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Eric Longnecker,
Deputy Assistant Secretary for Technology Security.
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DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR Parts 113, 133, 148, 151, and 177
[CBP Dec. 24–03; USCBP–2019–0037]
RIN 1515–AE26

Enforcement of Copyrights and the Digital Millennium Copyright Act

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adopts as final, with some changes, proposed amendments to the U.S. Customs and Border Protection (CBP) regulations pertaining to importations of merchandise that violate or are suspected of violating the copyright laws, including the Digital Millennium Copyright Act (DMCA), in accordance with title III of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The amendments set forth in this document clarify the definition of “piratical articles,” simplify the detention process involving goods suspected of violating the copyright laws, and prescribe new regulations enforcing the DMCA.

DATES: This final rule is effective on August 23, 2024.

FOR FURTHER INFORMATION CONTACT: Alaina van Horn, Chief, Intellectual Property Enforcement Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border

Protection, (202) 325–0083, Alaina.VanHorn@cbp.dhs.gov.

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I. Background

A. Digital Millennium Copyright Act and the Trade Facilitation and Trade Enforcement Act of 2015

Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114–125; 130 Stat. 122; Section 628A of the Tariff Act of 1930 (19 U.S.C. 1628a), as amended) (TFTEA), made several significant changes to the U.S. Customs and Border Protection (CBP) procedures related to the importation of merchandise that violates or is suspected of violating intellectual property rights (IPR). Among the changes made by TFTEA are certain provisions regarding enforcement of the Digital Millennium Copyright Act (Pub. L. 105–304, 112 Stat. 2860, as amended by Pub. L. 106–113, 113 Stat. 1536, (codified at 17 U.S.C. 1201)) (DMCA). The DMCA prohibits the importation of devices used to circumvent the technological measures employed by certain copyright owners to protect their works (“copyright protection measures”).

Section 303(a) of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding subparagraph (G) (19 U.S.C. 1595a(c)(2)(G)), which provides that CBP may seize merchandise containing a circumvention device violating the DMCA. Section 303(b) of TFTEA states that, when merchandise containing a circumvention device is seized pursuant to 19 U.S.C. 1595a(c)(2)(G), CBP must disclose to persons injured by that circumvention device information regarding the seized merchandise that is equivalent to the information disclosed to copyright owners when merchandise is seized for violation of the copyright laws.

Section 302 of TFTEA amended the Tariff Act of 1930 by inserting a new section 628A (19 U.S.C. 1628a) authorizing CBP to make certain pre-seizure information disclosures to owners of properly recorded trademarks or copyrights that may comprise information otherwise protected by the Trade Secrets Act (18 U.S.C. 1905). CBP is authorized to disclose information when CBP determines that these disclosures would assist CBP in determining whether the imported merchandise suspected of violating the

IPR laws actually violates 17 U.S.C. 602 (copyright), 17 U.S.C. 1201 (circumvention devices), or 19 U.S.C. 1526 (trademark), as long as the disclosures would not compromise an ongoing law enforcement investigation or national security. Specifically, section 302(a) of TFTEA (19 U.S.C. 1628a(a)) permits CBP to disclose to the right holder information that appears on the imported merchandise and its packaging and labels, including unredacted images of the merchandise and its packaging and labels. CBP also may, subject to any applicable bonding requirements, release unredacted samples of the merchandise to the right holder.

B. Notice of Proposed Rulemaking

On October 16, 2019, the Enforcement of Copyrights and the Digital Millennium Copyright Act notice of proposed rulemaking (NPRM) was published in the **Federal Register** (84 FR 55251). The NPRM proposed changes to 19 CFR part 133 necessary to implement the applicable provisions of title III of TFTEA, clarify the definition of “piratical articles,” provide for procedural safeguards to limit the release of information concerning non-violative shipments, simplify the detention process related to merchandise suspected of violating the copyright laws, and clarify the existing CBP procedures for post-seizure disclosures.

C. Changes From the Proposed Rule for Applying to CBP for DMCA Protections

Section 133.47 provides for post-seizure disclosures to persons injured by a circumvention device, as defined in § 133.47(a)(4), who have successfully applied for and been approved by CBP for DMCA protections as provided in § 133.47(b)(2)(iii). Section 133.47(b)(2)(iii) announces the establishment of a list of persons approved by CBP to receive such post-seizure disclosures. In response to the public comments received, as discussed in more detail below, this final rule expands the ways that an eligible person, as defined in § 133.47(a)(3), may apply to CBP for these DMCA protections. Eligible persons may apply for such DMCA protections when this final rule becomes effective by attaching a letter requesting such disclosures to an application to record or renew a copyright. Owners of existing recorded copyrights may apply for these DMCA protections by submitting a letter requesting such disclosures to the Intellectual Property Enforcement Branch of Regulations and Rulings at HQIPRBranch@cbp.dhs.gov. Pursuant to

section 303(b)(2) of TFTEA, CBP will publish a notice, signed by the Executive Director, Regulations and Rulings, in the **Federal Register** when the list is established. CBP will also publish the necessary revisions to the list in a notice signed by the Executive Director, Regulations and Rulings, in the **Federal Register** on, at minimum, an annual basis, every September.

II. Discussion of Comments

CBP received six public submissions in response to the NPRM. One submission was unresponsive and contained no specifics about the NPRM, copyrights, or IPR. The remaining five submissions supported the proposed rule’s intent but sought clarifications, raised concerns, and/or made recommendations for improvements. The five submissions each contained multiple comments. The comments have been grouped together below based on the general topic.

A. Bond Requirements for Right Holders To Obtain Samples From CBP

Prior to CBP’s releasing a sample of imported merchandise pursuant to § 133.21, § 133.25, § 133.42, or § 133.47, for suspected infringement of a recorded mark or recorded copyright or suspected circumvention of a copyright protection measure, proposed 19 CFR 113.70 required the owner of the recorded mark or the recorded copyright to furnish a single transaction bond to CBP. The bond was required in the amount specified by CBP and was required to contain the bond conditions set forth in proposed § 113.70, including an agreement to only use the sample for the limited purpose of assisting CBP in enforcing IPR and an agreement to indemnify the importer or owner for any improper use of the sample.

1. Type of Bond

Comment: Two commenters requested that CBP also permit the right holder to furnish a continuous bond. The commenters stated that continuous bonds are more efficient in terms of simplified tracking and administration, more economical, ease the burden of underwriting, reduce the administrative burden on CBP, and further CBP’s overall strategy to facilitate trade. One of the commenters further noted that CBP has in the past allowed continuous bonds when samples of merchandise were sought for examination or testing.

Response: CBP agrees with the commenters and recognizes that some owners of a recorded mark or recorded copyright may prefer a continuous bond for reasons of efficiency, economy, or underwriting. Thus, CBP is amending

the language in proposed § 113.70 to permit the owner of the recorded mark or the recorded copyright to furnish to CBP either a single transaction bond or a continuous bond, in the amount specified by CBP and containing the conditions listed, when obtaining a sample of the merchandise.

2. Bond Conditions

Comment: One commenter requested that CBP amend § 113.70 to remove references to post-seizure disclosures or procedures. The commenter noted that the use of the term “suspected” in the heading and text of proposed 19 CFR 113.70, which specifically states that the bond conditions apply when a right holder obtains a sample of imported merchandise “suspected of infringing recorded marks or recorded copyrights, or circumventing copyright protection measures,” demonstrates that the bond conditions in § 113.70 are only intended to apply in a pre-seizure context. Since proposed § 113.70 contains general citations to §§ 133.21, 133.42, and 133.47, the commenter noted that the bond requirement and conditions apply in a both pre-seizure and post-seizure context because §§ 133.21(f), 133.42(f), and 133.47(f) address post-seizure disclosures and procedures. The commenter further asserted that TFTEA does not provide statutory authority for imposing the § 113.70 bond conditions, including an agreement to use the sample for the limited purpose of assisting CBP, in a post-seizure context because TFTEA only addresses CBP’s authority to provide samples to right holders when doing so would assist CBP in determining whether the merchandise is being imported in violation of the IPR laws. The commenter pointed out that imported merchandise is only seized after this determination has been made and that this post-seizure context is not addressed in title III of TFTEA.

