



Statement of the U.S. Chamber's Global Intellectual Property Center

ON: USTR Special 301 Report

TO: Office of United States Trade Representative

BY: U.S. Chamber of Commerce's Global Intellectual Property Center

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The U.S. Chamber of Commerce is the world's largest business federation representing the interests of more than 3 million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on issues are developed by Chamber members serving on committees, subcommittees, councils, and task forces. Nearly 1,900 businesspeople participate in this process.

**Statement
to the
OFFICE OF UNITED STATES TRADE REPRESENTATIVE
on behalf of the
U.S. CHAMBER OF COMMERCE
Tuesday, February 24, 2015**

Good morning. I am Patrick Kilbride, executive director for international intellectual property at the U.S. Chamber of Commerce's Global Intellectual Property Center (GIPC).

Thank you for the opportunity to testify and for your continued efforts to promote the importance of intellectual property (IP) worldwide.

The GIPC, in cooperation with the Chamber's International Division, welcomed the opportunity to submit joint comments on this year's Special 301 Review.

Our submission seeks to highlight both systemic as well as country-specific challenges.

We included 18 countries in our submission; double that of the Chamber's 2014 submission.

These countries were chosen based on factors including the size of the market, the geo-political significance of the market, or specific intellectual property issues posed by that country.

That is to say that, although these countries each present particular challenges to U.S. intellectual property rights holders, they should not necessarily be taken to represent the worst performers globally.

BUILDING A COMMUNITY OF FIRST MARKET'S

We here at the Chamber greatly appreciate the ability to give input into the Special 301 process.

But instead of thinking of the Special 301 Review as an American-made and government-wielded hammer, the Chamber approached this process as an exercise to

demonstrate how strong, predictable, and meaningful IP infrastructures benefit economies of all shapes, sizes, and makeups.

Every nation has the opportunity to enter the community of first-markets, but the non-discriminant protection of IP is a necessary precondition to succeed in fostering local entrepreneurship and attracting foreign investment.

In many countries around the world, innovators face unsurmountable obstacles in their efforts to bring groundbreaking ideas to market, denying all of us effective access to much of the world's creative capacity.

Time and again, we've seen that some countries have a tendency to idealize their economies as "importers of IP," thereby questioning the domestic benefit of a strong IP regime and almost certainly ensuring a self-fulfilling prophecy.

The U.S. example is illustrative where, due to a strong IP framework, fully three-fifths of U.S. exports are generated by IP-intensive industries, supporting some 40 million jobs.

Furthermore, California's Silicon Valley—the birthplace of the information-age—leads all other major international locales in patent filings.

And interestingly, nearly one-half of all patents granted there are to immigrant inventors, underlying the notion that global entrepreneurs seek environments with strong IP rights.

Nations which skirt enforcement against counterfeiting and piracy or fail to establish predictable and meaningful IP regimes ostensibly lose talent, as well as the faith of the international business community.

With the guidance of the U.S. government and industry, we can together help build the next generation of net-exporters of IP, through bilateral cooperation, multilateral trade agreements, and helpful and informative exercises like the Special 301 Review, which identifies significant IP challenges industry faces in key markets.

GIPC INDEX

The GIPC set out to create an intellectual property roadmap for countries seeking to foster robust intellectual property policies that facilitate the creation of jobs, continued innovation, and access to new technologies.

The result, the GIPC's 2015 International IP Index, UP: Unlimited Potential (GIPC Index), is an empirical assessment of the strengths and weaknesses of 30 developmentally and geographically diverse countries.

This cross-disciplinary, empirical assessment of intellectual property protection and enforcement in 30 economies provides a snapshot of what countries are doing well and what they can be doing better.

The GIPC Index is not intended to be an industry Special 301 Report, and as such, not all countries included in the GIPC Index are included in the Chamber's Special 301 submission.

Rather, the GIPC Index serves as a discretionary policy tool to those countries wishing to evaluate the strengths and deficiencies in their intellectual property environments.

We have attached a copy of the GIPC Index to our submission to provide further evidence to support the issues raised throughout.

