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SPECIAL 301 AND THE FIGHT AGAINST TRADE PIRACY

HEARING

BEFORE THE

SUBCOMMITTEE ON INTERNATIONAL TRADE

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

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SPECIAL 301 AND THE FIGHT AGAINST TRADE PIRACY

MONDAY, APRIL 19, 1993

U.S. SENATE,
SUBCOMMITTEE ON INTERNATIONAL TRADE,
COMMITTEE ON FINANCE,
Washington, DC.

The hearing was convened, pursuant to notice, at 10:10 a.m., in room SD–215, Dirksen Senate Office Building, Hon. Max Baucus (chairman of the subcommittee) presiding.

Also present: Senators Rockefeller, Daschle, Grassley, and Hatch.

[The press release announcing the hearing follows:]

[Press Release No. H–11, April 6, 1993]

INTERNATIONAL TRADE SUBCOMMITTEE SCHEDULES HEARING ON SPECIAL 301 TRADE REMEDY LAW

Senator Max Baucus (D.–Mont.), Chairman of the Senate Finance Subcommittee on International Trade, announced today a hearing in advance of this year's designation of "priority foreign countries" under the "Special 301" trade remedy law.

The hearing will begin at *10:00 a.m. on Monday, April 19,* in room SD–215, Dirksen Senate Office Building.

Senator Baucus said the hearing will focus on which countries to target this year under the Special 301 law for failing to protect U.S. intellectual property—U.S. creative works and inventions—from illegal copying.

"Trade piracy costs our exporters billions of dollars annually in lost sales overseas," Senator Baucus said. "Through Special 301, the United States has an annual opportunity to seek an end to piracy of U.S. patented, trademarked, and copyrighted goods through negotiations.

"With the Clinton administration's Special 301 designation due by the end of April, I consider this hearing a timely opportunity to explore the records of our trading partners in this important area."

Under the Special 301 provisions of the 1988 Trade Act, the U.S. Trade Representative (USTR) is required to identify, within 30 days of the submission of the annual National Trade Estimate report, those countries that deny adequate and effective protection of intellectual property rights. USTR must also identify which of the cited countries are "priority" countries. Special 301 requires USTR to initiate section 301 investigations on the practices of the "priority" countries.

OPENING STATEMENT OF HON. MAX BAUCUS, A U.S. SENATOR FROM MONTANA, CHAIRMAN OF THE SUBCOMMITTEE

Senator BAUCUS. The hearing will come to order.

On April 30th, under the Special 301 trade law, the U.S. Trade Representative will release the annual list of priority foreign countries for negotiations on strengthening protection of intellectual property, along with the accompanying priority watch list and the watch list.

This process is America's strongest weapon against piracy, weak legal protection, and barriers to access for American intellectual

property works abroad. Like the Super 301 law, it sets deadlines and forces action.

That's why it works! We need to renew Super 301 this year if we hope to make the same sort of progress in other sectors that Special 301 brings about in intellectual property.

Today, with the Special 301 lists due in 11 days, we will give the USTR Office and representatives of private industry a chance to share their views on the effectiveness of the law in general and on their priorities for this year in particular.

Intellectual property products are broadly divided into three types: copyrights, patents, and trademarks.

Copyrighted works include books and magazines, musical scores, films and videos, sound recordings, and computer software.

Patented products include pharmaceuticals, agrichemicals, and innovative machines, tools, and processes.

Trademarked goods include a vast array of products from food to apparel to machines and more, recognizable by the name or symbol of their producers.

Together, these industries rank with agriculture and aerospace as one of America's three most successful export sectors.

American film and TV programs generate a $3.5 billion trade surplus each year. American pharmaceuticals generate a $1 billion surplus.

American computer software leads all competitors. I believe we have about 75 percent of the world market. And American trademarks get instant recognition worldwide.

Creative works like these are difficult and often expensive to make, but they are often easy to copy.

A software program, for example, takes years, technological wizardry, and millions of dollars in R&D to write and publish. Pirating the same program takes seconds, minimal skill, and an 80 cent floppy disk.

This problem is worldwide, and is extraordinarily damaging to our economy. Several years ago, after an exhaustive survey, the International Trade Commission estimated that they cost America somewhere between $43 billion and $61 billion dollars in lost exports every year. It is likely that the figure is even higher today.

The financial injury is at times even accompanied by physical injury. One of my constituents from Bozeman, MT, permanently injured her knee a few years ago when a pair of Korean-produced counterfeit Reebok sneakers came apart while she was playing tennis.

This problem requires a strong American response. In 1988, Congress provided it by passing the Special 301 law. It directs the USTR to identify the countries in which intellectual property receives the weakest legal protection and meets the strongest barriers to entry.

USTR must then begin trade negotiations with these priority foreign countries. If this fails to get results, the United States can impose trade sanctions against the country in question.

This is our strongest weapon against piracy of intellectual property overseas. Two developments are proof enough: first, the record number of filings by American industries this year; and second, the

troops of foreign officials which have come to Washington to negotiate last-minute deals to avoid listing.

This year, India, Taiwan, and Thailand are among the highest priorities. They have all been named before as priority foreign countries, but have not changed their ways.

We should not hesitate to retaliate against them unless they adopt dramatic changes in the next 10 days.

The credibility of Special 301 depends on willingness to use retaliation as a last resort. A very important point, the credibility of Special 301 depends upon the willingness of the United States to use retaliation as a last resort. And I believe we have reached that last resort in these cases.

There are many candidates for priority foreign country status this year. Poland continues to be a notorious center for piracy of software, sound recordings, and books, and has taken little action to resolve the problem.

Copyright industries add Italy, South Korea, and Turkey as targets for PFC status. Saudi Arabia, one of the richest countries in the world, continues to allow blatant piracy of films, sound recordings, and CDs, and, in fact, does not guarantee protection of foreign works at all. It is a disgrace.

Despite years of promises, Argentina and Brazil have not yet upgraded their patent regimes for pharmaceuticals.

And other patent offenders include Colombia, Hungary, South Korea, Turkey, and Venezuela. Trademark industries cite China's inadequate trademark law as a major problem, to go along with other serious problems in Taiwan, Thailand, Brazil, and South Korea.

With this year's deadline approaching, we have already reached an important agreement with the Government of the Philippines to protect American copyrights, patents, and trademarks. And last-minute efforts to upgrade pharmaceutical patent protection are going on in Argentina.

We have seen energetic raids on sellers of pirated shoes in South Korea, and a factory making pirate audio cassettes in Thailand.

There is activity in the Taiwanese legislative Yuan and the Russian parliament. All are a result of Special 301.

Today, we will hear about these events from representatives of U.S. Government charged with determining this year's listings, and from private industry representatives who have participated in filing petitions with the USTR this year.

It promises to be an enlightening morning. And with no further delays, let's begin.

[The prepared statement of Senator Baucus appears in the appendix.]

Senator BAUCUS. First, I will turn to my colleagues in order of appearance. And Senator Grassley, I think, was first.

OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM IOWA

Senator GRASSLEY. Thank you, Mr. Chairman.

Before I get into some comments I have on Special 301, I think I would make a more generic comment about trade generally and say that it looks very positive.

The President took a strong point of view last week with the Japanese Prime Minister when he was here.

And weekend reports in both the Japanese press and the American press indicate that there might become a new day. We will not be taken for granted as Americans in international trade negotiations, and maybe our efforts will be taken a little more seriously.

I know this is just a preliminary report, but at least it kind of implies that we are getting their attention to a greater extent than we have in the past.

And so maybe on your efforts on the Special 301, we would say the same thing for these nations that you have just named and some that I am going to name.

It might do the same thing in a more specialized area of the law on Special 301 to send a signal that the United States is tired of being unfairly treated.

So I believe that, Mr. Chairman, it is expressly important for the United States to be able to identify those countries that deny adequate and effective protection of intellectual property rights or deny fair or equitable market excess to U.S. exporters that rely on intellectual property protection.

I took the liberty in getting ready for this hearing of reviewing the 1993 National Trade Estimate Report on unfair foreign trade barriers released by the U.S. Trade Representative office to be very candid.

I am alarmed by the problems that currently exist in the areas of intellectual property rights from Argentina to South Africa.

Argentina is an example of a country with a very old patent law dating back to 1864. And it does not provide adequate patent protection.

Specifically, it excludes pharmaceutical products from protection. Argentina has been on the Special 301 watch list since May of 1989 and remains yet today.

South Africa, like the United States, is a member of two major multi-lateral conventions pertaining to intellectual property: the Paris Convention for the protection of industrial property, and the Berne Convention for the protection of literary and artistic works.

South Africa does not, however, belong to some agreements that are important from the standpoint of U.S. business, including the Patent Cooperation Treaty, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the purpose of patent protection procedures, and the convention for the protection of procedures for phonograms.

The South Africans have passed a copyright act in 1992. And a number of major U.S. software companies have been reassured of domestic legal protection for their intellectual property, and have decided to enter the South African market.

Yet, in that very same country, the motion picture industry reports that piracy, including unauthorized public performances, video piracy, and parallel imports pose a problem for doing business in South Africa today.

Now, Mr. Chairman, I pick the extremes from the front of the report to back of the report. I could just as easily have picked countries like Chile, Japan, Korea, Mexico—as other examples.

And in fact, I will refer to some of these other countries as examples in the questioning I have this morning.

The point is, Mr. Chairman, that regardless of which country it is that is placed on the watch list or the priority list, we must aggressively pursue and resolve this unfair trade practice.

And I say that specifically as it relates to 301, but to remind you that in other areas of law that it applies not only for the enforcement of law, but as the President in his own initiative has decided in a more generic way to pursue a stronger message. I think it is going to be very effective.

Senator BAUCUS. Thank you very much, Senator.

And I also appreciate your statement with respect to the President meeting with Prime Minister Miyazawa.

Our trade deficit with Japan is about $49 billion. And that is more than half our worldwide trade deficit. So it is a significant problem.

And I think it only appropriate that the President and Prime Minister did not sweep that problem under the rug, but apparently dealt with it in a very open and frank way. And it usually is a necessary precondition to resolution. I hope now that we follow up and get that deficit reduced.

Senator Rockefeller.

OPENING STATEMENT OF HON. JOHN D. ROCKEFELLER IV, A U.S. SENATOR FROM WEST VIRGINIA

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I hesitate to hold up the testimony of the General Counsel for the USTR, but I will do so for just a moment or two because I want to observe that all three of us have very strong views on this. And they are all very similar.

Sometimes we come to the Finance Committee and we do not give statements. Sometimes we come to the Finance Committee and we want to give statements. This is one of those times.

I have said frequently since I have been in the Senate that the protection of intellectual property rights is really a fundamental trade issue facing U.S. business around the world.

Intellectual property is the technology that determines our National income, our social well being, and our international competitiveness.

When the intellectual property of Americans is not protected, our country loses jobs, production, and obviously profits.

The degree to which the U.S. Government protects property rights goes to the heart of our ability to maintain a successful industrial society.

I do not believe that the U.S. Government has done enough to protect U.S. intellectual property rights overseas. And I expect this hearing will very strongly confirm that view this morning.

At present, USTR has complete discretion whether to identify a bad patent system, and consequently whether to take any remedial action. Carla Hills used this discretion to put countries with inadequate intellectual property rights under the watch list, but she did not formally identify them under the Special 301 provisions. As a result, the USTR was not required to seek improved patent protection. Therein lies the critical difference.

To ensure that the U.S. Government will take greater action, on January 21st I introduced S. 149, the International Protection of Patent Rights Act of 1993 that will require the U.S. Trade Representative to identify in his annual Special 301 report countries that deny adequate patent protection.

Senators Mikulski, Hatch, Wofford, and Conrad joined me in this proposal.

I do not know what the General Counsel of the USTR will have to say about this.

With the Special 301 specific mandates and strict timetables, this legislation can help eliminate the type of problem we will hear described today in strong terms.

In previous years, USTR told the Congress not to, "Tie their hands by requiring actions against countries that deny adequate standards for the protection of U.S. intellectual property rights." I believe the long history of USTR not using its discretionary authority is, in fact, the best argument there is for required instead of discretionary action.

Even if our friends in office now are planning to exercise their discretionary authority this year, who knows about the future and who knows about the future administrations, whether they will do so at all.

Mr. Chairman, I will ask the witnesses, including the Representative from USTR, whether they think this legislation is needed and whether it should be expanded, in fact, to include copyright and trademark protection, as well as patent protection.

And I believe some of our witnesses will say that my legislation does not go far enough. And that is easy enough to adjust by including copyright and trademark protection.

It is my hope that with these hearings today, the provisions of S. 149 will be included in the trade bill our committee will work on, I hope, later this year.

I thank the chair.

Senator BAUCUS. Thank you very much, Senator.

I would like now to begin with our first witness, Mr. Ira Shapiro, who is the General Counsel for the USTR.

Welcome back to this hearing room, albeit in a somewhat different capacity. And I know Senator Rockefeller, in particular, and the rest of the committee in general very much looks forward to your testimony.

STATEMENT OF IRA S. SHAPIRO, GENERAL COUNSEL, OFFICE OF THE U.S. TRADE REPRESENTATIVE, WASHINGTON, DC

Mr. SHAPIRO. Thank you, Mr. Chairman.

It is a pleasure to appear before this subcommittee today to discuss the Clinton administration's plans for the implementation of Special 301 provisions of the trade law.

At the risk of sinking too early into puns, I want to say this is special for me to be here. I spent most of my adult life either working in the Senate or preparing to work in the Senate.

And the opportunity to testify here for the first time, particularly as a Representative of USTR and the administration, is a great honor for me.

I am also delighted to appear before you, Mr. Chairman. We have worked together in the past. And I have been very happy that this job has given me the opportunity to continue working with you.

Very few people have shown the constancy of concern you have on intellectual property, strengthening trade policy generally, and fighting for U.S. competitiveness. And obviously, Senator Rockefeller, who I not only worked with but for: it is a great privilege to be here with you as well.

Mr. Chairman, with your permission, I would like to submit my written statement for the record and essentially summarize the comments.

Senator BAUCUS. Without objection.

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

Mr. SHAPIRO. Special 301 and the intellectual property interests that it advances are critical to this administration.

President Clinton's economic policy seeks to build our economy so that is capable of fostering the creation of high-wage and high-skilled jobs.

At the same time, the administration's guiding principle in trade policy is to open foreign markets to the exports of U.S. companies and workers. Special 301 and intellectual property stand at the intersection of those two ideas.

The ideas and products protected through intellectual property rights often represent the highest level of technology and creativity available in the world.

These products, as Senator Baucus has noted, represent a major portion of total U.S. exports. U.S. computer software, motion pictures, sound recordings, books, and television programs are exported worldwide and benefit from strong copyright protection.

Other industries that are an important source of U.S. exports, including the aircraft, pharmaceutical, and medical equipment sectors, rely fundamentally on trademark, patent, and trade secret protections. In 1991, exports in those three industries alone totaled approximately $40 billion.

The ability of U.S. companies to export products protected by intellectual property rights, and to compete in foreign markets, depends to a large degree on whether other governments provide adequate and effective protection of our intellectual property and fair and equitable access to their markets.

The stakes are high. It costs millions of dollars to develop and market a new computer program or a pharmaceutical or to create a motion picture. It costs very little in the short term for the pirates to copy those products.

Such piracy costs all of us in the United States. As Senator Baucus has said, the thing that connects these products which rely on intellectual property protection is that they are hard to invent and easy to copy.

As the President said in his speech at American University, this administration will not let trade issues play a secondary role to non-trade concerns.

Ambassador Kantor is prepared to look at every possible means of advancing the objectives of Special 301.

If we are not succeeding in advancing those objectives, Ambassador Kantor will recommend significant, not merely symbolic, actions in response to the unreasonable practices of our trading partners.

This administration is fully prepared to take a strong position with other governments to obtain world-class laws and enforcement efforts that will put the pirates out of business.

At the present time, USTR and its colleagues in the interagency process are intensely involved in the Special 301 review that will result on April 30th in the identification of priority foreign countries which maintain the most onerous and egregious acts, policies, and practices to the detriment of U.S. intellectual property.

As Senator Baucus has indicated, negotiations with many nations are ongoing at the present time.

When Congress enacted Special 301 as part of the 1988 Trade Act, U.S. owners of intellectual property faced extensive piracy in other countries.

Many countries with important markets either failed to provide protection or did not enforce the laws that were in place.

Since 1989, Special 301 has played an important role in obtaining the enactment by many of our trading partners of stronger laws for the protection of intellectual property rights.

It has also helped ensure stricter enforcement of those laws and in certain markets, improved access for our products.

We have not attained all of our goals, far from it. As Senator Grassley pointed out, the foreign trade barriers estimate, which was released last month, has a great volume of material on the barriers to intellectual property that still exists, but Special 301 has racked up an impressive series of accomplishments.

The statute has worked particularly well in helping U.S. negotiators persuade countries to adopt changes in their laws to bring them up to international standards.

The list of successes under the statute is long. And in the appendix to my written testimony, I have tried to itemize a full list of the changes of law and enforcement that have occurred in the past 4 years.

In fact, progress continues to be made. Just this month, Ambassador Kantor signed an agreement with the Philippines Government in which that government agreed to legislative and administrative measures that when implemented will greatly improve the protection and enforcement of copyrights, trademarks, and patents in that country.

Adequate laws, however, are just the first step to ensure that owners of intellectual property rights have an environment that permits them to market their products in a fair manner and encourages investment in that country.

It is likely that Special 301 will be focused in the future more on the issue of obtaining effective enforcement of existing laws.

It is easy enough to ascertain when another nation adopts a copyright, trademark, or patent law, and to assess whether the protections promised in the law are adequate.

But effective enforcement of those laws is a much more complex task to measure and to obtain. It requires changed behavior by the

police, prosecutors, the judiciary, and other authorities. It requires major changes in business as usual.

We will have to work tenaciously to accomplish those results. And we are prepared to do so.

Despite Special 301's track record and successes to date, the administration believes that the statute can be used even more effectively.

We are committed to giving a fresh direction to the Special 301 review process to ensure that our objectives are clear and that other countries know what we are seeking.

First, many of our trading partners have entered into agreements with the United States that include commitments to improve protection, strengthen enforcement, and remove barriers to market access.

Those countries must live up to those agreements and fully implement measures necessary to eliminate identified problems.

Any partner that fails to meet those commitments can expect a strong and speedy response from the administration.

Second, as noted above, effective enforcement of laws already on the books is critically important. Countries that do not enforce their laws can expect to receive special attention under Special 301.

Third, while the sales of counterfeit and pirated goods in a particular domestic market can cause damage to U.S. interests, that damage is multiplied when a country exports pirated goods to third markets.

Countries that are exporters of pirate and counterfeit goods can expect the United States to consider this to be an onerous or egregious act and consider it to be an important factor in the Special 301 process.

Fourth, on Special 301 market access issues, the administration will be concerned about barriers that prevent U.S. products from being sold in overseas markets.

The EC Broadcast Directive, which places a stringent quota on U.S. television programs throughout the community, remains an issue of particular concern.

Finally, USTR is particularly concerned and focused on countries, including Brazil, India, Taiwan, Thailand, Korea, and Argentina, which have had a long-term place on the Special 301 list.

Obviously, the designations under the statute do not occur until April 30th, and negotiations are ongoing. But Special 301 cannot be seen as effectively functioning if countries can take up permanent residence on a list without making sustained progress in addressing the problem issues.

It is our hope and intent to formulate specific action plans, including deadlines and benchmarks for evaluating a country's performance.

We will enforce those deadlines and take action if necessary through out-of-cycle reviews of countries' status under Special 301.

Let me say, Mr. Chairman, at the end of the day, the statute's credibility and usefulness, as you have indicated, depends on the administration's commitment to take strong and decisive action in the event that problems remain unresolved.

We must be firm in naming names and telling our trading partners that we will act if they harbor pirates, counterfeiters, or permit infringements to go unpunished.

The Clinton administration is determined to put real teeth into retaliation measures where needed. Ambassador Kantor is prepared to use Special 301 more aggressively than it has been in the past.

In that context, he is looking at every means to drive our message home. One means used by past administrations was the revocation of benefits currently granted under the generalized system of preferences, GSP.

But Ambassador Kantor is also interested in exploring means that have not been used in past administrations.

For example, the administration is exploring the possibility of a linkage between intellectual property issues and bilateral aid programs, as well as encouraging multilateral development banks to include intellectual property protection as a key component of their programs for improving the investment climate and infrastructure of developing countries.

In sum, Mr. Chairman and members of this subcommittee, because the administration is committed to open markets and to the creative energy and technological edge needed to foster a high-wage economy in the 21st century, the forceful implementation of Special 301 is a very high priority for us.

Thank you, Mr. Chairman.

Senator BAUCUS. Thank you very much, Mr. Shapiro.

Could you, for the subcommittee again, just very briefly indicate the areas where you believe this administration will utilize Special 301 in the same way as the past administration and also of equal brevity and as succinctly, where you believe it will differ in its utilization of Special 301 compared with the last administration?

Mr. SHAPIRO. Mr. Chairman, our view basically is that Special 301 has attained significant accomplishments.

We plan to continue using the structure, which is not required by the statute, of having a priority watch list and a watch list, as well as the designation of priority foreign countries.

We think that having that hierarchy is important both in terms of identifying our negotiating objectives and to let our trading partners know of the concerns we have.

Where we will differ, I hope, from the previous administration is in dealing with countries that are violating our intellectual property rights, and have perhaps grown somewhat inured to being designated because they have been designated any number of times.

We are interested in results and not in promises, and if those results are not forthcoming, Ambassador Kantor and the administration will have no hesitation to take action, including retaliatory measures.

As I also tried to indicate, we are currently exploring whether there are other tools that would impress upon our trading partners the priority we give these areas.

Senator BAUCUS. I will expect that this administration to be actually more aggressive for a couple of reasons. Number one, as you have mentioned, the President's speech at American University, where he made it very clear that domestic economic policy is very

much integrated with foreign policy, and that we Americans were going to take strong action to enhance our domestic economy.

Second, I think it is not only in our best interest, but it is in the other country's best interest for the United States to pursue a more aggressive policy in the Special 301.

Let's take Thailand, for example. In the past, the State Department probably weighed in an opposition to potential U.S. action, some agreements it may or may not have had with, say, Thailand.

But two wrongs do not make a right, that is, Thailand's failure to enforce its anti-narcotics actions, where the United States worked with Thailand to help Thailand enforce its narcotics enforcement actions, should not be an excuse for the United States not to be more aggressive, say, in intellectual property infringements.

In addition, it would very much help Thailand, as an example, if the United States were to enforce intellectual property infringements because then Thailand's business climate would be more favorable to international investment. And that would be very helpful to Thailand generally to have a more stable and more dependable economy.

So I would very strongly encourage the administration to be considerably more aggressive than past administrations, not only because it is in the United States best interest, but it is in Thailand's best interest as well.

Second, Mr. Shapiro, isn't it true that the deadlines in Special 301, the listing of offenders under Special 301, which essentially gives Special 301 its teeth?

Isn't it a fact that there are deadlines, they are specifically naming the countries' offenses that make Special 301 effective? Isn't that the case?

Mr. SHAPIRO. Mr. Chairman, I think it is undeniable that the deadlines of Special 301 and the identification of named countries do have that effect.

It is important that if, as I indicated, countries are designated time and again and they are able to take up sort of permanent residence on these lists without much fear of retribution, that will undermine the credibility of the statute. And we are trying to work on that.

Senator BAUCUS. You anticipated my next question, that is, if it works for Special 301, doesn't that also logically compel a strong argument for Super 301?

Mr. SHAPIRO. Mr. Chairman, as you know, the President has, when he was a candidate and since, endorsed Super 301, supported the concept of it, and continues to be supportive of that concept.

And we have indicated in our desire to get fast track renewal considered as quickly as possible for the Uruguay Round that we hope that legislation, even that legislation that we are supportive of, might be considered at a later time.

But the administration's position on the substance of Super 301 remains.

Senator BAUCUS. Well, I appreciate the President's very strong statement during the campaign in support of Super 301. In fact, during the campaign, he even said he supported enhanced Super 301.

And frankly, I think that now, as usually in life, if you are going to do something, you might as well do it now rather than later. Let us not put it off.

Thank you.

Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Mr. Shapiro, you said the well documented success of Special 301 and its priority watch list and watch list demonstrate that they can be used as a negotiating tool, which implies that you are well satisfied with the present law as is, just as a matter of enforcement. I think that is what you said.

I do not understand what negotiating advantage you see to threatening to take—in a sense threatening to take no action as opposed to saying, unless you, the other country, do take action, we will take action ourselves in the form of some kind of retaliation.

In other words, you seem comfortable in the enforcement. And you seem uncomfortable in going further than the present statute.

Mr. SHAPIRO. Senator, we have not taken a position on your legislation yet. And I would certainly like to have a little time to study it and to talk with you and your staff about it. I know others at USTR would as well.

The general question of discretion for negotiators as opposed to more automoticity is something that reasonable people, I think, can differ on.

I think that, as I tried to indicate, the statute has had successes. I think when it has been used aggressively, it has brought about a significant number of changes.

Whether it could be used better remains to be seen. I think that we will try in this cycle to demonstrate that the present law can be used aggressively.

If we do not use it to the satisfaction of those who rely on intellectual property and to the Congress, then we ought to talk about whether more automoticity is needed.

Having been here a sum total of 2 months and having reviewed the accomplishments that the statute has had in the past few years, I'm not yet convinced on that point.

Senator ROCKEFELLER. I understand that, but for you to be there for 2 months is like others to be there for 10 years.

Mr. SHAPIRO. It certainly feels that way. [Laughter.]

Senator ROCKEFELLER. You indicate that you do not have hesitation in taking—you expect a lot of frustration with countries that, as you say, take up permanent residence on the watch list.

Mr. SHAPIRO. Right.

Senator ROCKEFELLER. And then you point in the appendix to a number of successfully negotiated results.

Mr. SHAPIRO. Right.

Senator ROCKEFELLER. But you still express the frustration about countries that take up permanent residence on the watch list area, the priority watch list area. Now, I mean, I hate to say it, but this is kind of like a replay of the early days of the Bush administration.

I mean, after all, Super 301, which the chairman champions, is not there because the USTR absolutely needs to have it.

I mean, you could argue for Super 301, as, indeed, one could argue for 301 that you do not need to have it if you enforce the laws that are already there.

But it is there as a very clear psychological statement.

It is there to say something more than enforcement. I mean, this has been my objection to U.S. trade policy and Japan policy—that we just keep saying we will enforce, but we never really make it clear that, in fact, we have a course of action that we are going to follow. And you can count on that.

So why do you hesitate to put countries that are on the statutory list, priority list, make them statutory instead of just warning them so to speak?

Mr. SHAPIRO. Well, Senator, I think it——

Senator ROCKEFELLER. I will agree that my reference to the previous administration is going to get an altogether very good, sort of a specific clear emotional answer from you. But I am drawn to that. I mean, I have heard conversations like that in this room before.

Mr. SHAPIRO. It was harsh, Senator. [Laughter.]

I think that it may be a little too early to judge whether this administration's trade policy, even in this area, can be likened to the previous administration.

We do have some difference of opinion on whether the statute has been used successfully. I do think it has had more successes than you apparently give it credit for.

I would say that part of enforcing the trade laws and furthering our objectives here is in having priorities and focusing on those priorities and not backing off on those that you have deemed to be priorities.

I would like to raise intellectual property protection in 60 or 70 countries simultaneously. It is difficult to do that realistically when you have to negotiate over those intellectual property regimes and keep pressure on many nations at the same time.

If you look at the list of accomplishments for the past 4 years, there have been a large number of nations that have upgraded protection they have given to intellectual property, not enough, but I think that it shows that the statute does work.

And the statute in the hands of an aggressive U.S. Trade Representative who is ready to take on some of the leading offenders in this area, I think will have some successes.

I share your frustration about questions like the Japanese patent system which the last administration did not make particular progress on, but I think that the statute can be workable and strong in this administration.

If we have not satisfied you or other Congressional critics by the time this cycle is over, we ought to talk about whether more automoticity is needed.

Senator ROCKEFELLER. Thank you.

Senator BAUCUS. Thank you, Senator.

Senator Hatch.

OPENING STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM UTAH

Senator HATCH. Thank you, Senator Baucus, Mr. Chairman.

I welcome you, Mr. Shapiro, and the other distinguished panel of business representatives as well today.

We talk too often of the macro-policy effects of trade agreement violations, but it is the micro-economic effects of these policies and practices that can destroy jobs, investments, and whole industrial sectors.

These concerns are found throughout the legislative history of Section 1303 of the Omnibus Trade Act of 1988, the so-called Special 301 provision of the law.

I supported Special 301 then, as I do now. And as the senior Senator from Utah, which Business Week has called the nation's software valley, I have seen the information technology industry of my State suffer great losses.

This industry in Utah numbers over 800 companies, producing a payroll almost equal to that of our Utah defense sector, for which Utah has long been well known.

Despite my obvious commitment to rigorous overseas protection of intellectual property and assured access to foreign markets, the twin objectives of Special 301, I have been a cautious proponent of its use.

In my article in the latest issue of Computer Law Reporter, entitled "Protecting Intellectual Property Rights in China," I argue that Special 301 almost certainly induced China's adherence to the January 1992 Memorandum of Understanding with the United States.

China simply could not afford being returned to the Special 301 priority watch list, and the impending retaliation then being held over its head.

However, I also warned that the reckless use of Special 301 could ignite mutual retaliatory measures, which is, of course, a euphemism for trade wars.

I would like to invite the committee to take note of these arguments, Mr. Chairman, and submit the article along with the balance of my remarks for the record.

Senator BAUCUS. It will be included.

[The information referred to above along with the prepared statement of Senator Hatch appear in the appendix.]

Senator HATCH. Thank you.

And I was encouraged, Mr. Shapiro, by the action late last year of the U.S. Supreme Court, which reaffirmed the validity of the Taiwan Relations Act and the continued validity of the United States-Republic of China Treaty of Friendship, Commerce, and Navigation, the FCN Treaty of 1948.

Professor Lawrence Tribe of Harvard argued that the Second Circuit Federal Court of Appeals found the defendants, Healy Enterprises, in violation of the FCN Treaty for selling materials in the United States that had been pirated, that is, the copyrights had been infringed upon.

Professor Tribe said that since Taiwan is no longer a "nation," the FCN Treaty was nullified.

The Supreme Court disagreed, referring to the effect of the TRA, the Taiwan Relations Act, which shows Taiwan to be treated as if it were a nation.

For obvious reasons, the Government of Taiwan was pleased with the ruling. Now, why hasn't this enthusiasm spilled over into more aggressive enforcement of its intellectual property laws?

Mr. SHAPIRO. Well, Senator, I think in focusing on Taiwan, you have raised a question of a country that has been right at the top in terms of piracy, counterfeiting, and other violations of U.S. intellectual property.

Our Customs service tells us that Taiwan is the leading nation in terms of products coming into this country that are counterfeited or pirated.

And there is no question that the performance of Taiwan in this regard casts a real cloud over its economic accomplishments otherwise.

We have made some progress in discussions with Taiwan in the implementation of the 1992 IPR Understanding, but we still have significant remaining concerns with Taiwan.

Those issues that concern us most include the need for the approval of a strong bilateral copyright agreement, and the passage of a cable TV law because frankly, they have cable stations now that basically just play pirated material from the United States. We ask from Taiwan a much stronger examination of their exports and a monitoring of trademarked and copyrighted products going out of the country.

I have been struck, and I know Ambassador Kantor has been struck, by the unanimity of view that Taiwan is a serious problem in the copyright and trademark area, less so in the patent area. But in copyrights and trademarks, they have been right at the top.

Senator HATCH. The IPA estimates that Taiwan's piracy cost U.S. companies something like $669 million in 1992. PMA, the Pharmaceutical Manufacturers Association, estimates their losses last year at somewhere between $25 and $100 million.

I would say that any promises from Taiwan need to be compared with these numbers. And I think in Taiwan, they have to realize the imminence of retaliatory measures and even the loss of support from long-time friends on Capital Hill, including my own because this is simply unacceptable.

I have a lot of regard and friendship for people there, but this just isn't right. They should have to come into the order of nations here.

I appreciate the work that you are doing.

Senator BAUCUS. Thank you, Senator.

Senator HATCH. Thank you, Mr. Chairman.

Senator BAUCUS. Senator Daschle.

Senator DASCHLE. Mr. Chairman, other than to compliment Mr. Shapiro on his testimony today, I have no questions.

Senator BAUCUS. Thank you, Senator.

Mr. Shapiro, I have a question about the standard that the United States should use under Special 301. As you well know, the administration, under current law, has a lot of discretion.

And the question therefore arises obviously is to what degree the administration should properly enforce and bring retaliatory action when the requisite time expires.

And some countries, some developing countries might argue that, well, they are poor, they are disadvantaged, they need some special treatment.

Isn't that argument not a good argument in the face of the intellectual property provisions that the United States is negotiating with Mexico under NAFTA?

For example, the average wage in Mexico, a developing country, is between one-tenth and one-fifth of that of the United States. And Mexico, too, has a per capita income of one-tenth of the United States.

Its living standards are much lower than that of the United States. It truly is a developing country.

Mr. SHAPIRO. Right.

Senator BAUCUS. Yet, the intellectual property provisions that the United States negotiated with Mexico under NAFTA are much higher than the standards under the Dunkel text, for example, in the Uruguay Round.

So the United States could negotiate a strong intellectual property protection provision with Mexico, a developing. Why shouldn't the United States properly ask for the same standards with respect to other countries, whether they be Thailand, Taiwan, or India, or any other country?

Mr. SHAPIRO. Senator, I basically agree with your point. Let me go back to the question of sort of standards. I think there is no one factor that is the governing standard. A lot of things enter into one's assessment.

But I certainly accept and agree with your point that developing nations ought not be exempt from our expectations of strong intellectual property simply because they are developing.

If you look around the world, there are some developing nations that have been quite forthcoming in terms of intellectual property protection.

Sometimes, as in the example of Mexico, this is in part because their leadership recognizes the advantages to them as a country.

They will advance more rapidly if they create a climate where intellectual property is protected. This is a point you made earlier with respect to Thailand.

We are obviously pursuing our intellectual property interests because they matter a great deal to our companies and our jobs here and to our industrial and technological strength, but frankly, it is in the interest of these other countries to upgrade their intellectual property as well. It will strengthen their economy.

So we will certainly look at the overall economic development of a country, but we will not be inclined to say simply because it is a developing country, it ought not to upgrade its standards and ought not to be held to high standards.

Senator BAUCUS. On the other side of that same coin, I would like your response to the concerns of many in the intellectual property community, particularly, in the pharmaceutical community, that the Dunkel text would weaken U.S. intellectual property protection insofar as under the Dunkel text, I think that the pharmaceutical protection or some protection is not available for 20 years.

Mr. SHAPIRO. Well, Senator, I think that basically the Dunkel (TRIP's) text, which we support with some changes, would estab-

lish strong standards of intellectual property for hopefully the 108 nations that would subscribe to it if we reached agreement on the Uruguay Round.

We agree with the industry concerns that you have expressed, that some of these transition periods are too long.

Senator BAUCUS. Twenty years is a long time.

Mr. SHAPIRO. Well, frankly, there is an argument about whether 20 years is actually the transition period in there. And I think that the transition period is actually 10 years.

Senator BAUCUS. What about the pipe line problem?

Mr. SHAPIRO. Well, we are concerned about both the transition and the pipeline problem, but the U.S. Government over the years has, as Capital Hill has, worked closely with the concerns of the pharmaceutical industry.

And, to some extent, the progress that has been made by Special 301 over time has raced along side and even ahead of the TRIP's' text.

When we started this exercise years ago, TRIP's and the Uruguay Round were regarded as the best way to upgrade intellectual property.

Special 301 has opened another front and enabled us to do things bilaterally as well.

I think the industries, including pharmaceuticals, would benefit from a set of rules that governed all nations and that the Dunkel text has become a standard that we have worked off for in our intellectual property efforts.

Senator BAUCUS. Why the concern about the Dunkel text?

I mean, there are countries like Brazil, for example, that have worked very hard against even the provisions in the present Dunkel text, still a major offender of intellectual property and which I think should be named under Special 301.

But I just think that the administration should not only take a new look at Special 301, but take a new look at the Uruguay Round negotiations, including specific provisions of the Dunkel text.

Mr. SHAPIRO. Well, I can assure you, we are doing that.

