

August 7, 2013

Intellectual Property: *Additional Questions for the Record*

Dear Mr. Chairman:

It was a pleasure for GAO to appear before your subcommittee on July 9, 2013, to discuss our previous work on intellectual property counterfeiting, piracy, and cyber espionage. The enclosure is GAO's response to the subcommittee's questions for the record.

Sincerely yours,

Susan Offutt
Chief Economist, Applied Research and Methodology

Enclosure: Additional Questions for the Record

The Honorable Tim Murphy

Question 1: In your testimony you mention counterfeiting risks may lead to reductions in investment in R&D. Can you cite some recent examples?

Experts we spoke with in our 2010 report stated that companies could experience a decline in innovation and production of new goods if counterfeiting leads to reductions in corporate investments in research and development.¹ Similarly, the Organisation for Economic Cooperation and Development's (OECD) 2008 report cited loss of sales volume and lower prices as short-term effects, while the medium- and long-term effects include loss of brand value and reputation, lost investment, increased costs of countermeasures, potentially reduced scope of operations, and reduced innovation.² In our July 2012 testimony before this subcommittee, we provided a range of examples involving data loss or theft, economic loss, and privacy breaches.³ In particular, in March 2012, it was reported that a security breach at Global Payments, a firm that processed payments for Visa and MasterCard, could compromise the credit- and debit-card information of millions of Americans. Subsequent to the reported breach, the company's stock fell more than 9 percent before trading in its stock was halted.

¹ GAO, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, GAO-10-423 (Washington, D.C.: April 12, 2010).

² Organisation for Economic Cooperation and Development (OECD), *the Economic Impact of Counterfeiting and Piracy*. Paris: OECD, 2008).

³ GAO, *Information Security: Cyber Threats Facilitate Ability to Commit Economic Espionage*, GAO-12-876T (Washington, D.C.: June 28, 2012).

Question 2: It seems that neither government nor industry is able to solidly assess what the size and scope of the problem is. In your testimony, you state that “one of the key problems is that data have not been systematically collected and evaluated”. How can this be improved? Is it possible to move forward with somewhat accurate data of incidents that allows for a basic understanding of the situation?

There are three possible sources of information and analysis that might help advance the understanding of the size and scope of the problem of intellectual property (IP) theft. One source is government, where those agencies that have responsibilities regarding enforcement of IP laws can provide statistics that might help inform the debate. For example, five key agencies play a role in IP enforcement: (1) Customs and Border Protection (CBP) and (2) Immigration and Customs Enforcement (ICE) of the Department of Homeland Security, (3) Federal Bureau of Investigation (FBI), (4) Food and Drug Administration (FDA), and (5) Department of Justice. Since we issued our 2008 report,⁴ many agencies have implemented GAO recommendations to better assess data related to IP enforcement. For example, agencies have taken steps to better identify enforcement actions against IP-infringing goods that pose a risk to the public health and safety of the American people, and to collect and systematically analyze enforcement statistics to better understand variations in IP-related enforcement activity. In addition to our 2010 report on efforts to quantify the economic effects of counterfeit and pirated goods,⁵ the International Trade Commission (ITC) conducted two studies regarding the effect on the U.S. economy and U.S. jobs of IP rights infringement in China. These studies were conducted in response to an April 2010 request from the United States Senate Committee on Finance.⁶

Another government source for understanding the scope of IP theft is the Intellectual Property Enforcement Coordinator (IPEC), a position created by the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (PRO-IP Act).⁷ The act mandates IPEC to chair an interagency advisory committee and coordinate the committee’s development of the Joint Strategic plan against counterfeiting and infringement. The joint strategic plan was required to address key elements of an effective national strategic plan. The PRO-IP Act required the IPEC to submit the joint strategic plans to specific committees of Congress every third year after the development of the first strategic plan. The Act also requires the IPEC to submit a report on the activities of the advisory committee during the preceding fiscal year. These reports provide information on the size and scope of the problem. Specifically, the joint

⁴GAO, *Intellectual Property: Federal Enforcement Has Generally Increased, but Assessing Performance Could Strengthen Law Enforcement Efforts*, GAO-08-157 (Washington, D.C.: Mar. 11, 2008).

⁵GAO-10-423.

⁶ITC, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, Investigation No. 332-514, USITC Publication 4199 (amended) (Nov. 2010). ITC, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, Investigation No. 332-519, USITC Publication 4226 (May 2011).

⁷Pub. L. No. 110-403, 122 Stat. 4256

strategic plan is required to provide an analysis of the threat posed by violations of IP rights, including costs to the U.S. economy and threats to public health and safety. The annual report is required to report on, among other things, the progress made on implementing the strategic plan and progress toward fulfillment of the priorities identified in the joint strategic plan. In our 2010 report, we reported on the status of IPEC's efforts to implement the act.⁸

A second source of information that might help advance the understanding of the size and scope of the problem of IP theft are studies conducted by firms or their industry associations. In our 2010 report, we observed that assumptions such as the rate at which consumers would substitute counterfeit for legitimate products can have an enormous impact on the resulting estimates.⁹ Nonetheless, these studies can provide insights on the nature of IP theft in particular markets or geographic locations and can help firms and others understand some of the patterns and characteristics of IP theft. The third source for information that might help advance the understanding of the size and the scope of the problem of IP theft are studies conducted by academic, public policy research organizations, and international groups. These entities have made significant contributions to understanding the impact of IP theft and its broader implications. For example, OECD released a report in 2008 examining the impact of counterfeiting and piracy on the global economy.¹⁰

Question 3: In your testimony, you highlight the importance of accurate data regarding the extent and value of counterfeit trade. You also highlight industry's frequent unwillingness to disclose such data. What privacy standards are necessary to improve disclosure by these entities?

