

**COMMENTS OF THE INFORMATION TECHNOLOGY AND INNOVATION
FOUNDATION BEFORE
THE OFFICE OF MANAGEMENT AND BUDGET,
EXECUTIVE OFFICE OF THE PRESIDENT
Washington, DC 20503**

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In the Matter of

The Coordination and Strategic Planning of the Federal Effort Against Intellectual Property
Infringement

March 24, 2010

Introduction

Intellectual property (IP) enforcement is an essential part of commerce. It is an increasingly urgent matter for the United States because IP is a large component of what the United States produces and because this content is increasingly vulnerable in the global, knowledge-based economy.

In the past, IP has been a domestic issue where victims and perpetrators exist within the same borders. Within this context national governments created IP laws that protected domestic inventors, artists, and industries with little attention to the international legal community. In the old economy, closed networks, regional supply chains and localized consumers created an economic climate that insulated many firms from differing legal frameworks and IP enforcement priorities of foreign countries. Yet as international markets developed and IT has allowed for ubiquitous information exchange across the globe, foreign IP theft has begun to weaken U.S. competitiveness, innovation, jobs and standard of living.

As documented here and elsewhere, IP makes substantial contributions to the U.S. economy and the impact of IP violations harm the U.S. economy, U.S. businesses and U.S. consumers. Policymakers must do more to protect IP domestically and internationally. Toward that end we make a number of recommendations, including:

- Strengthen the U.S. trade enforcement regime,
- Combat digital piracy,
- Educate other nations on the importance of intellectual property, and
- Use technology to better monitor and combat the problem of global IP theft.

... **Forced Technology Transfer**

Developing nations have long argued that intellectual property laws keep them from enjoying the benefits of the intellectual property created by the developed world. This is a bit like the children's story about the Little Red Hen who did all the work to make the bread—including growing the wheat and grinding the grain, making the loaves and baking them—only to have her barnyard mates demand the right to eat it. To appease developing nations, negotiators enshrined the right to access intellectual property in the TRIPS agreement, requiring developed countries to provide incentives for their companies to transfer technology to least-developed countries. But mercantilist nations have decided that this is not enough. Some force companies to transfer technology such as product designs, software code, or technical specifications. For example, some countries make technology transfer a requirement for selling a product or service in the market through certification procedures, or foreign direct investment (FDI) requirements such as joint ventures and R&D. Mercantilist nations use these unfair tactics to give their companies a competitive advantage by enabling them to get their competitor's technology for free, even while they run large trade deficits that could be going to pay for technology.

... Joint Ventures/R&D

Conditioning technology transfer before foreign companies can enter into business alliances, such as joint ventures, or requiring them to set up R&D facilities before getting access to the domestic market are two ways nations get intellectual property for free.³¹ While this is not quite theft, it is extortion. These practices violate the WTO when they require companies to comply with certain provisions as a condition for market access. But they are popular tactics with some mercantilist countries because they let them get valuable technological know-how, which they can then use to support domestic technology development in direct competition to the foreign firms originally supplying it. It is one thing if companies want to invest in R&D in other nations as part of their business strategy. It is quite another for them to be coerced into doing so in order to access the market. Since the WTO prohibits forced technology transfer, mercantilist nations that are members have discovered that they can avoid a WTO violation by —encouraging technology transfer without formally requiring it. One way is for local government officials reviewing investment applications to make it clear that a quid-pro-quo deal is required for approval. Burying these deals in the fog of bureaucracy lets mercantilist countries hide their WTO violations.

China is a master of joint venture and R&D technology transfer deals. In the 1990s when the country began aggressively promoting domestic technological innovation it developed investment and industrial policies that included explicit provisions for technology transfers, particularly for collaboration in production, research, and training.³² So, rather than doing the hard work to build its domestic technology industries, or better yet focus on raising productivity in low producing Chinese industries, China decided it would be much easier and faster simply to take the technology from foreign companies. It uses several approaches. One is to get companies to donate equipment. Others include requiring companies to establish a research institution, center, or lab for joint R&D in order to get approval for joint ventures. Several large U.S. companies, including Motorola, IBM, and General Motors Corporation, have since built more than 400 R&D facilities in China. China recently approved Intel's plans to build a semiconductor chip fabricating plant in China, although U.S. export control laws will probably prevent China from accessing the company's most sensitive technologies. While these companies haven't publicly said they were forced to make these investments or give up technology, it's likely that many had little choice since China's strategy of extorting technology from U.S. companies as a condition for entering the market is an important source of technology transfer from the United States to China.³³

Since the WTO prohibits these types of deals and China is a member it now hides them in the informal agreements that Chinese government officials force on foreign companies when they apply for joint ventures. They also still require other WTO-violating provisions, such as export performance and local content, to approve an investment or a loan from a Chinese bank.³⁴ So China continues to violate the WTO, only more covertly, getting U.S. technology and paying nothing in return. U.S. companies continue to capitulate because they have no choice. They either give up their technology or they lose out to other competitors in the growing Chinese market.

China is not the only nation that has figured out how to force foreign companies to give up their intellectual property. Brazil is taking a page out of China's book in its new innovation law that encourages public-private R&D collaboration, but does not provide for the protection of the intellectual property resulting from that collaboration. So, a company that invested and participated in the development of a new IT product in Brazil would not be able to exclude others from capitalizing on the invention.³⁵ If a company could not be sure that it could protect its investment in its invention, it would not have an incentive to innovate. Yet Brazil, like China, is an important market for IT goods and services and one which many companies feel they cannot afford to ignore. Like China, Brazil wants the benefit of gaining the technology without paying for it, while maintaining a \$7.2 billion trade surplus with the United States...

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...35. Lawrence A. Kogan, —Rediscovering the Value of Intellectual Property Rights: How Brazil's Recognition and Protection of Foreign IPRs Can Stimulate Domestic Innovation and Generate Economic Growth,|| *International Journal of Economic Development*, Volume Eight, Number 1-2 (2006): 23.

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