Senator BAUCUS. Thank you.

Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Mr. Shapiro, I will persist here. Again, your conclusion is that the Clinton administration believes that the Special 301 review process is an effective tool in gaining protection in foreign markets for intellectual property.

Now, in the appendix which you attached, you give examples. Under your watch, so to speak, there a number. Of course, the day is coming up. And that is obviously a discipline.

But there is one here, the "Chinese Government enacts amendments to the Trademark Law and supplementary provisions to the criminal law adding to penalties for trademark infringement."

Well, "adding to penalties," as this says, the Chinese are not well known for enforcement. In other words, this is a skeptical Senator looking at a list.

In the year before your watch, in 1992, the last four, I think, on the bottom of page 12, "Taiwan passed a Fair Trade law that provides some protection for trade secrets."

Well, you have been lambasting Taiwan all over the place this morning. And here, you cite that they have passed something called a Fair Trade Law. Again, China style, what does that mean?

"India committed to the liberalizing of market access for motion pictures." I mean, they have been committed to liberalizing for years and years and years. And now, they are doing it again. And you are accepting it, potentially.

"India announced that it will accord national treatment for the use of trademarks owned by a foreign proprietor." Maybe yes; maybe no.

Finally, "Thailand's National Legislative Assembly enacted amendments to the patent law that will extend product patent protection to 20 years from filing. However, the law does not provide protection for existing patented products that have not yet been marketed in Thailand, and contains extremely broad compulsory licensing provisions."

I mean, it is just hard for me to really be impressed by that. I give you the benefit of the doubt because I believe that President Clinton, Ambassador Kantor, and yourself—and I think a lot of trade policy, in fact, is going to come right out of the mind of Ira Shapiro for the next 4, and hopefully 8, years.

So I am inclined to give you the benefit of he doubt on this, but you will understand my nervousness about these accomplishments, so to speak, in the past.

Now, you get to that Special 301 matter again, dealing with the fact of intellectual property theft.

My bill proposes—and I again ask you to think about it—to focus upstream. Go upstream and focus there.

This is particularly important in the Japanese case where discriminating patent practices allow intellectual property theft to occur legally, I mean, that is what the current situation is.

In other words, if a U.S. company cannot get a patent in Japan where it is almost impossible to get one—it takes years in spite of their brand new building, even though that company may have a patent everywhere else—then its intellectual property can be, quote, stolen, unquote and done so legally.

It seems to me that we should be focusing on not just the current problem, but also on upstream situations.

And I hope that you would look at my bill.

Mr. SHAPIRO. Senator, I will do that obviously. I will.

I appreciate the earlier compliment. I have to say that I think the trade policy of this administration will come from many minds, not the least of which is the President's, because I know the President, for example, in preparing for and dealing with Prime Minister Miazawa's visit, was very strongly involved and made his views obviously clear.

Senator ROCKEFELLER. And I want to agree with that, too, because I thought, as Senator Grassley and Senator Baucus pointed out, that was a very powerful demonstration of a switch in approach, one, if I might say, if repeated several times will be one

that the Japanese will not fail to understand is the American trade policy. And their behavior, I think, will then change.

Mr. SHAPIRO. I do not mean to digress on this, but I also want to say that it was very important in the way Secretary Christopher and Secretary Bentsen were also strongly involved in this. There has always been a tendency when Japan looks at the U.S. Government to see if there are differences between the agencies.

And having the Secretary of State suggesting that the Japanese Government ought to be more worried about the procurement of U.S. computers sent a powerful message as well.

But returning to your major point, I do not really think there is any inconsistency between our positions, except that I am saying, in some of these situations, we have seen progress and it is not enough.

That is to say, from the list that you were reviewing, the 1992 Memorandum of Understanding on intellectual property that was entered into with China, represented an enormous amount of progress with respect to the intellectual property regime of China.

Now it will not be self executing. What I tried to do in my testimony is to say that once other countries have adopted laws, we have to make sure that these laws are real.

Now, in China, they have met some of the requirements of the Memorandum of Understanding. They have enacted amendments to their patent law. They have issued new copyright regulations.

And they have joined the Berne Convention for the protection of literary and artistic works. They have also improved their trademark law.

Now, all of those things are good, but at the same time, we worry a great deal about their enforcement of the law.

Senator BAUCUS. I think you have to summarize, Mr. Shapiro.

Mr. SHAPIRO. I am sorry.

But in any event, Mr. Chairman and Senator Rockefeller, I do think that in these situations, it is heavy lifting and slow moving to get countries to do the things we want them to do.

And I am trying to indicate where there has been progress. And there is still things that need to be done.

Senator BAUCUS. Thank you, Senator.

Senator Hatch.

Senator HATCH. No further questions. Thank you.

Senator BAUCUS. Senator Daschle.

Senator DASCHLE. Thank you very much, Mr. Shapiro, for your testimony. And I understand you have to leave promptly because you are going to be conducting negotiations with Brazil.

Mr. SHAPIRO. Thank you, Senator.

Senator DASCHLE. Good luck.

Mr. SHAPIRO. I appreciate it.

Senator DASCHLE. And I hope you are effective.

Senator BAUCUS. Our next witnesses include a panel of several people very much involved in the intellectual property community.

First, Harvey Bale who is with the International Division of the Pharmaceutical Manufacturers Association.

Mr. Jason Berman, president, Recording Industry Association of America. Mr. John J. Cummins, president of the U.S. Trademark Association.

Mr. Eric Smith, executive director and general counsel of the International Intellectual Property Alliance.

Dr. Bale, why don't you begin?

STATEMENT OF HARVEY E. BALE, JR., Ph.D., SENIOR VICE PRESIDENT, INTERNATIONAL DIVISION, PHARMACEUTICAL MANUFACTURERS ASSOCIATION, WASHINGTON, DC

Dr. BALE. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, you have done a valuable service in holding this hearing today on the 1988 Special 301 law, prior to the administration's decisions due by the end of this month.

Thank you very much for inviting me to represent the U.S. research-based pharmaceutical manufacturing industry.

The administration has a real opportunity to accomplish change and contribute substantially to enhancing America's high-technology manufacturing industries' ability to compete better globally through enhanced intellectual property protection abroad.

This subcommittee will, I hope, continue to carry forward the concerns and messages that I expect will emerge from this panel and hearing through follow-up communication with the administration and our sometime so-called trade partners.

In our case, we believe that we especially need priority attention toward such alleged trade partners as Argentina, Brazil, Turkey, Hungary, Korea, Colombia, India, Thailand, and Venezuela, just a few.

In this brief summary statement, I want to discuss only three points. First, some countries are long overdue in reform of their intellectual property policies toward pharmaceuticals and other subject matter.

Argentina promised to change 4 years ago. And every time senior economic officials visit the United States, they repeat their government's commitment to change. Then, of course, they return to Buenos Aires and do absolutely nothing about patent reform.

In 1990, the previous administration withdrew tariff sanctions against Brazil, based upon a promise to enact adequate patent protection, which, of course, it has not fulfilled.

And two other pirating countries, Hungary and Turkey, right now continue to drag on discussions with our government.

And finally, Indian drug manufacturers continue to have the blessing of their government to copy and counterfeit medicines.

The message is clear. President Clinton's new trade team, headed ably by Ambassador Kantor, can achieve real breakthrough success in the trade field this spring, but only if it gives appropriate weight to intellectual property as part of a high-technology manufacturing and job strategy, and by taking whatever trade actions are necessary to rectify foreign piracy practices and policies that condone them.

Second, we are concerned that when action is warranted, the interagency policy process that decides to recommend the appropriate level of trade response, in fact, gives too much weight to foreign policy concerns and belittles industry's measurement of economic damage from unfair foreign trade practices.

Some agencies seem anxious to throw out as much as 99 percent of the estimated damage in order to arrive at a retaliation figure.

Thus, our alleged trade partners find it much easier to live with the limited U.S. slap on the wrist than to rectify the problem that led to the Special 301 action in the first place.

A credible Special 301 demands that there be a credible measure of response to foreign piracy.

Third and finally, in this very brief statement—I hope, Mr. Chairman, you will permit me to enter my full statement for the record.

Senator BAUCUS. Just so all witnesses know, all statements will be entered into the record.

[The prepared statement of Dr. Bale appears in the appendix.]

Dr. BALE. Thank you.

Third and finally, one of the greatest concerns in industry is that the fundamentally flawed GATT Dunkel intellectual property, or TRIP's text, will be agreed to.

And worse still, it will effectively kill Special 301, or for that matter, Section 301 as a remedy for unfair intellectual property practices.

While we in the pharmaceutical industry wait 10 to 20 years before a defective TRIP's text becomes effective, we expect not to have recourse to Special 301 under the current Dunkel text.

Mr. Chairman, this problem needs to be addressed. We believe that any delay whatsoever in the transition under the TRIP's text should explicitly allow for interim use of Special 301 to its fullest extent.

As a one-time, it was a long time ago, negotiator in the 1975–1979 GATT Tokyo Round, I personally share my industry's skepticism about the GATT's outcome in the TRIP's negotiations and the concern about the future of 301 actions if a GATT package is ever implemented.

In conclusion, I hope that at this hearing we might be able to explore some of these issues, and that there might also be a chance to follow up with further thoughts on how to strengthen Special 301, or other legislation, which has been and can continue to be an effective instrument to complement other bilateral and somewhat less effective multilateral tools.

Thank you.

Senator BAUCUS. Thank you, Dr. Bale.

Mr. Berman.

STATEMENT OF JASON S. BERMAN, PRESIDENT, RECORDING INDUSTRY ASSOCIATION OF AMERICA, WASHINGTON, DC

Mr. BERMAN. Thank you, Mr. Chairman.

My name is Jason Berman. I am president of the Recording Industry Association of America.

The RIA represents over 250 record labels that produce over 90 percent of the pre-recorded music sold in the United States. And our members also account for approximately 60 percent of the music sold worldwide. That amounted to just over $16 billion in 1992, Mr. Chairman.

It was in recognition of the value of U.S. intellectual property industries, the recording industry included, that Special 301 was created.

It has a very simple predicate, that nations who want to trade with us on favorable terms have an obligation to grant us access to their markets and further, to ensure that the products of American ingenuity and creativity are not pirated or counterfeited.

Unfortunately, the U.S. record companies' market conditions in many places around the world can only be described in one word: hostile.

Whether through the failure to adopt adequate legislation or the unwillingness to effectively enforce laws, many countries have implicitly condoned piratical activities.

We have identified the most serious violators in our annual submissions to USTR under Special 301.

I would like to pay special attention now, Mr. Chairman, to those bilateral consultations that have produced results and to those that have remained on our Special 301 list as offenders for far too long.

Let me begin with the most dramatic development. A little more than a year ago, I sent a letter to USTR apprising them of a piracy problem of huge dimensions in Paraguay.

Yes. Little Paraguay was the source of a big problem. A handful of large and powerful tape pirates not only controlled 100 percent of Paraguay's market, but exported nearly $200 million worth of tapes into the surrounding markets of Argentina, Brazil, and Uruguay.

When Paraguay was named to the Special 301 watch list, Paraguayan authorities took notice. They discovered that this listing affected their ability to attract foreign investment, particularly, much needed U.S. investment.

In this case, Special 301 was able to serve its function merely be highlighting a problem. Paraguayan authorities have moved relatively quickly and decisively to eliminate piracy.

They have done such a good job in this effort that I am pleased to confirm that last week I wrote to USTR, requesting that Paraguay be removed from all Special 301 lists.

On the other side of the coin, however, is Thailand, a permanent resident on Special 301, where years of bilateral discussions aimed at improving copyright enforcement have failed to produce any concrete results.

This may be the result of Thai confidence in its ability to avoid sanctions based on geo-political concerns or that the Thais simply do not believe that sanctions, even if imposed, are too high a price to pay for maintaining an incredibly profitable pirate industry.

Whatever the reasons, efforts to address copyright piracy in Thailand until now have been spectacularly unsuccessful.

Once again, as we near the April 30th deadline for designations under Special 301, the Thais have been making public declarations about their good intentions.

Until recently, these words were unmatched by any deeds. Not a single pirate had been sent to jail as a result of Thai enforcement actions. It is a sorry record. It should not go unnoticed.

Let me add, Mr. Chairman, that April 30th seems to have a kind of magical quality to it when it comes to trade negotiations.

And I have to give credit where credit is due. The new Commerce Minister in Thailand, over the course of the last 2 weeks, has done more to enforce Thai law than in the 3½ years that Thailand has been on Special 301 lists.

As you pointed out in your discussions with Ira, the test is enforcement, but it is enforcement over time. And that remains a question mark.

I do not know the answer to the question, except to say that everything that has happened in the last 2 weeks in Thailand has been wondrous. It is amazing that it took 3½ years to do it.

And somewhere in between the success story of Paraguay and the story of Thailand lie Korea and Taiwan, both of whom have deserved reputations as pirate nations.

And again, it is April 30th that has brought the Taiwanese and the Koreans out into the open, offering declarations of good intentions, and some evidence of enforcement. But again, the question is, what will happen over time?

Let me turn to a country that does not appear at the top of my list, but a country that poses the greatest threat to the U.S. recording industry and at the same time, represents the greatest potential and that is, China.

There was some discussion earlier with Ira about events in China. China has passed a milestone copyright law. And on its face, it is a wonderful law. Unfortunately, it has no criminal penalties associated with it.

There is no transparency in the Chinese system for U.S. records to get into the country. There is an unwritten list of 100 titles a year. Unfortunately, most of those go to Hong Kong for Cantonese repertoire.

China needs to be sent a message. And it needs to be an unambiguous message. And this is the year for sending it.

Senator BAUCUS. I will have to ask you to summarize your statement.

Mr. BERMAN. Mr. Chairman, in summary, I am just happy to thank this committee and to see Senator Hatch, here as well, who helps actually to write our own copyright laws. So we have some sense of what is involved.

It has been the involvement of this committee over the years since the creation of Special 301, in the 1988 act, that has led to a confluence of administration actions that have benefitted U.S. industries.

And it is my hope that this committee will stay involved.

Senator BAUCUS. Thank you very much.

Mr. BERMAN. Thank you.

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

Senator BAUCUS. Mr. Cummins.

STATEMENT OF JOHN J. CUMMINS, PRESIDENT, U.S. TRADEMARK ASSOCIATION, NEW YORK, NY

Mr. CUMMINS. Thank you, Mr. Chairman.

My name is John J. Cummins. I am appearing here as chairman of the board of directors and president of the U.S. Trademark Asso-

ciation. In every day life, I work for Proctor and Gamble, but I am wearing my USTA hat here.

As with all USTA officers, board members, and committee chairs, I serve on a voluntary basis.

Contrary to what is probably a popular belief, a trademark, that is, a brand name for or an identifier of a product, does not become invulnerable simply because it has been registered or created or because it is being used in the market place.

If left unprotected, a mark's value can descend. And the descent can be both rapid and total. An unprotected mark is subject to a myriad of dangers.

The most pernicious of these is counterfeiting which is usually defined as the use of a spurious mark. It is the same as or undistinguishable from the genuine mark.

Counterfeiting and other protection trade barrier problems are not simply threats to the trademark owner, however; they also constitute threats to consumers and to our global trading system.

Trademarks that are adequately and effectively protected under a jurisdiction's law provide an assurance of consistent quality, standards, and values to the consumer.

Conversely, without this protection, that assurance is lost. As a result, the consumer loses trust, not only in the specific product, but in the whole system.

Indeed, if it is a counterfeiting situation, such as you referred to, Mr. Chairman, it can have disastrous results—I am speaking about the counterfeit Reebok shoes that caused a serious injury.

The trademark owner obviously loses. And as the mark declines in value and sales go down, the economic system as a whole loses.

As a 115-year-old not-for-profit association of over 2,500 members, USTA's principal goal is the preservation and promotion of trademarks as essential instruments of commerce, both domestic and international.

With our February 1993 filing of the Special 301 petition with USTR, we have indicated our commitment to create and implement a worldwide program to raise the profile of trademark protection to a level equal to the negotiation priority that has been accorded to the other principal forms of intellectual property: patents and copyrights.

Eight countries have been identified in our petition as particularly troublesome to the worldwide protection of marks: People's Republic of China, Taiwan, Thailand, the Republic of Korea, Brazil, Spain, Indonesia, and Mexico.

These nations are the ones with serious protection/trade barrier problems in many or most of the following areas: slow or cumbersome judicial procedures, arbitrary judicial decisions, ineffective civil remedies, ineffective criminal remedies, trafficking in trademarks, non-national treatment, uncooperative and/or uninformed police, unsympathetic or uninformed judges, and the inability to sue for trademark violations.

We trust that our submission will result in appropriate action by the USTR regarding trademarks. At a minimum, we hope that it will increase the level of understanding of these just-mentioned nations as to the importance that we attach to the need for adequate safeguards for the protection of trademarks.

Thank you, Mr. Chairman.

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

Senator BAUCUS. Thank you, Mr. Cummins.

Mr. Smith.

STATEMENT OF ERIC H. SMITH, EXECUTIVE DIRECTOR AND GENERAL COUNSEL, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, WASHINGTON, DC

Mr. SMITH. Senator, copyright piracy drains from $12 to $15 billion a year from the U.S. economy. During the 5 years since Congress passed the Omnibus Trade and Competitiveness Act of 1988, annual reviews and negotiations under Special 301 to improve inadequate laws and enforcement have, indeed, achieved very significant results.

Special 301 has been essential in stemming the tidal wave of losses in U.S. jobs and competitiveness that have threatened our industries among the country's most productive and fastest growing economic sectors.

Mr. Chairman, Jay Berman's RIAA was a founding member of the IIPA back in 1984. This year, over 1,500 companies, making up the eight trade associations in the IIPA, identified 28 countries whose piracy levels are particularly intolerable and which caused over $4.6 billion in losses to this economy in 1992.

These losses translate into tens of thousands of lost jobs for Americans at a time when job creation is at the heart of national economic and trade policy.

Bilateral pressure under Section 301 under the GSP Program and under Special 301, the subject of this hearing, has been responsible for great successes, among them Singapore, Indonesia, and as recently as last year, China, which passed a copyright law. Even more recently, Greece passed a good copyright law. And we await enforcement. These countries come to mind in the copyright area.

But as successful as Special 301 has been, we must, nevertheless, communicate to you and to the administration our grave concern for the future.

Many of the countries which you identified in your floor statement of 3 weeks ago and here today have been on the USTR list before. We talked about this.

Some, like Taiwan and Thailand, have been at the top of the list, have even been named as priority foreign countries. Some, like Thailand and India, have been subject to 301 action.

Some have even been the target of trade sanctions in the past, for example, Thailand in 1989.

The question is, have these countries come to view the threat of trade sanctions as no longer a credible threat?

On April 12th, Senator, our eight presidents met with Ambassador Kantor. We pointed out that the threat of trade sanctions is not credible unless we are prepared to use it. And if it is used, it must inflict real economic pain.

We believe Ambassador Kantor agrees with this conclusion. And we were particularly delighted to hear this confirmed by Mr. Shapiro's testimony today.

Thailand is a perfect example. The IIPA first identified Thailand as a priority country as early as 1985. Negotiations were conducted each year since that time. This was before Special 301 even came into existence in 1988.

But as Mr. Berman said, no major pirate in Thailand has ever been subjected to a significant fine or any jail term since our campaign started. Audio and video software piracy remain close to 100 percent. The Thai Government will cite the number of prosecutions which have resulted in convictions, but all have been retailers, most of whom have pled guilty, and have been fined up to a maximum of no more than $1,700, simply an annoying "tax" or a mere "cost of doing business."

The United States even retaliated in 1989, withdrawing part of Thailand's GSP benefits. Unfortunately, the amount was far too small to make any real difference to the Thai Government to induce them to take any action at all—a mistake which we must never make again.

Since 1984, our industry has estimated their total losses to Thai pirates at over $500 million. In 1992 alone, they were $123 million.

Mr. Chairman, when we wrote and delivered this testimony to you last week, we had seen no results in Thailand. And results are the only thing that will satisfy us, given the years of unfulfilled promises and commitments.

Mr. Berman mentioned the very recent activities of the Ministry of Commerce. And actually, the Prime Minister himself has had a stake in it. We are beginning to see maybe—maybe some real movement towards a solution to this problem.

We have another 2 weeks. And we expect major events to happen. We have been told by the Thai Government that they will happen.

Last Thursday, the largest pirate in Thailand, Super Peacock, was raided for the second time. They closed the factory and put the owner in jail. This is a truly major advance.

If this can continue between now and April 30 and beyond, we may—and I emphasize may—begin to see and end to piracy in Thailand. It all depends on the overall commitment of this government.

Back to Taiwan. Taiwan has been for years cited by all the IP industries as one of the world's worst offenders. Cumulative losses to our industries--the copyright industries—are estimated to total $1.8 billion since 1984.

Taiwan has staved off sanctions by every April 30th, doing just enough to get past. This can no longer continue, Mr. Chairman. We must deal with Taiwan in a forthright manner.

And at this point, again, with 2 weeks to go, from the copyright industry's standpoint, we do see some major progress. The situation is not over. And we expect the remaining problems to be resolved by April 30th.

Mr. Chairman, one thing that Mr. Shapiro said represents a major and an important development, that is, that the administration will not wait from April 30 to April 30 to keep the pressure on.

We hope and expect to see short-term deadlines and bench marks that these governments must meet before the annual review period next year.

This kind of exercise of discretion by the administration, we hope, will have exactly the kind of effect that Senator Rockefeller has asked for, immediate improvement of the situation.

And I wanted to mention two other countries quickly. And I know my time has expired. In addition to these worst offenders, one is Italy.

The losses to the movie industry are the highest in the world, $224 million. The situation has been total egregious for 2 years now with Italy having done nothing in this period. However, Italy did start taking action under the threat of Special 301 this year and we hope that this progress will continue, as it has in the software industry.

The software industry suffers some of its largest losses in the world in Italy. But Italy has taken some major steps recently to improve the situation. But it is another country where constant and credible pressure must be applied.

Senator BAUCUS. I will have to ask you to summarize, please.

Mr. SMITH. You mentioned Poland. This is a key country in Eastern Europe—we lost almost $200 million there last year. The situation there can no longer be tolerated.

Mr. Chairman, we have been delighted with what we have heard from you, and from Mr. Shapiro today. And we hope that exactly this kind of hearing and this kind of oversight on the operation of Special 301 will move these countries into the plus column for us.

And as I said before, $4.6 billion in those 28 countries is a very significant amount to the U.S. economy.

Thank you.

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

Senator BAUCUS. Thank you.

I would like to demonstrate a point that Mr. Cummins made with respect to the trademark problems, that is, that trademark violations and all intellectual property infringements not only have a very adverse economic consequence, they can also have a very significant physical consequence to Americans.

That is basically because the American products, I think, by and large in almost all cases are very high quality. Whereas often the counterfeited products are not the same high quality.

In this case, these are counterfeited Reebok tennis shoes. A constituent of mine in Montana in Korea, found some Reebok tennis shoes which he thought were fairly inexpensive. He brought them home to his daughter who plays tennis in Bozeman, Montana.

Well, she wore these Reeboks. You can see where they fell apart. Counterfeit, they were not Reebok shoes. They were counterfeited shoes. And she is now permanently damaged.

It is just a consequence again of the inferior quality of a counterfeited product.

Now, I believe frankly that not only for the physical reasons, but also the economic reasons, this country just has to be a lot more aggressive.

I would like to address your point you made, Mr. Smith, with respect to enforcement. It is the April 30th phenomenon.

And Mr. Berman, you have all made the point, that is, as April the 30th approaches, you hear all these wonderful words and how they are going to reform. And they are going to finally do what they should be doing, even a few actions around April 30th.

What advice do you have with respect to interim provisions, benchmark provisions? Because it does make sense that if April 30th comes and passes and we reach agreement with a country, that we want some assurance that before the next April 30th, they are going to live up to their promises, whether it is on a quarterly basis or a semi-annual basis.

How do we avoid this phenomenon of a flurry of good intention and a few good actions, a few good deeds around April 30th only to find a lot of these countries just slack off for the balance of the year?

How do we address that problem? What advice do you have for this committee and for the USTR?

I will just go down the line. I will begin with you, Mr. Smith. And I will just go right down the table.

Mr. SMITH. Well, I think establishing short-term benchmarks between the two dates is absolutely critical. And problems that we have had in the enforcement area have been because countries have made raids and begun cases against pirates, but those cases then drag on for years.

What we must see and what USTR must look to are specific results, that is, pirates going out of business and levels of piracy going down prior to a specific benchmark date.

Senator BAUCUS. Now, does the administration have that authority now under the law? Or do you request that we in the Congress give the administration new authority?

Mr. SMITH. Right now, Mr. Chairman, they do have the authority. They can set interim deadlines. Special 301 is not necessarily tied to April 30th. Countries can be designated in mid-year, that is my understanding.

So if a mid-year date is established and the deadline is not met, designation can come at that point.

Senator BAUCUS. So you recommend what, semi-annual review or quarterly? What seems to——

Mr. SMITH. Well, I think it needs to differ country to country, depending on the specific circumstances.

Some countries, for example, where legislation is pending, may need "x" period of time depending on the legislature and when its session ends and begins.

And in another country, you may want to put them on "y" deadline. I think that is the kind of thing that USTR needs to look to, the individual situation.

Senator BAUCUS. Dr. Bale.

Dr. BALE. I think I would make two points, Mr. Chairman. First of all, I think in a couple of these cases where countries have dragged out the process too long, there has to be a credible response and action taken this month.

I would cite Brazil, Argentina. And obviously, if countries do not take action, the pressure peaks out on April 30th. Then, it slacks off. And they are doing this under the understanding that they can get away with it.

And even if you have a quarterly benchmark, unless there is action where countries have simply slacked off for so long, Brazil, Argentina, Thailand, Hungary. All of these countries are dragging people out. I think that has to be part of it.

So the strategy has to be action taken in certain cases so the rest of the world gets the message that they cannot use these periods to just mark on their calendar, hope they get by. If it is Sunday perhaps, then, they are off into the next week and the next quarter.

Second, I do think staff resources of USTR and elsewhere in the government are an issue here I have to say.

When I think about the people in Mr. Shapiro's shop and elsewhere in USTR who are working these issues or who have worked the issues, they are extraordinarily stretched.

And I think between GATT negotiations and with Special 301, I think, there is an issue of staff allocation perhaps or some sort of issue involving staff resources that has to be looked at.

Senator BAUCUS. Thank you.

Mr. Berman.

Mr. BERMAN. Well, I agree with both Harvey and Eric. I do think it is important to have out-of-cycle review.

And I do think the current law gives USTR all the authority it needs to establish the kind of quarterly benchmarks that we can judge, but I do not think benchmarks are the test, Mr. Chairman. Results are the tests.

We have had experience in the past with benchmarks. And it is very possible—and I will speak only about the recording industry. It is very possible for the pirates to go out of business for a period of time and to go back into the business.

It is a very low threshold. It does not require an enormous amount of capital to do that. So it is the result that counts.

And I think in regard to results, I think it would be very important, Mr. Chairman, for this subcommittee to have another hearing 4 or 5 months from now, to see where we are in this process and to continue that over the course of the year.

We do not have to tie ourselves to the dance that goes on the month before April 30th. We can make sure that this goes on throughout the year.

Senator BAUCUS. Dr. Bale, you said benchmarks. Did you mean results?

Dr. BALE. Yes, sir. I think you have to be able to take action in certain cases to send the message that you are not just in this for the exercise of doing it.

Senator BAUCUS. Mr. Cummins.

Mr. CUMMINS. Insofar as trademark counterfeiting is concerned, I agree with what the previous speakers have said.

I have listed, however, a number of other trade barrier protection problems that we have in the trademark field.

And these are not the sort of things that you can see the results of overnight. It is going to have to be something that is played out over a period of many months. And I think it is just a matter of looking at, reviewing the situation each year annually as to those.

Senator BAUCUS. Let's turn to another issue, and that is, interagency review process and terminations that the administration may or may not make here.

I think all of us will agree that in the past too often the State Department perhaps or some other agency weighs in too heavily, prevents the United States from taking some action that it otherwise should take under Special 301, for example, or maybe under some other trade law.

I would like your views as to what kinds of objections the USTR might receive from other agencies in any of these interagency reviews, and what your rebuttals would be to those objections so we can get that out in the record.

It would hopefully help the USTR frankly and help Americans more importantly to be more assured that their economic interests are protected.

Does anybody want to begin?

Mr. BERMAN. I would be happy to begin. I think that all of us who have lived through the process would come to basically the same conclusion. That is, that very often as issues wind their way up beyond USTR in the interagency process, questions of geo-political concerns, and other foreign policy issues tend to impinge on the decisionmaking process that led USTR to either identify a country or to ask for a response from a country.

What we have lacked in the past is a sense that resolving these issues consistent with U.S. law is in the interest of the United States.

It is as much a geo-political issue as whether a nation sits astride a very important sea lane or not. We are engaged in global economic warfare with many of our trading partners, unfortunately, because it is their mercantile view of the world that that is the way trade should be conducted.

And if our response is less than adequate because other considerations impinge on it, then I think what we have done is to short change ourselves, Mr. Chairman.

Senator BAUCUS. Thank you.

Dr. Bale.

Dr. BALE. Well, those of us in the private sector have no presence, of course, at the table when the interagency group gets together and decides on what the level of response should be, but I know of cases because I get reports back from government and get a reaction to the discussions.

But basically, it results in a whittling down of the industry's amount of damage. You do not know really what is driving it or what the measures are; but they are ignoring, for example, the impact of taking no action or deminis action, some of which is less than the legal fees that we pay for these cases.

The damage involved is in the hundreds of millions of dollars. And someone comes back and says, well, it is a couple of hundred thousand dollars with the retaliation. Well, that does not explain why industries are concerned.

Yet, there is a decisionmaking process going on that ignores those basic industry figures. And some other figures are cooked up. So I think there has to be much more of a dialogue between the

agencies and industry in this process, much more of a sunshine process that goes on between industry and government.

Senator BAUCUS. What are the principal objections that your industries are aware of if the United States, if it does, presumably argues for as the last resort some retaliation?

What are some of the objections that your industry would have?

Mr. BALE. What those objections are, as Jay has indicated, are typically foreign policy concerns.

And I think there is a feeling on the part of some agencies in the government that the Congress did not consider foreign policy when it developed the legislation in the first place.

And I think that needs to be the approach, that basically those were taken into account. And these are the issues, just as Jay has indicated.

There is a foreign policy dimension that should be segmented. That should be segmented out. And this is an economic decision.

And those are the issues that should be focused on, and a much more thorough analysis of the industry's figures from the point of view of getting the necessary measures changed in this country.

That should be the basis of the level of response, not some whittling down of the——

Senator BAUCUS. I think you have the point that these issues of foreign policy should not be linked because we are not talking about a commercial transaction here where there is give and take in negotiation. Rather, we are talking about an illegal activity.

Mr. BALE. Exactly right.

Mr. CUMMINS. Mr. Chairman, it seems to me you also have an economic argument being made on the other side that we are protecting our local industries and illegal as they may be or improper as they may be.

And I think the message that has to get across is that it is to the betterment of the consuming public of your country to have the good products because inevitably, the counterfeit and the rip-off is an inferior product.

So it is important to your consumer. And it is also important to your country's economy from the standpoint of transfer of technology and encouraging investment.

Mr. BERMAN. Mr. Chairman, one of the ironies in that whole process where so-called foreign policy concerns may impinge upon the economic issues involved, it always struck me as kind of backwards. We should actually be asking more of our friends in terms of their willingness to enforce the law and to protect our products, not less.

In fact, that is what friendship might be all about. And if these countries have an importance and in many cases, they are also quite dependent on U.S. assistance for that strategic importance, it seems to me we have a right to ask that U.S. industries be protected.

We are not asking for something that is so out of the extraordinary. We are not asking to be protected against somebody's penetration of the market place.

What we are asking for is access, fair access to a market place and then for the ability to protect our product in that market place.

Senator BAUCUS. Mr. Smith.

Mr. SMITH. Senator, this administration came into office on the belief that foreign economic policy has now become critical in a new world order.

We are very encouraged that Secretary Christopher and Secretary Bentsen, as this committee knows so well, will put foreign economic policy first as essential to U.S. foreign policy generally.

And we hope that that will be the case. And we hope that former instances of the State Department or other agencies in the administration taking negative views toward tough action in this area will diminish.

And with your help, we hope that will happen.

Senator BAUCUS. I will ask you about the TRIP's provisions, the Dunkel text and how that can be improved upon, what action our country can take to help make that happen.

The administration is now about to send up a request for fast track extension.

Mr. BERMAN. I would say one phrase: that national treatment is the catch word. The Dunkel text is absolutely inadequate and unacceptable on the basis of the issue of national treatment.

Dr. BALE. I would add to that the transition provisions, the 20-year figure, that you had mentioned earlier, Mr. Chairman, is, in fact, the risk that we run in the text, a minimum of a 10-year transition in the pharmaceutical area.

Such countries as Brazil, Argentina, and India are why Special 301 is so important. The extra 10 years comes about because that text is structured so that if copied products come on in the market in the interim, that protection just extends right out to the next cycle of products.

And so the fact of the matter is the risk is that before protection ever comes about in some of these markets, it could be 20 years. It depends on who is important.

Senator BAUCUS. Mr. Smith.

Mr. SMITH. In the copyright area, no question about it, Mr. Berman hit the nail on the head. The issue is national treatment. That is certainly the key issue in TRIP's.

I would add also for the services text, the whole issue of possible culture exceptions and quotas—these issues affect both the recording industry and the motion picture industry.

Senator BAUCUS. Well, you have identified deficiencies. You have not yet identified the associated strategy.

How do we accomplish our goals? How do we get there? Any ideas? How do we get better intellectual property provisions in the Uruguay Round?

Dr. BALE. I think here that Special 301 plays a particular useful role. I am afraid that in the last couple of years, there was only a restricted use of Special 301 because of a concern that the Special 301 process might upset the drive toward the end of the Uruguay Round.

I think Jay would agree with me in this respect. I think we saw a certain reluctance on the part of the administration to use Special 301.

Senator BAUCUS. Because it might upset somebody?

Dr. BALE. It might upset somebody in the GATT negotiation.

Mr. BERMAN. Or alternatively, the administration would say, well, you know, so and so is really helping us on the QT in the Uruguay Round. We do not want to rock the boat.

Dr. BALE. So certainly, one part of the strategy here that has certainly accelerated the drive in the beginning of the Tokyo Round—the Uruguay Round—excuse me—was at that time in 1985, the administration was on the theme of the use of Section 301. It propelled it forward.

I think here, a particularly targeted and well-used Special 301 process can be something to drive it forward.

I think also we have to be aware of what some of our trade partners really want out of this round. What they really want out of this round is to defang Super and Special Section 301.

We have to be very careful about that. And I am afraid right now in the Dunkel text, there are the seeds of the destruction of the bilateral 301 approach.

Senator BAUCUS. I very much agree with you. And frankly, I have forgotten the exact data here and the instances, but I have a very strong impression that it has been our trade laws which have helped reach agreements worldwide, that is, the use of 301, Super 301 and in some cases, I hope, Special 301.

But anyway, Super and regular 301 have helped reach agreements worldwide. Even the Uruguay Round, there is a large part propelled because of the United States use of Super 301 and the regular 301. Without those statutes, an argument could be made that there would not even be the beginnings of Uruguay Round negotiations.

We are helping make things happen. And we are standing up for our rights. And frankly, that adheres to the benefit not only to Americans, but to people worldwide.

Mr. BERMAN. I think we often lose sight when we get into global negotiations of the leverage we actually have. We are still, in most instances the world's single most important market for everybody else.

And that is what we bring to the table. And so if you are asking for a strategy that moves the Uruguay Round in terms of the Dunkel text where it is now to where it needs to be, that is the key to it. Special 301 has had a role to play in it.

Ambassador Lavorel has gone back to the table on a couple of occasions with suggested changes in language.

We have gotten past the critical period. There was a time when it appeared that an agreement for the sake of an agreement might jeopardize our larger concerns and our goals. And I think we have gone beyond that.

Senator BAUCUS. And I frankly think that is another reason why Super 301 should be part of fast track extension, that is, if Super 301 is enacted along with the extension of fast track negotiating authority for the Uruguay Round, then, our trade partners are going to know that they better negotiate something that is really good. Otherwise, they are going to be faced with Super 301 retaliation.

