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Written Testimony of

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On Behalf of

The International AntiCounterfeiting Coalition

Counterfeits and Cluttering:

**Emerging Threats to the Integrity of the Trademark
System**

and the

Impact on American Consumers and Businesses

United States House of Representatives

Committee on the Judiciary

Subcommittee on Courts,

Intellectual Property, and the Internet

July 18, 2019

Chairman Johnson, Ranking Member Roby, Members of the Subcommittee:

Thank you for the opportunity to appear before you today, and to share my thoughts and experience on this important topic.

Founded in 1979, the International AntiCounterfeiting Coalition (“IACC”) is the world’s oldest and largest organization dedicated exclusively to combating trademark counterfeiting and copyright piracy. Forty years ago, a handful of companies came together to establish the IACC upon a simple premise: the illicit trafficking of counterfeit goods was a problem too large and too complicated for any single company, or country, to solve on its own. Four decades later, that handful of companies has grown to over 200. Our members span every industry, and include some of the world’s best-known brands in the apparel, automotive, electronics, entertainment, luxury goods, pharmaceutical, software, and other consumer product sectors; along with the professional firms and associations that support their brand protection efforts. Central to the IACC’s mission is the education of both the general public and policy makers regarding the severity and scope of the harms caused by intellectual property crimes – not only to legitimate manufacturers and retailers, but also to consumers and governments worldwide.

Whether measured in terms of lost sales to legitimate businesses, tax revenues and duties that go unpaid to governments, decreased employment, or diminished investment in capital improvements and research and development; counterfeiting is a significant drain on the U.S. and global economies. Further, the production and distribution of goods produced in an entirely unregulated supply chain, where the makers have every incentive to cut corners by using cheap, substandard components, and no incentive to abide by accepted standards of consumer health and safety, presents a clear threat to the well-being of consumers, and to the integrity of our national security infrastructure.

The IACC seeks to address these threats by promoting the adoption of legislative and regulatory regimes that effectively protect intellectual property rights, by encouraging the application of resources sufficient to implement and enforce those regimes, and by working with partners in the public and private sectors to identify and remediate practical impediments to IP enforcement.

We welcomed the news of today's hearing, and the much-needed attention that it brings to the trafficking of counterfeit goods in e-commerce. Without question, online sales of counterfeits, and the significant growth of such sales in recent years, are a concern of the highest priority not only for the IACC's members, but for rights-holders more broadly. Our member companies invest heavily to keep dangerous counterfeits out of consumers' hands. They spend countless hours and millions of dollars each year to develop and incorporate new technologies into their products and packaging to thwart counterfeiters' attempts to defraud consumers, to investigate violations of their rights and seek civil and criminal enforcement, and to offer investigative and prosecution support to our colleagues in the public sector. But, as noted above, they also understand that counterfeiting is a problem far larger than any of them can handle alone.

Collaboration both within the private sector and between the public and private sectors is essential to protect consumers from counterfeits that put their health and safety at risk, and to safeguard legitimate businesses and the U.S. economy from the unfair competition represented by the trade in counterfeits. Collaboration, by definition though, requires the commitment of parties on both sides, and a recognition of shared responsibility to accomplish a mutual goal. Throughout the past decade, the IACC has sought to identify partners for collaboration, and to pursue meaningful engagement to address the sale of counterfeits in e-commerce. We have no misgivings regarding the size or scope of the problems presented by the current status quo; they are substantial, and they are severe. But we also do not believe that they're insurmountable. We have no doubt found some willing partners who have gone above and beyond the bare minimum required by current law, and who have invested their time and resources to demonstrate their commitment to a safe and trusted e-commerce system. At times, we've also encountered those who disclaim responsibility, viewing their legal obligations as a ceiling for what they're willing to do rather than a floor on what they're capable of doing. To that end, we seek constructive solutions where we can, and we seek to highlight the deficiencies of those stakeholders who are failing to contribute to the effort. I'm pleased to be able to share with you today information regarding that work, as well as my thoughts on those areas where greater efforts are needed.

