

THE KNOWLEDGE POLICE

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I. INTRODUCTION

The theft of U.S. trade secrets and intellectual property (“IP”) has reached such critical proportions that President Barack Obama personally called China’s new president, Xi Jinping, to ask him to take serious steps to investigate and halt any IP thefts against U.S. companies that originate from China.¹ Other senior Washington officials, such as National Security Advisor Tom Donilon, Treasury Secretary Jacob Lew, Secretary of State John Kerry, and Chairman of the Joint Chiefs Army General Martin Dempsey, have voiced similar concerns.² In 2008, Congress enacted the Prioritizing Resources and Organization for Intellectual Property Act (“PRO-IP Act”),³ which led to the appointment of the nation’s first “IP Czar.”⁴ While this development was greatly heralded as an important achievement in the effort to coordinate national efforts to combat IP infringement, this Article argues that the office of the IP Czar has been largely ineffective.

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1. Tom Gjelten, *U.S. Turns Up Heat on Costly Commercial Cybertheft in China*, NAT’L PUB. RADIO (May 7, 2013, 3:03 AM), <http://www.npr.org/2013/05/07/181668369/u-s-turns-up-heat-on-costly-commercial-cyber-theft-in-china>.

2. *Id.*

3. Pub. L. No. 110-403, 122 Stat. 4256 (2008) (codified as amended in scattered sections of 15 U.S.C., 17 U.S.C., and 18 U.S.C.).

4. The first Intellectual Property Enforcement Coordinator (“IPEC” or “IP Czar”) was Victoria Espinel, who resigned in 2013. Ben Sisario, *Interview with the U.S. Copyright Czar*, N.Y. TIMES, June 8, 2011, <http://www.nytimes.com> (search “NY Times” for “Victoria Espinel”); then follow “Interview with the U.S. Copyright Czar” hyperlink); *U.S. Copyright Czar Resigns from White House for Job at Anti-Piracy Firm*, RUSS. TODAY (Aug. 28, 2013, 11:32 PM), <http://rt.com/usa/espinel-copyright-czar-anti-piracy-130>.

This Article recognizes the serious threat of IP theft,⁵ and asserts that an important goal for the U.S. federal government is to develop an effective national strategy for IP protection and enforcement. A vast body of academic literature addresses the normative and economic justifications, or lack thereof, for imposing civil and criminal penalties on IP infringement.⁶ Although this is an important debate, this Article will take current enforcement levels as a given, and will hold them constant. The analysis in this Article will, therefore, focus on the topic of federal interagency coordination holding constant the current state of criminal IP rights enforcement, and, at the same time, recognizing that effective enforcement of existing laws is an important goal.

For an increasing number of developed and developing nations, economic growth is largely contingent on the creation and commercialization of knowledge-based assets, such as IP.⁷ In the United States, it has become apparent among top policymakers that to grow the economy, the government must provide adequate policies that encourage

5. See OFFICE OF THE NAT'L COUNTERINTELLIGENCE EXEC., FOREIGN SPIES STEALING U.S. ECONOMIC SECRETS IN CYBERSPACE 3 (2011) [hereinafter ONCIX REPORT], available at http://www.ncix.gov/publications/reports/fecie_all/Foreign_Economic_Collection_2011.pdf.

6. See, e.g., Miriam Bitton, *Rethinking the Anti-Counterfeiting Trade Agreement's Criminal Copyright Enforcement Measures*, 102 J. CRIM. L. & CRIMINOLOGY 67, 72-84 (2012); Stuart P. Green, *Plagiarism, Norms, and the Limits of Theft Law: Some Observations on the Use of Criminal Sanctions in Enforcing Intellectual Property Rights*, 54 HASTINGS L.J. 167, 240-41 (2002); I. Trotter Hardy, *Criminal Copyright Infringement*, 11 WM. & MARY BILL RTS. J. 305, 323-37 (2002); Irina D. Manta, *The Puzzle of Criminal Sanctions for Intellectual Property Infringement*, 24 HARV. J.L. & TECH. 469, 493-99 (2011); Geraldine Szott Moohr, *The Crime of Copyright Infringement: An Inquiry Based on Morality, Harm, and Criminal Theory*, 83 B.U. L. REV. 731, 753-78 (2003).

7. See J. Benjamin Bai & Guoping Da, *Strategies for Trade Secrets Protection in China*, 9 NW. J. TECH. & INTELL. PROP. 351, 351 (2011) (discussing how "China became the world's most litigious country for intellectual property disputes in 2005, surpassing the U.S. in the number of intellectual property lawsuits filed annually"); David Orozco, *Will India and China Profit from Technological Innovation?*, 5 NW. J. TECH. & INTELL. PROP. 426, 427-28 (2007) (discussing how developing economies such as "India and China have dynamic and rapidly growing technology sectors, yet their markets for technology [are underdeveloped] . . . partly because of a history of inadequate appropriability regimes and investments in generic technologies that do not lend themselves to be secured as intellectual properties traded in markets for technology"); Shigeki Kamiyama et al., *Valuation and Exploitation of Intellectual Property* 6 (Statistical Analysis of Sci., Tech. & Indus., Working Paper 2006/5, 2006), available at <http://www.oecd.org/sti/sci-tech/37031481.pdf>. Shigeki Kamiyama et al. assert that:

In knowledge-based economies, intellectual assets such as intellectual property (IP), human capital and organisational play a crucial role in business performance and economic growth. An increasing share of the market value of firms appears to derive from their intellectual assets, and firms are managing these assets more actively to further enhance their contribution to value creation.

Kamiyama et al., *supra*, at 6.

knowledge diffusion, while preserving the incentive to invest in knowledge-based assets.⁸

Several challenges underscore the need to develop a national strategy for IP protection and enforcement. For example, particular industries are targeted in a wholesale manner for IP theft. Some of these industries are critical to secure growth and competitiveness, and merit additional levels of security.⁹ Other technologies are important to preserve military or national security, and likewise merit particularized precautions.¹⁰ IP-intensive industries also generate highly paid and skilled jobs.

In 2012, the Department of Commerce and the U.S. Patent and Trademark Office (“USPTO”) authored a study to examine the impact of IP on the U.S. economy and job creation.¹¹ That study found that IP-intensive industries contributed directly to 27.1 million jobs and indirectly to an additional 12.9 million jobs in 2010.¹² Additionally, IP-intensive sectors accounted for approximately \$5.06 trillion in value added, or 34.8% of the U.S. gross domestic product.¹³ These jobs historically pay relatively well, with average weekly wages of \$1156 in

8. For example, patents in high technology sectors may impede innovation and block open access to technology in general. See also R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV. 995, 1001 (2003) (discussing how the incentive justification is the only traditional utilitarian basis of property that extends to IP). See generally JAMES BESSEN & MICHAEL J. MEURER, *PATENT FAILURE: HOW JUDGES, BUREAUCRATS, AND LAWYERS PUT INNOVATORS AT RISK* (2008) (arguing that vague patent claims in high technology sectors raise costs for the majority of firms); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698 (1998) (raising the anti-commons problem in IP-related industries, like biotechnology).

9. See David Orozco, *Amending the Economic Espionage Act to Require the Disclosure of National Security-Related Technology Thefts*, 62 CATH. U. L. REV. 877, 890-91 (2013) [hereinafter Orozco, *Economic Espionage Act*] (stating that “trade secret theft by foreign agents has clear and significant implications for national competitiveness because many of the country’s most profitable and rapidly-growing industries are targeted for trade secret theft”). Some of the technologies identified as important for national competitiveness include clean technologies, pharmaceuticals, and nanotechnology. *Id.*

10. *Id.* at 891 (“Trade secrets also significantly affect national security if they relate to classified information or information pertaining to military technologies.”); ONCIX REPORT, *supra* note 5, at 3 (“[I]llicit transfer of technology with military applications to a hostile state [or organization] . . . could endanger the lives of US and allied military personnel.”); see also Brian Grow, *Fake Cisco, Real Threat: Bogus Gear Could Enable Spying*, BUSINESSWEEK, Oct. 13, 2008, at 38, 38 (discussing how counterfeit Cisco routers from China may have created a vulnerability in secure military networks).

11. See generally ECON. & STATISTICS ADMIN. & U.S. PATENT & TRADEMARK OFFICE, *INTELLECTUAL PROPERTY AND THE U.S. ECONOMY: INDUSTRIES IN FOCUS* (2012), available at http://www.uspto.gov/news/publications/IP_Report_March_2012.pdf.

12. *Id.* at 43.

13. *Id.* at 45.

2010, which is 42% higher than other non-IP-intensive wages.¹⁴ Another report issued by Congress estimates that U.S. companies have lost between \$200 to \$250 billion per year and 750,000 jobs to IP theft.¹⁵

IP theft has been linked to organized crime and can pose a danger to consumer safety due to faulty counterfeit products.¹⁶ For example, counterfeit pharmaceuticals are a thriving area of black market trade, and these products may cause personal injury and even death in some cases.¹⁷ For all of these reasons, it is increasingly important for the federal government to develop a comprehensive, coordinated, and effective national strategy for IP protection and enforcement.

Serious efforts have been undertaken by the federal government to address these challenges. These efforts, however, such as the PRO-IP Act, have not been adequately explored in the legal scholarship.¹⁸ This Article will provide an initial critique of the government's efforts to create a national IP enforcement strategy and coordination mechanism, what is labeled in this Article as a national "knowledge police." As will be addressed in Part II, in spite of the government's willingness to expand criminal penalties for all sorts of IP infringement, the proliferation of laws has not adequately deterred illegal conduct.¹⁹ A key—but often overlooked—aspect of this increasingly complex area of the law is the adequate intergovernmental coordination among the various federal agencies that share overlapping authority necessary to execute a cohesive national IP enforcement strategy.²⁰

14. *Id.* at 50.

15. H.R. REP. NO. 110-617, at 21 (2008).

16. OFFICE OF THE U.S. INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR, 2010 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT app. 2, at 52-53 (2010), available at http://whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf (describing the U.S. government's plan to enforce IP rights); ORG. FOR ECON. CO-OPERATION AND DEV., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY: EXECUTIVE SUMMARY 8-10, 15 (2007), available at <http://www.oecd.org/industry/ind/38707619.pdf>.

