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INTELLECTUAL PROPERTY

CBP Can Enhance Information Sharing with the Private Sector to Address Changes in the Counterfeits Market

Statement of Kimberly Gianopoulos, Director,
International Affairs and Trade

Chairman Hatch, Ranking Member Wyden, and Members of the Committee:

I am pleased to be here to discuss the results of our review of U.S. agencies' efforts to address changes in the market for counterfeit goods and their work with the private sector. Intellectual property is an important component of the U.S. economy, and the United States is an acknowledged global leader in its creation. Infringement of intellectual property rights (IPR) through the illegal importation and distribution of counterfeit goods harms the U.S. economy by stifling innovation, slowing economic growth, weakening the competitiveness of U.S. employers, and threatening American jobs.¹ IPR infringement can also threaten the health and safety of American consumers. The Department of Homeland Security's U.S. Customs and Border Protection (CBP) and U.S. Immigration and Customs Enforcement (ICE)—two of the many agencies involved in IPR enforcement—are responsible for IPR enforcement at U.S. borders. CBP leads enforcement activity at the border by detecting and seizing counterfeit goods that enter the United States through its more than 300 ports of entry and by assessing penalties against IPR infringers. CBP coordinates its efforts with ICE, which investigates IPR violations for federal prosecution.

My testimony today summarizes the findings from our January 2018 report,² which was released on February 27, 2018, on CBP's and ICE's IPR enforcement at U.S. borders. This testimony addresses (1) what is known about counterfeit goods entering the United States and the challenges they present, (2) efforts CBP and ICE have undertaken to enhance IPR enforcement and the extent to which they have assessed the results of these efforts, and (3) the extent to which CBP and ICE collaborate on IPR enforcement as well as ways in which they coordinate with the private sector in enforcing IPR.

For our report, we analyzed CBP seizure data for fiscal years 2012 through 2016 and reviewed documents and reports from CBP, ICE, other U.S. government entities, and international organizations. We interviewed CBP and ICE officials in Washington, D.C., and at selected port locations

¹In this statement, "counterfeit goods" refers to any physical goods that are found to be in violation of trademark or copyright law.

²GAO, *Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market*, [GAO-18-216](#) (Washington, DC: Jan. 30, 2018).

in Chicago, Illinois; Los Angeles, California; Miami, Florida; and New York, New York. We also interviewed representatives of IPR-holding companies (rights holders) and popular consumer websites that offer platforms for third-party sellers. We used undercover identities to purchase selected products from third-party sellers on popular consumer websites and subsequently asked the rights holders for the selected products to test their authenticity. More detailed information on our objectives, scope, and methodology for this work can be found in the issued report. We conducted the work on which this statement is based in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives. We conducted our related investigative work in accordance with investigation standards prescribed by the Council of the Inspectors General on Integrity and Efficiency.

Accelerated by E-Commerce, Changes in the Counterfeits Market Present Challenges to U.S. Agencies, Consumers, and the Private Sector

E-Commerce Has Contributed to a Shift in the Market for Counterfeit Goods

The rise of e-commerce has contributed to a fundamental change in the market for counterfeit goods, according to our analysis of documents from CBP, ICE, and international organizations and our interviews with CBP and ICE officials. U.S. agencies and international organizations have observed a shift in the sale of counterfeit goods from “underground” or secondary markets, such as flea markets or sidewalk vendors, to primary markets, including e-commerce websites, corporate and government supply chains, and traditional retail stores. Whereas secondary markets are often characterized by consumers who are knowingly purchasing

counterfeits, primary markets involve counterfeiters who try to deceive consumers into purchasing goods they believe are authentic.

This shift has been accompanied by changes in the ways in which counterfeit goods are sold. In the past, consumers could often rely on indicators such as the location of sale or the goods' appearance or price to identify counterfeit goods in the marketplace. However, counterfeiters have now adopted new ways to deceive consumers. For example, as consumers increasingly purchase goods online, counterfeiters may exploit third-party online marketplaces to gain an appearance of legitimacy and access to consumers. When selling online, counterfeiters may post pictures of authentic goods on the websites where they are selling counterfeits and may post pseudonymous reviews of their products or businesses in order to appear legitimate. Additionally, by setting the price of a counterfeit at, or close to, the retail price of a genuine good, counterfeiters may deceive consumers, who will pay the higher price because they believe the goods are real or who believe that they are getting a slight bargain on genuine goods.

