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October 16, 2015

Mr. Daniel Marti
United States Intellectual Property Enforcement Coordinator
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503
Via Regulations.gov

Re: Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of the Joint Strategic Plan on Intellectual Property Enforcement, 80 Fed. Reg. 52800 (September 1, 2015).

Dear Mr. Marti:

The International AntiCounterfeiting Coalition, Inc. (“IACC”) is pleased to provide the attached comments in response to your request for public input concerning the forthcoming 2016 Joint Strategic Plan on Intellectual Property Enforcement. We welcome the opportunity to share our experience in shaping U.S. Government priorities in this area of vital importance to American businesses, consumers, and the economy overall. We are available at your convenience to discuss any questions you might have regarding the attached comments, or to otherwise provide clarification of our submission.

Founded in 1979, the IACC is the world’s oldest and largest organization representing exclusively the interests of companies concerned with trademark counterfeiting and copyright piracy. Our members consist of over 250 corporations, trade associations, and professional firms. Our brand and copyright owner members represent a broad cross-section of industries, and include many of the world’s best known companies in the apparel, automotive, consumer goods, entertainment, pharmaceutical, and other product sectors. The IACC is committed to working with government and industry partners in the United States and elsewhere, to strengthen IP protection by encouraging improvements in the law and the allocation of greater political priority and resources, as well as by raising awareness regarding the enormous—and growing—harm caused by IP violations.

The IACC strongly supported the Prioritizing Resources and Organization for Intellectual Property Act of 2008 (“The PRO-IP Act”), and specifically, its provisions creating the position of the IPEC and the development of the Joint Strategic Plan. We appreciate this opportunity to provide input on this important project, and we look forward to working with you and your colleagues in the Administration to ensure that the United States continues to set the global gold standard for IP

protection and enforcement. We are available at any time for clarification of any issues raised in the attached submission.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Travis D. Johnson', written in a cursive style.

Travis D. Johnson
Vice President – Legislative Affairs, Senior Counsel

Submission of
The International AntiCounterfeiting Coalition
to the
Intellectual Property Enforcement Coordinator
Regarding the Joint Strategic Plan

October 16, 2015

The International AntiCounterfeiting Coalition, Inc. (“IACC”), submits the following comments and recommendations to the Intellectual Property Enforcement Coordinator (“IPEC”) pursuant to a request for written submissions from the public providing specific recommendations for accomplishing the goals of the Joint Strategic Plan and for significantly improving the US Government’s IP enforcement efforts.

Priority Legislation and Policy Initiatives

Administration Support for Voluntary Collaborative Initiatives

In each of the previous iterations of the Joint Strategic Plan, the IPEC has cited the importance of voluntary initiatives within the private sector to address the variety of threats associated with intellectual property theft. Both the current and prior Administration recognized that the challenges to IP protection and enforcement evolve at a rapid pace, often faster than legislation and regulation can adapt to counterfeiters’ and pirates’ ever-changing tactics. Voluntary collaboration between responsible partners in the private sector has been an important strategy in this fight, and will continue to be so moving forward. The IACC has been a leader in the development of these types of programs, and has benefited greatly from the support of the both the current IPEC and his predecessor. We encourage the IPEC to continue to take an active role in encouraging further dialogue and partnership among the relevant industry sectors.

The IACC launched its RogueBlock program in January 2012, after a short beta testing period in December 2011, with the main objective of providing a streamlined, simplified procedure by which rights-holders could report online sellers of counterfeit or pirated goods directly to participating credit card and payment processing network partners. This effectively facilitated action against the corresponding merchant accounts and diminished the ability of individuals to profit from their illicit sales. The program has seen great success, and significant expansion over the past three years, and has been seen as a “win-win” for all of the parties involved. Rights-holders are able to provide timely, relevant intelligence, and in the process aid financial service providers in policing bad actors who seek to misuse legitimate commercial tools for illicit purposes. The end results have been a mutually-beneficial relationship between the partners, a more challenging environment for counterfeiters and pirates seeking to do business online, and a safer environment for consumers shopping online.

Our goals upon commencing the RogueBlock program were: 1) to increase the cost of doing business for, and decrease profits to, the counterfeiters; 2) to shrink the universe of third-party acquiring banks willing to do business with rogue merchants; 3) to facilitate an efficient use of resources by both IP owners and our partners by sharing relevant data and avoiding the duplication of efforts; and 4) to disrupt and dismantle counterfeit networks. By any measure, we are achieving those goals. Equally important, the strong partnerships we’ve developed in the financial sector are enabling us to continue enhancing, expanding, and evolving to face new challenges in the online space. Similarly, our IACC MarketSafe program, developed in collaboration with the Alibaba Group, is making strides in addressing the trafficking of counterfeit goods on two of the world’s largest online marketplaces – Taobao and Tmall. We are also pleased to announce that the program

will soon be expanding to include Alibaba.com, AliExpress, 1688. We've also been supportive of recent efforts undertaken by the online advertising sector with the creation of the Trustworthy Accountability Group, and are actively engaging with internet registrars and registries to explore ways in which we can use the relevant data that we've developed through our existing partnerships, to further impact counterfeiters' online operations.

