

**Submission of the
International AntiCounterfeiting Coalition
to
U.S. Customs and Border Protection
Department of Homeland Security**

**Comments on Proposed Rules Re:
Disclosure of Information
Regarding Abandoned Merchandise**

84 Fed. Reg. 44790 - 92 (August 27, 2019)

Docket Number USCBP-2019-0031

October 28, 2019



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October 28, 2019

Mark A. Morgan, Acting Commissioner
1300 Pennsylvania Avenue Northwest
Washington, DC 20229

RE: Comments in Response to Proposed Rule – 19 CFR Parts 127 and
133: Disclosure of Information Regarding Abandoned Merchandise

Dear Commissioner Morgan:

The International AntiCounterfeiting Coalition, Inc. (“IACC”) is pleased to provide these comments regarding the amendment of 19 CFR Parts 127 and 133, by U.S. Customs & Border Protection (“CBP”) pertaining to the “Disclosure of Information Regarding Abandoned Merchandise.”

In adapting the existing voluntary abandonment process for the purpose of intellectual property enforcement, CBP created an alternate pathway to adjudicate the admissibility of suspected counterfeit goods presented for entry. It should not, however, serve as a free pass to individuals who repeatedly attempt to send vast quantities (albeit in small consignments) of counterfeit goods into the U.S. market. Absent real consequences for the illegal importation of counterfeit goods, counterfeit sellers from abroad will continue to flood the system with small packages.

While the abandonment procedure may encourage consumers to be more cautious in their dealings with online merchants by putting them on notice of the illicit nature of the goods that were interdicted; the abandonment process must also provide a lasting deterrent to those counterfeiters attempting to evade CBP’s efforts, particularly in light of the fact that they’ve already pocketed their profits by the time the merchandise has been detained. That deterrence is most likely to come in the form of improved targeting against future shipments, joint criminal actions, civil enforcement by rights-holders, and voluntary collaborative efforts among industry stakeholders to identify and effectively remove bad actors from the ecosystem. Each of those actions will only be made possible by ensuring that the capture and sharing of relevant information is an essential component of the abandonment process – as it has been under CBP’s historical approach to enforcement.

On March 31, 2017, President Trump issued Executive Order 13785, directing the Secretary of Homeland Security and the Secretary of the Treasury,

To ensure the timely and efficient enforcement of laws protecting Intellectual Property Rights (IPR) holders from the importation of counterfeit goods ... tak[ing] all appropriate steps, including rulemaking if necessary, to ensure that CBP can, consistent with law, share with rights holders:

- (i) Any information necessary to determine whether there has been an IPR infringement or violation; and
- (ii) Any information regarding merchandise voluntarily abandoned, as defined in section 127.12 of title 19, Code of Federal Regulations, before seizure, if the Commissioner of CBP reasonably believes that the successful importation of the merchandise would have violated United States trade laws.¹

In discussing the present regulatory proposals, it is important to consider the historical context within which that directive was issued by the President. Why might “appropriate steps, including rulemaking” be necessary to ensure CBP’s authority to share information with rights-holders? The answer to that question begins with CBP’s (and by extension, the Department of Treasury’s) interpretation of the Trade Secrets Act (“TSA”).² As noted in CBP’s August 27th Federal Register Notice, the TSA prohibits government employees from disclosing, *without authorization*, “any information received in the course of their employment or official duties when such information ‘concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation or association [emphasis added].’”

The Trade Secrets Act and IPR Enforcement

Historically, the enforcement of IPR at our ports and borders has been undertaken in close collaboration between CBP and rights-holders. Given that CBP is tasked with the border enforcement of over 17,000 recorded trademarks and copyrights, across over 300 ports of entry, this sort of cooperation is not only understandable, it’s essential. CBP personnel cannot reasonably be expected to maintain the level of expertise necessary to effectively and efficiently authenticate such a broad range of products, particularly given the growing sophistication of counterfeiters and their ability to produce more convincing fakes. Accordingly, CBP personnel have, in the past, sought assistance from their private-sector counterparts in determining whether merchandise was authentic or counterfeit by providing information about the shipment³, a physical sample of the goods, or more frequently, by providing digital images of

¹ Executive Order 13785 of March 31, 2017. Establishing Enhanced Collection and Enforcement of Antidumping and Countervailing Duties and Violations of Trade and Customs Laws. 82 FR 16719 (2017).

² See 18 U.S.C. 1905.

³ Pursuant to 19 CFR 133.21(b)(4), CBP personnel are authorized to share with the owner of a mark a variety of importation information regarding shipments from the time they are presented to CBP for inspection. That regulation also *requires* such disclosure to the owner of a mark no later than concurrently with CBP’s issuance of a detention notice.

suspect products and packaging for examination by the rights-holder.⁴ Doing so allowed for a relatively expeditious determination of the products' authenticity by the one party most qualified to make that determination. Over a decade ago, however, rights-holders began reporting that CBP officials had informed them in the course of requests for assistance that the officials were no longer able to disclose certain information about such shipments of suspected counterfeit goods. CBP pointed to the provisions of the TSA as the legal basis for its reluctance to share samples and other information not specifically enumerated by statute or in its regulations. As noted by CBP in the Federal Register Notice though, the TSA only prohibits the disclosure of confidential information that is "not authorized by law."

Having considered CBP's position regarding the applicability of the TSA, and its adverse effect on CBP's ability to seek assistance from rights-holders in carrying out its mission of enforcing IPR at the border; Congress responded by enacting new provisions to clarify that authority, as part of the National Defense Authorization Act for FY 2012.⁵ Section 818(g) of that law stated:

(g) INFORMATION SHARING.— (1) IN GENERAL.—If United States Customs and Border Protection suspects a product of being imported in violation of section 42 of the Lanham Act, and subject to any applicable bonding requirements, the Secretary of the Treasury *may share information appearing on, and unredacted samples of, products and their packaging and labels, or photographs of such products, packaging, and labels, with the rightholders of the trademarks suspected of being copied or simulated for purposes of determining whether the products are prohibited from importation pursuant to such section* [emphasis added].