CBP Data Indicate Changes in Several Key Characteristics of Counterfeit Goods Seized

According to CBP seizure data and CBP officials, the volume, variety, and methods of shipment of counterfeit goods seized by CBP and ICE have changed in recent years. CBP reports indicate that the number of IPR seizures increased by 38 percent in fiscal years 2012 through 2016. According to CBP data, approximately 88 percent of IPR seizures made during this period were shipped from China and Hong Kong. The variety of products being counterfeited has also increased, according to CBP officials. CBP and ICE officials noted that, while many consumers may think of luxury handbags or watches as the most commonly counterfeited goods, counterfeiting occurs in nearly every industry and across a broad range of products. In addition, according to CBP data we reviewed and officials we spoke to, the methods of importing counterfeit goods into the United States have changed in recent years. Specifically, express carriers and international mail have become the predominant form of transportation for IPR-infringing goods entering the United States, constituting approximately 90 percent of all IPR seizures in fiscal years 2015 and 2016, according to CBP data.

Twenty of 47 Items Purchased from Third-Party Sellers on Popular E-Commerce Websites Were Counterfeits, Highlighting Potential Risks to Consumers

In an attempt to illustrate the risk that consumers may unknowingly encounter counterfeit products online, we purchased a nongeneralizable sample of four types of consumer products—shoes, travel mugs, cosmetics, and phone chargers—from third-party sellers on five popular e-commerce websites.³ According to CBP data we reviewed and officials we spoke to, CBP often seizes IPR-infringing counterfeits of these types of products. As table 1 shows, the rights holders for the four selected products we purchased determined that 20 of the 47 items were counterfeit.

Table 1: Results from Rights-Holder Testing of GAO Covert Purchases of Four Frequently Counterfeited Consumer Products

| | Nike Air Jordan shoes | Yeti travel mugs | Urban Decay cosmetics | UL-certified phone chargers | Total |
|--------------|-----------------------|------------------|-----------------------|-----------------------------|-----------|
| Authentic | 15 | 3 | 0 | 9 | 27 |
| Counterfeit | 0 | 6 | 13 | 1 | 20 |
| Total | 15 | 9 | 13 | 10 | 47 |

Source: GAO | GAO-18-383T

Note: We asked the rights holders for the four products to test a total of 47 items that we purchased from third-party sellers on five popular e-commerce websites. These results do not include one charger that we excluded from testing. Despite being advertised as UL-certified, the product arrived without a certification seal and therefore could not be tested for authenticity.

We did not identify any clear reasons for the variation among the counterfeit and authentic items that we purchased based on the products that they represented, the e-commerce websites where we bought the items, or the third-party sellers from whom we bought them. For three of the four product types, at least one item we purchased was determined to be counterfeit, with results varying considerably by product. Representatives of the rights holders also could not provide a specific explanation for the variation among authentic and counterfeit goods that we received. They noted that the results of covert test purchases can fluctuate depending on enforcement activities and the variety of goods

³All 47 items we purchased were shipped from U.S. addresses, signifying that any items manufactured outside the United States were imported before being sent to us. Rights holders confirmed that at least a portion of the authentic versions of the products purchased are manufactured abroad. Additionally, according to a 2011 IPR Center report, most physical counterfeit goods are manufactured abroad. Final production of some counterfeit items, such as applying labels and packaging items, may take place after items are imported into the United States.

and sellers on a particular website on a given day. Rights-holder testing also showed that we purchased at least one counterfeit item and one authentic item from each of the five e-commerce websites. In addition, our analysis of the customer ratings of third-party sellers from whom we bought the items did not provide any clear indications that could warn consumers that a product marketed online may be counterfeit. For example, we received both counterfeit and authentic items from third-party sellers with ratings that were less than 70 percent positive as well as sellers with ratings that were up to 100 percent positive.

Rights holders were able to determine that items we purchased were not authentic on the basis of inferior quality, incorrect markings or construction, and incorrect labeling. Some counterfeit items we purchased were easily identifiable as likely counterfeit once we received them. For example, one item contained misspellings of “Austin, TX” and “Made in China.” Other items could be more difficult for a typical consumer to identify as counterfeit. For example, the rights holder for a cosmetic product we purchased identified one counterfeit item on the basis of discrepancies in the color, composition, and design of the authentic and counterfeit items’ packaging. Counterfeit goods may also lack key elements of certification markings and other identifiers. For example, on a counterfeit phone charger we purchased, the UL certification mark did not include all components of the authentic mark. Figure 1 shows examples of these counterfeit items.

