

**Commercial Customs Operations Advisory  
Committee (COAC)  
Intelligent Enforcement Subcommittee**

IPR Working Group  
April 2020



# **Commercial Customs Operations Advisory Committee (COAC) Intellectual Property Rights (IPR) Working Group Recommendations**

After a brief hiatus, the IPR WG was realigned with CBP's 21<sup>st</sup> Century Customs Framework to think of the "Art of the Possible" to fully tackle the growing challenges for IPR enforcement especially in the areas of eRecordation and data sharing. The reinvigorated IPR21 WG kicked off on November 6, 2019, and held an in-person meeting in Washington, DC on December 5, 2019. A background paper around this meeting and the development of these recommendations has also been prepared.

The IPR WG has 65 members consisting of brand holders representing different industry sectors, importers, customs brokers, express couriers, eCommerce platforms, Customs attorneys, sureties, and trade associations. Government participation from U.S. Customs & Border Protection included the Office of Trade, Office of Trade Relations, Centers of Excellence and Expertise, Office of Field Operations, and Chief Counsel's Office.

To achieve its objectives to develop practical and implementable short, mid-term and long-term recommendations, the IPR WG broke into two teams and held bi-weekly conference calls to develop recommendations. Team 1 focused on rebuilding the eRecordation portal and Team 2 on data sharing, regulatory rewrite, public outreach, and discussion of the following public reports issued on IPR enforcement and eCommerce.

- [The Department of Homeland Security Report on Combating Trafficking in Counterfeit and Pirated Goods issued on January 24, 2020](#)
- [Presidential Executive Order for Ensuring Safe & Lawful E-Commerce for Consumers, Businesses, Government Supply Chains, and IPR issued on January 31, 2020.](#)

## **Team 1 Recommendations on eRecordation**

Team 1 was created to examine matters related to the e-recordation portal and procedures for trademarks. The charter of the Team was to consider how a "clean-sheet" approach would manifest, and therefore reflect an idealized state of business process. Further exploration, as well as investment, in terms of people and/or budgetary expenditure, will be required to bring the recommendations from concept to reality. These recommendations reflect the Team's collective view about how to best accelerate cooperation between trade actors and CBP in a more coordinated and effective fashion to enforce IPR.

### **eRecordation System**

- 1) In support of prior recommendation #10374 to provide CBP with additional budget and resources, COAC recommends that CPB redesign the eRecordation system in which IPR enforcement is made more effective and efficient by:
  - a. Allowing data to flow automatically from the registration of the IPR.
  - b. Make it the hub for data upon which CBP can rely to target IPR violations
  - c. Allow the system to be the hub for data from CBP
  - d. The E-recordation system should be interactive, allowing CBP and IPR owners the ability to share information in real time.

### **Data Flows Automatically**

- 2) **Integration:** COAC recommends CBP work with the U.S. Patent & Trademark Office (USPTO) to have registration numbers flow directly from USPTO to the CBP Portal. Rights holders will select registrations for enhanced enforcement via the portal. Once selected, rights holders can assign contact information by groups of trademarks. Rights holders can provide information about authorized parties/licensees for groups of marks or individual marks, as well as supplying information about known violators of all or certain marks.

## Hub for Enforcement

- 3) **Enforcement Targeting:** COAC recommends the new system be multi-functional. The new system should be the registry for enforcement targeting data such as:
  - U.S licensees of the IPR
  - Authorized manufacturing locations add actual name manufacturers
  - Known offender data
  - Unique identifiers or verifiable credentials that promote more secure trade by providing greater insights into importers of genuine articles and their histories
  - IPR owner contacts associated with IPR to assist with determinations of authenticity
- 4) **Brand Identification Guides:** COAC recommends the system should make it easier for CBP to research and locate information filed by IPR owners such as brand identification guides. Using automation to allow CBP officers to enter a search term and be brought automatically to the relevant page of an IP owners Brand Identification Training Guide uploaded to CBP's systems. Right now, one visible problem is that frontline officers don't have the time to search through detailed brand manuals to find what they're examining. We need to make this easier for them.
- 5) **Key Technology:** COAC recommends data could be linked to keys that could be shared with brokers and then transmitted to CBP in the entry filing process in ACE. The keys would identify to the authorized licensee/importer (validate to IOR) and item level (to extent the holder loads this info). The key would link directly to the appropriate locations in the recordation database that could automate release or allow officers to very quickly make determinations. It shrinks the haystack and allows CBP to focus its efforts on potential bad actors. Also, it is essential that the system for maintaining the data is user friendly for SME's and automated for use by folks with lots of data to share.