Response: The proposed amendments to 19 CFR 113.70 were intended to consolidate the IPR sample bond language and conditions, currently contained throughout 19 CFR part 133, in one centralized location. As set forth in existing 19 CFR 133.21(f) and 133.42(e), CBP already requires an IPR sample bond in the post-seizure context, conditioned on indemnifying the importer or owner of the imported merchandise against any loss or damage resulting from the furnishing of the sample by CBP to the right holder. CBP endeavored to incorporate these existing post-seizure bond requirements and conditions in proposed § 113.70. However, CBP agrees with the commenter that, as drafted, the bond

conditions proposed in § 113.70 conflate pre-seizure and post-seizure contexts. To avoid confusion and to clarify the bond conditions in a post-seizure context, CBP is amending proposed § 113.70 to revise its heading and to add a new paragraph (b) setting forth the bond requirements and conditions for when CBP provides the owner of a recorded mark or recorded copyright a sample of imported merchandise seized for infringing the recorded mark or copyright, or circumventing a copyright protection measure, including samples provided pursuant to § 133.21(f), § 133.42(f), or § 133.47(f). For additional clarity, CBP is also specifying in any cross-references made to § 113.70 throughout part 133 whether § 113.70(a), containing the bond conditions for merchandise suspected of IPR violations, or § 113.70(b), containing the bond conditions for merchandise seized for IPR violations, is applicable.

Comment: Two commenters expressed concern that proposed § 113.70 does not describe the types of actions that would violate the bond conditions, including what activities are permissible in service of “providing assistance to CBP in enforcing intellectual property rights,” and what actions may be deemed an “improper use” of the sample.

Response: CBP does not believe it is necessary to amend or expand on the bond conditions language in § 113.70(a). The specificity of the bond conditions in § 113.70(a) is consistent with the specificity of the conditions for other types of CBP bonds set forth throughout title 19 of the CFR. Furthermore, section 302(a) of TFTEA states, in part, that CBP may provide the right holder with a sample of the merchandise suspected of violating the IPR laws if CBP determines that the “examination or testing” of the merchandise by the right holder would assist CBP in determining if the merchandise is being imported in violation of the IPR laws. In the pre-seizure context, any activity performed by the owner of the recorded mark or recorded copyright that falls outside the scope of determining the authenticity of the sample would constitute an improper use of the sample and would violate the § 113.70(a) bond conditions.

Comment: One commenter stated that the bond conditions in proposed § 113.70, which limit the sample’s use, could be construed as prohibiting a right holder from providing relevant information gleaned from its examination to law enforcement agencies other than CBP, or from pursuing civil enforcement of the right holder’s legitimate rights authorized elsewhere under Federal or State law.

The commenter sought clarification on this issue. This commenter also objected to CBP’s not including in proposed §§ 133.21(f), 133.42(f), and 133.47(f), language specifying that another use that the sample may be utilized for is “in pursuit of a related private civil remedy for infringement,” particularly given that this specific language is included in existing §§ 133.21(f) and 133.42(e).

Response: The bond conditions that limit the sample’s use, as set forth in proposed § 113.70, only apply in a pre-seizure context. Pursuant to CBP’s statutory authority in section 302 of TFTEA, for merchandise suspected of being imported in violation of the IPR laws, the sample may only be used by the right holder for the limited purpose of providing assistance to CBP in enforcing IPR. Thus, as explained above, in the pre-seizure context, any activity performed or disclosure made by the right holder that falls outside the scope of determining the authenticity of the sample would constitute an improper use of the sample and violate the § 113.70(a) bond conditions. This restriction is necessary since, at the time that CBP is furnishing the sample to the right holder, the imported merchandise is only suspected of IPR infringement or circumvention and therefore, it would be inappropriate for the right holder to provide information gleaned from its examination of the sample to law enforcement agencies other than CBP, or from pursuing civil enforcement under Federal or State law.

However, a right holder may use a sample obtained after the merchandise is seized for violations of the IPR laws for purposes other than assisting CBP. To provide clarification on this issue, CBP is adding a new paragraph (b) to § 113.70 to provide less restrictive bond conditions in the post-seizure context, including those related to other uses such as a civil remedy for infringement. CBP is also amending the post-seizure disclosure provisions in §§ 133.21(f), 133.42(f), and 133.47(f), as requested by the commenter, to explicitly state that samples released by CBP post-seizure may be used in pursuit of a related private civil remedy for infringement.

3. Amount of the Bond

Comment: Two commenters asserted that there is a lack of clarity regarding the amount of the bond because the proposed language in § 113.70 and part 133 states that the bond will be in the “amount specified by CBP.” One of the commenters stated that this broad language appears to allow bond valuations based on highly speculative claims of loss or damage, which the

commenter believes would discourage right holders from requesting samples. This commenter recommended that the bond be formulated only on provable harm that may arise from the importer's loss of the physical sample and that, for any indirect injury because of misuse of the sample, the importer should seek recourse in the courts, not with CBP. The other commenter sought clarity on the amount of the bond and whether the bond amounts would remain at the current levels, which the commenter stated are set at the value of the sample (typically \$100), to secure the importer from any damage to the sample while in possession of the right holder, or if the bond amounts would dramatically increase due to the bond's now securing against any loss or damage resulting from improper use of the sample. This commenter also requested information on the range of criteria appropriate for setting bond amounts.

Response: CBP disagrees that there is a lack of clarity regarding the amount of the bond. CBP will specify the amount of the bond based on the same standard CBP bond requirements and parameters that CBP uses to determine the amount of its other bonds, as set forth in § 113.13. Section 113.13 governs the amount of any CBP bond, unless expressly exempt by law or other regulation, including setting the minimum amount of the bond, providing guidelines for determining the amount of the bond, requiring periodic review of the bond sufficiency, and providing CBP authority to require additional security if CBP determines the bond is not sufficient. In accordance with § 113.13(a), while the minimum amount of an IPR sample bond is \$100, as noted by the commenter, the bond amount assessment is based on the domestic value of the sample, or \$100, whichever is greater. This determination has been the long-standing policy of CBP when setting bond amounts in the post-seizure context. Regarding the criteria for setting pre-seizure bond amounts, CBP takes the particular circumstances of each situation into account when making its determination using the guidelines set forth in § 113.13(b). Numerous factors, including but not limited to, the nature of the merchandise at issue, the value of the merchandise, including the size of the shipment, and CBP's prior dealings with the principal will inform CBP's decision in setting the bond amount. It is essential to CBP's operations that CBP be able to retain flexibility in establishing the appropriate bond amount.

4. Bond Return Requirements

Comment: One commenter requested that CBP revise proposed § 113.70 to clarify that the bond will be returned when the imported merchandise at issue is determined to violate the right holder's IPR. This commenter stated that while the existing § 113.70 makes clear that the right holder's bond will be returned where the goods at issue are ultimately determined to violate the right holder's IPR, the proposed § 113.70 does not contain similar language. The commenter stated that, as drafted, the proposed regulations could lead to the forfeiture of the bond even when CBP determines that the goods were counterfeit or piratical.

Response: CBP disagrees with this commenter's suggestion. The commenter's bond description and stated concerns are addressing a bond required to pursue a disputed determination of copyright infringement that is in the existing regulations in §§ 113.70, 133.43, and 133.44, not the IPR sample bond that is contained in proposed § 113.70. The existing regulations require the right holder to furnish a bond under § 133.43(d)(1) to pursue a copyright infringement determination. Existing § 113.70 is currently a bond to indemnify the United States if CBP detains any articles alleged by the principal to be a piratical copy of material covered by the principal's copyright pending a final determination and to hold the United States harmless from any material depreciation, loss, or damage to the articles if it is determined that the goods are not piratical. Section 133.44(a) states that this bond will be returned to the right holder if the articles at issue are ultimately determined to violate the right holder's IPR. However, as explained in the NPRM, CBP believes that these procedures, including the bond, are an outdated and inefficient mechanism to address situations where CBP has a suspicion that certain goods may be piratical, therefore, CBP is removing §§ 133.43 and 133.44 in their entirety from title 19 of the CFR. Additionally, as noted in the NPRM, because CBP is removing §§ 133.43 and 133.44, CBP is revising the related provision in § 113.70, which currently sets forth the bond conditions for detention of copyrighted material. CBP is revising § 113.70, as proposed in the NPRM and finalized in this rule, to set forth, in one centralized location, the bond conditions for a right holder to obtain samples of imported merchandise suspected of infringing the right holder's IPR.

