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Intellectual Property— An Introduction

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I.A. Why Is Intellectual Property Enforcement Important?

Intellectual property (“IP”) is critical to the vitality of today's economy. IP is an engine of growth, accounting for an increasing share of jobs and trade. In 2002, the core copyright industries alone were estimated to account for 6% or more of U.S. GDP, and in 2005 the overall value of the “intellectual capital” of U.S. businesses—including copyrights, trademarks, patents, and related information assets—was estimated to account for a third of the value of U.S. companies, or about \$5 trillion. Stephen Siwek, *Copyright Industries in the U.S. Economy: The 2004 Report* 11 (Oct. 2004) (copyright industries statistic), available at http://www.iipa.com/pdf/2004_SIWEK_FULL.pdf; Robert J. Shapiro & Kevin A. Hassett, *The Economic Value of Intellectual Property* 18 (Oct. 2005) (overall value of intellectual property statistic), available at http://www.usaforinnovation.org/news/ip_master.pdf.

Intellectual property rights create incentives for entrepreneurs, artists, firms and investors to commit the necessary resources to research, develop and market new technology and creative works. As one court observed, “[t]he future of the nation depends in no small part on the efficiency of industry, and the efficiency of industry depends in no small part on the

protection of intellectual property.” *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991). Therefore, effective protection of intellectual property rights is essential to fostering creativity and to supporting our economic and financial infrastructure.

This is a pivotal time for intellectual property enforcement. Market and technological developments have converged to create an environment in which the distribution of both legitimate and illegitimate goods flourishes as never before. As economic freedom expands to more and more countries, their manufacturers and consumers are increasingly interconnected due to advances in telecommunication networks, integrated financial markets, and global advertising.

This interconnected global economy creates unprecedented business opportunities to market and sell intellectual property worldwide. Geographical borders present no impediment to international distribution channels. Consumers enjoy near-immediate access to almost any product manufactured in the United States or abroad, and they are accustomed to using the international credit card system and online money brokers (such as PayPal) to make payment a virtually seamless process worldwide. If the product can not be immediately downloaded to a home PC, it can be shipped to arrive by next day air.

However, the same technology that benefits rights-holders and consumers also benefits IP thieves seeking to make a fast, low-risk buck. Total global losses to United States companies from copyright piracy alone in 2005 were estimated to be \$30-\$35 billion, not counting significant losses due to Internet piracy, for which meaningful estimates were not yet available. *See International Intellectual Property Alliance Submission to the U.S. Trade Representative for the 2006 Special 301 Report on Global Copyright Protection and Enforcement*, at 21 (Feb. 13, 2006), *available at* <http://www.iipa.com/pdf/2006SPEC301COVERLETTERwLTRHD.pdf>.

Trafficking in counterfeit merchandise presents economic consequences no less severe. It has been estimated that between 5% and 7% of world trade is in counterfeit goods, which is equivalent to approximately \$512 billion in global lost sales. U.S. Chamber of Commerce, *What Are Piracy and Counterfeiting Costing the American Economy?* 2 (2005), *available at* <http://www.uschamber.com/ncf/initiatives/counterfeiting.htm> (following links re “Scope of the Problem”). Counterfeit products are not limited to bootleg DVDs or fake “designer” purses; they include prescription drugs, automobile and airline parts, food products, and insecticides. *See Stop Counterfeiting in Manufactured Goods*

Act, Pub. L. No. 109-181 § 1(a)(2) (“Findings”), 120 Stat. 285, 285 (2006). As a result, the trade in counterfeit merchandise threatens the health and safety of millions of Americans and costs manufacturers billions of dollars each year.

Whether sold via the Internet or at sidewalk stands on New York's famous Canal Street, the harm to the U.S. economy from IP theft is substantial. Total losses suffered by U.S. industries due to their products being counterfeited is estimated at between \$200 and \$250 billion per year, costing 750,000 American jobs. U.S. Chamber of Commerce, *What Are Piracy and Counterfeiting Costing the American Economy?* 2 (2005). Strong enforcement, both civil and criminal, is therefore essential to fostering creativity and protecting our economic security.

