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# Statement of the U.S. Chamber of Commerce

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**ON:** NAFTA at Twenty: Accomplishments, Challenges, and the Way Forward on Intellectual Property

**TO:** U.S. House Committee on Foreign Affairs  
Subcommittee on the Western Hemisphere

**BY:** Mr. Mark Elliot, Executive Vice President, Global Intellectual Property Center, U.S. Chamber of Commerce

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

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.

## Introduction

- Thank you Chairman Salmon and Ranking Member Sires.
- The U.S. Chamber of Commerce appreciates your leadership and the opportunity to testify today on the North American Free Trade Agreement on its twentieth anniversary.
- My name is Mark Elliot. I am the Executive Vice President of the U.S. Chamber of Commerce's Global Intellectual Property Center.
- Today, I am going to focus my testimony on intellectual property matters in regard to NAFTA, and Canada and Mexico specifically.
- As you know, the U.S. Chamber of Commerce's views on NAFTA are both wide-ranging and extensive, and my testimony today is intended to address only a narrow sub-section of the Chamber's overall perspective on NAFTA. The Chamber plans to submit broad comments encompassing all aspects of the NAFTA relationship to the Committee for review as well.
- In discussing the importance of protecting and enforcing intellectual property rights throughout the North American region, it is unfortunately necessary to highlight some concerns industry has, particularly in Canada.

## Importance of IP

- First, it is important to note the critical role intellectual property plays in creating jobs and spurring innovation.
- According to the U.S. Department of Commerce, U.S. IP industries account for:
  - \$5 trillion of the nation's GDP;
  - 60 percent of exports; and
  - 40 million jobs;
- In short, intellectual property drives knowledge economies.

## NAFTA and Rising International IP Standards

- At the time of its signing, NAFTA intended to create the best levels of IP protection and enforcement ever negotiated. It was a testament to how important IP was viewed by Mexico, Canada, and the United States.
- However, as this was signed twenty years ago, this level of IP protection is now a very low bar in 2014.
- Since NAFTA, IP protections and enforcement have continually improved around the globe, now making the IP provisions of NAFTA outdated. Standards in agreements such as the Korea-U.S. Free Trade Agreement are providing greater opportunity for trade.
- Even with the low bar set by NAFTA, we continue to see challenges in both Mexico and Canada on IP protections and enforcement.

## IP Index highlights challenges specifically in Mexico and Canada

- Last December, the Chamber released an International IP Index, a comprehensive review of the intellectual property environment in 11 key markets based on existing international standards and best practices.
- Both Canada and Mexico's respective scores put them clearly in the second tier of countries, well below the developed-country standard, and markedly inconsistent with the competitiveness agendas both countries are advancing in other areas.
- With the highest possible score of 25, the likes of the United States, UK, and Australia performed well, receiving scores between 24 and 21. However, Mexico received a 12.2 and Canada received a mere 14.2, which actually puts its IP policies and enforcement closer to Russia, Malaysia, and even China.
- Mexico's low score is due to its relatively weak copyright protection, particularly online piracy, and the lack of IP enforcement and effective enforcement practices.

- We continue to see progress in Mexico, and we are working with the Mexican government on issues such as illegal camcording, implementing the World Intellectual Property Organization (WIPO) Internet Treaties and liability issues related to internet service providers (ISPs). In addition, Mexico is taking steps to provide regulatory data protection (RDP) for pharmaceuticals and providing a transparent pathway for patent linkage.
- As a whole, the business community is working productively with Mexico to improve its IP environment.
- Canada also scored low on the GIPC Index— in enforcement, particularly on effective border measures, but also scored weak on membership and ratification of international treaties and scored fairly low in both patents and copyrights.
- However, industry is expressing serious concerns about the IP environment in Canada.
- Canada is the largest trading partner for the United States—the bilateral trade totaled \$582.4 billion a year, the equivalent of \$1.6 billion a day in goods. U.S. exports to Canada totaled \$277 billion per year, and as mentioned earlier, IP-industries account for 60% of U.S. exports. This makes it all the more bewildering to the business community at how substandard Canada’s IP system is.
- In a recent op-ed in the Ottawa Citizen, Robert Atkinson, a Canadian and President of the Information Technology and Innovation Foundation (ITIF) and Michelle Wein, Trade Policy Analyst with ITIF called Canada “one of the leading nations in the world. And yet, surprisingly, Canada has a long tradition of providing intellectual property protections on a level with that of the developing world.”
- I would like to provide a few specific examples of these industry concerns:

**(1) Patent Utility:** The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the North America Free Trade Agreement (NAFTA) require patents to be granted for inventions that are new, non-obvious, and useful, also known as “utility.” This is not intended to be a burdensome requirement. It is simply to ensure that patents are not granted for inoperable, fanciful, or purely aesthetic inventions.