## Hub for Data from CBP

- 6) **Track and Trace:** COAC recommends that CBP report the results of assistance rendered by IPR holders so that the latter can track and trace on a transaction basis from detention to seizure or release. With this information, IPR holders will know better how the assistance provided to CBP should be refined or improved.
- 7) **Data Sharing:** COAC recommends Customs brokers have access to information about rights holders' recorded goods to help facilitate legitimate trade and automate their customer vetting processes. Brokers play an integral part in the Customs clearance process. As key trade partners to importers and CBP, brokers are equally concerned with ensuring the facilitation of legitimate goods and identifying bad actors. Access to information improves the broker's ability to properly vet their importer customers, identify bad actors and act as an effective force multiplier in preventing the importation of infringing goods.

## Vehicle for Real Time Communication with IPR Owners of Record and between CBP Offices

- 8) **Real Time Communication:** In support of prior recommendation #010356 COAC also recommends the electronic system be used to send and receive e-messages for purposes of authentication of detained goods. It can also be used for issuing notices of seizure to IPR holders. In either case, functionality could include the ability of IPR owners to request additional information such as photographs and samples. IPR bond information can also reside in the system. IPR owners who've recorded contact information can indicate e-mail addresses and mobile device IDs for purposes of automatic distribution of the above-mentioned messages from CBP.

## **Interim Recommendations**

We visualize these as a process that can benefit from automation that immediately exists until CBP system can be automatically updated.

- 9) COAC recommends the elimination of trademark-by-trademark recordation. The IPR owner should be able to record multiples marks and trademarks simultaneously.
- 10) COAC recommends as an interim step that the Automated Commercial Environment (ACE) be updated to carry the capability of recording IPR, including the renewal of marks as well as the expiration and renewal of license agreements, etc. thus alleviating the need for separate systems.
- 11) COAC recommends that CBP look at existing systems that can be used to automatically notify rights holders of the seizure. This would save both time and money for CBP and rights holders compared to many notifications being sent via U.S. Mail. This could possibly be an interim solution and/or part of a long-term solution depending on the functionality of the systems.

## **Team 2 Recommendations**

Team 2 was established to discuss and review recommendations for Data Sharing, the DHS Report on Trafficking and Pirated IPR goods, and the Presidential Executive Order on eCommerce. The recommendations developed by Team 2 are provided below.

### **Data Sharing**

In regards to automation and data sharing, the COAC previously submitted recommendation #010353 to automate the current paper process for seizures and detentions, #010375 to make the detention and seizure process more transparent and visible as allowed by law, and #010376 to build functionality in ACE that would allow the ability to see these notices and share information among approved parties. In further support of automation and data sharing, the COAC submits these additional recommendations.

- 12) **Blockchain:** COAC recommends that CBP pursue blockchain encryption technology based on the successful IPR Proof of Concept completed by the COAC Emerging Technologies Working Group. This will enable CBP, rights holders and importers to share and access database information in a secure and confidential manner so that items could be targeted or pre-cleared before arrival at the port of entry. Specifically, the rights holder would provide a database of identifiers for legitimate product. The data would be encrypted through Blockchain technology so that neither CBP nor the importer would have access to the raw data, thereby ensuring confidentiality of the Rights Holder's intellectual property.
- 13) **Sharing of Detention Information:** COAC recommends that CBP automate the sharing of detention information, photographs, images and samples as provided for by current regulations. CBP regulations provide for disclosure of unredacted photographs, images and samples ("images") to the importer per 19CFR 133.21(a)(1) and to the IP owner per 19 CFR 133.21(b)(3), (c) and (e) but CBP has not adopted procedures to do the following allowed for under these regulations:
  - Generate sharable images at the time of inspection
  - Provide images to importers at the outset of the 7-day response period
  - Provide images to intellectual property (IP) owners promptly following seizure
  - Provide images electronically
- 14) **Photographic Standards Guide:** COAC recommends that CBP partner with brand holders to share and provide "photographic standards guides" to aid CBP Officers in taking the required photographs necessary to streamline and expedite the brand authentication process. This can help authenticate products that are detailed within 24-48 hours.