Though the progress made with regard to addressing the misuse of payment systems, and with regard to cleaning up large-scale B2B and B2C trafficking has been notable, the IACC recognizes that there remain a number of sectors in which collaborative efforts have been less robust, or have yet to materialize at all. As discussed herein, shipping companies – both in terms of express delivery services, and the numerous players involved in large-scale ocean-going cargo shipments, including customs brokers and freight forwarders – as well as internet service providers and search engines all play a critical role in the legitimate and illegitimate supply chains. More can and should be done to target illicit trafficking at each of these critical choke-points. The IACC would welcome the support of the IPEC in convening these key industries to discuss common-sense, commercially-reasonable ways in which legitimate businesses can find common ground on the development of best practices to ensure the safety and vitality of our consumer markets, both online and in the brick-and-mortar world.

Trade Facilitation & Trade Enforcement Legislation

In spite of numerous attempts, it has been over a decade since Congress enacted a comprehensive Customs Reauthorization bill. Early in the 114th Congress, both the House and Senate again introduced such legislation; the current legislative vehicle is H.R. 644, now awaiting action in conference. While the House and Senate versions of the bill vary in scope, it should be noted that the intellectual property provisions in each bill (found in Title III), encompass a number of important provisions for which the IACC has long advocated.

Foremost among those is Section 302, concerning the Exchange of Information between U.S. Customs & Border Protection (“CBP”) and rights-holders, and more specifically, CBP’s authority to seek assistance from intellectual property owners in carrying out its IP enforcement mission. CBP has long maintained that its authority to seek such assistance was limited by the Trade Secrets Act, and a related desire to maintain the confidentiality of what it considers to be proprietary information belonging to importers. Pursuant to the National Defense Authorization Act for Fiscal Year 2012, Congress provided clear statutory authorization for the sort of free exchange of information between CBP and rights-holders that had been the norm prior to CBP’s errant interpretation of the Trade Secrets Act. That NDA provision, however, included a sunset clause, to be triggered by the enactment of a new Customs Reauthorization bill. As such, Section 302’s permanent extension of authority to CBP in this regard is a vital component of the legislation. A comprehensive discussion of the “Information Sharing” issue is included below.

Title III of the pending legislation also includes a variety of other provisions that have been widely-supported by rights-holders, and would significantly benefit the overall environment for IP protection and enforcement in the United States. Among these are Section 303 (Provision of

Information related to Seizures of Circumvention Devices), Section 305 (Authorization of the IPR Center), Section 307 (Dedicated IP Enforcement Personnel), and Section 311 (Educational Information for International Travelers). Section 303 seeks to remedy a long-standing oversight with regard to CBP’s authority to provide information to parties affected by the illicit importation of circumvention devices, in violation of the Digital Millennium Copyright Act.¹ As copyright piracy has, in large degree, shifted to the online environment, the seizure of physical copies of pirated materials has greatly diminished. However, end-user piracy in some sectors – particularly entertainment software – is largely reliant upon the availability of circumvention devices manufactured abroad and imported into the United States. Unfortunately, neither the Customs Code nor relevant regulations have been modernized in recent years to account for this actuality. While CBP personnel can share a wide range of information with affected rights-holders when detaining and seizing physical copies of pirated materials, no clear legal authority exists to share that same information where they have detained and seized circumvention devices that enable the use of illegally downloaded, pirated games. That lack of information, in turn, severely diminishes copyright owners’ ability to investigate the parties involved in the manufacturing and importation of circumvention devices, and to enjoy meaningful protection of their copyrights. The enactment of these provisions, and those others identified herein, could provide an immediate practical improvement to CBP’s IP enforcement capabilities.

The IACC also strongly supports the inclusion of provisions included in Section 116 of the House version of the legislation, relating to the duties of customs brokers. While omitted from the bill passed by the Senate, Section 116 directs the Secretary to implement regulations that will help to ensure that customs brokers “know their customer.” Although current regulations require brokers to obtain a “valid power of attorney,” those existing regulations fail to provide clear guidance as to what constitutes a “valid power of attorney.” As a result, individuals trafficking in counterfeit goods frequently provide fraudulent documentation for their shipments, which in turn is likely to go undetected, absent the safeguards contemplated by Section 116. The current framework poses a significant threat, not only to intellectual property owners, but to border security in general. We are hopeful that Section 116 will be retained in the final version of the legislation, when enacted. Further, we would ask that Congress provide the necessary guidance and oversight to ensure the implementation of these provisions in a robust manner to ensure their effectiveness in practice.

CBP Policy Regarding Exchange of Information with Rights-Holders

Historically, the owners of intellectual property rights have provided invaluable assistance to those CBP personnel tasked with the enforcement of IPR at our nation’s borders. This assistance has been necessitated by a number of factors, including the overall volume of imports passing through U.S. ports, the variety of goods presented to CBP for inspection, and more recently, the increasing ability of counterfeiters to manufacture near-perfect copies of products and packaging. These, and other factors, have contributed to the difficulty faced by CBP officers in determining whether those goods before them were genuine or counterfeit. CBP officials could not, and should not, be expected to maintain the expertise required to make such determinations with the level of

¹ 17 U.S.C. 1201(a)(2), prohibiting the importation of circumvention devices.

efficiency and accuracy necessary to achieve the agency’s twin goals of trade facilitation and IPR enforcement. The recognition of that fact is what drove the long-standing collaboration between CBP and rights-holders.

