



**CITIZENS  
AGAINST  
GOVERNMENT  
WASTE**

**Thomas A. Schatz, *President***  
1100 Connecticut Ave., N.W., Suite 650  
Washington, D.C. 20036  
cagw.org

December 21, 2018

Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
Washington, D.C. 20580

Ref: Docket ID: FTC-2018-0090

Dear Commissioners,

Citizens Against Government Waste (CAGW) is a private, nonpartisan, nonprofit organization representing more than one million members and supporters nationwide. Founded in 1984 by the late industrialist J. Peter Grace and syndicated columnist Jack Anderson, CAGW was established to follow up on the work of the President's Private Sector Survey on Cost Control, also known as the Grace Commission. On behalf of CAGW's members and supporters, I submit the following responses to the hearing questions presented online for the Federal Trade Commission's (FTC) hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century relating to innovation and intellectual property rights.

***Is there a role for the government in advancing or supporting innovation?***

The Founding Fathers protected intellectual property (IP) in Article 1, Section 8 of the Constitution:

To promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

This clause is rooted in the notion that the best way to encourage creation and dissemination of new inventions and creative works to the benefit of both the public good and individual liberty is to recognize one's right to his or her IP. Unlike IP, personal property is protected under the Fourth and Fifth Amendments, not in the Constitution itself.

In his first Presidential address on April 30, 1789, George Washington encouraged Congress to enact legislation that would further protect IP, stating, "nothing ... can better deserve your patronage than the promotion of science and literature."<sup>1</sup> The Senate responded on January 11, 1790, noting that, "Literature and science are essential to the preservation of a free constitution; the measures of government should, therefore, be calculated to strengthen the confidence that is due to that important truth." On January 12, 1790, the House of Representatives issued its concurrence with the President stating, "the promotion of science and literature will contribute to the security of a free Government; in the progress of our deliberations we shall not lose sight of objects so worthy of our regard." Congress responded by passing H.R. 43, the Copyright Act of 1790, which was signed into law on May 31, 1790.<sup>2</sup>

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<sup>1</sup> William F. Patry, *Copyright Law and Practice*, The Bureau of National Affairs, Inc., 1994, 2000, <http://digital-law-online.info/patry/patry5.html>.

<sup>2</sup> *Ibid.*

As one of the first laws enacted by Congress, the legislation provided copyright protection for books, maps, and charts and established both the U.S. Copyright Office and the U.S. Patent and Trademark Office (PTO). The agencies were tasked with cataloguing, analyzing, and protecting IP rights.<sup>3</sup>

***What is the importance of intellectual property – all forms – in advancing, protecting, and supporting innovation? Does it differ because of industry-specific or other market-based factors, or because of the form of intellectual property?***

Innovation is best served by strong IP protection regardless of industry, market-based factors, or the form of IP. According to a September 26, 2016 Economics and Statistics Administration and PTO report, IP-intensive industries support nearly 28 million jobs in the U.S.<sup>4</sup> Between 2010 and 2014, the value added by IP-intensive industries accounted for \$6.6 trillion of the GDP. Directly and indirectly, IP-intensive industries supported 45.5 million jobs, or about 30 percent of all employment in 2014.<sup>5</sup>

***How does modern economic analysis and empirical literature view the relationship between intellectual property and innovation, and the role of government in advancing and supporting innovation? Are there differences that depend on the type of intellectual property, and the protections offered for that intellectual property?***

Most Americans do not think much about how property rights affect them in their daily lives. If they consider the subject at all, they are likely to be more aware of the monetary value of private property than IP. People will protect their valuables at home and work by locking their doors and installing security systems, and they usually have a good idea of how much their business, home, car, and investments are worth.

But few people realize that nearly every product they use is the result of someone's idea, or IP; nor are they likely to know the value of IP to the economy. And it is even more unlikely that they understand the impact of IP theft on either the creative process or the tens of millions of ordinary Americans who participate in that process.