I.B. What Is Intellectual Property?

Similar to the way the law recognizes ownership rights in material possessions such as cars and homes, it also grants rights in intangible property, such as the expression of an idea or an invention. Federal law protects intellectual property in four distinct areas: copyright, trademark, patent, and trade secrets.

I.B.1. Copyright

The law of copyright is designed to foster the production of creative works and the free flow of ideas by providing legal protection for creative expression. Copyright provides protection against the infringement of certain exclusive rights in “original works of authorship fixed in any tangible medium of expression,” including computer software; literary, musical, and dramatic works; motion pictures and sound recordings; and pictorial, sculptural, and architectural works. *See* 17 U.S.C. § 102(a). These exclusive rights include the rights of reproduction, public distribution, public performance, public display, and preparation of derivative works. 17 U.S.C. § 106. Legal protection exists as soon as the work is expressed in tangible form. Copyright law protects the physical expression of an idea, but not the idea itself.

Although civil law protects all the copyright owner's exclusive rights, criminal law primarily focuses on the rights of distribution and reproduction. *See* 17 U.S.C. § 506(a) and 18 U.S.C. § 2319. Those convicted of criminal copyright infringement face up to five years' imprisonment and a \$250,000 fine. *Id.*

I.B.2. Trademarks and Service Marks

The federal law of trademarks and service marks protects a commercial identity or brand used to identify a product or service to consumers. The Lanham Act, 15 U.S.C. §§ 1051-1127, prohibits the unauthorized use of a trademark, which is defined as “any word, name, symbol, or device” used by a person “to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods.” 15 U.S.C. § 1127. By registering trademarks and service marks with the U.S. Patent and Trademark Office, the owner is granted the exclusive right to use the marks in commerce in the United States, and can exclude others from using the mark, or a comparable mark, in a way likely to cause confusion in the marketplace. A protected mark might be the name of the product itself, such as “Pfizer” or “L.L. Bean”; a distinguishing symbol, such as the Nike “swoosh” or the MGM lion; or a distinctive shape and color, such as the blue diamond shape of a Viagra tablet. Certain symbols like the Olympic rings also receive like protection.

Legal protections for trademarks and service marks not only help protect the goodwill and reputation of mark-owners, but also promote fair competition and the integrity of markets, and protect consumers by helping to ensure they receive accurate information about the origins of products and services.

Federal criminal law has long prohibited trafficking in goods or services that bear a counterfeit mark. 18 U.S.C. § 2320. As discussed more fully in subsequent chapters, in March 2006 the criminal trademark statute was amended to also prohibit trafficking in labels or packaging bearing a counterfeit mark, even when the label or packaging is unattached to the underlying good. Individuals convicted of § 2320 offenses face up to 10 years' imprisonment and a \$2,000,000 fine.

I.B.3. Patents

Patents protect the world of inventions. In its simplest form, a patent is a property right for an invention granted by the government to the inventor. A patent gives the owner the right to exclude others from making, using, and selling devices that embody the claimed invention. *See* 35 U.S.C. § 271(a). Patents generally protect products and processes, not pure ideas. Thus, Albert Einstein could not have received a patent for his theory of relativity, but methods for using this theory in a nuclear power plant are patentable. Inventors must file for patent protection with the U.S. Patent and Trademark Office.

There are three types of patents: utility, design, and plant. Utility patents are the most common form and are available for inventions that are novel, non-obvious, and useful; that is, “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” 35 U.S.C. § 101. Examples of utility patents include the ingredients of Silly Putty (1949) and the diagnostic x-ray system known as the CAT-Scan (1975).

Unlike copyright and trademark infringement, there are no criminal—only civil—penalties for committing patent infringement. However, there are some criminal and quasi-criminal penalties for certain conduct related to patents.

