

October 30, 2015

The Honorable Daniel H. Marti
United States Intellectual Property Enforcement Coordinator
Office of Management and Budget
Executive Office of the President
The White House Washington, DC 20500

Submitted via: www.regulations.gov

**Re: Request for Public Comments: Development of the Joint Strategic Plan on
Intellectual Property Enforcement 80 Fed. Reg. 52800 (September 1, 2015)**

Dear Mr. Marti:

The American Intellectual Property Law Association (“AIPLA”) is pleased to have the opportunity to present its views with respect to the U.S. Intellectual Property Enforcement Coordinator (“IPEC”) Request for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 80 Fed. Reg. 52800, dated September 1, 2015 (the “Request”).

AIPLA is a national bar association of approximately 14,000 members who are primarily lawyers engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public’s interest in healthy competition, reasonable costs, and basic fairness.

Consistent with AIPLA’s August 2012 comments on the Joint Strategic Plan, AIPLA continues to support and advocate for government efforts to improve enforcement of intellectual property rights. AIPLA also continues to support the efforts of the Intellectual Property Enforcement Coordinator to streamline and facilitate government programs which promote intellectual property enforcement, both domestically and abroad. We take this opportunity to address some specific strategy recommendations for the Joint Strategic Plan currently in development.

Specific Strategy Recommendations

A. Reduce Counterfeiting

AIPLA favors, in principle, the government providing an organized and aggressive solution to address the effects of domestic and international counterfeiting. Counterfeiting costs United

States businesses more than \$250 billion in revenue a year. In addition, it is responsible for more than 750,000 lost jobs in the United States.¹ Counterfeiting reportedly deprives local, state and federal governments of billions of dollars in tax revenue annually.² In addition, counterfeit goods may create health and safety concerns. Efficient border enforcement efforts benefit both producers and consumers by helping to reduce the need for expensive civil litigation over counterfeit goods, the cost of which is often passed on to the consumer through higher prices. Accordingly, it is important to continue efforts to combat and reduce counterfeiting.

B. Strengthen Enforcement of ITC Exclusion Orders

AIPLA continues to support IPEC's efforts to strengthen the effectiveness of enforcement of U.S. IP rights under Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 by the U.S. International Trade Commission ("ITC") and U.S. Customs and Border Protection ("CBP"). Section 337 "declares the infringement of certain statutory intellectual property rights and other forms of unfair competition in import trade to be unlawful practices."³

ITC investigations under Section 337 are frequently conducted for the purpose of identifying and blocking the importation and sale of parallel imports. Section 337 is an important and sometimes the only means of effective relief available to U.S. companies against unfair competition in the form of infringing imports. Strengthening the enforcement of ITC exclusion orders would reduce the supply of infringing goods imported into the United States.

The 2013 Joint Strategic Plan on Intellectual Property Enforcement ("2013 Strategic Plan") specifically prioritized improving CBP and ITC enforcement.⁴ The 2013 Strategic Plan stated that IPEC would "chair a new interagency effort directed at strengthening the processes that CBP uses with regard to enforcement of ITC exclusion orders pertaining to intellectual property." The 2013 Strategic Plan further explained that "one focus of the interagency review will be on

¹ http://www.stopfakes.gov/sites/default/files/Consumer_Tips.pdf.

² Transcript of the Minutes of the Committee on Public Safety [hereinafter Transcript] 4 (June 13, 2013) (explaining that current trademark law only applies to manufacturers or sellers and isn't addressing the issue properly). *See also* Julie Shapiro, *Tourists Say They'll Still Buy Handbags Despite Proposed Law*, DNAINFO NEW YORK (Apr. 26, 2011), <http://www.dnainfo.com/newyork/20110426/downtown/tourists-say-theyll-still-buy-counterfeit-handbags-despite-proposed-law> (describing the current trademark law as "incomplete" as it does address the demand for counterfeit goods); LEGISLATIVE RESEARCH CENTER, *The New York City Council Website*, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=885894&GUID=926F900B-7A1E-48E8-991D-6A3CFE24EA90&Options=ID|Text|&Search=544> (last visited Dec. 20, 2013).