HIGHLIGHTS OF GIPC SUBMISSION

Global Trends

Now, I would like to discuss a few global trends on the opportunities and challenges facing IP rights:

Unequivocally, the Chamber is supportive of the negotiation of bilateral and regional free trade agreements (FTAs) that can speed up the process of global trade integration and further unify and update intellectual property protections.

The Trans-Pacific Partnership Agreement (TPP) is the next immediate opportunity where such standards should be pursued and built upon with important trading partners.

If these countries can reach consensus on a strong set of protections for copyrights, patents, trademarks, and trade secrets, the TPP promises to create a new global benchmark for IP.

And in doing so, they may establish an economic bloc of \$28 trillion in collective GDP that will provide a substantial safe haven for innovation.

The precedential value for setting standards in this critical trading region as well as the sheer scope and size of the TPP, necessitates that the U.S. pursue high-standard benchmarks for IP.

The Chamber also supports the Transatlantic Trade and Investment Partnership (TTIP) as a vehicle for increasing trade between the United States and the European Union and meaningfully addressing measures that hinder IP protection and enforcement, such as those driven by industrial policy priorities or that otherwise impede market access and trade or undermine the rights of IP holders.

But suffice to say, TTIP and TPP would just be a twinkle in the Administration's eye if not for Trade Promotion Authority (TPA).

The Chamber is supportive of advancing TPA legislation reflecting the bipartisan, bicameral provisions on negotiating objectives developed in the last Congress, which were supported by all major business groups.

Furthermore, the Chamber asks that the U.S. Government and relevant agencies remain involved in the multilateral rules-making and norm-setting process.

We must continue to promote and defend a robust international system of intellectual property rights and norms and oppose any efforts to weaken or expropriate intellectual property in international institutions, whether in WIPO, WTO, WHO, United Nations Framework Convention on Climate Change (UNFCCC), the Post-2015 Development Agenda, or other multilateral institutions.

The U.S. Government should also be a vocal supporter of strong intellectual property protections in regional forums, such as the Asia Pacific Economic Forum (APEC) and the Organization for Economic Cooperation and Development (OECD).

These forums provide important opportunities to engage like-minded partners and emerging powers to ensure the development of strong intellectual property frameworks that drive innovation.

In addition, 2014 proved a trying year for trademark and brand owners.

Trademark owners have been subject to unwarranted efforts to weaken protections in the name of public health.

New rules and governance structures on the Internet make the protection of trademarks cost-prohibitive or even impossible.

Governments are trying to strip companies of their brands, trade dress and trademarks—the list goes on.

The Chamber remains particularly concerned by government policies that reduce or eliminate the ability of manufacturers to distinguish, and consumers to identify trusted, regulated, and well-known brands.

As such, the GIPC established the Global Brands Council (GBC) in October 2014, to give trademark owners and brands a strong voice in this fight.

And throughout the Chamber’s Special 301 submission, you will see our mounting concerns with protecting trademarks globally.

Country Assessments

In addition to these global trends, the GIPC submission also highlights specific country assessments. Over the past year, a number of countries have taken steps toward improving their IP systems by securing effective and transparent IP rules. For example:

- The U.S. and Indian governments have re-opened a formal dialogue through the bilateral Trade Policy Forum, with the creation of an Intellectual Property Working Group as a core element.
- Canada recently concluded negotiations with the European Union on the Comprehensive Economic and Trade Agreement (CETA). Should the provisions of CETA successfully be implemented, Canada’s IP environment would improve significantly.
- Following a GIPC report, the European Medicines Agency (EMA) published its final policy guidelines with respect to the disclosure of clinical trial data, which include significant potential safeguards to stakeholders pending the full implementation by member states.
- We recognize China’s recent institutional reforms focused on the rule of law include the establishment of three specialized IP courts at in Beijing, Shanghai

and Guangzhou. China has made efforts to put a group of experienced IP judges in the new courts to better deal with “technology centric” matters.

However, challenges remain. Key economies have also experienced significant backsliding in establishing meaningful and predictable IP systems, thereby potentially stifling innovation, and arresting the ability of creators and inventors to have their IP protected. Some examples are:

India

The election of Indian Prime Minister Sri Narendra Modi in 2014 provided an important opportunity to re-establish a collaborative and productive working relationship on intellectual property issues between India and the United States.

