending foreign nations for free, and then in return for that honor, we would like to make major trade concessions. If this was a wise policy during the Cold War or not is not longer relevant to us, but it is certainly not a wise policy today.

I am particularly interested in the bill that you referred to that was carried by Mr. Menendez. If you could describe that bill for me and how it gave you access to the U.S. courts?

Mr. MONTE. The bill has a 6 month sunset provision, I believe it is, to simply address the specifics of the Mitsubishi-Soler case law and say, in effect, that all bilateral trade agreements with Japan prior to 1985, if affected by this binding and mandatory arbitration ruling, have an opportunity to file the case in the U.S. Federal court. It is pretty simple; it is like two paragraphs, end of story.

Mr. SHERMAN. I guess our risk was that Japan, which enjoys, what is it, a $60 billion trade surplus with the United States would somehow think that our rules were unfair?

Mr. MONTE. Yes, right, and that we would be treating them unfairly. Even though the State Department came down and spoke out against Kenrich, which I really was infuriated over, they couldn't produce a number as to how many companies would be involved if this law were passed. How many companies, in fact, have a bilateral trade agreement with Japan prior to 1985 that have been affected by this ruling of mandatory arbitration? Maybe two? One? Me, for sure. I am raising my hand, "I need help, I need help from my Government," and my Government is standing up there saying, "No," and they have stalemated me, and Ajinomoto's people have told my attorneys we don't have a prayer in hell of getting that law passed. They are confident they are going to be able to stalemate me and grind me into bankruptcy. They are going to win.

Mr. SHERMAN. Given the natural tendency of this Congress to simply go along with what the State Department suggests, they may be right. Others who have served in Congress longer who might know what the chances of getting this bill passed, but apparently they weren't good when it was raised last year with the Judiciary Committee.

I am particularly concerned with Canada's attempt to take our entertainment industry. They do so with a unique combination. On the one hand, they won't allow our product on their stations, because they want to defend their cultural sovereignty, or so they

say. But, at the same time, they are happy to make—to give tax incentives for American content, movies, to be made there for the American market, many of which have strictly U.S. themes. I think one of them was the President's wife; another one was the Texas Rangers. It wasn't the Prime Minister's wife; it wasn't the Calgary Rangers; there were no Mounties in any of these films. Perhaps our Mr. Salesin can comment on the efforts of Canada to restrict U.S. product while at the same time entice American producers to make them American content product in their country.

Mr. SALESIN. Your problem is a bigger one than what just my industry deals with here. You are talking about television; you are talking about film.

Mr. SHERMAN. Yes, right.

Mr. SALESIN. I don't——

Mr. SHERMAN. I realize I am talking about your cousins, not about your——

Mr. SALESIN. Right, and I don't fault the Canadians for trying to create an impressive software industry if in fact they are trying to do it, but I think what is important here is that we are a huge part of the American economy, a huge part of the export economy, and we need the support of the Government to try to protect that in the foreign countries. I think you have hit a very good point. I just don't know the specifics of that tax issue.

Mr. SHERMAN. This is going to shock the Committee: I have run out of questions.

Ms. ROS-LEHTINEN. Thank you so much for your expert testimony. We look forward to hearing more about the bill from Mr. Menendez, and thank you so much for your patience today.

The Committee is now adjourned.

[Whereupon, at 3:42 p.m., the Subcommittee was adjourned.]

A P P E N D I X

OCTOBER 13, 1999

COMMITTEES:
INTERNATIONAL RELATIONS
GOVERNMENT REFORM
CHAIR:
SUBCOMMITTEE ON
INTERNATIONAL ECONOMIC
POLICY AND TRADE
VICE CHAIR:
SUBCOMMITTEE ON
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"Violations of Intellectual Property Rights: Protecting American Ingenuity"
Wednesday, October 13, 1999
2172 Rayburn Building
1:30 p.m.

In much the same way that Eli Whitney's cotton gin is credited with igniting the Industrial Revolution, intellectual property industries are propelling us into a new age of discovery and growth.

According to the report, "Copyright Industries in the U.S. Economy", the core copyright industries accounted for $278 billion in value added to the U.S. economy, or almost 4% of GDP. For all copyright industries, the report cites that the total value added amounted to close to $434 billion or almost 6% of GDP.

The core industries grew at nearly twice the annual growth rate of the U.S. economy as a whole between 1987 and 1996. Employment in these industries grew at close to three times the levels in the overall economy. Further, they accounted for an estimated $60 billion in foreign sales and exports in 1996 – a 13% gain over the previous year.

The American formula for excellence and success in the area of intellectual property is one many would like to emulate. Unfortunately, many across the world are seeking to repeat the U.S. experience through stealing, pirating, counterfeiting, and other unauthorized uses of American products.

The impact of piracy on the U.S. economy is widespread. As industry leaders have stated: "Piracy puts brakes on the development of the national producers, generates tax evasion, reduces the creation of employment on the part of American companies, and provokes serious losses for the national economy."

The pervasiveness of this infringement, despite the growth of the copyright industries, is resulting in significant losses worldwide. The International Intellectual Property Alliance estimated that, in 1998, losses were about $5 billion for business applications; over $3 billion for entertainment software; almost $2 billion for the motion picture industry; and close to $2 billion for the record and music industries.

Focusing on just two countries, the Pharmaceutical Research and Manufacturers of America reports that its member companies lose over $1 billion annually.

Intellectual property rights issues continue to be at the heart of U.S. relations with industrialized countries such as Japan and European Union members; allies such as Russia and Israel; as well as developing countries in Latin America, Asia, and the Middle East.

Violations of intellectual property rights are a direct infringement on free trade, as it creates distortions in the market and creates parallel black market systems which, in the end, will hurt, not just the U.S. but the global economy as a whole.

In turn, as a Finnish copyright specialist has argued, the global phenomena of intellectual property industries "can only be dealt with by a global approach and, where necessary, by global rules."

One agreement considered by experts to be a good first step was the Uruguay Round (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) which took effect in January 1996. It established international obligations for the protection and enforcement of intellectual property rights, and established enforcement and dispute settlement mechanisms.

However, there were still issues relating to protection of intellectual content in cyberspace, loopholes regarding duplication of sound recordings, and other challenges posed by global networks that needed to be addressed.

In December 1996, the World Intellectual Property Organization Diplomatic Conference concluded negotiations on two multilateral treaties – one to protect copyrighted material in the new digital environment and another, to provide stronger international protection to performers and producers of phonograms. The implementing legislation was passed last year.

Nevertheless, the differences in deadlines for implementation of international requirements and the failure of our trading partners to effectively address the issue, translate into an escalation of violations and the creation of an environment where piracy is becoming rampant.

Our enforcement, monitoring, and investigative agencies – some of which are represented here today – are doing an outstanding job within the limitations imposed by the pervasiveness and magnitude of the problem.

The Intellectual Property Law Enforcement Coordination Council established by the FY2000 Treasury/Postal Appropriations Bill will certainly help as enforcement of intellectual property is coordinated domestically and internationally among U.S. federal agencies, as well as foreign entities.

But more needs to be done on the preventive side of the equation.

I look forward to the recommendations of our witnesses today as we search for a cure to this growing epidemic.

STATEMENT OF COMMISSIONER RAYMOND KELLY

BEFORE THE SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY AND TRADE OF THE HOUSE COMMITTEE ON INTERNATIONAL RELATIONS

OCTOBER 13, 1999

Thank you for this opportunity to testify.

Throughout its long history, the U.S. Customs Service has defended the nation from the harmful effects of unfair and predatory trade practices. In recent years, we have taken on the rising threat against intellectual property rights, or IPR.

IPR theft hurts not only our national economy, but our world economy as well. This crime is already costing industry approximately 200 billion dollars a year in lost revenue and nearly 750,000 jobs.

In fiscal year 1998, the U.S. Customs Service seized almost 76 million dollars worth of counterfeit and pirated merchandise and conducted 484 criminal IPR investigations. China and Taiwan were the source countries for nearly half of all the merchandise seized.

In just the first half of fiscal year 1999, we seized over 73 million dollars of pirated merchandise and conducted 505 criminal IPR investigations. Again, China and Taiwan accounted for 56% of this seized merchandise. Motion pictures, computer software and music were the products that were illegally copied the most.

Our investigations have shown that organized criminal groups are heavily involved in trademark counterfeiting and copyright piracy. They often use the proceeds obtained from these illicit activities to finance other, more violent crimes.

These groups have operated with relative impunity. They have little fear of being caught, for good reason. If apprehended, they face minimal punishment. We must make them pay a heavier price.

Customs continues to raise awareness of the importance of protecting our intellectual property rights. This past summer our fraud investigations division sponsored two conferences on methods to recognize and investigate IPR violations. Our agency teamed up with private industry and trade associations to provide advanced training for approximately 200 Customs special agents and inspectors. Twenty special

agents from the federal bureau of investigation were also included in this training.

Our federal law enforcement agencies are stepping up to the challenge. But we cannot do it alone. We need international cooperation. We need the help of our foreign partners.

Accordingly, we have conducted training for Customs and federal police officers in nine different countries. We also provided training to six additional foreign law enforcement agencies under the auspices of the international law enforcement academy in Bangkok, Thailand.

U.S. Customs has also forged a close working relationship with those industries most affected by IPR violations. We're working with these corporations to train personnel at airports, seaports, mail facilities, land borders, and other locations where foreign imports are received on ways to spot counterfeit merchandise.

Our partners in this effort have included: the Interactive Digital Software Association, the Motion Picture Association of America, the Recording Industry Association of America, the Software Publishers Association, Lucas Arts, Microsoft, Novell, Nintendo, Sega, and Sony entertainment.

In recent months, we have contacted major pharmaceutical manufacturers to learn about their IPR concerns. As a result, we've developed training for Customs officers to help them identify shipments of imported pharmaceuticals that violate manufacturers' IPR rights, as well as food and drug administration regulations.

Customs mandate now extends to the borderless world of cyberspace as well. The internet has opened up vast new opportunities for legitimate business and criminal smuggling alike. In this new environment, our traditional enforcement remedies simply won't suffice.

U.S. industries, particularly those involved in computer software, motion pictures and sound recordings, are at great risk from internet piracy. Cyber criminals are difficult to track. With a few simple keystrokes, from a computer anywhere in the world, they can ship stolen trademarks, traffic pirated music, or download copyrighted software.

Customs is tackling this new breed of criminal on a variety of fronts. Our main weapon in this fight is the Customs Cybersmuggling center, or C-3, located in Fairfax, Virginia. The Center is devoted to combating internet crime, including IPR violations.

Currently, the center is conducting about 100 investigations involving the sale of counterfeit goods through the internet. With the help of the Congress, we've secured funding for expansion of the Center, and we will continue to devote our resources to its important work.

President Clinton included the protection of intellectual property rights in his 1998 international crime control strategy. Customs, along with the FBI, co-chair a working group charged with implementing the IPR strategy and strengthening the enforcement of IPR laws.

Members of this group include the Departments of Treasury, Justice and State; the Patent and Trade Office; the Copyright Office; the U.S. Trade Representative; the Central Intelligence Agency; and the National Security Counsel.

I would also like to take this opportunity to announce a new intellectual property rights coordination initiative. This initiative will synchronize the joint efforts of our federal agencies in IPR investigations.

Investigative personnel from Customs and the FBI will provide the core staffing for this effort. Other interested agencies have been invited to participate.

The main objectives of the IPR coordination initiative will be to eliminate duplication of investigative efforts between agencies, and to coordinate multinational investigations. We will formally commence our efforts within thirty days.

We will also utilize the 44 Customs mutual assistance agreements we've signed with our international partners to help in our IPR efforts. These agreements provide for the free exchange of information and assistance in areas of mutual concern. The IPR Coordination Center will tap our attaché offices worldwide to gain intelligence under the agreements for IPR investigations.

Madame Chairwoman, with the continued support of the congress, U.S. Customs will remain a force in the battle against IPR piracy. Every day we gain in fighting those who subvert legitimate commerce and destroy livelihoods by stealing the creative works of others. Every day we build new partnerships to help us in this battle.

But as much as we have done, we need to do more. IPR crime is an increasingly porous and global threat. We need to educate consumers on the dangers of counterfeit and pirated goods. U.S. Customs looks forward to working with the Congress to raise public awareness of the IPR threat and to enhance the defense of our cultural and commercial interests.

The fact is, IPR crime affects more than those whose copyrighted works are stolen. In some way, it affects us all.

With your consent, I would like now to offer a brief demonstration of our work on this important front. This demonstration is being conducted by Special Agent Del Richburg. Special Agent Richburg is currently assigned to the Customs Cyber Crime Center. He specializes in IPR investigations.

[run demonstration]

Thank you Agent Richburg.

Madame Chairwoman, I would also like to point out the items on this table. All of these products were confiscated by Customs officers in the course of our IPR enforcement work.

Again, thank you for the opportunity to testify this morning. Now I'd be happy to answer any questions you might have.