- 15) **Data-Driven CBP Seizure Process:** COAC recommends that CBP re-evaluate the current 25-point step seizure process to eliminate unnecessary steps and choose an expedited process for small parcels vs. pallets. An innovative, streamlined seizure flow would create more efficient identification, interdictions, and seizures. Particularly, the first six to seven steps could be combined through technology advancements. Expedited seizure should not eliminate ability to share information with the business community or target bad actors.
- 16) **Trusted IPR Vendor:** COAC recommends that CBP authorize all Centers (Center) of Excellence and Expertise (Centers) to establish pilot programs for “Trusted IPR Vendor” lists which are good actors within the supply chain (i.e., importers and foreign suppliers). A Trusted IPR Vendor could be identified with a flag in ACE similar to the Broker Known Importer Program (BKIP) that attaches a flag to every entry an importer makes once “known” or approved as a Trusted IPR Vendor. A Trusted IPR Vendor could be defined as:
- a) A company which is authorized to import on behalf of a brand owner or;
  - b) A company which has been identified directly by the Center as a Trusted IPR Vendor either directly or in conjunction with a third-party organization acceptable to the Center.

Companies wishing to be considered a Trusted IPR Vendor under either paragraph a) or b) above must agree to sign a Certification Agreement, agreed to by the Center and Industry, which would include the company’s agreements to certain criteria such as:

- a) Due diligence in sourcing goods to avoid counterfeit products
- b) Best efforts to avoid goods that were manufactured with forced labor
- c) Cooperation with U.S. Law Enforcement in any counterfeit investigation
- d) Quarantine goods identified as counterfeit

- 17) **Donation Acceptance Program:** In support of COAC recommendation 010355, COAC recommends that CBP conduct more outreach with brand holders at least bi-annually to brainstorm on additional tools that are most helpful to CBP in counterfeit detection. This includes bar code scanners, mobile applications, and other broad-based technology that can assist CBP with authenticating a shipment in a matter of seconds. Donating enforcement technologies helps trade across the board. Sharing best practices or applications like third-party assessment tools streamlines and broadens information sharing, while decreasing the time required to catch the violative goods. This can also help streamline the seizure and detention process and allow CBP officers quick access to data to identify counterfeit products.

### **DHS Report on Combatting Trafficking in Counterfeit and Pirated Goods**

In response to the Presidential Memo on Combatting Trafficking in Counterfeit and Pirated Goods, the COAC submitted public comments to the Department of Commerce under Docket Number 190703544-9544-01 at the following link: <https://www.regulations.gov/document?D=DOC-2019-0003-0090>. On January 24, 2020, DHS finalized its report in response to the Presidential Memo and provided 11 recommendations to CBP as well as best practices for rights holders. The IPR Working Group reviewed and discussed the report to develop the following recommendations in response to it. However, due to the COVID-19 pandemic, the in-person meetings scheduled for the IPR Working Group on March 18<sup>th</sup> and March 19<sup>th</sup> were cancelled. As such, the COAC and IPR Working Group have not had ample time to discuss the DHS Report with CBP and make the following high-level recommendations.

- 18) **Trade Collaboration:** COAC recommends that CBP engage with COAC working groups to brief the trade on plans to comply with the DHS Report before policy and/or regulatory decisions are made. The report asks CBP to implement the DHS recommendations within 180 days, which is on or after July 24<sup>th</sup>, 2020. Although COAC has made some high level recommendations in the near term, there continues to be a need for discussion on the impact this report will have on the trade, the policy questions that need to be answered, the regulations that need to be modified, and the technology that’s necessary to support the changes.