I. EVOLUTION OF COUNTERFEIT DISTRIBUTION MODELS

Historically, the distribution chains for counterfeit goods have largely mirrored those of legitimate commerce. It should come as no surprise then that China, the largest source of consumer goods imported into the United States, has also been the greatest source of counterfeit goods arriving at our borders for a number of years. In Fiscal Year 2017, the People’s Republic of China was cited as the country of origin for 48% of all seizures effected by U.S. Customs and Border Protection (“CBP”) (16.5K out of more than 34.1K total seizures), and 46% by value (\$554.63 million out of a total of \$1.2 billion).¹ It is worth noting, however, that Chinese imports actually account for a much larger percentage of CBP’s seizures than the raw figures would indicate. The second position on CBP’s list is occupied by Hong Kong, identified as the source country of 39% of seizures (32% by value). Hong Kong though is not widely viewed as a manufacturing hub for counterfeit goods, but rather as a major transshipment point for counterfeits produced by mainland China.

Until relatively recently, “brick and mortar” distribution remained the norm for counterfeit goods, with large overseas manufacturing operations shipping their illicit exports by ocean-going container vessels to supply domestic wholesale and retail distribution networks in the United States. This traditional distribution chain centered largely around flea markets, swap meets, and small storefronts in well-established hotspots in major metropolitan areas such as New York’s Canal Street and Santee Alley in Los Angeles. In today’s marketplace however, manufacturing remains offshore, but counterfeiters are no longer reliant upon the distribution channels of yesteryear; e-commerce now provides direct access to the end consumers. With the rise of online shopping and the emergence of e-commerce platforms, we’ve seen a concurrent, and steady, increase in the volume of counterfeit seizures by CBP in the express consignment and postal shipping environments. As detailed in CBP’s above-referenced report, these small consignments accounted for 89% of seized shipments, and 47% of total seizures by value.

¹ Intellectual Property Rights Seizure Statistics – Fiscal Year 2017.
<https://www.cbp.gov/sites/default/files/assets/documents/2018-Feb/trade-fy2017-ipr-seizures.pdf>.

As sellers of illicit goods have increasingly turned to an e-commerce model, utilizing standalone websites and online marketplaces to reach potential customers, the challenge of detecting and interdicting those illegal imports has grown far more challenging than in the past. The relative anonymity, minimal cost of entry, and decreased overhead of the online retail market, compared to traditional brick-and-mortar, offers criminals a highly desirable and increasingly profitable environment for their illegal sales while also creating practical impediments to the civil and criminal enforcement of IP rights.

As detailed in a report published last January by the Government Accountability Office², counterfeit sellers are increasingly seeking to exploit legitimate e-commerce services to reach unwitting consumers. Online marketplaces are attractive targets for counterfeiters for a variety of reasons – among them, that consumers’ familiarity with the platforms, and the goodwill and trust imbued by that familiarity, typically extends to the individual sellers on the platform. As a result, counterfeiters need not seek out and attract consumers themselves; by infiltrating a well-known marketplace, the consumers will come to them. This distribution model also bypasses a number of the traditional opportunities for enforcement available to rights-holders and law enforcement personnel, while necessitating the application of ever greater enforcement resources for ever-diminishing returns. While border enforcement of IP rights was often characterized in the past as searching for a needle in a haystack, the explosion in small parcel shipments has served to shrink the proverbial needle while exponentially increasing the number of haystacks. In the past, a single seizure of one or more containers also might substantially decrease the availability of counterfeits in the market and significantly impact a counterfeiter’s bottom line; achieving that same impact today requires the seizure of thousands of small parcels. Understanding how the trafficking of counterfeit goods has evolved and developing new strategies to attack this illicit trade is vital to protecting U.S. consumers and businesses in the current environment.

² Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market, GAO-18-216, January 2018. <https://www.gao.gov/assets/690/689713.pdf>.

II. Challenges in the Current E-Commerce Landscape

While we have undoubtedly seen some progress in our efforts to address the trafficking of counterfeit goods in e-commerce, the overall volume of illicit sales remains distressingly high. And while we will continue to engage with our partners in good faith, it remains without question that there is much more than can and should be done to ensure that the online ecosystem is one that can be trusted by both consumers and legitimate businesses. Throughout our work with a variety of platforms, and based on the experiences and feedback reported by our members; we have identified a number of issues that remain systemic in e-commerce. These are issues that remain pervasive, and are typically cited by rights-holders to varying degrees, across a broad range of platforms. Perhaps chief among these are concerns related to the onboarding and vetting of sellers, the need for more comprehensive data sharing among relevant stakeholders, and the need to ensure that the penalties imposed upon bad actors are both meaningful and permanent. To the latter point, rights-holders frequently point to a lack of transparency among platforms with regard to actions taken in response to counterfeit sales and access to actionable information that might permit an IP owner to further investigate or pursue independent legal action.