17. See U.S. DEP'T OF JUSTICE, PROGRESS REPORT OF THE DEPARTMENT OF JUSTICE'S TASK FORCE ON INTELLECTUAL PROPERTY 21-22 (2006) [hereinafter DOJ, PROGRESS REPORT], available at <http://www.justice.gov/opa/documents/ipreport61906.pdf>.

18. The academic discourse related to the IPEC is hardly existent. One of the few treatments on this subject is Susan Sell, *The Global IP Upward Ratchet, Anti-Counterfeiting and Piracy Enforcement Efforts: The State of Play* 6-8 (PIJIP Research Paper No. 15, 2010), available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1016&context=research>.

19. For example, trade secret criminal prosecutions, although on the rise, remain relatively rare. See Orozco, *Economic Espionage Act*, *supra* note 9, at 894-95 (discussing why domestic civil trade secrets infringement suits are more common than criminal trade secret cases).

20. The effective enforcement of federal legislation requires the cooperation of various federal agencies. See U.S. GEN. ACCOUNTABILITY OFFICE, GAO/T-GGD-00-95, MANAGING FOR RESULTS: USING GPRA TO HELP CONGRESSIONAL DECISIONMAKING AND STRENGTHEN OVERSIGHT 19 (2000), available at <http://www.gao.gov/assets/110/108330.pdf> ("Virtually all of the results that the

To address this gap in the literature and provide the critique, this Article will examine the complex range of administrative agency interactions designed to implement the growing list of federal criminal IP statutes.²¹ It is important to critically examine the administrative structure developed to execute these laws because greater administrative complexity, triggered by the expansion of various criminal enforcement statutes, can hinder interagency coordination and stifle the overall aims of policy and legislative reform.²² This Article will, therefore, discuss the successes, failures, challenges, and opportunities that exist in the federal administration of this increasingly complex area of law, and will examine the collaboration techniques adopted by the various governmental agencies that execute IP protection and enforcement statutes.

A central aspect of this critique will focus on the activities of the Office of the U.S. Intellectual Property Enforcement Coordinator (“IPEC”), referred to as the nation’s first “IP Czar.”²³ Although widely heralded as an important development in the effort to coordinate and improve IP enforcement, the IP Czar, to date, has proven largely ineffective. As will be discussed, the recent creation of this office through the passage of the PRO-IP Act was considered necessary to achieve clarity and purpose in the government’s previously unsuccessful efforts to develop a coordinated national IP strategy or knowledge police.²⁴ The IPEC has been charged with organizing a national IP enforcement policy, and has undertaken efforts to coordinate resources among federal agencies that are related to the achievement of that objective.²⁵

The IPEC’s efforts to develop a coordinated knowledge police fall short, however, in some important respects. For example, patents play an

federal government strives to achieve require the concerted and coordinated efforts of two or more agencies.”).

21. See *infra* Part II.B. The list of criminal IP statutes has grown considerably to include: (1) patents, see 18 U.S.C. § 497 (2012); 35 U.S.C. § 292 (2012); (2) trade secrets, see 18 U.S.C. §§ 1831-1839 (2012); (3) copyrights, 17 U.S.C. § 506(a) (2012); 18 U.S.C. §§ 2318–2319 (2012); and (4) trademarks, see 15 U.S.C. § 1117 (2012); 18 U.S.C. § 2320 (2012).

22. See Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1139-46, 1182 (2012) (referring to a “shared regulatory space” when various agencies have overlapping authority and a need to coordinate efforts).

23. See Frank Ahrens, *House Bill to Create Anti-Piracy Czar Advances*, WASH. POST, May 1, 2008, at D1.

24. See *infra* Part II.B.

25. 15 U.S.C. § 8111(b)(1) (2006); see U.S. INTELLECTUAL PROP. ENFORCEMENT COORDINATOR, 2013 JOINT STRATEGIC PLAN ON INTELLECTUAL PROPERTY ENFORCEMENT 19-24 (2013) [hereinafter 2013 JOINT STRATEGIC PLAN], available at <http://www.whitehouse.gov/sites/default/files/omb/IPEC/2013-us-ipecc-joint-strategic-plan.pdf>.

insignificant role in the IPEC's national strategy, despite the fact that patent rights play a vital role in the economy.²⁶ This Article will explore why patents are altogether excluded from a national enforcement strategy, and the implications of this exclusion. Two reasons are advanced to account for this omission, and these are the lack of criminal penalties for patent infringement, and political economy forces acting on the patent system.²⁷ A consequence of the failure to integrate patents into the national enforcement strategy has resulted in the IPEC's inability to coordinate activities between the International Trade Commission ("ITC") and other federal enforcement agencies. The ITC is an independent IP tribunal that hears patent and other IP cases, and is an increasingly important venue for adjudicating patent disputes with international trade implications.²⁸

Another key deficiency in the IPEC's coordination efforts is its overall lack of strategic planning. For example, a key component of strategic planning is prioritizing resources to achieve well-defined goals.²⁹ Another component of strategic planning is defining existing strengths, weaknesses, opportunities, and threats, or engaging in what is called a "SWOT" analysis.³⁰ Despite having the opportunity to do so since its creation in 2008, the IPEC has not engaged in any of these essential strategic planning activities, which hinders its long-term effectiveness as a strategic planning and coordination office.³¹

26. ECON. & STATISTICS ADMIN. & U.S. PATENT & TRADEMARK OFFICE, *supra* note 11, at 43-45, 50-51.

27. For a discussion of the political forces acting on the patent system, see generally Colleen V. Chien, *Patent Amicus Briefs: What the Courts' Friends Can Teach Us About the Patent System*, 1 U.C. IRVINE L. REV. 395 (2011) (finding that courts listen to, or at least agree with, their friends about which cases are important, but failing to find any relation to the amount of amicus briefs filed on each side); David Orozco, *Administrative Patent Levers*, 117 PENN. ST. L. REV. 1 (2012) [hereinafter Orozco, *Patent Levers*] (discussing how political forces have shaped administrative patent rules enacted by the USPTO); David Orozco & James G. Conley, *Friends of the Court: Using Amicus Briefs to Identify Corporate Advocacy Positions in Supreme Court Patent Litigation*, 2011 U. ILL. J.L. TECH. & POL'Y 107 (2011) (discussing how corporations with differing attributes, such as size and patent capabilities, advocate different patent law outcomes).

28. See Colleen V. Chien, *Protecting Domestic Industries at the ITC*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169, 177-78 (2011) [hereinafter Chien, *Domestic Industries*].

29. See JACK KOTEEN, STRATEGIC MANAGEMENT IN PUBLIC AND NONPROFIT ORGANIZATIONS: THINKING AND ACTING STRATEGICALLY ON PUBLIC CONCERNS 10-11 (1989) (discussing that the for-profit sector has successfully applied strategic planning, and it may be successfully applied in the government non-profit sector).

30. *Id.* at 112-13 (describing a strengths, weaknesses, opportunities, and threats ("SWOT") analysis as a "WOTS-UP" analysis).

31. See, e.g., EXEC. OFFICE OF THE PRESIDENT OF THE U.S., ADMINISTRATION STRATEGY ON MITIGATING THE THEFT OF U.S. TRADE SECRETS 11-12 (2013) [hereinafter EOP, ADMINISTRATION STRATEGY], available at http://www.whitehouse.gov/sites/default/files/omb/IPEC/admin_strategy_on_mitigating_the_theft_of_u.s._trade_secrets.pdf.

Part II of this Article will provide a sketch of the federal IP enforcement landscape.³² Furthermore, Part II will specifically examine all of the federal criminal IP laws,³³ and the various administrative agencies that execute these laws.³⁴ Finally, Part II will assess the issue of interagency coordination, and the role that the IPEC plays as a legislatively designated coordination mechanism.³⁵ Part III will consider the challenges that have prevented effective coordination in this area of the law.³⁶ A historical overview is offered that examines the antecedent coordination efforts that predate the IPEC.³⁷ Part IV of this Article will assess the IPEC's coordination structure and strategy.³⁸ Moreover, Part IV offers a descriptive analysis of the IPEC's institutional structure,³⁹ and a critique of its current strategic approach.⁴⁰ A remedial solution is offered that involves engaging in a high level strategic analysis, prioritizing activities and resources, and integrating patents and the ITC to the IPEC's enforcement efforts.⁴¹

II. THE FEDERAL INTELLECTUAL PROPERTY ENFORCEMENT LANDSCAPE

IP law has, over time, become increasingly complex and subject to doctrinal⁴² and statutory expansion.⁴³ IP laws originally, and exclusively, provided civil remedies as private property rights.⁴⁴ As IP rights became increasingly important to companies,⁴⁵ and correspondingly difficult to enforce,⁴⁶ the call for greater security was met by increased criminalization and public sector involvement in enforcement.⁴⁷ This

32. *See infra* Part II.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

35. *See infra* text accompanying notes 100-03.

36. *See infra* Part III.

37. *See infra* Part III.

38. *See infra* Part IV.

39. *See infra* Part IV.A.

40. *See infra* Part IV.B.

41. *See infra* Part IV.B.1-3.

42. *E.g.*, *MGM Studios, Inc. v. Grokster Ltd.*, 545 U.S. 913, 939-41 (2005) (expanding the liability for inducing copyright infringement).

43. The statutory expansion of criminal IP offenses illustrates this point. *See supra* note 21 and accompanying text.

44. Manta, *supra* note 6, at 481.

45. *See* CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* 83-84 (1999).

46. *Id.* at 83.

47. *See* GERALDINE SZOTT MOOHR, *THE CRIMINAL LAW OF INTELLECTUAL PROPERTY AND INFORMATION: CASES AND MATERIALS 2* (2008) (stating that IP infringements were criminalized because of the increase in value of intangible property).

shift towards public sector enforcement was motivated by demands from IP rights owners for greater protection, resulting in greater state involvement in enforcing rights, and penalizing and deterring violators of those rights.