- 19) **Entry Type 86 Pilot:** COAC applauds CBP on the successful implementation of this pilot to process millions of Section 321 entries that are up to \$800 *de minimis* value and recommends that CBP resolve the ongoing policy issues and unanswered question since the Noticed of Proposed Rulemaking was issued including but not limited to:
  - a. Policy Guidance from the BIEC on the different PGA requirements for Section 321.
  - b. Requirements for importer of record (when optional or mandatory), power-of-attorney (when required) for Entry Type 86 transactions.
  - c. Trade is looking for a clear definition of “one person per shipment per day.” How is one person defined and what person is legally authorized to do so within the supply chain?
- 20) **Section 321 Data Pilot:** COAC has members who participate in the pilot and recommends that the pilot continue since the data being collected and provided to CBP through this pilot can be very beneficial. However, CBP has not had the opportunity to evaluate the data being received, and there is still a great deal of effort for the pilot participants to gather the data.
- 21) **Section 321 Enforcement:** COAC recommends that CBP triangulate the data being collected from both pilot programs to identify enablers (whether knowingly or not) to establish a means to stop the product from being shipped to, or accepted at entry into the U.S. if coming from or through red-flagged entities.
- 22) **Co-Mingling:** To address the challenges with co-mingling by eCommerce platforms with fulfillment centers, COAC recommends that CBP work with the Federal Trade Commission (FTC) develop new policy and/or regulation that provides benefits if eCommerce platforms do the following:
  - a) Include a mandatory country of origin field and require sellers/merchants to disclose the country of origin of the goods for every item being sold on the platform as required for all other commercial importations.
  - b) Require a “verified source” tag which indicates that the seller/merchant does not allow co-mingling of its merchandise. This provides the buyer with an option to choose the authentic merchandise that is a “verified source” over one that is not on the platform.
- 23) **Foreign-Trade Zones (FTZs):** In support of prior recommendation #010309, COAC recommends that CBP allow FTZs to be used for Section 321 shipments to increase visibility into these importations due to the recordkeeping, auditing and bonding requirements imposed on FTZs. Changes to U.S. informal-entry rules increasing the U.S. duty-free *de minimis* level for imported goods from \$200 to \$800 adversely impacted U.S. foreign-trade zone (FTZ) distribution operations by encouraging a shift of e-commerce fulfilment for the U.S. market to Canada, Mexico, and other foreign locations. Since the *de minimis* benefit is currently available only to foreign distributors but not to U.S. FTZs, COAC recommends that CBP work to make legislative changes to the 321 statute and FTZ Act to address the adverse impact of this change and assure that e-commerce operations can remain in the U.S. With the explosive growth of small-package delivery through e-commerce channels, moving even a portion of this trade through the stringent enforcement and compliance system of the FTZ program will help ensure that illicit goods, including products violating intellectual-property rights (IPR), do not enter the U.S. market.
- 24) **Public Outreach:** COAC recommends that CBP take the following actions to increase consumer awareness of counterfeit merchandise:
  - a) Share photos from raids globally that highlight some of the conditions where products are manufactured and marketed to consumers.
  - b) Educate consumers on what best practices are working in other countries and focus on more violative health and safety issues (e.g., best practices that France uses to enforce consumer purchases which are considered illegal if counterfeit).
  - c) Increase outreach to consumers on the dangers of buying on-line utilizing joint industry/government campaigns with a stress on consumer safety.