This broad mandate was in turn implemented by CBP, first as an interim rule in 2012⁶, and later finalized in 2015⁷, in a manner that continues to baffle rights-holders, as it appears to have been designed more to frustrate the efficiency and effectiveness of CBP's collaboration with rights-holders than to facilitate it. As implemented, the amended rules imposed a new process on CBP, requiring it to seek assistance in verifying the authenticity of the goods first from the importer, allowing seven business days from CBP's issuance of a notice of detention to prove that the goods are genuine. This approach defies logic as, if the importer is knowingly importing counterfeit goods, it can be expected that he or she will either fail to respond to CBP's inquiries, or will offer falsified documentation in hopes that the entry will be permitted. Even if they're unknowingly importing counterfeit goods, the importer may only offer – under the best of circumstances – documentary evidence to support a claim that the goods in question were obtained from a legitimate source. Unless the importer of the goods is also their manufacturer though, they will be entirely unqualified to offer an opinion on the authenticity

⁴ Such information typically included unredacted images of the merchandise, as presented for inspection; serial numbers included on the product and packaging; and information about the presence or absence of overt anti-counterfeiting technologies incorporated into authentic products by the legitimate manufacturer.

⁵ National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81 (2011).

⁶ Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border, 77 FR 24375 (Apr. 24, 2012).

⁷ Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border, 80 FR 56370 (Sept. 18, 2015).

of the specific goods in question.⁸ Under the current regulations, it's only after an importer fails to adequately demonstrate the goods' authenticity, or fails to respond entirely, that the rights-holder is offered an opportunity to examine the goods and their packaging, as presented for examination, in an unredacted form. In practice, the new rules formulated by CBP can only be seen as decreasing the efficiency of the examination process by delaying CBP's ability to seek effective assistance from rights-holders.

In response to the 2015 rulemaking, Congress took up the issue again, passing legislation in early 2016⁹; again, seeking to clarify CBP's authority to share relevant information with rights-holders and to facilitate a return to the collaborative approach that typified IP enforcement in the past. Those new provisions state, in relevant part that:

... if the Commissioner of U.S. Customs and Border Protection suspects that merchandise is being imported into the United States in violation of section 526 of this Act or section 602, 1201(a)(2), or 1201(b)(1) of title 17, United States Code, and determines that the examination or testing of the merchandise by a person described in subsection (b)¹⁰ would assist the Commissioner in determining if the merchandise is being imported in violation of that section, the Commissioner, to permit the person to conduct the examination and testing— “(1) shall provide to the person information that appears on the merchandise and its packaging and labels, including unredacted images of the merchandise and its packaging and labels; and “(2) may, subject to any applicable bonding requirements, provide to the person unredacted samples of the merchandise.¹¹

⁸ We are unaware of any information available to support the approach adopted by CBP. No statistical data has been published which might indicate importers' capacity to demonstrate the goods' authenticity to CBP's satisfaction, or to do so within the prescribed period. We'd also note that, to our knowledge, CBP has neither provided any guidance to the field, nor established any criteria, by which CBP personnel might make an objective determination that the subject goods are authentic, or that rights-holder assistance is unnecessary to determine the goods' suitability for entry.

⁹ Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125 (2016).

¹⁰ See TFTEA at Section 302. The cited paragraph (b) defines a person as, “(1) in the case of merchandise suspected of being imported in violation of section 526, the owner of the trademark suspected of being copied or simulated by the merchandise; “(2) in the case of merchandise suspected of being imported in violation of section 602 of title 17, United States Code, the owner of the copyright suspected of being infringed by the merchandise; “(3) in the case of merchandise suspected of being primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under that title, and being imported in violation of section 1201(a)(2) of that title, the owner of a copyright in the work; and “(4) in the case of merchandise suspected of being primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of an owner of a copyright in a work or a portion of a work, and being imported in violation of section 1201(b)(1) of that title, the owner of the copyright. Importantly, neither Congress nor the Administration make any reference to CBP's seeking similar assistance from the importer in determining the admissibility of the relevant goods.

¹¹ See TFTEA at Section 302. Paragraph (d) of Section 302 restricts CBP's disclosure authority only “if providing such information, photographs, or samples would compromise an ongoing law enforcement investigation or national security.” The potential disclosure of commercially sensitive information belonging to the importer, or of information that might enable the owner of the mark to learn such information, upon which CBP's position concerning the applicability of the TSA rests, is notably absent from the statutory language.

While the provisions of TFTEA remain to be implemented, Congress has provided CBP with a clear mandate to ensure that its disclosure of information to, and sharing of samples with, relevant rights-holders in furtherance of its IPR enforcement mission should not be restricted by the provisions of the TSA. Such actions are unquestionably “authorized by law.”

Adapting the Abandonment Process for IPR Enforcement

In the interim period between Congress’ 2011 enactment of the NDAA, and the 2016 enactment of the TFTEA provisions which superseded them; CBP began exploring alternative approaches to enforcement, largely in response to a drastic increase in the volume of small consignments entering the country via express shipments and international mail, and correlated with the rise of e-commerce. One such approach developed by CBP sought to leverage its authority to permit the voluntary abandonment of shipments. The abandonment process, initially operated as a pilot program between 2014 and 2018, was developed as a means to substantially reducing the administrative burden borne by CBP under its existing formal detention and seizure process. Under that program, CBP would contact the importer / consignee of a shipment to provide notice that the merchandise had been detained based upon a suspicion that the goods were counterfeit and that the importation of those goods would be in violation of U.S. trade laws. The importer / consignee was offered an opportunity to abandon the goods within 30 days. If the importer / consignee consented to the abandonment, or failed to respond to CBP’s notice within the period, the goods would be deemed voluntarily abandoned, and subject to destruction. Alternatively, the importer / consignee had the option of contesting CBP’s suspicion, in which case, the dispute would move forward through the normal detention and seizure process.¹²

Upon becoming aware of CBP’s pilot program, rights-holders raised significant concerns regarding the broader impact of the procedure on IPR enforcement. Chief among those concerns was the fact that CBP was purportedly failing to capture relevant information regarding those shipments which would *by law* be made available to affected rights-holders if the goods had been seized under the formal process. That information is seen as a vital component to ensuring the effectiveness of CBP’s targeting for illicit shipments, as well as rights-holders’ own investigations to support criminal and civil enforcement of their rights. Despite these concerns, CBP took the position that sharing information with rights-holders regarding the shipments was precluded by the TSA. CBP noted that its regulations authorized such disclosures only pursuant to the detention or seizure goods, but not in cases involving abandonment.¹³ In the agency’s view, because the regulations governing voluntary abandonment did not include an explicit authorization for disclosure, the provision of information comparable to that provided under the traditional process was not “authorized by law,” and thus prohibited by the plain language of the TSA. That point was reiterated in the Federal Register Notice, which highlights, “In fact, the regulations in part 133 are silent with respect to IPR enforcement against merchandise that has been voluntarily abandoned.”¹⁴

¹² Based on statements by CBP, it is our understanding that the overwhelming majority of the “abandonment notices” issued during the operation of its pilot program went unanswered, and those goods were destroyed.