³ The U.S. International Trade Commission, *Section 337 Investigations: Answers to Frequently Asked Questions 1* (DIANE Publishing, Mar. 2009); *See also* 19 U.S.C. § 1337(a)(1)(B)-(E).

⁴ Office of the U.S. Intellectual Property Enforcement Coordinator, 2013 Joint Strategic Plan on Intellectual Property Enforcement, June 2013, <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf>.

ensuring that CBP uses transparent and accurate procedures for determining whether an article is covered by the ITC exclusion order.”⁵

AIPLA supports the provision of resources to CBP for enforcement of ITC exclusion orders, including for providing guidance on the implementation of these orders to the ports. For example, determining whether an article is covered by the ITC exclusion order, especially when new or designed products are at issue, requires more robust resources than those available today.

Toward that end, AIPLA and a number of other interested parties offering comments in response to IPEC’s notice seeking public comments on the interagency review of the exclusion order enforcement process, 78 Fed. Reg. 37242 (June 20, 2013), suggested or supported the creation of an *inter partes* procedure for such settings. See Comments of the AIPLA regarding Interagency Review of Exclusion Order Enforcement Process, at 3 (July 19, 2013). In February 2015, the ITC also announced a new pilot program for expediting rulings on whether or not redesigned or new products are covered by outstanding exclusion orders.

AIPLA supports IPEC’s continued focus on improving the effectiveness and transparency of procedures for enforcement of ITC exclusion orders and supports focusing attention and resources on strengthening the ITC exclusion order process. AIPLA encourages and supports IPEC’s efforts to strengthen the enforcement process and improve procedures such as *inter partes* review.

C. Design Patents – CBP Authority

AIPLA believes that design patents should be enforced at the border in a way similar to trademarks and copyrights, and favors investigating the possibility of including design patents within CBP authority.

The effective and efficient enforcement of design patent rights at the border by the government and private parties would benefit the public in a number of ways. First, elimination of counterfeit products provides an overall public benefit as it protects public expectations about the quality of products, and protects public health and safety through the elimination of harmful and substandard counterfeits. Further, efficient enforcement efforts at the border benefit both producers and consumers by reducing, in some cases, the need for expensive civil litigation, the cost of which is often passed on to the consumer through higher prices. Accordingly, AIPLA continues to encourage IPEC efforts to consider strengthening design protection at the border.

⁵ Office of the U.S. Intellectual Property Enforcement Coordinator, 2013 Joint Strategic Plan on Intellectual Property Enforcement, June 2013, (at page 17) <https://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipec-joint-strategic-plan.pdf>.

D. Trade Secrets

As the Administration is no doubt aware, there has been a significant increase in media reports and commentary describing a growing rise in trade secret theft from hackers, international companies, and rogue employees interested in stealing trade secrets of U.S. businesses.

In February 2013, President Obama's Administration issued a report on the Strategy on Mitigating the Theft of Trade Secrets, which outlined a five-prong "Strategy Action" list including: (1) focus diplomatic efforts to protect trade secrets overseas; (2) promote voluntary best practices by private industry to protect trade secrets; (3) enhance domestic law enforcement operations; (4) improve domestic legislation; and (5) public awareness and stakeholder outreach.⁶ This report recognized the increasing problem of trade secret theft against U.S. corporations by foreign competitors and former employees.⁷ The National Security Agency has described recent trade secret theft as the greatest transfer of wealth in history, estimating the losses of theft of trade secrets and cyber breaches to be in excess of \$334 billion per year,⁸ and the Federal Bureau of Investigation has estimated that \$13 billion in trade secrets has been stolen from American businesses.⁹

We believe that the strategy issued in the 2013 Administration report continues to be relevant and represents many of the concerns faced by U.S. trade secret owners. In addition, the time has come to consider a federal civil remedy to address international trade secret misappropriation. Accordingly, AIPLA supports a federal cause of action to protect trade secrets from misappropriation. Although state trade secret laws afford U.S. trade secret owners many protections, the broad jurisdictional powers of federal courts could assist them further. U.S. trade secret owners understand their own technology and trade secrets, and generally they are incentivized to litigate, as needed, to protect those assets. Despite their best efforts, government agencies and prosecutors may not be able to move as quickly or with the nimbleness of a private litigant in some circumstances. Given the importance of speed and injunctive relief in trade secret cases, a federal private right of action would be a powerful tool in the case of trade secret misappropriation. Thus, a federal civil remedy for trade secret misappropriation would provide more adequate remedies for claimants.