I.B.4. Trade Secrets

A trade secret is any secret formula, pattern, device or compilation of information used in a business that has some independent economic value and which is used to obtain an advantage over competitors who do not know or use it. *See* 18 U.S.C. § 1839(3). One of the most famous trade secrets is the formula for manufacturing Coca-Cola. Coca-Cola was accorded trade secret protection in 1920 because the recipe had been continuously maintained as a trade secret since the company's founding in 1892, and it apparently exists to this day. *See Coca-Cola Bottling Co. v. Coca-Cola Co.*, 269 F. 796 (D. Del. 1920) (holding that Coca-Cola retained legal title to its formula upon entering a bottling contract because it kept the formula secret).

Trade secrets are broader in scope than patents, and include scientific and business information (e.g., market strategies). However, the information can be freely used if it is obtained or learned through legitimate means, such as reverse engineering. Moreover, if the trade secret is publicly disclosed, it loses its legal protection.

The theft of trade secrets is punishable by up to fifteen years' imprisonment and a \$500,000 fine if done to benefit a foreign government or agent, 18 U.S.C. § 1831, and up to ten years' imprisonment and a \$250,000 fine in other cases.

I.C. Why Criminal Enforcement?

Although civil remedies may help compensate victimized intellectual property rights-holders, criminal sanctions are often warranted to punish and deter the most egregious violators: repeat and large-scale offenders,

organized crime groups, and those whose criminal conduct threatens public health and safety. Indeed, because many violations of intellectual property rights involve no loss of tangible property and, for infringement crimes, do not even require direct contact with the rights-holder, the intellectual property owner often does not know that it is a victim until an infringer's activities are investigated and prosecuted.

The Department pursues a three-front approach to ensure aggressive and effective prosecution. First, the Criminal Division's Computer Crime and Intellectual Property Section (“CCIPS”), based in Washington, D.C., provides a core team of expert intellectual property prosecutors who investigate, prosecute, and coordinate national and international cases of intellectual property theft. This group of specialists helps develop and execute the Department's overall intellectual property enforcement strategy, and provides training and 24/7 support to Assistant U.S. Attorneys nationally. This Manual, for instance, is one of the training tools that CCIPS provides.

Second, because primary responsibility for prosecution of federal crimes generally—and intellectual property offenses specifically—falls to the 94 U.S. Attorneys' Offices across the United States and its territories, the Justice Department has designated at least one, and oftentimes more, Computer Hacking and Intellectual Property (“CHIP”) Coordinator in every U.S. Attorney's Office in the country. CHIP Coordinators are Assistant U.S. Attorneys with specialized training in prosecuting intellectual property and computer crime who serve as subject-matter experts within their districts. As of this writing, there are approximately 230 CHIP prosecutors designated to handle both computer crime and intellectual property matters nationwide.

Third, CHIP Units augment the extensive network of CHIP prosecutors. Each CHIP Unit consists of a concentrated number of trained Assistant U.S. Attorneys in the same office. CHIP Units are strategically located in districts that experience a higher incidence of intellectual property and cyber-crime, or where such crimes have the highest economic impact. These specialized squads focus on prosecuting intellectual property offenses such as trademark violations, copyright infringement, and thefts of trade secrets. In addition, they prosecute high-technology offenses including computer hacking, virus and worm proliferation, Internet fraud, and other attacks on computer systems. CHIP Unit attorneys are also actively involved in regional training of other prosecutors and federal agents regarding high-tech investigations, and they work closely with victims of intellectual property theft and cyber-crime on prevention efforts. There are currently 25 CHIP Units consisting of approximately 80

Assistant U.S. Attorneys, in addition to the approximately 150 CHIP prosecutors in the remaining districts and Justice Department divisions.

The combined prosecution efforts of the CHIP network, CHIP Units, and CCIPS create a formidable three-front enforcement attack against intellectual property thieves and counterfeiters. These enforcement efforts will be even more necessary in the future, as advancing technology and changing economies continue to present new challenges.