Strong protection of IP provides real benefits. Consider the following American inventions and whether they would have come about in a climate of weak IP protections:

- The telegraph in 1835
- The phonograph in 1877
- The light bulb in 1880
- Air conditioning in 1902
- The television in 1927
- The point contact transistor in 1947-1948
- Marshmallow peeps in 1952
- Magnetic tape cartridges in 1964
- The cell phone in 1973
- The microprocessor in 1973

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<sup>3</sup> Ibid.

<sup>4</sup> Justin Antonipillai and Michelle K. Lee, "Intellectual Property and the U.S. Economy: 2016 Update," Economics and Statistics Administration and the U.S. Patent and Trademark Office, September 26, 2016, <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

<sup>5</sup> Ibid.

***How can the FTC use its enforcement and policy authority to advance innovation? What factors should the FTC consider in attempting to achieve this objective?***

In February 2017, the Commission on the Theft of American Intellectual Property released a report, which estimates the economic loss of IP to be between \$225 billion to \$600 billion annually.<sup>6</sup> The report estimates that counterfeit goods account for \$29 billion to \$41 billion annually.<sup>7</sup> According to the Department of Homeland Security, the number of IP rights seizures increased from 31,560 in fiscal year (FY) 2016 to 34,143 in FY 2017.<sup>8</sup> Based on the estimated manufacturer's suggested retail price, had the seized goods been genuine, those seizures would have had a value of \$1,206,382,219.<sup>9</sup>

According to the Global Innovation Policy Center at the U.S. Chamber of Commerce (GIPC), counterfeit goods and merchandise can include not just clothing, but also automotive parts, industrial parts, medicines, and tobacco products.<sup>10</sup> On October 10, 2012, the National Highway Traffic Safety Administration (NHTSA) released a warning,<sup>11</sup> including a video,<sup>12</sup> about an increase of counterfeit airbags on the market. These counterfeit airbags, when deployed had a series of malfunctions such as non-deployment and the issuance of metal shrapnel when deployed.

The U.S. received high marks for enforcement in the GIPC's annual IP Index, issued in February 2018. In 2016, the Trade Facilitation and Trade Enforcement Act was enacted, which strengthened the ability of border patrol officers to interdict and seize suspected infringing goods at the border.<sup>13</sup>

As noted in the GIPC's 2018 IP Index, while improvements to IP protection have been made, continuing to protect and enforce IP rights is critical to enabling future innovation and economic growth.<sup>14</sup>

***What are emerging trends in patent quality and litigation issues? Should these trends influence the FTC's enforcement and policy agenda?***

Over the past 10 years, the FTC has taken 85 enforcement actions. Of these cases, only one related to IP and resulted in a \$100 million settlement from Mallinckrodt Ard, Inc. (Questcor Pharmaceuticals) to resolve charges of antitrust violations linked to an adrenocorticotrophic hormone drug.<sup>15</sup>

In May 2018, IP Watchdog released the results of a PricewaterhouseCoopers 2018 Patent Litigation Study, which showed that the number of a patent cases have declined since 2011,

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<sup>6</sup> "The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy, Update to the IP Commission Report," The Commission on the Theft of American Intellectual Property, The National Bureau of Asian Research, February 2017, [http://www.ipcommission.org/report/IP\\_Commission\\_Report\\_Update\\_2017.pdf](http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf).

<sup>7</sup> Ibid.

<sup>8</sup> "Intellectual Property Rights Seizure Statistics, Fiscal Year 2017," U.S. Department of Homeland Security, February 2018, <https://www.cbp.gov/sites/default/files/assets/documents/2018-Feb/trade-fy2017-ipr-seizures.pdf>.

<sup>9</sup> Ibid.

<sup>10</sup> "Measuring the Magnitude of Global Counterfeiting: Creation of a Contemporary Global Measure of Physical Counterfeiting," Global Innovation Policy Center, June 20, 2016, <https://www.theglobalipcenter.com/measuring-the-magnitude/>.