I thank you all. This has been a helpful hearing. And I appreciate your suggestion, Mr. Berman, of a followup hearing at a later

date to see whether these countries actually do what they say they are going to do.

Mr. BERMAN. There is May 30th and June 30th and July 30th.

Senator BAUCUS. Right.

Hearing adjourned.

[Whereupon, at 11:59 a.m., the hearing was concluded.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED

PREPARED STATEMENT OF HARVEY E. BALE, JR.

Mr. Chairman and Members of the Subcommittee:

I am Harvey Bale, Senior Vice President International of the Pharmaceutical Manufacturers Association (PMA). Thank you very much for providing me the opportunity to testify on behalf of the PMA at this important hearing today on the Special 301 trade remedy law and its vital importance to the research-based pharmaceutical industry as means by which to improve intellectual property protection around the world. PMA is a non-profit scientific and professional association that represents over 100 U.S.-based companies which research, develop and market the majority of prescription medicines sold in the United States and a substantial portion of those sold throughout the world.

PMA is grateful for the decade-long bipartisan support, in both the Congress and the Executive Branch, in helping to ensure that the international trade environment becomes more conducive to the sale of U.S. research-based medicines and U.S. goods and services in general. Mr. Chairman, you and the members of this committee have been strong leaders in the battle against global patent piracy, and we look forward to working closely with you and the Subcommittee. We also believe that Ambassador Kantor is personally committed to a pro-intellectual property strategy, and he is supported ably by his staff and other Executive Branch agencies.

I. Introduction

A. Industry Background

The U.S.-based international research-based pharmaceutical industry is one of this country's premier high-technology manufacturing industries. In 1992, the U.S.-based industry registered a trade surplus exceeding $1.3 billion. The key to the U.S. industry's past and future success is based on an extraordinary commitment to high levels of research and development spending. R&D spending by the U.S. pharmaceutical industry has doubled every five years since 1980. R&D spending is expected to reach a record $12.6 billion in 1993 (see, Chart 1).

The ratio of R&D spending to sales is now at 16.7 percent, whereas other U.S. industries with established R&D programs average only 3.6 percent (see, Chart 2).

Chart 1

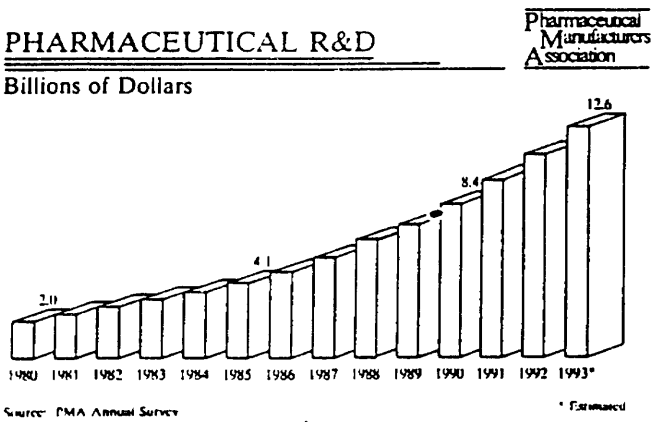
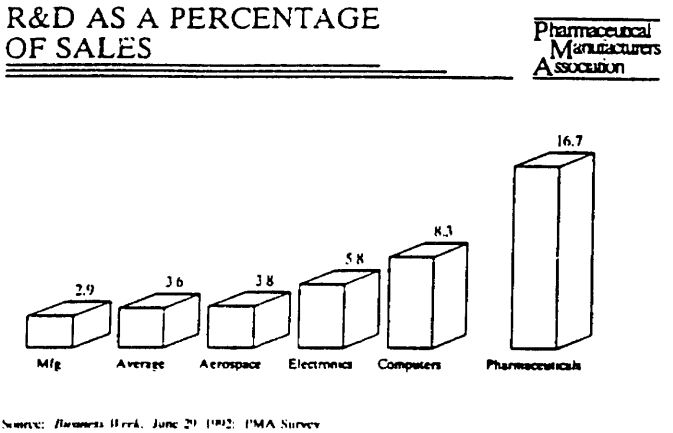


Chart 2

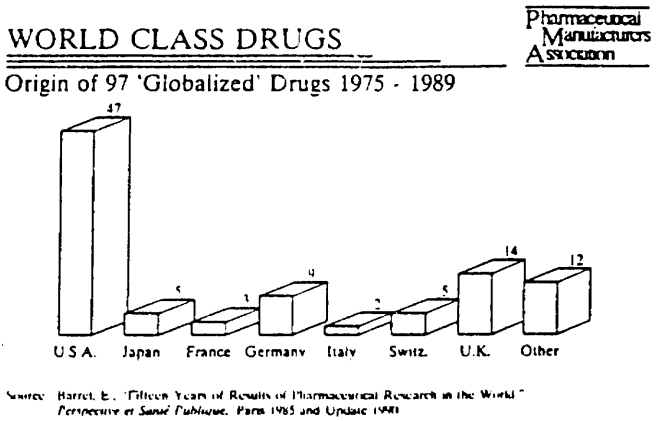


To put these figures in context, PMA member companies spend more on research and development than does the U.S. Government's National Institutes of Health on all of its biomedical research.

The benefit of this extraordinary commitment to research and development spending by the U.S. industry is clear from a comparison of new "world class" drugs (i.e., products that have won global acceptance), invented by U.S. companies versus European and Japanese companies. According to a study originally published in France by Dr. Etienne Barral, of 97 such "globalized

drugs" invented in the 15 years between 1975 and 1989, 47 were developed by U.S. companies. During the same period, Japan produced only five, and our closest competitor, the United Kingdom, produced only 14 new pharmaceuticals (see, Chart 3, below).

Chart 3



Source: Harrel, E., "Fifteen Years of Results of Pharmaceutical Research in the World," *Perspective et Santé Publique*, Paris 1985 and Update 1989

The trend of increasing research and development investment by the U.S. pharmaceutical industry also runs counter to the overall trend of R&D investment with the rest of U.S. industry. A 1992 National Science Foundation study found that research spending in the United States is declining, even as our foreign competitors are spending more. This is a reversal of a long-term trend in the United States, where R&D spending had been increasing since the 1970s. When these findings were reported in the New York Times, a number of experts noted their concern that although new research and development investment is a priority for our country, the decline in R&D spending augurs ill for American competitiveness and job creation. However, this is not the situation in our industry.

As shown on the following charts, one reason for this tremendous commitment to R&D is that new drug therapies are increasingly expensive to discover and develop and the pharmaceutical R&D process is highly uncertain. While it takes approximately $359 million (in 1990 dollars, according to the most recent estimate by the Office of Technology Assessment) (see, Chart 4, below) and 10-12 years of development to bring a new drug to market, only one in 5,000 compounds discovered in the laboratory is ultimately approved for marketing (see, Chart 5, below).

Chart 4

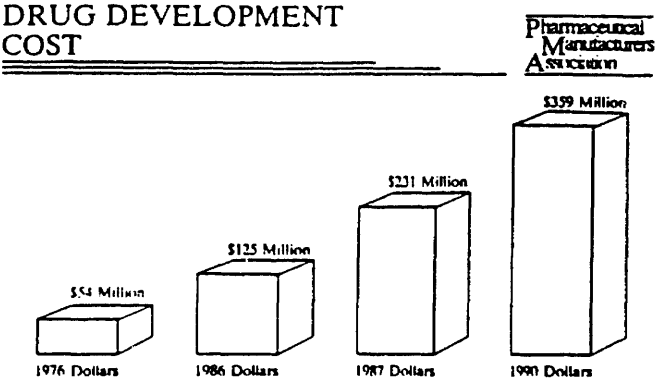
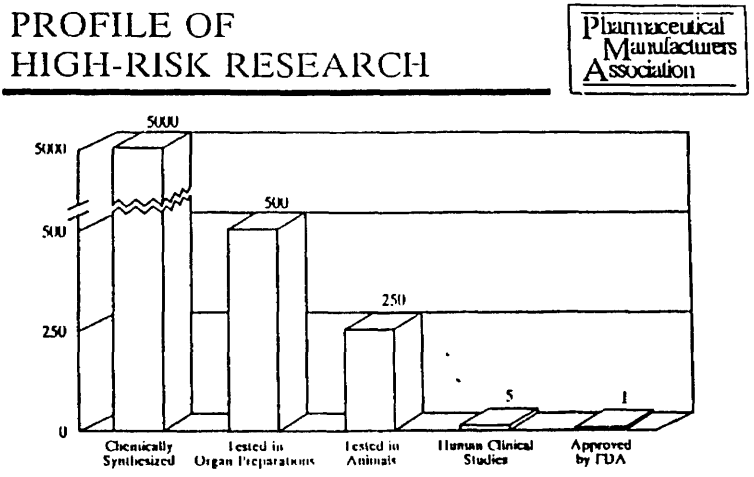


Chart 5



Source: National Cancer Institute and Food and Drug Administration

Unfortunately, many of these pharmaceutical products, while costly to develop, can be often copied at a very small fraction of their development cost. The copying of pharmaceuticals, as in the case of movie and music cassettes, is a very, very profitable and low risk business in many countries. And it robs America of its technological lead.

B. Intellectual Property Protection and U.S. Trade Policy

U.S. international trade policy over the last decade has embraced strong and effective protection of intellectual property around the world as a key aspect of American industrial competitiveness and economic health. This policy was crafted and supported through a bipartisan Legislative and Executive Branch

effort. The objective was and remains aimed at enhancing U.S. interests in such diverse countries as Mexico, China, Canada, Korea, Taiwan, Thailand, Turkey, Hungary, India, Brazil, Argentina, and many others, as well as in multilateral fora such as GATT and plurilateral fora such as NAFTA. The United States has had a number of successes, e.g., Special 301 actions against Mexico, China,and most recently the Philippines; but much work remains to be done, e.g., concluding the Uruguay Round with a sound TRIPs agreement.

New states, such as the former Soviet republics, and the emerging democracies of Eastern and Central Europe have recognized the importance of intellectual property protection to economic development. This policy encourages the evolution to market economics and industrial innovation as well as supports the competitiveness of U.S.-based high-technology industries.

II. Effectiveness of Special 301

A. International Challenges and Progress

The changes that have taken place in national laws in Mexico and Canada, and reflected in the NAFTA, provide examples of the positive trends in strengthening global intellectual property protection.

Mexico: Mexico deserves recognition for implementing on June 28, 1991, a "world-class" patent law. We have been told repeatedly since the law was implemented that the ensuing regulations to further strengthen and clarify the law would be soon published. Unfortunately, nothing has happened. We have continued to urge USTR to encourage Mexico to close this final chapter and publish the regulations to its 1991 intellectual property law. PMA believes that Mexico should be placed on the Watch List in 1993. Mexico should be dropped, however, from all Special 301 lists only once satisfactory regulations are published. These have been promised but not delivered for about two years.

Canada: In the past, PMA has suggested that Canada be included on the Special 301 Watch List. On February 3, the Canadian Parliament passed C-91, the Mulroney Government's patent bill. The passage of C-91 eliminates the discrimination against full patentability of pharmaceuticals not researched and discovered in Canada and the use of compulsory licenses as a sanction. Thus, Canada should not, we believe, be considered any longer in the context of Special 301.

NAFTA: The NAFTA also represents an example of the way in which international trends have been moving in the direction of improved intellectual property rights on a global scale. The NAFTA reinforces the gains achieved in a recently-implemented Mexican patent law which went into effect on June 28, 1991. The law contains many of the provisions developed in the NAFTA such as a twenty-year patent term, product and process patent protection for pharmaceuticals, limited compulsory licenses, immediate implementation and, very importantly, pipeline protection. Mexico's law represents a major advancement in the protection of intellectual property protection and is a benchmark for other countries to follow.

NAFTA will help to reinforce and internationalize positive elements of C-91 and the new Mexican patent law. When implemented, it will set the standard for patent protection for other countries in the Western hemisphere to achieve if they wish to strengthen trade ties with the United States.

Thanks to the tireless efforts of the USTR staff, with tremendous assistance from the Departments of Commerce and State, the NAFTA represents the highest intellectual property standards and enforcement in any international agreement. The intellectual property provisions contained in Chapter 17 of the NAFTA will benefit the U.S. research-based pharmaceutical industry and other technology-intensive industries significantly.

PMA supports the initiative of President Clinton and Ambassador Kantor to work with the Governments of Canada and Mexico to include supplementary agreements on the important issues of labor rights and environmental protection. We hope these negotiations will reach a timely conclusion so that the entire NAFTA package can be considered and approved by the Senate later this year and that the Agreement will take effect on January 1, 1994.

B. The U.S. and Global Consensus

Because the research-based pharmaceutical industry is both extraordinarily dependent on patent protection and one of this country's most successful high-technology manufacturing industries, the U.S. Government has made strong global protection of intellectual property a foundation of U.S. trade policy.

Thus, Congress mandated in the 1988 Trade Act that the U.S. Government pursue intellectual property protection as a trade priority. As Senator Lautenberg said:

> "America's economic edge is its technology and its innovation. But, if we are to enjoy the fruits of our labor -- the jobs and growth that are to come from innovation -- we need to stop the piracy of American intellectual property.... It takes as much as $150 million [N.B., most recent estimates are as high as $359 million] if not more to develop and bring a new pharmaceutical product to market. Yet, an average chemist could duplicate it with ease...."
> **Source: Senator Frank Lautenberg, D-N.J., during debate on H.R. 4848, Congressional Record, page S-10711.**

Also, it is noted in Congressional reports:

> "The problems of piracy, counterfeiting, and market access for U.S. intellectual property affect the U.S. economy as a whole. Effective action against these problems is important to sectors ranging from high technology to basic industries, and from manufacturers of semiconductors and other electronic products, motion pictures, books, chemicals, computer software, records, and pharmaceuticals.... Intellectual property protection and market access problems in foreign markets are often closely intertwined...."
> **Source: Report of the House Committee on Ways and Means to accompany H.R. 3, the Trade and International Economic Policy Reform Act of 1987, Report No. 100-40, at page 163.**

President Clinton and Vice President Gore have also noted in their book Putting People First: Strategy for Change, "We will ensure that the Uruguay Round protects our intellectual property and takes a tough stand against unfair trade practices."

The importance of effective patent protection to pharmaceutical innovation, as well as lengthy regulatory approval periods for pharmaceuticals, is recognized internationally. It has long been recognized that a nominal 17- or 20-year patent term is seriously reduced by regulatory delays in getting pharmaceuticals approved. It is for this reason that Japan in 1987 and the European Community in 1992 (both following the U.S. lead via the 1984 Waxman-Hatch Act) enacted patent term restoration. Language from the EC Commission during the debate over patent term restoration (the Supplementary Protection Certificate, SPC) is instructive:

> "...the aim of this proposal [the SPC] is to improve the protection of innovation in the pharmaceutical sector. In this respect, it forms part of Community health policy which seeks to create the conditions which permit the European pharmaceutical industry, by the turn of the century, to guarantee therapeutic, scientific, economic and social progress which is indissolubly linked with the discovery of new medicinal products. Patents still represent the best tool for protecting innovation in this respect.

While patent term restoration laws in the European Community and Japan were not the result of Special 301 actions, they do illustrate that many countries in the world also recognize the fundamental link between intellectual property protection and innovation, especially for pharmaceuticals.

C. Progress as a Result of Section 301 Actions

Nowhere in the world has the USTR been more aggressive in applying the trade tools it has been provided by Congress to improve the environment for strong intellectual property protection through Special 301 than in the Asia-Pacific region. We are now in the fifth year of application of the Special 301 provisions of the 1988 Trade Act and the second year after the first countries were designated as priority foreign countries under this provision.

In 1991, the first year in which designation status was actually applied, USTR designated China, India and Thailand as priority foreign countries. In 1992, India and Thailand were re-designated and Taiwan was added to the list of priority countries to be investigated by USTR. Other countries in the region, especially Indonesia, Korea and the Philippines were maintained under "priority watch" or "watch" status under Special 301. And there have been some promising results from the efforts of USTR to focus on the countries of this region.

China: In China, USTR experienced success in negotiations with the Government of China which culminated in a U.S.-China Memorandum of Understanding in January 1992. In the agreement, China promised to provide several improvements in patent protection for pharmaceutical products. These included:

- Full 20-year product patent protection for pharmaceuticals, to become effective as of January 1, 1993;
- Non-discriminatory compulsory licensing;
- Importation allowed to satisfy working of a patent in China; and
- "Pipeline" protection for products invented as early as 1984, with patents granted on or after January 1, 1986. Pipeline products have 7.5 years of marketing exclusivity.

(PMA and its member companies have had a chance to study the implementing regulations, both for the patent law revisions and for the pipeline arrangement, and have found some significant problems in the wording of these provisions. These problems specifically relate to the provisions in the Chinese law regarding compulsory licenses and the requirements for the granting of pipeline protection for qualifying pharmaceutical products. China will continue to provide an attractive and growing market for PMA member companies, and we are confident that we will be able to work with USTR to resolve the outstanding IPR problems.)

Taiwan: In June 1992, the U.S. and Taiwan concluded an agreement in which the Government of Taiwan agreed to improve the quality and enforcement of intellectual property protection, including copyrights, trademarks and patents. This agreement followed Taiwan's designation as a priority foreign country some two months earlier. PMA and its member companies are encouraged by Taiwan's willingness to improve the business environment for the research-based pharmaceutical industry in Taiwan, but remain concerned that the provisions in Taiwan's law allowing for the granting of compulsory licenses are not narrowly enough defined. While Taiwan has yet to add real pipeline protection to its 1986 patent law, it has attempted to provide the research-based industry with a somewhat improved environment in Taiwan.

The Philippines: PMA welcomes the April 6 agreement between Philippine trade negotiators and USTR Kantor as a symbol of the commitment of the Philippines to improve intellectual property protection in the areas of copyrights, trademarks and patents.

In the agreement, the Philippine Government has committed itself to ensure that any exclusions from patentability conform to the limits provided in the December 20, 1991 draft Uruguay Round text on TRIPs. It also has committed itself to submit an amendment to its current patent law in conformance with Article 31 of the TRIPs draft. This article describes the "rights conferred" on the owner of a patent. The Philippines also reportedly will submit an amendment to indicate that importation of a patented product or the product of a patented process will be treated as "working" a patented invention. If the Philippine Government can follow up in adherence to its commitments, PMA would concur with USTR's decision to remove the Philippines from the Special 301 priority watch list.

D. Key Challenges Ahead for the Congress, Administration and Industry

Despite the successes in Special 301 negotiations with the aforementioned countries, there are still several countries which have continued to ignore or lag behind the global trends towards improved intellectual property rights. The most prominent among these are Argentina, Turkey, Hungary, Brazil, Colombia, India, Korea, Thailand and Venezuela.

Argentina: In the case of intellectual property rights in the pharmaceutical industry in Argentina, the Menem Administration had assured the previous Administration four years ago that Argentina would have a "world class" patent law. Our two countries have also signed and the Argentine Congress has ratified a treaty on the promotion and protection of investments that includes language on protecting intellectual property.

Yet to this day, the Argentine Government has not fulfilled its commitment, not only to the United States but, indeed, the world business community, to have a patent law that instills confidence and projects the permanence of the structural changes in Argentina.

Argentina's Congress is now in an "extraordinary" session where they can take up and vote a world class patent law. The Argentine Administration, with the weight of its office and the essential argument of the importance of an effective intellectual property law for the future of Argentina, has, and can, influence the passage of the patent reform bill at this critical time.

Argentina is well aware of our government's position vis-a-vis 301 and our determination in the words of President Clinton to "compete not retreat." However, in a broader sense what will be confirmed here is whether this "New Argentina" is real and here to stay or whether Argentina will fail to achieve the lofty goals it has set for itself.

Argentina offers a most timely example of how the U.S. Government will handle the intellectual property issue in the world arena. In ten days the patent reform bill, presently in the Argentine Congress, will expire and, because of the beginning of elections in Argentina and numerous other reasons, it is unlikely to be taken up in the next two years. We should recognize that CILFA, the organization of Argentine pirate producers, is the most powerful anti-patent force in Latin America, and it has sought to extend its influence even to the United States. If Pat Choate intends ever to write a second edition of his book, Agents of Influence, he would do well to focus on the efforts of CILFA.

PMA urges the U.S. Congress and the Administration to recognize that this is the critical time to focus its resolve on this issue. There are important repercussions that an unresolved status can have on U.S./Argentine bilateral relationship, the rest of the hemisphere, and those that steal U.S. intellectual property with impunity. If this requires the United States to designate Argentina under Special 301, then do so we should. The United States should not allow continued access to our market for Argentine exports, let alone negotiate a free trade pact, unless Argentina fulfills its 4-year commitment.

Turkey: After years of promises, the Government of Turkey introduced to Parliament in 1992 a totally inadequate draft patent law which would provide limited product patent protection for pharmaceuticals. The proposed law, as presented to Parliament, is fundamentally flawed in a number of key areas, and runs the risk of being weakened further in the legislature. The Turkish Parliament has begun active consideration of the draft patent law, but it is reported that the local industry, which is among the world's more successful patent infringers, is involved actively in lobbying Turkish parliamentarians to weaken even further the draft law.

Principal among the serious deficiencies of the draft Turkish law are a ten-year transition period, no pipeline protection for pharmaceuticals and open-ended compulsory licensing provisions, which would allow, inter alia, compulsory licenses for export production and also for the "public welfare." Additionally, importation of a patented product does not satisfy patent working requirements, a key aspect of any meaningful patent protection regime.

In summary, while the proposed law would make improvements in a few respects, the above deficiencies and the lack of pipeline protection make it totally unacceptable.

A measure of pipeline protection for pharmaceuticals has been a key feature of intellectual property agreements negotiated by the United States in such countries as Mexico and China. Countries seeking to accede to the NAFTA in the future will be required to provide pipeline protection. Even if the pipeline issue is addressed in Turkey the compulsory licensing provisions would undercut any protection afforded by other provisions of the law.

The inability of the Government of Turkey to provide meaningful patent protection for pharmaceuticals adversely affects the investment climate for this high technology sector. The continued delay on the part of the Government, and its willingness to put forward a fundamentally flawed piece of legislation, merit the designation of Turkey as a Priority Foreign Country in 1993.

Hungary: Hungary has been a major infringer of pharmaceutical product patents. It traditionally has been a source of "pirated" products worldwide. Ongoing negotiations between the United States and Hungary are stalled over the Hungarian Government's reluctance to provide patent protection to pharmaceutical products. Hungarian authorities are more concerned about protecting the operations of certain politically powerful indigenous companies which have thrived by copying patented products and manufacturing them through purportedly different processes.

The U.S. Government has asked Hungary to introduce comprehensive patent protection for pharmaceutical products by August 1993. Because of Hungary's extreme recalcitrance and unwillingness to reform its patent law, PMA believes that Hungary should be designated as a Priority Foreign Country.

Brazil: The previous Collor Government introduced a flawed patent law proposal into the Brazilian Congress on May 1, 1991 in response to the lifting of U.S. trade sanctions on July 2, 1990. Trade sanctions were imposed on Brazil in 1988 as a result of a Section 301 action initiated by PMA. Brazil's refusal to provide patent protection for pharmaceutical processes and products was found to be an unfair trade practice under the provisions of U.S. trade law.

After its introduction, the law has been twice amended by the Patent Commission of the Chamber of Deputies. Regardless of some positive amendments, the Brazil patent law proposal remains flawed and would not offer the same protection found in other patent laws enacted recently, such as that of Mexico.

Since assuming power, the new Government of Itamar Franco has not supported the patent law but has suggested that the law be weakened. In fact, the Franco Government is considering government subsidies to state-owned and Brazilian national pharmaceutical companies.

Despite nearly three years of promises, Brazil has taken no concrete steps to enact an adequate patent law since trade sanctions were lifted. For this and other reasons, we believe that Brazil should be elevated from Priority Watch to Priority Foreign Country status and that reinstatement of sanctions should be pursued as a policy option.

Given the imminence of the U.S. Government's decision on Special 301 priority countries, Brazil is now trying to beat the Special 301 deadline by passing a weak law. We need to send a clear message: no law is preferable to an inadequate one and in either case the U.S. Government will take strong action. The Bush Administration was promised action in 1990 when it rescinded the tariff increases placed on Brazilian exports in 1988. Since then, Brazil has done absolutely nothing and it fully deserves

and should expect the reinstatement of sanctions at such a level that will get that Government's attention. To do anything less, will send a signal that our Government is not serious when it says it believes in vigorously pursuing foreign unfair trade practices.

Colombia: Andean Pact member Colombia provides no effective pharmaceutical patent protection. Decision 313 addresses pharmaceutical patents, but it is seriously flawed. Furthermore, legislation has been introduced in the Colombian Congress to delay even the minimal pharmaceutical patent protection provided by Decision 313 for ten years.

The Colombian Government has made repeated claims that Decision 313 would be improved, however, no such actions have occurred. In addition, the Government is taking advantage of weak intellectual property protection by promoting an open-ended policy of importation, labeling, and marketing of copies of patented pharmaceuticals.

Despite the fact that Colombia is a major beneficiary of preferential U.S. trade programs, such as the Generalized System of Preferences (GSP) and Andean Pact Trade Preferences (APTP), and that it would like greater access to the U.S. market through a free trade agreement, it has done little in the trade area to deserve such preferential access to the U.S. market. We believe that Colombia should be elevated from Watch to Priority Foreign Country status.

India: Because of its great potential as one of Asia's most successful economies, yet also because of its Government's tolerance of rampant intellectual property rights infringement, India remains as one of the greatest, as well as enigmatic, international challenges for PMA.

There has been no major change in the intellectual property environment in India for the past several years, despite the reforms that have been announced and are taking place in several other major industry sectors. PMA company managers have noticed some marginal change in the Government attitude, for the most part due to initiation of USTR retaliation by the imposition of import duties on drug exports. This was effected through the removal of $60 million in GSP benefits one year ago. Yet, this has had no appreciable effect on improving the situation in India for our member companies.

Unless India moves to adopt effective patent protection for pharmaceuticals, there will remain a strong incentive for research-based pharmaceutical companies to leave India altogether within the next several years. This could be detrimental to the growth of the Indian economy, and would be devastating to the state of Indian medicine, and to the future health and well-being of the Indian people.

PMA believes that USTR should take trade actions against imports from India unless India change's its patent law to afford effective protection to pharmaceutical products.

Korea: The efforts of USTR and other U.S. Government agencies to convince Korea to enact its amended Patent Law six years ago actually preceded the formal introduction of Special 301 in the U.S. 1988 Trade Act. The 1987 Korean amendments promised to provide effective protection for pharmaceutical products in that country.

Today, while we can still point to the Korean example as a "legislative" model for other countries in the region, we still are facing problems, especially in the form of regulatory

and administrative barriers in that country. These barriers have served to erode the effective patent life of our companies' products in Korea. In particular, the Korean Government's requirement that a Free Sales Certificate (FSC) accompany the registration package for pharmaceutical products effectively reduces the workable patent life of our companies' products to 4.5 years.

Moreover, as we understand, as of 1994, Korea's Ministry of Health and Social Affairs will require Phase I, II and III clinical trials to be conducted in Korea. Korea will be asking our companies to repeat trials which they already perform in the U.S. and in other developed economies. Because Korea has only three facilities where such trials can be conducted, this requirement will add at least 10 years to the already existing erosion of effective patent life for PMA company products in Korea.

Thailand: Thailand enacted totally inadequate new Patent Law amendments in mid-1992 to provide minimum protection to pharmaceutical products. The amendments were enacted in response to PMA's efforts to bring the lack of such protection to the attention of the U.S. Government through a Section 301 petition filed with the USTR in January 1991. USTR increased the pressure on Thailand by designating Thailand as a Priority Foreign Country under Special 301 in 1991 and again in 1992. While PMA initially was encouraged that Thailand finally had changed its law to provide protection to pharmaceutical products, we also viewed the law as deficient in a variety of ways:

- It allows compulsory licenses to be granted at the recommendations of a Pharmaceutical Patents Review Board, which maintains excessive arbitrary powers and may award such licenses based on its arbitrary judgement that the patent holder is charging "excessive" prices in the Thai market. Since Canada repealed such egregious compulsory licensing provisions in its patent law earlier this year, Thailand is the only significant country in the world to tie patent protection to prices;

- It does not allow for importation to satisfy fully the definition of "working" the patent in Thailand, and

- It contains no provisions for providing pipeline protection to pharmaceutical products patented outside but not yet marketed in Thailand.

PMA supports efforts by USTR to continue to negotiate with Thailand to improve these provisions in the current Thai Law -- but only for a very limited period of additional time. If Thailand refuses to alter these provisions, or refuses to negotiate in good faith with the U.S. Government to amend these provisions through a change in the law, or through significant implementing regulations, the U.S. Government should retaliate against Thailand to the full extent of applicable laws. The Thai Government, as are many others, is watching to see if the U.S. Government will act forcefully to enforce its unfair trade laws against patent piracy.

Venezuela: Unlike its Andean Pact neighbors, Venezuela was never bound by previous legislation which did not protect pharmaceutical patents and always had the option to enact an adequate pharmaceutical patent law. Despite repeated indications by the Government, Venezuela has yet to introduce an adequate product patent law for pharmaceuticals. In fact, there is debate within Venezuela whether even the inadequate patent protection provided by Andean Pact Decision 313 is in force in that country.

Like Colombia, Venezuela is content to offer third-world intellectual property protection rather than following the lead of diverse countries, such as China and Mexico, and adopt a world-class patent regime. For this and other reasons, we believe that Venezuela should be elevated from Watch to Priority Foreign Country status.

E. Other Countries

In addition to these countries listed above, PMA has suggested that five other countries be kept on a "priority watch list" because their acts and practices regarding patent protection for pharmaceuticals remain objectionable, but not so critical as earn them the status of priority country. These five are: Egypt; Indonesia; Poland; Russia, and Spain.

PMA has also petitioned the USTR to include 11 countries on the "watch list" to ensure that their current commitments to improve IP protection are fulfilled, or that refinements to current laws are made to ensure appropriate protection for pharmaceuticals. Since Canada has enacted and is implementing Bill C-91, reforming its discriminatory compulsory licensing regime as described above, we believe there should be 10 "watch list" countries. These 10 are: Chile; the People's Republic of China; Ecuador; Cyprus; European Community; Guatemala; Mexico; Peru; the Philippines, and Taiwan.

III. Implementation of Special 301 Needs to be Improved

As I previcusly indicated, PMA lauds the commendable efforts of USTR and other agencies of the U.S. Government to utilize Special 301 to negotiate significant improvements in intellectual property protection in other countries. Yet, we also find troubling the somewhat timed approach that the U.S. Government has utilized to determine the monetary value of the damages to U.S. commerce brought about by certain practices or the lack of intellectual property protection that hinder or burden such commerce. There are cases where the suggested levels of retaliation agreed to on an inter-agency basis were only one percent of the actual damage inflicted by patent piracy on our industry.

When USTR designates a country as a Priority Foreign Country under Special 301, it begins a year-long investigation of the intellectual property acts and practices of that country and attempts to determine the way in which those may burden and restrict U.S. commerce. At the end of that year, assuming that the country under investigation has made no progress or effort to improve its intellectual property environment, the USTR may determine that this country's practices restrict and burden U.S. commerce and may set into motion the process by which monetary damages are determined.

This process involves consultation with several government agencies or offices, including USTR, Treasury, OMB and the National Security Council. Among the calculations taken into consideration by these agencies are the actual losses from patent piracy, as provided by PMA, and the calculations of the potential market size in the country under investigation, as provided by PMA and as determined by the government agencies. The calculations of losses by the industry then are discounted. The "retaliation figure" subsequently produced by the U.S. Government is narrowly defined, often de minimis, and does not appear to take into account such considerations as the opportunity cost to industry of inadequate intellectual property protection, or the cost to industry in other countries in the region because of poor patent protection in the investigated country.

We would ask that USTR, Congress and other U.S. Government agencies undertake a thorough review of the process by which they determine the level of retaliation in Special 301 and other 301 cases. We believe the goal should be to achieve a broader perspective on the full damages inflicted on U.S. commerce by the acts and practices of countries which either ignore intellectual property rights or promote the existence of patent piracy within their borders.

In short, we have got to do less "nickel-and-diming" of U.S. industry and put more real pressure on foreign pirates.

IV. Relationship of Special 301 to the Uruguay Round

The GATT Uruguay Round negotiations likely will again be the focus of intense negotiations aimed at completing the talks by the end of this year. We continue to hope that our industry can work closely with the USTR, other Government agencies and Congress to arrive at a solid TRIPs agreement which will put international patent pirates out of business. PMA approves of several of the TRIPs provisions included in the December 20, 1991 "Dunkel text," including a 20 year patent term, and a prohibition of discrimination in patent practices, such as compulsory licenses. As mentioned above, such discriminatory practices have a chilling effect on pharmaceutical innovation and investment and have therefore been abolished by Canada, and also New Zealand.

The Dunkel text, however, has significant flaws, including the lack of protection for major segments of biotechnology. The text also has another critical flaw, chiefly a long, at least ten year, period of delayed implementation for developing countries, and no "pipeline protection." As written, the Dunkel text would protect only those patents filed after the Uruguay Round agreement goes into effect, which will now not happen until 1995 at the earliest.

Pipeline protection, i.e., the protection of medicines patented abroad but not yet marketed in countries where pharmaceuticals do not receive adequate patent protection, is of critical importance to the research-based pharmaceutical industry and, therefore, to continued pharmaceutical innovation. Given the 10-12 years of R&D time necessary to bring one new drug to market, lack of pipeline protection would leave an entire generation of products now under development without patent protection, costing our industry billions of dollars over the next decade.

Because of the delayed implementation period, however, countries such as Argentina, Brazil and India could continue to pirate patented pharmaceuticals at will, and yet be in conformance with their GATT obligations. Such a situation calls into question the future potential usefulness of Special 301 as a U.S. trade policy tool. This is particularly troubling. In effect not only would the Dunkel TRIPs text delay implementation of patent protection in such countries as Brazil and India, but the overall GATT agreement, we believe, would effectively remove Special 301 as a U.S. trade policy tool.

Mr. Chairman, we urge the Administration to reject this so-called "deal." We hope, Mr. Chairman, that you and the Administration would work to ensure that so long as an effective international regime is lacking, Special 301, as well as Section 301, remains viable to industries which depend on protection of intellectual property.

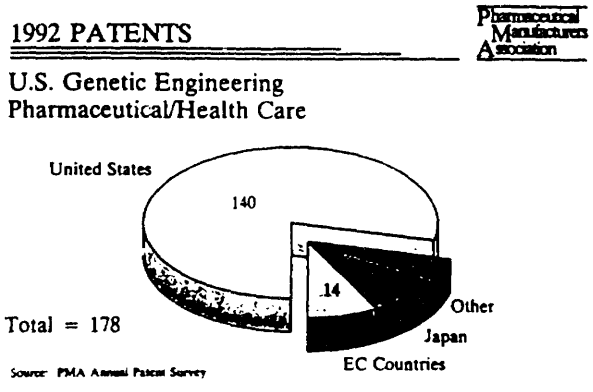
Another key area in which the current TRIPs text offers only weak intellectual property protection is in the vital biotechnology field. As President Clinton and Vice President Gore wrote in Putting People First: Strategy for Change,

commercial research and development spending must be increased in "crucial new industries such as biotechnology" if we are to help American business create new jobs and compete in the global economy.

Yet the Dunkel text, in Article 27.2 of TRIPs, would allow GATT signatories to exclude from patentability plant and animal varieties other than microorganisms, an exclusion which could have significant adverse effects on biotechnology-derived products. The Dunkel text, in this provision, is in direct contradiction to the stated policy goal of the Clinton Administration to foster biotechnology in the United States.

We are the world leaders in the promising field of biotechnology. Of the 178 biotechnology patents for pharmaceuticals/healthcare products granted in 1992, 140 went to Americans and 43 of those went to PMA member companies (see, Chart 6, below).

Chart 6



V. Conclusion

Developments around the world in the past few years have shown that increasing numbers of countries recognize the importance of intellectual property protection to their economic development. Similarly, the U.S. Government and this Subcommittee have long understood the vital role of innovative, high-technology industries such as pharmaceuticals to U.S. economic health.

Patent pirates abroad are resisting this trend in order to protect entrenched domestic interests which thrive on appropriating others' patented technology. Special 301 has been successful in stopping such theft in a number of countries.

