DETERRING IT THEFT IN MANUFACTURING WILL SPUR INNOVATION AND GROWTH

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Information technology ("IT") plays a critical role in driving innovation and competitiveness in manufacturing. As such, manufacturers often invest millions of dollars to purchase state-of-the-art technology to increase productivity and operational excellence and lower costs. In 2010 alone, manufacturers in the U.S. spent nearly $95 billion on information technology.[1]

This investment by law-abiding manufacturers in the latest technology, however, is undercut by the use of stolen IT by some of their competitors. Globally, more than $60 billion worth of IT is stolen each year.[2] Manufacturers, especially in emerging markets with weak rule of law, often use stolen IT thereby reducing their input costs relative to their competitors who pay for IT.[3] Because many manufacturers operate with tight profit margins, even small differences in operating costs, including for IT, can significantly impact the competitive playing field. Further, IT theft erodes incentives to innovate and invest in IT and manufacturing, thereby undermining the innovation and growth that drives the U.S. economy.

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Moreover, the effects of IT theft are not confined to U.S. borders. In addition to undermining the many foreign manufacturers that pay for IT, IT theft undermines foreign IT companies—particularly nascent firms. In an industry where scale and network effects are critical, widespread IT theft, as it exists today, can dramatically undermine scale, creating serious, unwarranted risk for the development of innovative IT.

Given how rampant the problem is and how consequential its effects are, it is no surprise that state and federal officials are taking a closer look and seeking ways to use existing federal and state unfair competition laws to address the problem.

Last November, 39 state and territorial Attorneys General signed a National Association of Attorneys General ("NAAG") letter urging the Federal Trade Commission ("FTC") to take action against unfair competition and deter foreign manufacturers from using stolen information technology.[4] The AGs noted that Congress specifically gave the FTC authority to identify and challenge "unfair methods of competition" under Section 5 of the FTC Act as they arise, and to take action against conduct by foreign entities with substantial deleterious effects on competition in the U.S.

The AGs concluded that "theft of information technology is the type of competitive wrong that falls easily within the traditionally broad definition of unfair methods competition."

In addition to urging federal action, the AGs also announced their own commitment to increase enforcement against manufacturers that use stolen IT by leveraging existing state laws, including state statutes modeled after the FTC Act.[5] The 39 AGs wrote that "each of us is seeking ways to use the traditional power of our offices to address the unfair advantage that results when foreign and other manufacturers use stolen information technology, including pirated software, to illegally slash their costs."

On October 18, 2012, Massachusetts Attorney General Martha Coakley announced that her entered into a settlement with a seafood processing company in Thailand to stop using stolen IT, which provided the company an unfair competitive advantage over Massachusetts businesses.[6] The AG's Office alleged that Narong Seafood Company, Ltd. unfairly sold and delivered products into Massachusetts by illegally using pirated software products—a violation of M.G.L. Chapter 93A and its prohibition on unfair competition. "Businesses using unlicensed software should not gain an unfair cost advantage over rivals who play by the rules," Attorney General Martha Coakley said. "We are committed to ensuring that companies

doing business in Massachusetts compete on a level playing field." Under the settlement, Narong agreed to pay a $10,000 civil penalty and not to illegally use unlicensed software in the production of goods that enter Massachusetts.

Federal policy makers and enforcers have also focused on this issue. The U.S. House of Representatives Committee on Small Business and the U.S. Senate Committee for Small Businesses & Entrepreneurship have also called on the FTC to help address an issue with serious ramifications for manufacturers in their states and districts, noting that 98 percent of all manufacturers are small businesses and that "one in three Americans who work in manufacturing, work at a small business."[7]

In March 2012, the FTC responded to the NAAG letter acknowledging that "intellectual property enforcement is of critical importance to ongoing U.S. innovation and competitiveness. Foreign companies gain an unfair advantage when they engage in software piracy, at the expense of law-abiding American firms who pay their fair share for IT."

The FTC went on to say that "[a]ttacking software piracy would reduce this unfair advantage, thereby promoting manufacturing competition and fueling economic growth by bringing more manufacturing jobs back to America."[8]

Unfair competition takes many forms and U.S. manufacturing suffers from a number of challenges, but tackling unfair competition caused by manufacturers using stolen IT is a worthy and efficient use of enforcement resources to level the playing field and aid law-abiding manufacturers.

Exploring opportunities within existing laws to curb unfair competition—at both the state and federal levels—is a logical starting point.

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The FTC and a large number of state Attorneys General have expressed their interest in taking action in this area. Now that Massachusetts has taken action, it will be interesting to see whether other states and the FTC step up to stop unfair competition that is undermining U.S. growth and innovation.

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His practice has encompassed antitrust litigation and counseling in private actions (including complex class actions) as well as federal and state antitrust agency proceedings. He has represented clients in various industries, including air transportation, telecommunications, media, electronic payments, biotechnology and pharmaceutical, consumer products, and fashion.

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[1] *See* Int'l Data Corp. (IDC), *United States Black Book: State IT Spending by Vertical Market, 2Q11* (Sep. 2011).
[2] *See 2011 BSA Global Software Piracy Study* (9th ed. May 2012).
[3] *See* Letter from the National Association of Attorneys General to the Federal Trade Commission (Nov. 4, 2011) and Letter from FTC Chairman Leibowitz to the National Association of Attorneys General (Mar. 13, 2012).
[4] *See* Letter from the National Association of Attorneys General to the Federal Trade Commission (Nov. 4, 2011).
[5] *Ibid.*
[6] *See* http://www.mass.gov/ago/news-and-updates/press-releases/2012/2012-10-18-narong-seafood-co.html.
[7] *See* Letter from the U.S. Senate Committee for Small Business & Entrepreneurship to the Federal Trade Commission (Apr. 2, 2012) and Letter from the U.S. House of Representatives Committee on Small Business to the Federal Trade Commission (Aug. 2, 2012).
[8] *See* Letter from FTC Chairman Leibowitz to the National Association of Attorneys General (Mar. 13, 2012).