

TESTIMONY OF

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AND

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ON

S. 1631,

THE CUSTOMS FACILITATION AND TRADE ENFORCEMENT
REAUTHORIZATION ACT OF 2009

BEFORE THE

COMMITTEE ON FINANCE

OF THE

UNITED STATES SENATE

OCTOBER 20, 2009

I. Introduction

Chairman Baucus, Ranking Member Grassley, and distinguished members of the Finance Committee: thank you for inviting me to testify on S.1631, the “Customs Facilitation and Trade Enforcement Reauthorization Act of 2009.”

While I serve as Executive Vice President and General Counsel at NBC Universal, I appear today primarily on behalf of the Coalition Against Counterfeiting and Piracy, or CACP, for which I have served as Chairman for the last three years.

The CACP is a cross-sector coalition of over 650 companies and associations who have come together to fight the vital economic battle against intellectual property theft. Since the beginning of this year alone, the CACP’s membership has grown by nearly 150 members. There are companies from nearly every sector of our economy in our coalition, from the copyright sectors – which produce movies, music, video games and software – to pharmaceuticals, auto parts, aircraft parts, consumer goods, footwear, fashion apparel, luxury goods, toys, electronics, food products, medical devices and health products, machine tools, and many more. The breadth of our coalition stands as an eloquent reminder of the extent of the counterfeiting and piracy problem.

We vigorously applaud S.1631, and, in particular Chapter 3 – Import-Related Protection of Intellectual Property Rights (§§ 231- 242), as a critically important step in heralding a new era in the role of the Bureau of Customs and Border Protection (CBP) and the Immigration and Customs Enforcement Bureau (ICE) in protecting the future economic well-being of the U.S. This bill recognizes that CBP must reshape itself as a bulwark to ensure that the innovation and creativity of U.S. industry is used to produce jobs here and is not stolen abroad -- endangering our economy, killing our jobs, threatening our citizens’ health and safety, and nourishing organized crime. We commend the Chair and Ranking Member and their able staff for crafting such a forward-thinking bill, and offer some suggestions for its improvement.

In particular, we applaud the provisions of the bill that:

- Establish high-level leadership on IP issues by combining the international and commercial office under a single Assistant Commissioner at CBP, and formally authorizing the National Intellectual Property Coordinating Center (NIPCC) under an Assistant Director at ICE (Sections 102 and 232);
- Increase resources devoted to IP enforcement by requiring the Strategic Plan to assess the optimal allocation of personnel to ensure that CPB and ICE are effectively enforcing IP; to assign, in the meantime, at least one full-time IP specialist at each of the 10 top ports; to ensure CBP personnel are effectively trained to detect and identify IP infringing imported goods; and by requiring at least three IP-dedicated CBP agents to join with IP-dedicated agents from ICE, the FBI, other agencies at the NIPCC (Sections 232, 233, 235, 236); and
- Enhance the IP Enforcement Capabilities of CBP and ICE, by requiring a Joint Strategic Plan that addresses, among other priorities, IP enforcement; establishing

of “National Targeting and Analysis Groups” (NTAGS) to help port inspectors work smarter; directing the creation of a list of persons who have had a history of attempts to import infringing goods; directing the creation of a list of “trustworthy” partners; instituting reforms that reduce unnecessary barriers for sharing information between rights holders and CBP; and calling for an information campaign to inform travelers of the many pernicious effects of trafficking in IP theft (Sections 202, 234, 237, 238, 239, 240).

II. Statement of the Problem

A few years ago, I heard Michael Danet, then Secretary General of the World Customs Organization, speak about the transformation of the counterfeiting and piracy problem during his tenure as head of the organization. He said that the manufacture and distribution of phony goods had begun as a cottage industry, but that over the last 20 years has metastasized into a global network with deep infiltration by organized crime. He called the scale and sophistication of today’s systems of copying, transporting and distributing illicit goods "a second industrial revolution." Likening the battle against this crime to a tennis match with vital stakes, he said that we have already lost the first set, are behind in the second set and are in grave danger of losing the match.