U.S. trade policy on intellectual property embraces a broad range of sectors, pharmaceuticals, computer software, publishing, audio and video recordings, in order to support innovation without which high-technology industries cannot survive. The range of agreements reached to date and those pending, such as the GATT Uruguay Round and numerous Section 301 actions, encompass all sectors representing American interests. We must, together, keep up the fight on all industry fronts: to weaken efforts in one area weakens the position of all sectors.

In conclusion, industry continues to rely on the strong support both of the Administration and Congress in order to achieve the objective of effective intellectual property protection abroad. I am here in particular to emphasize the help we need in ongoing activities. At this moment, countries such as Argentina, Brazil, Turkey and Hungary are engaged in legislative consideration of patent law reforms. Mr. Chairman, we need the help of this Subcommittee as well as Ambassador Kantor to see that these and other countries do what is right. We urgently ask your help.

The issues are clear.

- We say that we want to protect U.S. innovation.
- We say that we want to foster high-technology industries in the United States.
- We say that we want to promote highly-skilled jobs in this country.
- We say that we want to preserve manufacturing industries.
- And finally, we say that we want to fight foreign unfair trade practices.

If we want to accomplish these things, we need an international strategy as well as a domestic one. Intellectual property protection, including pharmaceutical patents, as a key element of that protection is essential in such a strategy. We need to send a message that we are fed up talking about technology policy and fair trade and step up the effort, now, in bilateral (as well as multilateral) negotiations.

Foreign patent pirates are somewhat like termites in eroding the technological foundation of our economy. We do not see their effect very materially early on, but the final effect can be devastating if they are allowed to continue their behavior unimpeded. Patent pirates are seeking GATT protection to cover their activities for at least another decade. We need to act bilaterally and unilaterally before it is too late.

Special 301 supplemented by appropriate additional free trade negotiations would seem to be an effective strategy to address foreign intellectual property piracy, so long as we are prepared not to grant automatic access to the world's largest market.

RESPONSES OF DR. BALE TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Question: If you had to list the top two or three most egregious countries that violate our intellectual property rights, who would they be, and what action would you recommend the United States Government pursue?

Response: From the perspective of PMA and research-based pharmaceutical industry, I would contend that the three most egregious countries certainly would have to include Argentina, Brazil and India.

On August 10, 1988, the Pharmaceutical Manufacturers Association (PMA) filed a petition, pursuant to Section 301 of the Trade Act of 1974, as amended, relating to Argentina's failure to provide patent protection for pharmaceutical products. An investigation was initiated by the U.S. Trade Representative on September 23, 1988. A finding by the U.S. Trade Representative pursuant to this investigation was due to occur on or before September 23, 1989. Due to apparent progress between the U.S. and the Argentine Government, the Pharmaceutical Manufacturers Association withdrew its petition on

September 23, 1989 on the basis of the understanding that the Argentine Government had given reasonable assurances that it would address constructively the issue of patent protection for pharmaceutical products.

Two years later, in October 1991, President Menem sent a flawed bill to the Congress which the Congress failed to act on. The Menem Administration failed to put its weight behind the bill. After three and one half years since the original commitment to the USTR, in March 1993, the Industry Committee of the Chamber of Deputies voted 14 to 2 to postpone discussions about any improvement in patent protection until an agreement in the GATT (Uruguay Round) is reached and only then will they ostensibly start the discussion of the pharmaceutical patent issue.

With respect to Brazil, in 1987, following the filing of a 301 petition by PMA, USTR found that Brazil was infringing PMA companies' patent rights which led to the application of sanctions on Brazil on October 1988. When the Collor Administration assumed power in 1990, pursuant to negotiations between the U.S. and Brazil, Collor sent the pharmaceutical patent bill to Congress and the sanctions were lifted. After Congressional deliberations of more than two years, the proposed law being considered continues to be absolutely unacceptable in meeting world class standards.

So, in both cases, we have been negotiating and waiting at least since 1987 for improvements with no results. Therefore, our only alternative based on the facts explained above is to act decisively and propose immediate and meaningfui sanctions.

With regard to India, there has been no country which has played a more insidious role in the undermining of global standards of effective intellectual property protection than India. While the Indian Government has shown a willingness to create incentives for investment in other economic sectors, it has chosen to ignore the potential contribution of the research-based pharmaceutical industry by refusing to accept any of the increasingly global standards for intellectual property protection for pharmaceutical products.

It thus also has condemned its citizens to low quality and at times dangerous medicines which are produced by Indian pharmaceutical patent pirates. Since these same pirates export these medicines to other countries, especially in the Asia-Pacific region, the Indian Government endangers the health and safety of many more hundreds of thousands of citizens beyond India's shores. If India were to enact effective patent protection, we estimate that the patented pharmaceutical market in India could be close to $ 300 million per annum, whereas today it is less than half that amount.

India also has led an effort within the GATT negotiations to delay the implementation of effective global norms of intellectual property protection by as much as 10 to 20 years, and to resist the acceptance of the principle of pipeline protection of qualifying pharmaceutical patents of any future GATT agreement.

Because India has refused to negotiate at all for improved patent protection for pharmaceuticals, we would urge the U.S. Government to take immediate action against India by reducing India's GSP benefits from the U.S., as it did one year ago.

Question: In 1989, Canada was placed on the "Watch List" under the "Special 301" provisions of the 1988 Trade Act, because of the compulsory licensing provisions for pharmaceuticals. In January 1992, Canada announced that it would end compulsory licensing of pharmaceuticals and extend patent protection to 20 years from the date of registration as part of a Uruguay Round agreement. Legislation to implement those changes was introduced at the end of 1992, and, as of January 1993, was close to becoming law. Can you tell me where this currently stands? And are you content with the resolution?

Response: In past years, PMA has suggested that Canada be placed on the Special 301 Watch List. On February 3, the Canadian Parliament passed C-91, the Mulroney's government's patent bill. The passage of C-91 eliminates the discrimination against full patentability of pharmaceuticals not researched and discovered in Canada and the use of compulsory licenses as a sanction. Because of this achievement, PMA does not believe that Canada should be considered any longer in the context of Special 301.

While it may be too early to gauge the full impact of this change in Canada, PMA member companies certainly have been encouraged by this change and perceive a much brighter future for the industry in Canada, especially in terms of the opportunities for increased research and development for new drugs in that country.

Question: Since 1989, Japan has been on the "Special 301" "Watch List" from which the United States seeks stronger intellectual property protection. I would like to hear from each of you as to what you perceive is Japan's most flagrant violation and what, if any, action this Administration should be contemplating.

Response: In general, PMA member companies do not encounter significant problems in the patent application and grant process in Japan. The U.S. research-based pharmaceutical industry has encountered one particular problem with the Japanese patent term restoration law.

Specifically, the problem is that products which receive a marketing authorization prior to patent grant are not eligible for patent term restoration. This issue is of particular concern to our industry, because of the long eight to twelve year delay in Japan between patent filing and patent grant. The long delay between filing and grant is due to the long prosecution period which averages three to five years, and the fact that the opposition period is only allowed within the pre-grant stage of a patent application. If an opposition is filed, patent grant could be postponed for five to seven years in the case of a simple opposition.

While expedited prosecution is provided for in certain situations, these opportunities are of little or no use to the pharmaceutical industry in addressing the patent term restoration problem. Due to delays in the granting of a patent in Japan, in a number of cases, especially those involving innovative drugs, products receive a marketing authorization prior to patent grant and thus are not eligible for patent terms restoration. The problem does not occur in the United States, where the period between patent filing and grant is only two to three years, or in Europe, where the same period lasts about five years.

The other problem in the patent are in Japan really applies to the biotechnology companies which are research affiliates of PMA. This generally involves the narrow protection given in Japan to the original inventor of a biotechnology invention. This applies, for example, to "second generation products," or new polypeptides produced by the DNA sequence. The invention typically involves only a particular portion of the DNA sequence, i.e., the portion that codes for the new polypeptide. The rest of the DNA sequence is relatively unimportant.

In Japan, patent examiners apparently are hesitant to grant a patent claim to only a portion of the DNA sequence. There is a huge backlog of applications that worsens this problem, with the Japanese Patent Office apparently avoiding a decision. The result of such a claims structure essentially is to allow others to use the DNA sequence coding the new polypeptide simply by changing the unimportant part of the remainder of the sequence. Thus the protection given to the original inventor is very narrow.

Another problem is that access to Japanese courts is extremely limited. The discovery procedures for investigating infringement are much more limited than in the U.S. Courts delays are notorious in Japan, and judges there push litigants toward settlement. Under the patent statute, patent claims are interpreted literally, that is, as they are written. The doctrine of equivalents, which is used in the U.S. to expand the interpretation of a claim beyond its literal wording, is virtually non-existent in Japan.

None of these problems is necessarily biased against foreign inventors utilizing the Japanese system. Japanese inventors indeed are subject to the same law. Nonetheless, U.S. innovators, including some PMA research affiliates, would be more affected to the degree that they are more likely to arrive at a seminal invention that can receive broad protection in the U.S., but only narrow protection in Japan. In contrast, a pioneering Japanese company would receive broad protection in the U.S. Thus, there is an apparent problem of reciprocity.

Question: I would like to ask a question as it relates to the NAFTA. As we all know, Mexico has made strides in resolving many of its intellectual property concerns and the NAFTA will resolve additional U.S. concerns if implemented. I would like each of you to tell me your position on the NAFTA generally and specifically how you envision the NAFTA strengthening the intellectual property rights issue?

Response: PMA believes that the NAFTA is a monumental agreement in that it strengthens pharmaceutical patent protection and provides other benefits to increase the competitiveness of the U.S. research-based pharmaceutical industry.

The NAFTA reinforces the gains achieved in a recently-implemented Mexican patent law which went into effect on June 28, 1991. The law contains many of the provisions developed in the NAFTA such as a twenty-year patent term, product and process patent protection for pharmaceuticals, limited compulsory licenses, immediate implementation and pipeline protection. Mexico's law represents a major advancement in the protection of intellectual property protection and is a benchmark for other countries to follow.

Further, NAFTA also will build on the recently-passed Canadian Patent Law, C-91. C-91 promises to eliminate flaws in the previous law in Canada, particularly, discrimination against pharmaceuticals not researched and discovered in Canada and open-ended compulsory licensing language. For its part, the NAFTA will reinforce and internationalize positive elements of C-91.

Thus, we strongly support speedy Congressional implementation of the NAFTA agreement.

Question: Russia is the largest and wealthiest republic of the former Soviet Union. While there are no significant legal barriers to trade with Russia, there are a number of factors that discourage trade. The Russian government has shown considerable interest in formulating laws to bring the country up to world standards in the area of intellectual property. One of the weak point's with Russia is its inability to enforce existing and contemplated IPR Laws. What if anything should the United States be doing to hep them resolve this problem or should we be even contemplating trading with the Russian?

Response: I believe we should support the Russian Federation's efforts to formulate laws to bring it to world standards in order to facilitate and expand trade. In the area of intellectual property protection, Russia has enacted legislation which significantly improves upon the protection previously afforded. Enforcement of this and other laws, however, is crucial to their success and meaningfulness.

To help Russia overcome obstacles to the implementation and enforcement of the legislation, the U.S. and other developed western countries, in conjunction with interested industries should consider affording the Russian authorities technical expertise in the area of patents. For example, the U.S. Patent office conducts training programs for foreign patent officials. The U.S. pharmaceutical industry in conjunction with our government, also has facilitated the training of Mexican patent lawyers at law schools in this country, in anticipation of the implementation of Mexico's new patent law.

As in all aspects of commercial activity, the dramatic transition to a market economy requires that Russia be afforded sound technical advice and expertise by all interested parties both in the public and private sectors.

PREPARED STATEMENT OF SENATOR MAX BAUCUS

On April 30th, under the Special 301 trade law, the USTR will release the annual list of Priority Foreign Countries for negotiations on strengthening protection of intellectual property, along with the accompanying "Priority Watch List" and "Watch List."

This process is America's strongest weapon against piracy weak legal protection and barriers to access for American intellectual property works abroad. Like the Super 301 law, it sets deadlines and forces action.

That's why it works. We need to renew Super 301 this year if we hope to make the same sort of progress in other sectors that Special 301 brings about in intellectual property.

Today, with the Special 301 lists due in eleven days, we will give the USTR office and representatives of private industry a chance to share their views on the effectiveness of the law in general and on their priorities for this year in particular.

Intellectual property products are broadly divided into three types: copyrights, patents and trademarks.

Copyrighted works include books and magazines, musical scores, films and videos, sound recordings and computer software.

Patented products include pharmaceuticals, agrichemicals, and innovative machines tools and processes.

Trademarked goods include a vast array of products from food to apparel to machines and more recognizable by the name or symbol of their producers.

Together, these industries rank with agriculture and aerospace as one of America's three most successful export sectors.

American film and TV programs generate a $3.5 billion trade surplus each year. American pharmaceuticals generate a $1 billion surplus. American computer software leads all competitors. And American trademarks get instant recognition worldwide.

PROBLEM OF PIRACY

Creative works like these are difficult and often expensive to make. But they are often easy to copy. A software program, for example, takes years, technoloaical wizardry, and millions of dollars in R&D to write and publish. Pirating the same program takes seconds, minimal skill, and an eighty-cent floppy disk.

This problem is world wide, and is extraordinarily damaging to our economy. Several years ago, after an exhaustive survey, the International Trade Commission estimated that they cost America somewhere between $43 and $6! billion dollars in lost exports even year. It is likely that the figure is even higher today.

The financial injury is at times even accompanied by physical injury. One of my constituents from Bozeman, Montana, permanently injured her knee a few years ago when a pair of Korean-produced counterfeit Reebok sneakers came apart while she was playing tennis.

SPECIAL 301

This problem requires a strong American response. In 1988, Congress provided it by passing the Special 301 law. It directs the USTR to identify the countries in which intellectual property receives the weakest legal protection and meets the strongest barriers to entry. USTR must then begin trade negotiations with these "Priority Foreign Countries." If this fails to get results, the U.S. can impose trade sanctions against the country in question.

This is our strongest weapon against piracy of intellectual property overseas. Two developments are proof enough—first, the record number of filings by American industries this year; and second, the troops of foreign officials which have come to Washington to negotiate last-minute deals to avoid listing.

THIS YEAR'S LISTINGS

This year, India, Taiwan and Thailand are among the highest priorities. They have all been named before as Priority Foreign Countries, but have not changed their ways. We should not hesitate to retaliate against them unless they adopt dramatic changes in the next ten days. The credibility of Special 301 depends on willingness to USA retaliation as a last resort; and I believe we have reached that last resort in these cases.

There are many candidates for Priority Foreign Country status this year. Poland continues to be a notorious center for piracy of software, sound recordings, and book, and has taken little action to resolve the problem. Copyright industries add Italy, South Korea, and Turkey as targets for PFC status. Saudi Arabia, one of the richest

countries in the worlds continues to allow blatant piracy of films, sound recordings and CDs, and in fact does not guarantee protection of foreign works at all. It is a disgrace.

Despite years of promises, Argentina and Brazil have not yet upgraded their patent regimes for pharmaceuticals. Other patent offenders include Colombia, Hungary, South Korea, Turkey, and Venezuela. Trademark industries cite China's inadequate trademark law as a major problem, to go with other serious problems in Taiwan, Thailand, Brazil, and South Korea.

With this year's deadline approaching, we have already reached an important agreement with the government of the Philippines to protect American copyrights, patents and trademarks. Last-minute efforts to upgrade pharmaceutical patent protection are going on in Argentina.

We have seen energetic raids on sellers of pirated shoes in South Korea, and a factory making pirate audio cassette in Thailand. There is activity in the Taiwanese Legislative Yuan and the Russian Parliament. All are a result of the Special 301 law.

TODAY'S WITNESSES

Today we will hear about these events from representatives of U.S. government charged with determining this year's listings, and from private industry representatives who have participated in filing petitions with the USTR this year. It promises to be an enlightening morning, and with no further delays let's begin.

PREPARED STATEMENT OF JASON S. BERMAN

I want to thank you, Mr. Chairman, for holding this important hearing and for asking me to discuss existing market conditions and the ability to address these under special 301. Without your leadership it is fair to say that we would not be here talking about how important Special 301 really is to U.S. copyright industries. It is our trade lifeline.

We are indebted to you and to the subcommittee, for the firm resolve that you have demonstrated in ensuring that the trade remedy that you helped to fashion in the omnibus trade and competitiveness act of 1988 has been—and continues to be—effectively used by executive branch officials to accomplish its objective of securing fair market access and the adequate and effective protection of our intellectual property. And the USTR has done just that. Special 301 has been the instrument for resolving major piracy and market access problems for the recording industry. We firmly believe it continues to be an essential ingredient of an effective U.S. trade policy designed to open markets and protect American intellectual property abroad.

Special 301 serves to protect what America does best—to create, to entertain, to educate. America's recording industry does more than just return billions of dollars back into our economy. It captures and exports American cultural and democratic values, promoting individual creativity, diversity and independent thinking. It is interesting to note the importance that most observers have placed on the influence of American recordings and films in the dramatic democratic upheavals in Russia and its former republics, as well as elsewhere around the globe. American music has played a major role in shaping the way people around the world view the importance of free speech and robust debate, and will undoubtedly continue to make life difficult for totalitarian regimes whenever they may exist. Yes, rock and roll actually does that.

Unfortunately, for U.S. record companies market conditions in many places around the world can only be described in one word: Hostile. Whether through the failure to adopt adequate legislation or the unwillingness to effectively enforce laws, many countries have implicitly condoned piratical activities that deprive U.S. record companies, performers, composers, songwriters, and music publishers of billions of dollars every year. We have identified the most serious violators in our submission to USTR under Special 301. I will briefly discuss the status of copyright protection in a number of territories, particularly with a view to those bilateral consultations that have produced results and to those that have remained on our special 301 list as offenders for far too long.

Let me begin with the most dramatic developments. A little more than a year ago, I sent a letter to USTR apprising them of a piracy problem of huge dimensions in Paraguay—yes, little Paraguay was the source of a big problem. A handful of large and powerful tape pirates not only controlled nearly 100% of that country's market, but exported nearly $200 million annually into the surrounding markets of Argentina, Brazil and Uruguay. Just to put this in perspective: The pirate business was more than the combined legitimate markets of Argentina, Bolivia, Chile, Colombia,

Peru, Venezuela, and all of Central America. At that point, Paraguayan authorities had done nothing to address this problem.

When Paraguay was named to the Special 301 watch list, Paraguayan authorities took notice. They discovered that this listing harmed their international image and their ability to attract foreign investment—particularly much needed U.S. investment. One of the emerging trends in today's business community is attention to intellectual property protection, even by companies whose intellectual property concerns are only ancillary to their business. The last decade's concern about nationalization of businesses is today's concern about the failure of governments to adequately and effectively protect intellectual property.

In this case, Special 301 was able to serve its function merely by highlighting a problem. Once placed in the spotlight, Paraguayan authorities moved relatively quickly and decisively to eliminate piracy. They have done such a good job in this effort, that I am pleased to confirm that last week I wrote to USTR requesting that Paraguay be removed from all Special 301 lists. This is a truly remarkable development, and I commend the government of Paraguay for its swift and effective action. I also want to take this opportunity to express my great hope that the government of Paraguay will continue to support anti-piracy operations in the future and thus prevent the reemergence of trade tensions between our countries.

On the other side of the coin, however, is Thailand, where years of bilateral discussions aimed at improving copyright enforcement have failed to produce any concrete results. This may be the result of Thai confidence in their ability to avoid sanctions based on larger geo-political relationships between Thailand and the United States or, simply, that the Thais did not believe that sanctions, even if imposed, was too high a price to pay for maintaining the pirates. Whatever the underlying reasons, efforts to address copyright piracy in Thailand have been spectacularly unsuccessful.

Once again, as we near the April 30th deadline for designation under Special 301, the Thais have been more vocal about their intentions regarding piracy. But these words are unmatched by any deeds. Not a single pirate has been convicted or sent to jail as a result of Thai enforcement actions. That is a sorry record that should not go unnoticed or unpunished.

Somewhere in between the success story of Paraguay and the failure in Thailand lies Taiwan and Korea. Both countries have long-standing reputations—well deserved—for hosting large scale piracy. Recent events seem to suggest that concern about possible Special 301 retaliatory measures have led to a new round of government expressions of concern.

Taiwan, the world's leading source of pirated compact discs, last year had taken a few halting steps to address this problem but has failed to follow through on these initiatives and was just a few months ago backsliding into non-enforcement. Events during the past few weeks—including further raids and indictments against CD pirates, as well as constructive discussions to eliminate the reservations Taiwan placed on the AIT CCNAA bilateral treaty—appear to reflect an awareness that 301 retaliation will be announced and swiftly implemented if U.S. concerns are not addressed.

Korea, too, has finally recognized that it's failure to adequately and effectively protect intellectual property has dramatic consequences for its' development and trading relationships. After years of struggle in which U.S. record and film companies have lost hundreds of millions of dollars to piracy in Korea—a problem that the Korean government itself exacerbated by granting licenses to pirates—the government has finally announced a plan by which it appears ready to address the problem.

If Korea, currently on the priority watch list, is to avoid designation this year, it must amend some of the inadequate features of this plan, such as permitting continued unauthorized production of pirate tapes and CDs under existing ministry of culture licenses, and it must move quickly to implement this plan. We will be closely monitoring progress in Korea over the next few months, and we hope that we will be able to report that pirate tapes and CDs have become an endangered species.

If I could change gears a little bit, I would like to talk about a country that poses the greatest threat to the U.S. recording industry and also represents perhaps the greatest potential, yet does not appear at the top of our list for priority designation. I am speaking of China, a country in which Special 301 has already achieved a monumental, if currently only procedural, milestone. The milestone was the passage of China's first copyright law and a memorandum of understanding committing the Chinese to participation in an international framework for copyright protection.

I cite this great achievement as "procedural" because, in the absence of market access for U.S. companies and adequate enforcement, the copyright law is merely symbolic. As CD facilities have begun to proliferate in china, and entrepreneurial

Chinese seek to expand exports, we cannot afford to have this important legislation merely occupy space on a shelf. Non-transparent rules and regulations have kept U.S. recording companies out of this potentially huge market and pirates are left free to reap the rewards secured from the theft of our property. This year we must send the Chinese an unambiguous message: Access to our market is placed in jeopardy by their failure to allow us to compete in their market and by their failure to take effective action to curtail a growing piracy problem. China should be upgraded from the watch list to the priority watch list and the market access talks must produce concrete results for U.S. companies.

Time does not permit me to detail our concerns elsewhere around the globe, but I will make a few general observations. First, today's problems generally reflect the failure of governments to commit to enforcement of laws already on the books rather than an unwillingness to pass legislation. As a consequence, more and more of our attention under Special 301 must be focused on enforcement policies that actually shut down the pirates.

Second, that the problems faced by U.S. record companies are more likely to result from discriminatory laws and practices than inadequate substantive legislation. The developing pattern within the EC suggests that trading blocs and individual countries will maximize the opportunities under the existing international legal framework to discriminate against foreign copyright owners—read that to mean the U.S. We are engaged in negotiations to create a new international framework in both the GATT and WIPO that will hopefully bear fruit. If we do not succeed in these multilateral endeavors, we will need to continue to pursue bilateral measures with even greater intensity and resolve.

My final general observation is that one should be wary of general observations. As we speak, the legislation of many of our trading partners, as well as that of the United States itself, is quickly being outdistanced by advances in technology, or is otherwise inadequate. Many countries have yet to expand the scope of their laws to give record companies the ability to prohibit rental. And a fifty year term of protection, while generally accepted, has not been universally adopted.

Our concerns to date have focussed on our ability to secure access to a market and to prohibit others from manufacturing pirate copies of our sound recordings. Developments in digital transmission systems in which CD quality sound can be delivered directly to a retailer or consumers without the need for copies threatens to transform the market and to completely undermine the copyright system unless record companies have the legal and practical ability to exercise control over such activity. Thus, we need to remain constantly vigilant. Today, what appears to be adequate standards may be tomorrow's invitations to piracy.

With the continued support of this subcommittee and USTR, Special 301 can be the instrument for denying such invitations to those pirate trading partners.

RESPONSES OF MR. BERMAN TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Question No. 1. If you had to list the top two or three most egregious countries that violate our intellectual property rights, who would they be, and what action would you recommend the United States government pursue?

Answer. Over the course of the past few years, the most consistent offenders of U.S. intellectual property rights, or at least those where we and the U.S. government have focused the greatest amount of attention, have been Korea, Taiwan and Thailand.

Fortunately, the Administration's message that piracy will not be tolerated has had a significant impact even on these countries, and I would not recommend any course of action other than that announced by Ambassador Kantor under Special 301—out of cycle reviews for Korea and Taiwan, and designation of Thailand with the immediate imposition of sanctions if they fail to live up to commitments or relent in their recently found anti-piracy vigor.

Question No. 4. Since 1989, Japan has been on the "Special 301" "Watch List" from which the United States seeks stronger intellectual property protection. I would like to hear from each of you as to what you perceive is Japan's most flagrant violation and what if any action this administration should be contemplating?

Answer. The greatest existing limitation of Japan's copyright law is the failure to extend to copyright owners of sound recordings the exclusive right to control the rental of their sound recordings. Until legislation passed in 1991 extending to U.S. copyright owners the same limited ability to control rental as Japan had granted to its own nationals since 1984, Japanese law completely discriminated against U.S. record companies. Fortunately, the 1991 copyright amendments, passed in the face of strong trade pressure from the U.S. Administration, resolved the discriminatory element of Japanese law. The overall inadequacies, however, remain.

Japanese copyright law continues to discriminate against U.S. record companies and performers by denying us the right to get paid when our sound recordings are broadcast. This discriminatory behavior unfortunately does not conflict with Japan's existing international legal obligations, and the RIAA, supported by the Administration, has been seeking to create new international obligations to bar discriminatory conduct.

Question No. 6. I would like to ask a question as it relates to the NAFTA. As we all know, Mexico has made strides in resolving many of its intellectual property concerns and the NAFTA will resolve additional U.S. concerns if implemented. I would like each of you to tell me your position on the NAFTA generally and specifically how you envision the NAFTA strengthening the intellectual property rights issue?

Answer. The NAFTA text on intellectual property is satisfactory and RIAA supports the intellectual property text specifically and NAFTA generally. We remain extremely troubled, however, by overall lack of enforcement and correspondingly alarming piracy levels. Reports from the region suggest that two pirate tapes are sold for every legitimate one, and that the total volume of pirate tapes sold annually may approach 100 million units! Mexican authorities have begun to address this rampant piracy problem, but little or no change in the market has been effected. This gives us pause in enthusiastically supporting NAFTA, and consideration of Mexico's willingness and ability to enforce its laws has great relevance in a determination of likely benefits that would flow from NAFTA.

Question No. 7. Russia is the largest and wealthiest republic of the former Soviet Union. While there are no significant legal barriers to trade with Russia, there are a number of factors that discourage trade. The Russian government has shown considerable interest in formulating laws to bring the country up to world standards in the area of intellectual property. One of the weak point's with Russia is its inability to enforce existing and contemplated IPR laws. What if anything should the United States be doing to help them resolve this problem? Or should we be even contemplating trading with the Russians?

Answer. I believe unequivocally that we should strengthen the trading relationship between the U.S. and Russia, and that assistance, both technical and financial, should be made available to promote market reform and the development of a stable democracy. This includes, for the purposes of your question, such assistance as may be required to enforce the law. Market opening initiatives such as copyright reform in the absence of effective enforcement are merely symbolic. Where the U.S. targets aid for Russia, we should provide that funds be directed to facilitate the enforcement of copyright laws. Such assistance is mutually beneficial, and the costs quickly recouped through the sale of U.S. copyrighted materials and the consequent contribution to balance of trade payments.

PREPARED STATEMENT OF JOHN J. CUMMINS

Mr. Chairman: The U.S. Trademark Association (USTA) appreciates the opportunity to appear before your committee to comment on:

- Major problems trademark owners encounter abroad with respect to the protection of their marks;
- The "Special 301" process; and,
- The most current pressing trademark owner concerns today.

My name is John J. Cummins. I presently serve as Chairman of the Board of Directors and President of USTA. I am employed by the Procter & Gamble Company as Corporation Counsel and Assistant Secretary. As with all USTA officers, board members and committee chairpersons, I serve on a voluntary basis.

USTA is a 115 year old not-for-profit worldwide membership organization. The Association's principal goal is the preservation and promotion of trademarks as essential instruments of international commerce. Since its founding in 1878, its membership has grown to over 2500 corporations, package design firms, law firms and professional associations from across the United States and 90 countries. Although eighty-five of the Fortune 100 companies are USTA members, we also welcome new and small businesses. USTA crosses all industry lines, spanning a broad range of manufacturing, retail and service operations.

The United Nations formally recognized USTA in 1979 as a non-governmental organization. In this capacity, we work closely with the World Intellectual Property Organization (WIPO). USTA also was involved in the intellectual property (TRIPs) negotiations of the Uruguay Round of the GATT negotiations and the trademark-related aspects of the proposed North American Free Trade Agreement (NAFTA).

Additionally, we have worked closely with a variety of governmental entities to reduce trademark-related non-tariff barriers to trade that exist around the world.

By filing a "Special 301" petition with the U.S. Trade Representative (USTR) on February 12, USTA has indicated its commitment to create and implement a worldwide program that will raise the profile of trademark protection issues to provide the same level of trade negotiation priority that copyright and patent interests have enjoyed. Our presence here further indicates our resolve.

I. MAJOR PROBLEMS TRADEMARK OWNERS ENCOUNTER ABROAD WITH RESPECT TO THE PROTECTION OF THEIR MARKS

Trademarks are words, names and logos which enable trademark owners (and thus consumers) to distinguish their goods or services from those of their competitors. In other words, trademarks serve as identifiers and symbols. Trademarks that are "adequately and effectively" protected under a jurisdiction's laws provide assurance of consistent standards and values to both trademark owners and consumers alike. Consequently, any reduction of a trademark's utility will reflect a corresponding decline in its practical meaning and monetary value. This in turn, reduces our nation's economic potency.

Contrary to popular belief, a trademark that is registered and established in the marketplace does not become fixed or invulnerable, generating profits for its owner as long as it actively uses the mark. If left unprotected, the value of a trademark is certain to descend rapidly. Consequently, unprotected marks are subject to myriad dangers, of which the most pernicious is counterfeiting—the use of a mark identical or substantially indistinguishable from a registered mark.

Trademark counterfeiting affects more than just the trademark owner's ability to distinguish and sell his or her product. Counterfeiting undermines consumer confidence in the marketplace, threatens consumer health and safety, and controverts the principles of free and fair competition. Moreover, it injures the international reputations of the countries in which counterfeiting flourishes.

Ironically, counterfeiting is proof of the value of trademarks. No one copies something having no value. However, because counterfeiting is such a surreptitious activity, it is almost impossible to accurately calculate its total costs to trademark owners. Nevertheless, it is commonly estimated that the damage caused by counterfeiting causes trademark owners to lose over $1 billion of business annually in the U.S. alone. Outside of this country, trademark and service mark owners estimate that they lose $12—$15 billion annually due to trademark piracy . USTA has embarked upon an extensive project to assemble more precise data in this area and expects to be able to offer more detailed industry-by-industry composite global data in the time ahead.

While most nations possess adequate trademark registration laws, many lesser developed countries routinely fail to enforce those laws. This leads to rampant trademark infringement, particularly of the trademarks of U.S. Companies.

II. THE "SPECIAL 301" PROCESS

USTA and "Special 301" generally

USTA is a recent participant in the "Special 301" arena. Thus, with the exceptions of Taiwan and the Republic of Korea, it is difficult for the Association to comment fully on "Special 301's" forthcoming benefits to trademark owners at present. Nonetheless, we can make several observations, both procedural and substantive, with respect to trademarks in response to the Committee's inquiry.

First, our submission to the USTR under the "Special 301" provisions of the 1988 Omnibus Trade and Competitiveness Act should dramatically increase the attention of offending nations to the importance we attach to the protection of trademarks. Second, the filing submissions will require the USTR to identify and investigate foreign "priority" nations that deny "adequate and effective" trademark protection and "fair and equitable" market access. Third, the submission will grant the agency authority to recommend trade sanctions for those countries which engage in unjustified or discriminatory trade practices relating to the protection of marks. Lastly, the submission should spur nations that have not acted in a spirit of cooperation to bolster their efforts to better protect marks and streamline their registration processes.

USTA "Special 301" Submission

As noted, in February, USTA made its initial "Special 301" filing with the USTR. The Association provided specific information on eight countries that deny "adequate and effective" protection to trademark owners and/or deny "fair and equitable market access" to persons, corporations and other interests that rely upon trademark protection as a cornerstone of their business.

USTA has requested that the USTR:

- Maintain current 306 monitoring of the Peoples' Republic of China (PRC), Taiwan and Thailand;
- Place The Republic of Korea, Brazil, Spain and Indonesia on the priority watch list; and,
- Place Mexico on the "watch list."

Special comment was made in regard to the trademark counterfeiting problems in Italy as well.

The above named nations have serious trademark protection/trade barrier problems in many or most of the following areas:

- slow or cumbersome judicial procedures;
- arbitrary judicial decisions;
- ineffective civil remedies;
- ineffective criminal remedies;
- trafficking in counterfeit marks;
- non-national treatment;
- uncooperative and/or uninformed police;
- unsympathetic or uninformed judges; and,
- inability to sue for infringement.

The ranking of the countries varies for different industries/companies. However, in terms of counterfeiting and overall enforcement problems, the survey reveals that the lack of cooperation by Taiwan, the Republic of Korea, Indonesia, Brazil and Thailand is particularly egregious. Not surprisingly, these same countries also were at the top of the 1988 list of the International Trade Commission's (ITCs) survey. Unfortunately, since that time, little progress has been made.

III. MOST PRESSING TRADEMARK INDUSTRY CASES TODAY

The specific concerns and recommendations of USTA are contained in the filing. In summary, they are as follows:

Peoples' Republic of China (PRC)

The PRC is a major center of piracy of trademarked goods. Ironically, it is also the beneficiary of international trade for many trademark owners who "source" their product manufacturing from the PRC. The PRC recently drafted trademark legislation and USTA has commented extensively on the PRC text. These comments have been forwarded to the PRC by the Association. Nevertheless, USTA continues to have grave concerns as to whether the necessary intellectual property protection mechanisms will be created for the legislation to be effective.

USTA strongly recommends that PRC administrative, judicial and customs staffing, procedures be given close scrutiny to ensure that long delays, under-staffing and insufficient resources are addressed. Close monitoring of goods being exported as well as those being distributed throughout the PRC is certainly required as are strong sanctions for those who violate the law.

Taiwan

For many years, Taiwan has held the reputation of being an "epicenter" of piracy. USTA believes that, despite some indications of improvement of its trademark policies and procedures. A great deal of work remains to be done in implementing those intentions. In this respect, the Association refers to the extensive IACC filing on Taiwan which contains both important "case histories" and details that which illustrate the frustrations and impediments trademark owners have faced in Taiwan over an extended period of time. As that document illustrates, continuous and unrelenting trade pressure and/or incentives are needed in order to obtain policy changes and, perhaps even more importantly, to ensure that Taiwan actually complies with the extensive promises and representations it has made.

Taiwan presents the U.S. government with a "test" of the overall effectiveness of the "Special 301" process. Ten years of arduous negotiations and attempts to implement treaties, laws and viable mechanisms for enforcement is proving merely to be a triumph of "process" over "performance." USTA encourages strong measures to accelerate this protracted process.

USTA has expressed its views on several priority points in respect to the Taiwan law and its implementation. Specifically, USTA recommends the following:

- Examinations based on the "overall commercial impression" of the elements of the trademark viewed as an entirety. The current practice has been to separate a mark into elements and examine each element as if it typically was perceived by consumers as separate entities. This seemingly-innocuous practice has fore-

closed registrations of "internationally famous" marks with damaging results to both international owners and local legitimate businesses as well;
- Adoption of the international classification system for trademarks;
- Simplified, less-burdensome licensing recordal practices;
- Clarification of opposition criteria;
- Broader protection for famous marks;
- Clearer legislative language to distinguish between descriptive and suggestive marks;
- Clarification of the extent to which prior or senior users of an unregistered trademark have the right to block registration of the same or a similar mark by a junior user;
- Improvement in their manual of examining procedures;
- Statutory provision to amend of an existing registration and/or renewal provided that the commercial impression is the same, thereby avoiding forfeiting of the original registration date;
- Enumeration of the type of record required for appellate authority;
- A longer non-use period;
- A provision requiring consent of a third party before an applicant may register the third-party's name, trade name, stage name, image, etc.; and
- Recognition that trademark rights are not extinguished in certain circumstances, including the dissolution of the trademark owner

These points, while highly technical, are not trivial. Taiwan's history in the intellectual property area proves that in addition to the lack of police, customs and judicial requirements, "technical" loopholes and archaic practices and procedures create an arbitrary gauntlet of obstacles to "adequate and effective" protection of trademarks. Only by addressing these points (as well as the others detailed in USTA's "Special 301" filing) will significant progress will be achieved.

