

U.S. Customs and Border Protection



DEPARTMENT OF THE TREASURY

19 CFR PART 133

CBP DEC. 17-21

RIN 1515-AE21

DONATIONS OF TECHNOLOGY AND RELATED SUPPORT SERVICES TO ENFORCE INTELLECTUAL PROPERTY RIGHTS

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations relating to the enforcement of intellectual property rights. This final rule implements section 308(d) of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which requires CBP to prescribe regulatory procedures for the donation of technologies, training, or other related services for the purpose of assisting CBP in intellectual property enforcement.

DATES: Effective January 16, 2018.

FOR FURTHER INFORMATION CONTACT: Garrett D. Wright, Chief, Donations Acceptance Program, Office of Field Operations, U.S. Customs and Border Protection, telephone (202) 344-2344.

SUPPLEMENTARY INFORMATION:

Background

The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Public Law 114-125, 130 Stat. 122 (19 U.S.C. 4301 note), was enacted on February 24, 2016, and includes several provisions regarding trade facilitation and trade enforcement, some of which deal with improving U.S. Customs and Border Protection's (CBP's)

intellectual property rights (IPR) enforcement at the border. Section 308(d) of the TFTEA requires the Commissioner of CBP to prescribe regulations to enable CBP to receive donations of hardware, software, equipment, and similar technologies, and to accept training and other support services, from private sector entities, for the purpose of enforcing IPR.

Acceptance of such donations must also be consistent with either section 482 of the Homeland Security Act of 2002, as amended by section 2 of the Cross-Border Trade Enhancement Act of 2016 (Pub. L. 114–279), or section 507 of the Department of Homeland Security (DHS) Appropriations Act of 2004 (Pub. L. 108–90).

Section 482 of the Homeland Security Act replaced section 559 of Title V of Division F of the Consolidated Appropriations Act, 2014 (Pub. L. 113–76) and permits CBP, in consultation with the General Services Administration (GSA), to “enter into an agreement with any entity to accept a donation of personal property, money or nonpersonal services” to be used for certain CBP activities at most ports of entry where CBP performs inspection services. Pursuant to section 482(c)(3), CBP in consultation with GSA will establish criteria for evaluating donation proposals under section 482 and make such criteria publicly available.

If donations cannot be accepted under section 482, they may be accepted under section 507 of the DHS Appropriations Act of 2004. Section 507 made the DHS Gifts and Donations account “available to the Department of Homeland Security . . . for the Secretary of Homeland Security to accept, hold, administer and utilize gifts and bequests, including property to facilitate the work of the Department of Homeland Security.” Title V, Public Law 108–90, 117 Stat. 1153–1154. DHS policy on the acceptance of gifts pursuant to section 507 is contained in DHS Directive 112–02 and DHS Instruction 112–02–001. The Secretary of DHS delegated the authority to accept and utilize gifts to the heads of certain DHS components, including the Commissioner of CBP, in DHS Delegation 0006.

This document implements section 308(d) of the TFTEA by promulgating a new subpart H to part 133 of title 19 of the Code of Federal Regulations (CFR) which provides for the receipt and acceptance by CBP of donations of hardware, software, equipment, and similar technologies, as well as training and related support services, for the purpose of assisting CBP in enforcing IPR. New subpart H, as set forth in § 133.61, prescribes the methods by which donations of IPR technology and related support services may be made. Specifically, 19 CFR 133.61(a) sets forth the scope of this section and identifies the

authority to accept donations, § 133.61(b) describes the donation process, and § 133.61(c) lays out the elements of the written donation agreement.

On January 17, 2017, CBP published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** (82 FR 4800) proposing to amend its regulations pertaining to the enforcement of intellectual property rights in order to enhance CBP's intellectual property rights enforcement capabilities. The NPRM solicited for public comments on the proposed rulemaking. The public comment period closed on March 3, 2017.