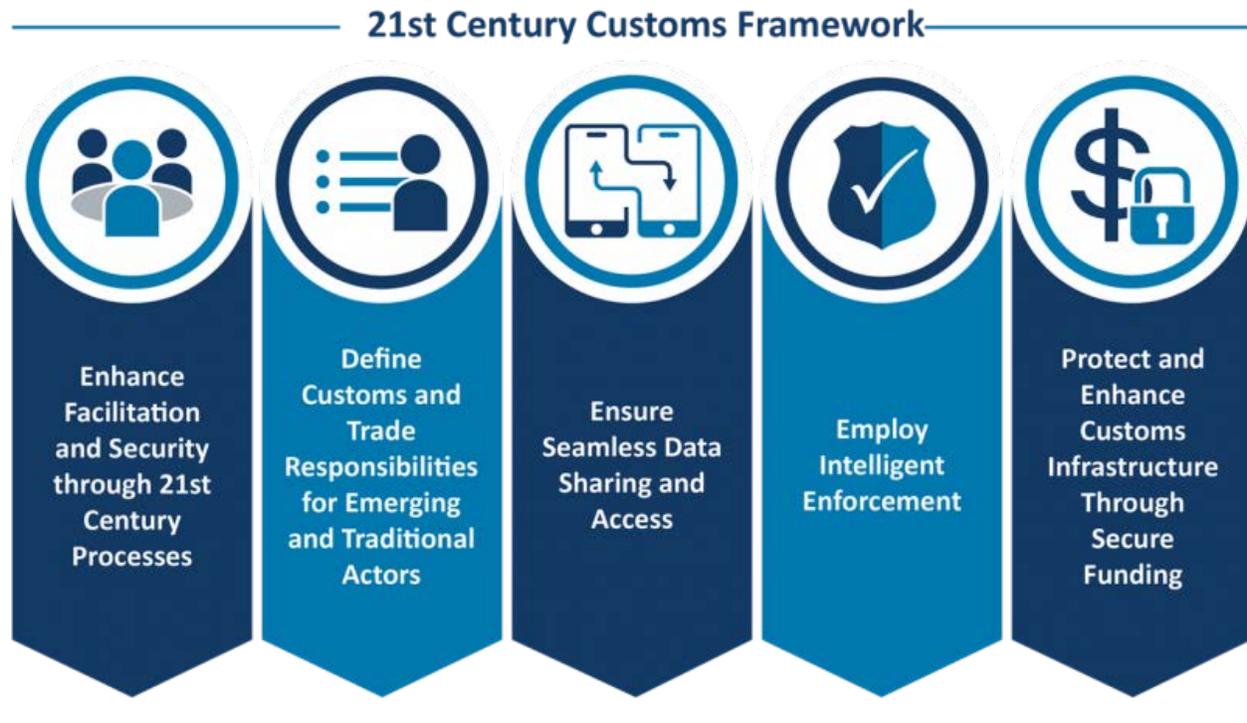
- 25) **Suspend and Debar Repeat Offenders:** COAC recommends that CBP program ACE to reject entries for any importers that are suspended or debarred from doing business with CBP as identified within any applicable database.
- 26) **Ensure Entities with Financial Interests in Imports Bear Responsibility:** COAC recommends that CBP develop regulations and/or policy guidance that would define what is considered “high risk” shipments and when any additional bonding would be required for the party with a financial interest in the transaction so this could be managed in an automated fashion in ACE (preferably by HTS tariff number). Policy guidance is also necessary since Section 321 de minimis shipments under \$800 in value do not require an importer of record number or bonding, unlike other transactions where this designates the party with the financial interest who is liable for complying with Customs laws and regulations. COAC further recommends that CBP consult with the trade to have more in-depth conversations on these requirements within the DHS report since they have far-reaching implications on the trade to effectively manage and identify the roles of the transacting parties in order to ensure compliance.
- 27) **Action Against Non-Compliant International Posts:** COAC recommends that IPR brand holders be provided with a means to identify in ACE if they provide any approval for their importations to arrive via post or courier service. Many brand holders have strict instructions and a simple flag in ACE could provide a short-term solution for CBP to target that cargo prior to arrival to provide advance notice to brand holders that a shipment is arriving by post or courier, which is likely counterfeit if the brand holder did not provide approval for such transit.
- 28) **BIEC Engagement:** COAC recommends that CBP conduct regular inter-agency meetings with the United States Postal Service as part of the BIEC as well as CBP’s outreach and relationship building with other Partner Government Agencies to address Section 321 compliance, IPR facilitation and enforcement to ensure that similar data sets are required with both the public and private post as other modes of transportation via air, ocean, truck, etc.

#### **Presidential Executive Order on Ensuring Safe & Lawful eCommerce**

- 29) **Customs Brokers:** When developing regulations to respond to this Executive Order, COAC recommends that CBP consider it already has authority under 19 CFR 111.5 and 19 CFR 111.74 to begin proceedings to suspend or revoke a customs broker license or issue a monetary penalty for violations, which provides for due process. CBP also has authority to issue monetary penalties under Section 116 of the Trade Facilitation and Trade Enforcement Act (TFTEA) for which CBP has already issued a Notice of Proposed Rulemaking. COAC encourages CBP to utilize these processes and procedures to the greatest extent possible to address the enforcement issues raised in the Executive Order.

## IPR21 Working Group Background Paper

During the 3rd quarterly meeting of the 10th Term Commercial Operations Advisory Committee (COAC), a subcommittee on IPR Enforcement was established on August 16, 2007. The IPR Subcommittee has since been transitioned to the IPR Working Group (WG) currently residing under the Intelligent Enforcement Subcommittee of the 15<sup>th</sup> term of COAC. After a brief hiatus, the IPR WG was realigned with CBP's 21<sup>st</sup> Century Customs Framework to think of the "Art of the Possible" to fully tackle the growing challenges for IPR enforcement especially in the areas of data sharing.



Violations of IPR remain a threat to the United States economy not only by stealing market share from those who hold the rights to copyright, but also through health and safety risks. With the increase in de minimis and explosion of e-commerce, the express consignment and small package environments pose excellent circumstances in which to camouflage a black market for these types of violations.

While CBP is committed to taking action against IPR violations, available administrative remedies (seizure, abandonment, etc.) pose several challenges to the agency.