Ensuring a “clean” online marketplace – one that is free from the trafficking of counterfeit goods – must start with the initial onboarding of merchants. Absent sufficient procedures to verify that a seller is in fact who they purport to be, no amount of monitoring and no disciplinary action taken, can be expected to serve as an effective deterrent to illegal sales on a platform. E-commerce platforms are often-likened to virtual flea-markets or shopping malls, but there is frequently a stark contrast between the processes and requirements that govern a vendor’s access to a virtual storefront and those real-world counterparts. The IACC strongly supports the adoption of policies to ensure that online sellers are able to demonstrate, at minimum, proof of identity and a verified physical address. Where an individual is engaged in commercial-scale activity (as demonstrated by actual sales, or inventory offered for sale) on a platform (or platforms) though, those sorts of requirements should be far more extensive, to include perhaps, evidence of incorporation or similar business organization documents, a registered agent for service, and state and/or federal tax ID. In the case of individuals selling those types of goods most susceptible to counterfeiting, or who have been previously found to have violated a platform’s IP policies, evidence that the goods on offer have been obtained

through a legitimate source (including relevant licensing or distribution agreements, which could be made available to relevant rights-holders for verification) would be welcome. Comparable safeguards would be desirable in terms of oversight for sellers of goods which carry heightened consumer health and safety concerns. We note that a similar “Know Your Customer” approach was adopted with regard to customs brokers as part of the enactment of the Trade Facilitation and Trade Enforcement Act of 2015³, recognizing that those service providers were uniquely positioned to act as a gate-keeper for others who might seek to traffic in illegal goods. The adoption of comparable Know Your Customer policies by e-commerce marketplaces, even where not legally mandated as is the case in China, can play a key role in ensuring the accountability of their merchants, identifying high-risk sellers, and reducing the risk to consumers and harm to rights-holders associated with sales of counterfeits.

While we recognize that historically, there has been a tension between the competing interests of privacy and transparency on the internet, in the realm of e-commerce, and particularly where issues of consumer protection arise, we believe the balance weighs heavily in favor of transparency. Online sellers should not be permitted to simply hide behind a username; consumers should be able to determine precisely with whom they’re dealing; and platforms’ terms of service should explicitly authorize the disclosure of sellers’ contact information in cases of consumer disputes or rights-holders’ complaints related to alleged infringements. Further, platforms should publicly report figures showing the volume of IP complaints received (including the outcomes of such complaints), remedial actions taken (such as the removal of listings for infringing items, or the suspension, or removal of sellers from the platform). While many e-commerce platforms place a premium on reviews and feedback from customers, history has shown that such systems are often easily exploited by nefarious sellers. Consumers and rights-holders should be provided with the necessary tools to clearly identify sellers who have a history of complaints.

The ability to verifiably confirm an illicit seller’s identity is closely tied to another concern frequently highlighted by rights-holders; that being the ability to track a seller’s illegal sales across platforms. Since its early days, online enforcement has often been described as a “whack-a-mole” process. Enforcement actions focused on domain takedowns or the removal

³ See, Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125 (2016), at Sec. 116.

of listings or links to counterfeit goods or pirated content are often Sisyphean in nature, with the target of enforcement quickly replaced by a new website or link. Both experience and significant research have shown that counterfeiters online typically operate through a network of sites, and remain to some extent platform agnostic. Put another way, they will take advantage of any available means by which to get their products into consumers' hands. When operating with the relative anonymity available on the internet, or without the sort of verified identification described above; it is significantly more difficult to take any sort of meaningful or permanent enforcement action against a counterfeiter. Even where an individual has been identified and removed from a platform for relevant IP violations, absent an effective system to verify his or her identity, the same bad actor need only register a new account to resume their illicit activity. Alternatively, they may simply move to another e-commerce platform to begin anew with a clean slate. To combat such recidivism, we support the adoption of policies that would permit the robust sharing of information among relevant stakeholders within the e-commerce landscape.