Discussion of Comments

Three commenters responded to the solicitation of comments to the proposed rule. A description of the comments received, together with CBP's analysis, is set forth below.

Comment: One commenter, an association dedicated to serving the needs of the video game industry, commended CBP's efforts to enhance its engagement with intellectual property-intensive industries and border enforcement needs, but also voiced several concerns.

The first concern is related to proposed § 133.61(b). The commenter expressed concern with the procedure laid out in paragraph (b) because this "formalized" process might interrupt the dynamic nature of the relationship between CBP and the video game industry in providing training, as well as the tools CBP needs in order to accurately confirm the illegality of suspected infringing imports.

CBP Response: CBP seeks to maintain the dynamic relationship it has with the video game industry and other industries. The donation process that CBP is creating is intended to be streamlined, non-invasive, and flexible. For example, in certain circumstances, CBP and the industry partner may only need to enter into one written partnership agreement whereby any IPR donation proposal made pursuant to that agreement could be evaluated and, if viable, accepted at the local level. In addition, as explained below, the donation process does not apply to "sample" products or stand-alone training or educational seminars.

Comment: The commenter asked for clarification on whether a single donation offer, as envisioned by § 133.61(b), would cover a quantity or a range of items, or whether a donation offer must be submitted for each item contemplated for donation.

CBP Response: In general, a single donation offer could cover more than one item and/or a range of items assuming such items serve a similar IPR enforcement purpose. Each donation offer and each item, however, will be considered on a case-by-case basis.

Comment: The commenter also requested clarification on whether a single, written donation offer would encompass anticipated intermittent donations of samples of infringing products and circumvention devices. The commenter explained that current practice allows for video game companies to donate hardware, software, samples of infringing products, circumvention devices that violate 17 U.S.C. 1201, and training materials along with a request that CBP seize like goods using a simple transmittal letter to CBP's Office of Trade, Regulations and Rulings, IPR Branch. Typically, these donations comprise numerous identical or comparable items, such as game copiers, other circumvention devices, or memory cards filled with pre-loaded games.

CBP Response: The process described in the public comment with regard to submissions of samples of genuine and infringing articles will not be changed with the new regulation. A distinction needs to be made between "donations" covered under section 308(d) of the TFTEA which are provided for the regular use by CBP personnel assisting with the enforcement of IPR, such as an x-ray machine or a high magnification microscope, and "samples" of merchandise provided to the IPR Branch for purposes of determining admissibility. The furnishing of samples of genuine and infringing articles is not covered by the intended scope of the Donations Acceptance Program under § 133.61. Rights owners, including the video game industry, will be able to continue to communicate and provide samples to the IPR Branch and field offices as the need for enforcement arises. Accordingly, based on this comment, CBP has amended the regulatory text in § 133.61(a) to clarify that articles provided to CBP as "samples," as referenced in 19 CFR 151.10 and 177.2, are not included within the scope of this rule.

Comment: The commenter also seeks clarification on whether the proposed donation offer requirements and process would hinder the ability of CBP or other DHS personnel, such as those of Immigration and Customs Enforcement (ICE), to request hardware or software samples from private companies for the purpose of conducting investigations.

CBP Response: The donation requirements will not hinder the current process of cooperation and information-sharing that regularly occurs between rights holders and DHS personnel. The regulations are not intended to affect the processing of criminal investigations into potential IPR violations within other DHS agencies, such as DHS/ Homeland Security Investigations (HSI) under DHS/ICE.

With regard to CBP's civil administrative enforcement authority of IPR, if CBP makes a request to a rights holder for information, software and/or hardware, such request would not fall in the "dona-

tion” category as contemplated by the regulations, but would be considered a request for a “sample” of merchandise to be used by CBP for authentication purposes with regard to a specific matter. The current process with CBP will continue unaffected by the donation regulations put in place.