On April 7, 2000, U.S. Customs published Customs Directive 2310-008A² (hereafter, “the Directive”), advising personnel that the disclosure to rights-holders of certain information regarding shipments, prior to seizure of those goods, was impermissible, even when a disclosure was made for the limited purpose of obtaining assistance to determine whether the goods were genuine or counterfeit. Specifically, the Directive required CBP officers to “remove or obliterate any information indicating the name and/or address of the manufacturer, exporter, and/or importer, including all bar codes or other identifying marks,” prior to the release of any sample to a trademark holder. Though issued in 2000, by most reports, the Directive, and the new procedures prescribed thereby, were not fully-implemented until 2007 - 2008. Once implemented however, the Directive posed a severe impediment to the public-private cooperation that, previously, had been the norm. The IACC, in fact, heard relatively few reports from rights-holders of any change in practice until 2006 – 2007.

The basis for this change in policy appears to be tied to an overly-formalistic reading of the relevant regulatory code sections related to the sharing of information regarding, and samples of, suspect shipments, and a similar, overly-literal interpretation of the Trade Secrets Act, 18 U.S.C. 1905 (“the Trade Secrets Act”). The apparent conflict, as seen by CBP, is between CBP officers’ authority to seek assistance by providing a physical sample, or a digital image of those goods, to a trademark owner from the date the goods are presented for inspection³, and the timing authorized for the disclosure of other information related to the shipment.⁴ While rights-holders have incorporated a variety of technologies to assist in the authentication of their legitimate goods, CBP believes that, if those technologies or other information evident on the goods or their packaging might reveal to the trademark owner any information that would otherwise only be made available post-seizure, then any such markings must be removed or redacted before providing the samples to the rights-holder. Likewise, if the provision of a sample, or photographic images of the goods in question, might reveal confidential or proprietary information purportedly belonging to the importer, then such a disclosure would violate the Trade Secrets Act⁵, and in turn expose CBP officers to criminal prosecution.⁶

With CBP’s insistence that its hands were tied by Trade Secrets Act, the IACC and a number of other rights-holders’ groups advocated for a legislative exception to permit rights-holders to resume their traditional role of providing assistance to CBP. To that end, language was included

² U.S. Customs & Border Protection - Customs Directive 2310-008A, <http://www.cbp.gov/sites/default/files/documents/2310-008a.pdf>.

³ 19 CFR 133.25(c).

⁴ Compare 19 CFR 133.25(b), permitting the disclosure, from the time of presentation, of the date of importation, the port of entry, a description of the merchandise, the quantity involved, and the country of origin of the merchandise; to 19 CFR 133.21(c), authorizing the disclosure of the above information, as well as the identity of the manufacturer, exporter, and importer, subsequent to a seizure.

⁵ 18 U.S.C. 1905.

⁶ The Trade Secrets Act prohibits any disclosure, *not authorized by law*, of a broad range of information a government employee obtains or has access to in his or her official capacity.

in Section 818(g)(1) of the National Defense Authorization Act of Fiscal Year 2012 (“NDAA”).⁷ Despite that explicit authorization, CBP published an Interim Rule in April of 2012, creating what rights-holders viewed as an arduous and inefficient process requiring CBP personnel who were seeking assistance in determining whether or not goods were counterfeit, to first seek that assistance from the importer. As drafted, the Interim Rule included a procedure “intended to achieve the policy goals of the NDAA in a manner consistent with maintaining the flow of information to the government, fostering competition, keeping prices low, and maintaining consumer choice.” The rule required CBP to provide the importer of goods suspected of being counterfeit with an opportunity to demonstrate, within seven days (exclusive of weekends and holidays) of the issuance of a notice of detention, that the goods in question do not bear a counterfeit mark. “Only absent such a demonstration by the importer will information, images, or samples be shared with the right holder.” The IACC outlined its numerous concerns with the adoption of the Interim Rule in its submission to CBP and the Treasury Department, dated June 25, 2012.⁸

Last month, over three years after the publication of the Interim Rule, CBP published a Federal Register Notice⁹, amending and finalizing the Interim Rule regarding the “Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border.” Among the most relevant changes embodied in the Final Rule, as adopted, were:

- The elimination of the optional 30-day extension period for detention of goods (19 CFR 133.21(b)(1));
- Acknowledgement of CBP’s authority to seek assistance from the owner of a mark at any time after the presentation of goods for examination (19 CFR 133.21(b)(2)(i)(A));
- Concurrent provision of limited importation information (19 CFR 133.21(b)(2)(i)(B)); and
- Disclosure / Provision of Redacted and Unredacted Photos or Samples. (19 CFR 133.21(b)(3) and (b)(5)).

The Final Rule, as amended, though a significant improvement over the Interim Rule, remains substantially unchanged with regard to CBP’s position on the disclosure of unredacted images or samples to rights-holders. Such disclosure will only take place in the event that the importer either fails to respond in a timely manner, or provides CBP with insufficient proof that the goods in question are authentic. CBP maintains its authority to provide redacted samples or images of the merchandise and its packaging, at any time after it has been presented for examination.