Thailand

Thailand's disrespect for international trademark rights is universally recognized; it has long been the subject of industry and public sector trade complaints. In the past, these complaints focused primarily on copyright issues, but a similarly intensive focus on trademarks is now in order.

The issues in Thailand range from registration practices to enforcement. Among them are:

- foreign trademark applications are frequently rejected on arbitrary grounds;
- enforcement of trademark rights is expensive, riddled with protracted delays;
- information of pending counterfeiting raids is "leaked" to the targets of those raids; and,
- a maze of obstructive civil code procedures which create barriers to effective intellectual property enforcement.

The time, resources and discouraging results (e.g., minimal fines, inability to catch and halt manufacturing/distribution sources, and rarity of actual incarceration of offenders) have made attempts at enforcement in Thailand unproductive for a great many trademark owners. There are losses suffered in Thailand as well as countries around the world to which Thai pirates ship their goods. USTA strongly encourages mounting sufficient trade pressures to curb this situation in a definitive and expeditious manner.

The Republic of Korea

For manufacturers of various world-famous product brands (including athletic footwear, apparel and luggage) Korea remains one of the single worst offenders of trademark protection on both domestic and export market fronts. This was dramatically illustrated by detailed materials submitted to The USTR by Reebok International Ltd. Counterfeits of Reebok's trademark, and those of many other trademark owners, are exported in massive quantities throughout the world on a daily basis. They are also marketed openly and notoriously within Korea as well.

As this activity indicates, the critical problem in the Republic of Korea is one of enforcement policy and practice. The Korean Foreign Trade Act, adequate staffing of customs functions in key ports, the ability to make "unannounced searches" in both criminal and civil cases and, most critically, realistic "standards of proof" for establishing infringement and obtaining prosecutions provide the Korean government the statutory authority and manpower to control these problems should it so decide.

As is outlined in greater detail in the March 1993 submissions from Reebok International to the USTR, "to improve the enforcement of intellectual property rights in Korea, problems must be addressed in four basic areas: cultural/educational; stat-

utory; regulatory; and implementation." Reports of recent government raids and seizures, particularly in the athletic footwear industry, are promising. However, these raids (which have occurred only since Reebok's "Special 301" filing) are only a start.

Long-term policy, regulatory and enforcement changes are required in order for the Republic of Korea to reach the level of generally-accepted international norms for the protection of trademarks. Both short-term and long-term measures for achieving this objective have been detailed to the USTR. USTA encourages close examination and support of these suggestions.

Brazil

Brazil has made only minimal steps towards protecting trademarks "adequately and effectively." Unauthorized registrations of "internationally famous" marks by local parties have been permitted in Brazil and has led to what can fairly be described as extortion practices. Court proceedings to challenge these "negotiations" are expensive and protracted. The Brazilian Patent and Trademark Office often facilitates such practices by unfairly rejecting registration applications.

A detailed USTA task force report is forthcoming with respect to Brazil. It will specifically outline the judicial, administrative and enforcement impediments that hamper or completely block "adequate and effective" relief for foreign trademark owners' registration and protection of their marks.

Spain

Spain is also the subject of a forthcoming detailed USTA task force report. The following obstacles impede "adequate and effective" protection of foreign trademark rights:

- inadequate cancellation procedures against infringing marks;
- slow or cumbersome judicial procedures;
- arbitrary judicial procedures;
- trafficking in internationally famous trademarks by local unauthorized registrants;
- uncooperative, unsympathetic and/or uninformed police and judges;
- failure to improve opposition proceedings;
- failure to adopt more uniform "standard" examination procedures;
- failure to provide clear-cut definition of "well known" marks;
- failure to provide stronger civil/criminal penalties; and, – failure to enlist broader government enforcement against counterfeiting.

As was noted with respect to Taiwan and is, perhaps, even more pronounced in a civil code jurisdiction such as Spain, technical problems loom large and operate to block what most consider "adequate and effective" intellectual property protection and fair market access.

Indonesia

A lengthy USTA Indonesia task force report was prepared last year. On the eve of the issuance of the report, a new Indonesian Trademark Law was enacted. USTA, in consultation with the U.S. Patent and Trademark Office, is analyzing the new provisions and redrafting the original report to account for these changes. This revised filing is expected in the near term.

Nevertheless, from all indications, substantial local and export counterfeiting problems continue. They range from unsatisfactory administrative examination and policies to haphazard enforcement procedures. Without significant change in its day to day trademark administrative practices, USTA believes that the new Indonesian trademark law will not satisfy all of the requirements necessary to correct the national and export counterfeiting problems currently being experienced in that market.

Mexico

The extensive domestic and import/export counterfeiting problems were detailed in the Mexican Appendix of USTA's "Special 301" filing. They are substantial, particularly for a NAFTA partner. While USTA has lent its support for NAFTA's adoption, it is important that Mexico's promise to provide greater trademark protection procedures be closely monitored to ensure that they are implemented. There have been promising indications in recent months but these are only a beginning.

Mexico's development of serious transshipment and "open border" policing, training and enforcement programs is vital to curtailing the substantial counterfeit traffic that continues to operate within and across its borders. Mexico also needs to develop implementing regulations for the 1990 Mexican Trademark Law and permit immediate, unrestricted criminal trademark enforcement against infringers using the provisions of the 1990 law.

USTA has requested that Mexico be placed on the watch list by the USTR. There are indications of "good faith" intentions by the government to acknowledge and correct the administrative and enforcement problems with respect to counterfeiting. It is crucial to continuously monitor these developments to see that the promises made are implemented swiftly and effectively.

General recommendations

Counterfeiting and other international market barriers to trademark protection are a threat not only to trademark owners but also to consumers and our economic system. It is imperative that all of us give further attention to fostering a workable federal system that minimizes this corrosive problem.

USTA is grateful that you and the members of your committee are willing to grapple with these issues and offers to serve as a continuing resource to you and the committee.

U.S. TRADEMARK ASSOCIATION,
New York, NY, May 18, 1993.

Mr. WAYNE W. HOSIER,
Printing Specialist,
Senate Committee on Finance
Washington, DC.

Dear Mr. Hosier: In response to your letter of April 26 to John J. Cummins, then President of the U.S. Trademark Association (USTA), I am submitting for the record four copies of answers to additional questions regarding USTA testimony at the April 19 Special 301 hearing.

Please note, at USTA's 1993 Annual Meeting concluded just last week, our members overwhelmingly approved a name change from USTA to the International Trademark Association (INTA). At the same meeting, Mr. Cummins's year-long presidency ended, and I was elected to succeed him.

I have a continuing interest in Special 301, and look forward to assisting the Subcommittee in future in its important mission.

Please let me know if I may be of any further assistance.

Very truly yours,

RICHARD M. BERMAN, *President*

Enclosures.

RESPONSES OF USTA TO QUESTIONS SUBMITTED TO MR. CUMMINS BY SENATOR GRASSLEY

Question No. 1. If you had to list the top two or three most egregious countries that violate our intellectual property rights, who would they be, and what action would you recommend the United States government pursue?

Answer. As stated in its Special 301 submission to the United States Trade Representative (USTR), INTA's (formerly USTA)[1] survey of trademark owners internationally found that the People's Republic of China, Taiwan and Thailand are the most serious violators of trademark rights. These violations occur either directly or through condoning infringements by various businesses and they range from slow or cumbersome judicial procedures and ineffective civil and criminal remedies to blatant counterfeiting and trafficking in trademarks.

INTA is working closely with the U.S. Patent and Trademark Office (USPTO) and the USTR, not only to document such violations but also to recommend remedial actions that the governments of these countries should take. We believe that the U.S. government should remain adamant in its demands that these countries fully recognize the need to protect trademark rights and to stop infringements within acceptable time frames.

Question No. 2. Since 1989, Japan has been on the "Special 301 Watch List" from which the United States seeks stronger intellectual property protection. I would like to hear from each of you as to what you perceive is Japan's most flagrant violation and what if any action this administration should be contemplating?

[1] INTA (formerly USTA) is a 115 year old not-for-profit worldwide membership organization with 2,600 members. The Association's principal goal is the preservation and promotion of trademarks as essential instruments of international commerce. Since its founding in 1878, its membership has grown to over 2500 corporations, law firms and professional associations from across the United States and 90 countries. Although eighty-five of the Fortune 100 companies are INTA members, we also welcome new and small businesses. INTA crosses all industry lines, spanning a broad range of manufacturing, retail and service operations.

Answer. While INTA did not include Japan in its Special 301 submission to the USTR, the Association's 1992 survey of members did reveal serious difficulties with Japan's trademark law and procedures. Specific examples include inordinate delays and burdensome formalities in registration and trademark office procedures as well as overly formalistic proof of use requirements and restrictions on trademark applications. We believe that Japan should be encouraged to remove such burdens on trademark owners and that the U.S. government should continue to monitor Japan's progress in this area.

Question No. 3. I would like to ask a question as it relates to the NAFTA. As we all know, Mexico has made strides in resolving many of its intellectual property concerns and the NAFTA will resolve additional U.S. concerns if implemented. I would like each of you to tell me your position on the NAFTA generally and specifically how you envision the NAFTA strengthening the intellectual property rights issue?

Answer. Because of its particular focus on trademarks, INTA has no position on NAFTA generally. Topics such as agriculture, energy, tariff elimination, and the overall potential economic impact of the Agreement are beyond the scope of INTA's purpose of the preservation and promotion of trademarks as essential elements of worldwide commerce.

However, with respect to NAFTA's impact on Mexico's handling of trademark rights, INTA is cautiously optimistic. The Agreement is designed to provide "adequate and effective protection and enforcement of" trademarks and other defined intellectual property rights, and to require each party to accord nationals of other parties at least the same level of treatment it accords its own. Although Mexico has made progress in this area in recent years, there is still room for improvement. (From the start, INTA has analyzed NAFTA's impact on the protection of trademarks and continues to provide information to both the Mexican and U.S. governments). INTA expects Mexico to redouble its efforts under NAFTA and, within a fairly brief period, to meet the same trademark registration and protection standards of the other parties to the Agreement.

INTA also has voiced its concern about Mexico's delay in promulgating regulations for its 1990 Trademark Law. The possibility of further revisions to the current law may exacerbate this delay. INTA urges the Mexican government to issue the regulations as soon as possible.

Question No. 4. Russia is the largest and wealthiest republic of the former Soviet Union. While there are no significant legal barriers to trade with Russia, there are a number of factors that discourage trade. The Russian government has shown considerable interest in formulating laws to bring the country up to world standards in the area of intellectual property. One of the weak point's with Russia is its inability to enforce existing and contemplated IPR laws. What if anything should the United States be doing to help them resolve this problem? Or should we be even contemplating trading with the Russians?

Answer. Addressing the second issue first, I think that it is in the interest of the United States to promote free and fair trade with the nascent Russian democracy and its market economy. The more that we can do to promote Russia's evolution into a modern, free market and democratic state, the more opportunity there will be for U.S. businesses which own trademarks. A key catalyst for such evolution is trade.

With regard to the first issue, INTA is very active in promoting the adoption of trademark laws in the former Soviet republics which are consistent with those of modern industrial nations. The Association offers advice on proposed laws and recommendations for improving laws already on the books. While INTA can provide such assistance, the major problem, as you pointed out, is Russia's inability to enforce its trademark laws. The U.S. government should give serious consideration in any aid package to Russia to including training programs by U.S. Customs, an assistance by the USPTO, and educational programs directed to the court system, to improve the registration and enforcement of trademarks throughout the country.

PREPARED STATEMENT OF SENATOR ORRIN G. HATCH

Mr. Chairman, I welcome our distinguished panel of business representatives. We talk too often of the macro-policy effects of trade agreement violations. But it is the micro-economic effects of these policies and practices that can destroy jobs, investments and whole industrial sectors.

These concerns are found throughout the legislative history of Section 1303 of the Omnibus Trade Act of 1988, the so-called "Special 301" provision of the law.

I supported Special 301 then, as I do now. As the senior Senator from Utah, which *Business Week* has called the nation's "Software Valley," I have seen the information technology industry of my state suffer great losses. This industry in Utah numbers

over 800 companies, producing a payroll almost equal to that of our defense sector—for which Utah has also been well-known.

Despite my obvious commitment to rigorous overseas protection of intellectual property and assured access to foreign markets—the twin objectives of Special 301, I have been a cautious proponent of its use.

In my article in the latest issue of *Computer Law Reporter*, entitled "Protecting Intellectual Property Rights in China," I argue that Special 301 almost certainly induced China's adherence to the January 1992 Memorandum of Understanding with the United States. China simply could not afford being returned to the Special 301 Priority Watchlist—and the impending retaliation then being held over its head.

However I also warned that the reckless use of Special 301 could ignite mutual retaliatory measures, a euphemism for trade wars. I would like to invite the committee to take note of these arguments, Mr. Chairman, and submit the article along with the balance of my remarks for the record.

MIXED RESULTS OF SPECIAL 301

Mr. Chairman, as I mention in my Computer Law Journal Article, we can expect too much from unilateral measures, like Special 301. However, without more universal protections in place, like the Trade-Related Intellectual Property (TRIP) provisions of the Uruguay Round, we must protect our rights of market access and market presence.

As Mr. Bale of the Pharmaceutical Manufacturers Association points out, his industry generates a substantial part of our trade earnings. But look at his costs in reaching this plateau: his R&D investments are nearly four to five times those of other industries, and his productivity nearly double that of all other foreign pharmaceutical manufacturers combined.

We have an obligation to the pharmaceutical industry. I tried to meet that obligation in part nearly ten years ago, through the Hatch-Waxman Act of 1984, which extended protection to patented drugs undergoing the long approval process. I am happy to say that the act has become a model for Japan and, now, the European Community.

Mr. Bale concedes some progress, but properly warns that there remains much to be done. I for one am hopeful that countries like Argentina, Korea and Thailand, will see the wisdom and benefits for themselves in following the examples of the EC and Japan in extending improved patent protection to U.S. drug manufacturers. And I want to advise these countries that they will always find willing assistance in my office.

I also welcome the comments of the International Intellectual Property Association, and its many constituent associations. Along with Senators Rockefeller, Grassley, Durenberger, Stevens, Bennett, and others, I recently wrote President Clinton urging greater sensitivity in U.S. trade-related agencies to piracy losses, which now run between $12–15 billion annually.

I was also pleased to work with the Business Software Alliance, and the International Anti-Counterfeiting Association, in publicizing the long list of countries still violating the most fundamental precepts of private property protection. These violators must realize, as I think China has, that foreign investment and technology will not be risked in societies that freely pirate and sell counterfeit goods.

Mr. Chairman, I give back the balance of my time, and thank the chair for the privilege of commenting on Special 301.

Attachment.

Protecting Intellectual Property Rights in China

by

Senator Orrin G. Hatch

The People's Republic of China has discovered Monopoly, the most capitalist of board games. The Parker Brothers game has become popular in China both for entertainment and for teaching budding entrepreneurs the rudiments of capitalism. However, the two Chinese companies that make the game are passing go, collecting more than $200 and staying out of jail despite breaking a number of copyright and trademark laws.[1]

The pirating of Monopoly is an example of a larger problem in China involving different kinds of monopolies—those created by intellectual property laws. Intellectual property rights (IPR) are still a fuzzy concept in China. Communism's rejection of individual property ownership, coupled with a legal history not steeped in IPR, has given intellectual property an insecure place in China's legal scheme.

As described below, the groundwork for expanded protection of intellectual property rights in China has been laid, but there remains a gap between the formal promise of recognition and the fulfillment of that promise. Specific, practical steps need to be taken to educate the emerging Chinese entrepreneurial class, and to provide meaningful enforcement mechanisms for the victims of trademark, copyright and patent infringement.

U.S. industry has an important role to play in this process. Internationally acceptable levels of intellectual property protection in China must be one of the prices exacted for the promise of foreign investment which will bring coveted economic development to the PRC. U.S. industry must educate their trade counterparts in China on the importance of protecting intellectual property rights. U.S. industry must insist on the implementation of adequate enforcement mechanisms. And U.S. industry must be as vigilant and assertive in the protection of their intellectual property rights in China as they are at home.

In January 1992, United States Trade Representative (USTR) Carla Hills negotiated a Memorandum of Understanding (MOU) with China that will tighten Beijing's intellectual property laws. China agreed to the Memorandum after a seven-month investigation by the USTR under the "Special 301" provision of the Trade Act of 1988. Special 301 requires the USTR to identify, investigate and if necessary, retaliate against countries that fail to provide adequate protection for U.S. intellectual property owners.

Since the MOU was signed, China has made steady progress toward fulfilling its obligations. The PRC has joined the Universal Copyright Convention and published its Implementation Rules for International Copyright Treaties. Meeting these commitments will be a giant step for China, and one in the right direction. However, prospects for success under the MOU are still uncertain.

The agreement contains only a vague enforcement clause calling for the Chinese to use "effective procedures" to stop IPR violations. Given that China paid little attention to IPR until the last decade, significant protection may not be immediate. To declare the MOU already ineffective, though, would be a premature indictment of the Chinese officials responsible for implementing and enforcing the agreement. So far, these officials have shown every intention of following through with their obligations. But the MOU instantly transformed China's IP laws and there is bound to be lag time between when the

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Chinese implement MOU standards and when they actually figure out how to make them work.

In the interim, even if the Chinese make a good faith effort to enforce the MOU, there will still be obstacles to meaningful protection. China could help overcome these obstacles by implementing a broad, three-step approach.

First, China must help American companies find intellectual property infringers. In the past, U.S. firms have often been left to find the violators themselves. This is nearly impossible in a country where factories and small businesses are as hard to count as the population.

Many U.S. companies who have been successful in curbing IPR violations in China have resorted to hiring local legal counsel and investigators to trace the infringing goods or processes back to their sources. Often these are small factories in the backwaters of China with no knowledge that their activity is illegal.

The problem is fueled by middlemen from Hong Kong who subcontract with factories and businesses in China to produce a limited number of copies within a certain time period. This makes the timing of the investigation critical. By the time company investigators trace the goods to their origin, the factory is often manufacturing something else and the damage is done.

Furthermore, only limited technology is needed to counterfeit or pirate certain kinds of goods. This gives infringers a wide variety of locales from which to operate. When one location is discovered, violators simply find another site and continue to break the law.

Investigations are an expensive and time-consuming process that few companies can afford and even fewer are willing to engage in. Some large firms that could afford to bankroll such extended investigations choose not to because they feel the occasional success is not worth the expenditure. One U.S. executive responded that losses from intellectual property violations in China are simply a cost of doing business.

Second, China should create a simple, inexpensive and binding forum to solve intellectual property disputes. The body should also have the authority to dole out sentences stiff enough to deter larger, Hong Kong influenced violators.

China's cumbersome dispute resolution system has made it difficult for U.S. firms to stop intellectual property thieves. Because China's legal system developed along different lines, there is a shortage of Chinese lawyers trained in intellectual property law. As a result, legal processes that look effective on paper don't work in reality. Actions are rarely brought in People's Court, and arbitration boards have also been ineffective.

The complicated and tedious nature of dispute settlement make formal proceedings an option reserved for corporations with vast reserves of patience. Levi-Strauss, which has been comparatively successful in obtaining relief in China, prefers to avoid formal proceedings all together, opting instead to deal directly with the infringer. To do this, Levi-Strauss has spent considerable time and resources cultivating good relationships with Chinese officials. However, developing such ties can take years, and many small U.S. interests have only a short time before infringement significantly reduces their profit-making ability.

The profusion of new intellectual property laws may initially overload China's legal system, exacerbating its ineffectiveness and leaving American companies in the lurch. A streamlined resolution process with cooperation from Chinese officials would open the door to hundreds of U.S. companies that currently do no business in China because they cannot protect their intellectual property there.

Third, China needs to continue to educate its masses about intellectual property. On a recent trip to China, an American observer watched an old Chinese woman pull small and ugly oranges from a garbage bag, stamp them with the "Sunkist" trademark and repack them in a Sunkist box. When asked, the woman replied that although she didn't know what the word "Sunkist" meant, she did know that the oranges marked with it sold much better than those without it.

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This example is not unusual. Because of China's size and isolation, many Chinese people do not understand intellectual property, much less the laws protecting it. The MOU and China's efforts to implement it are already helping to educate the Chinese. Even still, if the MOU is to have any practical effect, Beijing must step up efforts to promote respect for IPR in business, schools and among the general public.

These small steps could be easily undertaken and their positive effects would be substantial not only for the United States, but for China as well. China has clear incentives to make the MOU work.

First adequate levels of IP protection would bring to China a flood of new industries and products. The Chinese crave foreign investment, particularly from high-tech industries that often rely on intellectual property protection. Already such companies are prepared to enter China if they believe that their IP interests will be adequately protected by the MOU. If these enterprises enjoy initial success, many others are sure to follow. Both manufacturing and marketing would prosper under solid IPR protection.

Second, enforcing the MOU will help China expand its role in international trade. In the last, 102nd Congress, China faced much resistance to the renewal of the Most Favored Nation trading status. It is unlikely that China's quest for renewal in the new Congress will be any easier. Certainly, a good enforcement and compliance record with the terms of the MOU will help. And, American firms will be exercising close surveillance of China's legal climate before making investment commitments.

China also wants to join the General Agreement on Tariffs and Trade (GATT). Given the importance IPR played in the GATT's Uruguay Round of multilateral trade talks, any effort by China to address IPR problems will help them accomplish this goal.

Finally, if China fails to enforce the MOU they face the threat of being returned to the Special 301 Priority List. Special 301 is a valuable tool for dealing with stubborn countries and its use should never be ruled out. However, it should be a weapon of last resort.

Negotiations leading up to the MOU illustrated the potential drawbacks of indiscriminate use of Special 301 against China. Special 301 is potentially a dangerous proposition for American businesses. If the United States and China fail to reach an understanding over enforcement, the USTR would could slap sanctions a. illions of dollars worth of Chinese exports. China would undoubtedly retaliate with commensurate tariffs of its own, setting of an all-out trade war. Not only would U.S. companies lose millions of dollars in China, but, foreign countries would fill the void left by American exports—thereby gaining control of what is now an American market share.

In addition, resorting to retaliation may actually harm U.S. intellectual property owners. The tension and resentment created by a trade war would the leave the Chinese with little desire to protect U.S. intellectual property, or cooperate with U.S. IP owners—causing violations to go unchecked.

The United States asked China to rewrite its domestic IPR laws for the benefit of American companies, and they agreed to do so. For that, China should be commended. The Chinese must now live up to their commitment to protect American IP interests. Both the United States and China have large economic consequences at stake and both will benefit from meaningful protection of U.S. intellectual property rights in China.

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[1] *U.S. Has No Monopoly on 'Monopoly' In China*, Journal of Commerce, Monday June 8, 1992 (Reuter).

PREPARED STATEMENT OF IRA SHAPIRO

It is a pleasure to appear before the Subcommittee today to discuss the Clinton Administration's plans for the implementation of the "special 301" provisions of U.S. trade law. This Administration's guiding policy is to open markets and create trade opportunities by enforcing U.S. law and ensuring that the countries with which we sign agreements comply with the letter and the spirit of those agreements. In the context of the "special 301" review this means moving our agenda forward and being prepared to take strong action if countries do not meet our goals of providing adequate and effective protection of intellectual property rights and comparable market access for U.S. goods.

As the President stated in his February speech at American University, this Administration will not let trade issues play a secondary role to non-trade concerns. In that context, Ambassador Kantor is willing to look at every possible means to achieve the objective of adequate and effective protection of intellectual property rights and comparable market access for U.S. goods. If we are not successful in achieving this objective, Ambassador Kantor will recommend significant--and not merely symbolic--actions in response to the unreasonable practices of our trading partners.

Today I would like to focus on the importance to the U.S. economy of protecting intellectual property in other countries; the policy direction that this Administration will pursue in implementing this important trade statute; the role of "special 301" in obtaining high levels of protection for U.S. intellectual property abroad; the current track record of achievements using the "special 301" review process.

Importance of Intellectual Property to the U.S. Economy

Intellectual property is an essential element of the U.S. economy and will be even more important in the future. Every industry in the United States has some connection with intellectual property rights (e.g., patents, copyrights, trademarks, and trade secrets). The ideas and products protected through intellectual property rights often represent the highest level of technology available in the world.

Products protected by intellectual property rights represent a major portion of total U.S. exports. U.S. computer software, motion pictures, sound recordings, books and television programs are exported world-wide and benefit from strong copyright protection. Other industries that are an important source of U.S. exports, including the aircraft and pharmaceutical and medical equipment sectors, rely on trademark, patent and trade secret protection. In 1991, exports in these three industries amounted to approximately $40 billion. Export industries are a driving force in the creation of new jobs in the United States.

Strong intellectual property protection will be even more important in the future. It provides an incentive for investment in the United States and the creation of well-paid, high-skilled jobs in this country. High technology products add greatly to overall productivity. Consider the effect of computers and software over the past decade on U.S. industries. This increase in productivity and development of new products naturally increases our ability to compete at home and abroad.

The ability of U.S. companies to export products protected by intellectual property rights and compete in foreign markets depends to a large degree on whether other governments provide adequate and effective protection of intellectual property and

whether these governments provide fair and equitable access to their markets for these products.

As you know, it costs millions of dollars to develop and market a new computer program or pharmaceutical or create a motion picture. It costs little, in the short term, for "pirates" to copy these products. In the longer term, such piracy costs all of us a better future.

Special 301's Track Record

Since 1989, "special 301" has played a key role in obtaining the enactment by many of our trading partners of stronger laws for the protection of intellectual property rights. Special 301 has also helped ensure stricter enforcement of those laws and improved access for products (such as motion pictures) into these markets. Achieving these objectives--strong laws, strict enforcement, and comparable market access--is critical for realizing many of the economic benefits that flow from the creative products protected by intellectual property rights.

When Congress enacted special 301, U.S. owners of intellectual property faced extensive piracy in other countries. Many countries with important markets either failed to provide protection or did not enforce the laws that were in place. For example, barriers, such as quotas, limited access to some markets. "Special 301" has been a major element of the effort to solve these problems. This statute, negotiations on intellectual property in the Uruguay Round and NAFTA, and other U.S. bilateral negotiations have brought the issue of strong intellectual property protection to the attention of the world's trading community.

We have not attained all of our goals. In some countries we have encountered intense resistance. But, use of "special 301" has resulted in positive changes to our trading partners' laws and some improved enforcement of those laws. The challenge that this Administration now faces is to give new direction to the "special 301" review process to address the difficult remaining problems and to ensure that other countries live up to the commitments that they have made. The Clinton Administration is fully prepared to take a strong position with other governments to obtain world-class laws and enforcement efforts that will put the pirates out of business.

Implementation of Special 301

The "special 301" provisions of the Trade Act of 1974, as amended, require the U.S. Trade Representative to determine whether the laws and practices of foreign countries deny adequate and effective protection of intellectual property rights or fair and equitable market access for U.S. exporters who rely on intellectual property protection. The USTR must then identify as priority foreign countries those countries that (1) have the most onerous and egregious acts, policies and practices which have the greatest adverse impact on the relevant U.S. products and (2) are not engaged in good faith negotiations or making significant progress in negotiations to address these problems.

If a country is identified as a priority foreign country, the USTR must decide within 30 days whether to initiate an investigation of those acts, policies and practices that were the basis for identifying the country as a priority foreign country. A "special 301" investigation is similar to an investigation initiated in response to an industry Section 301 petition, except that the maximum time for an investigation is shorter--6 months with the possibility of an extension to 9 months--as compared with the 12 to 18 months permitted under a petition-based section 301 investigation.

The USTR must undertake this global review each year within 30 days after the issuance of the National Trade Estimates (NTE) Report. The announcement each year follows a lengthy information gathering and negotiation process. The interagency group that advises the USTR on implementation of "special 301" obtains information from the private sector, American embassies abroad, our trading partners, and the NTE report. The Copyright Office and the Patent and Trademark Office provide invaluable advice and support during this process. The statute also authorizes the USTR to revoke or make additional identifications of countries at any time that the information available indicates that such action is appropriate.

In addition to obtaining results through "special 301" investigations that were initiated in the past, significant results have also been obtained through issuance of the so-called "priority watch list" and "watch list." These lists are not required under the statute, but have been used to alert our trading partners of concerns about intellectual property rights practices and the possibility of future identification as a priority foreign country.

"Special 301"--as implemented through initiation of investigations and maintenance of the "priority watch list" and "watch list"--has yielded significant results. The statute has worked particularly well in helping U.S. negotiators to persuade countries to adopt changes in their laws to bring them up to international standards. The list of successes under special 301 is a long and growing one. (Attached to this testimony is a fact sheet that describes the progress on intellectual property issues that has been made since the first annual review in 1989.) In fact, progress continues to be made: just this month Ambassador Kantor signed an agreement with the Philippines in which that Government agreed to legislative and administrative measures that (when implemented) will greatly improve the protection and enforcement of copyrights, trademarks and patents in that country.

Adequate laws, however, are just the first step in the process of ensuring that owners of intellectual property rights have an environment that permits them to market their products in a fair manner and that encourages investment in that country. It is likely that "special 301" will be focused more in the future on the issue of obtaining effective enforcement of existing laws. While effective enforcement of the law is a critical part of obtaining this objective, it is also much more complex and difficult to measure and attain. Effective enforcement requires cooperation between the right owner, police, prosecutors, and the judiciary and other authorities. Each must be educated and convinced of the importance of this issue. Let me give you some examples of the need for the interaction between enacting laws and enforcing them.

Since signing an intellectual property agreement with China in January 1992, we have consulted frequently on its implementation of this Agreement--a U.S. team is in China today. We have obtained results: the Chinese Government has enacted patent law amendments that will provide world-class protection. China has also joined the Berne Convention For the Protection of Literary and Artistic Works and the Universal Copyright Convention and has issued the necessary regulations to implement those conventions and relevant laws. We also understand that U.S. companies are now in the process of seeking administrative protection in China for their U.S. patented agrichemicals and pharmaceuticals. Yet, we will need to see sustained follow up by the Chinese Government in order to ensure enforcement of the rights provided in its new laws.

Another country that has made good progress in implementing IPR reform is Greece. Early this year, the Greek Government passed a new copyright law which represents a major step forward in the implementation of the European Community's software directive; the new Greek law contains stiff penalties for copyright infringement. We will now monitor enforcement of the new law in Greece, in order to ensure that it has its intended effect: putting pirates out of business.

The agreement reached with Taiwan in June 1992 is a good example of the need for our trading partners to provide effective enforcement and benchmarks for the United States to evaluate the effort. Although the June 1992 agreement with Taiwan includes obligations to draft and use best efforts to enact legislation, a major difficulty in the Taiwan market is obtaining effective enforcement even of existing laws. Taiwan has an export oriented economy. We see counterfeit and pirated products entering the U.S. and other markets from Taiwan. The U.S. Customs Service makes the largest number of seizures against imports of products from Taiwan. Thus, we have asked the authorities on Taiwan to implement an export monitoring system that will prevent these pirate and counterfeit goods from being shipped throughout the world. We still are hopeful that Taiwanese authorities will work with us to implement a system that does the job.

Effective enforcement has also been an elusive goal in Thailand. Although raids on copyright infringers have increased recently and the Thai Government has begun seizing equipment used to copy audio and video cassettes, cases involving infringement of U.S. sound recordings and motion pictures are moving at a snail's pace through the Thai judicial system. In the two years since Thai police conducted major raids, the courts have yet to issue a decision against a major pirate. The Thai Government must take action that convinces the pirates to get out of the piracy business and that deters others from replacing them.

How the Clinton Administration will Implement "Special 301"

The "special 301" provisions permit the USTR to exercise considerable discretion in determining whether to identify a country as a priority foreign country and whether to initiate an investigation. The well-documented success of "special 301" (and its "priority watch list" and "watch list") demonstrates that discretion can be used as a negotiating tool.

With a change of administration, the discretion provided in the statute raises questions about the direction that President Clinton and Ambassador Kantor will take in implementing the "special 301" review. During the few months since taking office, the Administration has examined "special 301" to determine the acts, policies and practices that should be considered "the most onerous and egregious." We have also considered the indicia of actual or potential adverse impact on relevant products and assessed how much progress a country must make to warrant a decision not to identify that country as a priority foreign country. In short, we are committed to giving a fresh direction to the "special 301" review process to ensure that our objectives are clear and that other countries know what we expect.

Submissions received by USTR in response to our request for public comments cited more than 30 trading partners as warranting some action under "special 301" (either identification as a priority foreign country, placement on the priority watch list or watch list, or inclusion in the list of countries that fail to satisfactorily implement a "special 301" agreement.) The USTR must use the "special 301" review to establish priorities in terms of objectionable practices, goals for addressing those practices and evaluation of harm to U.S. interests.

This is the fourth consecutive year of the "special 301" review process. Many trading partners have entered into agreements with the United States that include commitments to improve protection, strengthen enforcement and remove barriers to market access. Those partners must live up to those commitments and fully implement measures necessary to eliminate identified problems. Any partner that fails to meet their commitments can expect a strong, speedy response from this Administration.

In our evaluation of a country's legal framework for protecting intellectual property rights, we will be looking to see if foreign countries provide the same high levels of protection such as those required in the NAFTA Chapter on intellectual property. We will also give particular importance to specific issues that have been brought to our attention by the private sector in the information gathering phase of the "special 301" review when deciding whether a country should be identified as a priority foreign country or placed on one of the "special 301" lists.

An issue of growing importance is "effective enforcement"; that is enforcement of laws that foreign governments have already enacted. Countries that do not enforce their laws can expect to receive special attention under "special 301."

While sales of counterfeit and pirated goods in a particular domestic market cause damage to U.S. interests, that damage is multiplied when a country exports pirated goods to third markets. Countries that are exporters of pirate and counterfeit goods can also expect the United States to consider this to be an "onerous or egregious" act and consider it an important factor in the "special 301" process.

On the "special 301" market access issue, the Administration has been concerned about barriers that prevent U.S. products from being sold in overseas markets. The European Community's broadcast directive which puts a stringent quota on U.S. television programming throughout the EC is an issue of particular concern. Elimination of these practices are a priority for the Clinton Administration.

These are some of the decision points that the statute presents to Ambassador Kantor. But they are just the beginning. I have described some of the progress that the United States has accomplished in the "special 301" process. Progress in other cases has been painfully slow or non-existent. Some countries, such as Brazil, India, Korea, Thailand, Taiwan, and Argentina, have had a long term place on the "special 301" lists.

In the past, we have seen an annual spring-time flurry of enforcement actions or legislative drafting just before the announcement of the results of the "special 301" review process. In other cases, we have draft laws that have been pending before legislative bodies without positive actions or have laws that need some amendment. "Special 301" cannot be seen as effectively functioning if countries can take up permanent residence on a list without making sustained progress in addressing the problem issues.

To address the problem of slow legislative progress or erratic enforcement efforts, USTR will formulate specific action plans including deadlines and benchmarks for evaluating a country's performance. We will enforce these deadlines and take action, if necessary, through out-of-cycle reviews of a country's status under "special 301." The statute permits the USTR to revoke identifications made in the annual review process as well as to make additional identifications, if the facts warrant such action.

Actions at the End of an Investigation

It is premature for me to discuss what actions will be taken at the end of an unsuccessful "special 301" investigation. The statute's credibility and usefulness depends on the Administration's commitment to take strong and decisive action in the event that problems remain unresolved. We must also be firm in naming names and telling our trading partners that we will act if they harbor pirates, counterfeiters or permit infringements to go unpunished. The Clinton Administration is determined to put real teeth into retaliation measures.

Ambassador Kantor is prepared to use "special 301" more aggressively; in this context he is looking at every means to deliver our message home: the United States insists on compliance with trade agreements, and on obtaining comparable access in foreign markets. One means used by past administrations is revocation of benefits currently granted under the Generalized System of Preferences (GSP). However, failure to renew the GSP program, which expires in July of this year, will eliminate leverage that this Administration is prepared to use. Ambassador Kantor is also interested in exploring means that have not been used by past administrations, in order to make our responses as accurate and effective as possible.