The industry has called for increased state involvement because an increasingly large percentage of the value created by companies is captured by IP assets.⁴⁸ Technological advancements also allow parties to infringe on IP rights at a relatively low cost.⁴⁹ To a considerable degree—notwithstanding significant criticism due to the intangible nature of IP rights—government regulators and policymakers have responded favorably to stakeholders' requests for greater IP protection to promote the goals of job creation, national competitiveness, and consumer safety.⁵⁰

Contrary to what is often perceived primarily as a patent-centric technology issue, the call for greater IP rights enforcement extends across a diverse swath of industries. Disparate industries, such as the media, fashion, manufacturing, and merchandising industries, have demanded greater copyright, design, and trademark infringement penalties.⁵¹ Currently, criminal prosecution at the federal level is offered for trade secret,⁵² copyright,⁵³ and trademark infringement.⁵⁴ Patent infringement is presently the only IP offense that provides civil penalties as the exclusive remedy for infringement.⁵⁵ In the absence of substantive criminal patent infringement remedies, there are two relatively minor criminal patent offenses related to false patenting.⁵⁶

What follows next is a brief overview of the public laws related to the protection and enforcement of IP rights.⁵⁷ While the majority of these laws are criminal statutes, a few laws allow a public authority to enjoin unlawful acts through *in rem* proceedings.⁵⁸ The various public

48. See SHAPIRO & VARIAN, *supra* note 45, at 83.

49. *Id.*

50. See Manta, *supra* note 6, at 482.

51. Ahrens, *supra* note 23 (discussing the broad base of support across industries in favor of the PRO-IP Act).

52. Orozco, *Economic Espionage Act*, *supra* note 9, at 884-85.

53. Manta, *supra* note 6, at 481-85.

54. *Id.* at 485-87.

55. See *id.* at 492.

56. 18 U.S.C. § 497 (2012) (criminalizing the forging of letters patent); 35 U.S.C. § 292 (2012) (criminalizing false marking).

57. See *infra* Part II.A.

58. *In Rem Definition*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/in_rem (last visited Feb. 15, 2015) (“In-rem jurisdiction is based on the location of the property and enforcement follows property rather than person.”).

laws are grouped according to the functional IP regimes comprised of trade secrets,⁵⁹ copyrights,⁶⁰ trademarks,⁶¹ and patents.⁶²

A. *The Public Intellectual Property Law Framework*

1. Trade Secrets

Trade secret theft was criminalized by the passage of the Economic Espionage Act of 1996 (“EEA”).⁶³ The legislative history of the EEA suggests that it was enacted to deal with increasing instances of foreign and state-sponsored corporate espionage.⁶⁴ Misappropriation under the EEA is defined more broadly than the Uniform Trade Secrets Act,⁶⁵ because the EEA makes it a crime to “appropriate” or “take” a trade secret without the trade secret owner’s authorization.⁶⁶ The EEA criminalizes industrial espionage undertaken for the benefit of foreign state actors and the theft of trade secrets committed by domestic or foreign private actors.⁶⁷ For individuals, the EEA imposes a fine of up to \$5 million and imprisonment for up to fifteen years.⁶⁸ The EEA authorizes civil proceedings by the Department of Justice (“DOJ”) to enjoin violations of the act, but does not create a private cause of action.⁶⁹ Victims of trade secret theft must, therefore, work with the U.S. Attorney’s Office to obtain relief under the EEA. Penalties include fines assessed against individuals and organizations, in addition to imprisonment.⁷⁰

59. *See infra* Part II.A.1.

60. *See infra* Part II.A.2.

61. *See infra* Part II.A.3.

62. *See infra* Part II.A.4.

63. 18 U.S.C. §§ 1831–1839 (2012); *see* Rochelle Cooper Dreyfuss, *Trade Secrets: How Well Should We Be Allowed to Hide Them? The Economic Espionage Act of 1996*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 6–7 (1998) (discussing how Congress believed prior criminal laws related to trade secrets to be of limited value).

64. James H.A. Pooley et al., *Understanding the Economic Espionage Act of 1996*, 5 TEX. INTELL. PROP. L.J. 177, 187 (1997).

65. 14 U.L.A. 536 (2005).

66. §§ 1831(a)(1), 1832(a)(1); UNIF. TRADE SECRETS ACT § 1, (amended 1985), 14 U.L.A. 537 (2005). This is in contrast to the usual claim of the breach of a fiduciary duty.

67. §§ 1831(a), 1832(a).

68. § 1831(a).

69. § 1836; *see also* Orozco, *Economic Espionage Act*, *supra* note 9, at 894–95 (describing other pitfalls that face companies when they rely on criminal enforcement under the EEA).

70. For example, in 2010, scientist Kexue Huang was charged with stealing trade secrets from his former employer, Dow Agrosciences. Press Release, Chinese National Charged with Economic Espionage Involving Theft of Trade Secrets from Leading Agricultural Company Based in Indianapolis (Aug. 31, 2010) (on file with the *Hofstra Law Review*). He was accused of using those secrets to conduct research that would benefit Chinese universities. *Id.* Huang ultimately pled guilty and was sentenced to eighty-seven months in prison. Press Release, Chinese National Sentenced to

2. Copyrights

The first criminal copyright law in the United States was introduced in 1897.⁷¹ Since then, criminal copyright laws have evolved considerably to cover a broad scope of activities, and have lessened the *mens rea* requirements necessary to establish liability. For example, the original basis for criminal copyright infringement required willfulness and a profit motive.⁷² The Copyright Act of 1976⁷³ modified the law by substituting the profit requirement for either “commercial advantage” or “private financial gain.”⁷⁴ The No Electronic Theft Act⁷⁵ of 1997 went a step further to criminalize copyright infringement by removing the “financial gain” requirement, and making it illegal to reproduce or distribute one or more copies of copyrighted works with a total retail value in excess of \$1000.⁷⁶ The Digital Millennium Copyright Act⁷⁷ extends criminal copyright sanctions to anyone who circumvents copyright protection systems.⁷⁸ Willful copyright violations under the recently signed Anti-Counterfeiting Trade Agreement (“ACTA”)⁷⁹ are subject to criminal provisions among all nations that have signed and ratified this treaty.⁸⁰

87 Months in Prison for Economic Espionage and Theft of Trade Secrets (Dec. 21, 2011) (on file with the *Hofstra Law Review*).

71. See Lydia Pallas Loren, *Digitization, Commodification, Criminalization: The Evolution of Criminal Copyright Infringement and the Importance of the Willfulness Requirement*, 77 WASH. U. L.Q. 835, 840 (1999).

72. Ben Shiffman et al., *Intellectual Property Crimes*, 49 AM. CRIM. L. REV. 929, 951 (2012).

73. Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended 17 U.S.C. §§ 101–801 (2012)).

74. § 506(a)(1)(A).

75. Pub. L. No. 105-147, 111 Stat. 2678 (1997) (codified as amended in scattered sections of 17 U.S.C. and 18 U.S.C.).

76. 111 Stat. at 2678.

77. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C. and 28 U.S.C.).

78. 17 U.S.C. §§ 1201, 1204 (2012).

79. 50 I.L.M. 239 (2011).

80. *Id.* art. 23, 50 I.L.M. at 250. Margot Kaminski described ACTA as “an intellectual property (IP) enforcement agreement that was negotiated by the Office of the U.S. Trade Representative (USTR) between over thirty countries over the course of five years.” Margot E. Kaminski, *The U.S. Trade Representative’s Democracy Problem: The Anti-Counterfeiting Trade Agreement (ACTA) as a Juncture for International Lawmaking in the United States*, 35 SUFFOLK TRANSNAT’L L. REV. 519, 519 (2012) (citation omitted). The legal standing of ACTA as international law is still in question, however, since at least six countries must ratify the treaty, and, so far, only Japan has done so. Anti-Counterfeiting Trade Agreement, *supra* note 79, art. 40, 50 I.L.M. at 256; Press Release, Int’l Trademark Ass’n, Japan Ratifies ACTA (Sept. 6, 2012), available at <http://www.inta.org/Press/Pages/JapanRatifiesACTA.aspx>. Further, the legality of ACTA’s ratification in the United States through the exclusive use of an executive order has been greatly debated. See Sean Flynn, *ACTA’s Constitutional Problem: The Treaty Is Not a Treaty*, 26 AM. U. INT’L L. REV. 903, 914-19 (2011); Eddan Katz & Gwen Hinze, *The Impact of the Anti-Counterfeiting Trade Agreement on the Knowledge Economy: The Accountability of the Office of*

3. Trademarks

Trademark infringement was first criminalized by the passage of the Trademark Counterfeiting Act of 1984 (“TCA”).⁸¹ This law authorized courts to impose criminal penalties of up to five years of imprisonment and \$250,000 in fines on anyone who “intentionally traffics or attempts to traffic in goods or services” that are known to be counterfeit.⁸² Counterfeiting is the exclusive basis for criminal trademark infringement and enforcement. As defined in the TCA, counterfeiting is the use of a mark “identical with, or substantially indistinguishable from, a mark registered on the principal register in the U.S. Patent and Trademark Office and in use.”⁸³ As interpreted later by the judiciary, the TCA did not extend to counterfeit labels that were not attached to actual products.⁸⁴ To overcome this exemption, Congress enacted the Stop Counterfeiting in Manufactured Goods Act (“CMGA”)⁸⁵ in 2006. The CMGA criminalizes the trafficking of labels and packaging, even when they are not associated with any goods.⁸⁶ Willful trademark counterfeiting under ACTA is likewise criminally sanctioned in those nations that have ratified the treaty.⁸⁷ The PRO-IP Act imposed new criminal penalties for offenders who knowingly or recklessly cause, or attempt to cause, serious bodily injury or death from counterfeiting activities.⁸⁸

4. Patents

The U.S. Supreme Court stated in *Dowling v. United States*⁸⁹ that “[d]espite its undoubted power to do so . . . Congress has not provided criminal penalties for distribution of goods infringing valid patents.”⁹⁰ Instead, Congress has enacted only two criminal law provisions related

the U.S. Trade Representative for the Creation of IP Enforcement Norms Through Executive Trade Agreements, 35 YALE J. INT’L L. ONLINE 24, 27-30 (2009), available at <http://www.yjil.org/online/volume-35-fall-2009/the-impact-of-acta-on-the-knowledge-economy>.

