

April 11, 2019

Mr. Brandon Lord
U.S. Customs & Border Protection
Office of Trade
1331 Pennsylvania Avenue NW, Suite 950N
Washington, D.C. 20229
Via Regulations.gov

Re: The 21st Century Customs Framework; Docket Number USCBP-2018-0045

Dear Mr. Lord:

The International AntiCounterfeiting Coalition, Inc. (“IACC”) is pleased to provide these comments in response to the request published by your office in the Federal Register on March 12, 2019. 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.

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 200 corporations, trade associations, and professional firms; they represent a broad cross-section of industries, and include many of the world’s best-known brands 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.

As a preliminary matter, we’d like to commend our partners within the Department of Homeland Security, including U.S. Customs and Border Protection (“CBP”), for their efforts in addressing the trafficking of counterfeit goods. From CBP’s frontline personnel

in over 300 ports across the nation, to the officers at Homeland Security Investigations (“HSI”) who build cases within and beyond our borders, the IACC has been consistently impressed with the dedication and support provided by our public sector colleagues. Without question, the task of protecting American consumers and legitimate businesses from this illicit trafficking is a monumental one. We welcome the opportunity to work with you as you undertake this comprehensive review of existing policies and procedures related to trade enforcement, and the development of new tools and practices that will increase the efficiency and effectiveness of your and our efforts as we work toward a common goal of keeping counterfeit goods out of consumers’ hands.

In recent years, the IACC has devoted significant resources to developing collaborative programs across industry sectors, most notably in our work with the credit card and payments sector through our RogueBlock program, as well as our IACC MarketSafe initiative, developed in partnership with the Alibaba Group. The foundation of these programs has been a recognition that the criminal networks trafficking in counterfeit goods necessarily rely upon a variety of commercial services in order to facilitate their illegal activity; and accordingly, that any effective anti-counterfeiting strategy must involve the assistance of those third-parties. Legitimate businesses, whether intellectual property owners or commercial service providers, benefit from a safe and trusted marketplace; and we firmly believe that every stakeholder in the distribution chain can and should play a role in ensuring that the market remains free of counterfeit goods. Historically, anti-counterfeiting efforts have been hampered by the siloing of information among stakeholders; rights-holders, law enforcement officials, and legitimate service providers have been constrained by incomplete data that has hindered each of those parties’ abilities to effectively and efficiently target counterfeits for interdiction. We’re pleased greatly therefore, by the focus that CBP has placed on developing a holistic approach to enforcement, involving the full range of stakeholders, and in stressing the importance of data-driven processes in creating the 21st Century Customs Framework (“21CCF”).

Before turning our focus to new weapons in the fight against illicit imports, we’d like to underscore the importance of making full use of those tools that are already available. Specifically, we would point to several relevant provisions included in the Trade Facilitation and Trade Enforcement Act of 2015¹, as well as Executive Order 13785 of March 31, 2017²; which to date have not been implemented.

¹ Trade Facilitation and Trade Enforcement Act of 2015, Public Law No: 114-125 (2016).

² Executive Order 13785 of March 31, 2017, “Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws.”

For a number of years, the IACC has raised concerns related to CBP’s interpretation of statutes and regulations relevant to its authority to share information with rights-holders in carrying out its IP enforcement mission.³ CBP has maintained that its authority to share such information with, and to seek assistance from rights-holders is limited by the Trade Secrets Act⁴, and by its need to maintain the confidentiality of what it considers to be proprietary information belonging to importers. Congress addressed those concerns with provisions enacted as part of the National Defense Authorization Act for Fiscal Year 2012⁵, providing statutory authorization for the sort of free exchange of information between CBP and rights-holders that had been the norm prior to CBP’s current interpretation of the Trade Secrets Act. Unfortunately, that 2012 enactment was followed by a final rulemaking⁶ in 2015 that did little to remove the impediments to sharing information with private sector rights-holders. Congress spoke to the issue again – and more explicitly – in Section 302 of the Trade Facilitation and Trade Enforcement Act of 2015. Over three years after that law’s enactment however, CBP has yet to publish or adopt new regulations that would promote the more efficient sharing of intelligence with rights-holders, and the effective provision of assistance in turn.

Similar concerns have been raised with regard to the abandonment procedures adopted by CBP in response to the considerable increase in the use of express delivery and international mail services as a vector for the trafficking of counterfeit goods into the United States. The agency’s pilot program to implement procedures for “Simplified Enforcement for Express Consignment,” developed at the recommendation of CBP’s Commercial Operations Advisory Committee (“COAC”) Trade Enforcement & Revenue Collection Subcommittee, allowed for an expedited process to permit the abandonment of suspected counterfeit imports with the consent of the importer and/or ultimate consignee. While laudable in its goal of increasing the number of express consignment

³ See, e.g., IACC Submission to the Intellectual Property Enforcement Coordinator Regarding the Joint Strategic Plan for Fiscal Years 2017 – 2019, October 16, 2015, https://www.iacc.org/IACC%20Comments_2016%20IPEC%20Joint%20Strategic%20Plan_FINAL.pdf.

⁴ 18 U.S.C. 1905.

⁵ 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.