The call-to-arms sounded by Mr. Danet should be heeded in every country, but especially here in the United States. The U.S. is simply not a low-cost manufacturing economy. The economic future of the U.S. depends on innovation, ingenuity, invention and creativity. Global competition in the world of the 21st Century will depend on the technical sophistication of our products, the global recognition of our brands for quality, and the appeal of our creative industries. These intangibles will determine our competitiveness in the global markets. Historically, U.S. companies—large and small—have been the most innovative in the world. And it is the economic fruits of this innovation that strong IP enforcement protects, and what IP theft erodes. If we are to get the U.S. economy back on its feet and grow jobs here in the U.S., we must capture the fruits of our own ingenuity and innovation; and not allow them to be hijacked by counterfeiters and pirates operating outside the rule of law.

We must recognize IP theft for what it is: a stealth job killer stymieing progress on the road to economic recovery. If we fail to take bold steps now to attack this cancer at its roots, the U.S. will be committing slow-motion economic suicide.

Equally important, we must establish our customs functions as a model for the rest of the world in protecting IP. We cannot call upon our trading partners to take extraordinary measures to protect intellectual property if we are not willing to give the customs agencies all the resources and statutory tools they need to enable them to safeguard our borders against infringement.

Last year’s PRO-IP Act, expanding the government’s ability to respond to this peril with better laws, leadership, and dedicated resources, was a necessary and promising first step. Strong action to shore up the ability of CBP and ICE to protect our

borders from IP theft is the next essential step. This is not merely a question of good government; it is whether we have the will to protect our economic well-being and the future economic well-being of our children.

There is ample evidence of the tidal wave of counterfeiting and piracy that is swamping the borders of every country, including ours. In 2008, for example, after a comprehensive study, the OECD estimated that the amount of counterfeit goods smuggled across borders amounts to at least \$200 *billion* per year worldwide. But it is important to note that the \$200 billion only represents *cross-border* counterfeiting and piracy. It does not purport to estimate counterfeit and pirated goods manufactured and sold within the same country. It does not purport to measure Internet piracy, the scourge of my company and other movie, music, software, games and book companies. And it does not try to account for the upstream and downstream losses suffered by suppliers to and customers of the companies whose legitimate sales are displaced by counterfeiting and piracy. When these missing pieces are added to the puzzle, it is fair to estimate that the amount of economic harm inflicted by IP theft easily surpasses *a half-trillion dollars* every year.

And it is clear that U.S. companies, whose products are stolen by pirates and whose good names and reputations are sullied by counterfeiters, suffer disproportionately from this tsunami. Statistics released by CBP earlier this year show that from FY07 to FY08 the number of IPR seizures increased by 9.7%, from 13,657 to 14,992, and the domestic value of the goods CBP seized for IPR violations increased by 38.6% to \$272.7 million from \$196.7M in FY 2007.¹ This is no doubt to some extent attributable to CBP doing a better job identifying and seizing counterfeit goods. But from the reports of our member companies, it primarily reflects the fact that the economic assault on the worldwide marketplace in every sector is simply out of control.

Counterfeits pouring across our borders not only cost money; they cost jobs. This is why organized labor has rightly been up in arms to ensure that good jobs in this country are not lost to the growing influx of illegal counterfeit products.

Additionally, IP theft is a health and safety issue that presents a clear and increasing danger to the public, from counterfeit toothpaste laced with antifreeze to exploding batteries to phony medicines that can kill patients, and other dangerous consumer goods. Sectors where IP theft threatens health and safety include automobile parts, airplane parts, food, medical devices, medical supplies, electrical supplies, pharmaceuticals and many more. CBP reports that in 2008 IPR seizures of products posing potential safety and security risks increased by over 124% in domestic value, from \$27.8M to \$62.5M.