CBP further maintains that its disclosure of unredacted photos or samples and the information provided to a mark owner under the regulation may be subject to the Trade Secrets Act, and that

⁷ National Defense Authorization Act for Fiscal Year 2012, Sec. 818(g)(1), stating, “IN GENERAL.—If United States Customs and Border Protection suspects a product of being imported in violation of section 42 of the Lanham Act, and subject to any applicable bonding requirements, the Secretary of the Treasury may share information appearing on, and unredacted samples of, products and their packaging and labels, or photographs of such products, packaging, and labels, with the rightholders of the trademarks suspected of being copied or simulated for purposes of determining whether the products are prohibited from importation pursuant to such section.

⁸ [http://www.iacc.org/downloads/key-issues/Submitted Comments re Disclosure of Information for Certain IPR at the Border.pdf](http://www.iacc.org/downloads/key-issues/Submitted%20Comments%20re%20Disclosure%20of%20Information%20for%20Certain%20IPR%20at%20the%20Border.pdf).

⁹ Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border, 80 Fed. Reg. 56370 (September 18, 2015).

the information is provided only for the purpose of assisting CBP in determining whether the merchandise bears a counterfeit mark. The IACC has strenuously objected to CBP's and Treasury's interpretation of the Trade Secrets Act, and its purported prohibition on the agency's sharing of information with rights-holders. While such disclosure might reasonably be said to be prohibited in the absence of statutory authorization, the NDAA expressly provided that authority, and it should be exercised fully. We believe our interpretation is further borne out by the language included in the Trade Facilitation and Trade Enforcement Act currently pending in Congress.

It is also worth noting that while the Final Rule notes that the disclosure of information by CBP to mark owners is made only for the purpose of those mark owners' provision of assistance in determining whether merchandise bears a counterfeit mark, CBP did not adopt a more extreme position advocated by the importer community in recent years that would specifically preclude any other use of the information by mark owners, or require mark owners to attest that the information would not be used for other purposes. The IACC has argued that such a requirement would be unenforceable in practice, and infringe upon rights-holders' legitimate business interests.

The Final Rule also permits CBP to disclose to the importer, at any time after the presentation of goods for examination, unredacted photos and samples of goods suspected of bearing a counterfeit version of a registered and recorded mark. The IACC expects this amendment to have no practical effect on an importer's ability to aid CBP's IP enforcement mission.

As noted in the above discussion of the Trade Facilitation and Trade Enforcement Act, Congress has again included provisions intended to clarify the clear authority that CBP personnel retain to seek assistance from rights-holders in the performance of their IP enforcement mission. We would strongly support an Administration review of the implementation of the NDAA provisions previously enacted by Congress, and the permanent enactment contemplated by the Trade Facilitation and Trade Enforcement Act, to ensure that CBP's interpretation and implementation of the Congressional mandate is not needlessly hampering its IP enforcement mission.

CBP Pilot Program – Abandonment of Express Delivery Shipments

In recent years, express delivery and international mail have seen considerable growth as a vector for the trafficking of counterfeit goods into the United States.¹⁰ That increased volume appears to correlate with the shift during that same period to a "direct-to-consumer" distribution model associated with the proliferation of rogue websites. Earlier this year, the IACC became aware of an ongoing pilot program operated by CBP in cooperation with the express delivery industry, intended to respond to this evolving distribution model.

The genesis of the pilot program is found in a recommendation from CBP's Commercial Operations Advisory Committee ("COAC") Trade Enforcement & Revenue Collection

¹⁰ Though CBP reported an overall decrease in the number of seizures overall for FY 2014, it's notable that express delivery shipments were the only shipment environment in which a year-over-year increase was seen. As a percentage of seizures by value, express delivery and mail shipments accounted for approximately 31% of seizures in FY 2014, versus approximately 25% in FY 2013.

Subcommittee.¹¹ Specifically, the COAC recommended that CBP collaborate “with its express consignment stakeholders to develop a simplified and mutually beneficial IPR enforcement process in the express consignment environment through which CBP would offer the importer and the U.S. consignee an abandonment option on detention notices for shipments detained by CBP on suspicion of trademark or copyright violations.” At the May 22, 2014 public meeting of the COAC, a status report was presented by the Office of Trade Relations Trade Enforcement and Revenue Collection Subcommittee, referencing the “Simplified Seizure Process” of May 15, 2014. That report highlighted provisions of the express carriers’ terms of agreement which permit the abandonment of suspect goods, and suggesting the voluntary process as a means of increasing CBP’s efficiency in handling small consignments, while “providing all parties of interest with their legal due process.”¹² Regrettably, the IACC believes that the COAC recommendations, and their implementation via the pilot program, fail to take into account the interests and legal rights of intellectual property owners specifically provided for in the relevant statutory and regulatory provisions. Further, rights-holders have expressed significant concerns regarding the need for greater clarity and oversight in the process.

Pursuant to the program, when CBP personnel at participating facilities identify express consignments as suspected shipments of counterfeit goods, the express delivery companies – as the importer of the goods – and the ultimate consignee, are given notice of CBP’s determination, and given the option of abandoning the shipment, rather than subjecting the shipments to the formal seizure and forfeiture procedures established by statute and regulation. Once abandoned, the goods are destroyed by the relevant express delivery company under CBP supervision; the cost of destruction is borne by the express delivery company.