81. Pub. L. No. 98-473, 98 Stat. 2178-83 (codified as amended at 18 U.S.C. § 2320 and scattered sections of 15 U.S.C.).

82. 98 Stat. at 2178 (amended 1994). These penalties were subsequently increased, permitting fines up to two million dollars for individuals and imprisonment up to ten years. 18 U.S.C. § 2320(b) (2012).

83. § 2320(f)(1)(A)(ii).

84. *United States v. Giles*, 213 F.3d 1247, 1253 (10th Cir. 2000).

85. Pub. L. No. 109-181, § 1, 120 Stat. 285 (2006) (codified in relevant part at § 2320(a)(2)).

86. 120 Stat. at 286.

87. Anti-Counterfeiting Trade Agreement, *supra* note 79, art. 23, 50 I.L.M. 250. So far, only Japan has ratified this treaty. *See supra* note 80 and accompanying text.

88. § 2320(b)(2).

89. 473 U.S. 207 (1985).

90. *Id.* at 227.

to patents that have relatively little importance.⁹¹ The first law criminalizes the forging of letters patent.⁹² The second criminalizes the false marking of patents.⁹³ Neither of these statutes, however, criminalizes behavior that infringes on the substantive elements of U.S. patent rights. As recognized by one scholar, this puts patents “entirely at odds” with other areas of IP.⁹⁴ There are some valid reasons, however, for this state of affairs, including the relative social costs and benefits of imposing criminal liability on patent infringement, and strong political economy forces acting on the patent system that deter the imposition of criminal liability.⁹⁵

B. Intellectual Property Enforcement, Prosecution, and Support Agencies

The public IP laws just mentioned are enforced by various federal agencies, which possess overlapping authority.⁹⁶ The type of overlap in this area of administrative decision-making is known as “interacting jurisdictional assignments,” and occurs when “Congress assigns agencies different primary missions but requires them to cooperate on certain tasks.”⁹⁷ Scholars have criticized instances whereby administrative agencies possess overlapping authority, because it can generate duplicative efforts, inefficiency, less accountability, and ineffective results.⁹⁸ Those undesirable effects occur when administrative agencies possess overlapping authority that generates duplicative redundancy.⁹⁹

Some administrative law scholars have questioned whether redundancy is truly an accurate portrayal of what occurs when there is administrative agency overlap.¹⁰⁰ These scholars instead reframe the issue as a “shared regulatory space.”¹⁰¹ From this perspective, shared regulatory space generally leads to positive outcomes as long as

91. Manta, *supra* note 6, at 488.

92. 18 U.S.C. § 497 (2012).

93. 35 U.S.C. § 292 (2012).

94. Manta, *supra* note 6, at 488.

95. *Id.* at 504, 511-12. For a discussion of the political economy forces acting on the patent system, see generally Orozco, *Patent Levers*, *supra* note 27.

96. Many areas of regulation involve fragmented and overlapping delegations of authority to administrative agencies. See, e.g., Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 806-13 (2005) (describing the broad distribution of federal and state authority that pertains to environmental regulations); *supra* Part II.A.

97. Freeman & Rossi, *supra* note 22, at 1145.

98. See, e.g., *id.* at 1138, 1150; Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 198, 206-07 (2011).

99. Freeman & Rossi, *supra* note 22, at 1138.

100. *Id.* at 1145-49.

101. *Id.* at 1145.

coordination efforts succeed in managing the resources and policy objectives underlying the various agencies' activities.¹⁰² The end goal of shared regulatory space among disparate administrative agencies is, therefore, effective coordination. Given that there is considerable overlapping authority in the federal enforcement of IP laws, the normative goal of effective coordination becomes essential. The effectiveness of interagency coordination will be assessed below in relation to the "IP Czar," or IPEC, which was created to coordinate efforts of the various agencies involved in the public enforcement of IP laws.¹⁰³

Before assessing the IPEC's coordination efforts, the following Subparts will provide an overview of the various federal agencies that share oversight in the enforcement of public IP laws.¹⁰⁴ These agencies fall within the categories of enforcement,¹⁰⁵ prosecution,¹⁰⁶ and support agencies.¹⁰⁷

1. Enforcement Agencies

U.S. enforcement agencies employ the personnel on the ground who police the terrain in search of criminal activity. A key agency in the IP enforcement area is the Federal Bureau of Investigations ("FBI"), an agency within the DOJ. As a result of funding allocated to the FBI from the 2008 PRO-IP Act, the FBI has greatly increased its activities related to the criminal enforcement of IP infringement.¹⁰⁸ Currently, the FBI has fifty-one field officers housed within its Cyber Division who investigate IP rights violations.¹⁰⁹ Five of these officers are placed in the Intellectual Property Rights Unit, a multiagency coordination center located within

102. *Id.* at 1151. Freeman and Rossi assert that:

Yet it is also true that in some cases shared regulatory space could produce substantial advantages, including (1) constructive interagency competition; (2) better expertise in decisionmaking; (3) insurance against any one agency's failure; (4) opportunities for agency compromise; and (5) reduced monitoring costs for political overseers and the public. The first four enhance efficiency and effectiveness, while the last improves accountability. Another consideration is whether, as some commentators have argued, multiple-agency delegations make capture more difficult.

Id.

103. *See infra* Part IV.

104. *See infra* Part II.B.1–3.

105. *See infra* Part II.B.1.

106. *See infra* Part II.B.2.

107. *See infra* Part II.B.3.

108. *See generally Intellectual Property Enforcement Efforts, Statement Before the S. Judiciary of Comm.*, 112th Cong. (2011) (statement of Gordon M. Snow, Assistant Director, Cyber Division, Federal Bureau of Investigation) [hereinafter *Hearing* (statement of Snow)], available at <http://www.judiciary.senate.gov/imo/media/doc/11-06-22%20Snow%20Testimony.pdf>.

109. *Id.* at 2.

the Intellectual Property Rights Coordination Center (“IPR Center”) in Virginia.¹¹⁰ These five field officers coordinate the activities of the remaining forty-six field officers, who are located throughout the United States.¹¹¹ The majority of those field officers are located in twenty-one DOJ field offices with Computer Hacking and Intellectual Property (“CHIPS”) Units.¹¹² As of September 30, 2012, the FBI had 460 pending IP investigations.¹¹³ Some prominent cases that the FBI highlighted in one of its reports to Congress include: trade secret theft cases involving Apple, Inc., General Motors, Societe General, and Goldman Sachs; a copyright infringement case involving Microsoft software; and the arrest of a man accused of selling fake cancer medications.¹¹⁴

The Department of Homeland Security’s (“DHS”) agency for Customs and Border Protection (“CBP”) has the authority to enforce IP laws at various U.S. ports of entry.¹¹⁵ CBP has the authority to exclude or seize goods, which violate certain federal IP laws, including *in rem* exclusion orders issued by the ITC.¹¹⁶ An exclusion order issued by the ITC excludes from entry into the United States articles determined to be in violation of § 337 of the Tariff Act of 1930.¹¹⁷ Copyrights, federal trademarks, and trade names may also be recorded with CBP to assist the agency in identifying and seizing infringing goods.¹¹⁸ In July 2009, CBP

110. *Id.*; see *infra* note 164 and accompanying text.

111. *Hearing* (statement of Snow), *supra* note 108, at 2.

112. *Id.*

113. FED. BUREAU OF INVESTIGATION, PRO IP ACT ANN. REP. 1 (2012), available at <http://www.justice.gov/dag/iptaskforce/proipact/fbi-pro-ip-rpt2012.pdf>. These investigations are broken down as follows:

106 investigations for theft of trade secrets[;] 70 investigations for copyright infringement related to software[;] 121 investigations for other copyright infringement[;] 49 investigations for trademark infringement[;] 16 investigations for copyright infringement related to signal theft[;] 17 investigations for counterfeit aircraft parts[;] 17 investigations for counterfeit electrical parts[;] 11 investigations for counterfeit automotive parts[; and] 53 investigations for counterfeit health products.

Id.

114. See *Hearing* (statement of Snow), *supra* note 108, at 6-7.

115. See Debra D. Peterson, *The Knowledge to Act: Border Enforcement of Section 337 Exclusion Orders and the Need for Exclusion Order Disclosure Regulations*, 17 FED. CIR. B.J. 607, 611 (2008).

116. *Id.* at 608-10.

117. 19 U.S.C. §§ 1202-1683(g) (2012); Peterson, *supra* note 115, at 609. The ITC has seen a large increase in § 337 hearings related to patents. Some of these cases have drawn considerable attention, such as the smart phone patent wars. See Timothy B. Lee, *ITC: How an Obscure Bureaucracy Makes the World Safe for Patent Trolls: The Smartphone Wars Are Increasingly Fought in a Trade Office*, ARS TECHNICA (Sept. 21, 2012, 1:15 PM), <http://arstechnica.com/tech-policy/2012/09/itc-how-an-obscure-bureaucracy-makes-the-world-safe-for-patent-trolls>.