If the conditions of the IPR sample bond, as provided for in revised § 113.70(a)(1), are violated, CBP may make a demand on the bond, even if CBP ultimately determines that the imported merchandise violates the right holder's IPR. To clarify the IPR sample bond conditions, particularly with regard to the timing of the sample return requirements and to ensure that a bond is not incorrectly forfeited, CBP is amending the language proposed in § 113.70. As discussed above, proposed § 113.70 is being revised to address the pre-seizure context in paragraph (a) and the post-seizure context in paragraph (b). In the pre-seizure context, CBP is revising the language proposed to state that the sample must be returned upon demand by CBP or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the post-seizure context, CBP is adding language to state that the sample must be returned upon demand by CBP or at the conclusion of any examination, testing, or other use, whichever occurs sooner.

If the sample, in either a pre-seizure or post-seizure context, is not returned to CBP by the right holder, the IPR sample bond is forfeited regardless of whether the merchandise is determined to violate IPR.

B. Definitions

1. Piratical Articles

Comment: One commenter stated that the proposed language added to the definition of "piratical article" in § 133.42(a), which states that the copy or phonorecord must be "of a recorded copyright work, importation of which is prohibited by the Copyright Act of 1976," is too narrowly tailored. The commenter asserted that CBP enforces copyrights at the border so long as the work is registered with the U.S. Copyright Office and that the proposed definition seems to exclude works not recorded with CBP.

Response: CBP disagrees that "piratical articles" is too narrowly defined. Section 302 of TFTEA (19 U.S.C. 1628a(c)) explicitly limits its authority to apply only to merchandise suspected of infringing a trademark or copyright that is recorded with CBP. Accordingly, works not recorded with CBP are excluded from the procedures set forth in § 133.42.

2. Copyright Protection Measure

Comment: Two commenters requested that CBP revise the definition of "copyright protection measure" in proposed § 133.47(a)(1) to include copy controls. Copy controls, as set forth in

17 U.S.C. 1201(b)(1), prohibit the importation of technologies, products, or services that circumvent a technological protection measure that effectively protects the exclusive rights of a copyright owner. The commenters asserted that the proposed definition, as drafted, only applies to the seizure and forfeiture of imported merchandise that circumvents access controls, as set forth in 17 U.S.C. 1201(a)(2), prohibiting the importation of technologies, products, or services that circumvent a technological protection measure that effectively controls access to a copyrighted work. They stated that to ensure that CBP fully implements TFTEA and to ensure effective border enforcement against all unlawfully imported circumvention devices, the definition of “copyright protection measure” in § 133.47(a)(1) must also include copy controls. The commenters noted that Congress enacted section 303 of TFTEA to explicitly authorize CBP to seize and forfeit merchandise that is prohibited under both 17 U.S.C. 1201(a)(2) and 1201(b)(1). Both commenters provided language that they requested CBP use to amend the definition of “copyright protection measure.”

Response: CBP agrees that the definition of “copyright protection measure” in § 133.47(a)(1) should include copy controls. Section 303(a) of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding a new subparagraph (G), which states that the merchandise may be seized and forfeited if CBP determines it is a technology, product, service, device, component, or part whose importation is prohibited under 17 U.S.C. 1201(a)(2) or (b)(1). Since copy controls are set forth in 17 U.S.C. 1201(b)(1), CBP is amending the definition of “copyright protection measure” to include copy controls. While the language the two commenters suggested differs in form, it is substantially similar, therefore, CBP is adopting the more concise language suggested and is adding “or effectively protects a right of a copyright owner in,” to the definition of “copyright protection measure” in § 133.47(a)(1).

C. Pre-Seizure Disclosures to Right Holders

1. Limited Importation Information Disclosures

From the time merchandise is presented for examination, CBP may disclose to the right holder certain limited importation information, as listed in proposed §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4), to obtain

assistance in determining whether the merchandise is being imported in violation of the IPR laws.

Comment: One commenter noted that the proposed amendments to §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) shifted CBP’s disclosure of limited importation information to the right holder from a mandatory disclosure (“CBP will release the information”) to a permissive disclosure (“CBP may release the information”). The commenter requested that CBP revert to a mandatory disclosure using the language “CBP will release the information,” as required in the existing CBP regulations at 19 CFR 133.21(b)(4).

Response: CBP disagrees with the commenter’s suggestion. CBP believes that the limited information disclosures provided for in §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) should remain, as proposed, permissive. Based on CBP’s experience and right holders’ feedback, the disclosure of limited importation information at this stage of the determination process does not provide a significant benefit. The limited importation information that CBP may disclose only includes the date of importation, the port of entry, description and quantity of the imported merchandise, and the country of origin. While this data may have been beneficial in the past when supply chains were less complex, the current reality of multi-faceted and global supply chains limits the value of this limited importation information. In today’s trade environment, supply chains often involve multiple countries of origin, possible transshipment, as well as used, refurbished, or gray market merchandise. The comprehensive importation information disclosure provided to the right holder post-seizure in §§ 133.21(e), 133.42(e), and 133.47(e) is of significantly greater value and benefit. As such, CBP has determined that it is a better use of CBP resources, and of greater value to right holders, to provide more information later in the process, when appropriate, as opposed to less information sooner in the process, when it may not be as useful to the right holder and when the information disclosure requires significant expenditure of CBP resources.

Comment: A commenter stated that, as drafted, proposed § 133.21(b)(4) is silent regarding CBP’s ability to disclose the limited importation information in a scenario where the information was not disclosed prior to the issuance of the notice of detention and the information is available at the time the notice of detention is issued. In the existing CBP regulations, § 133.21(b)(4) describes this

scenario and states that where CBP does not disclose this information to the right holder prior to issuance of the notice of detention, CBP will do so concurrently with the issuance of the notice of detention. However, the commenter pointed out that proposed § 133.21(b)(4) only describes a scenario where the information is unavailable at the time the notice of detention is issued.

Response: CBP agrees that proposed § 133.21(b)(4), as well as proposed §§ 133.42(b)(4), and 133.47(b)(4), do not contain all the scenarios under which CBP may choose to disclose the limited importation information to the right holder. Please note that while §§ 133.21(b)(2)(i)(A), 133.42(b)(2)(i)(A), and 133.47(b)(2)(i)(A) address the scenario where CBP may have previously disclosed the information prior to the issuance of the notice of detention or where CBP may disclose the information no later than the date of issuance of the notice of detention, these regulatory sections’ intended purpose is to provide notice to the importer of the possible disclosure of its information and not to provide CBP authority to disclose this information to the right holders. Accordingly, CBP is amending the language proposed in §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) to address all the circumstances where CBP may permissively disclose the limited importation information, including that CBP may release such information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention.

CBP also notes that there is an inadvertent inconsistency between the third sentence in proposed § 133.21(b)(4) and the third sentence in proposed §§ 133.42(b)(4) and 133.47(b)(4). Specifically, CBP inadvertently did not propose to amend the third sentence of § 133.21(b)(4) in the NPRM, thereby leaving the regulatory language unchanged, which provides for a mandatory disclosure. To correct this error, CBP is amending the third sentence of § 133.21(b)(4) to state that CBP may permissively disclose the listed information. This amendment will correct the inadvertent error, align the third sentence of this paragraph with the permissive information disclosure proposed in the NPRM for the remainder of proposed § 133.21(b)(4), and ensure that the same permissive information disclosure is used for disclosures to owners of a recorded mark (§ 133.21), owners of a

recorded copyright (§ 133.42), and owners of a recorded copyright, who employ a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA (eligible persons in § 133.47).

Comment: A commenter also pointed out that there is a conflict between proposed § 133.21(b)(4), which contains a permissive information disclosure, and existing § 133.21(b)(2)(i)(A), which CBP did not propose to amend in the NPRM and contains a mandatory information disclosure.

Response: CBP agrees with the commenter. The commenter has correctly pointed out an inconsistency between proposed § 133.21(b)(4) and existing § 133.21(b)(2)(i)(A). Without a regulatory amendment, § 133.21(b)(2)(i)(A) would require CBP to provide notice to the importer that CBP has, or will, perform a mandatory information disclosure to the right holder of the same limited importation information that CBP has the authority to choose to disclose or to not disclose as needed, per proposed § 133.21(b)(4). This inconsistency was inadvertent and also created an inconsistency between existing § 133.21(b)(2)(i)(A) and the proposed §§ 133.42(b)(2)(i)(A) and 133.47(b)(2)(i)(A), which were intended to be parallel provisions to ensure the same treatment. Accordingly, CBP is amending § 133.21(b)(2)(i)(A) to reflect the language used in §§ 133.42(b)(2)(i)(A) and 133.47(b)(2)(i)(A) and changing § 133.21(b)(2)(i)(A) from an unintended mandatory disclosure to an intended permissive disclosure. This amendment makes the CBP regulations consistent across contexts and provides clarity on the issue raised by the commenter.