Comment: The commenter is further concerned with regard to the waiver language in proposed § 133.61(c) (“ . . . the service provider expressly waives any future claims against the government.”). The commenter stated that the proposed language is overbroad and potentially captures all instances where a donor of technology and services pursues unrelated claims against the U.S. government. The commenter suggested that the waiver be reasonably tailored to the donation in question and not include “any claims against the government.” Entering into a donation agreement with CBP should not foreclose any remedies against the government in cases unrelated to the donation agreement.

CBP Response: CBP agrees that a clarification is appropriate and has amended the regulatory text in 19 CFR 133.61(c) to address this concern.

Comment: Another commenter expressed a concern with the proposed rule. The commenter stated that it appears that the proposed rule would favor companies with more well-known intellectual property and a larger market share, undercutting the fundamental purposes of intellectual property rights, namely those which promote the availability of new technologies and competition in the market. The commenter asked for clarification how the proposed rule would benefit entities other than those with a market incentive to make donations.

CBP Response: The intent of the Act is to enhance IPR enforcement. Although enforcement of a particular IPR right clearly benefits the right-holder, other parties also benefit from IPR enforcement, in general.

Comment: The third commenter commended CBP for its focus on the implementation of section 308(d) of the TFTEA and appreciated the opportunity for CBP to accept technology to enrich inspection activity at all U.S. ports of entry. The commenter stated that the equipment and technology that may be used by agents will improve CBP’s ability to identify counterfeits at even earlier stages in the detection stage process.

The commenter further stated that under the TFTEA, CBP will now be able to provide samples of counterfeits to rights holders, and hopes that CBP will share details, such as container number, customs broker, freight forwarders, associated telephone numbers and email

addresses once the goods have been deemed counterfeit. The sharing of this additional information would enable rights holders to analyze the data and provide CBP with additional information to identify illicit trade patterns.

CBP Response: This comment falls outside of the scope of 19 CFR 133.61. The proposed regulation deals with establishing a donation process so CBP can receive donations of technologies, equipment and other support services for the purpose of detecting potentially infringing articles and does not address CBP sharing information or samples to rights holders.

Other changes: CBP is adding the word “related” before the words “support services” throughout the regulatory text in order to clarify that only training and support services associated with a donation of hardware, software, equipment or technology fall within the scope of this regulation. Training services that may be donated pursuant to § 133.61 will be in the context of donated technology or equipment, in contrast to training services provided to assist with CBP’s general trade facilitation and trade enforcement pursuant to section 104 of the TFTEA.

CBP is also adding a reference to “hardware, software, equipment, technologies” to § 133.61(c) to clarify that a donation agreement may also cover hardware, software, equipment, and technologies, as well as training and other related support services.

The email address in proposed § 133.61(b) to which donation offers should be submitted has been updated to *dap@cbp.dhs.gov* to reflect the program’s current email address.

Conclusion

After review of the comments, CBP has decided to adopt as final the proposed rule published in the **Federal Register** on January 17, 2017, with the changes described above.

Executive Orders 12866, 13563 and 13771

Executive Orders 13563 and 12866 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. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”) directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination,

and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

This final rule is not a “significant regulatory action,” under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget has not reviewed this regulation. As this rule is not a significant regulatory action, this rule is exempt from the requirements of Executive Order 13771. *See* OMB’s Memorandum titled “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), 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).

This rule will allow private sector entities to voluntarily donate technology, training, and other related support services to improve CBP’s ability to enforce intellectual property rights potentially related to their goods. As any entity with intellectual property could make these donations, this rule affects a substantial number of small entities. However, this rule imposes no new obligations on entities, including those considered small. Any small entity that chooses to make these donations will presumably do so because it believes the benefits of donating exceed the costs. Therefore, this rule will not have a significant economic impact on small entities. Given these reasons, CBP certifies that this rule, will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

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.