¹³ Compare 19 CFR 133.21 with 19 CFR 127.12.

¹⁴ It is worth noting that the silence of part 133 is not surprising, in light of the fact that the voluntary abandonment process had not been leveraged for purposes of IPR enforcement until relatively recently.

As noted at the outset, in March of 2017, President Trump sought to alleviate CBP’s concerns regarding the constraints placed on their authority by the TSA, by issuing Executive Order 13785; and that directive has led to the present rulemaking. Unfortunately, in our view, the proposed rules would continue to limit the essential collaboration and sharing of information between CBP and the rights-holder community. This concern is driven in-part by the permissive nature of the proposed rules as drafted, as the new text added at 19 CFR 133.21(b)(6) states, “... CBP *may* disclose to the owner of the mark the following comprehensive information, *if* CBP determines the disclosure will assist in CBP’s trademark enforcement ... [emphasis added].” This permissive disclosure – which itself requires a preliminary determination that the disclosure will assist in CBP’s IPR enforcement – stands in sharp contrast to the existing regulations governing the seizure of counterfeit goods, which mandate the disclosure within 30 days of each of the data points set forth in the proposed 133.21(b)(6).¹⁵

The voluntary abandonment approach was designed as an alternative pathway to permit the expedited resolution of cases involving the attempted importation of suspected counterfeit goods; and while it bypasses much of the administrative process of formal seizure, the end-point should remain the same – the goods must be barred from entry and be destroyed, the relevant information related to the shipment should be captured by CBP for use in targeting and related purposes, and the impacted rights-holders should have access to the full range of information, and samples, that they would have under the formal process. As CBP states, rather succinctly, in the Federal Register Notice, “If [importers / consignees] do not wish to have their merchandise’s information shared with the right-owner, they may choose not to voluntarily abandon these goods.”¹⁶ We wholeheartedly agree.

We also believe however that such information sharing should not be conditioned on a determination by CBP that “the disclosure will assist in CBP’s trademark enforcement.” No honest assessment of the potential value of the information obtained from any single shipment can be made in isolation. That limitation similarly ignores the fact that while such information may be deemed by CBP to provide little or no assistance to its trademark enforcement activities, that same information may be seen to have significant value to rights-holders in their own enforcement efforts. Those private actions may in turn provide vital information and assistance to aid CBP. As such, imposing such a vague standard for making information available is entirely inappropriate; doing so greatly diminishes the ability of “trademark owners [from] us[ing] this importation information to help CBP prevent IPR violations by identifying sources or channels of violative shipments.”¹⁷

And while we question the sufficiency of the proposed rule in ensuring the comprehensive approach to information-sharing prescribed by both the Executive Order and by past Congressional action “[t]o ensure the timely and efficient enforcement” of IPR at the border; we similarly question whether any rulemaking is, in fact, necessary to permit CBP’s sharing of information concerning merchandise voluntarily abandoned under section 19 CFR 127.12,

¹⁵ Compare 19 CFR 133.21(e) with proposed 19 CFR 133.21(b)(6).

¹⁶ Disclosure of Information Regarding Abandoned Merchandise, 84 FR 44790, 92 (Aug. 27, 2019).

¹⁷ *Id.* at 44791.

which CBP suspects of being counterfeit. As discussed herein, and in light of CBP’s own statements and actions related to its implementation of the voluntary abandonment process – both during its pilot phase, and as it currently operates – CBP already has clear authority under existing statutes and regulations to share the comprehensive import data described in proposed section 133.21(b)(6), including the name and address of the importer, exporter, and manufacturer, as well as samples of the goods as they were presented for inspection to CBP. Some such disclosures are limited or discretionary; some are subject to a request by the rights-holder and bonding requirements; some are mandatory, as in the case of seizures.

As noted above, in CBP’s discussion of its path to the present rulemaking process, the agency states, “the regulations in part 133 are silent with respect to IPR enforcement against merchandise that has been voluntarily abandoned.”¹⁸ While this is factually correct, it’s also irrelevant; CBP’s authority (and in some instances, obligation) to share information with relevant rights-holders under 19 CFR 133.21 is triggered before an importer or consignee is given any opportunity to abandon the shipment. CBP devotes significant attention in the Background section of the Federal Register Notice describing the challenges that have arisen with the rise of e-commerce and the substantial increase in the volume of “low-value shipments arriving via express consignment or international mail.”¹⁹ It goes on to note that, “Such shipments often are voluntarily abandoned *if CBP detains the merchandise on suspicion of an IPR violation* [emphasis added]”²⁰ ... “Instead some of these importations may be voluntarily abandoned (see 19 CFR 127.12(b)) *after CBP has detained the merchandise on suspicion of an IPR violation* [emphasis added].”²¹

CBP has also issued guidance to the various ports known as the “Trade Enforcement Options Toolkit” (the “Toolkit”) through which it has advised on the use of the voluntary abandonment procedure as a method of handling IPR violative merchandise. In Section 5 of the Toolkit, CBP has advised the ports that if they have “detained” a shipment to determine its admissibility, the port has the option of providing the importer and/or consignee with a CBP Form 6051D (detention form). CBP personnel are further directed to notify the importer and/or consignee of the nature of the violation or suspected violation, and to provide the importer and/or consignee with of the option of abandoning the goods.