Data sharing has long served as the lifeblood of intellectual property enforcement, perhaps best exemplified by the historically close working relationship between rights-holders and law enforcement personnel. The policies and procedures developed over time recognized the inherent value of data available to each, in informing the others' ability to take pertinent actions whether on a criminal or civil basis. By way of example, federal statutes and regulations have long authorized the disclosure by CBP to trademark owners of certain information related to the seizure of counterfeit goods at U.S. ports of entry, or to seek assistance from rights-holders in determining a product's authenticity.⁴ Facilitating the exchange of information among and between e-commerce platforms, relevant government agencies, and rights-holders could significantly enhance efforts to identify bad actors across multiple platforms, and to flag problematic sellers at onboarding. For instance, if a counterfeit item is seized en route to a customer in the United States, CBP should be permitted to notify relevant e-commerce platforms, who could leverage that information to conduct their own investigations, enforcement, and oversight to ensure that their platform was not being exploited to facilitate similar illicit sales. We would also welcome a more pro-active, industry-wide initiative to share data regarding known bad actors, in line with similar regimes that have been adopted within

⁴ See, e.g., 19 CFR 133.21.

the payment sector, to identify and remediate high-risk sellers. Such an approach could greatly diminish counterfeiters' abilities to avoid scrutiny by migrating their operations to a new platform.

III. IACC EXPERIENCE & VOLUNTARY COLLABORATION APPROACH

In response to the growing trade in counterfeits through e-commerce, rights-holders and enforcement agencies have sought to develop creative enforcement strategies, primarily focusing on the so-called “choke points” in the e-commerce system, and taking into account the emerging ways in which these goods are being marketed, sold, and delivered to consumers. Each step in the distribution chain – from advertisement, to point of sale, to transport and delivery, among others, presents an opportunity to disrupt counterfeiters' illegal activities. The IACC has long taken the position that a safe and trusted e-commerce system is beneficial to all of the legitimate stakeholders who comprise it, whether rights-holders, legitimate retailers, service providers, or consumers; and that the robust enforcement of IP rights online is an essential component to ensuring such a healthy marketplace. In furtherance of this belief in shared responsibility, the IACC has been a leader in the development of voluntary collaborative agreements with stakeholders from a variety of industry sectors to achieve that goal.

The programs and engagement efforts outlined below have been developed to a large extent in response to a specific issue or issues raised by IACC members. The mere fact of engagement should not be viewed as an indication that the underlying issues have been resolved, but rather as indicators of ongoing or progressive efforts to resolve significant concerns or our members. We are happy to report progress in a number of these areas, but are also cognizant of the fact that long-term solutions will undoubtedly require further efforts, greater resources, and commitments from our counterparts as well as ourselves.

A. Credit Card / Payments Sector

The IACC's first large-scale program to address the trafficking of counterfeit goods online launched in January 2012, following the development of industry-wide best practices by rights-

holders and global partners within the payments sector. The RogueBlock⁵ program, as it came to be known, sprung out of two simple facts. First, nearly every illicit website offering counterfeit goods for sale online was making use of one of the major credit card or money transfer services to facilitate their illegal business. And second, those companies were largely unable to draw connections between transactions flowing through their system and a website or sites generating those transactions, or to unilaterally determine whether such sites were engaged in illegal activity.

The RogueBlock system sought to provide a streamlined, simplified procedure to leverage rights-holders' intelligence to help connect those dots, and in doing so, to identify and remove bad actors from the system. Seven years later, the program has led to the termination of approximately 6,100 merchant accounts, impacting an estimated 300,000 websites. Our partners in the payments sector have consistently provided enhanced resources and essential support to target bad actors, despite counterfeiters' ever-evolving strategies to evade detection and to profit from their illegal activity. In light of the fact that approximately 80 percent of e-commerce sales involve payment via either a credit or debit card, an illicit merchant's inability to receive payment in that manner can be crippling. We've been fortunate to have willing partners across the payments sector to build out an effective program, and we continue to explore how we can further improve the existing system, and to leverage additional partnerships to have a greater impact against illicit sales online.

