2014 Special 301 Public Hearing
Special 301 Subcommittee of the Trade Policy Staff Committee
Office of the United States Trade Representative

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Hearing Statement of
Intellectual Property Owners Association (IPO)

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Special 301 Subcommittee Members:

My name is Herbert Wamsley. I am the Executive Director of Intellectual Property Owners Association, or IPO. I would like to thank you for the opportunity to testify today.

IPO is a trade association in Washington, DC representing more than 200 companies in all industries and fields of technology who own or are interested in intellectual property rights. I will highlight some key points from the 16-page letter that we submitted to you on February 7, emphasizing patent and trade secret rights.

IPO members create and commercialize new products and services that drive exports and create jobs. Innovation is not without risk, and we rely on our intellectual property rights at home and abroad to protect our investments in new technology.

IP Threats in International and Multilateral Organizations

We have observed a growing trend in international intergovernmental bodies to focus on exceptions and limitations to IP rights or to otherwise weaken IP rights. While such exceptions

and limitations are said to be designed to increase access to technology, they produce exactly the opposite effect by creating uncertainty that deters investors. Strong IP rights provide assurance that innovators will be able to realize a return on their investment in the market. Without this assurance, many innovators will be unwilling to invest, or they will make capital allocation decisions that favor countries with stable IP environments.

We have observed attempts to weaken IP in a range of UN bodies, including the UN Framework on Climate Change Convention and the World Intellectual Property Organization, an organization whose very mission should be to foster innovation. Similar proposals are being made in the World Health Organization and the World Trade Organization. Sometimes the proposals call explicitly for IP-weakening, such as by advocating more widespread use of compulsory licensing. At other times, proposals employ a more subtle approach by calling for the removal of "barriers" to technology transfer. These proposals impair the IP assets that sustain U.S. innovation, economic competitiveness, and jobs, and that promote technological advancement and standard of living improvements worldwide.

Country-Specific Concerns

Positions taken by many countries in international and multilateral fora reflect their domestic policies. Several countries have domestic IP policies that are a concern to IPO members. I will mention India, China, Brazil, South Africa, and Canada,

***India*:** India is an important market for U.S. innovators, with an economy that draws heavily on global investment and trade. Several members of our association have a significant presence in India. However, India's government pursues an agenda of forced technology transfer and

intellectual property weakening that is disadvantageous to American businesses. For example, India's National Manufacturing Policy calls for involuntary licensing of clean and healthcare related technologies. India has also infringed, overridden, or revoked nearly a dozen pharmaceutical patents held by foreign firms, in part because the patented products were manufactured outside the country. The stated rationale for such actions is high medicine prices. However, we believe expropriation of IP assets is inappropriate and deprives U.S. innovators of market opportunities.

In addition, although India has developed a National Competition Policy that provides a helpful framework for fair competition, IP rights owners must grant third party access to "essential facilities" under the Competition Policy. India also requires patent owners to actively "work" their inventions on a commercial basis *within India*. Failure to do so can subject the patent to compulsory licensing. Apparently to encourage more requests for compulsory licenses, the Ministry of Commerce (DIPP) has recently published the working status of Indian patents online.

Furthermore, despite recognizing the link between trade secret protection and investor confidence through its National IPR Strategy, no meaningful trade secret protection regime exists in India, and there has been no public move to establish one.

Finally, India continues to promote IP-weakening within international organizations. At the WTO, India has insisted that IP rights are unrelated to innovation. At WIPO, India collaborates with Brazil to prevent meaningful discussion of IP best practices. The situation may deteriorate further, as we understand India has recently pledged to take a leadership role among the BRICS IP Offices to influence IP-weakening policymaking.

China: Moving on to China, while much has been done to improve IP rights in recent years, achievement of an open and fair commercial landscape will require additional work. While China promised to delink its innovation policies from government procurement, U.S. companies continue to face challenges related to innovation policy. Technology developers may find themselves at a significant disadvantage through China's national standards, which are advanced through an invitation-only process, often to the exclusion of foreigners. IPO members must also cope with laws that impose greater risks and liabilities on foreign technology licensors compared to domestic innovators. Moreover, a recent trademark law change may expose American brand owners to risks caused by bad-faith registrants.

IPO members face hurdles in expanding research and development operations within China. U.S. innovators must share their know-how with others to build new solutions, risking exposure of essential trade secrets. [p10]While trade secret laws exist in China, recovery of damages is extremely difficult, and the criminal punishments are so minimal that they lack value as a deterrent. Companies sometimes must also reveal their trade secrets to comply with regulations, with no assurance that their know-how will remain confidential. When the government itself appropriates the knowledge, there is no meaningful recourse for any resulting losses. And even if an innovator's confidential information remains intact, operating in China is still complex – employers must face the onerous requirements of service invention regulations governing employee-inventors and navigate the uncertainties created by unexamined utility model rights.

Brazil: Overall, Brazil's position on IP issues both domestically and globally has improved over the past few years. Nonetheless, there are areas of real concern. For example, both INPI,

Brazil's patent office, and ANVISA, the National Health Surveillance Agency, examine the same pharmaceutical patent applications with different standards, generating uncertainty for innovators. This dual patent system compounds the patent backlog in Brazil, where patent examination takes eight to nine years. INPI also makes it difficult for foreign investors to share their knowledge with local operators. The patent office regularly interferes with technology transfer agreements, which can result in the loss of U.S. trade secrets.

Brazil's ongoing Patent Law Reform, which proposes limiting patent rights through a variety of policy changes, is also troubling. The elements of this patent reform are trumpeted by Brazil in international forums as "best practices" for developing countries. As one example, at WIPO Brazil has insisted that the patent system is broken and should be drastically weakened, particularly in developing countries. And as mentioned earlier, Brazil's representatives ofttern block any meaningful, substantive exchanges about IP other than the expansion of exceptions and limitations.

South Africa: Like Brazil, South Africa is also considering updating its approach to intellectual property. Last year South Africa published a draft National Policy on Intellectual Property. IPO welcomes many of the perspectives the Policy sets forth, but is troubled by the suggestion that IPR protections must be limited in order for the country to develop and thrive.

Canada: In Canada innovators in the pharmaceutical industry face unique and heightened standards of patentability. Patent applicants must demonstrate or predict the commercial promise of an invention upon filing. Canadian courts have rejected patents for their lack of utility when Health Canada has found the same inventions to be "safe and effective."

The Borderless Nature of Piracy

While many challenges of IPO members relate directly to the actions or policies of foreign governments, the fluid nature of online piracy is making it harder to pin down responsible parties. For example, "The Pirate Bay" enables wholesale downloading of copyrighted digital content. The group was founded by a Swedish anti-copyright organization and has moved its operations numerous times to evade government action. Governments should be encouraged to prevent the blatant copyright infringement occurring within their territories.

Opportunities to Improve Global IPR Protection and Enforcement

IPO believes there are near-term opportunities to strengthen the global intellectual property framework. Key elements of intellectual property systems can be strengthened through the Trans-Pacific Partnership (TPP) and Transatlantic Trade Investment Partnership (TTIP). In particular, we appreciate the efforts the U.S. has made to include trade secrets on these agendas. The successful adoption of legislative best practices to protect trade secrets will be a critical step to improving global U.S. competitiveness.

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In conclusion, allow me to say that IPO believes the economic future of the U.S. and the world depends on robust intellectual property systems that will incentivize innovation. IP protection enables innovators to turn ideas into products and services that generate exports and jobs.

We thank this Subcommittee for its efforts to help preserve tools that will sustain and grow America's economy.