TECHNOLOGICAL PROGRESS AND AMERICAN RIGHTS: TRADE POLICY AND INTELLECTUAL PROPERTY PROTECTION

Testimony of Ambassador Richard W. Fisher
Deputy U.S. Trade Representative

Subcommittee on International Economic Policy and Trade
House Committee on International Relations

Washington, DC

October 13th, 1999

Good morning, Madam Chairwoman and Members of the Subcommittee. Thank you for the opportunity to speak to you today about the role of trade policy in protecting intellectual property.

Madam Chairwoman, as our Constitution recognizes, intellectual property rights are at the heart of scientific and technological progress and artistic creation. As part of the U.S. Government's overall dedication to ensuring respect for intellectual property, the U.S. Trade Representative is committed to ensuring market access and fighting piracy overseas. We appreciate the support and interest we have received from Congress over the years, and today I would like to review with you our policy.

IMPORTANCE OF INTELLECTUAL PROPERTY RIGHTS

To begin with, ensuring respect for intellectual property rights is an immensely important American economic interest. According to industry estimates, the core American copyright industries – software, films, music, books and other works accounted for $278.4 billion in value added to the U.S. economy, or approximately 3.65% of the Gross Domestic Product. Virtually all of our manufacturing industries, as well as pharmaceutical firms and others, require patent protection to encourage innovation. Trademark protection is equally important for firms and for consumer protection.

The value of intellectual property rights, however, goes well beyond these issues. A system of strong intellectual property protection promotes future innovation by ensuring that artists, inventors, and scientists are rewarded for their work. Strong copyright protection for business and entertainment software, for example, is essential for a simple reason: software programs are technical marvels that require large investments to create, but can be copied at virtually no cost. Likewise, patent laws that protect inventions in pharmaceutical and other fields encourage discovery and invention by providing exclusive rights, for a limited period, to those who disclose the results of their work; disclosure, in turn, enables others to understand the advances made and to extend those advances both in the original field of technology and in other fields.

The results of our policy are clear in practice. Computer programs developed in the past two decades have vastly changed American life: they have saved lives by improving forecasts of hurricanes; improved productivity and safety in our factories; created new products in countless fields; improved health treatments; made tax filing easier; developed new forms of art and entertainment; strengthened our military and much more. Innovations in drug therapies developed by our pharmaceutical industry have saved millions of lives both at home and abroad.

THE THREAT OF PIRACY

Almost all types of intellectual property, however, are highly vulnerable to piracy. The American copyright industry reported losses through piracy overseas at between $20-22 billion last year. Our patent-dependent pharmaceutical industry estimates that it loses a billion dollars annually in India and Argentina alone. Other U.S. industries dependent on patents, trademarks, trade secrets, industrial designs and other forms of intellectual property suffer similar losses.

Toleration of piracy can swiftly remove all incentives to create. The result would be erosion of America's comparative advantage in high technology; and ultimately loss of the benefits of new advances in health, public safety, education, defense and freedom of information for the entire world. In a sense, the intellectual property of the American economy is like a warehouse of ideas. For people to walk in and steal them is no more tolerable than theft of goods. That is why we at USTR place such an emphasis on ensuring that our trading partners enact, enforce and continue to enforce laws that ensure respect for our rights.

In this work, we consult closely with Congress on our priorities and strategies; we use domestic trade law; regional initiatives in Europe, Asia, Latin America and Africa; existing institutions, notably the World Intellectual Property Organization; and the World Trade Organization (WTO). Our goal is to control piracy through strong laws and effective enforcement worldwide, and to ensure that protection remains effective as technology develops in the future. It is complex work: effective protection of inventions in the pharmaceutical area, protection of copyrighted works like software, music, and movies, and protection of the trademark reputation of our firms requires a coordinated effort involving not only trade officials but entire governments. Effective protection of intellectual property rights involves customs, courts, prosecutors and police, commitment by senior political officials; and a general recognition that to copy is to steal and to deprive finance ministries of revenue. But although it is complex and the work is never done, the effort, over the years, has been quite successful.

Let me now review our major initiatives and policy tools.

BILATERAL INITIATIVES AND SPECIAL 301

To begin with, we intercede directly in countries where piracy is especially prevalent or governments are exceptionally tolerant of piracy. Among our most effective tools in this effort is the annual "Special 301" review mandated by Congress in the 1988 Trade Act.

This tool has vastly improved intellectual property standards around the world, including for software. Publication of the Special 301 list warns a country of our concerns. And it warns potential investors in that country that their intellectual property rights are not likely to be satisfactorily protected.

The listing process itself has often helped win improvements in enforcement. One fascinating aspect of the Special 301 process occurs just before we make our annual determinations, when there is often a flurry of activity in those countries desiring not to be listed or to be moved to a lower list. IP laws are suddenly passed or amended, and enforcement activities increase significantly.

In many cases, these actions lead to permanent improvement in the situation. Bulgaria is a notable example. Several years ago it was one of Europe's largest sources of pirate CDs, and a major cause of concern for us. Since then, we have worked to raise awareness and concern about the problem, and Bulgaria has at this point almost totally eliminated pirate production.

At times, however, we must use the sanction authority granted to us for worst case offenders.

China is a prime example. In 1995 and 1996, persistent tolerance of piracy – in particular growth of pirate production for both the domestic market and export – led us to threaten $1 billion in trade sanctions. These helped us to win a bilateral IP agreement in1995 and further action in1996. Our follow-up work since has been to ensure that all relevant Chinese agencies including trade, customs, judiciary, police and senior political officials are involved.

Today, China has an improved system that protects U.S. copyrights much more effectively than ever before. Enforcement of intellectual property rights has become part of China's nationwide anti-crime campaign, involving the Chinese police and court system in fighting piracy. Production of pirated copyrighted works has dropped dramatically. And most recently in March, China's State Council followed our example in issuing a directive to all government ministries mandating that only legitimate software be used in government and quasi-government agencies.

However, we have continuing concerns. While production of pirated product is down, imports from other pirate havens is increasing - leading to the wide availability of pirated product at the retail level. Moreover, restrictions on market access have hindered our ability to replace pirate product with legitimate goods in many cases.

1999 Special 301 Review

In the 1999 Special 301 review, we analyzed 72 countries, with 54 countries recommended for specific identification and two subject to Section 306 monitoring. In this review we are focusing on three major issues:

- First, we are ensuring proper and timely implementation of the WTO's Agreement on Trade-Related Aspects of Intellectual Property (referred to by the acronym "TRIPS").

- Second, we are working to control piracy of optical media products (music and video CDs, and software CD-ROMs).

- Third, we are following up on our success with China's State Council Directive ensuring that government ministries worldwide ensure enforcement of the use of legitimate software.

TRIPS Implementation

Among our top priorities this year has been to ensure full implementation of World Trade Organization commitments on intellectual property. The WTO requires all members to enact and enforce copyright and other intellectual property protection, with obligations for developing countries phasing in on January 1, 2000. We are committed to ensure that all members meet this deadline.

Compliance with the enforcement provisions of TRIPS, however, remains a significant issue in certain developed countries and many developing countries, and is a focus of our attention under Special 301. This includes both ensuring legal protection and full enforcement.

For example, just last week, I traveled to Peru and Buenos Aires to remind the Andean Community countries and Argentina of their TRIPS obligations. As developing countries, the transition period for these countries expires on January 1, 2000. Not only is compliance a legal matter under the WTO TRIPS Agreement, but it is an essential element in creating a favorable climate for investment, especially in Latin American countries facing economic slowdown.

Pirate Optical Media Production

At the same time, however, our work must keep up with the very rapid advance of technology: as new software products and services develop, pirates quickly take advantage of them. Thus, we are focusing on the control of piracy in optical media -- for example, music and video CDs, and software CD-ROMs.

We have had some significant successes on this issue over the past year. Hong Kong is one case in point. Our expressions of concern here have been joined in the past year by a number of Hong Kong artists and copyright industry figures. In part because of this, Hong Kong has recently taken additional legislative and enforcement actions to combat optical media piracy, having already in the past year implemented model controls on optical media production. Unfortunately, Hong Kong's enforcement of its laws still leaves much to be desired and we are pressing for further improvements.

Malaysia is a second example. Having identified this country as a growing source of

pirate optical media production, we dispatched a team to Kuala Lumpur to address the problem. As a result, Malaysia committed to enact legislation to implement controls on optical media production, establish a special copyright enforcement task force, and publicly warned that pirates are subject to criminal and civil enforcement actions, including imprisonment.

Government Use of Software

The third component of this year's Special 301 initiative is government use of software. Our goal here is to control "end-user" piracy -- that is, the unauthorized copying of large numbers of legally obtained programs by government agencies.

Here we began by leading by example. One year ago, Vice President Gore announced that President Clinton had signed a new U.S. Executive Order mandating the use of only authorized software by U.S. Government agencies. By doing so, this administration set an example for the private sector in the United States, as well as for governments and industry abroad about the importance of guarding against the unauthorized use of business software.

In making this announcement, the Vice President directed USTR to undertake an initiative to work with other governments to take similar steps. We have worked closely with the U.S. software industry urging governments to ensure that procurement practices call for, and budgets provide for, acquisition and use of legal software. We are focusing particular attention on countries where the need to modernize software management systems is highest or where concerns have been expressed about inappropriate government use.

And we have achieved significant successes. As I noted, in March the State Council - the highest executive authority in the People's Republic of China - took a critical step toward combating software theft by announcing the issuance of a decree mandating legal software usage by ministries, commissions and agencies of the Chinese Government. Others which have issued similar decrees include Colombia, Paraguay, the Philippines, Korea, Thailand, Taiwan and Jordan. Spain and Israel are actively considering such decrees.

Problem Countries

We continue, however, to face serious problems in a number of countries in each part of the world.

In the Middle East and Europe, our concerns include Israel and Russia as well as many countries in Eastern Europe. Israel and Ukraine are of particular concern, as they each are becoming major production centers for pirate CDs exported to Europe. Several European Union members also raise concerns: in Spain, software piracy rates are some of the highest in Europe and in Italy, we still await passage of a much needed anti-piracy bill.

In Latin America, we are focused on Mexico, Brazil, Peru and Paraguay, where enforcement is dangerously weak and causes billions of dollars in losses for U.S. right holders

annually as well as Argentina where our pharmaceutical industry is not provided patent protection. Mexico has acted this year to improve its laws by enacting new legislation and has increased its enforcement efforts. On the other hand, we have had to initiate dispute settlement proceedings against Argentina to address the concerns of our pharmaceutical industry.

We also remain focused on several economies in Asia, notably China, Hong Kong, Macau, and Malaysia. Assistant USTR Joseph Papovich just returned from a major round of consultations in the region focusing on the need for improved IP enforcement and full implementation of TRIPS obligations.

MULTILATERAL TRADE INITIATIVES

Bilateral negotiations are and will remain central to our efforts to improve intellectual property standards worldwide. However, as time has passed, our trading partners have begun to see the effect of stronger standards at home – that is, that strong intellectual property standards allow nations to develop their own high-tech and artistic industries.

This allowed us to make a fundamental advance with the TRIPS agreement at the creation of the World Trade Organization in 1995. This was an historic achievement: it required all WTO members to pass and enforce copyright, patent and trademark laws, and gave us a strong dispute settlement mechanism to protect our rights. Thus we created a set of standards enforceable between governments and subject not only to our own trade laws but to multilateral rules.

Meeting Obligations

The TRIPS Agreement granted developing countries until January 1, 2000 to implement most provisions of the Agreement, and granted least developed countries until 2006. Over the past several years, we have pressed countries wherever possible to accelerate implementation of these obligations. Now, as we approach 2000, when it will be fully in force, we have shifted to ensuring that developing countries at a minimum are taking steps now to ensure that they will meet their obligations.

Use of Dispute Settlement

In the interim, we have been aggressive and successful in using WTO dispute settlement procedures to assert our rights in developed countries of American works, beginning with our initiation of the first TRIPS-related dispute settlement case against Japan in 1996. We have since initiated an additional twelve cases, including:

- With Portugal for failing to apply TRIPS-levels of protection to existing patents; and
- Against Pakistan and India for it failure to provide a "mailbox" and exclusive marketing rights for pharmaceutical products.

- with Denmark and Sweden over the lack of *ex parte* civil search procedures
- with Ireland for failure to pass a TRIPS-consistent copyright law, and
- with Greece over rampant broadcast piracy,
- with Argentina over exclusive marketing rights data protection for agricultural chemicals
- with Canada for failing to provide a 20-year patent term in all cases, and
- with the EU regarding regulations governing geographical indications.

We have brought complaints to address the failure of countries to implement TRIPS obligations of particular importance to the pharmaceutical, copyright, and trademark industry.