118. Debra D. Peterson, *Seizing Infringing Imports of Cinderella’s Slippers: How Egyptian Goddess Supports U.S. Customs and Border Protection’s Enforcement of Design Patents*, 90 J. PAT. & TRADEMARK OFF. SOC’Y 888, 895-98 (2008).

delivered to Congress a five-year Strategic Plan that provides a comprehensive enforcement strategy to reduce IP border violations.¹¹⁹

The Immigration and Customs Enforcement (“ICE”) agency is an investigative unit within the DHS that targets and investigates a wide range of criminal activities, including shipments of infringing goods attempting to enter the U.S. from other countries.¹²⁰ ICE’s IP criminal cases primarily involve trademark- and copyright-related offenses.¹²¹ In addition to preventing the movement of infringing goods through U.S. ports, ICE aims to “disrupt the manufacturing, distribution, and financing” of the criminal organizations that engage in IP theft.¹²² In 2010, ICE “initiated 1,033 intellectual property infringement cases.”¹²³ Seizures of suspected infringing goods are on the rise. In 2013, customs seized 24,361 shipments, which represented a near seven percent increase compared to 2012.¹²⁴ The retail value of the seized goods was estimated to be \$1.7 billion.¹²⁵ Sixty-eight percent and twenty-five percent of these seized goods originated from China and Hong Kong, respectively.¹²⁶

2. Prosecution Agencies

Attorneys in the DOJ prosecute individuals charged with violating criminal IP laws. The DOJ Criminal Division’s Computer Crime and Intellectual Property Section (“CCIPS”), based in Washington D.C., “consist[s] of a specialized team of 40 prosecutors . . . devoted to the enforcement of computer crime and intellectual property laws,” and helps to coordinate enforcement strategy and policy advancement.¹²⁷ The

119. U.S. CUSTOMS & BORDER PROT., SECURE BORDERS, SAFE TRAVEL, LEGAL TRADE: U.S. CUSTOMS AND BORDER PROTECTION: FISCAL YEAR 2009–2014 STRATEGIC PLAN 4, 19–20 (2009), available at <http://www.hsd1.org/?view&did=29986>.

120. *Promoting Investment and Protecting Commerce Online: Legitimate Sites v. Parasites, Part II: Hearing Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 3 (2011) (statement of John Morton, Director of the U.S. Immigration and Customs Enforcement Department of Homeland Security), available at <http://www.ice.gov/doclib/news/library/speeches/110406morton.pdf>.

121. *See id.*

122. *Id.*

123. *Oversight of Intellectual Property Enforcement Efforts: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 12 (2011) (statement of Erik Barnett, Assistant Deputy Director, U.S. Immigration and Customs Enforcement Department of Homeland Security) [hereinafter *Hearing* (statement of Barnett)], available at <http://www.ice.gov/doclib/news/library/speeches/110621barnett.pdf>.

124. *See generally* U.S. DEP’T OF HOMELAND SEC., INTELLECTUAL PROPERTY RIGHTS SEIZURES STATISTICS FISCAL YEAR 2013 (2013), available at <http://www.cbp.gov/sites/default/files/documents/2013%20IPR%20Stats.pdf>.

125. *Id.*

126. *Id.*

127. *Oversight of Intellectual Property Enforcement Efforts: Hearing Before the S.*

attorneys in CCIPS work closely with the DOJ's national CHIPs program, which consists of a nationwide network of approximately 260 federal prosecutors in various sections and divisions.¹²⁸ Twenty-five U.S. Attorney's offices contain specialized CHIPs Units with between two to eight CHIPs prosecutors where the caseloads are particularly heavy.¹²⁹

In February 2010, the U.S. Attorney General announced the development of a new task force on Intellectual Property ("IP Task Force").¹³⁰ The IP Task Force was created to enhance IP protection by strengthening and providing greater focus on domestic enforcement efforts, increasing international engagement, and coordinating efforts with state and local law enforcement partners.¹³¹ The IP Task Force is chaired by the Deputy Attorney General.¹³²

The ITC has the statutory authority to initiate its own IP investigations and issue exclusion orders, enforced by CBP, that prevent the entry of infringing goods into the United States.¹³³ In reality, however, all of the IP cases brought before the ITC are initiated by private parties who allege that their IP has been infringed by imported goods.¹³⁴ The ITC is an increasingly prominent forum used by private parties to obtain exclusionary orders that can stop infringing shipments from entering the United States.¹³⁵

3. Support Agencies

Several other federal agencies are important stakeholders in the public enforcement of federal IP rights. For example, IP enforcement agencies rely on support agencies to obtain data and engage in outreach efforts with constituencies in government, the private sector, and the

Comm. on the Judiciary, 112th Cong. 5 (2011) (statement of Jason M. Weinstein, Deputy Assistant Att'y Gen., Criminal Division) [hereinafter *Hearing* (statement of Weinstein)], available at <http://www.judiciary.senate.gov/imo/media/doc/11-06-22%20Weinstein%20Testimony.pdf>.

128. *Id.*

129. *Id.*

130. Press Release, U.S. Dep't of Justice, Justice Department Announces New Intellectual Property Task Force as Part of Broad IP Enforcement Initiative (Feb. 12, 2010), available at <http://www.justice.gov/opa/pr/justice-department-announces-new-intellectual-property-task-force-part-broad-ip-enforcement>.

131. *Id.*

132. *Id.* One of the impacts of this task force has been a twenty-nine percent increase in trade secret theft investigations. EOP, ADMINISTRATION STRATEGY, *supra* note 31, at 7.

133. 19 U.S.C. § 1337(b)(1) (2012); Peterson, *supra* note 115, at 609-12.

134. See INTERNATIONAL PRACTITIONER'S DESKBOOK SERIES: TRADE REMEDIES FOR GLOBAL COMPANIES 79 (Timothy C. Brightbill et al. eds., 2006).

135. See Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 73-74, 78-79 (2008) [hereinafter Chien, *Patently Protectionist*].

international community. Some of these support agencies include the Department of Commerce's Patent and Trademark Office ("PTO"), the Copyright Office, and the Department of Commerce's International Trade Administration ("ITA").¹³⁶

For example, the PTO's Global IP Academy plays an important role in outreach efforts to limit infringement and complement enforcement efforts by providing training and building public awareness of IP laws.¹³⁷ In fiscal year 2012, the PTO's Global IP Academy "provided training to 9,217 foreign [IP] officials from 129 countries."¹³⁸ Attendees typically include policy makers, judges, prosecutors, customs officers, and examiners, and training topics covered the entire spectrum of IP rights.¹³⁹

The ITA is a unit within the Department of Commerce with the mission of "strengthen[ing] the competitiveness of U.S. industry, promot[ing] trade and investment, and ensur[ing] fair trade through the rigorous enforcement of [U.S.] trade laws and agreements."¹⁴⁰ The ITA collaborates with the private sector to develop programs to heighten awareness of the dangers of infringing products and the economic value of IP to national economies. For example, an important initiative that the ITA undertakes with respect to IP is the STOPfakes initiative. This initiative offers business owners IP training and resources that help them better protect their rights abroad.¹⁴¹

The Office of the U.S. Trade Representative ("USTR") seeks to promote U.S. business and trade by negotiating agreements with foreign governments.¹⁴² The USTR also takes an active role in shaping IP policy

136. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-39, INTELLECTUAL PROPERTY: AGENCIES PROGRESS IN IMPLEMENTING RECENT LEGISLATION, BUT ENHANCEMENTS COULD IMPROVE FUTURE PLANS 19 & n.21 (2010) [hereinafter GAO 2010 REPORT], available at <http://www.gao.gov/new.items/d1139.pdf>. The International Trade Administration collaborates with the private sector to develop programs to heighten awareness of the dangers of counterfeit products and of the economic value of IP to national economies. *About the International Trade Administration: Overview*, INT'L TRADE ADMIN., <http://trade.gov/about.asp> (last visited Feb. 15, 2015). The ITA also develops and shares small business tools to help domestic and foreign businesses understand IP. *Id.*

137. *The Global Intellectual Property Academy*, U.S. PAT. & TRADEMARK OFF., <http://www.uspto.gov/ip/training> (last modified Apr. 9, 2014, 10:16 AM).

138. *Id.*

139. *Id.*; *Training & Education: The Mission*, U.S. PAT. & TRADEMARK OFF., http://www.uspto.gov/web/offices/dcom/olia/training_mission.htm (last modified Mar. 4, 2009).

140. *About the International Trade Administration: Overview*, *supra* note 136.

141. See *Business Tools*, STOPFAKES.GOV, <http://www.stopfakes.gov/business-tools> (last visited Feb. 15, 2015).

142. See Doug Palmer, *Michael Froman Approved as U.S. Trade Representative by Senate*, HUFFINGTON POST (Aug. 20, 2013), http://www.huffingtonpost.com/2013/06/20/michael-froman-trade-representative_n_3468736.html.

and trade-related issues. For example, the USTR engages in the 301 process of establishing trade sanctions to help persuade trading partners to reform their deficient IP practices.¹⁴³ The USTR also publishes a Priority Watch List of countries where U.S. IP infringement is a particularly severe problem.¹⁴⁴ This list is influential as it often becomes a negotiating point in trade agreements and places pressure on individual countries listed in the USTR's reports.¹⁴⁵ Currently, ten nations are on the Priority Watch List, and twenty-seven are on the Watch List; the FBI and ICE maintain a presence in several of those nations to coordinate international investigations with their foreign enforcement agency counterparts.¹⁴⁶ This Part sketched the federal administrative environment related to IP enforcement.¹⁴⁷ A portrait emerges of a complex environment with thousands of civil servants working across disparate agencies that are vying for autonomy, influence, and scarce resources within the federal government. An environment such as this lends itself to coordination problems that need to be mitigated, so that legislative and policy goals can be achieved and maintained. The next Part will address the history of interagency coordination in this area, and the particular challenges that can prevent such coordination from occurring.¹⁴⁸

143. The USTR is authorized to engage in the 301 sanctioning process through the enactment of the 1988 Trade Act, Omnibus Trade and Competitiveness Act of 1988. Pub. L. No. 100-418, §§ 1301, 1303, 102 Stat. 1107, 1164, 1179 (1988).

144. See Judith H. Bello & Alan F. Holmer, "Special 301": Its Requirements, Implementation, and Significance, 13 FORDHAM INT'L L.J. 259, 261 (1998). Special 301 requires:

[T]he USTR to name as "priority foreign countries" those countries: (i) whose acts, practices, or policies are the most onerous or egregious, and have the greatest adverse economic impact on the United States; and (ii) that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights.

19 U.S.C. § 2242(b)(1)(C) (1998).

145. For example, in 2011, the USTR placed Baidu, China's leading search engine, on its list of notorious markets for counterfeit and pirated goods. See *U.S. Says China's Baidu Is Notorious Pirated Goods Market*, BBC NEWS (Mar. 1, 2011), <http://www.bbc.co.uk/news/business-12605067>.