To the extent that this program results in fewer shipments of counterfeit goods entering the marketplace, or reaching consumers, the goal of the pilot program is laudable. Subsequent to the abandonment and destruction procedures however, the trademark owner whose rights are implicated by the interdiction receives no notice from CBP, nor any of the information that would typically be provided pursuant to notices of detention or seizure mandated by CBP regulations under standard procedures. CBP has further indicated that at this time they do not maintain records of the specific trademarks involved in any such actions, or other data relevant to rights-holders’ ability to undertake further investigation or enforcement of their intellectual property rights. It is likewise unclear whether the cooperating express delivery companies are capturing that data or maintaining records related to the marks involved, the individuals associated with the shipments, or other relevant information.

¹¹ FY2013 – FY2015 COAC RECOMMENDATIONS. Term 13, Recommendation Number 13047 (May 22, 2014). <http://www.cbp.gov/sites/default/files/documents/COAC%20Recommendations%2013th%20Term.pdf>. CBP has also cited the 2013 Joint Strategic Plan on Intellectual Property Enforcement prepared by the U.S. Intellectual Property Enforcement Coordinator, as a basis for its program although that document speaks only vaguely about the need to “Increase Focus on Working with Express Carriers and on Counterfeits Shipped through International Mail.”

¹² Office of Trade Relations Trade Enforcement and Revenue Collection Subcommittee Status Report (May 22, 2014).

<http://www.cbp.gov/sites/default/files/documents/Trade%20Enforcement%20and%20Revenue%20Collection%20Subcommittee%20Status%20Report.pdf>.

To our knowledge, the pilot program is operating in a limited number of express delivery facilities throughout the United States; though CBP has indicated its intention to expand the program nationwide and to all express carriers. In addition, CBP has stated its desire to further expand the program to include international mail shipments via USPS.

While CBP views this pilot program as providing a significant benefit with regard to lowering the administrative burden in connection with their IP enforcement mission, the IACC has grave concerns with the way in which CBP has sought to achieve increased efficiency. More directly, CBP's pilot program seems to fully disregard statutory mandates regarding the seizure of counterfeit goods as well as requirements to provide notice to rights-holders of such seizures.¹³ The program ignores the procedures set forth in its own announced regulations and directives and has done so with no formal, or even informal, opportunity for public comment on its new procedures.¹⁴

While CBP clearly recognizes the significant role that express delivery services play in the trafficking of illicit goods into the country, the program provides little or no incentive for those services to undertake any improvement of their existing procedures. Express shippers are largely absolved for their role in transporting the goods, while continuing to profit from the large volume of illicit shipments passing through their systems. At the same time, the express shippers apparently have made no commitment whatsoever to make use of the information that they are privy to, even where they've received repeated notices of a customer's use of their services to facilitate illegal activity.

CBP's determination that it is not required to provide notice to rights-holders, as is mandated when goods are detained or seized for intellectual property violations, is also greatly troubling – particularly in light of the long-standing issues related to pre- and post-seizure disclosure of information embodied by its Interim Rule adopted in 2012, and the Final Rule just recently adopted.¹⁵ The distinction between the abandonment of goods pursuant to the pilot program, and the seizure of those same goods is a semantic one. But while the pilot program may in fact reduce CBP's administrative burden, that benefit must be balanced with the legitimate rights of IP owners, and the long-term impact that the program will have on both CBP's and rights-holders' abilities to enforce IP rights. The collection and disclosure of information contemplated under the governing statutes and regulations is a vital component to targeting, detection, and interdiction.

Further, while the Status Report of May 15, 2014 makes direct reference to the importance of “providing all parties of interest with their legal due process rights,” CBP's failure to disclose

¹³ See, e.g., 19 U.S.C. 1526(a) (prohibiting the importation of infringing goods), 19 U.S.C. 1526(b) (providing for seizure and forfeiture of violative goods), 19 U.S.C. 1526(c) (providing for an injunction and damages), and 19 U.S.C. 1526(e) (providing specifically for the seizure, forfeiture, and disposition of merchandise bearing counterfeit marks).

¹⁴ See, e.g., 19 CFR 133.21 (outlining procedures for dealing with articles suspected of bearing counterfeit marks); and 19 CFR 133.25 (regarding procedures on detention of articles subject to restriction (including notice to rights-holders); Customs Directive 2310-008A, Customs Directive 2310-010A.

¹⁵ Detailed comments outlining the IACC's position on the Interim Rule are available at:

http://www.iacc.org/downloads/key-issues/Submitted_Comments_re_Disclosure_of_Information_for_Certain_IPR_at_the_Border.pdf.

information about such shipments serves to contravene the express provisions of 19 U.S.C. 1526(c), which states, “Any person dealing in any such merchandise may be enjoined from dealing therein within the United States or may be required to export or destroy such merchandise or to remove or obliterate such trademark *and shall be liable for the same damages and profits provided for wrongful use of a trade-mark, under the provisions of sections 81 to 109 of title 15* [emphasis added]. Absent any notice of the wrongful conduct, rights-holders are precluded from any meaningful opportunity to seek injunctive relief, damages or profits related to the wrongful use of their trademarks. Enforcement, even if that responsibility is being shifted from CBP to rights-holders, requires meaningful, detailed intelligence to act upon; the pilot program greatly diminishes the data available for that enforcement.

