

**ADVISORY COMMITTEE ON COMMERCIAL OPERATIONS OF CUSTOMS AND  
BORDER PROTECTION (COAC)**

**IPR Enforcement Subcommittee**

**Draft Facilitation Recommendations**

**December 2011**

**Section 1 – Facilitation**

**Facilitation is expedited processing to speed release of legitimate goods. CBP's objectives for facilitation are to**

**obtain advance information on low risk imports through supply and distribution chain management programs;**

**RECOMMENDATIONS**

- 1.** The subcommittee suggests that CBP outline an IPR Partnership Program concept for licensees and parallel importers modeled on or as an adjunct to the CTPAT program and further explore its viability with the trade. The number of responses to the Subcommittee's survey was not sufficient to indicate an industry wide interest in the program. The responses that were received did indicate an interest, but also uncertainly about how the program would work and whether the benefits would outweigh the costs of implementation. Further detailing the proposed program and socializing it in the trade will help determine whether there's sufficient interest to support its viability.

The subcommittee suggests that the program outline would insure participants could demonstrate the controls they have in place to insure the authenticity of the goods they are importing and how they determine whether goods are authentic. Licensees would need to demonstrate the legitimacy of their license agreements and be able to give CBP a very high level of confidence that they are keeping track of and not exceeding the life of any licensing agreement. The importer would demonstrate good internal physical security controls to insure goods are non-infringing. This would be a risk mitigation solution as part of a layered approach to IPR enforcement. This would lower the targeting profile for the importer, better segmenting risk for CBP and speeding the release of legitimate goods. Checking for infringing goods or shipments outside of licensee effective dates would be part of the validation process. The subcommittee further suggests that this program would come with assurances of confidentiality and non-disclosure of any information provided to CBP by the importer.

The subcommittee suggests that CBP explore whether the program could exist as an adjunct to the existing CTPAT program, adding an optional set of IPR related controls to existing CTPAT security criteria that would give CTPAT certified importers the option of a "CTPAT Plus IPR" benefit. This would minimize the burden of managing a separate partnership program for importers and may accomplish CBP's goal of attracting more participants to CTPAT.

- 2.** The subcommittee recommends that CBP further outline the distribution chain management serialization concept, a code or key passed through the supply chain as a way of validating

authenticity. The responses to the Subcommittee's survey on this topic indicated an interest in learning more about how the program might work and whether the benefits would outweigh the costs of implementation. Further detailing the proposed program and socializing it in the trade will help determine whether there's sufficient interest to support its viability. The subcommittee recommends that CBP explore the idea in a work shop environment and continue to work with COAC to assess feedback from those meetings.