Figure 1: Examples of Some Counterfeit Items Purchased Online



Source: GAO, Urban Decay (cosmetic photos). | GAO-18-383T

The risks associated with the types of counterfeit goods we purchased can extend beyond the infringement of a company’s IPR. For example, a UL investigation of counterfeit iPhone adapters found a 99 percent failure rate in 400 counterfeit adapters tested for safety, fire, and shock hazards and found that 12 of the adapters tested posed a risk of lethal electrocution to the user.⁴ Similarly, according to a rights holder representative, counterfeits of common consumer goods, such as Yeti travel mugs, may contain higher-than-approved concentrations of dangerous chemicals such as lead, posing health risks to consumers. According to ICE, seized counterfeit cosmetics have been found to

⁴UL, *Counterfeit iPhone Adapters: A UL Technical Investigation Shows a 99 Percent Failure Rate* (2016).

contain hazardous substances, including cyanide, arsenic, mercury, lead, urine, and rat droppings.

Representatives of rights holders and e-commerce websites whom we interviewed reported taking independent action to try to protect IPR within their areas of responsibility. For example, both rights holders and e-commerce websites maintain IPR protection teams that work with one another and with law enforcement to address infringement issues. E-commerce websites may also take a variety of steps to block and remove counterfeit items listed by third-party sellers. These efforts rely on data collected through a variety of means, including consumer reporting of counterfeits, rights-holder notifications of IPR infringement, and corporate efforts to vet potential third-party sellers, according to private sector representatives.

Our January 2018 report includes information on steps that consumer protection organizations and government agencies recommend consumers take to limit the risk of purchasing counterfeits online. These steps include, for example, buying only from authorized retailers online, avoiding prices that look “too good to be true,” and reporting counterfeit purchases.

Changes in the Marketplace Can Pose Challenges to U.S. Agencies and the Private Sector

We identified a number of key challenges that the changes in the market for counterfeit goods can pose to CBP and ICE as well as to the private sector. First, the increasing sophistication of counterfeits can make it difficult for law enforcement officers to distinguish between legitimate and counterfeit goods. Second, as the range of counterfeit goods expands, CBP has a wider variety of goods to screen, which requires CBP officials to have in-depth knowledge of a broad range of products and of how to identify counterfeits. Third, counterfeiters may break up large shipments into multiple smaller express carrier or mail packages to decrease the risk of losing significant quantities of merchandise to a single seizure. This shift toward smaller express shipments of counterfeit goods to the United States poses challenges to CBP and ICE because, according to CBP officials, seizure processing requires roughly the same amount of time and resources regardless of shipment size or value.

The changing marketplace also presents challenges to the private sector, according to representatives from rights holders and e-commerce websites. For example, it is more difficult for rights holders and e-commerce websites to identify and investigate individual counterfeit cases, because e-commerce websites face a growing inventory from a

larger registry of sellers. Tracking goods from known counterfeiters through various website fulfillment and delivery mechanisms is also a significant challenge for the private sector. Furthermore, the growth of e-commerce has accelerated the pace at which counterfeiters can gain access to consumers or reinvent themselves if shut down.

CBP and ICE Engage in Activities to Enhance IPR Enforcement, but CBP Has Not Fully Evaluated the Results of Its Activities

CBP and ICE engage in a number of activities to enhance IPR enforcement; however, while ICE has assessed some of its efforts, CBP has taken limited steps to do so. CBP's and ICE's IPR enforcement activities broadly include detecting imports of potentially IPR-infringing goods, conducting special operations at U.S. ports, engaging with international partners, and undertaking localized pilot programs or port-led initiatives. CBP and ICE have collected some performance data on activities we reviewed, and ICE has taken some steps to better understand the impact of its efforts, such as creating a process to track cases it deems significant. However, we found that CBP has conducted limited evaluation of its efforts to enhance IPR enforcement. Consequently, we concluded that CBP may lack information needed to ensure it is investing its resources in the most efficient and effective activities. We recommended in our report that CBP take steps to evaluate the effectiveness of its IPR enforcement efforts; CBP concurred with this recommendation.