⁶ Executive Office of the President of the United States, Administration Strategy on Mitigating the Theft of U.S. Trade Secrets 1 (2013), https://www.whitehouse.gov/sites/default/files/omb/IPEC/admin_strategy_on_mitigating_the_theft_of_u.s._trade_secrets.pdf.

⁷ *Id.*; Office of the National Counterintelligence Executive (ONCIX), "Foreign Spies Stealing US Economic Secrets in Cyberspace," November 2011, at 1, http://www.ncix.gov/publications/reports/fecie_all/Foreign_Economic_Collection_2011.pdf.

⁸ The Case for Enhanced Protection of Trade Secrets in the Trans-Pacific Partnership Agreement, U.S. Chamber of Commerce, 10-12, https://www.uschamber.com/sites/default/files/legacy/international/files/Final%20TPP%20Trade%20Secrets%208_0.pdf.

⁹ Frank Figliuzzi, *FBI's New Campaign Targets Corporate Espionage*, Wall Street Journal, May 11, 2012, at 1, <http://www.wsj.com/articles/SB10001424052702304543904577396520137905092>.

Economic Costs of Enforcing Intellectual Property Rights

As stated in AIPLA's August 2012 letter, AIPLA continues to believe that the government should strive to reduce the cost of enforcement on IP owners by reducing court costs, streamlining litigation, speeding up time to judgment, and removing barriers to collection of judgments. AIPLA is in a unique position to highlight the high costs of IP protection, through the direct input of its members.

Every two years, AIPLA conducts an economic survey of its members on, *inter alia*, the cost of enforcement of intellectual property rights. The latest survey, conducted in 2015, solicited participation from 8,485 AIPLA members, of whom over 1,366 members responded.¹⁰ Based on the responses, AIPLA compiled statistics on the typical cost of litigation, including outside legal and paralegal services, local counsel, associates, paralegals, travel and living expenses, fees and costs for court reporters, photocopies, courier services, exhibit preparation, analytical testing, expert witnesses, translators, surveys, jury advisors, and similar expenses. Median litigation costs were compiled for patent, trademark and copyright infringement cases in the courts, as well as trade secret misappropriation cases.

The 2015 median litigation costs in this area, including mediation and costs through the end of the litigation, were as follows:

Patent Infringement Suit:

<\$1 Million at risk: \$700,000
\$1-10M at risk: \$2,200,000
\$10-25M at risk: \$3,350,000
>\$25M at risk: \$5,300,000¹¹

Trademark Infringement Suit:

<\$1 Million at risk: \$375,000
\$1-10M at risk: \$575,000
\$10-25M at risk: \$820,000
>\$25M at risk: \$1,700,000¹²

Copyright Infringement Suit:

<\$1 Million at risk: \$290,000
\$1-10M at risk: \$563,000
\$10-25M at risk: \$850,000
>\$25M at risk: \$1,300,000¹³

¹⁰ Am. Intellectual Prop. Law Ass'n, Report of the Economic Survey, at 1 (2015).

¹¹ *Id.* at 37.

¹² *Id.* at 38.

¹³ *Id.* at 39.

Trade Secret Misappropriation Suit:

<\$1 Million at risk: \$550,000

\$1-10M at risk: \$975,000

\$10-25M at risk: \$1,600,000

>\$25M at risk: \$2,763,000¹⁴

While these figures represent the median cost, the actual cost could be substantially higher. As an example, the estimated costs of a patent infringement suit with >\$25M at risk ranged from approximately \$3,000,000 to \$9,750,000. These numbers illustrate the serious consideration and substantial resources that must be available for IP owners to enforce their rights, and why it is necessary to strive to reduce such costs when possible.

Conclusion

AIPLA appreciates the opportunity to provide input to IPEC with respect to the Development of the Joint Strategic Plan on Intellectual Property Enforcement. We are continuing to gather information on these important issues, and look forward to continuing to work with IPEC and to providing more information as it becomes available.

Sincerely,



Denise W. DeFranco

President

American Intellectual Property Law Association

¹⁴ *Id.*