Comment: A commenter requested that CBP amend § 133.42(b)(4) to add additional disclosures to the limited importation information that CBP may disclose to the owner of the recorded copyright to obtain assistance in determining whether an imported article is a piratical article. The commenter suggested that CBP also provide the owner of the recorded copyright with the origin of the shipment, including the sender and the owner of the merchandise, and the destination of the shipment, in order to assist the owner in identifying entities engaged in counterfeiting and trace the origin of the infringing goods.

Response: CBP disagrees with the commenter's suggestion. CBP may disclose limited importation information when CBP believes that the right holder may assist CBP in

determining whether the article is a piratical article. When CBP seeks authentication assistance from the right holder under § 133.42(b)(4), CBP is seeking information about the article itself, namely, whether the physical characteristics of the article indicate authenticity or inauthenticity. Given the complexity of supply chains and the legitimate trade of gray market and used goods, CBP notes that information concerning the sender and the recipient of the shipment should not form the basis of an authenticity determination by the right holder. Also, as explained above, in today's current global supply chain environment, this importation information is of limited value to the right holder. Additionally, the information that the commenter requested is disclosed to the owner of the recorded copyright post-seizure pursuant to § 133.42(e).

2. Unredacted Disclosures

Comment: One commenter stated that the language "if CBP concludes that the disclosure would assist CBP in its determination" in proposed §§ 133.21(b)(2)(ii) and (b)(3), 133.42(b)(2)(ii) and (b)(3), and 133.47(b)(2)(ii) and (b)(3) is ambiguous and recommended that CBP amend the regulatory language to create a presumption that the disclosure would assist CBP in its IPR enforcement mission. The commenter stated that after CBP provides notice of detention to the importer of CBP's suspicion that the goods are counterfeit or piratical, there are only two possible scenarios: the importer either fails to respond entirely or the importer provides additional information to CBP that might be considered when CBP makes its determination. The commenter asserted that, under both possible scenarios, the right holder's examination of the merchandise would greatly assist CBP in its determination and that a presumption that the information disclosure would assist CBP in its determination is warranted.

Response: CBP disagrees. CBP does not have the statutory authority for such a presumption, which would require CBP to abdicate its role in making a determination as to the information disclosure's utility, in direct conflict with title III of TFTEA. Section 302(a) of TFTEA explicitly restricts CBP's ability to provide unredacted information disclosures and samples to situations in which CBP determines that the examination or testing of the merchandise by the right holder would assist CBP in determining whether the imported merchandise is in violation of the IPR laws. The language in

§§ 133.21(b)(2)(ii) and (b)(3), 133.42(b)(2)(ii) and (b)(3), and 133.47(b)(2)(ii) and (b)(3) mirrors this statutory language.

3. Conditions of Unredacted Disclosures

Pursuant to existing § 133.21(c)(1), proposed § 133.42(c)(1), and proposed § 133.47(c)(1), when CBP discloses information prior to seizure, CBP will notify the right holder that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information for the purpose of assisting CBP in determining whether the merchandise bears a counterfeit mark for purposes of existing § 133.21(c)(1), in determining whether the merchandise is a piratical article for purposes of proposed § 133.42(c)(1), or in determining whether the merchandise violates the DMCA for purposes of proposed § 133.47(c)(1).

Comment: One commenter requested that CBP remove the references to the Trade Secrets Act in existing § 133.21(c)(1), proposed § 133.42(c)(1), and proposed § 133.47(c)(1), which set forth the conditions of disclosure for unredacted information and samples. The commenter provided two reasons for the requested removal of references to the Trade Secrets Act. Firstly, the commenter noted that the Trade Secrets Act only prohibits the unauthorized disclosure of information and the inclusion of the reference to the Trade Secrets Act is unnecessary because TFTEA specifically authorizes the disclosure of this information. Secondly, the commenter stated that the inclusion of the Trade Secrets Act reference could be construed as implying a threat of legal liability if the right holder uses the information disclosed for any purpose other than assisting CBP in the stated purpose, and the commenter asserted that the Trade Secrets Act does not restrict the subsequent use of the disclosed information by a third party.

Response: CBP disagrees and does not believe that the references to the Trade Secrets Act should be removed from §§ 133.21(c)(1), 133.42(c)(1), and 133.47(c)(1). Title III of TFTEA only authorizes disclosures in a pre-seizure context for a specific purpose, which is assisting CBP in making the relevant determination of whether the imported merchandise violates the IPR laws. Using the disclosed information in the pre-seizure context beyond the scope of what is authorized by TFTEA is impermissible and the references to the Trade Secrets Act in these sections provide notice to the right holder of the limited permissible use.

D. Notice of Detention and Importer Response Process

Pursuant to existing and proposed §§ 133.21(b), 133.42(b), and 133.47(b), CBP must notify the importer via a notice of detention that the importer's merchandise was detained and that the importer has seven business days from the notification to establish that the merchandise does not violate the IPR laws. Prior to and during those seven business days, CBP may only provide the limited importation information set forth in §§ 133.21(b)(4), 133.42(b)(4), and 133.47(b)(4) or the redacted photographs, images, or samples described in §§ 133.21(b)(5), 133.42(b)(5), and 133.47(b)(5) to the right holder. In accordance with §§ 133.21(b)(2)(ii), 133.42(b)(2)(ii), and 133.47(b)(2)(ii), CBP may disclose to the right holder information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, if the importer fails to respond within those seven business days or provides insufficient information to demonstrate that the merchandise does not violate the IPR laws.

Comment: One commenter recommended that CBP reassess the current bifurcated disclosure process in 19 CFR part 133. The commenter requested that CBP remove the seven-business-day response period process throughout 19 CFR part 133 because the commenter believes that this process has been overturned by the passage of title III of TFTEA and other actions taken by the government and that this process serves to impede efficient enforcement while failing to advance any legitimate interests of importers.

Response: CBP disagrees with the commenter. CBP has not observed any impediment to its enforcement efforts. The process of providing the importer with a notice of detention and a seven-business-day response period safeguards the importer's information from unnecessary disclosures. The Trade Secrets Act protects those required to furnish commercial or financial information to the government by shielding them from the competitive disadvantage that could result from disclosure of that information by the government, including importers whose merchandise is suspected of violating the IPR laws. These importers must be afforded due process to dispute this suspicion and provide information within the seven-business-day response period to prove that their detained merchandise is not violative before CBP discloses unredacted information and samples to the right holder. The Trade

Secrets Act permits those covered by the Act to disclose protected information when the disclosure is otherwise "authorized by law" which includes both statutes expressly authorizing disclosure and properly promulgated regulations authorizing disclosure based on a valid statutory interpretation. See *Chrysler v. Brown*, 441 U.S. 281, 294–316 (1979). Section 302 of TFTEA expressly authorizes disclosure of unredacted images and samples of the merchandise in a pre-seizure context only when such a disclosure would assist CBP in making a determination of the authenticity of the merchandise. To make such a determination, CBP requires the seven-business-day response period to appropriately assess the information available to CBP and decide whether an unredacted disclosure to the right holder would assist CBP in its authenticity determination.

E. Post-Seizure Disclosures to Persons Injured by Violations of the DMCA

Comment: Two commenters noted that proposed § 133.47(b)(2)(iii) states that eligible persons may apply to receive post-seizure disclosures from CBP when injured by violations of the DMCA by attaching a letter requesting such disclosures to an application to record a copyright. The commenters expressed concern that, as drafted, the proposed regulatory language appears to apply only prospectively. They stated that this raises concerns about the status of copyright registrations previously recorded with CBP and questioned whether CBP intended for copyrights to be recorded again in order for the right holder to qualify as an eligible person (and therefore, an injured person) for purposes of post-seizure disclosures. One commenter requested that CBP add language to § 133.47(b)(2)(iii) allowing owners of previously recorded copyrights to similarly apply for protection by submitting a letter requesting such disclosures and also requested that CBP permit a letter to be submitted during a request for renewal of an existing recordation.