GAO's work on IP enforcement has not examined whether government privacy standards would improve the disclosure of accurate data concerning IP theft. However, our 2010 report provided a few insights as to why industries are unwilling to disclose data regarding the extent and value of counterfeit trade.¹¹ We reported that industries that collect this information may be reluctant to discuss instances of counterfeiting because this might lead to consumers losing confidence in their products. Also, sharing information on IP theft could also provide opportunities for proprietary information to fall into the hands of competitors or those who are intent on infringing the firms' IP rights. In addition, OECD officials told us that one reason some industry representatives were

⁸GAO, *Intellectual Property: Agencies Progress in Implementing Recent Legislation, but Enhancements Could Improve Future Plans*, GAO-11-39 (Washington, D.C.: Mar. 11, 2008).

⁹GAO-10-423.

¹⁰Organisation for Economic Cooperation and Development (OECD), *The Economic Impact of Counterfeiting and Piracy* (Paris: OECD, 2008).

¹¹ GAO, *Intellectual Property: Observations on Efforts to Quantify the Economic Effects of Counterfeit and Pirated Goods*, GAO-10-423 (Washington, D.C.: April 12, 2010).

hesitant to participate in their 2008 study was that they did not want information to be widely released about the scale of the counterfeiting problem in their sectors because the presence of counterfeit products may damage the value of the brand and image of the producers of genuine products over time.

Question 4: How can the United States encourage China to adopt stricter policies on the protection of intellectual property (i.e., patent rights, copyright, infringement, trademark violations)?

In 2009, GAO issued a report examining efforts to enhance protection and enforcement of IP overseas and focused our work on four posts in three countries, including two posts in China: Beijing and Guangzhou.¹² We found that U.S. government officials had identified weak enforcement as a key IP issue in the three case study countries; however, weaknesses also persist in the countries' IP laws and regulations. According to the U.S. government, enforcement of existing IP laws and regulations and adjudication of suspected infringements are limited and inconsistent, and penalties are not typically sufficient to serve as an effective deterrent. U.S. government documents and U.S. officials we interviewed cited several factors that contribute to this limited and inconsistent enforcement, including flawed enforcement procedures; a lack of technical skills and knowledge of IP among police, prosecutors, and judges; a lack of resources dedicated to IP enforcement efforts; and the absence of broad-based domestic support for strong IP enforcement.

In our 2009 report, we also reported on the U.S. Patent and Trademark Office (USPTO) IP attaché program which was created to address country-specific and regional IP problems in key parts of the world.¹³ USPTO's first IP attaché was posted in Beijing in 2004 and Guangzhou in 2007, along with the addition of IP attachés in several other countries. The IP attachés work on a range of IP activities in coordination with other federal agencies, U.S. industry, and foreign counterparts. According to USPTO, the IP attachés are tasked with advocating U.S. government IP policy, interests and initiatives; assisting U.S. businesses on IP protection and enforcement; improving IP protection and enforcement by conducting training activities with host governments; advising officials from other U.S. agencies on the host government's IP system; advising representatives of the host government or region on U.S. intellectual property law and policy; helping to secure strong IP provisions in international agreements and host country laws and working to monitor the implementation of these provisions; and performing limited commercial service duties as necessary, such as representing the commercial service at host government functions and advising U.S. companies on the local IP environment.

We found that the USPTO IP attachés at the four posts we visited were generally effective in collaborating with other agencies, primarily by acting as IP focal points, establishing IP working groups, and leveraging resources through joint activities. However, we reported that three of the four posts, including the two posts in China, had not adopted interagency plans to address key IP issues. Policy guidance on IP at the

¹² GAO, *Intellectual Property: Enhanced Planning by U.S. Personnel Overseas Could Strengthen Efforts*, GAO-09-863 (Washington, D.C.: Sept. 30, 2009).

¹³ GAO-09-863

posts, such as the annual Special 301 report and embassy mission strategic plans, is high level and not generally used for planning agencies' day-to-day IP efforts. We reported that the three posts could potentially enhance collaboration by developing joint strategies to translate the key IP issues identified by the U.S. government into specific objectives and activities. For example, joint strategies could help agencies prioritize existing efforts, avoid duplication of efforts, formulate a common IP message to foreign governments, and maintain focus on IP given competing issues and personnel changes at posts. In response to our recommendation to develop annual work plans, the Department of State issued a cable in November 2009 to those posts with USPTO IP attachés at the time, noting the State's concurrence with our recommendation and directing post leadership to work with IP attaches to determine how to effectively apply our suggestions and implement the recommendation.