For example, a significant success for us is the case we brought against Ireland for failure to pass a TRIPS-consistent copyright law. Here, piracy levels for business software have been very high (estimated by the Business Software Alliance to be 57%). Last July, as a result of our dispute settlement consultations, Ireland passed special legislation on an expedited basis to address two significant enforcement issues. This raised criminal penalties for copyright infringement and removed procedural obstacles that had hindered effective enforcement. Ireland is also now completing comprehensive copyright legislation, and its government has made significant efforts to address our concerns, including pledging to do everything in its power to enact this remaining copyright legislation in the coming months.

In the pharmaceutical area, we successfully resolved dispute settlement proceedings against India earlier this year. In December 1997, the WTO Appellate Body upheld a panel ruling in favor of the United States in this case involving patent protection for pharmaceuticals and agricultural chemicals. As a result, the Government of India promulgated a temporary ordinance to meet its obligations, and then enacted permanent legislation entitled the Patents (Amendment) Act 1999. Through these mechanisms, the Government of India has established a mechanism for the filing of so-called "mailbox" patent applications, and a system for granting exclusive marketing rights for pharmaceutical and agricultural chemical products.

This year we also initiated a complaint against Argentina because it does not currently provide patent protection for pharmaceuticals, and is therefore required under Article 70.9 of TRIPS to provide exclusive marketing rights to pharmaceutical products as a transitional form of protection for products that meet certain conditions. While Argentina has in place a system for granting exclusive marketing rights, recent court decisions in Argentina make clear that those rights are subject to a severe limitation that is not consistent with Argentina's international obligations. Argentina also appears to be in violation of the TRIPS Agreement for revoking regulations in 1998 that had provided 10 years of protection for confidential test data for

agricultural chemical products. TRIPS requires WTO Members to provide data protection for such products, and further requires that Members enjoying a transition period ensure that any changes in their laws regulations, and practice during that transition period do not result in a lesser degree of consistency with the provisions of the Agreement.

In the area of trademarks, we filed a case this year against the EU regarding its regulation governing the protection of geographical indications for agricultural products and foodstuffs. This regulation denies national treatment with respect to certain procedures concerning the registration of geographical indications. Furthermore, the regulation does not provide appropriate protection for trademarks. USTR is concerned that U.S. companies' trademarks thus are not properly protected.

New Dispute Settlement Cases

In the year ahead, we expect to be equally active at the WTO. As part of her annual Special 301 report, Ambassador Barshefsky announced that USTR would conduct a Special 301 out-of-cycle review of developing countries progress toward full TRIPS compliance this December. We are aware of U.S. industry's concerns regarding compliance problems in a number of specific countries, including the pharmaceutical industry's concerns in Argentina and India. In the lead up to this review we have been actively consulting with countries and providing technical assistance to help address remaining deficiencies.

We are hopeful that many of these situations can be resolved through consultations. If not, we are prepared to address the problems through dispute settlement proceedings beginning in January, where necessary. For example, last week I met with the economic advisors to all three presidential candidates in Argentina, telling them that unless the Argentine Congress provides the wherewithal to address our concerns, between now and year end, their government to be elected next month may well be subject to a TRIPS suit early next year. We do not wish to upset the excellent relationship we have developed on trade matters with the Argentines, yet there can be no leeway for failure to address our concerns about their lack of compliance with the TRIPS Agreement.

Accessions to the WTO

Our negotiations on the accession of 33 economies to the WTO offer us a major opportunity to improve intellectual property standards worldwide. These economies make up a total population of 1.6 billion, and include a number of the countries in which our intellectual property industries have experienced very significant piracy problems over the years. In each case, we consider acceptance of the WTO requirement for enactment and enforcement of modern intellectual property laws a fundamental condition of entry.

TRIPS in the "Built-in Agenda" and New Round

Finally, let me offer a few thoughts on the new Round of trade negotiations set to begin at the WTO Ministerial in Seattle this fall.

The next year presents us with an opportunity to make fundamentally important advances in intellectual property protection worldwide, through the phase-in of existing WTO obligations in many developing countries and through the accession negotiations. Furthermore, under the WTO's "built-in agenda," we will conduct a thorough review in TRIPS Council of developing-country implementation of TRIPS obligations. Given the significant number of developing countries that will be reviewed, it is already clear that this work will continue through the end of 2001.

Therefore, we have not set new TRIPS negotiations as a priority as the Round begins. That being said, like other Members, we foresee the possibility of improvements to the TRIPS Agreement, in due course. Among other things, we believe that it will be important to examine and ensure that standards and principles concerning the availability, scope, use and enforcement of intellectual property rights are adequate, effective, and are keeping pace with rapidly changing technology, including further development of the Internet and digital technologies. We also expect that, once Members have the benefit of the experience gained through full implementation of the Agreement, we will want to examine and ensure that Members have fully attained the commercial benefits which were intended to be conferred by the TRIPS Agreement. In any event, no consideration should be given to the lowering of standards in any future negotiation.

WIPO TREATIES AND FUTURE ISSUES IN INTELLECTUAL PROPERTY

Finally, let me say a few words about the future.

Our overriding objective at the moment is to secure full and timely implementation of the TRIPS agreement by all WTO members, and broaden this to new members. However, we are also giving careful consideration to our options for protecting intellectual property associated with rapidly evolving new technologies and the fast-developing information society.

For example, we are consulting with U.S. industry to develop the best strategy to address problems such as Internet piracy. We began to address this issue through multilateral negotiations under the auspices of the World Intellectual Property Organization. This resulted in the signature of two new WIPO treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) which will help raise the minimum standards of intellectual property protection around the world, particularly with respect to Internet-based delivery of copyrighted works.

Of the 159 members of WIPO, fifty-one have signed and seven ratified these new copyright treaties. Fifty have signed and five have ratified the separate but related performances and phonograms treaty. With the recent Senate approval of these treaties, this Administration has committed to work closely with industry to encourage ratification of these treaties by all

other signatories as possible as soon as possible.

CONCLUSION

Madam Chairman, intellectual property protection is one of our most important and challenging tasks. We protect U.S. intellectual property rights to protect the research, investments and ideas of some of America's leading artists, authors, and private-sector and academic researchers. It is also to protect America's comparative advantage in the highest-skill, highest-wage fields; and to help ensure that the extraordinary scientific and technical progress of the past decades continues and accelerates in the years ahead and all of mankind prospers.

In the past century, the commitment we have shown to enforce respect for intellectual property rights at home has helped to create the world's most technologically advanced economy; a flowering of new artistic forms from films to sound recordings and computer graphic art; and inventions from in fields from medicine to aerospace that have improved lives and opened new worlds of experience.

The implications of our international intellectual property policies -- for prosperity, creative innovation and improved lives throughout the world -- are no less. Congress, through passage of the Special 301 law, passage of the Digital Millennium Copyright Act implementing the WIPO Treaties in 1996, and hearings such as this, deserves great credit for bringing public focus to these issues. We look forward continuing the effort together in the years ahead.

Thank you, Madam Chairwoman and Members of the Committee. Let me now take your questions.

Statement of

Q. TODD DICKINSON

ACTING ASSISTANT SECRETARY OF COMMERCE AND

ACTING COMMISSIONER OF PATENTS AND TRADEMARKS

before the

SUBCOMMITTEE ON INTERNATIONAL ECONOMIC POLICY AND TRADE

COMMITTEE ON INTERNATIONAL RELATIONS

U.S. HOUSE OF REPRESENTATIVES

on

October 13, 1999

Madame Chair and Members of the Committee:

Thank you for providing this opportunity to testify on the very important issue of protection of intellectual property.

We firmly believe that no single issue is more important in shaping the future growth and development of our economy, and the global economy, than developing and maintaining effective intellectual property protection.

While the Patent and Trademark Office (PTO) is responsible for examining and granting patents and registering trademarks, we also serve an important advisory role. The PTO advises the Administration and the Congress on all domestic and international intellectual property matters, including international agreements.

The PTO also works closely with the United States Trade Representative, U.S. Customs, the U.S. Copyright Office of the Library of Congress, the Departments of State and

Justice and other Federal agencies to secure and expand protection of U.S. intellectual property throughout the world.

I would like to describe some of our ongoing efforts.

International Efforts

We continue to engage in substantive discussions and education efforts with intellectual property officials throughout the world. Just last week, the PTO and the World Intellectual Property Organization's (WIPO) Asia Bureau co-sponsored a study program on the enforcement of intellectual property rights for customs officers from 12 Asian countries, including China, India, Indonesia and Thailand. The officers received substantive briefings and participated in discussions on a wide range of border enforcement issues and the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

Another enforcement program, again in cooperation with WIPO, will be held during the first two weeks of November. Participants will include intellectual property officials from over 15 countries.

PTO has also participated in programs for Russian prosecutors and judges (July 1999) and developed a new intellectual property enforcement training format to be used by other U.S. agencies and WIPO (July 1999). PTO also led programs on enforcement in Egypt and Kenya (spring and summer 1999).

Further, the 14th annual Visiting Scholars Program will be held the last two weeks of October. The program offers two weeks of classroom and hands-on study to intellectual property officials from approximately 15 countries. The participants gain a better understanding of the critical role of intellectual property protection in building strong, vital economies.

Technical Assistance

The PTO also provides technical assistance to developing countries that are setting up or improving their intellectual property protection systems. The assistance includes specific review of foreign laws and regulations to implement intellectual property enforcement regimes. Last fiscal year, we provided technical assistance to over 70 countries, and the effort included 90 separate assistance projects. We plan to improve on those numbers in the new fiscal year.

Inter-Agency Council

While PTO and other Federal agencies regularly consult on intellectual property-related enforcement activities, the recently enacted Treasury Appropriations law (P.L. 106-58) establishes a formal inter-agency coordination effort. The law creates the National Intellectual Property Law Enforcement Coordination Council with the mandate of

coordinating domestic and international intellectual property law enforcement among Federal and foreign entities.

The Council membership consists of PTO and our colleagues at the Justice Department, State Department, USTR, Customs, and the Department of Commerce. The Council is directed to consult with the Register of Copyrights on copyright-related issues and must report annually on its activities to the President and the House and Senate Committees on Appropriations and the Judiciary. We look forward to working with our colleagues on this important effort.

Patents

Securing effective patent protection as expeditiously as possible is critical to all U.S. industries, particularly pharmaceutical, computer and other high tech sectors, and the U.S. patent business is booming. Patent applications are up 25% in the last two years, and in the fiscal year that just ended we received nearly 268,000 applications. Since 1996, patent applications in information-related technologies have risen more than 70% and biotech applications have jumped over 60%.

To handle the rapid growth in patent applications and to address our customers' concerns, we hired more than 800 new patent examiners last year and hired another 800 examiners this year. Most of the new hires are in computer and information processing technologies, and one-third of the new examiners hold a Masters or a Ph.D. degree in engineering, computer science or mathematics.

With the addition of these new employees, our examining corps has increased to 2,940 examiners as of the end of August 1999, up from 2,212 examiners at the end of FY 1997 and 1,806 examiners in FY 1992. During this period of extensive hiring, the PTO has expended significant resources for training new employees and in reviewing their draft work product. As this group of new examiners becomes more experienced with their searching and examining functions, we anticipate even quicker and more accurate actions. Overall, we devoted nearly 6% of our budget to training this year, including over 100,000 hours for training new examiners in PTO procedures.

We continuously review our national statutory and regulatory provisions and our obligations under international treaties and agreements, seeking out areas where improvements may be made. The focus of our patent business goals is to increase the level of service to the public by raising the efficiency and effectiveness of our business processes. For example, in the notice of proposed rulemaking ("Changes to Implement the Patent Business Goals") published in the Federal Register on October 4, 1999, the PTO has proposed changes to Title 37 of the Code of Federal Regulations, our rules of practice. The intent is to eliminate unnecessary formal requirements, streamline the patent application process and simplify and clarify applicable provisions. We anticipate that these changes will reduce the costs of obtaining patents while maintaining, if not increasing, the quality of our searching and examination functions. Additionally these changes have addressed many potential pitfalls, which currently have the effect of

possible forfeiture or delay of protection caused by filing or procedural errors by applicants.

In order to ensure a timely search and an examination of high quality, the PTO has made great improvements to our examiners' search capability resources. Today, from a desktop computer, patent examiners search the full text of over 2.1 million U. S. patents issued since 1971; images of all U.S. patent documents issued since 1790; English-language translations of 3.5 million Japanese patent abstracts; English-language translations of 2.2 million European patent abstracts; IBM technical bulletins; more than 900 discrete databases; and over 5,200 non-patent literature journals. We are constantly improving these systems to make more information available more easily.

As a result, our patent examiners in the pharmaceutical art are provided with desktop access to a vast collection of databases containing pharmaceutical non-patent literature, as well as traditional foreign and U.S. patent databases. Examiners are also given significant art specific training, both in a formal setting and from more senior examiners within each work group.

In the computer related technology area, the patent law of the United States has undergone significant judicial and administrative changes during the last decade. The general outcome of these changes is that many inventions that previously would have been ineligible for patent protection for the sole reason that they were categorized as "software" related or embodying certain algorithms are now eligible for patent protection. These changes allow patents applications for devices encoded with program codes, or devices programmed to provide certain results, to be eligible for protection. The computer related applications are subject to the same novelty and non-obviousness requirements imposed on all other applications.