Response: CBP agrees that § 133.47(b)(2)(iii) should not be restricted to those right holders recording new copyrights and that owners of current copyright recordations should not be required to re-record their works in order to receive such post-seizure disclosures and be placed on the injured persons list. CBP is amending the language proposed in § 133.47(b)(2)(iii) to allow owners of currently recorded copyrights to apply for protection by submitting a letter to CBP requesting post-seizure disclosures

at any time, as long as there is a current relevant recordation with CBP. The application process is described further in section I.C. of the Background discussion above. CBP is also amending § 133.47(b)(2)(iii) by allowing owners of recorded copyrights to apply for DMCA protections by attaching the letter to a request to renew the copyright recordation. CBP reiterates that to qualify as an eligible person, as defined in § 133.47(a)(3), who may apply to CBP to receive DMCA protections, as set forth in § 133.47(b)(2)(iii), that person must have a recorded copyright with CBP upon which the person can claim a harm that the injured status might redress.

III. Technical Corrections

In addition to the modifications explained above, CBP is amending §§ 133.21(c)(2), 133.42(c)(2), and 133.47(c)(2) to remove the corresponding cross-references to paragraph (b)(2)(ii). Paragraph (b)(2)(ii) provides the importer notice that its information may be disclosed to the right holder if the importer fails to respond to the notice of detention in paragraph (b)(2)(i) within the seven-business-day response period or if the importer provides an insufficient response to the notice. Thus, it is inaccurate to cite to paragraph (b)(2)(ii) in paragraph (c)(2) as authority for CBP's releasing the unredacted sample. CBP is releasing the unredacted sample pursuant to the regulatory authority in paragraph (b)(3) only. Accordingly, CBP is removing the citation to paragraph (b)(2)(ii) in paragraph (c)(2) and is only citing to the appropriate cross-reference of paragraph (b)(3).

Additionally, CBP is adding the language "if practicable" after "entry after obliteration of the recorded copyright" in § 133.42(g) to clarify that a recorded copyright may only be obliterated in some circumstances. It may not be possible for the importer to obliterate or remove a recorded copyright from the seized merchandise in all circumstances, for example, when the article itself consists of a piratical copy. In § 133.47(g), CBP is removing "entry after obliteration of the recorded copyright" as an option entirely since obliterating the recorded copyright is not an appropriate disposition for articles that violate the DMCA because the article itself consists of the article that violates the DMCA.

In this document, CBP is also correcting the authority section for part 113, adding additional cross-references for clarification purposes, and correcting several cross-references in § 133.47 that inadvertently cited to the

definition for “copyright protection measure” (§ 133.47(a)(1)) instead of the definition of “articles that violate the DMCA” (§ 133.47(a)(2)) when referencing articles that are suspected of violating the DMCA.

IV. Conclusion

After careful consideration of the public comments received, for the reasons stated above, as well as the reasons outlined in the NPRM, CBP is adopting as final the NPRM published in the **Federal Register** on October 16, 2019 (84 FR 55251), with the changes described above.

V. Statutory and Regulatory Requirements

A. Executive Orders 12866 and 13563

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule is a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this regulation.

One of CBP’s roles is to safeguard the U.S. economy from the importation of goods that violate intellectual property rights. Under existing regulations, if CBP suspects that a shipment may be violative, it can share redacted information and samples of the suspect imported merchandise with a right holder.¹ To implement title III of TFTEA’s IPR provisions, this final rule will, among other things, allow CBP to disclose unredacted information and share unredacted images and samples of suspect imports with right holders, if examination by right holders would assist CBP’s determination and provided that these disclosures would not compromise an ongoing law enforcement investigation or national security.

Disclosing this unredacted information and sharing these unredacted samples and images with right holders may provide access to information about the importer

¹ Note that this rule does not alter CBP’s ability to provide redacted samples of an import to a right holder without prior notification to the importer.

protected by the Trade Secrets Act (18 U.S.C. 1905). This final rule establishes a procedure under which, following notice to the importer, the importer has seven business days to establish to CBP that the suspect imports are not violative of the IPR laws, and are instead admissible. If the importer is unable to demonstrate the admissibility of its imports within this timeframe, CBP will share information with the right holder by disclosing the information or releasing unredacted samples of the imports in question.

As CBP is establishing a new process for copyrights, it does not have data on the number of times CBP suspects shipments are violative of the copyright laws or piratical articles. However, on September 24, 2012, CBP published an interim final rule in the **Federal Register** (77 FR 24375) that established similar procedures for trademarks. For analytical purposes, CBP can assume that this final rule has similar effects after adjusting for the differing volumes. CBP subject matter experts estimate that CBP sends out an average of 824 detention letters every fiscal year for suspected trademark infringements. Based on the proportion of live trademark recordings² available to support the agency’s IPR seizures every fiscal year, relative to the copyright recordings, CBP estimates an average of approximately 21,423 seizures based on trademark, 8,881 based on copyright, and 116 DMCA seizures. If the number of detention letters is proportional to the number of seizures, CBP estimates that this final rule will result in 345 more detention letters for possible copyright-infringing importations. Similarly, by using the number of seizures related to DMCA as a proportion of total trademark seizures, CBP estimates that this final rule will result in four detention letters for possible DMCA-infringing importations.

CBP estimates that the procedure to demonstrate that the imports are not piratical will take two hours per affected importer at a cost of \$34.81 per hour.^{3 4}

² Source: CBP’s IPRiS database. Sampling methodology averaged five equally spaced dates in every fiscal year to estimate the IPRiS live recordings available for IPR seizures (95% CI, p = 0.05) annually. CBP took several sample counts per year as opposed to a single annual count to ensure a representative measure as IPRiS recordings enter and expire throughout the year.

³ Sources: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, “May 2021 National Occupational Employment and Wage Estimates United States.” Updated March 31, 2022. Available at https://www.bls.gov/oes/current/oes_nat.htm. Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation, “ECEC Civilian Workers—2004 to Present.” March 2022. Available at <https://www.bls.gov/web/ecec.supptoc.htm>. Accessed May

This is based on the existing information collection for the Notice of Detention (OMB Control Number 1651–0073), which is being updated for this rulemaking. CBP estimates that importers will bear an opportunity cost as a result of the higher number of detention notices caused by this rule. CBP estimates that this opportunity cost will total \$24,019 (345 * 2 * \$34.81) for copyright detentions and \$278 (4 * 2 * \$34.81) for DMCA detentions for a total monetized cost of \$24,297. CBP received no comments from the public regarding the estimated time cost to importers of two hours to respond.

This final rule will also formalize the existing practices used to enforce the DMCA. In 1998, Congress enacted the DMCA. The DMCA prohibits the importation of devices used to circumvent the copyright protection measures copyright owners use to protect their works. Although current regulations do not specifically provide for detention and seizure of articles that constitute violations of the DMCA, CBP has enforced the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce DMCA violations. CBP subject matter experts estimate that there are approximately 116 DMCA seizures. It is possible that this final rule will result in a small increase in DMCA seizures. TFTEA requires CBP to formalize the foregoing processes with respect to the DMCA. The formalization of these existing practices in regulations does not change current practice, so this provision will not have additional impacts if this rule is finalized.

In addition to the release of unredacted samples, this final rule will amend the detention procedures applicable to imported articles that are suspected of being a piratical copy or phonorecord of a copyrighted work. The current detention procedures in the

⁴ 2022. CBP assumes an annual growth rate of 4.15% based on the prior year’s change in the implicit price deflator, published by the Bureau of Economic Analysis.

⁵ Source of median wage rate: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, “May 2021 National Occupational Employment and Wage Estimates United States.” Updated March 31, 2022. Available at https://www.bls.gov/oes/current/oes_nat.htm. Accessed May 25, 2022; U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation, “ECEC Civilian Workers—2004 to Present.” March 2022. Available at <https://www.bls.gov/web/ecec.supptoc.htm>. Accessed May 25, 2022. Because median hourly wage information was not available for this respondent, CBP adjusted the annual median wage for this respondent to an hourly estimate using the standard 2,080 hours worked per year. CBP assumes an annual growth rate of 4.15% based on the prior year’s change in the implicit price deflator, published by the Bureau of Economic Analysis.

regulations allow up to 120 days for an importer or right holder of a suspect article to provide CBP with evidence, briefs, or other pertinent information to substantiate a claim or denial of infringement, prior to CBP's issuance of an admissibility determination. To expedite this process, this final rule will amend the regulations to require the agency to render an admissibility decision within 30 days from the date the articles are presented to CBP for examination. As the current detention procedures are seldom used, according to CBP subject matter experts, CBP does not believe this final rule will impose a significant effect on the public. During the public comment period, no comments were received regarding this statement.