And there are reasons to be optimistic that the new government will take steps to strengthen India’s intellectual property environment.

We are encouraged by the establishment of the Intellectual Property Working Group and IPR Think Tank, and urge the U.S. Government to again provide an opportunity for a mid-year status check of India’s intellectual property regime through an Out-of-Cycle Review, which will ensure that subsequent steps are appropriately recognized.

In the meantime, although the administration’s rhetoric has been positive and the rate of erosion has stabilized, there is currently no substantive basis for a change in India’s previous designation from the 2014 Special 301 Review.

Reflecting the legacy of previous governments, India’s overall environment for intellectual property remains poor, notwithstanding important signals that India may take steps to enhance its IP-related competitiveness.

At the present time:

- Patentability requirements remain outside established international best practices;
- There is a lack of specific IP rights for the life sciences sector;
- The enforcement environment remains challenging, with persistent high levels of physical and online piracy;

- and, finally, India is not a contracting party to many of the core international treaties that collectively establish an international standard for intellectual property laws and enforcement.

China

China has a rapid reform agenda in all aspects of its economy and IP is playing a significant role in China's development. However, China still maintains many policies with the purpose of driving innovation that instead favor domestic champions and create barriers for foreign companies to compete with domestic Chinese counterparts. Critical inventions made by our members still lack sufficient protections in spite of an active reforms agenda in China.

Examples of such policies include indigenous innovation accreditation; continued government-led standard setting that often excludes foreign parties from participation and sets standards that are inconsistent with international standards to the detriment of consumers; and forced or coerced technology transfer and licensing policies by local administrative authorities.

Separate from the discriminatory application of innovation policies, critical concerns surround the arbitrary patentability standards in rejecting or invalidating pharmaceutical patents; the large presence of low or no quality utility model patents; China's draft service invention regulations; and China's continued lack of effective trade secret protection.

There is an opportunity in the pharmaceutical sector, given the legislative revisions underway, to adopt pro-innovation policies to support the growth of innovative medicines sector through creating a patent linkage system, effective regulatory data protection, and harmonizing its patent examination guidelines with the other top patent offices.

As reported in the past, counterfeiting and piracy in China remain at epidemic levels, particularly in the online environment, and China remains the largest source of counterfeit and pirated goods in the U.S. market. However, there may be a light at the end of the tunnel. There are signs that things are changing rapidly in China in particular in the online space. It is important that the United States monitors China's efforts in the online market.

Canada

As our closest neighbor, ally, and top export market, an effective economic partnership with Canada is critical to U.S. global competitiveness.

While acceding to the North American Free Trade Agreement (NAFTA) was an important step in advancing Canadian intellectual property rights, many core IP obligations are absent from the 20-year old agreement, and Canada's implementation thereof has remained a concern for industry.

This condition makes setting high standards in the Trans-Pacific Partnership Agreement—of which Canada is a negotiating party—all the more important for gaining meaningful cooperation on IP.

Unfortunately, Canada's IP climate remains far behind other developed countries.

In recent years, the Canadian government has taken a number of steps to improve IP protection in the copyright space. In particular, the Chamber applauds the Canadian government's recent ratification of the World Intellectual Property Organization's (WIPO) Internet Treaties.

Additionally, the 2012 amendments to Canada's Copyright Modernization Act included a system of notification between rights holders and Internet service providers (ISPs). However, the amendments did not include a requirement for intermediaries to take down infringing materials upon becoming aware of such materials.

Industry, furthermore, faces significant hurdles with respect to patent rights in Canada.

Canadian courts have recently applied a heightened standard for patent utility by imposing an arbitrary patentability test on invention, which represents a significant erosion of the patent right. The heightened standard is inconsistent with international norms and Canada's obligations under NAFTA as well as TRIPS.

The patent utility requirements have caused nearly 20 patents to be invalidated for inutility, notwithstanding the fact that these important medicines were found to be safe and effective—in other words, useful—by Health Canada, and were indeed used by hundreds of thousands of Canadian patients.

The continued use of this heightened standard will significantly affect the growth of Canada's innovative environment, which in turn affects Canada's economic growth and global competitiveness.