It should be noted that in most cases the “importer of record” is the courier or transporter of the goods, and not the shipper or consignee. That is, the legal right to import the goods is vested with the courier or transporter and not the shipper or consignee. Further, under the courier or transporter’s agreement for transportation services, if a shipper or consignee attempts to use the transportation services for an illegal act (such as importing goods that consist of IPR violative merchandise) the shipper/consignee gives up rights to the goods being transported, and the transporter has no obligation to complete the importation or transportation of the goods. It is because of this relationship between the courier or transporter

¹⁸ *Id.*

¹⁹ *See Id.*, citing U.S. Gov’t Accountability Office, GAO 18-216, “Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market,” Report to the Chairman, Committee on Finance, U.S. Senate, p. 10-11 (2018).

²⁰ 84 FR 44791.

²¹ *Id.*

and the goods being imported that CBP can rightfully accept a voluntary abandonment of the goods from the courier or transporter (as opposed to the shipper or consignee) with actual title to the goods. The Toolkit further provides that once the courier or transporter has decided to abandon the goods, the port should issue a CBP Abandonment Form (CBP Form 4607) which will be signed by the importer/consignee agreeing to *cede further interest in the shipment*. Through this document, the importer of record gives up “all” rights to the goods.

The Toolkit goes on to provide that the IPR violative merchandise can be abandoned by the importer or “violate” at any time, up to the time of the seizure, i.e., any time prior to a final decision by CBP to formally seize the goods.

Border Enforcement of IPR in Practice

As shown above, CBP has already put into practice a procedure that provides for the traditional detention and seizure process to run in tandem with the abandonment process. Voluntary abandonment, as implemented with regard to IPR enforcement, flows directly from, and is contingent upon, CBP’s detention of a suspect shipment.

When a shipment of merchandise is presented to CBP for entry, “If a Customs officer can articulate a basis for having such ‘reasonable suspicion’ [that the goods bear marks which violate a federally registered trademark] at the time of presentation to Customs, he may formally detain the goods at that time. Where a Customs officer is unsure whether to formally detain the goods at the time of presentation to Customs, he may detain the goods for a 5-day period pursuant to 19 U.S.C. § 1499 to determine whether such ‘reasonable suspicion’ exists.”²² “If Customs determines that such ‘reasonable suspicion’ exists, Customs shall issue a formal letter of detention to the importer before the expiration of the 5-day period.”²³²⁴

While the proposed rule allows for the provision of importation information to rights-holders, on a permissive basis, “if CBP determines the disclosure will assist in CBP’s trademark enforcement,” the disclosure of the first five data points enumerated in the proposed 133.21(b)(6) is already authorized under existing regulations, either (at CBP’s discretion) from the time the goods are presented for examination, or (mandatorily) no later than CBP’s issuance of a notice of detention for the goods.²⁵ Similarly, from the time that the goods are presented for examination, CBP may provide redacted images and samples of the goods to rights-holders in order to obtain assistance in verifying the goods’ authenticity.²⁶ CBP must provide notice of its detention to the importer within five business days²⁷, at which point, the

²² Trademark and Tradename Protection, Customs Directive 2310-008A, Section 4.2.2 (April 7, 2000).

²³ *See Id.* at Section 4.2.3.

²⁴ Customs has publicly stated that the notification provided to an importer / consignee under its voluntary abandonment procedure is, in fact, Form 6051 – the same form used to provide notification of a detention under its traditional, formal process.

²⁵ Compare 19 CFR 133.21(b)(4) with proposed 19 CFR 133.21(b)(6).

²⁶ 19 CFR 133.21(5)

²⁷ 19 CFR 133.21(b)(2)(i)

importer is given seven business days within which to provide information to CBP sufficient to overcome its suspicion that the goods bear counterfeit marks. The importer's non-response or failure to provide sufficient information to CBP within the prescribed seven day period triggers CBP's authority to share unredacted images or samples of the goods.²⁸ Prior to the conclusion of the seven day window, CBP is authorized to share redacted images and samples of the goods.²⁹

Where an importer has affirmatively chosen to abandon the goods at issue, or has failed to respond³⁰ to CBP's notice of detention in a timely manner; it should make no difference in the practical outcome. We are aware of no statutory or regulatory authority that would support the premise that an importer's decision to voluntarily abandon a shipment detained by CBP supersedes, or in any way serves to limit CBP's authority to share information with relevant rights-holders that would otherwise be made available were the goods subject to the traditional process. Again – "If they do not wish to have their merchandise's information shared with the right owner, they may choose not to voluntarily abandon these goods."³¹ If an importer abandons the merchandise in question, CBP has established a presumption that the goods are counterfeit, which has not been rebutted. With its execution of CBP Form 4607, the importer has agreed to give up *further interest in the shipment*. If CBP retains any doubt as to whether those goods are in fact counterfeit, then a determination (as required by the proposed rule) that such "disclosure will assist in CBP's trademark enforcement" could not be more clear-cut. Accordingly, voluntarily abandoned shipments should be treated no differently for purposes of disclosure of comprehensive importation information, the provision of samples, and their ultimate disposition than would similar shipments that were formally seized and forfeited.³² To the extent that the proposed regulations are duplicative of existing authority, we feel they are unnecessary. Further, to the extent that the proposed regulations would bypass the existing, mandatory disclosure of information vital to rights-holders' efforts to enforce their legitimate IP rights, they should be amended, as detailed in the appendix to these comments, so as to ensure the robust sharing of information and collaboration between the agency and rights-holders envisioned under both the Congressional and Administration action that has

²⁸ 19 CFR 133.21(b)(ii)

²⁹ 19 CFR 133.21(b)(i)(B)

³⁰ As mentioned in fn 12, supra, it is our understanding that the overwhelming majority of notices sent to importers / consignees during the operation of the pilot program received no answer within the 30-day response period. This fact is likewise supported by CBP's statement in the Federal Register Notice related to the present rulemaking that, "... importers frequently fail to respond to CBP inquiries." As such, the normal 7-day response window provided under 133.21(b), after which CBP would be authorized to share unredacted images and samples of goods, as presented for examination, would pass four times over. And even in such cases where the importer / consignee responded within the 7-day window, CBP has rightly noted that if those parties "do not wish to have their merchandise's information shared with the right owner, they may choose not to voluntarily abandon these goods."

³¹ 84 FR 44792.