The Administration is exploring the possibility of a linkage between intellectual property issues and bilateral aid programs, as well as encouraging multilateral development banks to include intellectual property protection as a key component of their programs for improving the investment climate and infrastructure of developing countries. For example, the Inter-American Development Bank (IDB) now includes IPR reform as one of the objectives it considers in developing the investment sector loans (ISL) that it is making throughout Latin American and the Caribbean. In the case of El Salvador, to cite a recent example, technical assistance from the IDB resulted in the introduction of comprehensive draft IPR legislation earlier this year.

These are all steps that we can take to ensure that the "special 301" review process continues to be a positive tool for obtaining stronger laws, stricter enforcement, and improved market access.

Conclusion

The Clinton Administration believes that the "special 301" review process is an effective tool in gaining protection in foreign markets for intellectual property rights. Moreover, the Administration is dedicated to fighting for access to foreign markets for U.S. products. We will bring fresh ideas and new approaches to this fight. By so doing, we intend to further President Clinton's goal of expanding markets and creating trade opportunities for U.S. companies. This in turn will create jobs in the United States, particularly high-quality employment in the vital high-technology sector that relies on intellectual property rights protection.

ATTACHMENT

PROGRESS ON INTELLECTUAL PROPERTY ISSUES

JANUARY-APRIL 1993

- The Philippines signed an abreement that addresses copyright, patent and trademark concerns. It also includes provisions on enforcement of rights. (April)

- Switzerland's new Trademark Law came into effect making its protection EC compatible. New copyright amendments, that U.S. industry considers to be lacking, have been passed and will take effect in July. (April)

- Copyright Reform Law signed in Colombia that increases penalties for infringement and explicitly identifies unauthorized transmissions of satellite signals as illegal. (February)

- The Canadian Parliament passed a new Drug Patent Law which eliminates compulsory licensing provisions discriminating against pharmaceutical products. (February)

- Chinese Government enacts amendments to the Trademark Law and supplementary provisions to the criminal law adding to penalties for trademark infringement. (February)

- Greek Government enacts a copyright law which contains substantial enforcement provisions. (February)

- The Jamaican House of Representatives enacts a Copyright Law. (February)

- Cyprus acceded to the Geneva Phonogram Convention and has stepped up enforcement efforts of patent and copyright laws. (January)

- Egypt amends its copyright and censorship laws. (January)

- Malta enacts amendments to its Copyright Law which strengthen penalties, extend protection to computer software, and institutes new penalties. (January)

1992

- A new Trademark law enacted in Thailand provides for higher penalties for infringement and extends protection.

- South Africa enacted an improved Copyright Act protecting computer software.

- Italy implemented the EC Software Directive improving protection for computer programs.

- The United Arab Emirates passed new Copyright and Patent Laws, but copyright protection still needs to be extended to foreign works.

- The Government of Peru issued a decree law to protect industrial property.

- The EC has amended its proposal for biotech patents.

- Denmark became the first member state to implement the EC's Software Directive.

- Poland enacted a new patent law, although the U.S. remains concerned about the compulsory licensing provision.

- Korea ratified the US-Korea Patent Secrecy Agreement

- China joined the Berne Convention and the Universal Copyright Convention.

- The President of Turkmenistan signed a law for the protection of intellectual property.

- New copyright law enacted in Pakistan strengthening penalties for infringement and protecting computer programs as "literary works."

- The Russian Federation enacted and implemented a patent law that meets high international standards and is compatible with the terms of the bilateral Trade Agreement.

- The Russian Federation enacted and implemented strong laws for the protection of semiconductor layouts and the protection of computer software and databases. Both laws are fully compatible with the terms of the bilateral Trade Agreement and meet international standards.

- New Zealand repealed legislation that allowed compulsory licensing of pharmaceuticals.

- The Ukrainian Government adopted the Paris Convention, Madrid Agreement, and the Agreement on Patent Cooperation.

- Chile extended its term of copyright protection to life plus 50 years -- the Berne Convention standard.

- Brazilian Government issues Executive decree bringing Brazil into full compliance with the Stockholm Text of the Paris Convention For the Protection of Industrial Property.

- The United States and the Russian Federation exchanged diplomatic notes causing the entry-into-force of a bilateral Trade Agreement which commits Russia to an extensive IPR legislative agenda.

- Bolivia passed a new Copyright Law providing a framework for protection but still lacks regulations.

- Taiwan and the U.S. signed a Memorandum of Understanding on IPR issues.

- Indonesia agreed to provide improved market access for U.S. motion pictures.

- The United Arab Emirates enacted a trademark law.

- Japan's law providing for registration and protection of service marks took effect.

- The United States and China establish bilateral copyright relations.

- The Commission of Cartagena (the Andean Pact) passed decision 313, which replaced decision 85 covering industrial property protection and provides for certain improvements in patent protection.

- Taiwan passed a Fair Trade Law that provides some protection for trade secrets.

- India committed to the liberalizing of market access for motion pictures effective April 1, 1992.

- India announced that it will accord national treatment for the use of trademarks owned by a foreign proprietor.

- Thailand's National Legislative Assembly enacted amendments to the patent law that will extend product patent protection to 20 years from filing. However, the law does not provide protection for existing patented products that have not yet been marketed in Thailand, and contains extremely broad compulsory licensing provisions.

- The United States and China signed a Memorandum of Understanding committing China to improve protection for U.S. intellectual property, including providing strong protection for U.S. inventions and copyrighted works, computer software and sound recordings, and trade secrets.

- Japan amended its copyright law: to extend the protection of sound recordings to 50 years; to protect foreign sound recordings created between 1968 and 1978; and to extend to foreign producers the right to authorize and prohibit the rental of their sound recordings from one year from the date of release.

1991

- Paraguay joined the Berne Convention for the Protection of Literary and Artistic Works.

- Romania and the United States reached agreement on a trade accord that includes strong protection for intellectual property rights.

- Chile implemented its new patent and trademark law.

- Indonesia's Patent Law took effect.

- Mexico enacted an copyright law which extends the term of protection for sound recordings, creates rental rights and significantly increased sanctions.

- Mexico enacted an industrial property law which extended patent protection to chemical, pharmaceutical and metal alloy products, as well as to some biotechnological inventions; extended the term of patent protection to 20 years from filing; and extended the term of trademark protection to a renewable period of ten years.

- China's new copyright law took effect.

- The European Community adopted a directive requiring member states to provide copyright protection for computer software programs.

- The United States and Bulgaria signed a trade agreement including strong protection for intellectual property rights.

- Korea enacted trade secrets legislation.

- Chile enacted a revised Patent and Trademark Law, including product patent protection for pharmaceuticals.

- The United States and the People's Republic of Mongolia signed a trade agreement including strong protection for intellectual property rights.

- Singapore strengthened its Trademark Law.

1990

- The European Community took a "common position" on protection for computer software, including a 50-year term of copyright protection.

- Malaysia amended its copyright law and acceded to the Berne Convention for the Protection of Literary and Artistic Works.

- Japan enacted a law protecting trade secrets.
- Chile clarified its copyright protection for computer software, thus ensuring that it is a "literary work."
- The United States signed a trade agreement with Czechoslovakia which includes strong terms of protection for intellectual property rights.
- Yugoslavia amended its patent law to extend the term of protection to 20 years from filing, among other improvements.
- The United States signed a trade agreement with Poland which includes strong terms of protection for intellectual property rights.
- The Federal Republic of Germany increased penalties for infringement of intellectual property rights.

1989

- Saudi Arabia enacted a new copyright law.
- Portugal increased penalties for audio piracy.
- Indonesia enacted its first patent law including product protection for pharmaceuticals, effective August 1991.
- Colombia passed a law defining computer software as copyrightable material.
- Spain extended patent protection to U.S. plant varieties on a reciprocal basis.
- Colombia resolved royalty remission problem concerning motion pictures.
- Taiwan agreed to expeditiously resolve copyright problems concerning motion pictures.
- Saudi Arabia adopted a patent law.
- A Uruguay Round mid-term review decision on intellectual property was reached.
- A Bilateral Agreement on Copyrights was signed with Indonesia.
- Agreement was reached to establish bilateral copyright relations with Taiwan.

RESPONSES OF MR. SHAPIRO TO QUESTIONS SUBMITTED BY SENATOR GRASSLEY

Q: If you had to list the top two or three most egregious countries that violate our intellectual property rights, who would they be, and what action would you recommend the United States Government pursue?

A: On April 30, Ambassador Kantor announced that three trading partners -- the most egregious offenders of U.S. intellectual property rights -- would be identified as "priority foreign countries" under the "Special 301" provisions of the Trade Act. Those countries are: Brazil, India and Thailand. The main problem with Brazil is the lack of an effective patent law, but

there are also problems with the copyright law, lack of protection for semiconductor mask works and inadequate enforcement of copyright and trademarks. India's patent law lacks adequate protection for pharmaceutical products; the government is, however, taking actions to address our concerns on copyright, trademark and motion picture market access issues. Thailand has also failed to provide adequate protection for pharmaceuticals, and copyright piracy -- especially for sound recordings and videos -- has been a major problem.

Ambassador Kantor announced on May 28 his decision to initiate a new investigation on Brazil, and we expect to be engaging that country in consultations soon. No new investigation is required for either India or Thailand since USTR is monitoring both countries under Section 306 of the Trade Act. In ongoing consultations, we are pressing both co ntries to take actions to address our intellectual property concerns.

Taiwan has been a leading violator of U.S. copyrights and trademarks. We did not identify Taiwan because it passed the bilateral copyright agreement and undertook to control production and exports of copyright and trademark infr'nged goods, as well as ensure protection for copyrighted broadcasts. If the Administration determines that Taiwan does not meet the requirements set forth in the immediate action plan by July 31, 1993, then the Administration will reclassify it under the "special 301" provisions of the Trade Act and decide what further action is appropriate. Concerted action on Taiwan's part may enable it to avoid elevation to priority foreign country status.

Q: In 1989 Canada was placed on the "watch list" under the "special 301" provision of the 1988 Trade Act because of the compulsory licensing provisions for pharmaceuticals. In January 1992, Canada announced that it would end compulsory licensing of pharmaceuticals and extend patent protection to 20 years from the date of registration as part of a Uruguay Round agreement. Legislation to implement those changes was introduced at the end of 1992 and as of January 1993 was close to becoming law. Can you tell me where this currently stands? And are you content with the resolution?

A. Canada enacted its new patent law, bill C-91, in February, 1993. As promised, the new law ends compulsory licensing of pharmaceuticals and extends patent protection for 20 years from date of filing. U.S. industry is pleased with the legislation and, as a result of U.S. petition, we have removed Canada from the watch list.

Q: China was taken off the special 301 "priority (watch) list" after they agreed in a memorandum of understanding to provide improved protection for U.S. inventions and copyrighted materials, including software and sound recordings, as well as trade secrets. Since China does not have a trade secrets law, but has committed to passing an unfair competition law by January 1, 1994, that improves protection for trade secrets, can you tell me what if anything China has done to pass the unfair competition law?

A: China is proceeding according to the timetable established by the January 1992 MOU -- a landmark agreement with China to provide a high level of protection for intellectual property -- and we expect no difficulties in having all laws and regulations in place at the appropriate times. We have consulted with China on a frequent basis and have commented extensively on all draft laws and regulations involving intellectual property. The unfair competition law to be enacted by January 1, 1994 is China's trade secrets law. A Chinese delegation recently visited Washington to discuss the elements of the law, but the PRC has not yet provided us a draft. We will provide comments on the draft and have further consultations before the law is enacted.

Although we are satisfied that the laws and regulations already enacted provide for a high level of protection, we continue to monitor implementation. It is too early to comment on how effectively the laws are being enforced, whether penalties levied are sufficient to deter piracy, and the accesibility and fairness of courts for foreign parties.

Q: Since 1989, Japan has been on the "special 301" "watch list" from which the United States seeks stronger intellectual property protection. I would like to hear from each of you as to what you perceive as Japan's most flagrant violation and what if any action this Administration should be contemplating?

A: The main problems with Japan are in the patent area. Specifically, they are the lengthy time required to search and examine patent applications and grant patents; opposition to the grant of a patent before the patent is issued, encouraging competitors to oppose patents for important inventions; the requirement that patent applications must be filed in Japanese and the inflexibility in making changes due to translation difficulties; and the literal interpretation of patent claims, which are restricted to examples given in the application and to any limitations found in the application. Taken together, these practices have posed a serious problem for U.S. companies and have placed them at a competitive disadvantage with Japanese firms.

Some of these problems have been the subject of discussion in the international patent harmonization process, and may be resolved in the multilateral agreement which may eventually result from those talks. However, the patent harmonization negotiations, which have been underway for several years, have been suspended until the conclusion of the GATT Uruguay Round. Therefore, the patent issue remains on the bilateral agenda with Japan.

Q: In 1992, Korea was returned to the "priority watch list" since they did not effectively implement existing laws and had failed to update its laws to reflect the evolution of global discipline in the intellectual property rights area. What is the Clinton Administration doing to prod them into correcting these intellectual property rights differences that still exist?

A: For the 1993 Special 301 review, Korea was retained on the priority watch list, but also made subject to an out-of-cycle review to encourage the government to continue strong anti-piracy enforcement efforts initiated earlier this year. We have obtained commitments from Korea to amend laws dealing with copyrights, computer software, semiconductor mask works, and exportation of pirated and counterfeit goods, as well as to improve enforcement of laws to reduce piracy of computer software, compact discs, and video and sound recordings and reduce counterfeiting of footwear and other trademarked goods.

Q: I would like to ask a question as it relates to the NAFTA. As we all know, Mexico has made strides in resolving many of its intellectual property concerns and the NAFTA will resolve additional U.S. concerns if implemented. I would like each of you to tell me your position on the NAFTA generally and specifically how you envision the NAFTA strengthening the intellectual property rights issue?

A: The North American Free Trade Agreement (NAFTA) provides the highest level of intellectual property protection of any international trade agreement at the current time. In agreeing to NAFTA, the Mexican Government undertook to significantly improve its protection of intellectual property. Before the conclusion of the NAFTA, Mexico already enacted an entirely new patent and trademark ("industrial property") law in June 1991.

Reforms to the country's copyright laws became effective in August 1991. Sanctions and penalties against infringements have been increased and damages can be claimed regardless of the application of sanctions. In addition, the Mexican Government has established procedures designed to enable foreign (mostly U.S.) companies to regain control of their trademarks and to ensure protection for patents and copyrights. As with any good law, however, effectiveness depends on strong enforcement.

At every level and every opportunity, we make Mexican officials aware of our concerns about enforcement. We have had good cooperation with Mexican authorities in ensuring adequate and effective intellectual property protection in Mexico, in helping American companies to regain intellectual property rights which were lost or infringed in the past, and in encouraging other countries to put in place a high level of protection.

Q: Russia is the largest and wealthiest republic of the former Soviet Union. While there are no significant legal barriers to trade with Russia, there are a number of factors that discourage trade. The Russian Government has shown considerable interest in formulating laws to bring the country up to world standards in the area of intellectual property. One of the weak points with Russia is its inability to enforce existing and contemplated IPR laws. What if anything should the United States be doing to help them resolve this problem? Or should we be even contemplating trading with the Russians?

A: Russia has already enacted modern intellectual property legislation in the following areas: patent, trademark, computer software and database, and semiconductor mask works. A modern copyright law is awaiting implementation. Although the copyright bill only provides protection for Russian nationals, Article 8 of the bilateral trade agreement requires extension of national treatment.

We have generally had good cooperation with the Russian authorities on intellectual property issues and we expect them to implement the new laws. We expect that the Russian authorities will take steps to protect intellectual property since it is in their interest to pave the way for eventual GATT membership, and a closer trading relationship with OECD countries.

PREPARED STATEMENT OF ERIC H. SMITH

It has been almost six years since Congress passed the Omnibus Trade and Competitiveness Act of 1988 and created the country's principal trade tool, Special 301, to fight international piracy and counterfeiting—a scourge which continues to cause $12 to $15 billion in annual losses to the U.S. copyright industries. During this time, annual reviews and negotiations under Special 301 to improve inadequate laws and enforcement have achieved very significant results. Aggressive action under Special 301 by the U.S. Trade Representative has been essential in stemming the tidal wave of losses in U.S. jobs and competitiveness that have threatened one of our country's most productive and fastest growing economic sectors. Yet the advance of new technology which makes it ever easier, cheaper, and more profitable to steal, by illicit copying, U.S. creative works—movies, music and recordings, books and computer software—also makes it ever more difficult to stem these losses. The new Administration has already let it be known that it will not tolerate the continuing threat to U.S. competitiveness resulting from the maintenance of unfair trade barriers. Mr. Chairman, for the copyright industries, our principal trade barrier is piracy and we look to Ambassador Kantor and President Clinton, with the help of this Congress, to carry on the campaign to eliminate inadequate laws and enforcement around the world through consistent and uncompromising use of the trade leverage afforded to them under Special 301.

This February, following the annual process outlined by the Congress, the industries which rely on intellectual property protection identified for the new Trade Representative those countries which continue to condone piracy by maintaining inadequate laws or enforcement. The over 1500 companies making up the eight trade associations in the International Intellectual Property Alliance (IIPA) identified 28 countries whose piracy levels are particularly intolerable and which caused over $4.6 billion in losses to this economy in 1992 (see attached list of IIPA recommendations and estimated trade losses). This translates into tens of thousands of lost jobs for Americans at a time when job creation is at the heart of national economic and trade policy. Some of the key countries named are ever so familiar—Taiwan, Thailand, Korea; they have been at the top of the list of offenders for years. And while progress has been made in some of these countries over the years, none have yet reduced the problem to tolerable levels. These three countries, in particular, represent the biggest challenge to the new Administration's trade policy in this arena. We are urging that the privilege extended to trade in the world's most open market be withheld until they demonstrate, through specific actions, an unerring and permanent commitment to eliminate the problem.

The industries represented in the IIPA were responsible for delivering over $34 billion in foreign sales in 1990, making them among this country's most important trade assets. Collectively, these industries experienced revenue growth at over twice the annual rate of the economy as a whole (from 1977–1990) and job growth at close to three times the economy as a whole (from 1987 and 1990).

The U.S. motion picture and television industry delivered over $3.5 billion in surplus balance of trade last year. The creative output of this prized industry is consistently number one throughout the world, the most popular everywhere. But it is uniquely vulnerable to piracy and to other protectionist measures like broadcast and screen quotas, often falsely labeled as "cultural" restrictions.

The U.S. software industry also occupies a starring role, with 75% of the world market and growth rates that top almost every U.S. industry. But perfect copies of computer programs can be made in a fraction of a second by persons with no training. Unauthorized copies can then be sold at fabulous profits by any pirate with minimal capital. The software market is fiercely competitive and increasingly requires major investment to stay ahead. Piracy is a major hurdle to maintaining the revenue streams that will keep this industry competitive.

The U.S. book publishing industry is the largest of the world's publishing industries, generating over $15 billion in revenue. American books, in English and in translation, are, of course, available worldwide and, in many countries, also by means of pirate printings or through illegal commercial photocopying of full text. As electronic publishing proliferates and national boundaries are ignored, strong copyright protection and enforcement will be essential for this industry to remain strong.

The U.S. music publishing and recording industries have particularly benefitted from the new digital technologies but are now even more vulnerable to illicit copying and other unauthorized uses. RIAA members alone account for over 50% of the world's trade in recordings and the world's music publishing industry revenues grew by almost 25% last year. American music is still the most popular worldwide.

Mr. Chairman, in your floor statement on this issue of March 30, you outlined the history of Special 301, its successes and the challenge for the future. You called for the new USTR Mickey Kantor to take a "tough, aggressive" stance on halting the theft of intellectual property around the world. Of course, you are absolutely right. Countries should not expect free and open access to the world's largest market at the same time as they blind themselves, whether intentionally or through benign neglect, to the blatant and impenetrable barriers that they erect or condone through failing to take action against this outright theft. You are also right that Special 301 has been a powerful tool in the fight. Were it not for Special 301 and its effective use by the former USTR Carla Hills and her predecessors, losses would be significantly larger.

But as successful as Special 301 has been, we must nevertheless communicate to the Congress and the new Administration our grave concern for the future. Many of the countries which you identified in your floor statement and which we want to highlight further in our statement have been on the USTR "lists" before. Some, like Taiwan and Thailand, have been at the top of the lists—have even been named as Priority Foreign Countries. Some, like Thailand and India, have been subject to 301 action, some have even been the target of trade sanctions in the past—for example, Thailand in 1989. But the continuing failure of these governments to take meaningful actions to really solve the problems may increasingly be seen by these countries, similar to how many pirates view minimal penalties assessed on them, as a "cost of doing international trade." They may come to view the threat that the

U.S. market may be closed to them if good laws and aggressive enforcement are not put into place as no longer credible.

We do not say this lightly. In a meeting on April 12, our eight presidents communicated these concerns directly to Ambassador Kantor, who we feel confident will take an even tougher stand than in the past toward opening foreign markets. We pointed out that the threat of trade sanctions is not credible unless we are prepared to use it. And, if it is used, it must inflict real economic pain.

Let us first look at the problem of *Thailand*. The IIPA first identified Thailand as a "priority" country in 1985. Negotiations were conducted each year since that time. Some years we were given the illusion of progress. In 1989, for example, the U.S. joined the Berne Convention and our copyrighted works were acknowledged by Thailand (although even some Thai "scholars" voiced doubts that the Thai courts would conclude that Berne governs) to be protected there in spite of a bilateral treaty which we thought gave us protection but which the Thai government simply refused to acknowledge. Despite this, no major pirate in Thailand has ever been subjected to a significant fine or any jail term since our campaign started. Audio, video and software piracy remain close to 100%. The Thai government will cite the number of prosecutions which have resulted in convictions—but all have been of retailers, most of whom have pled guilty and been "fined" up to a maximum of about $1700—no more than an annoying "tax" and a "cost of doing business." They are immediately back on the street with new pirate product. The U.S. "retaliated" in 1989 by withdrawing part of Thailand's GSP benefits; unfortunately, the amount was far too small to make any real difference to the Thai government to induce them to take any action at all—a mistake which we must never make again. Since 1984, our industries have estimated their losses to Thai pirates at over $500 million; in 1992, annual losses escalated to $123 million. Unless the problem ends, losses will continue to increase.

This year Thailand again asks for "more time." There seems to be a new resolve at high levels of the government, but we have seen no real *results*—the only thing that will satisfy our industries given the years of unfulfilled promises and "commitments." Can the credibility of U.S. trade policy and of Special 301 afford another delay in taking sanctions after this history? We hope not, Mr. Chairman. Thailand knows that it is our friend and that there are serious strategic considerations which warrant it continuing to be our friend. But it is not treating us as a friend and we know of no other way at this point to get the government's real attention short of very painful trade sanctions that penalize Thailand as it has penalized us.

Then there is *Taiwan* which for years has been cited by all IP industries as one of the worst offenders. The problem here differs from that in Thailand. The estimated cumulative losses of the copyright industries are far greater—over an estimated $1.8 billion since 1984—but Taiwan has managed to stave off tough U.S. sanctions by taking some actions in the copyright area to improve the situation. Unfortunately, these actions have always been just enough, and always just before the Special 301 deadline. What is clear is that the Taiwan government has simply not been prepared to take the definitive action that would really solve the problem in the long run. In the last couple of years, new problems have arisen which the government let fester and worsen. Cable TV pirates were allowed to proliferate without legal controls. These so-called "Channel 4s" are now a powerful political force fighting all attempts to regulate them. Meanwhile the video and theatrical markets are in complete disarray with U.S. motion picture companies losing as much as they ever have. Taiwan's entrepreneurs were quick to pick up on the new CD technology. CD plants were promptly built; unfortunately, as we warned, they devoted most of their resources to piracy, particularly for the lucrative export market. Until very recently, under threat of retaliation, the government ran some raids against these expensive factories and their powerful owners. Pirate software exports proliferated, replacing the pirate book exports of the mid-1980s. Unfortunately, this was even a more lucrative business than book piracy. Losses to some of this country's most productive and creative companies in the software industry approached $600 million in 1992. This year, under the threat of sanctions, Taiwan has taken a number of actions to begin dealing with these problems. They have convicted and, unusual for Taiwan, sentenced to jail a number of pirates. This should begin having the needed deterrent effect—heretofore absent in that country. But Taiwan is not in compliance with all the commitments it made in a formal Memorandum of Understanding last year during the Special 301 process. If they do not come into compliance, we have urged that sanctions be imposed. Again, there is no other way of ensuring that Taiwan takes the kinds of aggressive action necessary to reduce losses.

We do not mean to suggest that these two countries cannot meet current Administration and industry demands by the deadline of April 30. It is still possible even at this late date if they are truly serious. But if they do not, sanctions must be em-

ployed—and they must be made painful. If not, it is a sorry message we send our trading partners—that you can take seven or eight years to solve a problem before the U.S. will act decisively.

While the above examples we have given to demonstrate our concern for the continued credibility of U.S. trade policy come from the region of the world that, at least eight years ago, was the center of world piracy, the list of offenders is by no means limited to Asia. Indeed, a number of copyright success stories are in Asia—*Singapore, Malaysia* and *Indonesia* come to mind. The *Philippines* has also just signed a comprehensive IP agreement which we hope will result in significantly reduced losses there. China must also be mentioned. To its very great credit, China finally joined the Berne Convention in October 1992. Lack of effective criminal penalties and enforcement is still a massive problem there, however. On the bright side, *Korea* has succeeded in substantially reducing book and video piracy; but music, tape and CD piracy continues at high levels. Enforcement against software piracy—and particularly against copying within major Korean corporations—has only just begun.

Nor are our problems limited to developing countries. Losses to the movie industry in *Italy* are the highest of any country in the world—$224 million in 1992. Italy has done little or nothing about the problem until this year. While some very significant raids have been made recently and the government has promised continuing aggressive enforcement action against video pirates, the problem is far from solved and will take a continuing political and resource commitment at the very highest levels. Italy is also a major center of software piracy, but to its credit, it was the first country in the EC to adopt the EC Software Directive and has undertaken major raids on government and private sector end users that do bode well for the future. Italy is another country where constant and *credible* pressure must be applied. Software piracy in *Spain* and *Germany* also continues at high levels.

The Middle East continues as a haven for pirates. While the recent passage of a copyright law by the *United Arab Emirates* is a major advance, we await the commencement this month of the government's enforcement campaign. *Saudi Arabia* continues to refuse to clarify the protection for foreign works under its new law, thereby ensuring that inexcusable industry losses of $117 million in 1992 continue. *Egypt* also recently passed inadequate amendments to its copyright law and its enforcement system remains untested. *Cyprus* continues to delay the passage of its new law and is now even threatening to adopt a "grace period" to further insulate its pirate community and punish legitimate business. *Turkey* continues to delay the introduction of a satisfactory draft copyright law. Piracy losses, now at $117 million, continue to mount. *Greece* may be on the way to becoming a success story. It has recently passed a completely revised law. Its commitments on enforcement will very soon be tested.

Piracy in Eastern Europe, particularly in *Poland* and *Russia* continues at virtually 100% and losses are $190 million and $490 million respectively. *Poland* is in violation of its Business and Economic Agreement commitments with the U.S. and as a result the U.S. has never signed it. IIPA has urged that the U.S. no longer tolerate that country's recalcitrance and designate it this year. Russia is poised to pass an internationally acceptable copyright law, hopefully this month. Enforcement will be a major challenge.

In South and Central America, problems continue in Brazil, Venezuela, and El Salvador. Paraguay is an impending success story as you will hear from Jason Berman of RIAA.

Time does not permit any further detail on countries. We have attached a summary highlighting problems in all 28 countries.

We cannot close our statement without mentioning briefly two other issues. The first, which we have highlighted in our February filing in reference to the laws and practices in France and Germany (and which is the subject of major discussion in the Uruguay Round TRIPS context), is the increasing tendency, particularly in the EC, to discriminate against U.S. copyright owners by denying them national treatment under private copying and rental regimes and by failing to recognize the division of rights and benefits reflected in U.S. contracts freely negotiated between producers and contributors to creative works. We hope to achieve a resolution of this blatant discrimination in the multilateral context but if we do not succeed with a GATT agreement, it may soon become an acute bilateral issue.

The second issue is the continued importance of the U.S. Generalized System of Preferences program which is due to expire on July 4, 1993. The GSP program offers additional leverage to induce IP violators to bring their IP regimes into compliance with international standards or risk loosing the duty free import privileges provided by that program. We strongly urge the Congress to extend this program when the Administration offers a proposal to do so, as we understand it soon will. Many

of the countries named under Special 301 this year obtain significant benefits from this program, including Egypt, Venezuela, Cyprus, El Salvador, Poland, and Thailand.

We thank the Chairman and members of the Subcommittee for their tireless support of the creative and high technology industries which are at the forefront of U.S. export growth as we move into the 21st century.

IIPA 1993 "SPECIAL 301" RECOMMENDATIONS AND ESTIMATED TRADE LOSSES DUE TO PIRACY (1992) [Revised 3/15/93]

(In millions)

	Motion pictures	Records & music	Computer programs	Books	Total
Priority Foreign Country:					
Taiwan	45	24	585	15	669
Thailand	30	24	49	20	123
Italy	224	38	238	na	500
Korea	20	66	315	15	416
Poland	45	30	100	15	190
Philippines	15	5	25	70	115
Turkey	35	12	55	15	117
Priority Watch List:					
People's Republic of China	45	45	225	100	415
India	40	41	63	25	169
Brazil	50	10	40	25	125
Saudi Arabia	50	33	28	6	117
Venezuela	12	10	40	20	82
Egypt	37	4	14	15	70
Greece	37	21	na	4	62
Cyprus	32	4	na	15	51
El Salvador	1.4	5	na	1	7.4
Australia	na	na	na	na	na
Watch List:					
Russia	40	300	100	50	490
Spain	31	7	336	na	374
Paraguay	0.1	[1]200	na	2	202.1
U.A.E.	6	108	na	2	116
Indonesia	40	16	na	40	96
Bulgaria	10	12	20	5	47
Malaysia	35	6	na	na	41
Pakistan	20	na	na	20	40
Hungary	25	11	na	4	40
Israel	11	2	na	na	13
Guatemala	1.1	na	na	1	2.1
Total	937.6	1034	2233	485	4689.6
Special Comment:					
Bahrain					
France					
Germany					
Honduras					
Mexico					
Singapore					
GSP Petition Targets:					
Cyprus					
Egypt					
El Salvador					
Philippines					
Poland					
Thailand					
Venezuela					

na: Estimate of trade losses not available.

[1] See discussion in text of Paraguay's 1993 anti-piracy efforts. *Italic* countries: Were designated as Priority Foreign Countries in prior years and remain subject to Section 306 monitoring, with the possibility of immediate retaliation. See discussion in text at pages 5-6.

FACT SHEET ON IIPA 1993 SPECIAL 301 RECOMMENDATIONS

PRIORITY FOREIGN COUNTRY

TAIWAN

- Taiwan is now subject to Section 306 monitoring and virtually immediate trade sanctions if it fails to meet its obligations under the June 1992 Memorandum of Understanding (MOU) between Taiwan and the U.S. So far, it is not in compliance:

  —Taiwan's promised software export inspection system is not yet effective to halt exports of pirated software;
  —At least two CD plants are still producing and exporting pirate CDs. The export inspection system is not yet effective and criminal actions have been subject to unreasonable court delays;
  —Piracy by "Channel 4s" (illegal cable systems) is not being contained or reduced as promised in the MOU;

- The Taiwan legislature has rejected key elements of a bilateral copyright agreement negotiated in 1989, including protection against parallel imports.

THAILAND

- In 1991, the USTR made a Section 301 "unfairness" finding against Thailand for inadequate copyright protection and enforcement;
- There has never been a conviction of a major manufacturer or distributor of pirate products since IIPA highlighted Thailand IPR practices in 1985;
- Piracy is rampant across all industries;
- Cases brought against several major audio and video pirates have remained tied up in court for almost two years with no end in sight.

ITALY

- The motion picture industry continues to experience staggering losses due to video piracy and woefully inadequate enforcement;
- Penalties levied in criminal copyright cases are very low and enforcement is totally inadequate to deter the widespread piracy in that country.
- To its great credit, Italy has amended its copyright law to implement the E.C. Software Directive.

KOREA

- The Ministry of Culture continues to refuse to deregister its import approvals of Korean pirates who have obtained rights under false licenses, contributing to audio and video piracy in Korea;
- No drafts have been developed to amend the Copyright Law and the Computer Program Protection Law.
- Problems persist in bringing enforcement actions against massive internal corporate copying of software.

POLAND

- Piracy of U.S. copyrighted works is rampant;
- While the Polish government finally introduced a draft law into the Sejm in April 1992, it continues to be incompatible with the Berne Convention. Slight improvements in the draft have been made over the last year, but delays continue. Without a strong copyright law and solid enforcement, piracy will continue to plague Poland.
- Poland is in full breach of an agreement with the U.S. to pass a Berne-compatible copyright law by January 1, 1991.

PHILIPPINES

- No significant improvements have been made in the Philippine copyright regime in the eight years the IIPA has tracked this country;
- A compulsory book license has seriously weakened the book market. Even promises made by the Philippine government last year to increase the royalties under this license have not been kept.

TURKEY

- Piracy is rampant across all industries.
- After years of delay, the Turkish government has begun drafting revisions to its inadequate 1951 copyright law; four drafts have been released in the past year but major improvements are still necessary;
- The 1986 Cinema, Video and Music Works Law must also be amended—recent drafts contain discriminatory taxes against foreign films;

PRIORITY WATCH LIST

PEOPLE'S REPUBLIC OF CHINA

- The PRC made substantial progress by meeting most of its obligations in the January 1992 Memorandum of Understanding (MOU) by adhering to the Berne Convention on October 15, 1992 and issuing regulations to protect foreign works consistent with the Convention's requirements;
- Losses remain high, however, and the question remains whether the PRC will meet its obligation to enforce its new law.

INDIA

- There has been no improvement in copyright enforcement for any IIPA members and piracy losses remain high;
- Promises by India in 1992 to liberalize its regime regulating the import and distribution of films and videos have still not been fully met.

BRAZIL

- Legislation to amend the Brazilian penal laws to provide improved anti-piracy measures has been stalled for over a year;
- While Brazil ended the market reserve for hardware at the end of October 1992, problems remain in the proposed legislation to amend the 1987 Software Act which is also stalled.

SAUDI ARABIA

- Saudi Arabia has reneged on its 1990 commitment to extend the protection of its new copyright law to foreign works. Repeated requests to remedy this situation have been ignored;
- Piracy of all U.S. copyrighted works remains rampant.

VENEZUELA

- Copyright reform is urgent—a draft copyright law which would revise the current law has been pending for over one year.

EGYPT

- After years of promised reform, Egypt finally passed amendments to its copyright law in 1992. Unfortunately, these amendments are seriously inadequate.
- Piracy remains rampant across all industries.

GREECE

- On February 10, 1993, a bill completely revising the Greek copyright law passed its Third Reading. Several substantive problems remain;
- Enforcement continues to be a problem in a country where piracy is widespread.

CYPRUS

- Draft amendments to the Cypriot law were developed last year after years of requests for that government to revise the law. The bill is stalled in the Parliament and a one-year moratorium on its effective date has been proposed;
- Cyprus acts as a center for the export of piratical goods, and in particular, videos.

EL SALVADOR

- El Salvador finally is in the process of revising its 1963 copyright law but progress is at a snail's pace;
- It is the leading audiocassette pirate in the Central American region, and operates as a key export center for the export of piratical sound recordings throughout the region and even into the U.S.

AUSTRALIA

- Australia has been systematically repealing protection against parallel imports, with separate actions affecting the book publishing and sound recording industries, and shortly, the computer software industry;
- Producers of sound recordings do not enjoy an exclusive rental right. The Australian government has refused to adopt such a right and losses are mounting. Australia's audio levy system discriminates against U.S. recording and music publishing companies and U.S. performers by denying national treatment.

RUSSIA

- The extent of piracy of all protected U.S. works is alarming and losses continue to escalate;
- The First Reading of the draft Russian copyright law took place in January 1993 and passage is anticipated sometime this year.
- Enforcement will be a huge problem without a major political commitment of the Russian government.