B. The Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) (RFA), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996, requires agencies to assess the impact of regulations on small entities. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people). Section 604 of the RFA requires an agency to perform a regulatory flexibility analysis for a rule unless the agency certifies under section 605(b) that the regulatory action would not have a significant economic impact on a substantial number of small entities.

As described in the Executive Orders 12866 and 13563 analysis above, CBP estimates that this final rule will result in the issuance of 345 additional notices of detention. CBP's current examination policies, use of shared enforcement systems, and targeting criteria that take into account previous examinations when determining risk make it unlikely that an importer who receives a notice of detention with this rule will be required to repeatedly prove the admissibility of its imports.⁵ As such, CBP assumes for the purposes of this analysis that the number of affected importers from this final rule will be equal to the number of additional

detention notices resulting from this final rule—345—with each importer receiving only one detention notice. To the extent that an importer must prove the admissibility of its imports more than once as a result of this rule, the number of importers affected by this final rule would be lower and the cost of this final rule per affected importer would be higher. During the public comment period, no comments were received regarding this assumption.

These importers are not centered in any particular industry; any importer of goods covered by a recorded copyright may be affected by this rule if CBP has a reason to believe the importer's merchandise may constitute a piratical copy and CBP cannot determine if an import is a piratical copy or prohibited circumvention device without the use of the provisions of this rule. CBP has conducted a study of importers to determine how many are small entities and has concluded that the vast majority (about 91 percent) of importers are small entities.⁶ Therefore, CBP believes this final rule may affect a substantial number of small entities.

Although the final rule may affect a substantial number of small entities, CBP believes the economic impact would not be significant. As described in the Executive Orders 12866 and 13563 section of this document, CBP estimates that it takes an importer two hours to provide proof of the admissibility of an import to CBP. CBP estimates the average wage of an importer is \$34.81 per hour. Thus, CBP estimates it will cost a small entity \$69.62 to prove the admissibility of its import with this final rule. CBP does not believe \$69.62 constitutes a significant economic impact.

CBP recognizes that repeated inquiries into the admissibility of an importer's imports could eventually rise to the level of a significant economic impact. However, it is unlikely that importers will be repeatedly required to prove the admissibility of their imports, as previously mentioned. Additionally, CBP does not anticipate law-abiding importers to be subject to the provisions in this rule on a repeated basis. Once CBP has determined the admissibility of an importation, it will record that information in the system so it can be viewed by CBP import specialists on future importations and successful previous importations are a favorable factor in the importation's risk profile. Further, CBP notes that providing this information to CBP is optional on the part of the importer, although not

providing admissibility information to CBP may result in the goods being seized. Therefore, CBP believes there will not be a significant economic impact on small entities.

Accordingly, although this final rule may have an effect on a substantial number of small entities, as discussed above, CBP believes that an estimated cost of \$69.62 to an importer does not constitute a significant economic impact. Thus, CBP certifies this regulation would not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the collections of information for this document are included in an existing collection for Notices of Detention (OMB control number 1651–0073). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB. The burden hours related to the Notice of Detention for OMB control number 1651–0073 are as follows:

Number of Respondents: 1,695.

Number of Responses: 1.

Time per Response: 2 hours.

Total Annual Burden Hours: 3,390.

Because CBP estimates that the availability of the procedures in this final rule will increase the number of Notices of Detention issued for IPR violations, there is an increase in burden hours under this collection with this final rule.

Signing Authority

This rulemaking is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or that of his or her delegate) to approve regulations concerning copyright enforcement.

Troy A. Miller, Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign the document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division of CBP, for purposes of publication in the **Federal Register**.

List of Subjects

19 CFR Part 113

Bonds, Common carriers, Customs duties and inspection, Exports, Freight, Imports, Laboratories, Reporting and recordkeeping requirements, Surety bonds.

⁵ CBP reserves the right to detain any imported merchandise, even if an importer has previously shown that its merchandise is admissible. This will depend on the particulars of the importation. Previous importations are taken into account in the risk profile, so having proven the authenticity of an importation in the past makes it less likely that an importer will receive a Notice of Detention for subsequent importations.

⁶ See "CBP Analysis of Small Importers," April 2022. Available in the docket of this rulemaking.

19 CFR Part 133

Copyright, Reporting and recordkeeping requirements, Trade names, Trademarks.

19 CFR Part 148

Airmen, Copyright, Customs duties and inspection, Foreign officials, Government contracts, International organizations, Reporting and recordkeeping requirements, Seamen, Taxes, Trademarks.

19 CFR Part 151

Cigars and cigarettes, Cotton, Fruit juices, Laboratories, Metals, Oil imports, Reporting and recordkeeping requirements, Sugar, Wool.

19 CFR Part 177

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

Amendments to the CBP Regulations

For the reasons stated above, U.S. Customs and Border Protection and the Department of the Treasury amends 19 CFR parts 113, 133, 148, 151, and 177 as set forth below:

PART 113—CBP BONDS

- 1. The general and specific authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624. Subpart E also issued under 19 U.S.C. 1484, 1551, 1565.

* * * * *

- 2. Revise § 113.42 to read as follows:

§ 113.42 Time period for production of documents.

Except when another period is fixed by law or regulations, any document for the production of which a bond or stipulation is given must be delivered within 120 days from the date of notice from CBP requesting such document. If the period ends on a Saturday, Sunday, or holiday, delivery on the next business day will be accepted as timely.

- 3. Revise § 113.70 to read as follows:

§ 113.70 Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise suspected of, or seized for, infringing recorded marks or recorded copyrights, or circumventing copyright protection measures.

(a) Prior to obtaining samples of imported merchandise pursuant to § 133.21(b)(3) or (5), § 133.25(c), § 133.42(b)(3) or (5), or § 133.47(b)(3) or (5) of this chapter, for suspected infringement of a recorded mark or

recorded copyright, or suspected circumvention of a protection measure safeguarding a recorded copyright, the owner of the recorded mark or the recorded copyright must furnish to CBP either a single transaction bond or a continuous bond in the amount specified by CBP containing the conditions listed in this paragraph (a).

(1) *Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise suspected of infringing such recorded marks or recorded copyrights, or circumventing copyright protection measures—(i) Agreement to use sample for limited purpose of assisting CBP.* If CBP provides to an owner of a recorded mark or a recorded copyright a sample of imported merchandise suspected of infringing the recorded mark or copyright, or suspected of circumventing a copyright protection measure, including samples provided pursuant to § 133.21(b)(3) or (5), § 133.25(c), § 133.42(b)(3) or (5), or § 133.47(b)(3) or (5) of this chapter, the obligors (principal and surety) agree that such samples may only be used for the limited purpose of providing assistance to CBP in enforcing intellectual property rights.

(ii) *Agreement to indemnify—(A) Improper use of sample.* If the sample identified in paragraph (a)(1)(i) of this section is used by the owner of the recorded mark or the recorded copyright for any purpose other than to provide assistance to CBP in enforcing intellectual property rights, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any loss or damage resulting from the improper use.

(B) *Physical loss, damage, or destruction of disclosed sample.* The owner of a recorded mark or a recorded copyright must return any sample identified in paragraph (a)(1)(i) of this section upon demand by CBP or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. If the sample identified in paragraph (a)(1)(i) of this section is lost, damaged, or destroyed as a result of CBP's furnishing it to such owner, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any resulting loss or damage.

(2) [Reserved]

(b) Prior to obtaining samples of imported merchandise pursuant to § 133.21(f), § 133.42(f), or § 133.47(f) of this chapter, seized for infringement of

a recorded mark or recorded copyright, or circumvention of a protection measure safeguarding a recorded copyright, the owner of the recorded mark or recorded copyright must furnish to CBP either a single transaction bond or continuous bond in the amount specified by CBP containing the conditions listed in this paragraph (b).

(1) *Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise seized for infringing such recorded marks or recorded copyrights, or circumventing copyright protection measures.* If CBP provides to an owner of a recorded mark or a recorded copyright a sample of imported merchandise seized for infringing the recorded mark or recorded copyright, or circumventing a copyright protection measure, including samples provided pursuant to § 133.21(f), § 133.42(f), or § 133.47(f) of this chapter, the owner of the recorded mark or recorded copyright must return the sample upon demand by CBP or at the conclusion of any examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. If the sample is lost, damaged, or destroyed as a result of CBP's furnishing it to such owner, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any resulting loss or damage.