³² 19 CFR 133.21(e) provides for the disclosure of comprehensive importation information (if available) to the owner of the mark by CBP, on a mandatory basis, within 30 days. Paragraph (f) of the same section authorizes the provision of unredacted samples and images of the relevant goods (subject to bond requirements).

been taken to date.

Additional Regulation is Necessary to Ensure Proper Disposal of Abandoned Goods

The IACC also wishes to draw attention to an additional, and significant, concern with regard to CBP's proposed amendment of 19 CFR 127.12. While the proposed addition of paragraph (c) states that "If merchandise voluntarily abandoned pursuant to paragraph (b) of this section is suspected of bearing a counterfeit mark, it also *may be subject to the detention and disclosure provisions of §133.21(b) of this chapter* [emphasis added]", the proposed language creates ambiguity with regard to the appropriate disposition of the subject goods. Under existing regulations in 19 CFR 127, voluntarily abandoned merchandise may be subject to sale by the port director.³³ CBP notes in the Federal Register Notice that "Such shipments often are voluntarily abandoned if CBP detains the merchandise on suspicion of an IPR violation. The cost of demonstrating to CBP that a shipment is legitimate may outweigh the importation's value ..." ³⁴ One could reasonably infer from that statement that, in the view of CBP, a significant percentage of those goods voluntarily abandoned are, in fact, authentic products for which the importer simply chose, on the basis of a cost-benefit analysis, not to contest CBP's suspicion that the goods were counterfeit. This in turn raises concerns that the goods could be deemed suitable for sale to the public following their abandonment.

The IACC, having worked with CBP for over 40 years, has a high regard for its efforts to prohibit the importation of IPR violative merchandise. In this regard, we believe that CBP never lightly detains merchandise based on a potential IPR violation. Instead, it is the IACC's position that goods detained are almost always correctly identified as being IPR violations. In light of this, if CBP has detained the merchandise on the basis of its suspicion that the goods are counterfeit, and that suspicion has gone unchallenged by the importer, it is absolutely improper for those goods to be disposed of via a sale to the public. Accordingly, they should be disposed of in the same manner as authorized for goods seized and forfeited under the traditional procedures outlined in 19 CFR 133.21 and 19 CFR 133.52. Further, the proposed amendment to 19 CFR 127.12 should be amended accordingly to explicitly prohibit the sale of any merchandise voluntarily abandoned that was suspected of bearing a counterfeit mark. A proposed revision to ensure the appropriate destruction of voluntarily abandoned goods is included as part of our proposed amendments in the appendix to this submission.

Additional Concerns – Abandonment in Practice

Moving beyond the strict confines of the regulatory implementation of CBP's voluntary abandonment process to the IPR context, the IACC would also like to reiterate more general concerns that have been raised previously with regard to those procedures and their

³³ 19 CFR 127.14 and 19 CFR 127.42

³⁴ 84 FR 44791.

applicability. During the operation of CBP’s pilot program, the agency developed practical guidelines under which the abandonment process could be leveraged. For instance, CBP indicated that shipments with a declared value in excess of a certain amount would be excluded from abandonment, and would only be processed through the traditional detention and seizure framework. Similarly, we were informed that certain types of goods – vaguely described as those which pose threats to consumers’ health and safety or which might have implications for national security or the military supply chain³⁵ – would be excluded from the abandonment process.

To our knowledge, CBP has not issued any formal guidance to the field regarding the applicability of the voluntary abandonment process for IPR enforcement aside from the Toolkit referenced above. The Toolkit provides no guidance concerning the proper exemption of shipments on the basis of the types of products involved or their value, other than that abandonment should be used with respect to “low-risk, non-repetitive, non-commercial shipments.” This guidance lacks any definitions as to what shipments can be categorized as “low-risk” or “non-repetitive” or “non-commercial”. We note that the proposed regulations are silent on these matters, and would encourage CBP to ensure that the necessary guidance has been formalized and communicated to the field no later than such time as the rulemaking process has been finalized.

As a final matter, we note that while the proposed rules are nominally aimed at implementing the provisions of Executive Order 13785, CBP’s proposal fails entirely in addressing Section 4(b)(i) of that Presidential directive, and appears to focus exclusively on Section 4(b)(ii). The former provision of the Executive Order directs “the Secretary of the Treasury and the Secretary of Homeland Security to take all appropriate steps, including rulemaking if necessary, to ensure that CBP can, consistent with law, share with rights holders: (i) any information necessary to determine whether there has been an IPR infringement or violation [‘[t]o ensure the timely and efficient enforcement of laws protecting Intellectual Property Rights (IPR) holders from the importation of counterfeit goods’].”³⁶³⁷ That mandate appears to point clearly at the limitations

³⁵ We assume that these categories were intended to include, at minimum, all manner of pharmaceutical products, medical devices, food & beverage or other consumables; and in the latter category, aerospace and automotive components, as well as electronics or IT hardware (including semiconductors). We agreed with CBP’s exclusion of such goods during the pilot phase, and continue to support their exclusion. In implementing the abandonment process on a permanent basis, we would hope that CBP would seriously consider additional product sectors such as cosmetics and toys, both of which have historically been found to pose heightened safety risks to consumers. In addition, we would note that some products, such as circumvention devices, are typically shipped direct-to-consumers in small quantity / low-value shipments; but the harm caused by such products in terms of enabling subsequent infringing activity far outstrips the retail price of the items themselves. Accordingly, CBP should strongly consider exempting those products from the voluntary abandonment procedures.

³⁶ Executive Order 13785.

³⁷ We note that Section 4(b)(i) of the Executive Order references sharing information concerning IPR infringements or violations in broad terms. To the extent that current regulations restrict CBP’s disclosures to the owners of copyrights, including those whose rights are implicated by the importation of circumvention devices rather than or in addition to physical imports, CBP should continue to review its existing regulations to ensure that its exchange of information with those parties is not unduly hindered.

on its authority self-imposed by CBP in its formulation 19 CFR 133.21 subsequent to the enactment of Section 818(g) of the National Defense Authorization Act for Fiscal Year 2012.