⁶ See, “Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border,” 80 FR 56370.

shipments removed from the stream of commerce, rights-holders have consistently decried the manner in which the process has been implemented – specifically, with regard to its failure to capture or report information related to abandoned shipments in a manner comparable to that called for when goods were seized via CBP’s traditional detention and seizure process.⁷ These concerns have not abated since the abandonment process was formalized as a tool for interdicting suspected shipments of counterfeit goods. CBP has asserted that it is legally prohibited from sharing information related to the abandoned shipments with rights-holders because the existing statutory and regulatory authority for sharing information about such shipments, e.g., the exporter’s name and address, extends only to imports that have been formally detained or seized.⁸ Executive Order 13785 provided additional clarity on the issue and directed the formulation, within 90 days, of a strategy and processes that would ensure the ability of CBP and rights-holders to share information as necessary for CBP’s performance of its IP enforcement mission. Over two years later, the Executive Order remains to be implemented, and no such plans have been promulgated.

Another provision of the 2016 Trade Facilitation and Trade Enforcement Act deserving of special mention is Section 303 of that law, related to Customs’ disclosure of information related to seizures of circumvention devices. The provision was intended to resolve a long-standing statutory oversight in regard to CBP’s authority to provide information to parties – most notably, the entertainment software sector – harmed by the illicit importation of circumvention devices. Piracy in that sector remains largely reliant upon the availability of circumvention devices that enable end-users to bypass copyright owners’ digital rights management tools which control access to the software. Until the enactment of the TFTEA in 2016 however, the statutes authorizing the disclosure of information regarding seizures of goods pursuant to copyright and trademark violations remained silent on comparable violations related to the importation of circumvention devices. As such, rights-holders have been deprived of valuable information that could be leveraged in their anti-piracy investigations and civil enforcement actions. To date however, no regulations have been published to provide the necessary framework for reporting such seizure-related information to the relevant rights-holders.

A final provision of the TFTEA, strongly supported by the IACC, Section 116 of the law mandated the implementation of regulations to ensure that customs brokers “know their

⁷ See, e.g., 19 CFR 133.21.

⁸ Unofficial reports indicate that the abandonment procedures may have been used in upwards of 25% of the most recent year’s IP-related interdictions by CBP. Absent the collection and sharing of relevant shipping data related to those consignments, rights-holders have raised significant concerns regarding the long-term impact of such an approach on their ability to effectively investigate and pursue civil enforcement against counterfeiting operations.

customer.” While prior regulations required brokers to obtain a “valid power of attorney,” they failed to provide clear guidance as to what constitutes a “valid power of attorney,” or minimum acceptable standards for validating a power of attorney. Customs brokers can and should play an important role in both the facilitation of legitimate trade and enforcement against illicit imports. Given their direct relationship with parties seeking to bring goods into the country, it is appropriate to expect that they abide by minimum standards of practice to ensure that prospective importers are in fact who they claim to be. Section 116’s direction that the Secretary establish such minimum procedures however remains unimplemented. While CBP continues to explore additional tools that would aid its enforcement efforts, and seeks further authority, as necessary, to ensure its ability to receive similar assistance from other parties within the supply chain, the implementation of each of the above provisions of TFTEA and Executive Order 113785 should be a priority for CBP.

In assessing the need for further authority, the IACC strongly supports the holistic approach that CBP appears to be taking through the 21CCF. We believe that every participant in the supply chain can and should play a role in ensuring that facilitation of trade, while also taking an active role in identifying those bad actors who seek to exploit legitimate commercial services. Again, facilitating the free flow of information that will allow the relevant parties to effectively and efficiently identify illicit activity is key. In Congressional testimony, CBP has expressed a desire to be able to share information with third-parties, including e-commerce platforms, that might enable those third-parties to detect the misuse of their services and take greater steps to combat the trafficking of counterfeit goods.⁹ The disclosure of information to key stakeholders, similar to that currently authorized to be provided to effected rights-holders, where CBP has seized (or obtained an abandonment of) shipments of counterfeit goods would be a positive first step. For example, where a consignment of counterfeit goods has been seized, with clear indicia that the goods were being sold through a particular e-commerce platform; Customs should be empowered to share relevant details with the platform to facilitate the platform’s own investigation, and where appropriate remediation, of the seller. Similarly, notice could be provided to the full range of shipping intermediaries to permit those companies a reasonable opportunity to perform due diligence and risk assessment to aid in targeting illicit and potentially hazardous shipments. Likewise, CBP should encourage commercial service providers to share relevant information concerning their own investigations of illicit sales, shipments, payments, etc., to aid in CBP’s targeting of illicit imports.

The need for expanded access to relevant data and collaboration between and among the public and private sector stakeholders has been a recurring theme in recent trade

⁹ See, Testimony of Brenda Smith, Executive Assistant Commissioner, Office of Trade, U.S. Customs and Border Protection. United States Senate, Committee on Finance. “Protecting E-commerce Consumers from Counterfeits,” March 6, 2018. <https://www.finance.senate.gov/hearings/protecting-e-commerce-consumers-from-counterfeits>.

enforcement initiatives, including the STOP Act which enabled the provision of advanced electronic data for international mail shipments (akin to that which the express consignment companies have been collecting and providing for many years); the above-discussed TFTEA provisions; Executive Order 13785; and most recently, the Presidential Memorandum on Combatting the Trafficking of Counterfeit and Pirated Goods. This same approach should serve as the foundation of CBP's efforts with regard to the 21st Century Customs Framework. We would welcome an opportunity to meet with CBP to discuss our past, and ongoing, cooperative efforts across industry sectors to facilitate the sharing of relevant data and expertise in the pursuit of our shared goal of enhanced IP enforcement. We stand ready to assist you as you move forward with this important initiative, and are available at your convenience should you have any questions regarding these comments.

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