The examination of these computer-related applications has presented some new administrative burdens. In most technologies, the PTO has at its disposal a large number of skilled examiners who are available to train inexperienced examiners and to review difficult applications. However, in computer related art, the office has had less time than normal to build a sufficiently large group of skilled examiners. An additional problem in this area is that the prior art collection, which is normally collected over time by the Office, must be newly discovered or assembled by the Office or the art must be searched in a non-traditional manner. We are working to overcome this problem.

In recent years, the PTO has been increasingly active in improving intellectual property rights around the world. We seek to promote intellectual property protection that is obtainable and protectable at a reasonable cost, in terms of both time and money. Additionally, we promote drafting of patent laws that not only encompass advanced technology of which we are currently aware, but also areas that are beyond our current imagination. This activity is consistent with Article 27(1) of the TRIPs agreement, which states in part:

> "...patents shall be available for all inventions whether products or processes, in all field of technology, provided that they are new, involve an inventive step and are capable of industrial application..."

Members to the TRIPs Agreement may, and have, invoked exclusions for some categories of inventions. Further, by defining "inventions" narrowly, members may, and have, effectively excluded advanced technological fields, such as computer related inventions from patentable subject matter. Unfortunately, by applying differing standards, these members have increased the cost of worldwide protection. It is our hope that consultations with other national intellectual property offices will limit this activity in the future. However, other avenues, such as initiation of the World Trade Organization (WTO) dispute settlement mechanism, may be an option in some instances.

The United States has also been an active participant the Ad Hoc Advisory Group on PCT (Patent Cooperation Treaty) Legal Matters. The group's meetings have focused on revisions to the PCT regulations to streamline processing of international applications by all entities involved. The changes discussed in the PCT will minimize the adverse impact on applicants when they make errors in filing documents in international application under the Patent Cooperation Treaty.

Through our membership in WIPO, the United States is currently negotiating a draft Patent Law Treaty (PLT). The principal goal of the PLT is to provide standardization of filing requirements and prosecution procedures among the member countries. This standardization of filing requirements would reduce the high costs of complying with various and sometimes inconsistent national and regional requirements. It would also reduce the risks of loss of potentially valuable intellectual property rights due to filing errors. By providing more consistent treatment of applications and prosecution procedures throughout the various member national and regional offices, the PLT will allow applicants to develop worldwide protection with greater confidence and at reduced costs.

The PTO is also working with the Japanese and European Patent Offices, the two other large patent offices in the world, to seek ways to benefit from advances in information technology. Together, we will develop and share patent search tools and work on the harmonization of Internet-based filing systems. A memorandum of understanding, developed and signed at the 16th Annual Conference in Miami, Florida, focuses on mechanisms for the future electronic exchange of data and the extension of a trilateral network to WIPO. It also provides for a cooperative effort to implement a new concurrent search pilot and to revise the information dissemination policy to allow each office to make available to the public, on an Internet service, the data received from the other two offices.

Trademarks

The trademark side of our operations is also experiencing significant growth, with trademark applications up nearly 25% this year alone. We expect to receive approximately 300,000 trademark applications this year.

Earlier this year, the PTO initiated a system for the on-line filing of trademark applications. Anyone with a credit card and Internet access can now file a trademark with the PTO, making us the first national intellectual property office in the world with such a system. Already more than 10% of our trademark applications are filed electronically, and we are now receiving more than 2,000 electronic applications per month. This lowers both processing time and costs as PTO staff no longer has to key-enter or scan the application information into the database. In addition, the quality of our database will improve because the electronic application process eliminates PTO-introduced errors as a result of key entry or scanning. *Yahoo Magazine* has cited this system, known as Trademark Electronic Application Submission (TEAS), as one of the most useful sites on the Internet.

This year, there have been a number of important international developments in the area of trademarks. At the Governing Bodies Meeting of the World Intellectual Property Organization, the WIPO General Assembly and the Paris Union Assembly adopted a recommendation on the protection of well-known trademarks. This recommendation represents an international consensus on such important issues as the standards for identifying a well-known mark or for determining what constitutes the relevant sector of the public. The recommendation will give guidance, and potential legislative language, to those countries that are now drafting legislation to implement the TRIPs Agreement. The standards set forth in the recommendation could also be useful in the ongoing process to protect well-known marks on the Internet.

Further, on both the domestic and international fronts, this year has seen the organizational development of ICANN (the Internet Corporation for Assigned Names and Numbers). Part of ICANN's mandate was to create a dispute resolution procedure for resolving disputes between domain name holders and trademark owners. The purpose of such a dispute resolution mechanism would be to allow a speedy and fair resolution of certain egregious types of infringement between trademarks and domain names. Such a dispute resolution mechanism will be revolutionary in the sense that it will allow trademarks owners throughout the world to access, on-line, a single and simple process for protecting their trademarks against certain types of infringement, such as cybersquatting and warehousing. ICANN posted a dispute resolution procedure for comment on September 29, 1999.

With respect to international filings of trademark applications, PTO recently issued regulations to implement the Trademark Law Treaty Implementation Act of 1998 (P.L. 105-330). The Treaty benefits U.S. trademark owners by requiring that member countries dispense with most legalization requirements and limit the list of filing and

registration requirements. It also requires member countries to accept multi-class applications and service mark registrations. The result will be simplification and harmonization of requirements for acquiring and maintaining a trademark registration in the member countries.

The future for trademarks internationally promises to be a very interesting one. On the positive side, the fact that trademarks have been such a popular target of Internet pirates means that trademark owners have been forced to lead the way in finding new ways to protect intellectual property on the Internet. Consequently, trademark owners have had the first opportunity to establish an Internet enforcement procedure. That procedure, the ICANN dispute resolution procedure, may be the forerunner of new Internet procedures, available on-line and worldwide, for settling intellectual property disputes in other areas such as copyrights and patents.

We believe that the Internet will ultimately enhance the value of trademarks as consumers increasingly will need recognizable marks to help them sort through the enormous selection of goods and services that will become available through the Net. At the same time, the Internet will benefit small businesses because they can have a worldwide marketing presence with just the cost of maintaining a web site.

Copyrights

While our publishing, computer software, information and entertainment industries continue to face serious challenges in terms of piracy and infringement in foreign markets, progress is being made to promote international cooperation in the protection of intellectual property in the global economy.

On December 20, 1996, the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, convened by WIPO, approved two Treaties designed to ensure international protection of copyrighted works, performances and sound recordings in the digital environment: the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). A major intellectual property related electronic commerce goal of the Administration has been United States adherence to these Treaties and to encourage their prompt ratification by our trading partners. The United States signed the Treaties on April 12, 1997. The Administration submitted the Treaties and recommended implementing legislation to the Senate on July 31, 1997 and submitted its recommended implementing legislation to the House of Representatives on July 29, 1997. The implementing legislation, the Digital Millennium Copyright Act (DMCA), was passed by the Congress and signed into law by the President on October 28, 1998.

The following countries have ratified the WCT and the WPPT: Belarus, Burkina Faso, El Salvador, Hungary, Panama, Republic of Moldova, and the United States of America. Indonesia and Kyrgyzstan have ratified or acceded to the WCT but not the WPPT. The Treaties will enter into force three months after 30 instruments of ratification have been deposited with WIPO.

The U.S. Government is actively working to encourage others to ratify and implement the Treaties. First and foremost, the United States is taking the lead by example. On September 14, 1999, Commerce Secretary Daley deposited the U.S. instruments of ratification with the Director General of WIPO. Additionally, the Administration, including the PTO, the Office of the U.S. Trade Representative (USTR), the State Department, and the U.S. Copyright Office, have been urging other countries to join the Treaties.

In addition, we are monitoring the progress of several of our key trading partners as they move toward ratification and implementation of the two Treaties. For example, this past summer, the Japanese Diet and the Argentine House of Deputies passed domestic legislation implementing the Treaties' obligations in their respective countries. The Australian Parliament also has drafted domestic legislation to implement the two Treaties, and it is our understanding that the bill will be considered later this year. The Colombian Senate has also passed two bills approving the two Treaties and the matter has now moved to the Colombian House of Deputies.

The European Union (EU) is also drafting a Copyright Directive to implement the Treaties. Once the European Commission completes and adopts the Directives, each Member State of the EU must then implement the Directives in their domestic legislation. Likewise, they must each put themselves in position to ratify the Treaties through their domestic legislative processes. When all of the Member States in the European Community are in a position to ratify, in accordance with the administrative provisions of the Treaty, they will all deposit their instruments of ratification simultaneously.

The U.S. Government has taken an active role in encouraging other countries to join the WCT and the WPPT. The United States has taken the lead in promoting joining the treaties through trade negotiations, speeches and participation in conferences on intellectual property, and WIPO meetings or programs promoting intellectual property protection. In these fora, U.S. representatives have explained the features of the DMCA and its approach to protection of anti-circumvention devices and systems, copyright management information, and limitations on liability of service providers.

For example, in July the PTO co-sponsored with WIPO a conference for representatives from 30 African states on intellectual property in the digital age. At this conference, PTO officials made presentations on the two Treaties and emphasized the importance of African states ratifying the Treaties and adapting their laws to deal with electronic commerce issues such as limitations on liability for service providers. During the same month, the Commerce Department's Commercial Law Development Program (CLDP) held a two-day seminar on intellectual property in Lagos, Nigeria, in which USPTO and private sector officials emphasized the importance of Nigeria and other states ratifying the Treaties. The CLDP includes promotion of the WCT and WPPT in all its intellectual property rights programs. Explanation, discussion, and promotion of the Treaties and the approach to implementation in the DMCA is also a major element of the PTO's annual Visiting Scholars Program and the Copyright Office's annual International Copyright Institute. Each year, these Washington-based programs attract dozens of government officials from a variety of developing and emerging economies.

The U.S. Government also is promoting the Treaties through activities and discussions in the WTO and the Free Trade Area of the Americas (FTAA). In the WTO, we have encouraged countries to ratify the Treaties through trips Council discussions related to electronic commerce. In connection with other work on electronic commerce in the WTO, we have also held discussions with countries concerning appropriate limitations on liability of Internet service providers. In the FTAA's Negotiating Group on Intellectual Property and the Government and Private Sector Committee of Experts on Electronic Commerce, we have proposed that members consider ratification and implementation of the WIPO Treaties by countries in the Hemisphere. Discussions in the FTAA Committee of Experts on Electronic Commerce have also included the matter of the establishment of appropriate limitations on liability for service providers.

The U.S. Government also is encouraging other countries to join the Treaties by using the Special 301 review process conducted by USTR. This objective is consistent with the mandate from Congress to seek adequate and effective levels of protection for intellectual property by our trading partners through promotion of the highest international standards. The standards in the WIPO Treaties meet these criteria. Therefore, the Administration continues to encourage countries to ratify and implement the WIPO treaties through the Special 301 process. To further promote the Treaties, the State Department sent cables to the U.S. embassies explaining the Treaties and their benefits and requesting that they consult with their host governments and encourage them to join.

Another area of legislative and international activity with significant impact on electronic commerce is the issue of legal protection for databases separate from copyright. In 1998, relevant legislation passed the House of Representatives twice, but was not taken up by the Senate. There are presently two legislative proposals for database protection in the 106th Congress: H.R. 354, sponsored by Congressman Coble; and H.R. 1858, sponsored by Congressman Tom Bliley. The Administration offered extensive commentary on each bill at hearings held in March and June, respectively. The Administration remains committed to working with the House and Senate on a database protection law that establishes adequate incentives for database production and distribution, while ensuring a robust range of fair uses, particularly for scientific, research, and transformative uses. Internationally, in 1999, the Administration made presentations on these developments at WIPO regional consultations in Minsk, Buenos Aires, and Manila. We anticipate that the subject will also be discussed at the next meeting of the WIPO Standing Committee on Copyrights, scheduled for November 1999 in Geneva.

On another copyright issue, the PTO, along with other U.S. Government agencies, worked with the U.S. motion picture industry and performers' unions to develop an agreement to improve international protection for audiovisual performers' rights. As a result, the U.S. Government last year put forward a comprehensive proposal in WIPO for a new Treaty on Audiovisual Performers Rights. This proposal aims to meet the needs of both performers and film producers in a way that will ensure that both parties benefit from the efficient exploitation of motion pictures in the marketplace.

This proposal is a new milestone in U.S. international copyright policy, as well as a milestone in developing the policies that shape international copyright law in this area. It represents the first time that the United States has taken the initiative on this long-standing and controversial topic and proposed an agreement that would ensure both moral rights and economic rights for audiovisual performers.

Conclusion

As we prepare to enter the next millennium, the PTO will continue its efforts to secure and expand protection of U.S. intellectual property throughout the world. With some hard work and good will, we are confident that we can build systems that will serve our citizens well during the next century. These systems need to reflect, however, the realities of a new marketplace -- one that is increasingly electronic and global.