Even if one was to accept the semantic distinction between the interdictions taking place under the pilot program and full-fledged seizures, at minimum, CBP’s own regulations require disclosure of some information regarding the shipments to trademark owners. “Once a notice of detention is issued¹⁶, *CBP will disclose to the owner of the mark* the following information, if available, within thirty days (excluding weekends and holidays) from the date of detention: (i) The date of importation; (ii) The port of entry; (iii) The description of the merchandise from the entry; (iv) The quantity involved; and (v) The country of origin [emphasis added].”¹⁷ That disclosure is not permissive.

While we applaud the efforts of CBP in the enforcement of intellectual property rights, we strongly believe that the ongoing pilot program is seriously flawed. We would welcome an opportunity to work with the IPEC, with CBP and with those in the express delivery sector in a manner that recognizes the capabilities and responsibilities of each of the relevant parties. We ask for your support in facilitating that collaboration.

Empowering the Federal Maritime Commission to Play a Greater Role in Combatting the Trafficking of Counterfeits via Ocean-Going Cargo Shipments

While much attention has shifted in recent years to the increasing volume of counterfeit goods being imported into the United States via small consignments (i.e., “direct-to-consumer” international mail and express delivery shipments), and the correlation between online sales of counterfeit goods and the apparent evolution in distribution models; the majority of counterfeit and pirated goods, like authorized goods, continue to enter the United States via large-scale ocean cargo shipments.¹⁸ This problem has been, and continues to be addressed in part by U.S. Customs and Border Protection through its review and regulation of incoming ocean freight. In 2014 alone

¹⁶ The TERC Status Report refers to CBP’s notifications to the importer of record as “detention notices.” CBP, likewise, has indicated that the notices provided to the express delivery companies pursuant to the pilot program are, in fact, notices of detention which should trigger CBP’s duty to provide notice to the relevant rights-holder under 19 CFR 133.21(b)(2).

¹⁷ 19 CFR 133.21(b)(2).

¹⁸ In CBP’s most recently published seizure statistics for FY 2014, cargo shipments accounted for over 48% of IP-related seizures (by value), totaling \$592.5 million. Express delivery and mail seizures combined for \$384 million, or approximately 31% of seizures. <http://www.cbp.gov/sites/default/files/documents/2014%20IPR%20Stats.pdf>.

CBP reported that it seized counterfeit and infringing cargo valued at nearly \$600,000,000.¹⁹ CBP's focus, however, is necessarily on the freight itself, or on those who represent what the freight is to CBP (i.e., licensed customs brokers filing entry documents), rather than on the various institutional participants who arrange or participate in the actual transport of the inbound freight, e.g., Ocean Transportation Intermediaries (OTIs). The Federal Maritime Commission (FMC), on the other hand, directly regulates the conduct of, and agreements between, those entities involved in the ocean transportation of goods into and out of the United States. Given this responsibility, the FMC is uniquely situated to significantly deter the illegal importation of counterfeit and pirated goods through its regulation and licensing of, and investigative activities regarding, OTIs.

Many of the IACC's brand and copyright owner members have experienced a large and growing incidence of counterfeit and/or pirated shipments being imported into the U.S. that, upon investigation, are found to have been originated with the assistance of OTIs in the United States. In many of these cases, the importers used stolen or fabricated identities that, under current regulations, are not required to be challenged or otherwise verified by OTIs as a precondition to providing transportation services. These transportation services frequently include the retention of a third-party customs broker to file entry documents on behalf of the importer. Our members have found that, in such cases, the customs broker usually is retained only upon the condition that it has no direct contact with the importer. This condition is required by OTIs to protect their business relationship with the importer from encroachment by the customs broker. In this manner, the unchallenged and unverified, but stolen or false, identity of the unlawful importer is simply passed along by the OTI to the customs broker, who has agreed not to contact the importer to challenge or verify the stolen or false identity.

Counterfeiters and pirates have exploited the lack of FMC regulations requiring OTIs to verify the identities of importers, as well as the corresponding practice of OTIs retaining third party customs brokers under conditions that prevent customs brokers from verifying the identities of the importers.

In May, 2013, the Federal Maritime Commission published an Advanced Notice of Proposed Rulemaking²⁰ – the first such proposal in fourteen years – “intended to adapt to changing industry conditions, improve regulatory effectiveness, improve transparency, streamline processes and reduce regulatory burdens. The IACC submitted comments in response to the FMC's Advanced Notice of Proposed Rulemaking, focused primarily on document validation and retention, and information sharing, intended to improve the efficiency and effectiveness of the FMC's oversight of OTIs. The overwhelming majority of the comments received however were from the regulated companies themselves, and were strongly opposed to any of the changes proposed by the FMC. Regrettably, the FMC subsequently published an amended notice of proposed rulemaking²¹ that failed to substantially alter the regulatory landscape, in spite of the acknowledged need to “adapt

¹⁹ Intellectual Property Rights Seizure Statistics – Fiscal Year 2014, <http://www.cbp.gov/sites/default/files/documents/2014%20IPR%20Stats.pdf>.

²⁰ Amendments to Regulations Governing Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties, 78 Fed. Reg. 32946 (proposed May 31, 2013) (to be codified at 46 CFR pt. 515).

