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## United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

### Via Electronic Transmission

June 18, 2019

The Honorable Kevin McAleenan  
Acting Secretary, Department of Homeland Security and  
Commissioner of U.S. Customs and Border Protection  
U.S. Customs and Border Protection  
1300 Pennsylvania Ave. NW.  
Washington, DC 20229

Dear Commissioner McAleenan:

On Tuesday, April 30, 2019, the Senate Judiciary Committee, Subcommittee on Intellectual Property held a hearing on the role of intellectual property in sports and public safety. We heard testimony from multiple witnesses about how ongoing intellectual property infringement harms American businesses and consumers, as well as our nation's larger innovation economy. Specifically, witnesses testified about the significant public safety risks posed by counterfeit goods flowing into the United States from China and the need for increased cooperation between rights holders and the United States Customs and Border Protection (CBP) to address these ongoing public safety concerns.

Based on the testimony we received at this hearing and additional feedback from stakeholders, we are concerned that CBP may not be sharing as much information with industry partners as is allowed and therefore not maximizing the potential for cooperation to prevent counterfeit goods from entering the United States. CBP currently has the authority to stop and seize counterfeit goods that infringe United States trademarks or copyrights before they enter the country and before they reach American consumers. Sometimes, identifying these counterfeit goods requires industry cooperation.

When the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was passed, Congress intended to grant CBP the necessary authority to share key information related to suspected counterfeiting with relevant industry rights holders. To better facilitate trade enforcement, Section 302 of the TFTEA permits the exchange of information between CBP officials and the owners of copyrights and trademarks. Congress intended broad information sharing and specified that – where the Commissioner determines that it would be helpful – CBP “shall provide . . . information that appears on the merchandise and its packaging and labels, including unredacted images of the merchandise and its packaging and labels.”<sup>1</sup> Sharing more information

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<sup>1</sup> 19 U.S.C. § 1628a(a)(1).

Four years after the TFTEA was signed into law, however, we are concerned by reports that the trademark community is not receiving necessary information on packages and labels. We understand the burdens and challenges CBP faces when it comes to prioritizing and implementing policies to achieve its many responsibilities. Accordingly, we wish to understand how CBP currently implements its authority under Section 302 of the TFTEA.

We encourage CBP to maximize the partnership with industry rights holders by sharing as much information as possible. Important information for CBP to share with rights holders includes photographs of shipping labels, the carrier or postal service, any marking on the package that indicates the platform on which it was purchased (such as Amazon's *Fulfillment By Amazon* number), any description of the goods as listed on the shipping documents, information related to the route of the shipment, the weight of the package, and the declared value of the goods. It is essential for CBP to work with industry rights holders by consistently sharing as much information as possible, and this information will be most useful to CBP and rights holders when provided in a standardized format.

We are also concerned about the increasing number of counterfeit goods shipped into the United States that infringe a valid design patent but do not display the rights owner's trademark. To avoid seizure by CBP, infringers are importing counterfeit goods without trademarks applied to the product. Instead, counterfeiters ship the trademarked logos and labels separately from the product. Although counterfeit goods shipped this way do not infringe trademarks, they do infringe design patents. As was demonstrated during our hearing, a counterfeit Nike sneaker without the trademarked swoosh otherwise looked identical in design to an authentic Nike sneaker. The only apparent difference was that the counterfeit was shipped without a logo to avoid seizure by CBP. The counterfeit sneaker poses the same safety risks to American consumers as one with a trademark, and we are concerned that counterfeiters are able to take advantage of this loophole to import counterfeit goods.

Finally, we are disturbed by the quantity of counterfeit goods that are being shipped in small parcels. An increasing number of counterfeit goods are being sold online directly to consumers. Instead of counterfeit goods being shipped into the country in large containers, counterfeiters are selling their products online through major online sales platforms or their own websites and shipping the goods in small parcels directly to American consumers. You acknowledged this risk and stated that the "rise of e-commerce requires that CBP aggressively adapt operations in all areas" to respond to these developing supply chain challenges in the CBP 2018 E-Commerce Strategy Report.<sup>2</sup> Specifically, you acknowledged that the increased volume of small parcels was taxing CBP resources. These counterfeit goods pose very real risks to unsuspecting American consumers, and there remain challenges associated with stopping these goods from entering the country. We believe that ongoing cooperation with private rights holders can ease the burden on CBP and enable more effective enforcement.

Given the important public safety concerns related to these issues, we ask that you answer the following questions by July 18, 2019:

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<sup>2</sup> United States Customs and Border Protection, *E-Commerce Strategy 2018*, available at [https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/CBP-E-Commerce-Strategic-Plan\\_0.pdf](https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/CBP-E-Commerce-Strategic-Plan_0.pdf).

1. What information is CBP currently sharing with rights holders pursuant to Section 302 of the TFTEA? Is any information being withheld from rights holders? If so, why?
2. Do you believe Section 302 has been implemented as Congress expected? If so, please explain why. If not, why not?
3. Has a determination been made that exchanges of information pursuant to Section 302 would not assist in determining if suspected merchandise is, in fact, counterfeit? If so, please explain why.
4. Are there any circumstances under which CBP currently can seize counterfeit goods that infringe a design patent but not a registered trademark or copyright?
5. What legislative changes would allow CBP to seize counterfeit products that infringe design patents in the same manner as products that infringe registered trademarks or copyrights?
6. What is CBP currently doing to address the increasing number of counterfeit goods shipped in small parcels? Have these programs been successful?
7. What are the biggest challenges CBP faces with respect to the increased volume of counterfeit goods shipped via small parcels? In what ways can increased cooperation with industry rights holders help alleviate the burden created by this increase?
8. What is the current status of the CBP E-Commerce Strategy published in 2018? Please update us on the implementation of the strategic goals outlined in that report.

We look forward to your answers to these questions. We believe they are important to addressing the public safety risks associated with counterfeit products. As always, we are committed to working with you to protect American consumers and our nation's innovation economy.

If you have any questions, please do not hesitate to contact either Elliott Tomlinson with Senator Tillis at 202-224-6342 or Philip Warrick with Senator Coons at 202-228-1993.

Sincerely,



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Thom Tillis  
United States Senator



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Christopher A. Coons  
United States Senator