Recent data included in the annex to the GIPC Index found that Canada ranks significantly below other developed countries in terms of its level of high-tech outputs, as measured by the Global Innovation Index's Innovation Output Sub-Index.

This gap in the growth of high-tech sectors, as compared to countries of similar levels of economic development, may be due to key gaps in patent protection in Canada's system, including the application of the patent utility test.

Brazil

In recent years, both the Brazilian private sector and the Brazilian government have increasingly recognized the role that strong IP protections and enforcement standards play in fostering innovation and spurring economic growth.

However, a number of specific challenges remain, particularly in the patent space.

The Brazilian National Health Surveillance Agency (ANVISA) continues to have the right to provide prior consent to pharmaceutical patents that are being examined by the Brazilian Patent Office (INPI).

Consequently, decisions on whether to grant a pharmaceutical patent are based on examination not solely by patent specialists and officials at INPI, but also by ANVISA. This standard of dual examination is inconsistent with Brazil's obligations under Article 27.1 of TRIPS.

Industry is also concerned with the pending patent reform initiative, which emulates many of the troublesome requirements of India's section 3(d), which adds an additional requirement for patentability.

Provisions in the reform initiative would narrow patentability criteria and disallow patents for new uses or new forms of known substances unless a significant improvement to the known efficacy is present.

In addition, there have been suggestions to repeal the 10-year minimum patent period guarantee which is in place to safeguard innovators for the long delays and backlog at INPI and reduce an innovators exclusivity period to a fraction of the 20-year period.

If enacted, these reforms would significantly weaken Brazil's patent environment.

Thailand

We would be remiss if we didn't mention the economy which ranked last in this year's GIPC Index.

Thailand's score in the GIPC Index fell from the previous year, primarily due to the private use and academic exceptions to copyright in addition to its inattention to combatting wide scale piracy.

The Thai National Legislative Assembly is considering many bills throughout the intellectual property fora which could fill outstanding gaps in Thailand's IP framework, although existing proposals do not fully resolve these gaps.

Nonetheless, upon enactment, the amendments would likely raise Thailand's score on the GIPC Index.

Industry, however, remains concerned about Thailand's intellectual property system as a whole, but the country's current political situation makes engagement even more tenuous and difficult.

FTA Trading Partners

While free trade agreements break down market access barriers, our trading partners are implementing and executing IP provisions to varying degrees of success.

For example, Australia's patent linkage system—which provides an inadequate mechanism for notifying patent holders of applications to market unauthorized copies of drugs—falls short of its FTA requirements in the Australia- U.S. Free Trade Agreement.

Chile also faces a shortfall in meeting its commitments under the 2004 Chile Free Trade Agreement including its heightened patentability requirements and its failure to implement protections against circumvention of technological protection measures. U.S. industry would be particularly encouraged by the full implementation of the IP

chapter of the FTA prior to the conclusion of the TPP as it would markedly strengthen Chile's IP system.

While the U.S.-Peru Trade Promotion Agreement (PTPA) included a number of IP provisions, Peru has yet to meet the PTPA obligations, such as the patent enforcement and resolution mechanism, patent term restoration, and implementation of a notice-and-takedown system for copyright violations on the Internet.

Lastly, the U.S.-Korea Free Trade Agreement (KORUS) remains the gold-standard in intellectual property protections. However, two years after enactment of KORUS, South Korea still has far to go in implementing the agreed upon provisions. In 2014, the U.S. Chamber called on South Korea to "rededicate" itself to open trade and reducing barriers to entry for business. This issue of implementation, specifically related to its insufficient patent linkage system and weak patent enforcement, has become even more significant since the Korean government expressed interest in joining the TPP negotiations.

CONCLUSION

I would like to point out that the countries and challenges discussed today are merely a representative sample of challenges faced by industry in reducing barriers to market access.

We ask that you reference the Chamber's official Special 301 submission for a more comprehensive look at the IP trade barriers.

Adequate and effective protection and enforcement of IP is vital to America's economy and to each of these economies looking to become a "first market."

We look forward to working with you and our trading partners to secure meaningful improvements to IP that create jobs, support innovation, create access to technology, and protect consumers in the United States and around the world.