As the IACC pointed out in comments following CBP's publication of the Interim Rule, and following the issuance of the final rule; the process adopted by CBP under that rule serves only to diminish the cooperative approach to enforcement that was contemplated by Congress in enacting those provisions. The requirement included in those rules, that CBP seek assistance from the importer prior to requesting similar assistance from the relevant rights-holder appears to have been created out of whole cloth. Section 818(g) provided explicit authority to CBP to share unredacted images and samples of suspected counterfeit goods and their packaging; it imposed no requirement, however, that such disclosures be conditioned on prior notice to or consent of the importer. When Congress revisited the issue – after the final rule was published – it provided even more explicit authority for sharing the relevant information with rights-holders. That more recent action was also entirely silent on the issue of CBP seeking assistance from an importer, rather than, or in addition to the rights-holder.³⁸

It should also be noted that the Trade Secrets Act, on which CBP has relied for its justification in adopting the current procedure, likewise, provides no foundation for the rule, as adopted by CBP. That statute does not permit disclosures that are authorized *or, so long as a potentially implicated third party is provided notice and an opportunity to intervene*. Disclosures are authorized, or they are not. In the present context, CBP's disclosure to rights-holders is clearly authorized, and it is not incumbent upon CBP to undertake additional steps to prevent the disclosure of information that may be indirectly discerned by a rights-holder while CBP carries out its trade enforcement mission. We are aware of no statutory basis for CBP's determination that it must, or even should, seek assistance from the importer in authenticating goods suspected of being counterfeit. Inasmuch as that procedure hinders "the timely and efficient enforcement" of IP laws at the border, CBP should undertake a comprehensive revision of the regulations set forth in 19 CFR 133.21, to comport with Section 4(b)(i) of the Executive Order and with the clear intent expressed by Congress pursuant to Section 302 of the Trade Facilitation and Trade Enforcement Act of 2015.

In that same vein, CBP's authority to share information with rights-holders should be interpreted to permit the disclosure of additional data regarding the shipments that can be ascertained from its examination of the goods, as presented, including details included on shipping invoices, packing slips, and other such items accompanying the shipment. The plain language of TFTEA and the Executive Order provides broad authority to share information in both the pre-detention and pre-seizure contexts. That authority is unnecessarily constrained by the current regulations promulgated by CBP and the proposed regulations that are the subject of this rulemaking. While we are aware that a separate proposed rulemaking is underway to implement Section 303 of that legislation, which includes a number of changes to 133.21, our initial review of that proposal indicates that CBP's approach to disclosure remains largely unchanged, and entirely at odds with the goal of more robust data sharing with rights-holders, in a manner that would substantially improve the timeliness and efficiency of IP enforcement.

³⁸ See TFTEA Section 302(b).

And while the Executive Order refers broadly to the enforcement of IPR and CBP's sharing of information both to determine whether the importation of certain goods would constitute a violation, and following any abandonment of such shipments; we have concerns related to the sufficiency of the proposed rules as they might be applied to violations involving copyrighted works, including the illegal importation of circumvention devices. The proposed rules appear to focus solely on offenses related to trademarks, and to the extent that CBP intends to make use of the abandonment procedure as a means to dealing with other such violations, it should amend its relevant regulations pertaining to copyright violations as well.

As set forth herein:

- **CBP has authority under its existing regulations to share comprehensive importation information with the owners of IPR, when the importation of certain goods would violate those rights, regardless of whether the shipment was detained and seized by CBP or voluntarily abandoned by the importer;**
- **The Trade Secrets Act does not prohibit CBP from disclosing such comprehensive importation information to the owners of IPR, regardless of whether the shipment was detained and seized by CBP or voluntarily abandoned by the importer;**
- **CBP, in fact, has an affirmative duty to provide that information to rights-holders, and to allow the rights-holder to examine samples of the goods in question; and**
- **Such disclosure and provision of samples is neither discretionary, nor conditioned upon a determination by CBP that such disclosure is necessary to further its own IPR enforcement efforts.**

To the extent that the proposed rules promulgated by CBP serve to limit the authority provided to it by Congress, or fail to heed the Administration's clear direction to "take all appropriate steps" to implement a more robust approach to public-private collaboration on the enforcement of IPR at the border, they should be amended accordingly.

In concluding this rule-making process, CBP must take care to ensure that the final rule:

- **Recognizes the voluntary abandonment of suspect goods as directly comparable to a formal seizure of those same goods;**
- **Clarifies CBP's authority to disclose to rights-holders limited importation information regarding such shipments without delay, and enables the sharing of unredacted images and samples of goods and their packaging to assist with CBP's authentication of the goods;**
- **Mandates CBP's disclosure to rights-holders of comprehensive importation information to rights-holders within 30 days of an importer's voluntary abandonment of a shipment, as would be required under a formal seizure;**

- **Provides for making available to rights-holders samples of voluntarily abandoned goods and their packaging, in the condition in which they were presented for inspection, as would be provided in the context of a formal seizure;**
- **Ensures that voluntarily abandoned goods are disposed of in the same manner, and with the same safeguards, that apply to shipments seized for IPR violations.**

We thank you for your work on these important issues, and for the opportunity to share our members' views. If you have any questions or concerns related to the comments provided herein, please contact me at your convenience.

Respectfully submitted,



Travis D. Johnson
Vice President - Legislative Affairs, Senior Counsel

About the IACC

The IACC is the world's oldest and largest organization dedicated exclusively to combating trademark counterfeiting and copyright piracy. Founded in 1979, and based in Washington, D.C., the IACC represents approximately 250 corporations, trade associations, and professional firms, spanning a broad cross-section of industries. IACC members include many of the world's best-known brands in the apparel, automotive, electronics, entertainment, luxury goods, pharmaceutical, software, and other consumer product sectors. 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. The IACC seeks to address these threats by promoting the adoption of legislative and regulatory regimes to effectively protect intellectual property rights, and to encourage the application of resources sufficient to implement and enforce those regimes.

Appendix – Proposed Amendments to the Proposed Rule

We provide the following recommendations for amendments to the proposed rule in both “redline” and “clean” text.

CBP Proposed Rule

§ 127.12 Abandoned merchandise.

...

(c) If merchandise voluntarily abandoned pursuant to paragraph (b) of this section is suspected of bearing a counterfeit mark, it also may be subject to the detention and disclosure provisions of §133.21(b) of this chapter.