²¹ Ocean Transportation Intermediary Licensing and Financial Responsibility Requirements, and General Duties, 79 Fed. Reg. 61544 (proposed October 10, 2014) (to be codified at 46 CFR pt. 515).

to changing industry conditions, improve regulatory effectiveness, improve transparency, streamline processes, and reduce regulatory burdens.” Though the FMC has made significant efforts in the meantime to increase its enforcement activities, further consideration should be given to modernizing the agencies regulatory mandate to ensure that the necessary tools are available to address the many changes that have taken place in the shipping industry during the past two decades. Rights-holders were very pleased by the FMC’s becoming a partner agency of the National IPR Coordination Center, and are optimistic that this partnership will create new opportunities for cooperation and collaboration between the FMC that will greatly enhance its IP enforcement capabilities, and also provide significant intelligence to other partner agencies. Additional resources – both in terms of material and personnel – would be helpful in ensuring the FMC’s continued improvement in these areas.

Enforcement of Exclusion Orders

In its 2013 Joint Strategic Plan, the IPEC recommended evaluating the enforcement process for Exclusion Orders issued by the International Trade Commission, to ensure that such enforcement is “transparent, effective, and efficient,” and that “CBP uses transparent and accurate procedures for determining whether an article is covered by the ITC exclusion order.” Regrettably, since the publication of the previous Strategic Plan, rights-holders continue to report many of the same concerns with regard to the enforcement of exclusion orders.

While exclusion orders could be an effective tool in eliminating unfair competition in the U.S. market by keeping infringing goods out of the country, their enforcement faces a number of structural impediments. The IACC believes that these obstacles could be easily remedied to significantly improve the effectiveness of the orders. For example, CBP currently has clear authority under the statutes and regulations to obtain assistance from relevant parties in the case of suspected counterfeits or pirated goods. Similar authority with regard to goods subject to an exclusion order, however, does not exist. Assistance from rights-holders, which has traditionally played a vital role in confirming goods’ authenticity or infringing nature, could play a similar role in the determination of whether certain goods presented for entry are otherwise subject to exclusion.

Rights-holders have also raised the issue of their inability to provide input in instances where an importer seeks certification from CBP that the products they’re seeking to import do not violate an exclusion order. Currently, importers are permitted to meet with CBP ex parte when seeking such certification. Conversely, rights-holders are afforded no meaningful opportunity to participate in such proceedings. Simply modifying the existing regime to allow for an inter partes process could result in better determinations.

Finally, right-holders point to a disparity between the information provided in Seizure and Forfeiture notices in cases involving exclusion orders, versus those provided as a result of seizures involving trademark or copyright violations. In the latter cases, rights-holders are

provided with a range of data points set forth in federal regulations.²² As has been the case with seizures of circumvention devices, the lack of clear authority to share relevant information about the enforcement actions with affected rights-holders, has hampered the abilities of rights-holders to effectively investigate and enforce of their own accord, or to determine with any certainty the usefulness of availing themselves of exclusion orders to protect their legitimate intellectual property rights. As in the above cases, providing Customs with a clear mandate to provide this information would help to remedy these concerns.

Engagement of, and Support for, State and Local Law Enforcement

In recent years, the IACC has focused significant efforts on the engagement of state and local law enforcement in the fight against counterfeiting, perhaps most notably in the development of law enforcement task forces at the city-level in New York and Los Angeles, as well as the statewide task force in Mississippi – the first of its kind in the United States. We’ve also worked closely with a number of like-minded groups, including the Recording Industry Association of America, the International Trademark Association, and the US Chamber of Commerce, in developing, and advocating for the adoption of model legislation at the state level to ensure that law enforcement and prosecutors have available the same sorts of tools available at the federal level.

The IACC and its members have found legislatures and law enforcement in states throughout the country to be enthusiastic about the issue, though often less familiar with the intricacies of IP cases than their federal counterparts. We believe that greater coordination between federal and state authorities could provide a powerful force-multiplying effect. While there is some variance between federal laws concerning trademark counterfeiting, and those found in the states, the experience and expertise of federal law enforcement and the US Attorneys – for example, in conducting investigations, and building and trying cases – would be invaluable to building the capacity of state and local enforcement. Fully funding the grant programs for state and local programs established under the PRO-IP Act is, likewise, viewed as an essential component to building the IP enforcement capacity of state and local law enforcement.

The IACC and its members have been active participants in programs conducted at the USPTO’s Global Intellectual Property Academy to train and educate law enforcement, prosecutors, and judges from abroad; a comparable model, aimed at developing greater understanding and expertise among domestic legal and law enforcement professionals could perhaps serve a similar end.

