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Attached are comments in response to the request issued by the IPEC. My comments are focused on the issue of software piracy and intellectual property violations related to the misuse of software, where I have significant experience. I am formerly the Director of anti-piracy activities in the Windows division at Microsoft where I managed efforts to combine technology and customer awareness efforts in coordination with enforcement activities.

The comments offered in the attached document are not a complete analysis or a complete set of recommendations. I am happy to provide additional input at a later time. Also, numerous specific examples exist of observations made in this document. Please contact me directly for more information as most of this information cannot be shared in a published form.

Thank you,  
Alex Kochis

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# Suggestions for Improving the Protection of Intellectual Property

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Submitted in response to: FR Doc. 2010–3539 Filed 2–22–10; 8:45 am

Submitted by: Alex Kochis, FiveBy Solutions, Inc.

Submitted on: March 23, 2010

## Submitted by

Alex Kochis is the founder of FiveBy Solutions<sup>i</sup> the mission of which is to deploy experience and strategic thinking to increase product value and mitigate the effects of software piracy. Prior to founding FiveBy Solutions Mr. Kochis led efforts at Microsoft to create a company-wide initiative to combat software piracy. He also served as Director of anti-piracy activities for the Windows division. In that capacity he managed one of the most extensive software anti-piracy programs in the industry.

## Introduction

*These comments are for the protection of software and software-based products.*

Software piracy is a problem with billions of dollars of products counterfeited, downloaded, and in other ways pirated each year domestically and abroad. **The complexity of this problem requires an integrated approach where the strategies of enforcement, education, awareness, and the application of technology-based approaches can reinforce each other.** This observation is based on the personal real-world experience of managing and observing successful efforts at reducing the impact of software piracy on existing large-scale businesses. However, it is also my experience that many aspects of IP infringement are not well understood, making many efforts to curb it haphazard and ineffective.

The creation of a Joint Strategic Plan represents the best opportunity to establish an integrated approach across government agencies while also stimulating the private sector to support the efforts through innovative product design and technology. Given the scope of this effort **IPEC should also ensure that the problem of IP infringement is well understood through research** efforts that develop insights that benefit IP rights-holders and improve the effectiveness of enforcement efforts.

The Joint Strategic Plan is also an opportunity to provide greater transparency and assessment of the effectiveness of the approaches being taken and the progress that is being made.

The comments offered in this response do not represent a complete analysis of current efforts or a full recommendation of future activities. I am happy to provide additional input at a later time. Also, numerous specific examples exist of observations made in this document. Please contact me directly for more information as most of the examples cannot be shared in a published form.

## Focus on the US First

The US government's interest in protecting intellectual property should be focused first on the IP rights of the manufacturers of products sold in the US regardless of their origin. **With a firmer grasp of how to make meaningful and sustained progress the methods can be extrapolated to the protection of IP abroad.** Improvements in the IP protection climate in the US will help US interests for the following reasons:

### **The US market is large and powerful**

The US software market is so large that the volume of software piracy that occurs is much greater than countries with higher rates of piracy but smaller market sizes. It is for this reason that IP protection within the US should be the focus of your work.

Example: In its annual study of software piracy<sup>ii</sup> the Business Software Alliance reported that the 2008 piracy rate of packaged software on PCs in the US was 20% while the rate in China was an amazing 80%. This translates into a US market loss of \$9.143 billion compared to that in China of only \$6.677 billion.

By continuing to focus on improving protections within the US with its relatively better IP protection climate and the size of the US market even small incremental improvements can yield meaningful gains. With the majority of producers of software for the US market being US-based companies the gains will be greatest for the US and provide leverage for influencing international markets.

Additionally, by improving the IP protection climate within the US the US will become even more attractive for development and sales of new products and IP-based services.

### **Developing Innovative Solutions and 'Best Practices'**

Size and power of the market doesn't mean that we have all of the information we need. Due largely to the relatively recent and rapid growth of the global and domestic computer software industries there is much that is not known about how to best protect products from being counterfeited, illegally sold or resold, or otherwise used in violation of their respective licensing. New challenges have been introduced as a result of the Internet and the increasing ease of online commerce as well as the ability to locate, share and download content have grown.

Government support for research and investment in improvement of IP protections in the US would encourage the following:

- insights into the nature of the problem;
- development of innovative solutions;
- cultivation of 'best practice' approaches to reducing the impact of piracy.

**While not all markets are the same the innovations and best practices that are proven effective here can be shared with other countries to elevate the protection of IP in other markets.**

## Summary of Recommendations

- Begin with a focus on the US market
- Fund research into various aspects of software IP rights violations
- Support innovation in the IP protection space (e.g. through SBIR/STTR<sup>iii</sup> topics)
- Improve coordination and sharing of information between rights-holders and enforcement agencies

## Specific Recommendations in Response to Request

Responses are specific to topics identified in **Part II** as well as the listed **Supplemental Comment Topics**.