Finally, IP theft is the new face of organized crime. Organized crime goes where the money is, and today that means piracy and counterfeiting, where criminals can engage, with minimal risk, in high-value commerce such as manufacturing millions of bootleg

¹ http://www.cbp.gov/linkhandler/cgov/trade/priority_trade/ipr/seizure/fy08_final_stat.ctt/fy08_final_stat.pdf

DVDs or bottles of counterfeit medicine. Their activities can also have far-reaching consequences for national security. Just last week, for example, counterfeiters were indicted for a scheme to import more than 10,000 phony integrated circuit computer chips to the U.S. Navy, which could have caused sophisticated military and government systems to fail.”²

III. The Solutions

While there is ample cause for alarm, there are also plenty of reasons for hope that our Congress and our country can muster an adequate and timely response to the threat that IP theft poses.

Just a few weeks ago, the President’s Innovation Strategy explicitly recognized the importance of IP protection, noting that “Intellectual property is to the digital age what physical goods were to the industrial age. We must ensure that intellectual property is protected in foreign markets and promote greater cooperation on international standards that allow our technologies to compete everywhere.”³

And almost exactly one year ago, the President signed into law the PRO-IP Act, a bi-partisan bill with the strong support of both business and labor, which the Senate passed by unanimous consent. That Act recognized that countering IP theft requires a new enforcement paradigm. No longer could IP enforcement be regarded as a mere nuisance, and relegated to the bottom of the priority list. Instead, Congress in the PRO-IP Act recognized that a three-pronged approach was necessary to turn the tide.

First, effective enforcement requires high-level leadership, on both an Agency and a government-wide level. Thus, the PRO-IP Act established a Senate-confirmed “Intellectual Property Enforcement Coordinator,” or IPEC, to have a major role in setting governmental IP policy and supervising the development of a government-wide strategic plan to ensure that the IP enforcement programs of the many Departments and Agencies who play critical roles in this area are synchronized and working in harmony. We were pleased that the Administration recently nominated Victoria Espinel as the first IPEC, and look forward to seeing the benefits of a more coordinated approach to IP enforcement.

Second, effective enforcement requires dedicated resources, and the PRO-IP Act authorized new IP-dedicated FBI agents and prosecutors. If IP enforcement remained one of many priorities for an agent or prosecutor, experience teaches that sustained and effective enforcement efforts are unlikely to come to pass.

² <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/09/AR2009100902021.html>

³ A STRATEGY FOR AMERICAN INNOVATION: DRIVING TOWARDS SUSTAINABLE GROWTH AND QUALITY JOBS (page 15), http://www.whitehouse.gov/assets/documents/sept_20__innovation_whitepaper_final.pdf

Third, and finally, the PRO-IP Act updated many of the laws that the rapid march of technology had made obsolete, and which no longer produced adequate deterrence to IP theft.

IV. Challenges at CBP and ICE

The PRO-IP Act's resource provisions addressed enforcement resources within the Justice Department. The CBP and ICE also have critical roles to play in IP enforcement.

Today, CBP and ICE are the single-most important enforcement barriers to an ever-increasing flood of counterfeit and pirated products. Through no fault of the hard-working but overburdened CBP and ICE personnel, however, the enforcement strategies and resources of the agencies have unfortunately fallen far behind scale and skill of the counterfeiters and pirates. In the past the agencies considered protecting IPR to be primarily the responsibility of the rights holders, who are the victims of this extraordinary crime wave. ICE and CBP saw their primary task to be collecting and protecting the revenue of the United States, ensuring that imports met the requirements of federal laws, and protecting America's homeland security from such scourges as illegal drugs and terrorism. Relegated to a much lower priority were the enormous economic, health and safety costs of IP crime.

Unfortunately, as the IP crime problem and its impact has mushroomed, CBP and ICE have been slow to adapt their mindset and undertake the policy changes and resource allocations necessary to counter it.