146. *Hearing* (statement of Barnett), *supra* note 123, at 4-5, 7, 13 (noting that ICE has partnered with Korea, Mexico, China, Canada, the Asia-Pacific Economic Cooperation Forum, and INTERPOL on a variety of investigations and initiatives); OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2014 SPECIAL 301 REPORT 8 (2014), available at <http://www.ustr.gov/sites/default/files/USTR%202014%20Special%20301%20Report%20to%20Congress%20FINAL.pdf>.

147. See *supra* Part II.

148. See *infra* Part III.

III. THE ROCKY PATH TOWARDS INTER-AGENCY COORDINATION

Despite the rapid expansion of criminal liability in this area, the effective enforcement of criminal IP laws has proven to be difficult.¹⁴⁹ It is now clear that stricter penalties are not sufficient to ensure the development of a cohesive and effective national IP enforcement strategy. Experience, instead, suggests that effective administrative coordination is an essential element. The PRO-IP Act was enacted to correct this problem and achieve four broad goals: (1) provide stiffer sentencing; (2) provide additional resources to law enforcement; (3) achieve greater interagency coordination via the IPEC; and (4) develop a national strategy coordinated by the IPEC.¹⁵⁰ The creation of the IPEC, however, was not the first time that the federal government sought to promote interagency coordination in this area of the law.

Interagency coordination efforts date back to the late 1990s.¹⁵¹ In September 1999, Congress created the National Intellectual Property Law Enforcement Coordination Center (“NIPLECC”).¹⁵² The NIPLECC was a multiagency council or taskforce designed to coordinate IP protection efforts across federal agencies, and its first IP Coordinator was appointed in 2005.¹⁵³ The NIPLECC consisted of the following seven officials: (1) the Assistant Secretary of the USPTO; (2) the Assistant Attorney General of DOJ’s Criminal Division; (3) the Under Secretary of State for Economic and Agricultural Affairs; (4) a Deputy United States Trade Representative; (5) the Commissioner of Customs; (6) the Under Secretary of Commerce for International Trade; and (7) the Register of Copyrights.¹⁵⁴ Pursuant to its statutory mandate, the Council was designed to “coordinate domestic and international intellectual property law enforcement among federal and foreign entities.”¹⁵⁵

Although it would seem as if this effort would provide the basis for an emergent and effective national knowledge police, by most accounts

149. See GAO 2010 REPORT, *supra* note 136, at 4-5.

150. See Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, 122 Stat. 4256 (codified as amended in scattered sections of 15 U.S.C., 17 U.S.C., and 18 U.S.C.).

151. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-74, INTELLECTUAL PROPERTY: STRATEGY FOR TARGETING ORGANIZED PIRACY (STOP) REQUIRES CHANGES FOR LONG-TERM SUCCESS 9 (2006) [hereinafter GAO 2006 REPORT], available at <http://www.gao.gov/assets/260/253073.pdf>.

152. Treasury and General Government Appropriations Act, 2000, Pub. L. No. 106-58, § 653 113 Stat. 430, 480 (1999) (codified at 15 U.S.C. § 1128 (2006)) (repealed 2008).

153. GAO 2006 REPORT, *supra* note 151, at 9-11.

154. § 1128(a), (c).

155. § 1128(b) (footnote omitted).

the NIPLECC failed to achieve its purpose, and it was dissolved when the IPEC was subsequently created. According to the Government Accountability Office (“GAO”), the NIPLECC “struggled to define its purpose.”¹⁵⁶ In a 2006 report, the GAO stated that the “NIPLECC had little discernible impact and had not undertaken any independent activities.”¹⁵⁷ According to the GAO’s report, the NIPLECC produced “annual reports that did little more than provide a compilation of individual agency activities.”¹⁵⁸

In light of the NIPLECC’s failures, and in response to industry’s ongoing call for tougher enforcement, the George H.W. Bush Administration sidestepped the NIPLECC and implemented the Strategy for Targeting Organized Piracy (“STOP”) initiative via an executive order.¹⁵⁹ To achieve its aims, STOP differed from the NIPLECC in the following ways: its leadership was located within the White House’s National Security Council; and meetings were scheduled more frequently.¹⁶⁰ Independent third parties, like the GAO, lauded the President’s STOP initiative, though the GAO expressed concerns regarding STOP’s status as a national strategy, its tenuous relation to the NIPLECC, and its long term viability. As the GAO stated in its 2006 report:

NIPLECC is a coordinating council, while STOP is a strategy involving coordination led by the National Security Council. While NIPLECC has struggled to define its purpose, STOP generated coordination and attention to IP protection from the outset. Congress gave NIPLECC an oversight role, funding, and an IP Coordinator as its head in 2005, but STOP remains prominent. Their functions, however, increasingly overlap. The IP Coordinator regularly conducts STOP activities and speaks for STOP before Congress and private industry. Most significantly, NIPLECC recently adopted STOP as its strategy.

STOP is a good first step toward a comprehensive integrated national strategy to protect and enforce IP rights and has energized protection efforts. GAO found, however, that STOP’s potential is limited because it does not fully address the characteristics of an effective national strategy, which GAO believes helps increase the

156. GAO 2006 REPORT, *supra* note 151, at 9.

157. *Id.*

158. *Id.*

159. OFFICE OF THE U.S. TRADE REPRESENTATIVE, STRATEGY TARGETING ORGANIZED PIRACY (STOP!) (2004), *available at* http://www.ustr.gov/archive/assets/Document_Library/Fact_Sheets/2004/asset_upload_file507_6462.pdf; *see also* GAO 2006 REPORT, *supra* note 151, at 10. STOP’s main objectives were to “target cross-border trade in tangible goods and strengthen U.S. government and industry IP enforcement actions.” GAO 2006 REPORT, *supra* note 151, at 10.

160. GAO 2006 REPORT, *supra* note 151, at 11 tbl.1.

likelihood of accountability, as well as effectiveness. STOP does not fully address characteristics related to planning and accountability. For example, its performance measures lack baselines and targets. STOP lacks a discussion of costs, the types and sources of investments needed, and processes to address risk management. Finally, STOP lacks a full discussion oversight responsibility.¹⁶¹

The GAO can be influential in its critique of administrative agencies, and its suggestions for administrative reform are often given notice by top news media outlets and Washington policymakers.¹⁶² The GAO's frequent criticisms of the NIPLECC and its prescient critique of the absence of, and need for, a national IP rights enforcement policy, may have prompted the legislature to build from STOP and address its deficiencies in its subsequent enactment of the PRO-IP Act. For example, one of the central critiques that the GAO made regarding STOP was that it failed to integrate individual agencies' priorities and objectives in a comprehensive and strategic manner.¹⁶³

In February 2012, shortly after the NIPLECC was created, ICE organized a multiagency taskforce located in Arlington, Virginia, called the National Intellectual Property Rights Coordination Center, commonly referred to as the "IPR Center."¹⁶⁴ "The [IPR] Center's responsibilities include[] serving as a clearinghouse for information and investigative leads provided by the general public and industry, as well as being a channel for law enforcement" to cooperate with one another.¹⁶⁵ The IPR Center was created in 1999 through an appropriations bill.¹⁶⁶ To date, the IPR Center remains an important player that has achieved success in improving interagency coordination efforts.¹⁶⁷

In 2009, Congress acted to further promote interagency coordination and accountability by enacting the PRO-IP Act.¹⁶⁸ One of the effects of this Act was to create a new administrative agency within

161. *Id.* at Introduction.

162. *See, e.g.*, Joan Lowy, *GAO Report: Too Few Pilots or Too Little Pay*, ASSOCIATED PRESS, (Feb. 28, 2014, 9:20 PM), <http://bigstory.ap.org/article/gao-report-airline-pilot-shortage-not-clear> (discussing a GAO report on airline pilots' wages).

163. GAO 2006 REPORT, *supra* note 151, at 20.

164. *Hearing* (statement of Barnett), *supra* note 123, at 4.

165. NIPLECC ANN. REP. 36 (2001), *available at* <http://www.uspto.gov/web/offices/dcom/olia/niplecc>.

166. On September 29, 1999, President Bill Clinton signed into law the Treasury and General Government Appropriations Act, 2000. Pub. L. No. 106-58, § 653, 113 Stat. 430, 480 (1999) (codified at 15 U.S.C. § 1128 (2006)) (repealed 2008).

167. FED. BUREAU OF INVESTIGATION, *supra* note 113, at 7-8.

168. *See* 15 U.S.C. §§ 8111(b)(1), 8113(a) (2012) (describing the duties of the IPEC, and the purpose of the joint strategic plan).

the executive branch called the IPEC, or the nation's first "IP Czar."¹⁶⁹ According to the PRO-IP Act, "[t]he IPEC shall . . . facilitate the issuance of policy guidance to departments and agencies on basic issues of policy and interpretation, to the extent necessary to assure the coordination of intellectual property enforcement policy and consistency with other law."¹⁷⁰ According to the GAO, the IPEC was designed to overcome the weaknesses present in prior coordination mechanisms by requiring that the interagency advisory committee prepare a comprehensive joint strategic plan, to be submitted to Congress every three years, that would address key elements of an effective national plan and integrate elements of resource and performance accountability and oversight.¹⁷¹

IV. THE INTELLECTUAL PROPERTY ENFORCEMENT COORDINATOR COORDINATION STRUCTURE AND STRATEGY: DESCRIPTION AND CRITIQUE

A. *Structural Description and Critique*

Structurally, the IPEC combines some of the successful attributes of STOP and the NIPLECC, and eliminates some of their shortcomings. For example, as with the NIPLECC and STOP, the IPEC coordinates an interagency advisory committee that is by statute comprised of the Office of Management and Budget ("OMB"); DOJ, including the FBI; USPTO; USTR; Department of State; U.S. Agency for International Development; DHS, including CBP and ICE; Food and Drug Administration; Department of Agriculture; and any other agencies that the "President determines to be substantially involved in . . . combat[ing] counterfeiting and infringement."¹⁷²

Congress also delegated a strategic mission that was previously lacking within the IPEC. The PRO-IP Act now requires the IPEC to prepare three-year strategic plans and report these back to Congress.¹⁷³ The IPEC also draws from STOP because it is situated within the White House, thus increasing its visibility and standing with other administrative agencies.¹⁷⁴ Currently, the IPEC is housed within the

169. See *supra* note 4 and accompanying text.

170. § 8111(b)(1)(D).

