June 3, 2015

RE: Support for HR 1907 –
Trade Facilitation & Trade Enforcement Act of 2015

Dear Chairman Ryan and Ranking Member Levin:

On behalf the International AntiCounterfeiting Coalition (IACC), I write to you today in support of H.R. 1907, the Trade Facilitation and Trade Enforcement Act, and to applaud the Committee for its efforts to ensure the inclusion of meaningful intellectual property enforcement provisions in the legislation. Founded in 1979, the IACC represents approximately 250 member companies including many of the world’s best-known brands from the apparel, software, pharmaceutical, electronics, automotive, entertainment, consumer goods, and other product sectors. Our mission is to combat counterfeiting and piracy by promoting laws, regulations, directives, and relationships designed to render the theft of intellectual property undesirable and unprofitable.

Title III of the legislation encompasses a number of important provision for which the IACC has long advocated, particularly Section 302 (Exchange of Information), Section 303 (Provision of Information related to Seizures of Circumvention Devices), Section 305 (Authorization of the IPR Center), Section 307 (Dedicated IP Enforcement Personnel), Section 311 (Educational Information for International Travelers). With regard to Section 302, I have attached more detailed comments outlining IACC’s position in light of long-standing rights-holder concerns involving CBP’s implementation of related Congressional measures in the past.

The IACC also strongly supports the inclusion by the Committee of Section 116 of Title I, relating to the duties of customs brokers. While omitted from the legislation recently passed by the Senate, Section 116 directs the Secretary to implement regulations that will help to ensure that customs...
brokers “know their customer.” While 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.

I thank you for your consideration of these positions, and would welcome an opportunity to meet with you or your relevant staff to discuss this bill. We stand ready to offer the full weight of our assistance to ensure that this important legislation is enacted.

Sincerely,

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

Official Position re: H.R. 1907 – Section 302, creating 19 U.S.C. 1628A -
Exchange of Information Related to Trade Enforcement

Background
On April 7, 2000, U.S. Customs & Border Protection published Customs Directive 2310-008A, advising CBP personnel that the disclosure to rights-holders of certain information regarding shipments, prior to seizure of those goods, was impermissible – even when such disclosure was made for the limited purpose of obtaining assistance to determine whether the goods at issue were genuine or counterfeit. This guidance was implemented, in practice, over the course of several years, and beginning around 2006, the IACC began receiving reports from its member companies concerning the negative impact that the Directive was having on intellectual property enforcement at the borders.

Traditionally, CBP personnel had frequently sought advice and assistance directly from intellectual property owners when attempting to authenticate goods entering at a port, but which the CBP personnel believed may be counterfeit. It is unquestionable that the legitimate manufacturers of branded merchandise are the most qualified parties to make an accurate determination of authenticity. Authentication by the rights-holder was often possible on the basis of photographic evidence of the goods in question, and / or their packaging; the typical turnaround time for request for authentication assistance, then and now, is less than 48 hours. The accuracy and efficiency of authentication is vital to achieving CBP’s twin missions of trade enforcement and trade facilitation.

The publication of Directive 2310-008A, and the accompanying change to CBP procedures, was tied to a legal interpretation of the Trade Secrets Act prepared by the Department of the Treasury. Though CBP has referred to that legal interpretation in past discussions, the IACC has not been afforded the opportunity to review the document. As summarized however, the interpretation sought the broad application of an already broadly-worded statute to reach the absurd conclusion that CBP’s long-standing policy of seeking assistance from rights-holders in authenticating suspected counterfeits – and more specifically, the provision of information (including unredacted photographs and samples of the goods) about the shipments prior to the seizure of the goods – exposed CBP personnel to criminal prosecution under the Trade Secrets Act.
In response to the legal opinion, CBP modified its policies to permit its officers to provide only redacted images or samples of the goods. In doing so, CBP largely precluded any capacity of rights-holders to determine whether the goods in question were authentic or counterfeit. In at least one instance, CBP took the drastic step of physically grinding off serial numbers that were etched into a glass bottle provided to a trademark owner as a sample for authentication.

**Past Congressional Action**
In 2011, Congress sought to address CBP’s policy, providing language within the National Defense Authorization Act for Fiscal Year 2012 to explicitly clarify the authority of CBP personnel to share information for such purposes, consistent with its trade enforcement mission. Because the Trade Secrets Act precludes liability for the disclosure of information in instances where the disclosure is specifically authorized by another statute, Section 818(g) of the FY 12 NDAA effectively negated the purported legal basis for CBP’s policy.

**Current Regulatory Framework**
In the aftermath of that Congressional action, CBP initially indicated its intention to revert to its traditional model of robust collaboration with rights-holders, in seeking authentication assistance. Regrettably, in April 2012, CBP and Treasury published an Interim Final Rule for comment in the Federal Register (77 Fed. Reg. 24375-80 (April 20, 2012)), largely disregarding the intent of the Congressional enactment contained in the NDAA. Citing concerns that CBP personnel may inadvertently disclose confidential or proprietary information relating to importers, the Interim Rule created a cumbersome process requiring CBP personnel to seek assistance from the importer of the suspect goods, rather than from the relevant rights-holder. Only if the importer is unable to prove the goods’ authenticity to CBP’s satisfaction within seven days (excluding weekends and holidays), or if the importer fails to respond at all, is CBP permitted to request assistance from the trademark owner.

In most circumstances however, the importer is poorly positioned to be able to provide authentication assistance. At best, they may be able to provide a pedigree demonstrating where the questioned goods were obtained from; but with regard to the core issue of the goods’ authenticity, the importer is wholly unqualified to make that determination. To compound concerns, the Interim Rule also failed to provide any standards or guidance to CBP personnel for use in assessing any “proof” that might be offered by an importer. Accordingly, the Interim Rule – which was “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[,]” fails on all accounts. In practice, the interim rule hinders both trade facilitation and trade enforcement. Authentications take longer (slowing the
pace of goods’ entry into the market), and are less accurate (due to the reliance upon the determinations of parties unqualified to authenticate goods or detect counterfeits).

**Enactment of 19 U.S.C. 1628A**
The IACC strongly supports the enactment of the proposed 19 U.S.C. 1628A, as provided in Section 302 of H.R. 1907. Given the historical background discussed herein, however, we also encourage the inclusion of report language clarifying Congress’ intent of the enactment and / or disavowing the procedural impediments created by the 2012 rulemaking process undertaken by the Department of Treasury and U.S. Customs & Border Protection, and in the development of Customs Directive 2310-008A. Likewise, we would encourage close oversight of the full implementation of the new law.