Improving Public Awareness

The problem of counterfeiting in the United States is one of both supply and demand. Large volumes of cheap, illicit goods are manufactured abroad for export to the United States, and American consumers continue to buy large volumes of those counterfeit goods. Consumers generally do so with no regard for the economic or human costs inherent in that decision. For a

²² 19 CFR 133.21 and 133.42, for trademarks and copyrights, respectively.

number of years, the IACC has sought to address the latter concern through a number of consumer education and public awareness campaigns. In 2008, the IACC partnered with then-Mayor Bloomberg's Office in New York City, to promote consumer awareness regarding the harms associated with counterfeiting, in the hope of driving down consumer demand for counterfeits. This public awareness campaign has been a true public-private partnership, and the initial success was followed by the campaign's expansion to additional cities in the US and abroad. More recently, the IACC partnered with the National Museum of Crime and Punishment in developing a first of its kind exhibit in the United States, focused on trademark counterfeiting and the range of harms caused to consumers and the economy. Other initiatives, including our DesignsFauxReal.com site, have attempted to find creative ways to engage with consumers about the risks associated with online sales of counterfeit goods, including identity theft and phishing scams. We cannot simply arrest and seize our way out of this problem; the scale of counterfeiting and piracy is simply too great. Consumer education, however, can play an important role in decreasing the demand for counterfeit goods, and the Administration should provide sufficient resources to the relevant agencies and other bodies tasked with IP protection and enforcement to ensure that outreach and education can remain a priority moving forward. The IPEC should take a leadership role in ensuring that such efforts are well-coordinated and without unnecessary duplication.

International Engagement, Capacity Building, and Training Programs

The IACC's priorities concerning international engagement were discussed at length in the Coalition's most recent Special 301 submission²³ to the U.S. Trade Representative. The additional comments included herein both summarize and supplement those key issues.

Continuation and Expansion of the USPTO IPR Attaché Program and DOJ IPLEC Program

IACC members have been very pleased with the performance and placement of attaches as part of the USPTO's Overseas IPR Attaché program, and encourage both the program's continuation and expansion. The regional attaches have proven exceedingly helpful in assisting rights-holders with a variety of concerns abroad. Similarly, IACC members have had the highest compliments for the work being done by DOJ's IP Law Enforcement Coordinators in a number of embassies; their expertise and local knowledge has been widely praised.

International Engagement Related to Enforcement Against Counterfeit Goods In-Transit

Transshipment of counterfeit goods has been a priority issue for the IACC for a number of years, and continues to grow in importance as counterfeiters adopt more complex distribution schemes in an attempt to evade detection and seizure of their illicit goods. The United States remains an outlier with regard to in-transit enforcement, in that it provides clear statutory authority to seize

²³ Comments of the International AntiCounterfeiting Coalition – Special 301 (2015), http://www.iacc.org/downloads/key-issues/2015_IACC_Special_301_Report_Submission.pdf.

good passing through the country, even where those goods are ultimately destined (or at least documented for) another market. Our neighbors to both the north and south have shied away from taking on that enforcement responsibility. Last year, in fact, when the issue was raised in the context of Canada's long-overdue updating of its IP statutes²⁴, the country's Industry Minister, James Moore, stated that "The idea Canada would act as a customs agent for the United States is, frankly, not something that's on the table ... The scope of this is protecting Canadians and the Canadian domestic market." Mexico, to its credit, is reportedly considering a reversal of its own policy precluding in-transit enforcement. We would encourage the IPEC to take a vocal role in support of that effort, and in advocating for the Canadian government to re-visit the issue as well. To that end, it would be extremely helpful if U.S. Customs and Border Protection could supply relevant data regarding the number shipments, and the volume and value of goods seized in-transit through the United States, and bound for each country. Likewise, relevant data concerning seizures of counterfeit goods that transited either Mexico or Canada prior to their interdiction by U.S. officials be most welcome. We are similarly hopeful that transshipment will remain a key topic of discussion in the context of U.S. and E.U. negotiations of the Transatlantic Trade and Investment Partnership ("TTIP") that are currently underway. A truly effective approach to enforcement against counterfeit goods requires a recognition by all responsible parties that we are dealing with a cross-border, multi-jurisdictional threat that demands a cooperative approach. Where enforcement personnel are aware of illicit trafficking – whether it involves narcotics, people, weapons, or counterfeits – those individuals should be empowered to take action against the shipment.

Support for Capacity Building Initiatives in the U.S. and Abroad

The IACC, like many other rights-holder groups, devotes significant resources to the development of curricula and hosting events for customs, law enforcement, and other government officials with IPR protection and enforcement responsibilities. During the past two years, we've sought to greatly expand our international footprint in this area with the development of our Latin America Training Program, hosting events in Argentina, Bolivia, Brazil, Mexico, and Panama; and working directly with governments in Curacao and Jamaica to provide assistance with priority issues in those countries. In addition, we've had the opportunity to work with partners in both the public and private sectors around the world on similar events in China, France, Italy, Hungary, the United Arab Emirates, Vietnam, and elsewhere. We've received great assistance from U.S. Government personnel – whether from the State Department, USPTO, Department of Justice, or Homeland Security – and they should all be commended for their efforts.

We have also been pleased to regularly participate in the U.S. Patent & Trademark Office's Global IP Academy, where IACC staff and members have had the opportunity to meet with foreign prosecutors, judges, and agency representatives. The value of such direct interaction cannot be underscored enough. We strongly encourage the Administration to continue supporting capacity building initiatives throughout the Executive Branch agencies. Ensuring that our international partners have sufficient training and awareness of IP provides a force-multiplier effect that should, in turn, help stem the flow of counterfeit goods into the U.S., while also allowing for the growth of strong markets abroad where American-made products can compete on an even footing.

²⁴ Combating Counterfeit Products Act, Statutes of Canada: 2014, c. 32.