<sup>11</sup> Ashley Halsey, III, "Government Warns Counterfeit Auto Air Bags Hitting U.S. Markets," *The Washington Post*, October 10, 2012, [https://www.washingtonpost.com/local/trafficandcommuting/government-warns-counterfeit-auto-air-bags-hitting-us-markets/2012/10/10/7f4b4438-12db-11e2-ba83-a7a396e6b2a7\\_story.html?noredirect=on&utm\\_term=.ecd24c748b3c](https://www.washingtonpost.com/local/trafficandcommuting/government-warns-counterfeit-auto-air-bags-hitting-us-markets/2012/10/10/7f4b4438-12db-11e2-ba83-a7a396e6b2a7_story.html?noredirect=on&utm_term=.ecd24c748b3c).

<sup>12</sup> "NHTSA Counterfeit Air Bags Testing," National Highway Traffic Safety Administration, YouTube, October 10, 2012, <https://www.youtube.com/watch?v=zunqSzAxeYc>, video.

<sup>13</sup> "International IP Index," Global Innovation Policy Center, Sixth Edition, February 2018, [http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC\\_IP\\_Index\\_2018.pdf](http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf).

<sup>14</sup> Ibid.

<sup>15</sup> Mallinckrodt Ard, Inc. (Questcor Pharmaceuticals), FTC File Number 1310172, Federal Trade Commission Case Summary, July 14, 2017, <https://www.ftc.gov/enforcement/cases-proceedings/1310172/mallinckrodt-ard-inc-questcor-pharmaceuticals>.

while patent grants continue to increase.<sup>16</sup> It is also interesting to note that of the patent holder median damages awarded to non-practicing entities (NPE), universities and non-profits make up the bulk of the awards, receiving \$16.6 million from 1998 to 2017.

***How should the current status of copyright law and current business practices influence the FTC's enforcement and policy agenda?***

In 2017, the FTC and the U.S. Department of Justice published Antitrust Guidelines for the Licensing of Intellectual Property. This document provides good guidance on the agency's role in protection IP rights against anti-competitive activities.<sup>17</sup>

But, one problem that deserves closer scrutiny and protection is the ongoing threat from counterfeit and pirated content online. The FTC should consider how piracy of digital goods, including movies, music, and software applications not only is anti-competitive, but is also often a harbinger of malware and other virtual attacks on unsuspecting consumers. With the increased proliferation of streaming set-top boxes on the market, consumers are at greater risk of downloading malware onto their networks through pirated streaming content. The movie industry has filed several piracy lawsuits against these manufacturers to reduce the availability of pirated digital goods being downloaded by unsuspecting consumers. These lawsuits include a \$90 million settlement on October 24, 2018 paid to DISH Network by SET TV for damages stemming from allegations that SET TV was using DISH channels and retransmitting them without permission.<sup>18</sup>

Protecting consumers from false advertising and sales of set-top boxes that transmit pirated cable, network and streaming services transmissions should be the focus of any copyright enforcement activity by the FTC.

Again, thank you for providing the opportunity to offer comments to this hearing process. If you have any questions regarding these comments, please contact either myself, or CAGW Technology and Telecommunications Policy Director Deborah Collier at 202-467-5300.

Sincerely,



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<sup>16</sup> Landan Ansell, Ronen Arad, Doug Branch, HyeYun Lee, Adil Pahsa, and Paul Robinson, "2018 Patent Litigation Study," Price Waterhouse Cooper, May 2018, <http://www.ipwatchdog.com/wp-content/uploads/2018/09/2018-pwc-patent-litigation-study.pdf>.

<sup>17</sup> "Antitrust Guidelines for the Licensing of Intellectual Property," U.S. Department of Justice and the Federal Trade Commission, January 12, 2017, [https://www.ftc.gov/system/files/documents/public\\_statements/1049793/ip\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf).

<sup>18</sup> *DISH Network L.L.C. and NAGRASTAR LLC, v. NELSON JOHNSON, JASON LABOSSIÈRE, SET BROADCAST LLC, STREAMING ENTERTAINMENT TECHNOLOGY LLC, DOE 1, as Trustee for Chateau Living Revocable Trust and DOE 2, as Trustee for Macromint Trust, individually and collectively d/b/a www.setvnow.com*, Civil Case No. 8:18-cv-1332-T-33AAS, Final Judgement and Permanent Injunction, October 24, 2018, <https://torrentfreak.com/images/DISH-v-SET-judgment.pdf>.