- Over the past eight years, approximately twenty pharmaceutical patents have been revoked in Canada for what is called “lack of utility or usefulness.
- This trend, which is not happening elsewhere in the world, is due to Canadian courts requiring evidence that is wholly inappropriate for judicial review of patent approvals, and it is a top concern for innovative pharmaceutical companies looking to do business in Canada.
  - For example, Indiana’s Eli Lilly had a patent overturned under this patent utility umbrella, costing the innovative company \$500 million in lost revenue.
- Canada is the only place patents have been routinely challenged solely on utility grounds.

**(2) Ex Officio:** Canada has yet to provide *ex officio* authority to its Customs officials to allow for the seizure of counterfeit and pirated products at the border. Instead, customs officials can seize suspected counterfeit goods only if 1) a court order is obtained by the trademark owner authorizing Customs to stop the goods; or 2) a directive is provided to Customs by the Royal Canadian Mounted Police (RCMP).

- We understand pending legislation in the Canadian Parliament addresses this, and we urge its swift passage.
- As former Canadian Ambassador to the United States Derek Burney has written, it is more difficult to transport a used mattress across the border strapped to the top of your car than it is to import a trunk-load of counterfeit software, DVDs or running shoes, which are not prohibited goods. Why? The mattress is deemed a health and safety risk under Canadian law unless it is certified to have been properly cleaned and fumigated. Believe it or not, Canadian border officials have no such authority independently to seize counterfeit goods.

**(3) Illicit Goods:** We continue to view with alarm the ongoing and substantial illicit trafficking in goods across some segments of the United States- Canada border. Recent reports estimate that the trade in counterfeit (and pirated) goods is as much as \$600 billion.

- Counterfeiting and piracy in Canada are worth approximately \$20 to 30 billion annually. These include sporting goods, medicines and personal care products, consumer electronics, pharmaceuticals, automotive parts, apparel, the list goes on. These goods may or may not be safe; they are clearly not regulated and not taxed.

- This dangerous situation only serves to enrich organized criminals at the expense, in many instances, of public security, safety, and brand owners. Greater efforts need to be undertaken by both Canadian and U.S. authorities to address this illegal activity.

**(4) No Right of Appeal:** Due to Canada's regulations a patent owner, unlike a generic drug producer, does not have a right to an administrative appeal. Following a decision by the Court in the first instance in favor of the generic producer, an appeal filed by the patent owner becomes moot. On the other hand, the right of appeal is available to the generic producer if the patent owner prevails in the first instance.

**(5) Copyright Protection:** Canada has also failed to ratify the WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT),

- It is important to note that the recent signing of the Comprehensive and Economic and Trade Agreement (CETA) between the EU and Canada provides Canada with the opportunity to greatly improve its IP environment, particularly when it comes to pharmaceuticals.
- We encourage Canada to implement the CETA agreement appropriately and amend legislation and regulations accordingly.

#### 2014 IP Index and TPP

- Later this month, the GIPC will be releasing the second edition of the International IP Index, with updated scores for the U. S., Canada, and Mexico.
- The Index will show that while progress has been made, there is still much more work to be done. Progress in Canada pertains to the improvements outlined in the CETA agreement and recognize the changes in Canada's Copyright law.

#### Opportunities for Improvement

- 2014 will present many opportunities for the United States, Canada, and Mexico to further improve their IP environments.

- As always, all three countries have the ability to pass legislation to ensure IP is better protected and enforced – and all three countries certainly have areas where they can improve.
- In particular, all three countries are participants in the Trans Pacific Partnership (TPP) Agreement negotiations.
- The TPP is being negotiated between 12 different countries, and it is essential that it include robust standards for IP protection, using the Korea-U.S. free trade agreement as a model and providing 12 years of regulatory data protection for biologic products.
- We encourage the U.S., Canadian, Mexican, and all TPP negotiators to uphold their positions and protect IP from the efforts to weaken existing laws and norms.
- The TPP provides the U.S., Canada, and Mexico the opportunity to stand shoulder-to-shoulder in support of strong IP protections, innovation, and access to the creations and inventions of the 21<sup>st</sup> century.
- A TPP agreement that includes a high-standard IP chapter is good for jobs and good for international trade. The TPP will also allow Canada to raise its IP standards, promote innovation, and bolster its growing economy.
- 2014 should be the year when the North American neighbors work together to improve each other's IP environments and the IP environments of countries around the world.
- We thank the Subcommittee for holding his hearing, and we look forward to working with you to address those IP concerns on the North American continent.