171. GAO 2010 REPORT, *supra* note 136, at 5.

172. § 8111(b)(3).

173. § 8113(b).

174. GAO 2010 REPORT, *supra* note 136, at 15 (stating that the "[o]ffice of the IPEC staff noted that because the office is located within OMB, it has had the opportunity to review and shape policy guidance and other policy statements provided by the departments and agencies involved in

White House's OMB.¹⁷⁵ The IPEC's location within the OMB is significant as this office has close ties to the President's top advisors and influences policy decisions related to the annual budget. "The OMB has authority to oversee the regulatory activities of federal agencies to ensure that Presidential policies are followed and that economic analysis is [applied] to inform regulatory policy" and rulemaking.¹⁷⁶ The IPEC, like the NIPLECC, is accountable to Congress, and due to its statutory basis, the IPEC has the long-term continuity that was lacking in STOP.¹⁷⁷

In many ways, the IPEC represents the best scenario, as it combines the strengths of the NIPLECC and STOP. There are two structural issues, however, that create a challenge for the IPEC's continuing coordination efforts. The first issue is the IPEC's overall lack of authority. As mentioned in the PRO-IP Act, "[t]he IPEC may not control or direct any law enforcement agency, including the Department of Justice, in the exercise of its investigative or prosecutorial authority."¹⁷⁸ In essence, the IPEC's role is to coordinate agency activities,¹⁷⁹ prepare the joint strategic plan,¹⁸⁰ and recommend actions to the legislative and executive branches.¹⁸¹ This limitation on the IPEC's authority was spearheaded by the DOJ, which did not want the new office of the IPEC to interfere with its independence and authority.¹⁸²

The second major structural hurdle facing the IPEC is its relationship with the IPR Center. All of the major agencies involved in IP enforcement efforts have a working relationship with the IPR Center, and the IPR Center is prominently cited as an effective coordination system.¹⁸³ Although the IPEC has a broader mandate that goes beyond

IP enforcement").

175. Section 8111(a) of the Pro IP Act requires the Office of the IPEC to be located within the President's Executive Office.

176. John D. Graham, *The Evolving Regulatory Role of the U.S. Office of Management and Budget*, REV. ENVTL. ECON. & POL'Y 171, 172 (2007); see also Joseph Cooper & William F. West, *Presidential Power and Republican Government: The Theory and Practice of OMB Review of Agency Rules*, 50 J. POL. 864, 870-71 (1988) (discussing how the "OMB is empowered to stay the publication of notice of proposed rulemaking or the promulgation of a final regulation by requiring that agencies respond to its criticisms, and ultimately it may recommend the withdrawal of regulations which cannot be reformulated to meet its objections"); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2288 (2001).

177. GAO 2006 REPORT, *supra* note 151, at 9-10, 21-22.

178. 15 U.S.C. § 8111(b)(2) (2012).

179. § 8111(b)(1)(A).

180. § 8111(b)(1)(B).

181. § 8111(b)(1)(D)-(F).

182. Ahrens, *supra* note 23.

183. See *Hearing* (statement of Weinstein), *supra* note 127, at 2; FED. BUREAU OF INVESTIGATION, *supra* note 113, at 7-9; GAO 2010 REPORT, *supra* note 136, at 7.

criminal enforcement, it shares overlapping goals with the IPR Center. The IPR Center, however, frequently overshadows the IPEC's ability to coordinate agencies and promote a strategic agenda. As a result, a scenario exists that is reminiscent of when STOP overshadowed the NIPLECC as a more effective coordination system.¹⁸⁴

These two structural weaknesses should not, however, impede the IPEC from developing a robust strategic plan, as it is mandated to do by the PRO-IP Act.¹⁸⁵ Producing a comprehensive strategic plan is one of the IPEC's most important mandates, and that plan could be an important document to guide policymaking, discussion, and resource allocations in this important legal area. To date, however, the IPEC has largely failed to provide a robust strategic plan. Thus, it is important to address the particular shortcomings in the IPEC's strategic planning efforts to date.

B. Strategic Description and Critique

The prior Subpart describes the IPEC's unique institutional setting.¹⁸⁶ The presence of various agencies wielding overlapping authority provides a formidable coordination challenge, and various prior attempts have been made to improve coordination. Three additional limitations in the IPEC's approach remain, however, and have not been adequately recognized.¹⁸⁷ The first limitation is the absence of a coordination strategy that reflects the evolving strategic landscape of IP rights enforcement.¹⁸⁸ The second limitation is the absence of strategic resource prioritization to achieve goals that fall in line with a strategic assessment.¹⁸⁹ Third, the patent regime is left out altogether in the IPEC's current national enforcement strategy.¹⁹⁰ Each limitation will be addressed next.¹⁹¹

1. Strategic Assessment Vacuum

Overall, the IPEC lacks a strong strategic direction and focus. The main driver of this critique is that the IPEC has largely failed to address and measure the ways that IP enforcement efforts succeed and fall

184. GAO 2006 REPORT, *supra* note 151, at 8-9, 14.

185. § 8111(b)(1)(B).

186. *See supra* Part IV.A.

187. *See infra* Part IV.B.1-3.

188. *See infra* Part IV.B.1.

189. *See infra* Part IV.B.2.

190. *See infra* Part IV.B.3.

191. *See infra* Part IV.B.1-3.

short.¹⁹² Also lacking is an explanation of what is driving these outcomes, and why they are of critical importance to the national enforcement system.¹⁹³ To address this very broad analysis, the IPEC would have to engage in a strategic IP enforcement assessment. One well-known framework for achieving this kind of result is utilizing what is called a strengths, weaknesses, opportunities, and threats (“SWOT”) analysis.¹⁹⁴

Currently, the IPEC offers several high level goals that do not reflect a strategic assessment of the current enforcement system’s SWOT. The IPEC’s goals, which are devoid of any SWOT type of analysis, include: “leading by example;” “transparency and public outreach;” “ensuring efficiency and coordination;” “enforcing our rights abroad;” “securing the supply chain;” and “data driven government.”¹⁹⁵

Engaging in a SWOT analysis is helpful to identify major strategic issues and assess the environment.¹⁹⁶ For example, a SWOT analysis might suggest that a key weakness in the IP enforcement landscape is the lack of a patent enforcement capability, or inadequate coordination with military agencies to prevent IP theft of technologies with national security implications.¹⁹⁷ Opportunities may involve developing public-private partnerships within the IP industry, or collaborations with foreign trading partners and world trade organizations to promote the President’s national export initiative.¹⁹⁸ Specific threats may be identified, such as cyber warfare and economic espionage, through electronic means. Particular strengths may be identified, such as effective detection techniques at the ports of entry and a robust domestic enforcement framework.

The GAO recognizes that important governmental activities, such as counter-terrorism, should possess the traits of a desirable national

192. 2013 JOINT STRATEGIC PLAN, *supra* note 25, at 7-9.

193. *Id.*

194. KOTEEN, *supra* note 29, at 112-13 (describing a SWOT analysis as a “WOTS-UP” analysis).

195. 2013 JOINT STRATEGIC PLAN, *supra* note 25, at 13-41. These very broad goals have action items related to them. For example, the action items related to “enforcing our rights abroad” include: “enhance foreign law enforcement cooperation;” “strengthen intellectual property enforcement through international organizations;” “promote enforcement of intellectual property rights through trade policy tools;” “combat foreign-based and foreign-controlled websites that infringe American intellectual property rights;” “protect intellectual property at ICANN;” “support U.S. small and medium-size enterprises [] in foreign markets;” “and examine labor conditions associated with infringing goods.” *Id.* at 25-34.

196. KOTEEN, *supra* note 29, at 25-26.

197. ONCIX REPORT, *supra* note 5, at 3.

198. This initiative aims to double exports by the end of 2014 through several means, for example, export financing, investigating unfair trade practices, and promoting trade agreements.

strategy.¹⁹⁹ The GAO states that an effective national strategy should have: a clear purpose, scope, or methodology; a discussion of the problems, risks, and threats the strategy intends to address; the desired goals, objectives, activities, and performance measures; a description of the resources needed to implement the strategy; a clear delineation of organizational roles and responsibilities that includes oversight and coordination; and a description of how the strategy relates to other government units.²⁰⁰ The IPEC's efforts to promote greater IP enforcement should encompass all of these desirable elements of an effective national strategy. The IPEC is in a unique position to develop a comprehensive national strategy for IP enforcement, because it can aggregate data from various sources and serve as an information clearinghouse.

2. Prioritizing Activities and Resources

A byproduct of strategic assessment is the process whereby scarce resources are assigned to their highest priority use in areas that generate the greatest results.²⁰¹ Since the IPEC has failed to implement a high level strategic assessment using a SWOT analysis, it cannot engage in the next important step, which is to suggest how scarce resources should be prioritized to address strategic goals and challenges.²⁰² Instead, the IPEC provides overly broad and general metrics, such as the overall number of enforcement prosecutions and property seizures.²⁰³ This level of reporting is similar to that in which the NIPLECC engaged in, and which was the subject of the GAO's criticism that the NIPLECC had simply provided "a compilation of individual agency activities."²⁰⁴

The IPEC is currently in the awkward position of failing to prioritize resources when several of the agencies it seeks to coordinate already engage in this vital strategic process. For example, the DOJ prioritizes the IP cases it pursues as follows: "The Department of Justice has historically placed—and should continue to place—the highest priority on the prosecution of intellectual property crimes that are complex and large in scale, and that undermine our economic national security or threaten public health and welfare."²⁰⁵ The FBI executes this strategic

199. GAO 2006 REPORT, *supra* note 151, at 2.

200. *Id.* at 15-16.