B. E-Commerce Platforms

a. Alibaba Group

While the RogueBlock program focused primarily on "standalone" websites, the IACC recognized that such sites represent only one part of the overall e-commerce landscape. Accordingly, the IACC has sought to engage with platforms to address our members' priority issues in a variety of ways over the past decade. Our first formal program in this area was the

⁵ <http://www.iacc.org/online-initiatives/rogueblock>

IACC MarketSafe Program⁶, launched in 2014, following nearly two years of discussions with the Alibaba Group. At the time of the program's launch, counterfeit sales on the various Alibaba platforms were undoubtedly the highest priority issue for IACC members. Our members' concerns were tied not only to the volume of illicit sales, but also to a number of discrete issues such as the platforms' responsiveness to complaints, its framework for disciplining sellers for IP violations, and a variety of others. We've been greatly pleased by the progress that Alibaba has shown during the past five years, in terms of its responsiveness to rights-holders' concerns, the revision of a number of its policies that previously served as practical impediments to enforcement, its significantly increased proactive enforcement measures, and its collaboration with rights-holders and law enforcement to leverage platform data for offline enforcement actions.

Alibaba's consistent willingness to work in a collaborative fashion, and its commitment to dedicating necessary resources to the effort has enabled our program to grow and evolve over time. For example, small- and medium-sized enterprises (SMEs) continue to experience many of the difficulties noted by our members in the past however, so at present we're making a concerted effort to make the program more accessible to those companies who may not otherwise have the necessary resources to combat the trafficking of fakes on the platforms. To its credit, Alibaba has subsidized the program's operation to permit any company – whether an IACC member or not – to participate in the MarketSafe Expansion Program at no cost.

b. Collaboration with Amazon

In April 2018, the IACC signed a Memorandum of Understanding (MOU) with Amazon to work more closely on the assessment of claims of potential infringement, reporting and enforcement; and intended to enhance collaboration and anti-counterfeiting efforts between Amazon and IACC's members. As in the other examples provided herein, this engagement was driven by a variety of concerns experienced by rights-holders on the platform, including inconsistent handling of infringement reports, and a lack of clarity with regard to the source of the goods in

⁶ <http://www.iacc.org/online-initiatives/marketsafe>

a particular listing (including whether the goods were being sold directly by the brand, by Amazon, or by some other third party).

Shortly after signing the MOU, an initial pilot program was launched, seeking to improve the platform's overall reporting process and engagement of rights-holders in further developing its brand protection initiatives and policies. That initial engagement resulted in constructive feedback from, and dialogue with participants, and has resulted in further commitments seeking to build upon the relationship. We're also happy to report that the number of brands participating in the program has doubled since its initial launch. Our engagement with Amazon has now moved beyond the pilot stage to become an ongoing collaboration; the scope of our efforts remains fluid and is largely dictated by the specific concerns raised by our members. As one of the largest and most influential e-commerce companies in the world, Amazon has an important role to play in ensuring that counterfeit goods stay out of consumers' hands; and we look forward to their continued cooperation toward that end.

c. Engagement with eBay / WeChat / DHgate / MercadoLibre

eBay was, at one time, viewed as head and shoulders above the rest of their counterparts in the e-commerce space. This view was largely attributable to its Verified Rights Owners (VeRO) program, which was considered by most to be the gold-standard of online enforcement / brand protection programs among platforms. Regrettably, we've begun to hear increasingly negative feedback about eBay in recent years; those complaints are most consistently tied to the issue of recidivism among its sellers. And despite repeated efforts to raise such concerns, little if any progress has materialized.

As the Subcommittee examines the issues of counterfeits in e-commerce, we would also like to draw its attention to the comments submitted by the IACC pursuant to the U.S. Trade Representative's Notorious Markets Review in October 2018, particularly with regard to the WeChat, DHgate, and Mercado Libre platforms. Following our submission, we've had some constructive dialogue with DHgate, and expect to engage in further discussions in an effort to address the issues raised in our filing. Despite some limited engagement over the past year with the other above-mentioned platforms, each remains a significant concern for rights-

holders, and regrettably we've seen little improvement on the issues raised in our comments since last October. We would welcome a more cooperative approach on the part of each platform, to address these ongoing concerns.

As global commerce and e-commerce grow increasingly synonymous, the Subcommittee's attention to the trafficking of counterfeit goods online is both welcomed and timely. We thank you for the opportunity to address our members' concerns with you today, and look forward to working with you to ensure that consumers and legitimate businesses are able to benefit from a safe and vibrant online market.

I welcome any questions you might have, and stand ready to assist you.

Respectfully submitted,

A handwritten signature in black ink that reads "Bob Barchiesi". The signature is written in a cursive, slightly slanted style.

Robert C. Barchiesi

President