Thank you, Madame Chair.

Interactive
Digital
Software
Association

TM

Testimony of Jeremy Salesin, General Counsel and Director of Business Affairs for LucasArts Entertainment Company LLC, before the House International Relations Subcommittee on International Economic Policy and Trade

October 13, 1999

Dear Chairwoman and distinguished Committee members,

Thank you for the opportunity to testify today on an issue that presents a major impediment to the continued growth of the video and computer game software industry: the piracy of intellectual property. My name is Jeremy Salesin, and I am the General Counsel and Director of Business Affairs for LucasArts Entertainment Company. Among my responsibilities is protecting the intellectual property of my company, and this experience has given me a good sense of the nature of the piracy problem we face on a global basis.

I am testifying today on behalf of the Interactive Digital Software Association (IDSA), the trade association representing the publishers of entertainment software for video game consoles, computers, and the Internet. IDSA's members publish nearly 90% of the more than $6 billion of entertainment software sold and rented in the United States, as well as a large portion of such software sold around the world. I serve on the IDSA Piracy Working Group, and in that capacity am intimately involved in a range of industry-wide anti-piracy initiatives.

You are probably most familiar with the LucasArts name because of the Star Wars motion pictures produced by LucasArts' parent company, Lucasfilm. You may not know, however, that LucasArts has produced dozens of best-selling entertainment software games. Two LucasArts games, Star Wars Rogue Squadron and Star Wars Episode 1: Racer, are among the top ten video and computer games so far in 1999. Though the Christmas buying season – during which 50-60% of games are sold— has not yet arrived, these two titles have already generated many millions of dollars in revenue.

The U.S. entertainment software industry is a dynamic amalgam of the entertainment and high-tech industries.

Entertainment software games provide tremendous entertainment to all ages, genders, tastes, and skill levels. It may surprise some of you to learn that over 70% of computer gamers and almost 60% of video gamers are over the age of 18, while almost 40% of all gamers are women. The genres of games are widely varied, and include sports, card,

quiz, trivia, action, adventure, real-time strategy, role-playing, racing, and flight-simulation games.

The fact that the industry is at the cutting edge of the high-tech revolution may be equally surprising to you. But over the years, the video game industry has triggered major advances in computer technology that have had ripple impacts far beyond games. For example, advances in game development helped stimulate the PC hardware industry to develop and produce machines with ever more processing power to run games; the development of the 3D graphics industry has been accelerated due to the demand for better imaging in video games; and demands in the video game industry for advanced chip architecture for the new generation of hardware are a boom to the semiconductor sector and are leading to new advances in semiconductor process technology.

And the next generation of video game consoles set to hit the market in Fall 2000 will be as powerful as low-end graphic work stations and will offer real convergence at a mass market price; the machines will be able to play DVD games, DVD movies, CDs, connect to the Internet, manage e mail, including video email, trade stocks, and act as a cable TV set top box. Users will even be able to directly download entertainment from the Internet to store on hard drives. In short, it is the video game industry which is taking Americans to a world of convergence.

The expanding mass market for games represented by the diverse user base, coupled with the industry's technological leadership, helps explain why the U.S. entertainment software industry has emerged as a major contributor to the U.S. economy. The industry has grown between 25-35% each year for the last four years, had $5.5 billion in U.S. sales in 1998, and had billions more in export sales. Analysts estimate that software sales in the US in 1999 may reach $6.5 billion. As a point of comparison, the US motion picture industry generates about $6.7 billion in revenue from box office receipts.

A 1996 Coopers & Lybrand report estimated that the industry contributed over $16 billion in economic activity to the U.S. economy, and employed over 50,000 workers in high-paying, highly-skilled jobs, numbers that have grown significantly over the last few years. Lastly, and perhaps most importantly for your purposes, the U.S. entertainment software industry is one of the core copyright industries that are collectively responsible for over $60 **billion** in foreign sales and exports – more than any other industry sector including agriculture, automobiles, or aerospace.

Though strong and growing rapidly, the entertainment software industry faces many business challenges, including changing markets, rising development costs, and technology transitions. However, far and away the biggest challenge we face is controlling intellectual property piracy.

Before getting into the details of our industry's piracy problems, let me first explain what I mean when I talk about "intellectual property piracy." As a form of creative

expression, entertainment software is protected by copyright; certain aspects of software code may also be patentable; and many of the characters, titles, and other aspects of games can be protected by trademark. Thus, "piracy" could refer to the infringement of the copyrights, patents, or trademarks held in a particular game. However, for the sake of simplicity, I will refer mostly to copyright piracy, by which I mean the unauthorized reproduction or distribution of a copyrighted game.

In 1998 alone, global copyright piracy caused over $3.2 billion in losses to the U.S. entertainment software industry. That's right, an industry with $5.5 billion in sales in the US lost over $3.2 billion. And, I might add, these piracy numbers are conservative – they don't even include losses due to Internet piracy because we have no accurate way to quantify these losses. The sheer dollar value of these losses should indicate the scope of the piracy problem for my industry.

Unfortunately, copyright piracy is a problem that is growing, not shrinking. Due to its digital nature (software code in its machine-readable form is just a series of ones and zeros), each copy of software is a perfect replication of the last. Thus, copying software does not result in degradation in quality, as occurs with copying of a video cassette or audio tape. Advances in technology are making mass copying and distribution of software far easier and less costly. Whereas once CD replication only occurred in multi-million dollar factories, now a basic CD burner costs under $200, and marginally more expensive models burn dozens of CDs at a time. And of course, now the Internet allows a pirate to copy and distribute thousands of perfect copies worldwide with the click of a mouse. As broadband Internet access proliferates, the speed of Internet piracy will increase.

The result is an increasing problem that is increasingly hard to cope with. Some anecdotes about piracy of LucasArts games demonstrate this reality.

We have not released a single game this year that was not available in a pirate version on the Internet within a week of arriving on store shelves – and in some cases the products were available on the Internet before they reached the stores. In addition, with each new release of one of our games, it is commonplace to find "dutch" auctions of home-burned copies. In these cases, an individual will use his or her own CD burner to create 20 or 30 copies, and then offers them for sale over an Internet auction site like eBay or Yahoo!. On a larger scale, with each new major release we find significant quantities of pirated games in Hong Kong and Singapore, and often find these games exported and on sale in Australia, New Zealand, Germany, Brazil and Argentina, among other places. LucasArts released two games to coincide with the May releases of Star Wars: Episode I: The Phantom Menace, and within days it was possible to buy a three-pack in Hong Kong – pirate copies of both of our games along with a pirate VCD of the film for a mere $15.

Of perhaps most relevance to this Committee is the fact that the vast majority of piracy suffered by U.S. companies occurs in other countries. To be sure, piracy of entertainment software does occur in the U.S., but it generally involves small-scale

operations: a person rents a CD game at the local Blockbuster and makes copies for friends on a home CD burner; a college kid sets up a "Warez" or "Gamez" Web site or FTP site so those on the Warez scene can exchange pirated games; or a small-time pirate offers a couple dozen pirated copies for sale on an Internet auction site. The impact of these small-time pirates should not be underestimated: in the aggregate, they cost our industry considerable lost revenue, particularly because $40 is the average price of a game in the U.S. This form of piracy is growing in the U.S. and is increasingly alarming. But it pales compared to international piracy.

Global game software piracy is increasingly dominated by international organized crime rings. Entertainment software piracy makes good business sense for them: it is relatively cheap to set up an operation; profit margins are extremely high; world attention is focused mainly on stopping drug, human, and other types of smuggling; some governments have the attitude that these are "only games"; and the pirates can pretend to be legitimate business people. Entertainment software piracy has become such big business that the crime syndicates have developed their own "brands"; for instance, the "Players" ring operating out of Southeast Asia stamps its CDs with its own logo, which often replaces the trademarks of the true game publishers.

The scope and breadth of the international trade in pirated entertainment software is astounding. Pirated entertainment software and related components are mass-produced and assembled in countries such as China, Bulgaria, Macau, Hong Kong, Thailand, Malaysia, Paraguay, and Taiwan. For example, in June 1999, Paraguayan prosecutors raided a CD replication factory and seized 62,000 infringing game CDs. This pirated entertainment software is usually shipped through nations, such as Paraguay, and Panama, that have spotty Customs enforcement. The pirated software then makes its way to its destination countries, which include places like Russia, Brazil, Argentina, Indonesia, Malaysia, Thailand, Turkey, and Poland.

This pervasive, illegal international trade in U.S. entertainment software effectively bars the U.S. owners of the intellectual property from entering many markets. U.S. entertainment software companies simply cannot compete with the pirates. Pirates, who have made no investment in research and development, pay no taxes, and run sweatshops, sell entertainment software at a mere fraction of the price U.S. companies would have to charge to break even. The result is that, in many countries, virtually all entertainment software sold is pirated. In China and Russia, in particular, the numbers are staggering. In China, the 1998 piracy rate was 95%, and my industry lost over $1.4 **billion**. In the Russian Federation, the piracy rate was 97%, and my industry lost $240 million.

Though China and Russia account for approximately half of the losses suffered by the entertainment software industry in 1998, the rest of our losses were evenly spread around the world. In Central and South America: Brazil had an 89% piracy rate and accounted for $103 million in losses; Mexico had a piracy rate of 85% and accounted for $170 million in losses; while Argentina had 94% piracy rate and accounted for $87 million in losses. In Southeast Asia: Thailand had a 92% piracy rate and accounted for

$93 million in losses; Hong Kong had a 72% piracy rate and accounted for $112 million in losses; and Indonesia had a 95% piracy rate and accounted for $81 million in losses. Europe, it may surprise you, is also a problem: Bulgaria has a 99% piracy rate and accounted for $50 million in losses; Turkey had an 80% piracy rate and accounted for $92 million in losses; and even Germany has a 52% piracy rate accounting for $94 million in losses.

And what's especially alarming is the fact that the price of counterfeit goods is down. Pirate goods are now cheaper, which means that the actual rate of piracy in many markets is up. In Thailand, for example, where 93 percent of the market is counterfeit, games are available for as little as seventy cents. As a rule, counterfeit PlayStation games can be found in many parts of the world for seventy-five cents to three dollars and PC games can be had for three to five dollars.

Clearly, the breadth and depth of the piracy problem for the entertainment software industry is significant. But why should this Congress or the U.S. government care? Some might say, "If the entertainment software industry is growing so fast and doing so well, why is it so concerned about piracy? Isn't piracy just the cost of doing business?" Still others say piracy is a form of "Robin Hood" behavior where big software companies lose a little profit while consumers get product a bit more cheaply.

But this notion that piracy is a "victim-less" crime is wrong. Creation of a quality game typically requires approximately two years of work, $3-4 million, and the full-time devotion of dozens of programmers, artists, sound technicians, researchers, testers, and managers. These people routinely put in 18 hour days to bring a product to market. Sometimes they work directly for software publishers; in other cases, they develop product under contractual arrangements with publishers. When a game is pirated, sometimes before it is even released, this creative community is robbed of the chance to realize the full reward for their extraordinary talents.

Others are hurt by piracy as well. Legitimate consumers who play by the rules and retailers who depend on this category for significant sales are adversely affected. Consumers are also hurt because piracy takes away much of the incentive to create new and interesting properties and technologies. In other words, when the pirates win, it is the public that loses.

In macroeconomic terms, think of how much faster the entertainment software industry could grow if countries like China and Argentina adequately and effectively protected intellectual property and, therefore, managed to reduce piracy rates to the 50% range. This would not only mean the opening of vast new markets to our industry, but would mean tremendous benefits for both the U.S. and foreign economies. To the U.S., it would mean more high-paying, high-skilled jobs, a stronger balance of trade, and more tax revenues from many sources, such as foreign sales, salaries of additional U.S. workers, sales tax, etc.

Foreign countries would likewise benefit from the establishment of a market for legitimate entertainment software. They would collect tax revenue from the sales of legitimate software, U.S. companies establishing a presence in the newly-opened markets, indigenous software companies springing up in an intellectual property-friendly environment, and higher incomes paid by the entertainment software industry. Furthermore, a legitimate entertainment software presence translates into desirable jobs: the pre-teen child who "runs" pirated software across the Paraguayan border for one dollar a trip will be replaced by a legitimate distributor employing drivers, accountants, and managers; the sweatshop worker will be replaced by programmers, artists, and testers.

So, how do we achieve this "business utopia" of accessing new foreign markets where the piracy rate has been brought down to a "moderate" 50%? Adequate and effective protection of intellectual property typically requires three elements: good intellectual property laws, enforcement of those laws, and technological protection of intellectual property.

First, you need laws on the books that, at least in theory, provide sufficient protection to intellectual property. The U.S. legal regime provides a model for the world; unfortunately, many countries choose not to follow it, and, of course, many of these countries are the very same ones responsible for huge piracy losses suffered by the entertainment software industry. Don't take just my word for it: in its April 1999 Special 301 report, the United States Trade Representative identified countries such as Argentina, Brazil, Colombia, Mexico, Taiwan, China, India, Indonesia, Poland, Paraguay, Thailand, Turkey, Macau, and Venezuela as providing insufficient protection or access to U.S. intellectual property owners.