201. KOTEEN, *supra* note 29, at 25.

202. See GAO 2010 REPORT, *supra* note 136, at 27-28 (indicating that IPEC's first joint strategic "plan did not include actual estimates of the resources needed to fulfill the plan's priorities").

203. 2013 JOINT STRATEGIC PLAN, *supra* note 25, at 43-46.

204. GAO 2006 REPORT, *supra* note 151, at 9.

205. DOJ, PROGRESS REPORT, *supra* note 17, at 15.

approach since its “[i]nvestigative priorities include theft of trade secrets, counterfeit goods that pose a threat to health and safety and copyright and trademark infringement cases having a national security, organized crime, or significant economic impact.”²⁰⁶ Significant benefits could be achieved in the IPEC’s overall coordination and congressional reporting efforts if the IPEC were to conduct comparable cohesive strategic assessments and resource prioritizations. Three areas seem to have particular prominent strategic significance. These are infringement activities that pose a threat to health and safety, have a significant impact on the economy, and threaten national security.

3. Lack of a Patent Strategy

Currently, federal IP enforcement efforts omit the patent regime, as this is the only area of IP law that remains beyond the scope of federal criminal law.²⁰⁷ Yet, the patent regime is an incredibly important aspect of the national economy.²⁰⁸ From a policy perspective, any national IP enforcement system that omits patents will remain incomplete. Also, patent infringement is a growing and pervasive problem, as serious, if not more so, than any of the other IP regimes. The foreign appropriation of patent rights is a serious problem because it often harms domestic innovators who are either deprived of the fruits of their ingenuity abroad, or suffer domestically when products incorporating the infringing technology are imported into the United States.²⁰⁹ Yet, patents are largely absent from the IPEC’s discussion involving national IP enforcement.²¹⁰

The omission of patents from the IPEC’s national enforcement strategy is somewhat paradoxical as the PRO-IP Act, which created the Office of the IPEC, specifically mentions patents,²¹¹ and requires the

206. FED. BUREAU OF INVESTIGATION, *supra* note 113, at 1.

207. *See* Manta, *supra* note 6, at 488. While the emphasis of this discussion involves utility patents, design patents are, technically, also within the domain of the patent regime. Design patents cover the aesthetic ornamental aspects of products, whereas utility patents encompass technical or useful inventions. Recently, the American Intellectual Property Law Association submitted comments to the IPEC advocating for the inclusion of design patent protection within its strategic plan, and for greater involvement of CBP in enforcing U.S. design patents. *See* Letter from William G. Barber, President, Am. Intellectual Prop. Law Ass’n to Victoria A. Espinel, U.S. Intellectual Prop. Enforcement Coordinator, Office of Mgmt. and Budget 2 (Aug. 10, 2012) (on file with the *Hofstra Law Review*).

208. ECON. & STATISTICS ADMIN. & U.S. PATENT & TRADEMARK OFFICE, *supra* note 11, at 43-45, 50-51.

209. *See* H.R. REP. NO. 110-617, at 21 (2008).

210. *See generally* 2013 JOINT STRATEGIC PLAN, *supra* note 25. The rare instance in which patents are discussed in the IPEC’s three-year joint strategic plan is when it discusses collaborations between CBP and the ITC in the enforcement of exclusion orders related to patents. *Id.*

211. 15 U.S.C. § 8112 (2012).

GAO to conduct a Study on Protection of Intellectual Property of Manufacturers.²¹² As stated in the PRO-IP Act, the GAO's report will examine "the impacts on domestic manufacturers in the United States of current law regarding defending intellectual property, including *patent*, trademark, and copyright protections."²¹³

A unique opportunity exists for the IPEC to integrate patents into its national enforcement strategy by integrating the ITC into its coordination efforts. The ITC is an administrative agency created by Congress in 1916, and was originally called the Tariff Commission.²¹⁴ Among other areas, the ITC has jurisdiction over cases involving:

The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

- (i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under title 17; or
- (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.²¹⁵

The IPEC announced that it will chair an interagency working group to review existing procedures that CBP and the ITC use to evaluate the scope of ITC exclusion orders to ensure that the process and standards utilized during exclusion order enforcement are transparent, effective, and efficient.²¹⁶ Much more can be done, however, to integrate the ITC and its patent related activities within a national enforcement strategy.

The ITC has the authority to launch its own independent investigations under the following statutory language: "The Commission shall investigate any alleged violation of this section on complaint under oath *or upon its initiative*."²¹⁷ If the ITC finds that a party has violated

212. Prioritizing Resources and Organization for Intellectual Property Act of 2008, Pub. L. No. 110-403, § 501, 122 Stat. 4256, 4277-78.

213. 122 Stat at 4278 (emphasis added).

214. Revenue Act of 1916, Pub. L. No. 64-271 § 700, 39 Stat. 756, 795. The ITC's name changed when the Trade Act of 1974 was enacted. 19 U.S.C. § 2231(a) (2012).

215. 19 U.S.C. § 1337(a)(1)(B) (2012).

216. 2013 JOINT STRATEGIC PLAN, *supra* note 25, at 17. The plan states that:

The interagency working group will review existing procedures that CBP and the ITC use to evaluate the scope of ITC exclusion orders and work to ensure the process and standards utilized during exclusion order enforcement activities are transparent, effective, and efficient. To help inform its review, IPEC will seek public input through issuance of a Federal Register Notice.

Id.

217. § 1337(b)(1) (emphasis added).

§ 337 of the Tariff Act of 1930, it is empowered to issue *in rem* exclusionary orders that are enforced by CBP.²¹⁸ These orders essentially exclude from entry any goods covered by the scope of the exclusionary order.²¹⁹

Given such broad powers, and authority to initiate and adjudicate IP investigations and work with CBP to enforce them at the ports of entry, it is singular that the IPEC would not seek to engage the ITC as a critical ally and partner in its national enforcement strategy.²²⁰ Also, given that the ITC has the power to work with CBP to enforce patent laws, it seems like the ITC would be a natural fit to fill the vacuum currently experienced with respect to national patent law enforcement.

The powerful political economy forces that exclude patent infringement from criminal liability, however, present a formidable barrier to the IPEC's efforts to integrate the ITC into its enforcement strategy.²²¹ Industry group pressure may be countervailed, however, in patent cases involving national security or public health.²²² Integrating the ITC into the IPEC's activities may also require presidential approval via executive order. The Obama Administration has already used executive orders to further IP issues,²²³ and the language in the PRO-IP Act clearly grants the President the authority to integrate the ITC with the IPEC. The PRO-IP Act specifically states that the President may

218. See *supra* notes 115-17 and accompanying text.

219. Peterson, *supra* note 115, at 609-10.

220. One scholar, however, thinks the ITC is far too immersed in patent enforcement efforts. See, e.g., Chien, *Domestic Industries*, *supra* note 28, at 177-80; Chien, *Patently Protectionist*, *supra* note 135, at 73, 79.

221. See *supra* note 28 and accompanying text.

222. For example:

ICE and the FBI worked with the New Jersey State Police and the Philadelphia FBI Joint Terrorism Task Force on a case that identified: a three-cell criminal organization; a U.S.-based stolen property and counterfeit goods group; an overseas procurement group; and an international group tied to Hezbollah procuring weapons, counterfeit money, stolen property, and counterfeit goods.

Hearing (statement of Barnett), *supra* note 123, at 14. According to another report:

Counterfeit automotive parts can be dangerous as counterfeit suspension parts and wheels break when made of substandard material; vehicle hoods without crumple zones penetrate the passenger compartment; counterfeit brake pads made of grass clippings and saw dust have caused fatal accidents; and counterfeit windshields without safety shatterproof glass cause injury or death.

NAT'L INTELLECTUAL PROP. RIGHTS COORDINATION CTR., INTELLECTUAL PROPERTY RIGHTS VIOLATIONS: A REPORT ON THREATS TO UNITED STATES INTERESTS AT HOME AND ABROAD 21-22 (2011) (internal quotation marks omitted), available at <http://www.iprcenter.gov/reports/ipr-center-reports/IPR%20Center%20Threat%20Report%20and%20Survey.pdf>.

223. See, e.g., Edward Wyatt, *Obama Orders Regulators to Root Out 'Patent Trolls,'* N.Y. TIMES, June 5, 2013, at B1 (describing several executive orders announced by President Obama aimed "to protect innovators from frivolous litigation" (internal quotation marks omitted)).

appoint to the IPEC's interagency committee "[a]ny such other agencies as the President determines to be substantially involved in the efforts of the Federal Government to combat counterfeiting and infringement."²²⁴ Given its mandate to protect domestic industries against foreign sources of counterfeiting and patent infringement, the ITC clearly falls within the IPEC's coordination purview.

V. CONCLUSION

This Article provides an in-depth analysis and critique of the IPEC's efforts to date.²²⁵ This is an important subject, since the IPEC has a mandate to serve as an effective interagency coordinator and strategic advisor to the legislature and the President in all areas related to IP enforcement.²²⁶ IP enforcement has risen to the highest levels of policymaking and national public discourse. As discussed in this Article, the IPEC has failed to adequately coordinate the various federal agencies that have overlapping authority in this area.²²⁷ The main reasons for this failure are the IPEC's lack of strategic planning, which prevent it from prioritizing resources and activities among agencies, and the inability to integrate patents as a key enforcement issue.²²⁸ Another important issue is the confusion between the roles of the IPEC and the IPR Center, which seems to be, in some cases, a more effective coordination vehicle than the IPEC.²²⁹ Policymakers, legislators, and oversight bodies may view these findings as a helpful aid to promote greater accountability and effective management at the IPEC.²³⁰

224. 15 U.S.C. § 8111(3)(A)(IX) (2012).

225. *See supra* Part IV.

226. *See supra* Parts II–IV.

227. *See supra* notes 178–84 and accompanying text.

228. *See supra* Part IV.

229. *See supra* Part IV.

230. *See supra* notes 178–84 and accompanying text.