



4 February 2019

Mr. Brandon Lord
Office of Trade
U.S. Customs and Border Protection
Department of Homeland Security
1331 Pennsylvania Avenue, NW, Suite 950N
Washington, DC 20229

VIA EMAIL (21CCF@cbp.dhs.gov)

**Re: U.S. Customs and Border Protection
Docket No. USCBP-2018-0045
Public Meeting: 21st Century Customs Framework**

Dear Mr. Lord:

Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments related to U.S. Customs and Border Protection's upcoming public meeting on "The 21st Century Customs Framework."

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes about 200 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

The *Federal Register* notice of 21 December 2018 requests feedback on the U.S. Customs and Border Protection (CBP) 21st Century Customs Framework initiative that seeks to address and enhance numerous aspects of CBP's trade mission to better position it to operate in the 21st century trade environment. IPO's comments that follow are responsive to a number of questions posed in the notice, including:

- Under Section (2) Intelligent Enforcement: How can CBP improve violation referral systems and allegation processing?
- Under Section (5) 21st Century Trade Process: What are some international best practices (*i.e.*, processes used by other customs agencies) that CBP should examine?

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In short, IPO proposes that the CBP extend full border enforcement protection to design patents. If implemented, such a procedure will: (1) reduce the number of counterfeit and knockoff products sold in the United States; (2) increase protection of both consumers and designers; and (3) bring the United States into step with key trading partners' IP protection practices. CBP enforcement of design patents will result in a better and more effective 21st Century Customs Framework.

Implementing a procedure for CBP to enforce design patents will reduce the number of counterfeit products sold in the United States. Counterfeiters have become more clever in the 21st century. They have recognized that counterfeit products (which bear infringing trademarks) are potentially at-risk to seizure by agents at the border; but the *very same products* not bearing the infringing trademarks generally evade seizure.

In response, counterfeiters increasingly ship products into the U.S. without the trademarks/labels and later apply the trademarks/labels after these goods have cleared customs. In many cases, the trademarks/labels are also shipped into the U.S. separately because the risk of loss is small. Counterfeit labels (*i.e.*, trademarked logos and hang-tags that are not attached to products) have been identified in the top nine categories of seized counterfeit products.¹ For example, in 2018, over \$70 million in fake Nike shoes –specifically Jordan brand shoes – were ultimately seized from a counterfeiter who used this technique.² Another technique used by counterfeiters is to cover or obscure the trademark and later remove a cover or the obscuring element after the goods clear customs in order to complete the counterfeiting process.³

These counterfeiting techniques and their ramifications were described in the U.S. Joint Strategic Plan on Intellectual Property Enforcement (FY 2017-2019) (“Joint Strategic Plan”). In addition to the large negative fiscal impact that counterfeit goods have on the U.S. economy, they also pose consumer safety concerns. By implementing a procedure for CBP to enforce design patents, many of these increasingly common shipping schemes used by counterfeiters to get around traditional trademark enforcement by CBP can be impactfully addressed, helping to protect consumers and important design rights of innovators.

Implementing a procedure for CBP enforcement of design patents will also reduce the number of unlawful knockoff products being sold in the U.S. (Knockoffs have been defined as goods which look the same (or very similar to) the authentic goods of an innovating company, but which otherwise do not infringe the trademark rights of the innovating company.) Stopping unlawful knockoffs at customs is

¹ See “9 Most Counterfeited Products in the USA,” www.USATODAY.com (Mar. 29, 2014).

² See “They allegedly imported \$70M of fake Nike Air Jordans. Then the feds dunked on them,” www.NJ.com (Aug. 7, 2018).

³ See The White House, “U.S. Joint Strategic Plan on Intellectual Property Enforcement (FY 2017-2019) at p. 26-27.

commonly the only practical way to prevent them from reaching consumers. Once they clear customs, the knockoffs are commonly sold in single or small units on websites where enforcement is difficult, time consuming, and costly. The proliferation of websites makes it easier than ever for consumers to be deceived because they include pictures that make the merchandise look authentic.

As identified in the Joint Strategic Plan, ill-gotten profits from knockoffs have been linked to organized crime and terrorist organizations.⁴ Further, consumers can be harmed when they purchase inauthentic goods.⁵ By implementing a procedure to enforce design patents at the border, CBP would be protecting consumers from deception and designers from intellectual property theft, while also reducing the diversion of ill-gotten funds to organized crime and terrorist organizations.

Additionally, most U.S. trading partners have established procedures enabling the enforcement of design-rights⁶ by their respective customs agencies. Countries recognizing this type of enforcement benefit both designers and consumers. Countries and regions having design-rights enforcement procedures at customs include the European Union (Council Regulation 608/2013 as supplemented by the laws of various countries within the EU), Japan, South Korea, China, India, Mexico, Turkey, Argentina, South Africa, Switzerland, and Panama.

The United States is noticeably absent among the list of large economies that provide customs enforcement for industrial designs. In the EU, suspected design-right infringement was the basis for detaining 5% of the goods that were detained by customs. CBP's enforcement of design patents would help the U.S. realize the enforcement benefits that its trading partners already enjoy.

In view of the above, IPO respectfully requests that the CBP consider implementing procedures to extend full border enforcement protection to design patents.

We again thank you for permitting IPO to provide comments and would welcome any further dialogue or opportunity to provide additional information.

Sincerely,



Mark Lauroesch
Executive Director

⁴ *Id.* at pp. 42-44.

⁵ *Id.* at pp. 33-38.

⁶ Other countries which enforce design-rights at Customs use design patents (like the U.S.), design registrations, or unregistered design rights based on the design-rights system in their country.