Many of these pirate nations have signed treaties committing them to protect intellectual property, but have not met their treaty obligations. All developing countries in the World Trade Organization are required to fully implement the Agreement on Trade-Related aspect of Intellectual Property Rights by January 1, 2000. Unfortunately, despite having been granted a five-year transition period to implement, few of these countries are on track to be TRIPs-compliant by that date, and several are now agitating for a further transition period. Likewise, many pirate nations have signed the World Intellectual Property Organization Copyright Treaty (WCT), which requires ratification by 30 nations to enter into force, but few have yet to ratify and/or implement it.

Even where a nation has the appropriate intellectual property laws on the books, these laws do little good if they are not enforceable or adequately enforced. An adequate legal regime must provide for both civil and, in certain cases, criminal enforcement. Adequate enforcement means both that a nation does not present obstacles to civil enforcement efforts, and has the will to pursue criminal enforcement itself.

Obviously, the entertainment software industry has the primary responsibility for protecting its products through civil enforcement. We aggressively pursue civil enforcement around the world. On a daily basis, the IDSA and its members send

"cease and desist" letters to identified pirates, work with Customs port inspectors to identify, detain, and seize shipments of pirated games, take down pirate Web sites and infringing Internet auctions, and, of course, initiate law suits against pirates.

Our industry's civil enforcement efforts in the U.S. have been growing. Before this hearing, we saw forty thousand counterfeit game CDs seized by Miami Customs destroyed over on the Capitol grounds. This past August, the IDSA and six member companies, including LucasArts, filed a lawsuit against six online pirates believed to be part of the largest hacking rings in the United States. Operating in San Francisco, Dallas, Austin, Minneapolis, Philadelphia and the Champaign (IL) area, the Class, Paradigm and Razor 1911 hacking groups are part of an international operation to obtain and post on the Internet pre-production copies of games or games that had just hit the market. After being uploaded onto the Internet, the games were downloaded by individuals for their own use or downloaded by pirate manufacturers in Russia and Asia who stamped out counterfeit CDs for sale around the world. "The scene," as the ring is called by participants, includes hundreds of individuals who work together to coordinate obtaining the games, breaking the security code, posting and transferring files to Internet sites and transferring files to entities outside the U.S. who pay cash for the game files.

Unfortunately, civil enforcement efforts in other nations are often far less successful. As stated previously, many nations simply do not have legal regimes that provide adequate civil remedies. In some nations that do have a legal regime, a variety of factors conspire to make it difficult or impossible to bring a successful civil suit. For instance, in some nations such as Mexico, Poland, and Russia, it is either difficult or impossible to obtain an ex parte seizure order, which is essential to ensure that pirates are not given warning allowing them to simply relocate the tools and products of their counterfeiting operation. In many nations, as in Thailand and Indonesia, penalties are so low as to provide no deterrent to copyright infringement. In other nations, such as Paraguay and Argentina, custom officials either do not have the power or the will to stop the flow of counterfeit product. And, of course, government corruption at all levels presents an obstacle to enforcement in many countries.

Criminal prosecution, which may result in fines and/or imprisonment, is the most effective deterrent to entertainment software piracy. In fact, because many entertainment software pirates, particularly small-scale ones, are effectively judgement proof, the threat of imprisonment often provides the only effective deterrent. Furthermore, prosecutors have at their disposal more effective investigative tools, and thus are more likely to bring a successful action.

Both in the U.S. and around the world, criminal enforcement against entertainment software pirates has been spotty. Inadequate sentencing guidelines in the U.S. make it extremely unlikely that an entertainment software pirate would actually "do time", thus prosecutors have, to date, been extremely hesitant to prosecute such pirates. We are hopeful that new Sentencing Commissioners, who are in the confirmation process at the moment, will amend the Sentencing Guidelines to create an effective deterrent to

entertainment software piracy. We are also hopeful that an intellectual property rights (IPR) initiative recently announced by the Department of Justice, Customs Service, and other agencies will result in prosecutions of entertainment software pirates. Already, federal prosecutors have succeeded in getting the first conviction under the No Electronic Theft Act, securing a guilty plea for copyright infringement from a University of Oregon student who had illegally posted entertainment software, business software, sound recordings, and movies on the Internet. This is encouraging and we commend the Justice Department for its efforts on this case.

While we anticipate more criminal prosecution of entertainment software pirates in the U.S., criminal prosecution in many other nations is non-existent or ineffective. In China, pirate retail outlets continue to operate openly in Shanghai, Guangzhou, and Hong Kong, and the best government enforcement efforts take the form of meek warnings that the pirates must soon start selling legitimate goods or face closure. While in Paraguay several raids of entertainment software pirates have been conducted, no criminal sentences have been issued in those cases. Similarly, the Malaysian authorities have conducted raids on pirates, but convictions are rare and, even when secured, fail to impose deterrent penalties. Raids in Macau also rarely result in deterrent fines, prison sentences, or the confiscation of replication equipment.

As I stated, protection of IPR involves three elements, and I have already discussed the first two: an adequate legal regime and enforcement of that regime. The third element is technological protection, but I will address this only in brief as it is perhaps tangential to this hearing.

There are a wide variety of technological measures that the entertainment software industry employs to protect its IPR. These measures include copy-protection technologies, digital watermarking, authentication procedures, hardware toggles, and access protection measures. However, no technology, no matter how sophisticated, is foolproof, and many have significant downsides such as degradations in game play or equipment compatibility. In reality, each technology has a limited period of usefulness, the nature of our industry being such that hackers see it as a game in and of itself to be the first to crack these technological protection measures. The basic point I want to make is not that technology is hopeless, rather it is that no technology represents a silver bullet. The entertainment software industry will continue to invest significant resources in developing and employing technological protections, but this only extends a continuous cycle of trying to stay one step ahead of the pirates.

So, what can Congress and the U.S. government do to help us deal with the vast problem of international intellectual property piracy? As you might imagine, I have a few ideas about this:

(1) As I noted above, prosecutors often decline to prosecute copyright pirates because under the current Sentencing Guideline for intellectual property crimes such pirates often escape "doing time." Of course, this fact only emboldens pirates to continue their thievery unabated. Futhermore, the absence of a

sufficiently deterrent Sentencing Guideline puts U.S. trade negotiators in a difficult position when arguing that other nations should provide sufficiently deterrent penalties. If, after its appointment, the United States Sentencing Commission does not act quickly to create sentencing guidelines that will effectively deter copyright infringement, Congress should consider stepping in and doing so itself.

(2) The recently announced federal IPR initiative is a definite step in the right direction, but will only be successful if the government remains thoroughly committed to it. As with the "war on drugs" and other, similar federal enforcement efforts, a committed federal campaign can play a powerful role in both shaping public perception about certain crimes and actually reducing the rate of such crimes. Such an effort is particularly necessary with intellectual property theft because of the widespread public perception that it is a "victim-less" and minor crime. Pirates, and the public in general, need to be sent a clear message that stealing intellectual property is as bad as stealing a car or any other tangible property. Through exercise of its oversight role, Congress should ensure that the Executive Branch remains committed to this IPR initiative.

(3) From a defensive standpoint, Congress should carefully consider whether legislation under consideration could increase intellectual property piracy. In particular, Congress should not expand or extend in any way the liability limitations for Internet access providers contained in the Digital Millenium Copyright Act (DMCA). A number of Internet businesses, including certain auction houses, have already claimed that the DMCA excuses them from responsibility for the black markets in intellectual property they have created. While we are confident that these businesses do not qualify for the DMCA liability limitations, any expansion of the DMCA might create loopholes that further encourage Internet piracy.

(4) One area in which a change to U.S. law may be necessary involves the Generalized System of Preferences (GSP) program. Developing nations that are the source of major piracy, and in particular those that USTR itself lists in the Special 301 report as failing to provide adequate and effective protection to intellectual property, should not be given preferential trade benefits under the GSP program. Currently, the GSP program gives USTR discretionary authority to deny GSP benefits to nations that fail to provide "adequate and effective protection to intellectual property." However, the GSP program does not define "adequate and effective protection" while Special 301 does provide a specific definition for that same phrase. If Congress harmonizes these two definitions, it will provide the USTR will much clearer guidance that a country listed under Special 301 should not receive GSP benefits.

(5) While the Executive Branch has, for several Administrations, placed an emphasis on international intellectual property protection, increasing public demands on decreasing federal resources make it vital that Congress continually communicates its interest in intellectual property protection. In this regard, Congress should provide support and encouragement to the Executive Branch in its efforts to wring true value out of the TRIPs Agreement and WIPO Copyright Treaty for which the U.S. fought so hard. Congress should encourage the

Executive Branch to aggressively press developing nations to meet their TRIPs Agreement obligations by January 1, 2000. I know this deadline is now unachievable for many developing countries, but having had a five-year transition period, whose fault is that? Furthermore, when a country is dragging its feet in implementing TRIPs, the U.S. should initiate a WTO action. Under no conditions should the U.S. consider extending the transition period for any developing nations. As for the WIPO Copyright Treaty, Congress should likewise encourage the U.S. government to continue to aggressively press other signatories to ratify and/or implement the Treaty.

(6) I also believe Congress can play a more direct and equally important role in the effort to persuade other nations to implement the TRIPs Agreement and ratify and/or implement the WIPO Copyright Treaty. I am sure that, due to your positions and evident area of interest, many of the Members of this Subcommittee have close relations with high-ranking officials in foreign governments. I would ask that you directly press your foreign counterparts to protect intellectual property, and where appropriate take the necessary actions regarding the TRIPs Agreement and the WIPO Copyright Treaty. Such outreach would be extremely effective in convincing nations to put intellectual property laws on their books, or where the laws exist, in giving those nations the will to enforce their laws.

In conclusion, I could recite once again the economic, tax, and consumer damage caused by piracy both in the U.S. and abroad, but I would like to close by focusing on what should be the most important issue. In Section 8, Clause 8 of the United States Constitution, our Founding Fathers specifically gave the U.S. Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Our Founding Fathers chose to provide specific protection for intellectual property because they recognized that the unleashed creative spirit provides myriad benefits to society, but needs a nurturing environment in which to flourish. Piracy destroys the spirit and poisons the environment of creators. It is for this reason, above all others, that the Congress must vigilantly adhere to its constitutional directive to protect intellectual property.

Testimony of Charles M. Caruso, Esq.

International Patent Counsel
Merck & Co., Inc.

Before the International Economic Policy and Trade Subcommittee of the House International Relations Committee

October 13, 1999

Good afternoon, Madam Chairwoman and members of the subcommittee, and thank you for the opportunity to speak with you today about the very important issue of the need to protect American intellectual property rights abroad. I am Charles Caruso, International Patent Counsel for Merck & Co., Inc. Merck is a U.S. research-intensive pharmaceutical company with operations worldwide focusing on the discovery, development, manufacturing and marketing of important medicines that treat, prevent and cure disease.

Research

Merck employs 5,000 scientists and spent more than $1.9 billion in 1998 for research and development covering nearly every major field of therapeutic research. This amount represents almost 10 percent of all spending by U.S.-based pharmaceutical companies and as much as five percent of all spending by the industry worldwide. Merck continues its commitment to research by increasing research spending in 1999 to $2.1 billion.

This investment has yielded impressive results -- since January 1995, Merck has introduced 15 new medicines -- an unprecedented record for the Company. Some of these breakthrough treatments include: *Fosamax*®, the first non-hormonal drug for treating and preventing post-menopausal osteoporosis, *Cozaar*,® a new class of hypertension medication, *Crixivan*®, a protease inhibitor for the treatment of HIV infection, *Maxalt*®, to relieve migraine headaches, *Singulair*®, for chronic asthma in adults and children over the age of six, *Varivax*®, the first chicken pox vaccine.

Merck's commitment to research will also bring new medicines and vaccines to patients in the future. Some promising treatments currently developing in Merck's research programs are for the treatment of cancer, depression, infection, osteoarthritis and pain. As a major discoverer of vaccines, Merck is currently targeting vaccines at HIV (the virus that causes AIDS), the human papilloma virus (a major cause of cervical cancer), and rotavirus (a leading cause of diarrhea and dehydration in children).

The Link between Research and Intellectual Property Protection

As Merck's International Patent Counsel, I am keenly aware of the link between our ability to invest in research and intellectual property – especially patent – protection worldwide. Strong patent protection is of fundamental importance to the pharmaceutical industry because drug research is highly risky, time-consuming, and expensive. Only one of 5,000 new chemical compounds discovered in the laboratory ever makes it to market. In part because of the increasing complexity of the chronic and degenerative diseases that have become the main targets of pharmaceutical research, it now takes on average 12 to 15 years to bring a new drug from the laboratory to market at a cost of more than $500 million.