### In response to request for input on:

*Reducing the supply of infringing goods, domestically and internationally*

The supply of infringing software products should be thought of in relation to the general type and method of the infringement as well as the intended purpose of the infringement--commercial, personal, social etc.. Strategies for curbing the supply of each should be evaluated independently. There are three primary types of infringements related to software products that should be addressed in the IPEC comprehensive plan--counterfeit, unlicensed, and license abuse.

### **Counterfeit**

Counterfeit software products can be categorized into two basic types, high-quality and low-quality counterfeits which will require two different but mutually supportive approaches.

#### *“High Quality” Counterfeit*

High-quality counterfeits are sold to a customer as a product that is believed to be licensed and genuine. Counterfeiters will normally copy anti-counterfeiting features of product packaging such as special labels, holograms, special printing techniques and other packaging elements. High quality counterfeits of software products are normally manufactured for sale in the US.

Enforcement, awareness, and product-based features (in both packaging and software) all are important elements of a successful strategy for combatting high quality counterfeit.

Enforcement: enforcement activities are crucial to reducing the impact of high quality counterfeits particularly in the US market and other developed international markets. Enforcement activities are most effective when a steady stream of reliable and specific

intelligence is available and easily shared between agencies. Rights-holders have an opportunity to enhance, primarily through product-based approaches, the volume and usefulness of some types of intelligence as well as support ways of making the information more easily shared.

To be most effective IPEC oversee the development of a common approach to intelligence gathering. **This approach would encourage rights-holders to collect and structure reports of IP violations collected from customers or initiated by the rights-holders that can be easily shared.** This information can then be used to discover and track common sources of counterfeit products as well as emerging trends and techniques in counterfeiting and distribution.

Awareness: increasing awareness through educational activities and marketing can enable consumers to better protect themselves from counterfeit products. IPEC can encourage rights-holders and industry associations to communicate with their customers ways of distinguishing genuine products from counterfeit. The endorsement of government agencies in public/private awareness campaigns and PSAs are effective tools for engaging the attention of customers. Messaging used in such campaigns should focus more on credible risks to personal property to be effective rather than legal penalties. More research should be done on this topic to refine the approach.

Product-based approaches: encouraging rights-holders to continue investing and implementing product-based approaches to mitigating high quality counterfeit is critical. **Online activation systems that gather customer-submitted piracy reports are an effective way of gathering useful and specific information.** IPEC should find ways to stimulate rights-holders and solution providers to invest and innovate in this area to enable improved intelligence and an even more effective and productive public/private partnership in combatting IP rights violations.

#### *“Low Quality” Counterfeit*

While low quality counterfeits typically do not attempt to replicate the original packaging or anti-counterfeiting devices that are found on genuine products their corollary in developed markets is a significant threat.

International markets often have low-quality counterfeit products freely available. They are packaged with a minimum of cost and typically cost between \$1 and \$5 USD. These products do not attempt to replicate the original packaging of the genuine versions of the software they contain.

Low quality counterfeit products not only undermine the value of genuine products but are also sources of transmitting malware. Low quality counterfeits are most often used by less sophisticated users or users without access to broadband connections to obtain software at very low prices. Low quality counterfeits limit the establishment of a viable software industry; unfortunately these markets are currently experiencing some of the most significant growth worldwide.

Given that most low quality counterfeit is found outside of the US IPEC should work through USTR and other agencies to pressure other governments to reduce the presence of counterfeit in their markets.

**Domestically IPEC can stimulate rights-holders to find ways to make differentiating their genuine products from illegal copies easier. Developments of new technologies and approaches to this issue will help to differentiate genuine products from high quality counterfeit as well when the incremental value can only reasonably be obtained with a genuine and licensed product.**

### **Unlicensed/shared distributions**

The corollary in developed markets to the “low quality” counterfeit distributions are the unlicensed and freely shared distributions that are available online. Sometimes they are referred to in the online community as ‘warez’ or as ‘hacked’ or ‘cracked’ copies they are available through online services and protocols such as BitTorrent, HTTP/Web file services and a variety of Peer-to-Peer networks. This type of unlicensed distribution can be thought of as the developed market or high-bandwidth version of low quality counterfeit. Typically no attempt is made to represent the product as a genuine and licensed version of the product being distributed, an anti-establishment attitude prevails in this community.

One of the primary challenges in confronting this activity is the speed with which the online community of hackers adapts to attempts to counter their activities. A serious study should be made of innovative ways to counter this.