Analysis of Proposed Rule / Explanation of Amendments Proposed by IACC:

Executive Order clearly directs CBP to take all appropriate steps to ensure that the agency can, consistent with law, share with rights-holders: (i) any information necessary to determine whether there has been an IPR infringement or violation; and (ii) any information regarding merchandise voluntarily abandoned ... if the Commissioner of CBP reasonably believes that the successful importation of the merchandise would have violated United States trade laws.” The permissive wording included in CBP’s proposed rule is likely to contribute to ambiguity with regard to the proper procedures for handling goods suspected of bearing a counterfeit mark subsequent to their voluntary abandonment by the importer, and with regard to CBP’s authority and duty to provide information, and to make samples or images available, to rights-holders. Accordingly, the proposed rule should be amended by deleting “also may” from the second line and inserting in its place, “will” to clarify that the procedures following voluntary abandonment must comport with those in Section 133.21.

Further, voluntary abandonment – as implemented by CBP – serves as a final disposition of suspected counterfeit goods, more akin to seizure than to detention. In abandoning a shipment, all rights in the shipment are ceded by the importer. As CBP has noted, importers wishing to avail themselves of the disclosure restrictions already in place in Section 133.21(b) have that option; choosing to abandon the shipment should not serve to limit further action by CBP in the furtherance of IPR enforcement. As such, a more appropriate formulation of the rule would invoke those procedures, rights, and remedies typically available to rights-holders pursuant to a seizure of the goods by CBP.

Finally, we note that the current part 127 allows for the disposal of abandoned goods via public sale at the discretion of the port director. Those regulations lack the necessary safeguards to ensure that counterfeit goods do not enter the stream of commerce. The proposed rule should be amended to guarantee that voluntarily abandoned goods are disposed of in the same manner as provided for counterfeit goods following seizure, as prescribed by 19 CFR 133.25.

IACC Proposed Rule Text (Redline)

§ 127.12 Abandoned merchandise.

...

(c) If merchandise voluntarily abandoned pursuant to paragraph (b) of this section is suspected of bearing a counterfeit mark, it ~~also may will~~ be subject to the ~~detention and~~ disclosure ~~and sampling~~ provisions of §133.21~~(be)~~ ~~and (f)~~ of this chapter; ~~and will be disposed of in a manner consistent with §133.52 of this chapter.~~

IACC Proposed Rule Text (Clean)

§ 127.12 Abandoned merchandise.

...

(c) If merchandise voluntarily abandoned pursuant to paragraph (b) of this section is suspected of bearing a counterfeit mark, it will be subject to the disclosure and sampling provisions of §133.21(e) and (f) of this chapter; and will be disposed of in a manner consistent with §133.52 of this chapter.

CBP Proposed Rule

§ 133.21 Articles suspected of bearing counterfeit marks.

...

(b)

...

(6) Voluntary abandonment and disclosure to owner of the mark of comprehensive importation information. When merchandise that bears a mark suspected by CBP of being a counterfeit version of a mark that is registered with the U.S. Patent and Trademark Office and recorded with CBP pursuant to subpart A of this part has been voluntarily abandoned under §127.12(b) of this chapter, CBP may disclose to the owner of the mark the following comprehensive importation information, if CBP determines the disclosure will assist in CBP's trademark enforcement:

(i) The date of importation;

(ii) The port of entry;

- (iii) The description of the merchandise;
- (iv) The quantity of the merchandise;
- (v) The country of origin of the merchandise;
- (vi) The name and address of the manufacturer;
- (vii) The name and address of the exporter; and
- (viii) The name and address of the importer.

...

Analysis of Proposed Rule / Explanation of Amendments Proposed by IACC:

CBP states repeatedly in the Federal Register Notice that merchandise suspected of bearing a counterfeit mark is subject to voluntary abandonment only after such time as it has been detained for a suspected violation. This fact is further supported by CBP's practical implementation of the abandonment process, including its use of Form 6051D for notification of the importer and the direction it has provided to personnel through its Trade Enforcement Options Toolkit. To the extent that the data points set forth in CBP's proposed 133.21(b)(6) are duplicative of CBP's existing authority to make such disclosures – whether prior to or subsequent to its detention of the goods, the proposed regulation is unnecessary.

CBP's disclosure to a rights-holder of the first five data points enumerated in the proposed regulation is already permitted from the time a shipment is presented for inspection. Those same data points are also required to be disclosed to the relevant rights-holder concurrently with the issuance of a notice of detention. The remaining data points – the names and addresses of the manufacturer, importer and exporter – are subject to mandatory disclosure following a seizure. Given the above-mentioned factors, including voluntary abandonment's serving as a final disposition of the goods comparable to seizure, and the clear preference expressed in the Executive Order and in Section 302 of TFTEA for a more robust information sharing regime than that currently embodied in the regulations; such mandatory disclosure of comprehensive trade information is a more appropriate approach than that outlined in the proposed regulation.

To that end, the proposed (b)(6) should be deleted in its entirety. To accomplish the intended goal, a new paragraph should be added to 19 CFR 133.21(e) mandating the disclosure of comprehensive importation information related to voluntarily abandoned shipments consistent with that provided in cases resulting in seizures. Paragraph (f) should be similarly amended to clarify CBP's authority to share unredacted images and samples of voluntarily abandoned goods, as they're authorized to do in cases resulting in seizures.

IACC Proposed Amendment Text (Redline)

§ 133.21 Articles suspected of bearing counterfeit marks.

...

(b)

...

~~(6) Voluntary abandonment and disclosure to owner of the mark of comprehensive importation information. When merchandise that bears a mark suspected by CBP of being a counterfeit version of a mark that is registered with the U.S. Patent and Trademark Office and recorded with CBP pursuant to subpart A of this part has been voluntarily abandoned under §127.12(b) of this chapter, CBP may disclose to the owner of the mark the following comprehensive importation information, if CBP determines the disclosure will assist in CBP's trademark enforcement:~~

~~(i) The date of importation;~~

~~(ii) The port of entry;~~

~~(iii) The description of the merchandise;~~

~~(iv) The quantity of the merchandise;~~

~~(v) The country of origin of the merchandise;~~

~~(vi) The name and address of the manufacturer;~~

~~(vii) The name and address of the exporter; and~~

~~(viii) The name and address of the importer.~~

...