SPAIN

- The U.S. software industry is experiencing escalating trade losses due to unreasonable procedural impediments to bringing software infringement cases.

PARAGUAY

- Paraguay is the leading exporter of pirate audiocassettes in South America—these exports displace records and music sales at an estimated $200 million per year;
- Very recently recording industry personnel have been notified by the Paraguayan government that it has "eliminated" audio piracy. This apparent positive development must be confirmed.

U.A.E.

- This country is the major Middle East export center for piratical goods, and in particular, sound recordings.
- Major factories openly produce piratical recordings;
- The U.A.E. passed an inadequate copyright law in 1992, and the effective date will be April 1993. The U.A.E.'s resolve to attack piracy will be tested very shortly.

INDONESIA

- This country places numerous market access barriers (like import quotas, import licensing, and other service and investment barriers) on the U.S. film industry. Commitments to liberalize these barriers have not been fully implemented;
- Piracy is again on the rise.

BULGARIA

- Piracy of all works is pervasive;
- A new draft copyright law has been developed. Bulgaria failed to meet the December 31, 1992 deadline to adopt a Berne-compatible copyright law as required by the 1991 U.S.-Bulgarian Trade Agreement.

MALAYSIA

- Although Malaysia is one of the copyright "success" stories of the 1980s in terms of adopting modern laws and pursuing enforcement aggressively, rising levels of piracy, particularly video piracy, require the return of Malaysia to the Special 301 lists.
- Malaysia must devote additional resources to enforcement.

PAKISTAN

- Amendments to the Pakistani copyright law were recently passed after long delays.
- Enforcement is minimal and losses are rising.

HUNGARY

- Proposed legislation to amend the penal law to increase penalties for infringement has been pending for almost two years while piracy levels escalate;
- Draft amendments to the copyright law were prepared last year.

ISRAEL

- Cable and video piracy is widespread;
- Additional resources for enforcement are needed and higher penalties must be imposed.

GUATEMALA

- In 1991 MPEAA filed a petition with USTR to deny Generalized System of Preferences (GSP) benefits to Guatemala because of its failure to provide adequate and effective copyright protection for U.S. motion pictures, television program-

ming and home videos. The investigation was extended in 1992 and now USTR must make a decision regarding this issue in April 1993.

SPECIAL COMMENT

BAHRAIN

- A draft copyright law has been proposed which is totally incompatible with the Berne Convention;
- Reports indicate that Bahrain may be acting as an export center for pirate videocassettes.

FRANCE

- France denies national treatment to U.S. copyright owners and performers in its audio and video levies.

GERMANY

- Over the years, the U.S. software industry has experienced tremendous losses due to piracy, primarily because of cases holding software to a higher "originality" standard. Amendments to the copyright law have been proposed which will implement the EC Software Directive and correct this legal aberration;
- Germany denies national treatment to U.S. copyright owners and performers in its audio and video levies.

HONDURAS

- In 1992 MPEAA filed a petition with USTR to deny Generalized System of Preferences (GSP) benefits to Guatemala because of its failure to provide adequate and effective copyright protection for U.S. motion pictures, television programming and home videos.
- Honduras is in the process of drafting a new copyright law.

MEXICO

- Penalties (which were increased in amendments made to the copyright law in 1991) must be aggressively imposed in order to reduce the high levels of trade losses due to piracy;
- Enforcement efforts by the Mexican government will be monitored by IIPA members, especially during the road toward the implementation of the NAFTA Agreement.

SINGAPORE

- The government must assist in prosecuting software piracy if losses in Singapore are to be reduced. Singapore was another copyright "success" story and can return to that status when it finally deals with rampant software piracy.

International Intellectual Property Alliance

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Eric H. Smith
Executive Director
and
General Counsel

May 11, 1993

The Honorable Charles Grassley
U.S. Senate
135 Senate Hart Office Building
Washington, DC 20510-6200

Re: Response to Your Questions Regarding the Recent Subcommittee on International Trade Hearing on "Special 301"

Dear Senator Grassley:

This letter responds to your questions regarding the Subcommittee's Special 301 hearing held on April 19 and reviews the copyright industries' perspective on the state of affairs under Special 301 current to that date. As you know, Ambassador Kantor released his Special 301 decisions on April 30. For your information, IIPA's press release on USTR's decision is attached to this letter. We have also, where appropriate, commented on actions by Ambassador Kantor in bracketed text.

The following responds to your four questions:

(1) What are the two or three countries that are the most egregious violators of intellectual property rights and what action would IIPA recommend that the U.S. government pursue?

In its February 12, 1993 "Special 301" submission to USTR, IIPA recommended that seven countries be designated "Priority Foreign Countries." These countries include Taiwan, Thailand, Italy, Korea, Poland, the Philippines and Turkey. Of these seven countries and to narrow this list, IIPA would characterize Thailand and Taiwan as the most "egregious" violators -- though not necessarily the countries where our industries lose the most money. IIPA has been working to improve the copyright situation in Thailand and Taiwan longer than in any other countries -- since 1985. Both countries have been designated as "Priority Foreign Countries" in previous years but improvements have been inexcusably slow (in the case of Taiwan) or non-existent (in the case of Thailand). IIPA's testimony before the Subcommittee provides further detail on the specific problems in these two countries. In its testimony, IIPA recommended that unless specific actions were taken by the April 30 Special 301 decision deadline, USTR should commence trade retaliation proceedings.

[Since April 19, the U.S. government and the IIPA have continued to track enforcement efforts by the Thai government. Ambassador Kantor designated Thailand as a "Priority Foreign Country" and will review progress on IPR matters in Thailand on or before July 31, 1993. Sustained enforcement efforts must continued and revisions to Thailand's copyright law are necessary. If progress is not sufficient by this deadline, Ambassador Kantor could take retaliatory measures. Taiwan removed its reservations to the bilateral copyright agreement and approved it; in addition, Taiwan amended its law to ban the unauthorized parallel imports of copyrighted goods. These actions, in addition to more aggressive enforcement and imposition of jail terms on many pirates, caused Ambassador Kantor to delay any possible action against Taiwan. Ambassador Kantor placed Taiwan on the Special 301 "Priority Watch List" with an out of cycle review by July 31, 1993. The pressure is being kept on both countries.]

(2) Japan has been on the Special 301 "Watch List" since 1989. What is Japan's most IPR flagrant violation and what, if any, action should this Administration be contemplating?

IIPA has not targeted Japan under Special 301. Problems in Japan tend to be focussed on patents. In recent years, however, a major copyright problem in Japan had been the widespread unauthorized rental of sound recordings. These rental transactions permitted customers -- for a very low price -- to take a new release home, copy it, then return it, thereby severely undercutting the sales market for that work. It was widely understood in Japan that unauthorized copying was at the center of these transactions.

On January 1, 1992, after strong pressure from the U.S. government and under threat of an industry-initiated 301, Japan amended its copyright law and, among other changes in the law, provided that foreign producers of sound recordings obtain exclusive rental rights in their sound recordings from one year from the date of release and the right to receive equitable remuneration for rental form the remaining term of protection. While not entirely satisfactory (U.S. law provides an exclusive right for the full term of copyright), it has significantly reduced the injury to our industry.

(3) Mexico has made strides in resolving many of its intellectual property concerns and the NAFTA will resolve additional U.S. concerns if implemented. What is IIPA's position on the NAFTA generally and, specifically, how do you envision the NAFTA strengthening the IPR issue?

IIPA strongly supports the copyright provisions of the intellectual property chapter of the NAFTA agreement. The NAFTA IP text incorporates the highest standards of protection and enforcement so far achieved by U.S. negotiators and at least partially corrects some of the deficiencies found in the Trade Related Aspects of Intellectual Property (TRIPS) chapter of the Dunkel text in the GATT. In particular, the positive points of the NAFTA copyright text include strong provisions on national treatment and contractual rights (two critical issues not dealt with adequately in the Dunkel text) and more effective copyright protection for computer programs, databases and sound recordings (including exclusive rental rights for computer programs and sound recordings).

However, IIPA does strongly oppose the decision of Canada to extend the exception for "cultural industries" (which are found in the Canadian Free Trade Agreement) to the NAFTA agreement. This would permit Canada to take wide derogations or exceptions from all the obligations of the NAFTA agreement, including the obligations in the copyright text, so long as the derogation is limited to Canada's cultural industries. This potentially gaping loophole must be closed at least by insuring that the NAFTA implementing legislation requires mandatory retaliation and associated procedures to deter Canada from ever taking advantage of this loophole.

Finally, while IIPA members fully and strongly support the NAFTA agreement (with associated mandatory retaliation provisions in the implementing legislation), we remain concerned about Mexico's enforcement efforts to combat high levels of software, audio and video piracy. There appears to have been a recent fall-off in enforcement efforts which greatly worries us and any continued failure to enforce the law only weakens our and Congress' efforts to obtain approval of the agreement in the United States. IIPA and its members have urged that enforcement efforts by Mexico must be carefully monitored under NAFTA.

(4) Russia is the largest and wealthiest republic of the former Soviet Union. While there are no significant legal barriers to trade with Russia, there are a number of factors that discourage trade. The Russian government has shown considerable interest in formulating laws to bring the country up to world standards in the area of intellectual property. One of the weak points with Russia is its inability to enforce existing and contemplated IPR laws. What if anything should the U.S. be doing to help them resolve this problem? Or should we even be contemplating trading with the Russians?

Over the past two years, both IIPA and the U.S. government have been working diligently in assisting the Russian Federation in revising its draft copyright law up to international standards. [N.B. As of April 19, the Second Reading of the draft copyright law had not yet occurred. IIPA has since learned that the Second Reading was passed on April 29, 1993. President Yeltsin still has to sign this law and related decrees implementing and enforcing the law have yet to be adopted.] IIPA has been working with the drafters of the copyright law to develop strong implementing and enforcement decrees for this copyright law which would provide effective mechanisms for enforcement.

Without a doubt, enforcement of the copyright law in the Russian Federation will be a major challenge. IIPA estimates that the U.S. copyright industries lost at least $490 million in 1992 due to piracy of U.S. films, sound recordings, musical compositions, computer software and books in Russia. Many of the companies in IIPA's member associations are eagerly awaiting the enactment of the new copyright law and adoption of effective enforcement mechanisms in order to enter the large Russian market. For years, rampant copyright piracy and lack of adequate and effective copyright protection and enforcement have blocked the U.S. copyright industries from trading with the Russians. To reverse this situation, the solution is for the Russians to pass a strong copyright law (this is almost completed) and provide deterrent penalties and strong enforcement mechanisms (this is still in progress). IIPA recommends that the U.S. government should encourage further trade with the Russian Federation.

IIPA APPLAUDS USTR KANTOR'S FIRST DECISION ON "SPECIAL 301"

Thailand named a Priority Foreign Country along with India and Brazil

Two countries -- Taiwan and Hungary -- must meet objectives of specific "action plans" by July 31, 1993

10 other countries are subject to "out of cycle" review

Washington -- The International Intellectual Property Alliance ("IIPA" or "Alliance") today applauded Ambassador Mickey Kantor's first decision under "Special 301" as "tough" and "designed to result in real improvement in the short term." In a technique used in the first year of the Special 301 program, Kantor refused to give a number of key problem countries an additional year to repair the deficiencies in their intellectual property (IP) regimes, but placed countries on short-term review cycles to ensure immediate and specific results.

Kantor named Thailand, Brazil and India as Priority Foreign Countries, noting, for example, that "options for appropriate retaliation" will be considered for Thailand and India if immediate progress is not made, and in the case of Thailand, pirate operations are not immediately and permanently closed down. Taiwan and Hungary were placed on the Priority Watch List and must implement specific "action plans," giving these two countries until July 31, 1993 to implement specific reforms.

Also placed on the Priority Watch List, Korea, Poland, Turkey, Egypt and Argentina will be subject to "out of cycle" reviews. Italy, Spain, Venezuela, Cyprus and Pakistan are also subject to "out of cycle" reviews under their placement on the Watch List. These 10 countries will be expected to make demonstrable improvements in their level of protection well before the next review cycle begins in February of next year.

Eric H. Smith, Executive Director and General Counsel for the IIPA, said, "These action plans and short-term reviews keep the pressure on these countries to improve their copyright protection and enforcement regimes. The Administration will hold these countries strictly accountable to meet the targets of these plans and to maintain continuous efforts against piracy or they will face designation and/or commencement of retaliation proceedings."

IIPA members commended USTR for considerable progress made to meet with so many countries in the short Special 301 time frame. Smith added, "USTR has engaged in tough negotiations with many of these targeted countries during this Special 301 cycle. These negotiations have yielded much progress in obtaining tangible actions in many of these countries." For example, Taiwan has rescinded reservations it placed on a bilateral copyright agreement with the U.S., has sentenced a number of pirates to jail terms, and is on the path to correcting remaining problems. The Philippines have entered into a bilateral agreement with the U.S. obliging that country to amend its copyright law and increase enforcement efforts. Korea has entered into an intense enforcement program and agreed to new procedures to end the granting of government licenses to pirates. Russia just today approved a new Berne-compatible copyright law which is due to be signed within two weeks. Paraguay has taken dramatic steps to address what had been a rampant

audio piracy problem and was removed from the Special 301 lists. Under Special 301 pressure, Greece and Cyprus passed amendments to their copyright laws. Despite this progress, however, much remains to be done in each of these countries.

Thailand, India and Brazil named as Priority Foreign Countries

In general, countries identified as "Priority Foreign Countries" become subject, after 30 days, to a Section 301 action with a negotiation timetable of 6 months. If at the end of this period the burdensome trade practices have not ended (and unless the period is extended for no more than an additional 3 months), the Trade Representative must determine whether or not to take retaliatory action. This year the Administration will determine whether to initiate an investigation of Brazil's IP practices on or before May 30, 1993.

Thailand and India have already been identified as Priority Foreign Countries in past years and are already subject to possible trade retaliation. USTR stated that an interagency task force will "immediately being exploring future actions, including options for appropriate retaliation" if enforcement is not maintained and pirate operations closed down permanently. Smith stated, "Thailand must put manufacturers and wholesalers of pirate product out of business and must amend its copyright law and penalties structure. If there is any fall-off in commitments or actions, IIPA will urge immediate retaliation."

Ten Countries Placed on the Priority Watch List

Ambassador Kantor named ten countries to the Priority Watch List. Countries placed on this list meet some, but not all, of the criteria for designation as a Priority Foreign Country and remain of great concern to the U.S. By July 31, 1993, the Administration will decide whether Taiwan and Hungary have met the objectives of USTR's "action plans." Copyright problems in Taiwan has been of great concern to IIPA and its member associations -- these industries having lost $669 million in 1992 due to piracy.

Korea, Poland, Turkey, Egypt and Argentina will be subject to "out of cycle" reviews. Australia and the European Community remain on the Priority Watch List. This year Saudi Arabia has been upgraded from the Watch List to the Priority Watch List.

17 Countries on the Watch List

Five countries -- Cyprus, Italy, Pakistan, Spain and Venezuela -- will be subject to "out of cycle" reviews. Also named to or retained on the Watch List due to copyright concerns including, in some cases, market access restrictions, are El Salvador, Greece, Guatemala, Indonesia, the People's Republic of China, the Philippines and the United Arab Emirates. Countries placed or retained on the Watch List which were not the target of IIPA Special 301 recommendations for copyright problems this year are Chile, Colombia, Ecuador, Japan and Peru. IIPA also has been working with the Administration in improving copyright regimes in Latin American countries under the "Enterprise for the Americas Initiative" (EAI).

Jack Valenti, Chairman and Chief Executive Office of MPAA, applauded today's actions by USTR, establishing specific goals and creating short-term reviews for countries on USTR's Priority Watch List and Watch List. "In particular," said Valenti, "We urge USTR to maintain a strong stance on Thailand. We are encouraged that Taiwan will be subject to a three-month review to see whether or not its pledges of progress are redeemed. We are also encouraged that Italy and Cyprus are subject to 'out of cycle' reviews to ensure continued progress against rampant piracy that infects those countries. Piracy is a cancer in the body of our business, costing the American economy many millions of dollars each year."

Jonas Rosenfield, President of AFMA, remarked,"The Independent Film Industry salutes this first action taken by Ambassador Kantor. We particularly urge the U.S. government to hold Thailand strictly accountable for its commitments. We also look for strong action in relation to India, Taiwan and Korea who have flagrantly failed to implement long-demanded agreements."

Edward P. Murphy, President of NMPA, said, "We welcome USTR's decision to establish short-term deadlines for review. The Special 301 clock is now ticking more loudly than before, and we hope its sound has awakened our trading partners to the urgent need to improve their copyright law and maintain strong enforcement."

Jason Berman, President of RIAA, commented that "The level of concern demonstrated by Congress about the denial of adequate and effective protection for U.S. creators, and the resolve of this Administration to ensure that the present and future competitiveness of this country is not undermined by the failure of our trading partners to treat U.S. creators fairly, has translated into demonstrable progress in securing fair market conditions in a number of territories which had for years taken up 'permanent residence' on Special 301 lists The Administration has made it clear that it will not tolerate the continued theft of the fruits of American creativity and ingenuity."

BSA President Robert Holleyman remarked, "Today's actions by Ambassador Kantor make it clear that the U.S. will not tolerate unchecked piracy from any trading partner. We believe that the periodic review mechanism, along with strict standards to determine progress, will keep a steady, constant pressure of recalcitrant countries such as Korea, Taiwan, and Spain."

Nicholas Veliotes, President of the AAP added, "The U.S. publishing industry welcomes Ambassador Kantor's announcement reaffirming the new Administration's commitment to safeguard America's creative industries and its willingness to use the power of trade incentives to protect American copyrights. We are especially pleased that Thailand is being called to account for its failure to deal with rampant copyright piracy. We have learned from past experienced that the Special 301 instrument is vital in protecting America's intellectual property."

"CBEMA members certainly share Ambassador Kantor's objection to countries' establishing permanent residence on these lists," said John Pickitt, CBEMA President. "We are pleased with USTR's naming of Thailand, Brazil and India as Priority Foreign Countries and in subjecting several others to 'out of cycle' reviews. We hope these USTR actions indicate that during the Clinton Administration retaliation for unfair government copyright policies is not just possible, but inevitable," Pickitt concluded.

Luanne James, President of ITAA, praised the U.S. government's ongoing effort to ensure that the intellectual assets of U.S. software companies are protected around the world. "The computer software industry is one of the most important contributors to the U.S. economy. Software creators will have the financial resources necessary to develop additional productivity-enhancing programs only if their past efforts are sufficiently protected and rewarded." James added, "What remains is to ensure that those countries subject to "immediate action plans" and "out of cycle reviews," particularly Taiwan, Korea, and Spain, meet specific protection criteria and firm deadlines to eliminate software piracy."

In a related action, the House Ways and Means Trade Subcommittee approved and sent forward a bill requesting extension of the Generalized System of Preferences (GSP) Program. IIPA recently testified before the House Trade Subcommittee strongly supporting such extension. Earlier, IIPA had announced its intention to file GSP petitions to declare certain counties which condone piracy of U.S. works ineligible for duty-free trade benefits under this Program. These countries include Egypt, Venezuela, Cyprus, El Salvador, Poland, and Thailand.

The IIPA consists of eight trade associations, each of which, in turn, represents a significant segment of the copyright industries in the United States. These associations are:

American Film Marketing Association (AFMA);
Association of American Publishers (AAP);
Business Software Alliance (BSA);
Computer and Business Equipment Manufacturers Association (CBEMA);
Information Technology Association of America (ITAA);
Motion Picture Association of America (MPAA);
National Music Publishers' Association (NMPA); and
Recording Industry Association of America (RIAA).

IIPA represents more than 1,500 companies that publish, produce and distribute computers and computer software; motion pictures, television programs and home videocassettes; music, records, compact discs and audiocassettes; textbooks, tradebooks, reference and professional publications and journals.

The core copyright industries accounted in 1990 for over $190 billion in value added from their copyright-related activities, or 3.3% of the U.S. Gross Domestic Product (GDP). According to a report prepared for the IIPA by Economists, Inc. entitled "Copyright Industries in the U.S. Economy: 1977-1990", these industries grew at more than twice the rate of the economy as a whole between 1977 and 1990 (6.3% vs. 2.5%), and employed new workers at a greater rate (4.2% vs. 1.6%) between 1987 and 1990 -- more than any other comparably-sized sector of the U.S. economy. These industries contributed over $34 billion in foreign sales to this country in 1990.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
ESTIMATES OF U.S. TRADE LOSSES
DUE TO PIRACY OF COPYRIGHTED WORKS (1992)
and
USTR "SPECIAL 301" DECISIONS FOR 1993

(in millions)

	Motion Pictures	Records & Music	Computer Programs	Books	Total
Priority Foreign Country					
Thailand (1)	30	24	49	20	123
India (1)	40	41	63	25	169
Brazil	50	10	40	25	125
Priority Watch List					
Taiwan (2)	45	24	585	15	669
Hungary (2)	25	11	na	4	40
Korea (3)	20	66	315	15	416
Poland (3)	45	30	100	15	190
Turkey (3)	35	12	55	15	117
Egypt (3)	37	4	14	15	70
Argentina #(3)	--	--	--	--	--
Saudi Arabia	50	33	28	6	117
Australia	na	na	na	na	na
European Community #	--	--	--	--	--

(more)

na: Estimate of trade losses not available.

(1) A U.S. interagency team will begin exploring future options, including options for retaliation.

(2) The Administration will formulate immediate "action plans" for this country and will give it until July 31, 1993 to meet U.S. requirements.

(3) The Administration will monitor this country through periodic "out of cycle" reviews.

: The E.C. and Argentina were not discussed in IIPA's February recommendations to USTR.

INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE
ESTIMATES OF U.S. TRADE LOSSES
DUE TO PIRACY OF COPYRIGHTED WORKS (1992)
and
USTR "SPECIAL 301" DECISIONS FOR 1993

(in millions)

	Motion Pictures	Records & Music	Computer Programs	Books	Total
Watch List					
Italy (3)	224	38	238	na	500
Spain (3)	31	7	336	na	374
Venezuela (3)	12	10	40	20	82
Cyprus (3)	32	4	na	15	51
Pakistan (3)	20	na	na	20	40
People's Republic of China	45	45	225	100	415
U.A.E.	6	108	na	2	116
Philippines	15	5	25	70	115
Indonesia	40	16	na	40	96
Greece	37	21	na	4	62
El Salvador	1.4	5	na	1	7.4
Guatemala	1.1	na	na	1	2.1
Chile #	--	--	--	--	--
Colombia #	--	--	--	--	--
Ecuador #	--	--	--	--	--
Japan #	--	--	--	--	--
Peru #	--	--	--	--	--
TOTAL	841.5	514	2113	428	3896.5

na: Estimate of trade losses not available.

(3) The Administration will monitor this country through periodic "out of cycle" reviews.

: This country was placed on the Watch List by USTR but was not discussed in IIPA's February 1993 submission to USTR.

COMMUNICATIONS

STATEMENT OF THE BUSINESS SOFTWARE ALLIANCE

This statement is submitted on behalf of the Business Software Alliance (BSA). BSA exists to promote the continued growth of the software industry through programs to eradicate software piracy. The focus of these programs is understanding and compliance with software copyright laws in the United States and around the world.

Member companies of BSA include: Aldus Corp., Apple Computer, Autodesk, Borland International, GO Corp., Lotus Development, Microsoft, Novell, and WordPerfect. These companies account for 71 percent of the prepackaged PC software published by all U.S. companies.

According to a recent study commissioned by BSA, entitled, The U.S. Software Industry: Economic Contribution in the United States and World Markets, the computer software industry is one of the fastest growing industries in the nation.[1/] In the period from 1977 to 1992, receipts for firms in the "core" software industry which includes custom computer programming services, prepackaged software and computer integrated design -- adjusted for inflation -- increased ten fold, last year totalling over $50 billion. This represents growth as a percentage of Gross Domestic Product (GDP) from 0.08 percent in 1977 to more than 0.6 percent in 1992.

As a source of jobs, the software industry has enjoyed growth comparable to its growth in revenues, with approximately 421,000 people now employed by the industry.

As a source of value added to GDP -- $36.7 billion last year -- the U.S. computer software industry now contributes more to our economy than all but five manufacturing industry groups: motor vehicles and equipment; aircraft and parts; drugs; electronic components; and miscellaneous plastic products.

From 1982 to 1990, the industry grew at a real annual rate of 16.4 percent, surpassing the growth rate of any other industry. Within the core software industries, the prepackaged software industry, the industry sector which includes BSA members, has been growing the most rapidly.

The industry study was also able to document that the computer software industry is contributing to the economic life

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[1/] The study commissioned by BSA was prepared by Stephen Siwek and Harold Furchtgott-Roth of Economists, Inc.

of every state in the nation. According to the 1987 Census of Services Industries, at least one establishment engaged in prepackaged software was located in 49 of the 50 states. In 1987, revenue exceeded $100 million in fifteen states and in eight states exceeded $1 billion. And, since the 1987 census, software industry revenue has grown by more than 50 percent.

Finally, BSA's study provides a startling picture of the industry's success in the international marketplace as well. The U.S. Department of Commerce's 1993 Industrial Outlook estimates that U.S. vendors hold 75 percent of the world prepackaged software market. Data indicate that in 1991 U.S. software companies recouped approximately 50 percent of their total revenues from foreign sales. These statistics would probably be even more impressive if software sales of hardware vendors such as IBM and Digital Equipment Corp. were included.

As impressive as these statistics may be, the software industry's role in the overall competitiveness of U.S. industry is even greater than its revenues, employment levels and world market share suggest. This is because the industry has an extremely important impact on the competitiveness of other U.S. industries. Software is characterized by rapid technological innovation. This innovation has improved the competitiveness of "downstream" U.S. industries which utilize software products to make themselves more innovative and competitive. Because the United States is the source of most of the world's software, U.S. companies are likely to enjoy the benefits of software innovation earlier than their foreign competitors, thereby giving them an advantage over foreign-based rivals in these "downstream" industries.

Clearly, the most significant challenge facing the U.S. software industry is to maintain its rate of growth and its worldwide market. Software piracy and the denial of access to foreign markets are two of the most critical problems confronting the industry in its effort to maintain its future competitiveness. Worldwide losses due to software piracy are estimated to be about $12 billion annually. For every dollar of sales abroad, the industry loses between fifty cents (50¢) and seventy-five (75¢) due to piracy. As world leaders, U.S. companies suffer the brunt of these losses.

In a recent Special 301 filing submitted to the United States Trade Representative (USTR) by the International Intellectual Property Alliance (IIPA) - BSA is a member of IIPA and actively participated in the filing - U.S. trade losses of $4.63 billion in 1992 were attributed to deficiencies in the copyright regimes of the twenty-eight "problem" countries identified in IIPA's submission. Of this $4.63 billion, almost half - about $2.2 billion - were trade losses suffered by U.S. computer software companies.

In BSA's view, the Special 301 provisions of the Omnibus Trade and Competitiveness Act of 1988 constitute the single most effective mechanism the United States now holds to secure strong copyright protection for computer software, and open markets for U.S. software companies. As stated, in its recent Special 301 filing with USTR, the IIPA identified 28 countries where there is inadequate intellectual property protection. BSA member companies have experienced particularly widespread problems in The Republic of Korea, Spain, Taiwan, The People's Republic of China, Thailand, Poland and Russia. Of these countries, Korea, Taiwan, and Spain have the highest rates of piracy and particularly ineffective intellectual property protection mechanisms. Below is a brief summary of the problems the U.S. software industry faces in these different countries:

Korea. In The Republic of Korea, software piracy in 1992 was 88 percent, with U.S. software publishers losing more than $315 million. Additional procedural remedies to authorize explicitly ex parte searches in civil cases as a means of preserving evidence, significant increases in penalties, and other statutory changes are necessary to combat widespread piracy in Korea.

Spain. In Spain, 90 percent of all software in use is pirated, representing a loss of more than $336 to U.S. publishers in 1992. During the past year in Spain, it has become increasingly difficult for software companies to bring enforcement actions against Spanish companies engaged in piracy. Spanish courts have repeatedly denied copyright holders the opportunity to conduct ex parte searches and seizures in civil lawsuits, even when there is compelling evidence of piracy. Recently, this disturbing trend has seemed to extend to criminal cases, as well. These decisions reflect a continuing weakness in the Spanish copyright and civil procedure laws. While Spain was recommended by the IIPA for inclusion in the "Watch List" category in 1993, the high rate of piracy and the U.S. software industry's continuing inability to bring effective enforcement actions make it a priority for the industry.

Taiwan. In Taiwan, losses to U.S. companies are now exceeding $585 million annually. Additional enforcement procedures are needed in Taiwan to combat the export of counterfeit products, organizational end-user and dealer software piracy.

Thailand. Explicit statutory protection for software still does not exist in Thailand, so counterfeit and pirated products flourish in Thailand. The piracy rate is 99 percent, and annual losses to the U.S. software industry are estimated at $49 million.

Poland. The Polish Government has failed to pass copyright protection laws for software which has led to a piracy rate in excess of 90 percent and a $100 million annual loss to the U.S. software publishing industry.

People's Republic of China (PRC). Piracy in the PRC continues despite the fact that in the fall of last year, the PRC joined the Berne Convention and promulgated regulations designed to afford foreign works the same level of protection mandated by Berne. The estimate of losses due to piracy of U.S. software continues at $225 million in 1992. Effective copyright enforcement is urgently needed in the PRC.

Russia. In Russia, the piracy rate exceeds 90 percent and losses in 1992 are estimated at $100 million. U.S. software developers are prepared to invest considerable sums in local development and marketing in Russia but will not do so without clear legal protection and strong action to enforce the law by Russian enforcement authorities.

In conclusion, the U.S. software industry is one of America's most competitive industries. The industry has experienced phenomenal growth in the last decade and certainly has the potential for comparable growth in the next decade. Moreover, the industry's potential to enhance the competitiveness of "downstream" U.S. industries is substantial.

However, whenever one nation possesses the market share now enjoyed by the U.S. computer software industry, there will be constant efforts to erode that lead by its trading partners. Such is the nature of competition. So long as that competition is fair we cannot complain. However, because software programs selling for hundreds or thousands of dollars may be copied

electronically in seconds with a few key strokes on a personal computer, there inevitably will be a tendency for many to try to steal instead of buy our products. To the extent that national legal systems permit unauthorized copying or fail to provide us with effective means of enforcement of our intellectual property rights, the competitive promise of this industry will never fully be recognized.

Because the U.S. software industry holds 75 percent of the world prepackaged software market, U.S. software publishers now bear the brunt of revenue losses attributable to piracy, a factor that has a significant adverse impact on our industry's ability to funnel money back into research and development that would further enhance our ability to compete in the future. Acting alone, our industry will never bring illegal copying under control. The continued assistance of the Congress and the various trade and intellectual property-related agencies of the U.S. Government will be required to ensure fair trade.

Special 301 and the continuing efforts of USTR are critical to the continued success of the U.S. software industry. BSA and its members appreciate the commitment USTR has demonstrated to protecting the interests of American software publishers and the attention that is being devoted by this Subcommittee to the interests of the U.S. software and other intellectual property-related industries. We are fortunate to have this support and look forward to working with USTR and the Congress to assure that the full promise of the U.S. computer software industry will be fulfilled.

STATEMENT OF CONE MILLS CORP.

INTRODUCTION

Senator Baucus and the Senate Finance Committee are to be commended for their efforts to put an end to the piracy of U.S. patented, trademark, and copyrighted goods. The magnitude of this problem and its adverse effects upon U.S. industry is enormous. Unfortunately, it is often overlooked, and the interests of U.S. manufacturers are sacrificed for other concerns in trade negotiations, both bilateral and multilateral.

The hearings on Special 301 are timely and needed. They should signal a renewed interest and dedication on the part of the Congress to ensure that intellectual property rights are given top priority throughout the U.S. government in all aspects of its trade negotiations and dealings with foreign countries.

Cone Mills Corporation (Cone Mills) is concerned about the growing piracy of copyrighted textile fabric designs. Currently, there are no effective remedies to prevent the "knock-off" of textile fabric designs in the international marketplace.

The countries of Pakistan and Korea are especially guilty of failing to protect the rights of U.S. textile manufacturers in their fabric designs. Cone Mills urges this committee to use all of its persuasive efforts with the USTR and the Clinton Administration to identify Pakistan as a named country subject to initiation of a Special 301 investigation.

Pakistan should be named under Special 301 because of its onerous and egregious acts, policies, and practices concerning protection of copyrighted textile designs. These acts, policies, and practices have a great adverse impact on textile manufacturers in the United States. The comments also address the practices of companies in Korea relating to the piracy of copyrighted textile fabric designs.

CONE MILLS CORPORATION

Cone Mills, founded in 1891, is a major textile manufacturer and producer with headquarters in Greensboro, North Carolina. Cone Mills has over 7,000 employees with plants located in North Carolina, South Carolina, and Mississippi. Cone Mills is the largest producer of denim fabrics in the world and is the largest printer of home furnishings fabrics in the United States. Net sales were $633 million in 1991 and $705 million in 1992. It operates in two business segments: apparel fabrics and home furnishings products, representing 72% and 28%, respectively, of 1991 sales.

All manufacturing is performed in the United States, with sales and marketing activities conducted through a worldwide distribution network. It is the largest domestic exporter of denims and is a major exporter of printed home furnishings fabrics, with total 1991 export sales of $92 million. First quarter 1993 export sales were $34.5 million.

Cone Mills services the home furnishings markets through three divisions: Carlisle Finishing Company, John Wolf Decorative Fabrics, and Olympic Products Company. Carlisle is the largest commission printer of decorative home fabrics in the United States and provides custom printing services to leading home furnishings stylists and distributors. John Wolf is one of the country's leading designers and marketers of printed and solid woven fabrics for use in upholstery, draperies and bedspreads. Olympic is a diversified producer of polyurethane foam and related products used in upholstered furniture, mattresses, quilted bedspreads and carpet padding.

Cone Mills utilizes its styling and development expertise and management depth and experience, in combination with its versatile manufacturing facilities and technical capabilities, to compete effectively in its worldwide markets. It has made significant capital investments to be competitive internationally. Its financial strategy is to enhance and accelerate programs in denim and home furnishings to take advantage of domestic and international growth opportunities.

Printed home fabric patterns are the result of extensive artistic and creative effort, manufacturing technology, and product marketing and development. Cone Mills receives input from its worldwide sales organization with regard to new ideas and products that will be successful in various international markets.

A print fabric design has value and represents many man hours of effort and a significant capital investment. Its value increases if the print design is successful and is in demand in the international marketplace. To protect the print design, it is routinely copyrighted. Any duplication is prohibited without an express license or royalty.

PAKISTAN SHOULD BE DESIGNATED A PRIORITY COUNTRY UNDER SPECIAL 301

The acts, policies, and practices of Pakistan permit and encourage the thievery of unique textile fabric designs. These designs are copyrighted and protected under U.S. copyright laws and international rules which recognize U.S. copyrights. In the textile trade, this thievery is called a "knock-off" of an original design. A "knock-off" is a theft of the design, its reproduction and printing on fabric.

The knock-off, i.e. piracy, of copyrighted textile fabric designs is a standard business practice in Pakistan and permeates all aspects of its textile industry. Pakistan's producers of decorative fabrics are able to obtain samples of U.S. manufacturers' textile designs in numerous ways: customers in other countries provide manufacturers with samples; manufacturers representatives of Pakistani companies attend international trade shows and obtain samples; or, companies use third parties to buy small lots which are then reproduced and manufactured in direct competition with the original copyrighted design.

There is no protection in Pakistan for U.S. manufacturers against these practices. Pakistan's copyright laws are ineffectual and provide no remedy for this practice. The government has no means of protecting or enforcing legitimate intellectual property rights and does not attempt to do so. There is no mechanism to enforce property rights and prevent designs from being stolen and then exported throughout the world in direct competition with the original design.

Unless forced to do so, Pakistan will not change its practices. It should be named under Special 301 and subject to a Special 301 investigation. This, along with other external pressures, is the only way to begin to reverse current practices and policies which totally ignore intellectual property rights.

Pakistan engages in a systematic pattern of wrongdoing, not only with regard to protection of intellectual property rights for textile fabric designs, but in other activities relating to textiles.