Once the difficult and expensive process of invention and discovery is concluded and the product approved, however, the chemical duplication of the active ingredient is often inexpensive to duplicate. This is why the industry faces challenges with the protection of pharmaceutical patents in many overseas markets.

To encourage risk and innovation, a patent allows an inventor to prevent others from manufacturing, using, importing or selling an invention in the U.S. for a limited period of time, but a patent does not grant a monopoly, as that term is generally understood. By encouraging the invention of new medicines, patents create competition and provide patients and doctors with a range of choice in every therapeutic category. Thus, while a patent provides an exclusive right to a particular invention for a limited time, it does not provide an exclusive right to serve a market or perform a function.

For example, the second and third protease inhibitors—a breakthrough class of AIDS drug—were introduced in March 1996, only three months after the first such drug was introduced. And, of course, once the patent expires, legitimate generic copies are marketed by dozens of companies, injecting further competition into the system. The difficulty with patent piracy, as opposed to legitimate generic competition, is that because

piracy does not respect any period of exclusivity afforded by a patent, it compromises the incentive and ability to invent new medicines.

The evidence demonstrates the direct relationship between strong patent protection and pharmaceutical innovation. In the United States, for example, in the decade after the enactment of the Orphan Drug Act of 1983, which provided limited market exclusivity and tax credits for drugs for small patient populations, 99 drugs for rare diseases were developed, up from 10 in the decade before enactment. Because of the promise of limited market exclusivity provided by the Orphan Drug Act, pharmaceuticals companies were able to both invent new drugs, and develop new uses for older medicines, greatly enhancing the health of Americans suffering from rare diseases.

Experience in foreign countries also demonstrates the benefits of protecting intellectual property. Pharmaceutical R&D increased by more than 600 percent in the decade after Italy's weak patent law was strengthened. After Canada improved its patent laws in 1987, pharmaceutical R&D rose from 6 percent to 10.6 percent of sales in four years. Announced foreign direct investment in Brazil's pharmaceutical industry exceeded one billion dollars after the government enacted a new patent law protecting pharmaceutical patents. In a 1988 World Bank study of 12 industries, it was estimated that 65 percent of drug products would not have been introduced without adequate patent protection.

Try to envision health care without 65 percent of the medicines available today. How many chemotherapy drugs, cardiovascular medicines, medicines that are making progress against AIDS, drugs that save the lives of premature babies, and many other innovative medicines would not exist? That is the importance of intellectual property protection to patients. Without the array of drugs available to patients, our quality of health care would be lower, and the hope for cures for currently untreatable diseases would be diminished.

The tangible evidence of this was announced by the National Center for Health Statistics last week. The scourge of AIDS was the eighth leading cause of death in the United

States in 1996, in 1998 it fell out of the top 15 causes of mortality, an unprecedented change in vital statistics in the last 50 years, and a direct result of the new anti-retroviral drugs discovered by the pharmaceutical industry. In the words of Harry M. Rosenberg, at the National Center for Health Statistics, "you could look at it [the decline in AIDS deaths] as a banner year."

Global Policy Challenges

This hearing is particularly timely as the United States and other World Trade Organization (WTO) members are preparing for the WTO Ministerial in Seattle later this year. Thanks to the leadership of the Congress and the Executive Branch, especially the US Trade Representative, the United States has led the fight for strong international protection of intellectual property. Since a principal purpose of this hearing is what policies should be encouraged to improve the terms of global intellectual property protection, I would like to focus my remarks on the WTO and the Seattle meeting.

Two issues are of immediate concern to the industry: the implementation of the existing intellectual property – formally known as the agreement on Trade-Related Aspects of Intellectual Property Rights, or TRIPs – agreement; and secondly, the possible attempts by some WTO members to initiate an effort to weaken the TRIPs agreement, especially as it relates to pharmaceuticals.

On the implementation issue, I would note that everyone is familiar with the "Y2K" problem as it relates to computers. The pharmaceutical industry, however is facing its own "millennium bomb" which might explode on January 1, 2000. According to the terms of the TRIPs agreement, many developing countries were given a five-year "transition" period (beginning January 1995) before they had to enact national laws and regulations consistent with TRIPs standards. (By contrast, developed countries like the United States were allowed 12 months.) We are pleased that the US Trade Representative has announced that it will review developing country compliance with

TRIPs in December, and is prepared to initiate dispute settlement proceedings in the WTO if our trading partners do not comply with their international obligations.

We remain concerned, however, that a number of developing countries will not, in fact, meet the January 2000 deadline. In some cases, we believe that no legislation will be enacted by the deadline, and in other cases, such as Argentina, the relevant laws have been amended but in our view the Argentine patent law remains manifestly inconsistent with TRIPs. The failure to implement TRIPs will have three adverse results:

- *The WTO's dispute settlement process will be overwhelmed by the flood of WTO intellectual property complaints that will likely occur on January 1, 2000;*

- *The viability of the WTO as a body that can develop international rules and enforce them will be seriously called into question; and,*

- *The long-delayed and expected commercial gains for those WTO Members that have already met their TRIPS obligations will not be realized,(because other WTO members will continue to deny patent protection), effectively extending the bargained-for transition periods beyond the period permitted by the TRIPS Agreement;*

We believe it is crucial that the Congress and the Administration work together to put a priority on the implementation of existing trade agreements, including TRIPs, as part of the WTO agenda. In the case of pharmaceuticals, one important element of the TRIPs agreement is that as of January 2000, all WTO members will be obliged to protect against the unfair commercial use of proprietary data used in the registration and approval of pharmaceuticals. A principal means by which "pirate" companies register their products is the wholesale copying of the originator's clinical trial data, which is the basis for

proving that a new medicine is safe and effective for human use. Such data is compiled after years of testing and clinical trials, and is enormously costly to generate. Strict implementation and enforcement of the prohibition against unfair commercial use of this data by "pirate" companies could bring immediate benefits to the American research-based pharmaceutical industry.

The second issue concerns the likely attempt in Seattle by some countries to define a WTO trade agenda designed to weaken TRIPs, and create broad exemptions targeted at pharmaceutical patents. As I have described in my testimony, there is a fundamental and inextricable link between intellectual property protection and pharmaceutical innovation. If the intellectual property foundation of the pharmaceutical industry is threatened, the result will be fewer medicines and vaccines for patients everywhere. I urge this Subcommittee and the Congress to provide as much support as necessary to the US Government negotiators in Seattle to resist any and all attempts to re-open the TRIPs agreement for the purposes of diminishing its standards.

I would like to conclude by quoting Dr. Judith Samson, RN, President of the United Patients Association for Pulmonary Hypertension, Inc., "Patents protect innovative medicines from profiteering by pirates and preserve incentives for reinvestment into the research that will lead to tomorrow's discoveries."

Thank you for the opportunity to testify today, and I am happy to answer any questions.

Salvatore J. Monte

President, Kenrich Petrochemicals, Inc.

October 13, 1999

Testimony before the House Committee on International Relations

Subcommittee on International Economic Policy and Trade

Madame Chair, Ranking Member Menendez, Members of the Subcommittee, I am Salvatore J. Monte, President of Kenrich Petrochemicals, Inc. of Bayonne, NJ. I sincerely thank you for your invitation to testify on this very important subject.

Let me first thank Congressman Menendez for all the help he has given over many years to my wife Erika and me in our battle to protect our property. He has stood for us as our champion in our battle even though we are just the "little guys." We consider ourselves fortunate to have him as the Congressman from Bayonne because of his willingness to listen to and help a small business. We greatly appreciate everything he has done for us.

Erika and I are the owners of Kenrich in the Hook section of Bayonne. I am an entrepreneur and the inventor of Ken-React® organometallic titanates and zirconates. My invention is one of those rare fundamental "coupling" concepts that touches all types of manufactured items – they form an invisible chemical bridge in atomic monolayers at the interface of the inorganic and organic material world.

The titanates I invented are little known outside the world of specialty chemicals but I can assure you that the use of these chemical agents makes your life easier in many ways virtually every day. The Fuji® videotape you record on. The Verbatim® floppy-disc you put into your computer's "A" drive. The ink used to print your documents on your Canon® desktop printer. The toner used in your office Xerox® copier. The Wilson® TITANIUM golf ball patented for distance and spin. The Revlon® Cover Girl cosmetics you see on the store shelves. They all have one thing in common. They are made with titanates—patented specialty chemicals called Ken-React®.

You would think that anybody who is responsible for the invention of these important chemicals would have been rewarded handsomely for it. Unfortunately, that is not the case. It has been others, who have stolen our intellectual property and refused to pay for it, and have profited from my pioneering work. They have stolen my property and the U.S. government has let them get away with it.

Kenrich has been the victim of an unfair method of competition by its Japanese licensee Ajinomoto, Inc. of Tokyo, Japan. Essentially the scheme works as follows. Japan in the 1970s and 1980s maintained a closed market, particularly for the importation of chemicals, through a series of non-tariff trade barriers. To sell into the Japanese market, foreign companies were required to form joint ventures with Japanese companies who would manufacture the chemicals in Japan under license. Such a 'working' requirement is illegal under both U.S. law and international trade law.

The licensing agreement would necessarily require the foreign companies to turn over the technology and manufacturing know how. The purpose was to expropriate U.S. technology and enable Japan to catch up with the United States and Europe in the chemical sector where they lagged behind. The Japanese licensee would then avoid paying any but a minimum amount of royalties though the notorious practice of patent flooding, claiming that they were not using the licensed technology, but were using "new" technology instead. This is exactly what happened to Kenrich.

Our small business would be larger and more profitable and we would have brought hundreds of new jobs to Bayonne and the surrounding Hudson County area if we had received the payments we deserved. Instead, Ajinomoto, Inc. of Japan has been allowed to rampage across the international trade arena with impunity, hiding behind technicalities, abusing the proprieties of international diplomacy while, at the same time, profiting from the illegal use of our property.

Kenrich had 90 employees when Congresswoman Helen Delich Bentley gave the first speech about Kenrich on the House floor on October 1, 1990. We now have less than 30 people at our facility. I estimate there are now 1,000 people working for Ajinomoto in plants, laboratories and offices that could have been Kenrich jobs for Americans.

Ajinomoto is a $6 billion Japanese conglomerate that, unfortunately, has turned out to be a corrupt player in international trade. It recently was found guilty in U.S. Federal Court of price fixing. And Ajinomoto has been a predator "partner" for Kenrich. Ajinomoto owes Kenrich approximately $100 million in unpaid royalties and we can't persuade the U.S. government to help us get the money -- or even to give us our day in court.

In the 1970's, when we were attempting to expand our company, we were lured into a trap by the Japanese kereitsu that opened the door for Ajinomoto to obtain access to my most valuable inventions. In the 1980's, we struggled valiantly to get justice. We have fought with Ajinomoto for our rights and, as I am sure every member of the Subcommittee knows, that means we are fighting the entire economic, legal and government structure of Japan.

Our Ken-React® titanate technology is truly high-tech and is covered by 27 U.S. Patents assigned to Kenrich and more than 200 Kenrich composition-of-matter patents filed worldwide. Over 1,300 primary, non-subdivisional patents have been issued to other companies using the Ken-React technology. These are the real patent types and not the junk patent flooding type. The Japanese have 80% of these legitimate patents, many of which are issued in the European Union and the U.S. and as many as 92 countries besides Japan. Almost all the high tech materials coming out of Japan contain titanates and zirconates covered by my invention.

Then there are the notorious Japanese flooding patents. There are over 600 Japanese flooding patents alone on my phosphato and pyrophosphato titanates that are not counted as part of the aforementioned 1,300 primary patents. You can tell they are patent flooding types in two ways: 1) The American Chemical Society CAS (Chemical Abstract Services) will not only abstract the patent - but, for an additional cost, they will provide the chemical structure of the molecule cited in the Japanese patent, and 2) for an additional cost they will provide you with not only the number of times the so-called patented molecule has been referenced in other technical articles and patents, but also the reference when the molecule was first cited.

Invariably, the Japanese patent flooding type patents will only have one or two references indicating no real world commercial interest in the molecule for application studies. These laboratory molecules are produced just to file patents. The molecules serve only to obfuscate and defeat any legal and/or forensic efforts by the true inventor to establish legitimacy. Legitimate patents such as Kenrich's have from several to several hundred references in the literature.

Tokuyama Soda has filed more than a dozen flooding patents on my isostearoyl titanate molecule. These actions show the intense interest by the Japanese in my inventions. Of course, Kenrich does not license Tokuyama Soda so we have no legal recourse in Japan. The point is that the patents should never have been issued in Japan. But the current patent setup suits the Japanese Mercantile System just fine.

Our saga of international corruption began innocently in 1976 when the Japanese company Nitto Shoji approached Kenrich to sell 43 different Ken-React molecules into Japan. At least, we *thought* it was innocent.

I had already invented, developed and patented the licensed breakthrough specialty chemical titanates starting in 1973. In the late 1970's, Japan's economy was hot. Its companies were expanding globally and its products were becoming world leaders. I thought, as did many others, that if the titanates were to be successful globally, Kenrich must enter the Japanese market. And we did, and were quite successful – initially.