OMB approved collection 1651–0123 has been revised to reflect this new collection of information in this final rule for written offers of donations to CBP of technology, training, and other related support services in accordance with 19 CFR 133.61(b). The information collection reflects the additional burden hours for each written offer of donation provided to CBP as follows:

Estimated number of annual respondents: 50.

Estimated number of annual responses: 50.

Estimated time burden per response: 2 hours.

Estimated total annual time burden: 100 hours.

Signing Authority

This document is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury's authority (or that of his delegate) to approve regulations related to certain customs revenue functions.

List of Subjects in 19 CFR Part 133

Circumvention devices, Copying or simulating trademarks, Copyrights, Counterfeit goods, Customs duties and inspection, Detentions, Donations, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures, Technology, Trademarks, Trade names, Support services.

Amendments to Part 133 of the CBP Regulations

For the reasons set forth above, part 133 of title 19 of the Code of Federal Regulations (19 CFR part 133) is amended as set forth below.

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

■ 1. The general authority citation for part 133 continues, and the specific authority for new subpart H is added to read as follows:

Authority: 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1202, 1499, 1526, 1624; 31 U.S.C. 9701.

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Section 133.61 also issued under Sec. 308(d), Pub. L. 114–125; Sec. 507, Pub. L. 108–90; Sec. 2, Pub. L. 114–279.

Subpart G—[Reserved]

■ 2. Reserved subpart G is added.

■ 3. Subpart H, consisting of § 133.61, is added to read as follows:

**Subpart H—Donations of Intellectual Property Rights
Technology and Related Support Services**

§ 133.61 Donations of intellectual property rights technology and related support services.

(a) *Scope.* The Commissioner of U.S. Customs and Border Protection (CBP) is authorized to accept donations of hardware, software, equipment, and similar technologies, as well as related support services and training, from private sector entities, for the purpose of assisting CBP in enforcing intellectual property rights. Such acceptance must be consistent with the conditions set forth in this section and section 308(d) of the Trade Facilitation and Trade Enforcement Act of 2015 (19 U.S.C. 4301 note), as well as either section 482 of the Homeland Security Act of 2002, as amended by section 2 of the Cross-Border Trade Enhancement Act of 2016 (6 U.S.C. 301a), or section 507 of the Department of Homeland Security Appropriations Act of 2004 (Pub. L. 108–90). However, this section does not apply to merchandise provided to CBP as samples, *e.g.*, as referenced in §§ 151.10 and 177.2 of this chapter.

(b) *Donation offer.* A donation offer must be submitted to CBP either via email, to dap@cbp.dhs.gov, or mailed to the attention of the Executive Assistant Commissioner, Office of Field Operations, or his/her designee. The donation offer must describe the proposed donation in sufficient detail to enable CBP to determine its compatibility with existing CBP technologies, networks, and facilities (*e.g.* operating system or similar requirements, power supply requirements, item size and weight, *etc.*). The donation offer must also include information pertaining to the donation's scope, purpose, expected benefits, intended use, costs, and attached conditions, as applicable, that is sufficient to enable CBP to evaluate the donation and make a determination as to whether to accept it. CBP will notify the donor, in writing, if additional information is requested or if CBP has determined that it will not accept the donation.

(c) *Agreement to accept donation.* If CBP accepts a donation of hardware, software, equipment, technologies, or related support services and training, for the purpose of enforcing intellectual property rights, CBP will enter into a signed, written agreement with an authorized representative of the donor. The agreement must contain all applicable terms and conditions of the donation. An agreement to accept a donation must provide that the hardware, software, equipment, technologies, or related support services and training are offered without the expectation of payment, and that the donor expressly waives any future claims, except those expressly reserved in the agreement, against the government related to the donation.

Dated: December 12, 2017.

KEVIN K. MCALEENAN,
Acting Commissioner,
U.S. Customs and Border Protection.

TIMOTHY E. SKUD,
Deputy Assistant
Secretary of the Treasury.

[Published in the Federal Register, December 15, 2017 (82 FR 59511)]