CBP and ICE Generally Collaborate on IPR Enforcement, but CBP Is Restricted in Sharing Information with the Private Sector

Our analysis showed that CBP and ICE interagency collaboration on IPR enforcement is generally consistent with the following selected key practices for effective interagency collaboration: (1) define and articulate a common outcome; (2) establish mutually reinforcing or joint strategies; (3) identify and address needs by leveraging resources; (4) agree on roles and responsibilities; and (5) establish compatible policies, procedures, and other means to operate across agency boundaries.⁵ For example, the agencies may leverage resources by collocating staff or sharing their expertise. CBP and ICE have also issued guidance and developed standard operating procedures to clarify roles and

⁵GAO, *Results-Oriented Government: Practices That Can Help Enhance and Sustain Collaboration among Federal Agencies*, [GAO-06-15](#) (Washington, DC: Oct. 21, 2005). Our October 2015 report listed eight practices that can enhance and sustain interagency collaboration. Our January 2018 report evaluated CBP's and ICE's collaboration on IPR enforcement against five of these practices, which we selected because we determined they were most relevant to that review.

responsibilities. CBP and ICE also coordinate with the private sector in a variety of ways, such as obtaining private sector assistance to determine whether detained goods are authentic and to conduct training.

Representatives of rights holders and e-commerce websites noted that information shared by law enforcement entities is critical to private sector IPR enforcement, such as pursuing civil action against a counterfeiter or removing counterfeit items from websites. In the Trade Facilitation and Trade Enforcement Act of 2015, Congress provided CBP with explicit authority to share certain information with trademark and copyright owners before completing a seizure.⁶ CBP officials stated that they share information about identified counterfeits with e-commerce websites and rights holders to the extent possible under current regulations. However, according to private sector representatives we spoke to, restrictions on the amount and type of information about seized items shared by CBP limit the ability of rights holders and e-commerce websites to protect IPR. CBP officials noted that there are legal limitations to the amount and type of information they can share, particularly if the e-commerce website is not listed as the importer on forms submitted to CBP.

Several private sector representatives stated that receiving additional information from CBP would enhance their ability to protect IPR. Representatives of one website noted that information on the exterior of seized packages, such as business identifiers on packages destined for distribution centers, would be helpful for identifying groups of counterfeit merchandise from the same seller. However, according to CBP officials, CBP cannot provide such information to e-commerce websites. Representatives of one e-commerce website noted that ICE sometimes shares information related to an investigation, but that ICE's involvement in the enforcement process begins only after CBP has identified and seized counterfeit items. Representatives of two e-commerce websites stated that, because of the limited information shared by CBP, they may not be aware of IPR-infringing goods offered for sale on their websites, even if CBP has seized related items from the same seller.

According to CBP officials, CBP is reviewing options for sharing additional information with rights holders and e-commerce websites and is assessing what, if any, additional information would be beneficial to share

⁶This authority applies only with respect to goods suspected of infringing a trademark or copyright that is recorded with CBP. Pub. L. No. 114-125, § 302(a), 130 Stat. 122, 149 (2016).

with private sector entities. CBP officials stated that they have not yet determined whether changes to the amount and types of information provided to e-commerce websites would require regulatory changes or additional legal authorities. These officials also said that they have discussed differences in CBP's and ICE's information sharing with ICE officials. In our report, we recommended that CBP, in consultation with ICE, assess what, if any, additional information would be beneficial to share with the private sector and, as appropriate, take action to enhance information sharing where possible. CBP concurred with this recommendation.

Chairman Hatch, Ranking Member Wyden, and Members of the Committee, this concludes my prepared statement. I would be pleased to answer any questions that you may have at this time.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact Kimberly Gianopoulos, Director, International Affairs and Trade, at (202) 512-8612 or gianopoulosk@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. GAO staff who made key contributions to this testimony are Joyee Dasgupta, Kara Marshall, Katie Bassion, Kristen Timko, Reid Lowe, Sarah Collins, Neil Doherty, Ramon Rodriguez, Helina Wong, Julie Spetz, Kevin Loh, Wayne McElrath, Grace Lui, James Murphy, Mary Moutsos, Justin Fisher, Rachel Stoiko, and Sarah Veale.

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