(2) [Reserved]

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

- 4. The general authority citation for part 133 is revised to read as follows, the specific authority for §§ 133.21 through 133.25 is removed, and a specific authority citation for § 133.47 is added to read as follows:

Authority: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 104, 106, 601, 602, 603; 18 U.S.C. 1905; 19 U.S.C. 66, 1202, 1499, 1526, 1595a, 1623, 1624, 1628a; 31 U.S.C. 9701.

Section 133.47 also issued under 17 U.S.C. 1201.

* * * * *

- 5. Amend § 133.0 by revising the last sentence to read as follows:

§ 133.0 Scope.

* * * It also sets forth the procedures for the disposition, including release to the importer in appropriate circumstances, of articles bearing prohibited marks or names, piratical articles, and prohibited circumvention devices, as well as the disclosure of information concerning such articles

when such disclosure would not compromise an ongoing law enforcement investigation or national security.

- 6. Amend § 133.21 by:
 - a. Revising paragraphs (b)(2)(i)(A), (b)(2)(ii), and (b)(3);
 - b. In paragraph (b)(4) introductory text, revising the second and third sentence;
 - c. In paragraph (b)(5), removing the word “mark” and adding in its place the word “markings” in the second sentence, and revising the third sentence;
 - d. In paragraph (c)(2), revising the first sentence; and
 - e. Revising paragraph (f).
 - f. Removing the words “owner of the mark” wherever they appear and adding in their place the words “owner of the recorded mark”;

The revisions read as follows:

§ 133.21 Articles suspected of bearing counterfeit marks.

* * * * *

- (b) * * *
- (2) * * *
- (i) * * *

(A) CBP may have previously disclosed to the owner of the recorded mark, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the owner of the recorded mark, if available, no later than the date of issuance of the notice of detention; and

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information is insufficient for CBP to determine that the merchandise does not bear a counterfeit mark, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded mark if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded mark of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the

merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the owner of the recorded mark as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded mark. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) * * * CBP may release the information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the owner of the recorded mark consists of:

* * * * *

(5) * * * CBP may release a sample under this paragraph (b)(5) when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter.

* * *

(c) * * *

(2) * * * CBP may release a sample under paragraph (b)(3) of this section when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. * * *

* * * * *

(f) *Disclosure to owner of the recorded mark, following seizure, of unredacted photographs, images, and samples.* At any time following a seizure of merchandise bearing a counterfeit mark under this section, and upon receipt of a proper request from the owner of the recorded 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 recorded mark. CBP may release a sample under this paragraph (f) when

the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(b) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded 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.”

* * * * *

■ 7. Amend § 133.25 by:

- a. In paragraph (b), removing the words “owner of the trademark” wherever it appears, and adding in their place the words “owner of the recorded mark”; and
- b. Revise and republish paragraph (c).
- c. Removing the word “Customs” wherever it appears, and in its place adding the term “CBP”.

The revision reads as follows:

§ 133.25 Procedure on detention of articles subject to restriction.

* * * * *

(c) *Disclosure to the owner of the recorded mark or trade name.* At any time following presentation of the merchandise for CBP’s examination, but prior to seizure, CBP may release a sample of the suspect merchandise to the owner of the recorded mark or trade name for examination or testing to assist in determining whether the article imported bears an infringing trademark or trade name. CBP may release a sample under this paragraph (c) when the owner of the recorded mark or trade name furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The owner must return the sample to CBP upon demand or at the conclusion of the examination or testing, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded mark or tradename, the owner must, in lieu of returning the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.25(c) was (damaged/destroyed/lost) during

examination or testing for trademark infringement.”

* * * * *

■ 8. Revise § 133.42 to read as follows:

§ 133.42 Piratical articles; Unlawful copies or phonorecords of recorded copyrighted works.

(a) *Definition.* A “piratical article,” for purposes of this part, is an unlawfully made (without the authorization of the copyright owner) copy or phonorecord of a recorded copyrighted work, importation of which is prohibited by the Copyright Act of 1976, as amended.

(b) *Detention, notice, and disclosure of information—*(1) *Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that is suspected of constituting a piratical article in violation of a copyright recorded with CBP. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to owner of the recorded copyrighted work—*(i) *Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise is a piratical article:

(A) CBP may have previously disclosed to the owner of the recorded copyright, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the owner of the recorded copyright, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the owner of the recorded copyright information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise is not piratical.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business

day response period, or the information provided is insufficient for CBP to determine that the merchandise is not piratical, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded copyright, if CBP concludes that the disclosure would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels), and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the owner of the recorded copyright as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded copyright. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to owner of recorded copyright of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the owner of the recorded copyright limited importation information to obtain assistance in determining whether an imported article is a piratical article. CBP may release the information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the owner of the recorded copyright consists of:

(i) The date of importation;

(ii) The port of entry;

(iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to owner of recorded copyright of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article is a piratical article and at any time after presentation of the merchandise for examination, provide to the owner of the recorded copyright photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph (b)(5) when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, 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 133.42(b)(5) was (damaged/destroyed/lost) during examination, testing, or other use.”

(c) *Conditions of disclosure to owner of recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in piratical merchandise determinations.* In accordance with paragraphs (b)(2)(ii) and (b)(3) of this section, when CBP discloses information to the owner of the recorded copyright prior to seizure, CBP will notify the owner of the recorded copyright that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the owner of the recorded copyright for the purpose of assisting CBP in determining whether the merchandise is a piratical article.

(2) *Bond.* CBP may release a sample under paragraph (b)(3) of this section when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, 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 133.42(c) was (damaged/destroyed/lost) during examination, testing, or other use.”

(d) *Disclosure to importer of unredacted photographs, images, and samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of being a piratical article at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that:

“The sample described as [insert description] and provided pursuant to 19 CFR 133.42(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to owner of the recorded copyright 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 is a piratical article, CBP will seize such merchandise and, in the absence of the written consent of the owner of the recorded copyright (*see* paragraph (g) of this section), 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 recorded copyright 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.

(f) *Disclosure to owner of recorded copyright, following seizure, of unredacted photographs, images, and samples.* At any time following a seizure of a piratical article under this section, and upon receipt of a proper request from the owner of the recorded copyright, 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 recorded copyright. CBP may release a sample under this paragraph (f) when the owner of the recorded copyright furnishes to CBP a bond in the amount specified by CBP and containing the conditions set forth in § 113.70(b) of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use, such as pursuant of a related civil remedy for infringement, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded

copyright, 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 133.42(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within 30 days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, entry after obliteration of the recorded copyright, if practicable, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52, subject to the importer’s right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§§ 133.43 and 133.44 [Removed and Reserved]

- 9. Remove and reserve §§ 133.43 and 133.44.
- 10. Redesignate subpart F as subpart G and add new subpart F, consisting of §§ 133.47 and 133.48, to read as follows:

Subpart F—Enforcement of the Prohibition on Importation of Merchandise Capable of Circumventing Technological Measures for Protection of Copyright

§ 133.47 Articles suspected of violating the Digital Millennium Copyright Act

(a) *Definitions*—(1) *Copyright protection measure.* A technological measure that effectively controls access to, or effectively protects a right of a copyright owner in, a copyrighted work for which the copyright has been recorded with CBP.

(2) *Articles that violate the DMCA.* Articles that violate the importation prohibitions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. 1201, consist of products, devices, components, or parts thereof primarily designed or produced for the purpose of circumventing a copyright protection measure, or which have only a limited commercially significant purpose or use other than such circumvention, or which are knowingly marketed by the manufacturer, importer, consignee, or other trafficker in such articles, or another acting in concert with the manufacturer importer, consignee, or trafficker for use in such circumvention.

(3) *Eligible person.* The owner of a recorded copyright, who employs a copyright protection measure that may have been circumvented or attempted to

be circumvented by articles that violate the importation prohibitions of the DMCA.

(4) *Injured person.* The owner of a recorded copyright, who employs a copyright protection measure that has been circumvented or attempted to be circumvented by articles seized for violation of the importation prohibitions of the DMCA, and who has successfully applied to CBP for DMCA protections pursuant to paragraph (b)(2)(iii) of this section.