Among the most prominent problems at CBP are those highlighted in recent reports by the Government Accountability Office, which include the following:

- CBP lacks agency-wide performance measures in its strategic plan and an integrated approach across key offices to guide and improve IP enforcement.
- CBP does not adequately analyze variances in port enforcement outcomes or share data that could help to identify potential IP enforcement improvements. For example, GAO found that some of the largest IP-importing ports had very small seizure rates relative to other top-IP importing ports. A lack of integration between the Office of Trade (OT) and Office of Field Operations (OFO) impedes using this type of analysis to identify potential IP enforcement improvements.
- Certain procedural weaknesses limit CBP's ability to enforce exclusion orders, which stop certain IP-infringing goods from entering the country.
- CBP staff that carry out IP enforcement activities operate in an environment that is plagued by staffing challenges, including staffing shortages, difficulty hiring and retaining staff, and fatigue among its workforce.

- CBP does not track the amount of time their staff spends on IP enforcement, making it difficult to determine if they are balancing their resources appropriately.⁴

Based on these findings, GAO recommended that CBP include measures to guide and assess IP enforcement outcomes in CBP's strategic plan; improve its IP enforcement data; use existing data to better understand ports' IP enforcement activities and outcomes, and link ports' performance to measures in CBP's strategic plan.

The reauthorization process presents an ideal opportunity for Congress to jumpstart these needed changes and ensure that the IP enforcement capabilities at CBP and ICE are upgraded.

V. The Baucus-Grassley Customs Authorization Bill (S. 1631)

Like the PRO-IP Act, S.1631 focuses on three fundamental areas that can help improve intellectual property enforcement: 1) establishing leadership with the responsibility to make IP enforcement a priority; 2) increasing IP resources with better training for those in the field; and 3) making statutory changes that will enable more effective enforcement for CBP inspectors and ICE investigators.

In most instances, the current bill fully hits the mark. In a few other areas, we suggest ways that the bill can be strengthened. And, finally, there are IP-related deficiencies that this bill does not address, which we strongly encourage the Committee to consider incorporating as this legislation moves forward.

A. Leadership

The bill calls for changes in CBP's organizational and leadership structure that promise to do much more than simply shift responsibilities. It is crafted to create increased sensitivity to commercial operations, including IP protection, reflecting the Committee's resolve to address these needs, without detracting from our Nation's homeland defense. It creates a structural means for CBP to solve those problems itself, rather than having Congress dictate the path forward. It requires CBP and ICE to be more accountable to Congress and this Committee. It demands that more officials have greater sensitivity to private sector interests. It enhances the public's leverage, forcing the agency to listen better than it has in the past.

Of particular value to the intellectual property community, section 102 of this bill combines the international and commercial operations in a single office, merging the two functions under one assistant commissioner. As CBP improves its own performance, the Office of Trade will be in a position to consult with and train other nations' customs

⁴ U.S. Government Accountability Office (GAO), "Intellectual Property: Better Data Analysis and Integration Could Help U.S. Customs and Border Protection Improve Border Enforcement Efforts", GAO-07-735 (Washington, D.C.: April 2007); U.S. Government Accountability Office (GAO), "Intellectual Property: Federal Enforcement Has Generally Increased, But Assessing Performance Could Strengthen Law Enforcement Efforts", GAO-48-157 (Washington, D.C.: March 2008)

services, leading by example and harmonizing IP enforcement practices. Counterfeiting and piracy are global in scope and require a global response, with CBP working cooperatively with other customs services.

Another provision in section 102 establishes a “Customs Facilitation and Trade Enforcement Division” within Field Operations, headed by a deputy assistant commissioner. This connects headquarters’ commercial trade interests with port operations throughout the country, promising vastly improved communications between port directors and Washington. It also paves the way for increased attention to imports, exports and transshipments of counterfeit and pirated merchandise. We hope headquarters’ interest in strengthened enforcement will incentivize the field to carry out this mission.