## **improve targeting to focus inspections on imports at high risk for IPR infringement; and**

### **RECOMMENDATIONS**

1. The subcommittee suggests that CBP allow legitimate importers to voluntarily transmit an IPR indicator to CBP in the cargo release data set that would link to a robust database. A valid IPR indicator would lower the IPR risk assessment for that shipment, segmenting risk for CBP and speeding release for the importer. The subcommittee suggests a simplified approach where certain identifiers are provided to CBP so an evaluation can be made against a shipment. As an example, right holders could voluntarily provide CBP with proof of their brand ownership or their authorization to allow a licensee to reproduce their brand. Parallel importers could provide proof of their right to import certain goods. CBP would store the data by IOR#. An indicator could be voluntarily transmitted at time of entry (cargo release) and CBP could validate the data against the IOR# in a robust database (as outlined in recommendation # 2 below). This better segments risk for CBP by designating those shipments as low risk and allows CBP to focus resources on high risk cargo and shipments to unknown parties. It would be the responsibility of the right holders to provide CBP with updated data for the robust database to insure their brand is protected. The subcommittee further recommends that the data elements supplied to CBP to identify legitimate imports in an advanced data set be limited to the smallest number possible. The subcommittee suggests that this program should come with assurances of confidentiality and non-disclosure of any information provided to CBP by the importer.
2. The subcommittee recommends that CBP establish a robust database for use by CBP Officers and by ATS in determining the authenticity of merchandise and in improving targeting to focus inspections on high risk cargo. There are several ways this can be done: 1) expanding the existing recordation database so that it becomes the repository of other appropriate IPR-related information; 2) creating a larger, independent IPR database of which the recordation database is a part; or 3) establish an IPR database separate from the recordation database which contains supplementary information. In all events, that data must be secure and access to proprietary information must be limited to the appropriate parties. Further, procedures must be established to determine the validity of any data collected and entered. The subcommittee further suggests that the IPR database described above be opened to parallel importers to provide CBP with information that would help CBP to recognize legitimate grey market imports more immediately. The subcommittee suggests that CBP continue to explore ways to speed release for legitimate importers using the IPR database described above. This accomplishes CBP's goal of segmenting risk and it encourages right holders' participation in the active updating of the database. CBP could continue to use the IPR database described above to note whether a mark is restricted or unrestricted. If restricted, the right holder could list the IOR #'s of the parties authorized to reproduce it along with effective dates (linking to an indicator as outlined in recommendation #1 above).
3. The subcommittee recommends that CBP explore the use of ISF type data for improved IPR targeting pre-arrival. Under Simplified Entry, cargo release decisions will likely be made earlier, requiring targeting for admissibility and trade violations pre-arrival. CBP could use this data for targeting pre-

arrival without use under an enforcement action to comply with the requirements of the Safe Ports Act.

**streamline authentication of suspect goods through tools and technologies that work for multiple products and rights, and legal authority to share unredacted samples with right holders prior to seizure with appropriate safeguards for importers.**

## **RECOMMENDATIONS**

1. The subcommittee recommends that CBP continue to use the methods currently available to it and work with rights holders to identify certain product and package elements that can be shared without violating the Trade Secrets Act. CBP should develop clear internal communication to each port about what can and cannot be shared with rights holders. Right now, each port interprets the rules differently. Some ports will not share the name or type of the suspect product. Many elements are in the public domain and shared broadly; such as brand names, brand descriptions, artwork codes, UPC codes. These are elements that could not be traced back to the original buyer and would in no way violate the Trade Secrets Act. The subcommittee recommends that CBP provide clear internal communication and port level training so officers are aware of their options with respect to release of redacted samples and other information about the imported product so that the rules are applied uniformly.
2. The subcommittee recommends that CBP explore the use of port level Microscopy analysis. Many counterfeit packages, printing, fabric weaves and product contents will look different from the genuine goods under a microscope. For example, genuine toothbrush bristles will be rounded and smooth. Most counterfeit toothbrush bristles will simply be cut off and have rough edges. The printing of a certain letter may look different on a genuine package verses a counterfeit when viewed under a microscope. CBP should provide low cost digital microscopes to officers in the field; allowing digital, microscopic photos of product manufacturing and packaging elements to be jointly shared with rights holders. Rights holders could, in turn, identify counterfeit indicators on their products and packaging that are difficult for counterfeiters to replicate, but that are not protected under the Trade Secrets Act. Training materials could be updated to include these indicators and made available to CBP officers in the field via CBP's internal Recordation system. Rights holders would continue to update training materials as genuine and counterfeit manufacturing standards evolve so CBP officers in the field would know which product and packaging elements are useful for authentication.
3. The subcommittee recommends that CBP coordinate all of its efforts and initiatives with respect to IPR enforcement with other government agencies to insure importers benefit from a harmonized approach.
4. The subcommittee believes that time is of the essence with respect to the above recommendations. We recommend that CBP act as quickly as possible in implementing these recommendations and exploring other concepts being worked on jointly between CBP and COAC which may help to forestall the implementation of potentially onerous regulations currently being discussed at the state and Congressional levels.