**Similar to the approach recommended for low and high quality counterfeit development of effective differentiation strategies are likely an important way for rights-holders to reduce the attractiveness of this activity to consumers.**

### **License Abuse**

This can occur as interpersonal or casual sharing of files between friends or can be the deliberate overuse of a product in violation of its license. This kind of IP rights violation occurs in consumer and business settings alike.

License abuse is a critical issue to consider within an overall IPR initiative however my response at this time is not able to fully address this issue but I would be happy to consult with you further on this at a later time. One point I would like to make, however, is that behavior change among naïve users of products is achievable through simple educational efforts and can be greatly magnified when product-based approaches are developed that actively assist a user in ensuring the product is used properly.

### **In response to Supplemental Comment Topic #3**

*Identify specific existing processes involving cooperation between stakeholders and the U.S. Government (or between stakeholders and other governments) that have been particularly effective at curtailing or preventing infringement.*

There have been numerous incidences of IP rights-holders documenting cases of counterfeiting or rights violations and bringing a significant amount of useful information to the attention of national authorities who can act on that information. IPEC should conduct an effort to collect and share the best practices of cooperation between stakeholders/rights-holders and US, state or local authorities and broadly with rights-holders.

#### **In response to Supplemental Comment Topic #9**

*Suggest how state and local law enforcement authorities could more effectively assist in intellectual property enforcement efforts, including whether coordination could be improved, if necessary, and whether they should be vested with additional authority to more actively participate in prosecutions involving intellectual property enforcement.*

Anecdotally incidences of IP rights violations that have been reported to local authorities only to have the authorities advise the customer to take their complaint to the rights-holder directly or to the reseller of the product. Users are easily frustrated. If IPR protection is an important part of the social and economic fabric of this country then anytime a report of a violation is offered to a local authority they should know is effective in helping to solve the problem. Offering better satisfaction will increase the reporting of violations.

IPEC should consider ways of creating a reporting function that is available to USG, state, and local authorities to share reports of violations or possibly accept reports directly from individuals that can be used to improve collection and enable analysis of reporting patterns, geographic concentrations, and changes and trends in IP rights violating activities.

#### **In response to Supplemental Comment Topic #14**

*Suggest specific methods to limit or prevent use of the Internet to sell and/or otherwise distribute or disseminate infringing products (physical goods or digital content).*

The government should establish standards and guidelines for educating consumers and providing recourse to customers when counterfeiting occurs.

Distribution and dissemination of infringing products happens over the Internet primarily in the form of the online sale of infringing physical or digital goods, often through online auction sites and online classifieds sites. Online distribution also occurs in the form of the free sharing of commercial products through peer-to-peer networks, download sources, or protocols such as BitTorrent.

With respect to the online commerce that takes place through auction and online classifieds sites, developing guidelines and incentives will increase the educational information and reporting and intelligence that can come from the auction and classified site operators. This information can help authorities and rights-holders to increase the effectiveness of their activities.

Some recourse does exist for rights-holders today in the form of cease & desist notices, cooperation from Internet Service Providers and others to remove or disconnect sites that host infringing content and other approaches pursued through legal action. **However significant progress that is sustainable**

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Submitted by Alex Kochis, March 23<sup>rd</sup>, 2010*

**over time will require the coordinated application of enforcement, awareness and product-based approaches.**

## **In response to Supplemental Comment Topic #20**

*Provide specific suggestions on the need for public education and awareness programs for consumers, including a description of how these programs should be designed, estimates of their cost, whether they should focus on specific products that pose a threat to public health, such as counterfeit pharmaceuticals, or whether should they be general infringement awareness programs.*

As a part of an integrated strategy in addition to my response to topic 14 I would add that **any attempt to raise awareness with consumers look for ways to communicate credible legal risk, highlight other credible risks (such as computer viruses, other malware and identity theft) to the consumer and demonstrate credibly how the value of genuine products is greater.**

## **Thank you**

I appreciate the opportunity to provide this input on this important work and I would like to congratulate Mrs. Espinel on being chosen as the coordinator of these efforts. I am pleased to offer any additional assistance that I can. Please feel free to contact me.

Thank you,

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<sup>i</sup> FiveBy Solutions offers an integrated approach to reducing the effects of software piracy. The approach includes specific methods for driving strategic planning, organizational alignment, market research and customer insight, positioning and messaging, marketing campaigns and product strategy. FiveBy Solutions also supports implementation of overall operations of anti-piracy activities as well as strategic consulting.

<sup>ii</sup> Sixth Annual BSA-IDC Global Software Piracy Study:  
<http://global.bsa.org/globalpiracy2008/studies/globalpiracy2008.pdf>

<sup>iii</sup> Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) information at:  
<http://www.sbir.gov/index.html>