But Japan was, and still is, a closed market. To sell in Japan, Nitto Shoji made it clear, we needed to work through a Japanese partner. We were told that the Japanese only trust Japanese quality standards and like to do business with only local Japanese manufacturers. They like close ties with their vendors and didn't know Kenrich. Besides, "Mike" Sano – Nitto's Kenrich contact person sent us a Japanese Government Environmental Impact Report on my first Ken-React® molecule (KR® TTS) that he claimed cost Nitto $125,000 for the tests. He explained that since there were 42 other molecules, we must get a Japanese manufacturing partner with close ties to the Ministry of Health to expedite and lower the costs of the approval process. The sham is that the licensed chemicals were not ENCS registered by Ajinomoto as we will explain.

So 20 years ago, Erika and I went to Japan to teach the titanate technology and put together a deal arranged by Nitto Shoji. We were steered by Nitto Shoji to Ajinomoto, in what we later realized to be a prearranged and highly orchestrated setup. Ajinomoto is not only the world's largest maker of monosodium glutamate, but it also produced many household products such as Aspartame® under license from respected companies like Searle. We thought then that we had a world class partner to help spread my Ken-React® mission and life's work to develop a more efficient use of raw materials through titanium chemistry.

We therefore contracted in 1980 for Ajinomoto to manufacture and distribute 15 of our titanates in Japan and other parts of Asia. Ajinomoto made many food and drink items and had a fine organics department that knew how to get new chemical additives approved. But, the 43 Ken-Reacts were artificially and arbitrarily restricted to 15, ostensibly to reduce the still high cost of testing and Government chemical inventory registration.

Reluctantly, I had to provide Ajinomoto with the formulas for the titanates. In return for the manufacturing know-how, Ajinomoto agreed to pay Kenrich a yearly royalty of a minimum of $50,000 plus 5 percent of the total sales exceeding $1-million for the products sold in Japan, South Korea and Taiwan. We would have made a larger profit if we had been allowed to sell into the Japanese market like we still do to the rest of the world through our 52-nation international agent network.

We learned in the mid-1990's that Ajinomoto had failed to live up to the contract. Only two of the 15 licensed chemicals were ENCS registered. The clear language in our contract had simply been ignored. Ajinomoto could not have anticipated the low-cost accessibility created by modern computerization of records that would uncover their deception.

By February 1983, we estimated that Ajinomoto had reached the $1 million sales mark – but its semi-annual sales reports to us began to look and feel more and more like a fabrication. We kept quiet – afraid that the Japanese conglomerate would crush us like a grape in the legal arena because of the anecdotal nature of the evidence we had at that time of their cheating on us.

We estimate Ajinomoto's 1998 sales to be about $200,000,000 on business resulting from the Kenrich license. We know that Ajinomoto is making big money on the sale of titanates, enough perhaps to owe Kenrich as much as $50 to 100 million in unpaid royalties. We know because Ajinomoto's sales reports to us are inadequate and inaccurate. We know because of our sales experiences in similar situations in other parts of the world. We know from eyewitness accounts of large sales by Ajinomoto. We know from the documented uses of the titanates in markets dominated by Japan as obtained from American Chemical Society patent and technical paper abstract searches dating back to 1974.

We know because in 1984, Erika and I hand carried to Tokyo documentation of territorial violation of the contract. The documentation showed that on February 24, 1984, Nichimen Trading Company quoted a price of US$20.33/kg FOB Yokohama (1 MT by sea) for the importation of four drums of Ajinomoto manufactured Ken-React® TTOP 12 into Johannesburg, South Africa for Xactics Isando, Ltd. Ajinomoto stonewalled Kenrich.

We know because of the documented, outright lies told to me by Ajinomoto on purely technical matters such as their refusal to recognize the existence of their own patent on an *isopropyldilauroylnonadecafluorodecanoyl titanate* (JP 03133990 dated 7 June 1991) developed from the Kenrich license know-how.

Ajinomoto even refused to use our Kenrich Ken-React trademark in Japan. Ajinomoto falsely claimed that the *Ken-React* trademark created a conflict with Sanyo Casei's *React* trademark. Kenrich allowed in 1980 a substitute *Plenact* trademark to be used by Ajinomoto in Japan. In 1990, ten years after Kenrich's *Ken-React* had been filed in Japan, the Japanese MITI approved the *Ken-React* trademark. When Ajinomoto was then asked by Kenrich's counsel to honor the contract, they stalled for nine months. Ajinomoto then responded in a meeting in their Teaneck, NJ offices that they could not comply with the contract because it would be a violation of Japanese trade law concerning "tied-up" licenses. The trademark issue is one of the many issues Kenrich wants to argue in U.S. Federal Court and has been waiting patiently for its government to allow it to do so.

All this and more point to a pattern of dishonesty by Ajinomoto. Besides, after a while, you know when you are just plain being jerked around.

Ajinomoto has not only done well selling the products it stole from us. It has made money from the products modified by the Kenrich technology. For example, it led a consortium of Japanese companies to build a gamma ferric oxide plant for China Steel in Taiwan. Gamma ferric oxide is also known as magnetite used in magnetic recording media and toner. Ajinomoto was selected because the treatment of the gamma with 0.5% of the Kenrich licensed Ken-React® KR 38S was key to its very dramatic improvement in high performance.

How do I know KR 38S is on all the gamma ferric oxide produced in Japan? Not only can one read it in a 1996 Xerox U.S. Patent, but also I know because when we visited Ajinomoto in 1979, one of their lab technicians broke from the greeting row ranks. He bowed deeply to me and handed over a small rubber capped glass vial filled with an orange-brown powder. He straightened, stepped back and said proudly, "Monte-San, I am pleased to tell you that all the iron oxide produced in Japan is treated with KR 38S". It was a very moving and gratifying moment for me. Validation is as important as money in the creation process known as invention.

I know because, in fact, a 1996 United States patent (US 5,489,497) issued to Xerox for a toner designed for its new digital copiers is based solely on 0.5% KR 38S treated spherical gamma ferric oxide sold to them by Toda Chemicals Co., Ltd. of Japan. The KR 38S outperformed older-art silane surface modification technology, which currently has a worldwide market sales value of ¾ $billion. Remarkably, Ajinomoto does not report to Kenrich their KR 38S sale in Japan to Toda Chemicals. Xerox buys the iron oxide from the Japanese source, Toda Chemicals. Kenrich winds up with nothing.

In 1992, we commissioned the well-respected accounting firm Arthur Andersen, Tokyo to audit Ajinomoto's books in Tokyo. But two-and-a-half years of Ajinomoto's stalling of the Andersen audit bought Kenrich $62,400 in audit fees – and no certified audit. Ajinomoto, in clear violation of the license agreement, refused to provide Arthur Andersen with the necessary records.

While Ajinomoto sales grow and go unreported to Kenrich, it has become internationally known for its criminal activities. In recent years, it has pleaded guilty not only to price-fixing lysine in U.S. Federal Court, but also to bribery with the Japanese *yakuza* (Mafia) where its leadership has been forced to resign in disgrace for rigging stockholder meetings.

Congressman Menendez has seen the obvious manipulation by Ajinomoto, when he saw that besides the more than 1,000 patents held by more than 100 different Japanese companies, Ajinomoto also had 40 patents based on Kenrich's licensed technology. The Congressman saw the pure and simple Japanese "patent flooding" where even the slightest change in the original patent can be issued a new patent. Patent flooding is prohibited in the U.S., where a patent requires a new concept. The extensive and expensive patent position by Ajinomoto stood in stark statistical contrast to the "lack of sales growth" claimed by Ajinomoto.

There is no doubt that Ajinomoto used the closed Japanese market to force us into a deal it wanted to sell our products in Japan. With the access to our technology, they then used the Japanese patent-flooding law and other obscure Japanese laws such as "antitrust/tied-up" licenses to steal our products and our trademark from us.

While we still seek the help of our government, Ajinomoto has coordinated with the vast power of the total Japanese economic structure to deny us justice. When Congresswoman Bentley, our initial champion, first raised the Ajinomoto issue publicly, the kereitsu struck back. The Japanese CIT financial conglomerate took over the bank that held our financing and called our notes. Kenrich was forced into bankruptcy while the bank abused its position to give our customer list to Ajinomoto. Erika and I used hard work and some fast action to keep Kenrich alive but we saw the lengths to which the Japanese would reach to get back at us.

The Japanese have also used the technology they stole from us to reach into our defense establishment. The U.S. Army has contracted to purchase improved ammunition using my invention but they have purchased the Japanese substitute and not mine. The fact that our defense establishment is subsidizing and condoning intellectual property theft should be a concern to every Member of Congress. I respectfully request that General Gordon Sumner, Jr. be permitted to submit a statement for the record on this issue and that he be permitted to address the Subcommittee for one minute.

We have been left without recourse. Our contract was signed in the United States of America, Ajinomoto has major facilities in this country and major law firms in New York and Washington represent them. Despite all this, we have been barred from legal action in this country by a Supreme Court decision on an unrelated case five years after our contract was signed.

Incredibly, the State Department has assured my wife and me in writing that if we go to Japan to arbitrate our dispute in Tokyo we will get a fair hearing. Erika and I have been to Japan before with the best of intentions and were manipulated and deceived by the proven corrupt and failed Japanese mercantilist capitalistic system. It is a "crony" system that does not have the political checks and balances of the American free capitalistic system.

My wife Erika and I won't go to Tokyo to seek Japanese arbitration justice. We run a small business in Bayonne and we cannot afford the time or expense of pursuing a case in the Japanese legal system just to prove the State Department is wrong. Our State Department, which I support with my tax dollars, is wrong-minded in sending us into Japan's notoriously closed legal system.

This failure of my government to provide any help has come as a surprise to me. As a law-abiding, tax-paying small businessman, I fully expect the U.S. government to come to my aid against a Japanese company. I have not asked for anything other than my day in court and the U.S. government must help me to obtain it. Do you think Ajinomoto would be left out there hanging by its government? They as a company and their country act as one. Why should I be acting as a company without a country in my battle with Japan?

Madame Chair, I only wish that our government—the State Department, the U.S. Trade Representative, the courts and the legislative branch—would be as zealous and tenacious in protecting the interests of American companies abroad as the Japanese government is for its commercial interests. I hope that this hearing will help this subcommittee begin the process of ensuring that the State Department and other agencies start to work on behalf of American companies in the global marketplace.

Our government must especially recognize that the interests, needs and resources of small businesses such as Kenrich are different from those of big business. The State Department's advice might work for Kodak, Dupont or even Merck but it is totally unrealistic for Kenrich. Small businesses lack the resources, clout and ability to take retribution that big businesses have. Ajinomoto would not have treated Kodak or Dupont as they have Kenrich because they know they would meet them someplace else. Kenrich does not have that gorilla in the closet so we need help from our government.

Congressman Menendez introduced legislation in the 105th Congress to help us get our day in court in the United States. Unfortunately, the State Department has, without any evidence whatsoever, warned of severe global trade consequences if the Kenrich legal case is allowed into the courts. From what Erika and I have seen during the past 15 years, the global trade situation the State Department is protecting could use a lot of improvement.

Neither the State Department nor Ajinomoto's attorneys have been able to say if the very specifically worded Kenrich Bill would affect one other trade agreement. The priority for the State Department is not helping a small business from New Jersey -- it is remaining on good terms with the Japanese.

I am more than happy to provide the Subcommittee with my recommendations, based on my experience with Japan, for improvements in the intellectual property protection laws and for dealing with patent flooding.

The Subcommittee should urge the U.S. Trade Representative, the Department of Commerce and the Department of State to enter into serious negotiations with the Japanese government to live up to their international treaty obligations by ending the notorious practice of patent flooding which is simply a scheme to steal technology.

Specifically, USTR should utilize Special 301 to force these negotiations under the threat of U.S. trade sanctions. We should also act to bring a complaint before the World Trade Organization (WTO) as patent flooding is a clear violation of the Trade Related Intellectual Property Agreement (TRIPS).

In addition, Congress should immediately pass legislation such as that introduced by Congressman Menendez in the 105th Congress to give companies, particularly small businesses, a one-time only opportunity to bring their cases in U.S. Federal Court. This legislation applies to companies prevented from the federal court system by *Mitsubishi v. Soler*.

In all candor, however, such changes, no matter how well-intentioned, are not all that Kenrich needs. We need strong and aggressive action by the U.S. government that will get us into court, face-to-face, eyeball-to-eyeball, with the people who stole our property. We need your help, Madame Chair and Members of the Subcommittee, to make the Executive Branch use its clout with the government of Japan to bring Ajinomoto, an international bandit corporation, to a courtroom within a few miles of its U.S. headquarters.

We have spent a decade arguing about intellectual property, patents and contracts without ever having gotten Ajinomoto into court. We need this Subcommittee to help us get our day in court.