In its relationships with the United States, Pakistan has consistently violated quota arrangements, and is now the subject of chargeback actions. The chargebacks are a result of transshipment of Pakistani textiles through other countries to avoid quota restrictions on direct imports from Pakistan. The U.S. Customs Service has said agency investigators found that more than 1.15 million bed-sheet sets were improperly identified as having been manufactured in several other countries, including Sri Lanka, Bangladesh, and the United Arab Emirates. The value of the transshipments is more than $16 million. Pakistan earlier had its quota for cotton-towel exports to the United States reduced in response to its illegal transshipments of those goods.

These alleged violations of quotas come at a time in which the United States and Pakistan have just completed a new two-year textile-apparel bilateral agreement. The agreement provides for an annual six to seven percent growth rate for U.S. import quotas during 1992 and again in 1993. In addition, the categories for the types of exports have been merged to provide more flexibility for Pakistani shipments.

Cone Mills has first-hand knowledge of the knock-off of copyrighted textile designs in Pakistan. Cone Mills sells its fabrics in Egypt and Abu Dhabi. Pakistani companies have obtained samples of these designs and reproduced them on cheaper fabric and sold them in competition with the original copyrighted design. No attempt is made to disguise the copy.

Such action is done with impunity. Cone Mills has in its possession the pirated goods. It knows the company in Pakistan responsible for the theft. However, it has no recourse against this company.

This situation, including the pirated goods, has been brought to the attention of the Pakistani government. To date, no action has been taken against the responsible company. Nor has Cone Mills been compensated for its damages.

The costs to Cone Mills are both direct and indirect. Direct costs are a loss of current and future sales in the markets for which the products are being sold. This is substantiated in review of sales activity prior to, during, and after the knock-offs occurred. The decline in sale is only one evidence of damage. Other damages include a loss of market share for sales of other goods, and the cost of maintaining its sales force and presence in the countries for which the infringer competes. In addition, there are indirect costs. For every successful design, there are many which are not successful. However, Cone must make an initial investment in a range of designs, produce the fabric, and make it available for sale. For designs which are not successful, Cone is required to absorb these costs. The cost of unsuccessful designs must be factored into marketing and sales costs associated with sale of the copyrighted designs. Infringing companies do not have these costs since they only produce successful designs.

The Pakistan knock-off has a direct adverse impact on U.S. products. U.S. products cannot compete against knock-offs. U.S. products have the overhead of the original fabric design, plus they are generally printed on higher quality fabric than the knock-off. Knock-offs are able to sell for approximately half the cost of U.S. fabric designs. They therefore drive U.S. products from the marketplace. The experience of Cone is not an isolated incident. It is a reflection of a pattern of business that costs American manufacturers' markets, and, ultimately, American jobs.

KOREAN PRACTICES

Cone Mills has direct knowledge of unauthorized copying of copyrighted textile fabric designs in Korea. The practice is not limited to small, isolated producers. The company responsible for copying Cone Mills' copyrighted fabric design is one of the largest industrial conglomerates in Korea. The practice involves "contract" printing for other parties. In so doing, no effort is made to verify the ownership of the design. To date, the Korean government has not taken action against these practices. A coordinated enforcement approach among the various branches of the Korean government needs to be undertaken.

NEED FOR A PRIVATE REMEDY

The practices of Pakistan and Korea underscore the need to establish a private remedy for companies who are the victims of the theft of their intellectual property. Special 301 is a government to government remedy. It highlights the difficulties which U.S. manufacturers face. It forces trade policy makers to take intellectual property violations into consideration as part of trade negotiations with offending countries and pressures these countries to revise their intellectual property regimes. However, it does nothing to help companies recover lost profits, lost markets, and lost business opportunities which occur from the theft of their products.

Therefore, Cone suggests that the Congress consider a private remedy for companies which are the victims of infringement of intellectual property rights. U.S. manufacturers with evidence of copyright infringement or other intellectual property violations should have an opportunity to raise their concerns and present evidence before a U.S. tribunal. If allegations are proven correct, victims should be compensated from penalties imposed upon the offending parties.

Cone Mills would like to have the opportunity to develop this concept in more detail with the Finance Committee and the Committee's professional international trade staff. There is clearly a need for the creation of a private remedy which is more targeted and less broad-based than the Special 301 process.

CONCLUSION

In conclusion, piracy of textile fabric designs is a major concern for Cone Mills. Pakistan and Korea require special attention. Pakistan condones a systematic piracy of textile fabric designs. It permits egregious acts and practices by its textile producers which adversely impact upon U.S. manufacturers. Remedies for U.S. manufacturers are non-existent in Pakistan, and there is no enforcement in situations where there is a known infringement. Pakistan should be identified as a named country under Special 301 and subject to a Special 301 investigation. Textile companies in Korea are also engaged in knowingly copying copyrighted textile designs. Korea does not provide adequate and effective protection for textile fabric designs and should be subject to scrutiny under Special 301.

STATEMENT OF THE NINTENDO OF AMERICA, U.S. VIDEO GAME INDUSTRY

This statement on Special 301 is presented for the record on behalf of Nintendo of America Inc. ("NOA"), over 70 independent U.S. licensees and developers which create, market and sell video games for the Nintendo video game systems and several film and character companies which license their properties for use in Nintendo video game systems (the "NOA video game industry"). In this statement, we focus on Absolute Entertainment, Inc. ("Absolute"), Upper Saddle River, New Jersey, a typical U.S. developer and licensee/publisher of video games for the Nintendo video game systems. We appreciate the opportunity to present our comments.

Introduction

We strongly support the aggressive enforcement of Special 301 by the United States Trade Representative ("USTR"). We do so because inadequacies in the international protection of intellectual property rights is a problem that cannot be resolved by private enterprise.

This statement describes the impact that copyright piracy and trademark counterfeiting have on our video game industry. The NOA video game industry filed Special 301 Comments on February 12, 1993 concerning eleven countries. (Attached as Exhibit 1 is a list of the licensees/developers and the film and character licensors.) However, this statement concentrates on the four countries, Taiwan, Venezuela, Korea, and Mexico, in which intellectual property problems are the most damaging to our industry and in each of which we most need USTR assistance.

The inadequate protection of intellectual property rights in these countries requires intervention by the U.S. government. Private parties cannot force the Taiwanese government to comply with the June 5, 1992, Understanding in which it promised to stop the export of infringing video games from Taiwan, the principal source of such pirated games throughout the world, nor to enact the Bilateral Copyright Agreement between the United States and Taiwan in the form to which it was agreed in 1989. Private enterprise cannot fix Venezuela's trademark registration system in which NOA's application for the "Nintendo" trademark registration has been pending since 1988 and is unlikely to issue for several more years, or stop a pirate which calls itself "Nintendo de Venezuela" and which sells more pirated video game products than the legitimate video game products sold by authorized distributors in Venezuela.

Similarly, in Korea, private enterprise cannot cleanse the Korean marketplace, which is saturated with pirated video games, and cannot stop Korea from continuing to import and export substantial quantities of pirated video games. Also, private efforts cannot fix Mexico's trademark registration system which affords little or no protection to the owners of famous trademarks or solve the problems in that country's intellectual property system which permit rampant trademark and copyright video game piracy.

Development of Absolute Entertainment and the NOA U.S. Video Game Industry

Absolute Entertainment is an independent American-owned and managed video game software developer and licensee/publisher. (The two terms which are used interchangeably in the statement describe a video game company that markets and sells video games.) Since its beginnings in a Midland Park, New Jersey, basement office in 1986, with only four employees, the company has grown to the point that last month Absolute moved into a 14,000 square foot facility in Upper Saddle River and hopes to complete an initial public offering ("IPO") within the next 30 days. Absolute believes that this IPO will provide a firm foundation for continued growth. Absolute currently employs 55 people, approximately twice the number of employees with Absolute at the beginning of 1992, including workers in the states of New Jersey, Pennsylvania, New York and California. In a depressed New Jersey economy, Absolute is a non-polluting, high-technology company providing high paying, highly skilled jobs to creative and technical personnel as well as marketing, sales, public relations, financial and support staff. Its products are the creations of its imagination.

Absolute Entertainment began as a developer and licensee of Atari-compatible Video Games. While it continues to create game software for other hardware systems, Absolute did not really start to grow until it began developing games for the "Nintendo Entertainment System" ("NES"). Absolute's success has been tied to the phenomenal acceptance by the American public of Nintendo hardware systems, which are now in 40% of American homes. Indeed, since Absolute began developing Nintendo-compatible video game products, its revenues have grown six-fold from approximately $2 million in the 1988 base year to approximately $12 million in 1992. Today, Absolute has grown to the point that it is also a licensee/publisher of some of the video games it creates and, thus, it both creates and sells video games.

Absolute Entertainment is now the largest developer of Nintendo-compatible software in the U.S. One of its products, "Super Battle Tank: War In The Gulf," first published under the Absolute Entertainment brand name in June 1992 has been a best seller. Its products have earned hundreds of millions of dollars in retail sales in markets around the country and the globe. Absolute's staff includes some of the best known names in video game design and it has more than 10 new home video games currently under development. Absolute's most valuable assets are its employees, its intellectual property and the copyrights and trademarks that protect its intellectual property.

The NES consists of a hardware unit comprised of a microprocessor and other components. This console operates video game software stored in semiconductor memory chips. The memory chips are mounted on printed circuit boards and housed in separate plastic game cartridges. The NES console is connected to a television set, which displays the game, and to hand-operated controllers, light-sensitive toy guns and other peripherals, which are used to control the game being played. A very popular hand-held unit, called the "Game Boy," and an advanced "Super Nintendo Entertainment System" ("Super NES") console are also available.

There are a growing number of independent U.S.-based software licensees and developers -- currently approximately 175 -- which create 80% of the game titles for use with the three Nintendo hardware systems and 70% of the sales of such video games. Nintendo of America licenses these products, but the copyrights are owned by the individual companies which create or publish the games. The marketing and ultimate success or failure of a particular game are the responsibility of the individual companies which own the copyrights. Licensees and developers make a strong economic contribution to the United States. For example, the 67

independent U.S. licensees/developers which supported the Special 301 Comments employ about 2,000 persons and had wholesale video game sales of about $780 million for 1992. If data were available on all of the independent licensees/developers, it would show an even greater economic contribution to the United States, perhaps as much as two to three times as much.

In addition to the creation, development and marketing of video games by its licensees and developers, NOA has also initiated a program by which licensees manufacture certain video games in the United States. About one million video games were manufactured in the United States in 1992 by these licensees. As more licensees manufacture games, the benefits to both the local and national economies will grow in terms of employment, income and spending.

It comes as a surprise to some, but video games are a multi-billion dollar a year industry. Indeed, video games are the single largest category in retail toy sales. The retail value of the video game products sold by NOA and its licensees in the United States in 1992 is estimated to be about $4.3 billion. Video game sales are as large as the PC-based business software industry and several times larger than sales of the PC-based video game industry.

The U.S. video game industry is composed of firms that design, develop, license, distribute and sell home video games, and companies that license popular trademarks and/or characters for use in those video games. Just like most business software companies, the majority of video game companies are small, yet this is an industry that produces many billions of dollars in taxable revenue each year. Our companies are young, entrepreneurial, growing, and when they combine hard work with technical and creative innovation, profitable!

When a counterfeit game is sold in lieu of a legitimate game, companies like Absolute Entertainment suffer substantial losses. In addition, such sales cause losses to NOA, a Washington state-based company with about 1,400 employees. They also cause losses to the many film and character licensors which license their properties for use in the video games. For example, Absolute Entertainment is a developer and publisher of a video game based on "Star Trek: The Next Generation"; that property is licensed from Paramount Pictures. Infringement of that game causes losses to Paramount as well as to Absolute.

To understand the adverse economic impact of video game piracy on licensees and developers, one must understand the realities of the video game industry. There are several economic fundamentals. First, legitimate video games are expensive to develop and produce -- it costs $75,000 to $500,000 to develop and bring to market a new video game, excluding the cost of manufacturing. Also not included in that cost are the expenditures to obtain the right to use the properties of the film and character licensors which are present in about 25% of the NOA video games.

Second, video games have a very short average shelf life of three to twelve months. When a video game's popularity fades, as with a hit audio recording, the licensee bears the loss of unsold video games.

Third, many licensees make about half of their sales in the United States and the other half in foreign markets.

Fourth, the most severe impact in terms of job losses is on developers, because development of video games is an extremely labor-intensive undertaking utilizing highly skilled, highly compensated employees. Lost sales reduce profits and consequently employment.

Unfortunately, piracy preempts legitimate video game sales in foreign markets before U.S. licensees can introduce the authentic product. This occurs all too often as a result of the infringers purchasing a copy of the authentic product in, for example, the United States and then copying it for resale in Europe. This has happened to all too many licensees. Moreover, it should be noted that few licensees do business in much of Latin America or in Asia, outside of Japan, because the pirates have virtually taken over many of these markets.

Thus, as you can see, piracy places developers and licensees at great risk. Also, the most popular games, the ones most likely to be copied, provide the revenue necessary to finance new games and sustain less popular ones. Thus, piracy results in a loss of development funds and can rob companies of the capital needed to maintain themselves and to create new video game software.

Turning to the four countries in which video game piracy has been most rampant, the problems in those countries and the urgent need for the U.S. NOA video game industry for assistance from USTR under Special 301 are described below.

Taiwan

Last year, our industry filed Special 301 comments requesting that Taiwan be designated as a Priority Foreign Country because it was the predominant source of pirated video games sold throughout the world. USTR made such a designation and initiated an investigation of Taiwan. The investigation was terminated on the basis of a June 5th, 1992, Understanding that obligated Taiwan to implement an effective export monitoring system to prevent the exportation of infringing video games and the enactment of the Bilateral Copyright Agreement which had been agreed to in 1989.

Taiwan has, however, breached the Understanding. For example, it has refused to protect Nintendo of America's U.S. copyrights by stopping exports of piratical video games and it has not enacted the Bilateral Copyright Agreement in the form agreed to in 1989. In short, Taiwan has failed to honor the Understanding.

The USTR's 1993 National Trade Estimate Report on Foreign Trade Barriers at page 251 details the lack of several key elements in the export licensing system, including an effective detection infrastructure, realistic administrative procedures and clear written guidelines regarding investigation of suspected producers of infringing software. As a result of these inadequacies and Taiwan's total failure to agree to prevent export of video games that infringe NOA's U.S. copyrights, Taiwan continues to export throughout the world substantial quantities of pirated copies of video games.

In the February 1993 Comments under Special 301 by our industry, we recommended immediate retaliation against Taiwan. While there have been consultations between the American Institute in Taiwan and the Coordination Council for North American Affairs, Taiwan continues to refuse to prevent the export of video games that infringe NOA's U.S. copyrights. Consequently, we see no alternative but retaliatory action against Taiwan. Without retaliation, we fear that our industry's efforts to expand and penetrate overseas markets will be undermined and that pirated video games made in Taiwan will continue to saturate international markets.

Korea

Pirate video games have virtually saturated the Korean marketplace. Korea also has the technological capability to substantially expand its current exports of pirated video games. Korean video game infringements have already been detected in such

countries as the U.S., Canada, Mexico and Israel. However, unlike Taiwan, Korean enforcement officials have conducted a number of raids. Also, the Korean government has committed itself to amend its customs statutes to prevent the import and export of products that infringe copyrights and trademarks.

We are cautiously optimistic that the Korean government will continue to make efforts to rid the Korean marketplace of infringing video games and that enactment of new customs laws will lead to the reduction of Korean importation and exportation of infringing video games. However, Korea must consistently enforce severe criminal penalties against infringers and conduct frequent raids of manufacturers, exporters, and sellers of infringing video games if piracy is to be reduced in Korea.

Because Korea's past promises to reduce copyright piracy and trademark counterfeiting have not led to any substantial improvements in Korea, we are requesting that USTR designate Korea as a Priority Foreign Country so that steps may be taken to correct intellectual property inadequacies in Korea.

Venezuela

Venezuela is an example of what can occur when major inadequacies in a trademark system allow trademark piracy to flourish.

Applications filed by NOA in 1988 to register its world-famous trademark "NINTENDO" in Venezuela have not yet been issued. In the meantime, trademark pirates have filed more than 30 applications for the mark. As a result, a Venezuelan pirate known as "Nintendo of Venezuela" is conducting business in Venezuela and other Andean Pact countries under the Nintendo trademark and passing off as authentic products its own counterfeit products.

In the last few weeks, the Venezuelan government referred two proceedings against this pirate which had been pending since 1989 to the Venezuelan courts, where the proceedings will languish for several years while trademark piracy continues unabated in Venezuela. Our industry understands that this referral to the courts was unnecessary as well as unjustified. The Venezuelan government has through this most recent action sent a signal to trademark pirates that the administrative and legal system in Venezuela will permit pirates to thrive.

Consequently, we are requesting that USTR designate Venezuela as a Priority Foreign Country so that efforts may be initiated to obtain adequate and effective protection in Venezuela for video game trademarks.

Mexico

Trademark and copyright piracy is rampant in Mexico. The North American Free Trade Agreement ("NAFTA") may help alleviate but will not solve this problem. For example, Mexico's recent amendment of its intellectual property laws in anticipation of the implementation of NAFTA has not resulted in improvements adequate to combat current counterfeiting and piracy in Mexico.

Three factors are responsible for the seriousness of the intellectual property problem in Mexico. First, the trademark registration system affords little or no protection to the owner of famous trademarks, permitting third parties, including notorious Mexican counterfeiters, to register well-known trademarks. Second, Mexico has been a dumping ground for the importation of piratical products, including piratical video games. In fact, counterfeit

imports have virtually saturated the Mexican marketplace. Third, Mexico has a substantial gray market import problem. This problem is so severe that approximately 50 percent of the Nintendo products sold in Mexico are smuggled gray market goods.

The pervasiveness of the piracy problem makes it essential for Mexico to take immediate action. Mexico must address the deficiencies in its trademark registration system, the most notable of which are the lack of a process for opposing trademarks and the failure to prevent the registration of famous trademarks by trademark pirates. Mexico must also dramatically improve the penalties for piracy and ensure that those penalties are systematically enforced. Finally, and perhaps most importantly, Mexico must quickly act to control the importation of both counterfeit and gray market products, which are flooding the Mexican marketplace. Only if Mexico institutes an import monitoring system will there be any hope of reducing the level of counterfeit activity in the country.

Despite recent changes in its trademark and copyright laws, Mexico's intellectual property system is inadequate to prevent increasing counterfeiting and piracy in Mexico. The failure of Mexican law to provide injunctive relief against infringers and to institute effective import controls is unacceptable.

Congress should not approve NAFTA unless and until Mexico resolves these serious intellectual property problems. Absent strong government action by the United States, U.S. holders of copyrights and trademarks will continue to suffer serious losses in Mexico.

Conclusion

Enactment and use of the Special 301 provision has well served U.S. companies which rely on intellectual property rights. Safeguarding intellectual property rights from foreign infringers should continue to be one of most important trade policy goals of the United States. It is critical at the beginning of this new Administration that the USTR send a strong message under Special 301 to those countries whose laws and practices foster counterfeiting and piracy that these acts will not be tolerated by our government.

Otherwise, the progress that has been made in strengthening intellectual property rights will be lost. Most importantly, absent strong worldwide intellectual property protection, American companies will be unable not only to obtain the rewards for their creations -- which translate into sales, profits and employment -- but also to finance the development for the next generation of their products.

STATEMENT OF THE TEXTILE PRODUCERS AND SUPPLIERS ASSOCIATION

The Textile Producers and Suppliers Association ("TPSA") submits this written statement for inclusion in the record of the hearing held by the United States Senate, Committee on Finance, International Trade Subcommittee, on Special 301 trade remedy law, held April 19, 1993. TPSA submits this statement to supplement its submission made to the Office of the United States Trade Representative seeking to have the following countries designated as "priority foreign countries" under the Trade Act of 1972, as amended: the Republic of Korea; the Republic of China; the Peoples Republic of China; Singapore; and Pakistan. TPSA's submission to the USTR is annexed hereto and incorporated by reference as if fully set forth..

Without reiterating each of the points set forth in TPSA's submission to the USTR, TPSA would like to emphasize that the problem of infringement of decorative fabric designs is, if anything, worsening. This is particularly true as respects infringing conduct in Korea and the Peoples Republic of China. Specifically, the volume of unauthorized copies of protected fabric designs emanating from these jurisdictions continues to grow without any tangible steps being taken by officials from such countries to address the problem. Thus, notwithstanding recent promises by Korean officials, we are unaware of any specific actions that have been implemented, and which will remain place for more than a transitory period of time, that will systematically address the specific problem of infringements of decorative fabric designs.

In addition, the conduct by Korean and PRC infringers has now grown to the point where infringing copies of protected works, are more and more frequently entering the U.S. Yet, the owners of U.S. copyrights in the works are helpless in addressing the problem at its root—the locale of the infringing party. Moreover, notwithstanding efforts by TPSA to negotiate directly with known infringers, including Sunkyong Limited, a leading Korean trading company, and Kabool, a large Korean print mill, no success has been achieved in reaching a satisfactory resolution to the problem.

Accordingly, TPSA urges that the Subcommittee take all steps within its power to cause the countries identified in TPSA's submission to the USTR to be designated as "priority foreign countries" under Section 301, and that such treatment be especially accorded Korea and the Peoples Republic of China.

Attachment.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

IDENTIFICATION OF PRIORITY FOREIGN COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1972, AS AMENDED

SUBMISSION OF THE TEXTILE PRODUCERS & SUPPLIERS ASSOCIATION CONCERNING ACTS, PRACTICES AND POLICIES TO BE CONSIDERED WITH RESPECT TO IDENTIFICATION OF COUNTRIES UNDER SECTION 182 OF THE TRADE ACT OF 1972, AS AMENDED

The Textile Producers & Suppliers Association ("TPSA") makes this submission in response to the United States Trade Representative's Request for Public Comment concerning acts, practices and policies to be considered with respect to the identification of countries under Section 182 of the Trade Act of 1972, as amended (the "Trade Act"). For the reasons set forth below, TPSA submits that five (5) countries should be so identified. These countries are: the Republic of Korea; the Republic of China; The Peoples Republic of China; Singapore; and Pakistan. In the experience of TPSA and its members these countries do not provide effective protection of intellectual property rights, specifically as respects copyrighted textile designs.

BACKGROUND

TPSA is a not-for-profit trade association formed approximately one year ago for the specific purpose of addressing the issue of copyright infringement of printed fabric designs in markets throughout the world. The members of TPSA include the majority of the decorative print fabric converters in the United States,[1] and other related entities in the textile industry. Because of the rampant piracy of copyrighted fabric designs in foreign jurisdictions, TPSA's members have incurred losses that aggregate into the millions of dollars and are growing. Moreover, in some instances,

[1] Print fabric converters develop or acquire artistic designs and then have such designs printed on various types of fabrics, which are then sold for purposes that include home furnishings such as upholstered furniture, draperies and bedding.

TPSA's members are now excluded from effectively competing in a number of important foreign markets.

In several jurisdictions, such as Australia and Hong Kong, TPSA members have been able to protect their copyrighted designs through the commencement of private legal actions. In others jurisdictions, however, either local copyright laws, to the extent they exist, have been deemed inapplicable to printed textile designs or the enforcement of local laws has been, at best, lax. Accordingly, in these latter jurisdictions TPSA's members have been unable adequately to protect their rights through private causes of action, and these countries should be identified under Section 182 of the Trade Act.

DISCUSSION

Korea

Through its own investigation TPSA has identified a large number of Korean entities, both trading companies and textile mills, that have engaged in the unauthorized copying and sale of fabrics that are identical in design to the copyrighted fabrics sold by TPSA's members. Such infringing works have been found by TPSA members in Korea, as well as in third countries, including Australia and the Middle East. Instances of unlawful copying have been brought to the attention of TPSA members by their customers and through direct observation.

The following examples provide a picture of the full range of problems that exist as the result of copying by Korean persons.

1. During a trip to Seoul, Korea on January 30—February 2, 1993, representatives of TPSA, in a one hour period, discovered over thirty examples of direct infringements of TPSA-member owned designs. Such copies were found in local fabric stores, as well as in Lotte and Midopa, the leading department stores in Seoul. Each of the copies that was found was printed in Korea. This was known because there appeared on each piece of fabric the name of the textile mill that made it. Included were some of the largest mills in Korea, such as, Kabool, Tong Kuk, Pang Him, Tae Hun, Daei Hong and Moo Gong Hwa. This information, and the identity of the Korean mills was confirmed by representatives of the Korean Textile Federation (an umbrella organization for 27 Korean textile associations) and by other private Korean sources.

The extent of copying that was discovered on this recent visit to Seoul was much greater than existed three years ago, at which time a trade mission sponsored by the U.S. Department of Commerce, and which included representatives of companies that are now members of TPSA, visited Korea. During this earlier trade mission instances of copying were found, but only on a limited basis in the local market, and it could be determined then only that small local printing mills were engaged in copying. How, in contrast, unlawful copies are being sold in the leading department stores in Korea, and are being made by the largest Korean textile mills. Moreover, as described below, this is no longer just a local Korean problem. Exports of infringing fabrics are being made from Korea at alarming volumes.

2. TPSA's members have seen their sales volumes to the Middle East market drop precipitously, and in some cases TPSA members have been excluded from selling their products to this market entirely. By way of example, one year ago one member was able to sell close to $800,000 of goods to Middle East customers during the annual Heimtex show. This year, this member's sales to Middle East customers was $10,000. Other members have reported similar results. The reason for this dramatic loss of sales is that the infringing goods being made in Korea and exported to the Middle East are being sold for as much as one-third the price of the legitimate goods.

The fact that Korea is the source of the vast majority of the infringing goods being exported to the Middle East is based on eye witness accounts of TPSA members. For example, in October 1992 a TPSA member was visiting a customer in Jeddah, Saudi Arabia. During this visit a person representing himself as an agent of a leading Korean trading company, without knowing the identity of the TPSA member, presented samples of a wide variety of fabric designs, including many that belonged to the TPSA member who was present. The sales representative of the Korean company then expressly stated that he could copy any design the customer desired.

An equally troublesome situation occurred in Dubai. A TPSA member was making a sales call to one of its customers trying to obtain a sale for several patterns. The customer said that he liked the patterns very much, but that he was buying them for one-third the price from the Korean printer Kabool. The customer then showed the TPSA member the contract of sale from Kabool to the customer, which had attached to it samples of the infringing fabric.

Customers in the Middle East of other TPSA members have also presented sample books provided to them by representatives of Korean firms, all of which contained direct copies of TPSA-member copyrighted works. These sample books have been obtained, as have samples of the other infringing works discussed above.

3. Exports of infringing goods have also been made from Korea to Australia. For example, a customer of one TPSA member in Australia received a package from a Korean company on a day when the Australian agent for the TPSA member happened to be at the customer's offices. The package contained samples of fabrics that were identical copies of the TPSA member's copyrighted designs, and were labeled with the Korean company's name.

4. Korean made infringing goods are also now beginning to appear in the United States. For example, in November 1992, a representative of a leading Japanese trading company visited two TPSA members offering samples of a newly made Korean fabric. The purpose of offering the Korean fabric was to demonstrate its quality. The second TPSA member to whom the fabric was shown, however, became incensed because the design that appeared on the fabric was a direct copy of one of that member's copyrighted designs. Efforts are being made to resolve this matter directly with the Japanese trading company, but to date no resolution has been reached and the representative of the trading company has refused to disclose the source of the goods other than to state that it is a Korean mill.

In an effort to address the infringement problems arising in Korea TPSA has had direct talks with Korean government and industry representatives. These include meetings with representatives of Korea's Ministry of Trade and Industry, Ministry of Culture and Ministry of Foreign Affairs, as well as meetings with the Korean Textile Federation and individual Korean companies that are known to have engaged in copying. Although great concern was voiced by all with whom we met, no firm commitment to address the problem of copyright infringement was offered. Certain officials urged us to recognize the difficulty of the situation, and others, such as the Ministry of Foreign Affairs, urged that TPSA members should commence legal actions and make criminal complaints under the Korean Copyright Act to address the problem. Whil TPSA and its members are now contemplating such actions, information provided by Korea's Ministry of Culture, which is analogous to the U.S. Copyright Office, and by private counsel in Soeul, makes it unclear whether any remedy even exists under the Korean Copyright Act for the infringement of fabric designs. Specifically, the Vice-Director, Copyright Division, of the Ministry of Culture, Mr. Tae-Hoon Kim, opined that in his view the Korean Copyright Act does cover fabric designs that are artistic, but he acknowledged that there has never been a court case in which such a holding was made. In addition, Mr. Kim pointed out that the governmental agencies responsible for the criminal enforcement of the copyright laws in Korea, the Ministry of Justice and National Police, are not bound by interpretations of the Ministry of Culture.

The uncertainty of Korean law on this point was confirmed through discussion with local Korean counsel. It was pointed out that to be successful at all it would be necessary to educate the Korean judiciary that intellectual property rights generally should be afforded a high degree of protection, and more particularly that fabric designs are artistic in nature, and not primarily functional. Moreover, Korean counsel indicated that in determining whether fabric designs should be treated as copyrightable, a Korean court, in the absence of any Korean decisions on point, is likely to look to Japanese law for guidance. We note that under Japanese law, textile designs are not treated as copyrightable material.

Thus, although TPSA is seeking to address the problem of copyright infringement of printed fabric designs in Korea directly, the obstacles for effectively doing so are high. As a result, rampant copying is, if anything, increasing, and the volume of business being lost by TPSA members is mounting. Certain members have been effectively precluded from selling in the Korean market, and others have been excluded from selling in third countries. All the while, the existence of effective remedies is entirely up in the air.

Thus, TPSA submits that designation of Korea as a priority country is required.

Republic of China

TPSA has previously communicated with the USTR regarding infringement problems in Taiwan, and reported instances of infringements are continuing. However, as previously communicated to the USTR, TPSA's concerns with the status of the available remedies under the ROC Copyright Act are discrete. For the most part TPSA is pleased that the new ROC Copyright Act has been adopted and that it provides stringent remedies and affords protection for copyrighted fabric designs.

The one area of concern for TPSA is what appears to be a "loophole" in the ROC Copyright Act, pursuant to which a U.S. copyright holder is not able to protect its

rights in Taiwan if the U.S. person acquired ownership of the copyrighted work from a creator who is a resident of a country that does not have a bilateral agreement with Taiwan regarding the enforcement of copyrights. This is an important issue for TPSA's members because a number of the designs that are acquired by them (and copyrighted by them in the U.S.) are from European creators who are residents in countries, such as France and Switzerland, that do not have bilateral agreements with Taiwan. Thus, our members are unable to protect their rights in such designs under the ROC Copyright Act, notwithstanding that such copyright rights are fully enforceable under U.S. law.

We understand that efforts have already been undertaken by the USTR, through negotiations with the Taiwanese, to cause this "loophole" to be eliminated. Specifically, we understand that Taiwanese negotiators have agreed that the "loophole" should be closed, and have endeavored to have the negotiated agreement with the U.S. enacted by the Taiwanese legislature. As the result of resistance by the legislature, however, we understand that there has been no action taken on this' proposal. Therefore, notwithstanding the negotiating efforts of USTR to date, Taiwan has not sought fit to amend its Copyright Act to give full protection to U.S. owned copyrights.

The effect of this continuing "loophole" in Taiwan's Copyright Act is significant. One member of TPSA, who had been conducting business in and through Taiwan, determined that it could no longer do so, and was forced to withdraw from the market. Because it could not protect its copyrighted designs, which had been acquired from non-U.S. artists, this member determined that any other course would have placed it in the unacceptable position of having its copyrighted designs repeatedly copied without permission. The lost sales incurred by this member as the direct result of this situation were in the Taiwan domestic market and in third countries such as Australia.

Another TPSA member has also been harmed by the continuation of the "loophole." This member recently prosecuted a copyright infringement case in the U.S. to a successful resolution. During the litigation in the U.S. it was determined that the source of the infringing goods being sold by the defendant in the U.S. was a Taiwanese mill, and that the screens used to print the infringing patterns were owned by the mill and not the U.S. infringer. However, because certain of the patterns in question were acquired by the TPSA member from a French resident, the member could not effectively seek relief against the Taiwese infringer, which is now able to reproduce the copyrighted design in Taiwan with impunity.

Accordingly, TPSA respectfully submits that it is necessary to designate Taiwan as a priority foreign country.

Peoples Republic of China

China is beginning to be a very important jurisdiction for textile converters because of the growing volume of printing capacity that is becoming available to U.S. firms. Absent the ability to effectively protect copyrighted fabric designs, however, the ability to use such printing capacity is severely compromised. Indeed, instances of infringement are already being reported.

More specifically, while TPSA certainly applauds the efforts of the USTR to date in causing the PRC to become a signatory to the Berne Convention, merely possessing such status does not, and will not, provide any recourse for TPSA members to protect their copyrighted textile designs in the PRC. First, we are advised by the Commercial Officer in the U.S. Embassy in Beijing that Chinese officials do not consider textile designs to be protectable subject matter under the PRC Copyright Act. Moreover, even assuming such designs were protectable, it is not apparent that there exists any judicial or administrative mechanism to adjudicate copyright disputes. We understand that it is planned that a National Copyright Administration will be established, which will create administrative arbitration tribunals to hear infringement claims, but the timing for the creation of this Administration is not certain. In addition, although a U.S. person may be able to litigate in Chinese courts, local judges have observed that the PRC court system is not yet ready to handle copyright infringement claims. Thus, at least for the foreseeable future, no recourse exists for U.S. owners of copyrights to enforce such rights in the PRC, and owners of copyrights in fabric designs are completely left without a remedy under the PRC copyright laws.

For these reasons TPSA submits that the PRC should be designated a priority country, and through continuing negotiations it should be required that textile designs be protected under the PRC Copyright Act, and that effective mechanisms for the enforcement of the PRC's Copyright Act be implemented.

Singapore

Notwithstanding private enforcement efforts by TPSA members to protect their copyrighted fabric designs in Singapore, a visit by a TPSA member within the last week revealed that the volume of unlawfully copied goods being offered for sale is enormous. Over twenty-five examples of infringing goods were obtained in a single shopping excursion.

The significance of this is that although private actions have been pursued by TPSA members in Singapore, copyright infringement of textile designs continues unabated. Therefore, TPSA submits, efforts must be made by the USTR to obtain agreements from Singapore officials that such infringing conduct will be treated as a high priority, and that steps will be taken by law enforcement officials that will serve to deter such piracy.

Such steps are more important now than ever. In a case currently being litigated by a TPSA member in the Singapore courts, an argument has been raised by the defendants that fabric designs should not be afforded copyright protection under the Singapore Copyright Act if (i) the design is capable of registration as a registered design in the United Kingdom; (ii) the design is industrially applied; and (iii) the design is not registered as a registered design in the United Kingdom. The Singapore court has not yet ruled on this point of law, but if it adopts the defendants' argument, the ability of U.S. textile firms adequately to protect their copyrighted designs in Singapore will be severely undermined.

Pakistan

TPSA members are being repeatedly advised by their customers that the source of infringing goods found in many markets is Pakistan. One dramatic example of this has occurred in Australia where, in the course of a litigation against an Australian infringer, a TPSA member learned that the source of the infringing goods was Pakistan. After successfully resolving that litigation, however, the TPSA member had to pursue twelve additional instance of infringement of the same design, all emanating from Pakistan.

Notwithstanding Pakistan's status as a Berne Convention signatory, the ability to protect ones copyrights from Pakistani infringement under the laws of Pakistan is non-existent. This fact was acknowledged to TPSA by a Mr. Bajwa during a meeting on fact was acknowledged to TPSA by a Mr. Bajwa during a meeting on October 26, 1992 at the USTR. Mr. Bajwa stated that if a U.S copyright owner were to pursue a legal course in Pakistan, the copyright owner "will not get anywhere." Mr. Bajwa explained that adequate laws to address this problem do not exist. Moreover, Mr. Bajwa voiced his opinion that copyright protection was not the issue, but rather that copyright owners could not compete simply because they charged too much for their products.

Accordingly, without designation of Pakistan as a priority country, and without the strenuous efforts of the USTR, the problem of copyright infringement of fabric designs in Pakistan will continue to go unchecked, and the view of Pakistani officials will remain as cavalier as those expressed by Mr. Bajwa.

CONCLUSION

For the foregoing reasons, the Textile Producers & Suppliers Association respectfully submits that the Republic of Korea, the Republic of china, the Peoples Republic of China, Singapore, and Pakistan be designated as priority countries under Section 182 of the Trade Act, as countries that, through their acts, practices, and policies, deny adequate and effective protection of intellectual property rights, and specifically as respects copyrights for printed fabric designs.