An additional very important structural change, contained in section 232, is formal authorization for the National Intellectual Property Coordinating Center (NIPCC) within ICE, headed by an Assistant Director. Making the NIPCC a permanent fixture with high-level leadership will go a long way towards strengthening its capabilities and enlisting support from the necessary participating agencies. The NIPCC in the past has suffered from a lack of high-level commitment participation by ICE and other enforcement agencies, undermining the goal of a centralized, cooperative and coordinated IP enforcement entity. Undermanned, its primary function has been outreach; yet, it needs to do much more in combining IP investigative efforts cross-agency. While this bill, for jurisdictional reasons, cannot reach many of the necessary agencies, it will boost the NIPCC’s stock in the eyes of those enforcement agencies, permitting it to become a valuable coordination link to support investigations.

Finally, we support the provision directing CBP to work with state and local officials to develop formalized referrals of information on detained and seized merchandise. And, as Section 232 requires, the NIPCC will play an important role in making this partnership a reality.

B. Increased Resources

CACP has long espoused assigning personnel dedicated to IP enforcement at the ports of operation. Our experience has taught that Customs officials with many priorities to weigh generally give IP enforcement short shrift, and that effective enforcement requires staff that is trained and experienced in *intellectual property*. Yet, we do recognize that a shortage of qualified port staff and the understandable insistence of CBP to be able to exercise its management prerogatives have to date stood in the way of achieving this goal.

Our concern has been partly addressed by sections 233 and 235 of the bill, which require that a Joint Strategic Plan (discussed more fully below) establish a list of ten ports, with at least one full-time employee with “principal responsibility” for IP assigned to each. Further, the bill requires an assessment of the optimal allocation of personnel,

resources and technology to adequately enforce intellectual property rights. This is a major step forward.

We submit, however, this provision would be improved if the selection of these ten ports were not based solely on the volume of seizures, as this criterion may prove not to be the most efficient or effective way to proceed. Generally, the most aggressive ports with respect to IP enforcement will have the most seizures, and thus would remain on the list. Ports that may have high rates of undetained counterfeit and pirated goods, but have not undertaken aggressive enforcement, will not be staffed. Port attention often varies not only by the volume of counterfeits and pirated goods, but also by the experience and interest of its personnel and by port leadership. And, of course, as a port becomes effective in seizing goods, criminals ship their contraband elsewhere. Accordingly, there should be dedicated personnel at all high volume ports.

As noted above, we are strongly supportive of the commitment made by this bill to the National IPR Coordinating Center. It is for that reason that we commend the Committee for the provision requiring at least three full-time CBP employees to be assigned to the Center (sec. 235).

Finally, under the broad rubric of resourcing, we include training (section 236). In this calendar year, we understand CBP has cancelled its IP training in order to construct a “more comprehensive” product. This leaves the training conducted by the private sector as the only real training to be conducted this year.

Companies with resources that enable them to provide highly-specific, product-oriented training for CBP personnel are more than willing to do their part. But training cannot be conducted only by the biggest players. CBP must vastly expand its intellectual property enforcement training for inspectors, making its subject matter experts freely available to the ports. This, in turn, requires a corresponding and expanded resourcing at the Office of Trade and Office of Training and Development.

C. Other Statutory Changes

Leadership and dedicated resources are two critical components necessary for enhanced protection of IP at the borders; the third necessary factor is a clear plan on how to utilize the additional resources and legal tools in the most effective manner possible.

In what should be regarded as the mainstay of this bill, Section 131 requires the CBP Commissioner and ICE Director to create and submit to this Committee a comprehensive biennial Joint Strategic Plan (the “Plan”). The Plan must address (1) a summary of action taken to better enforce such laws; (2) a statement of the objectives and plans to further improve enforcement of such laws and trade facilitation; (3) an identification of priority trade issues that pose a specific risk to public health and safety or revenues; (4) a description of efforts to improve consultation and coordination among Federal agencies regarding trade facilitation and the enforcement of U.S. customs and trade laws; (5) a description of existing commercial training efforts and methods to improve such efforts; and (6) an identification of domestic or international best practices to improve trade facilitation or

enforcement of U.S. customs and trade laws. The provision calls for consultation with private sector entities, among others, as part of the preparation of the Plan.