(b) *Detention, notice, and disclosure of information*—(1) *Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that it suspects is in violation of the DMCA, as described in paragraph (a)(2) of this section. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for the purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to eligible persons*—(i) *Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise violates the DMCA:

(A) CBP may have previously disclosed to the eligible person, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the eligible person, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the eligible person information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise does not violate the DMCA.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to

determine that the merchandise does not violate the DMCA, CBP will proceed with the disclosure of information, as described in paragraph (b)(3) of this section, to the eligible person if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(iii) *Request for DMCA protections and establishment of a list of persons approved for post-seizure disclosures.* Eligible persons may apply to receive post-seizure disclosures from CBP by attaching a letter requesting such disclosures to an application to record or renew a copyright. Owners of existing copyright recordings may similarly apply for protection by submitting a letter requesting such disclosures to CBP. CBP will add those persons CBP approves for such disclosures to a list that CBP will maintain. CBP will provide the post-seizure disclosures described in this section to injured persons, as defined in this part, appearing on the list. CBP will publish a notice, signed by the Executive Director, Regulations and Rulings, of the establishment of the list in the **Federal Register**. After the list has been established, CBP will publish a notice of revisions to the list, signed by the Executive Director, Regulations and Rulings, in the **Federal Register**.

(3) *Disclosure to eligible persons of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the eligible person as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the eligible person. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings

appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to eligible person of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the eligible person limited importation information in order to obtain assistance in determining whether an imported article violates the DMCA. CBP may release the information prior to the issuance of the notice of detention, concurrently with the notice of detention, or, if the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the eligible person consists of:

- (i) The date of importation;
- (ii) The port of entry;
- (iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;
- (iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and
- (v) The country of origin of the merchandise.

(5) *Disclosure to eligible person of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article violates the DMCA and at any time after presentation of the merchandise for examination, provide to the eligible person photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the

manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph (b)(5) when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(b)(5) was (damaged/destroyed/lost) during examination, testing, or other use.”

(c) *Conditions of disclosure to eligible person of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in DMCA determinations.* In accordance with paragraphs (b)(2)(ii) and (b)(3) of this section, when CBP discloses information to an eligible person prior to seizure, CBP will notify the eligible person that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the eligible person for the purpose of assisting CBP in determining whether the merchandise violates the DMCA.

(2) *Bond.* CBP may release a sample under paragraph (b)(3) of this section when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(a) of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(c) was (damaged/destroyed/lost) during examination, testing, or other use.”

(d) *Disclosure to importer of unredacted photographs, images or samples.* CBP will disclose to the importer unredacted photographs,

images, or an unredacted sample of imported merchandise suspected of violating the DMCA at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to injured person 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 violates the DMCA as described in paragraph (a)(2) of this section, CBP will seize such merchandise and, in the absence of written consent of the injured person (see paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the injured person 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.

(f) *Disclosure to injured person, following seizure, of unredacted photographs, images and samples.* At any time following a seizure of DMCA-violative merchandise under this section, and upon receipt of a proper request from the injured person, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging or labels, in its condition as presented for examination, to the injured person. CBP may release a sample under this paragraph (f) when the injured party

furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70(b) of this chapter. CBP may demand the return of the sample at any time. The injured person must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use, such as pursuit of a related civil remedy for infringement, whichever occurs sooner. In the event that the sample is damaged, destroyed, or lost while in the possession of the injured person, the injured person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within 30 days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52, subject to the importer’s right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

§ 133.48 Demand for redelivery of released articles

If it is determined that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, an authorized CBP official will promptly make demand for redelivery of the articles in accordance with § 141.113 of this chapter. If the articles are not redelivered to CBP custody under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62 of this chapter, a claim for liquidated damages will be made in accordance with § 141.113 of this chapter.

§ 133.51 [Amended]

- 11. Amend § 133.51, in paragraph (a), by:
 - a. Adding the words ” including the DMCA,” after the words “trademark or copyright laws,”; and
 - b. Removing the citations “§ 133.24 or § 133.46” and adding in their place the citations “§ 133.24, § 133.46, or § 133.48”

§ 133.52 [Amended]

- 12. Amend § 133.52, in paragraph (b), by adding the phrase “except as

provided in §§ 133.42(g) and 133.47(g)” after the word “destroyed”.

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

■ 13. The general authority citation for part 148 continues and new specific authority is added for § 148.55 to read as follows:

Authority: 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States).

* * * * *

Section 148.55 also issued under 17 U.S.C. 602 and 19 U.S.C. 1526;

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■ 14. Amend § 148.55 by revising the section heading and paragraphs (a) and (c) to read as follows:

§ 148.55 Exemption for articles embodying American trademark or copyright.

(a) *Application of exemption.* An exemption is provided for articles bearing a counterfeit mark (as defined in § 133.21(a) of this chapter) or piratical articles (as defined in § 133.42(a) of this chapter) accompanying any person arriving in the United States which would be prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602. The exemption may be applied either to those piratical articles or to those articles bearing a counterfeit mark that are of foreign manufacture and bear a recorded mark owned by a citizen of, or a corporation or association created or organized within, the United States, when imported for the arriving person’s personal use in the quantities provided in paragraph (c) of this section.

* * * * *

(c) *Quantities.* Generally, every 30 days, persons arriving in the United States may apply the exemption to the following: one piratical article of each type, or one article of each type bearing a counterfeit mark, and/or one piratical article of each type that is also an article bearing a counterfeit mark. The Commissioner shall determine if more than one article may be entered and, with the approval of the Secretary of the Treasury, publish in the **Federal Register** a list of types of articles and the quantities of each entitled to the exemption. If the owner of a recorded mark or recorded copyright allows importation of more than one article normally prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602, the total of those articles authorized by the owner may be entered without penalty.

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

■ 15. The general authority citation for part 151 continues to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Note 3(i) and (j), Harmonized Tariff Schedule of the United States (HTSUS), 1624;

* * * * *

§ 151.16 [Amended]

■ 16. Amend § 151.16 by:

■ a. Revising paragraphs (a) through (c);

■ b. In paragraph (d), removing the word “Customs” wherever it appears and adding in its place the term “CBP”, and removing the word “shall” wherever it appears and adding in its place the word “will”;

■ c. In paragraph (e), removing the word “Customs” and adding in its place the term “CBP”;

■ d. In paragraph (f), removing the word “Customs” wherever it appears and adding in its place the term “CBP”, and removing the word “shall” and adding in its place the word “will”;

■ e. In paragraph (g), removing the word “shall” and adding in its place the word “will”;

■ f. In paragraph (h), removing the word “Customs” and adding in its place the term “CBP”;

■ g. In paragraph (i), removing the word “Customs” and adding in its place the term “CBP”, and removing the word “shall” and adding in its place the word “will”; and

■ h. In paragraph (j), removing the word “Customs” and adding in its place the term “CBP”.

The revisions read as follows:

§ 151.16 Detention of merchandise.

(a) *Exemptions from applicability.* The provisions of this section are not applicable to detentions effected by CBP on behalf of other agencies of the U.S. Government in whom the determination of admissibility is vested.

(b) *Decision to detain or release.* Within five business days from the date on which merchandise is presented for CBP examination, CBP will decide whether to release or detain merchandise. Merchandise that is not released within the five business day period will be considered to be detained merchandise under 19 U.S.C. 1499(c)(1). For purposes of this section, merchandise will be considered to be presented for CBP examination when it is in a condition to be viewed and examined by a CBP officer. Mere presentation to the examining officer of a cargo van, container, or instrument of international traffic in which the merchandise to be examined is

contained will not be considered to be presentation of merchandise for CBP examination for purposes of this section. Except when merchandise is examined at the public stores, the importer must pay all costs relating to the preparation and transportation of merchandise for CBP examination.

(c) *Notice of detention.* If a decision to detain merchandise is made, or the merchandise is not released within the five business day period described in paragraph (b) of this section, CBP will issue a notice to the importer or other party having an interest in such merchandise within five business days from such decision or failure to release. Issuance of a notice of detention is not to be construed as a final determination as to admissibility of the merchandise. The notice will be prepared by the CBP officer detaining the merchandise and will advise the importer or other interested party of the:

(1) Initiation of the detention, including the date the merchandise was presented for examination;

(2) Specific reason for the detention;

(3) Anticipated length of the detention;

(4) Nature of the tests or inquiries to be conducted; and

(5) Nature of any information which, if supplied to CBP, may accelerate the disposition of the detention.

* * * * *

PART 177—ADMINISTRATIVE RULINGS

■ 17. The authority citation for part 177 continues to read as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

§ 177.0 [Amended]

■ 18. In § 177.0 remove the words “part 133 (relating to disputed claims of piratical copying of copyrighted matter)”.

Emily K. Rick,

Acting Director, Regulations & Disclosure Law Division Regulations & Rulings, Office of Trade, U.S. Customs and Border Protection.

Approved:

Aviva R. Aron-Dine,

Acting Assistant Secretary of the Treasury for Tax Policy.

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