(e) Seizure and disclosure to owner of the mark of comprehensive importation information. Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States bears a counterfeit mark, CBP will seize such merchandise and, in the absence of the written consent of the owner of the mark, forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the owner of the mark the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

(1) The date of importation;

(2) The port of entry;

- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

When merchandise is abandoned pursuant to paragraph (b) of section 127.12 of this chapter, CBP will disclose to the owner of the mark the comprehensive importation information described in paragraphs (e)(1) – (e)(8), if available, within 30 business days from the date of the abandonment.

(f)Disclosure to owner of the mark, following seizure, of unredacted photographs, images, and samples. At any time following a seizure of merchandise bearing a counterfeit mark under this section, or any time following the abandonment of merchandise pursuant to paragraph (b) of section 127.12 of this chapter, and upon receipt of a proper request from the owner of the mark, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the mark. To obtain a sample under this paragraph, the owner of the mark must furnish to CBP a bond in the form and amount specified by CBP, conditioned to indemnify the importer or owner of the imported article against any loss or damage resulting from the furnishing of the sample by CBP to the owner of the mark. CBP may demand the return of the sample at any time. The owner of the mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the mark, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.21(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

...

IACC Proposed Amendment Text (Clean)

§ 133.21 Articles suspected of bearing counterfeit marks.

...

(b)

...

...

(e) Seizure and disclosure to owner of the mark of comprehensive importation information. Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States bears a counterfeit mark, CBP will seize such merchandise and, in the absence of the written consent of the owner of the mark, forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the owner of the mark the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

When merchandise is abandoned pursuant to paragraph (b) of section 127.12 of this chapter, CBP will disclose to the owner of the mark the comprehensive importation information described in paragraphs (e)(1) – (e)(8), if available, within 30 business days from the date of the abandonment.

(f) Disclosure to owner of the mark, following seizure, of unredacted photographs, images, and samples. At any time following a seizure of merchandise bearing a counterfeit mark under this section, or any time following the abandonment of merchandise pursuant to paragraph (b) of section 127.12 of this chapter, and upon receipt of a proper request from the owner of the mark, CBP may

provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the mark. To obtain a sample under this paragraph, the owner of the mark must furnish to CBP a bond in the form and amount specified by CBP, conditioned to indemnify the importer or owner of the imported article against any loss or damage resulting from the furnishing of the sample by CBP to the owner of the mark. CBP may demand the return of the sample at any time. The owner of the mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the mark, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.21(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

...

Explanation of Additional Conforming Amendments Proposed by IACC:

As noted above, the permissive wording used by CBP in its proposed addition of paragraph (c) to 19 CFR 127.12, in conjunction with existing regulations, creates ambiguity with regard to the proper disposition of voluntarily abandoned goods. Accordingly, we propose amending paragraphs (a) and (c) of 19 CFR 133.52 to clarify that such goods cannot be sold subsequent to abandonment, and that they are subject to the safeguards previously adopted by CBP relating to the disposal counterfeit goods following seizures of the same.

Conforming Amendment – Proposed by IACC – Redline:

19 CFR 133.52

§ 133.52 Disposition of forfeited merchandise.

(a) Trademark (other than counterfeit) or trade name violations. Articles forfeited for violation of the trademark laws, other than articles bearing a counterfeit trademark or articles suspected of bearing a counterfeit mark that have been abandoned pursuant to §127.12(b) of this chapter, shall be disposed of in accordance with the procedures applicable to forfeitures for violation of the Customs laws, after the removal or obliteration of the name, mark, or trademark by reason of which the articles were seized.

(b) Copyright violations. Articles forfeited for violation of the copyright laws shall be destroyed.

(c) Articles bearing a counterfeit trademark. Merchandise forfeited for violation of the trademark laws or which has been abandoned pursuant to §127.12(b) and suspected of bearing a counterfeit mark shall be destroyed, unless it is determined that the merchandise is not unsafe or a hazard to health and

the Commissioner of Customs or his designee has the written consent of the U.S. trademark owner, in which case the Commissioner of Customs or his designee may dispose of the merchandise, after obliteration of the trademark, where feasible, by:

- (1) Delivery to any Federal, State, or local government agency that, in the opinion of the Commissioner or his designee, has established a need for the merchandise; or
- (2) Gift to any charitable institution that, in the opinion of the Commissioner or his designee, has established a need for the merchandise; or
- (3) Sale at public auction, if more than 90 days has passed since the forfeiture and Customs has determined that no need for the merchandise has been established under paragraph (c)(1) or (c)(2) of this section.

Conforming Amendment – Proposed by IACC – Clean:

§ 133.52 Disposition of forfeited merchandise.

(a) Trademark (other than counterfeit) or trade name violations. Articles forfeited for violation of the trademark laws, other than articles bearing a counterfeit trademark or articles suspected of bearing a counterfeit mark that have been abandoned pursuant to §127.12(b) of this chapter, shall be disposed of in accordance with the procedures applicable to forfeitures for violation of the Customs laws, after the removal or obliteration of the name, mark, or trademark by reason of which the articles were seized.

(b) Copyright violations. Articles forfeited for violation of the copyright laws shall be destroyed.

(c) Articles bearing a counterfeit trademark. Merchandise forfeited for violation of the trademark laws or which has been abandoned pursuant to §127.12(b) and suspected of bearing a counterfeit mark shall be destroyed, unless it is determined that the merchandise is not unsafe or a hazard to health and the Commissioner of Customs or his designee has the written consent of the U.S. trademark owner, in which case the Commissioner of Customs or his designee may dispose of the merchandise, after obliteration of the trademark, where feasible, by:

- (1) Delivery to any Federal, State, or local government agency that, in the opinion of the Commissioner or his designee, has established a need for the merchandise; or
- (2) Gift to any charitable institution that, in the opinion of the Commissioner or his designee, has established a need for the merchandise; or
- (3) Sale at public auction, if more than 90 days has passed since the forfeiture and Customs has determined that no need for the merchandise has been established under paragraph (c)(1) or (c)(2) of this section.