Section 233 makes clear that IP enforcement must be part of the Plan. In addition to the considerations enumerated above, the IP enforcement provisions of the Plan must include (1) a description of DHS's IPR enforcement efforts; (2) a list of the top ten ports, by volume, where CBP seized IPR infringing goods in the preceding two years; and (3) a recommendation of the optimal allocation of personnel to ensure CBP and ICE are effectively enforcing IPR.

We ask the Committee to expand these IP provisions to ensure that the Strategic Plan also ensures that other key measures are addressed, both in the near term (6-12 months) and the longer term (3-5 years). We ask that the bill be amended to require the Joint Strategic Plan to include the following:

1. A list of agency-wide performance metrics to be developed by CBP that set port-by-port and overall goals for IPR-related seizures, as measured against agency performance in the preceding two years. These metrics should reflect the complexity of the enforcement challenge and not rely on any single factor, such as seizure rates;
2. A description of the specific steps to be taken to promote substantially better information exchange with the affected sectors, including specific steps to establish clear channels of communication by rights holders of information about infringing goods, and including specific steps to remove unnecessary barriers to Customs enforcement officials communications to those rights holders concerning CBP's enforcement actions that were based on the information received;
3. A description of CBP's plan for developing and implementing technology strategies, such as those referenced in Section 236(b), enabling CBP to employ state-of-the-art authentication techniques to discern between counterfeit and legitimate goods for each of the top 20 sectors affected by counterfeit imports;
4. A list of best practices to interdict infringing IP goods at individual ports, as recommended by GAO, and a timeline for implementing those practices at all ports; and
5. A list of obstacles to effective IP enforcement that CBP and ICE identifies, and recommendations to Congress for any enhanced statutory authority necessary to enable CBP and ICE to be fully effective.

In addition to the provisions relating to the Plan, the CACP applauds other sections of the bill that should help the CBP and ICE become more effective in protecting our borders against the influx of counterfeit and pirated goods.

Specific Provisions that CACP Supports

- **NTAGs:** We note with approval the recognition at CBP and in this bill (section 211) of the “National Targeting and Analysis Groups” (NTAGs). Targeting helps port inspectors “work smart.” It sorts through imports based on risk, identifying shipments that have a higher probability of violating security, product safety or IP laws. With the enormous volume of imports that enter the country today, discovering IP violations can be like “finding a needle in a haystack.” In the words of CBP, targeting “makes the haystack smaller.” Use of targeting has long been necessary for the effective IP enforcement by CBP and it has been slow in emerging as a robust tool for the inspectors. We are encouraged by the bill’s attention to this tool and by its recognition of the responsibilities of the NTAGs. We urge the committee also to insist that the IP NTAG be fully resourced so that it can do its job.
- **List of Prior Offenders.** In a related provision (Section 234), the legislation requires CBP to establish a list of persons who have a history of importing goods that infringe intellectual property into the United States. We believe that this is a critically important database that is crucial to the NTAG effort. We encourage the development of clear criteria for being placed on the list and for removal.
- **List of Trustworthy Persons.** A corollary to this is the provision (Section 202) which establishes a “Customs Facilitation Partnership Program” comprised of supply chain participants who will receive facilitated entry of merchandise. CACP agrees that CBP targeting must separate trusted responsible participants in the supply chain from high risk shippers, carriers and other bad actor participants in order to be effective. We urge that CBP be required to develop clear criteria for applying this provision as well in order to give the necessary guidance to the private sector.
- **Copyright recordation.** Section 237 authorizes recordation of certain works for which a copyright is *pending*. This implements an earlier CBP proposed regulation, 69 FR 59562(October 5, 2004), that has languished for a half-decade. Recordation is the process whereby rights holders can register their intellectual property with CBP and have information about that related product incorporated in a database available to customs inspectors. The provision recognizes the vulnerability of copyrightable works during the time an application for registration is pending at the Copyright Office. This provision permits recordation and enforcement by CBP as soon as an application for registration is properly submitted to the Copyright Office, providing an important added measure of protection for rights holders and a critical enforcement tool for CBP. CACP wholeheartedly supports this provision.
- **Education Campaign.** Section 240 calls on the Secretary of DHS to develop and carry out an educational campaign to inform travelers about “the legal, economic, and public health and safety implications of acquiring goods that infringe

- intellectual property rights outside the United States and importing such goods into the United States in violation of United States law.” We applaud the bill’s authors for understanding the key role education plays, and look forward to seeing strong anti-counterfeiting and antipiracy messages communicated in such a campaign. We do suggest, however, that the most effective educational campaign would be to include a declaration on a passenger’s entry form stating that the person is not knowingly bringing illegal counterfeit physical goods into the U.S.
- **DMCA Implementation.** Section 239 specifically authorizes seizure of circumvention devices that violate the Digital Millennium Copyright Act, requires subsequent publication of that seizure on the CBP website, and provides procedures for disclosure to the aggrieved party. CACP fully supports this provision.
- **Samples Valued at Under \$100.** In addition to the provision cited above, the legislation provides in section 238 that no bond will be required if the value of a sample is less than \$100. In many instances, samples of counterfeit or pirated merchandise are critical to a rights holder being able to identify merchandise as violating IPR. A bond protects the importer from losing his property; however, individual bonds for small amounts are often unavailable, costly, or take too long to process. CACP supports this provision.

Provisions that CACP Would Like Added or Revised

The CACP submits that additional changes in statute would enhance the ability of CBP port inspectors to intercept counterfeit and pirated merchandise. In some instances, existing statutes and regulations are counterproductive to conducting their mission; in others, steps can be taken to empower the field staff with information and improved authority

- **Trademark recordation.** Section 242 provides for a *Sense of the Congress* stating that CBP should work with the U.S. Patent and Trademark Office to establish a one-step process for registering a trademark and then recording the mark with CBP. CACP supports this concept; however, we prefer the Committee to simply authorize this process directly. There is little reason for reluctance in directing this project: the IT changes are modest; registration/recordation should be as seamless as possible; and, these enforcement tools should be readily available to inspectors needing detailed information about specific merchandise.

- **Detention/Seizure Protocols.** CACP supports Section 238, which allows CBP to provide a sample of suspect merchandise to rights holders to determine if the product infringes a copyright or trademark. To be effective in thwarting counterfeit and pirated products, however, this premise, the provision must provide more explicit authority to CBP officers. Until recently, CBP routinely sought the assistance of trademark and copyright owners in authenticating suspect products detained or seized at the border. With the increased sophistication of counterfeiters, it can be very difficult for even a rights holder, let alone a CBP officer, to know for sure what is real and what is not. Unfortunately, after questionable but aggressive threats of lawsuits against individual officers under the Trade Secrets Act, CBP changed its policy in 2008. Now, deterred by threat of liability from providing rights holders with even a simple unredacted photo of the product or packaging to help spot the fakes, CBP officers are often unable to verify that the suspect product is indeed a counterfeit and, therefore, the shipment is released into U.S. commerce despite questions about its legitimacy.

This lack of authority can have grave consequences when the products involve fake microchips, transponders or other critical components that could end up in a sophisticated transit system or aircraft landing gear -- counterfeit products that pose significant safety concerns and products that require the rights owner's expertise to identify what is real and what is a potentially dangerous fake. These products should never be allowed to poison the stream of commerce.

Some have asserted that CBP inspectors should not initiate contact with rights holders and exchange information about the seized goods in order for CBP to determine whether goods are counterfeit or pirated. They claim that this information could be used by rights holders to enforce their contractual rights regarding jurisdiction for sales. It is, however, vital for CBP to be able to seek the best assistance available in distinguishing between illegal and legitimate goods. We should not tie Customs' hands in conducting enforcement activities, particularly based on speculative concerns that somehow information might be used for another purpose – especially where that other purpose is itself legal.

We therefore urge the committee to provide CBP officers with the clear authority to seek meaningful help from the rights holder when faced with a suspected counterfeit or pirated product.

- **Samples After Seizure.** The bill does not address the interest of a rights holder having access to samples at the end point of the CBP seizure process: *after* goods have been determined to be counterfeit or pirated and are destined for destruction. Samples of the seized and forfeited merchandise often provide useful information to identify the parties responsible for those IPR crimes and to help rights owners develop proactive strategies to prevent future theft of their IP. CACP supports adding language to make those samples available, without the requirements for posting bond or for return of the product (since a thorough examination often results in the counterfeit product being damaged or destroyed).
 - **Enhanced Administrative Procedures.** CACP requests the inclusion of provisions that provide administrative authority for CBP to seize products bearing registered, but unrecorded, marks. While recordation with CBP is of course the preferred process, there are often instances where the CBP inspectors encounter goods that from the packaging alone appear to be counterfeit. Yet, if the trademark has for whatever reason not been recorded, CBP officers cannot seize them under their *administrative* seizure authority (19 U.S.C. § 1526(e)). Instead, CBP's only option would be to seek a federal attorney to provide *criminal* enforcement authority – a far more arduous process with higher thresholds of proof and other rigorous legal requirements that make it impractical for day-to-day civil border enforcement. As a result, obviously counterfeit goods bearing registered but unrecorded trademarks are often simply released. Correspondingly in the instance of copyright violations, administrative authority is not available to CBP to seize clearly infringing sound recordings, motion pictures and similar audiovisual works that are registered at the Copyright Office, but not recorded at CBP. CBP officers should not be constrained by such technical limitations. CACP supports enhanced administrative seizure authority for CBP officers.
 - **Passenger Importations of Counterfeits and Pirated Goods.** Current law affirmatively permits a passenger to enter the United States bearing counterfeit or pirated products *for personal use*, without fear of confiscation. This is the wrong message for the statutes to communicate and it rewards overseas street sales of IP-infringing goods. That provision of the law should be repealed. Moreover, the Customs Form should be revised to include a declaration on a passenger's entry form stating that the person is not knowingly bringing illegal counterfeit physical goods into the U.S.
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VI. Conclusion

Chairman Baucus and Ranking Member Grassley, the CACP commends you for recognizing the importance of enforcing intellectual property rights at the Nation's borders. The IP-related provisions in S. 1631 are a bold step in the right direction, and we commend you and your staff who have toiled so hard to make better IP enforcement a major component of this bill.

In introducing this bill, you are charting the course for Congress to change CBP's mindset toward this critical task. You are also making a sound investment that will improve the safety of the American public and the competitiveness of American businesses. Two years ago, An "Economic Analysis of the Proposed CACP Anti-Counterfeiting and Piracy Initiative" (the "Tyson Report"), by Laura Tyson, former Chair of the National Economic Council, assisted by the respected economics firm, LECG, evaluated the costs and benefits of the type of prudent investment in enhanced IP protection that is embodied in the PRO-IP Act and this bill. It concluded that:

- For every dollar invested, federal tax revenues would increase significantly with an intermediate range of \$4.9 to \$5.7;
- Each dollar would increase U.S. economic output approximately between \$64 and \$75;
- The increase in output would result in the creation of between 174,000 and 348,000 new jobs during the third year of the program; and,
- State and local governments can expect to receive incremental revenues between \$1.25 billion and \$1.50 billion, in present value terms over three years.

The Tyson Report also concluded that, based on the success of other similar types of government programs, the CACP's approach could reasonably be expected to reduce losses attributable to piracy and counterfeiting somewhere between five and ten percent over three years. If the measures were to succeed even modestly beyond those assumptions, the return on investment – in terms of business, tax revenue, health and safety, and our economic future – would be much higher.

Your bill helps give CBP and ICE the structure, the resources, the tools, and – most importantly – the direction to address the global problem of IP theft. Your bill is strategic as well as tactical; it solves problems as well as demands results; it commands attention to this costly assault on America's economic well-being.

The CACP appreciates the opportunity to have worked with the Committee closely in developing this legislation and we hope for a continued dialogue regarding ways to add to and improve this legislation in the areas I've outlined in my testimony.

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