- 1) Depending on the remedy utilized, CBP is limited in the information it can share with rights holders, carriers, e-commerce platforms, and other interested parties, which may prevent the trade from taking more proactive and impactful action against known violators.
- 2) Available administrative remedies are limited and carry heavy burdens, which limit CBP's ability to scale these remedies in a manner that keeps pace with growing trade volumes.
- 3) Storing and/or destroying the goods that are detained, seized, or abandoned, also incur logistical and financial challenges, creating further limitations.

**Objectives and Scope of Activities:**

The objectives for the IPR WG are to generate advice and develop recommendations pertaining to enforcement of IPR. Building from the previous recommendations, the IPR WG expanded its focus to examine the entirety of an IPR rights holders' supply chain and develop an innovative and transformational model that leverages anticipatory and proactive behaviors that can address suspected IPR infringing goods before they are imported, as well as increasing collaboration among CBP and those with a role in enforcing the IPR seizure process.

The IPR WG identified where trade actors had opportunities to stem the flow of IPR-infringing goods before import, share and develop best practices for commercial stakeholders, improve intelligence and information flow between trade actors and CBP, and develop new solutions to reduce CBP's IPR enforcement costs, including costs associated with storage and destruction.

Proposed efforts and solutions included:

- Incentivize stakeholder support in removing violative goods from the U.S. economy;
- Strengthen partnerships between CBP and the trade community to promote compliance with IPR laws and enhance enforcement;
- Identify effective approaches for deterring IPR violations;
- Improve the effectiveness of IPR risk assessment through better identification of high and low risk shipments and/or entities;
- Streamline and modernize IPR processes through improved processes and use of technology;
- Achieve outcomes that continue to respect the rights of all parties to due process.
- Review the DHS Report and Executive Order on eCommerce to provide recommendations as needed for implementation.

## **Team 1 – Background to Recommendations for eRecordation**

### **Summary of Future Vision**

Thinking of the “art of the possible” for eRecordation, the trade envisions an electronic environment in which IPR enforcement is made more effective and efficient in the following fundamental ways:

- I) eRecordation - flows automatically from the registration of IPR.
- II) Is the hub for data upon which CBP can rely to target IPR violations.
- III) The CBP system should also be a hub for data from CBP.
- IV) Is a hub or portal for interactivity, allowing CBP and IPR owners the ability to share information in real time to assist CBP and sister law enforcement agencies to make enforcement determinations.

### **Current Status**

All trademarks must be registered with the United States Patent and Trademark Office (USPTO) before they can be recorded and enforced by CBP. CBP’s enforcement is directed against counterfeit imports and those that bear copying or simulating trademarks. Copyrights must first be registered with the US Copyright Office (USCO) in order to record them with CBP for enforcement against infringing copies or phonorecords.

CBP’s recordation database includes information regarding all recorded marks, including images of these marks. CBP officers monitor imports to prevent the importation of goods bearing infringing marks, and can access the recordation database at each of the 317 ports of entry.

Customs and Border Protection (CBP) treats IPR as a priority trade issue and members of the trade take great pains to assist CBP to interdict imports of counterfeits in a prime example of a government-industry cooperative effort.

### **Challenges for Importers/Rights Holders/Brokers**

IPR is registered in the first instance because the IPR owner wishes to protect its rights. When viewed in this context, CBP recordation is a superfluous step without added value. Thus, recordation is an impediment inherently. As a practical matter, it is a challenge for a number of reasons. One reason is that registration is frequently based on rights established in a foreign country entitled under treaty to have such rights recognized in the U.S. Consequently, the owner of the registration process may be non-resident. On the other hand, the U.S. sales and marketing function for these organizations is responsible for the supply chain to the U.S., customs clearance and interface. It is frequently the case that e-recordation is not under the immediate authority of U.S. sales and marketing. Bridging this gap requires time and coordination, especially because each country in which goods are marketed and sold may have disparate systems.

Recordation also adds expense. The recordation fee is \$190 for each registered mark/copyright. In addition, rights holders often incur fees from their IP law firms for the performance of this service. There is also a time expenditure require to record. The time is not merely measured in populating data into CBP’s system. It is also measured by the amount of time necessary to re-research IPR in order to validate information.

The bottom line is that eRecordation is a redundant system. Why register and then record with CBP? This complexity unnecessarily limits rights holders participation. IPR holders register because they want their rights to be enforced under Federal law. Therefore, registrations should be presumptively enforceable and enforced by CBP. Rights holders should not be obliged to perfect the eRecordation process. However, we can and should maintain the data in the CBP portal in ways that will enhance enforcement and information exchange.

### **A Hub for Enforcement Information Needed by CBP**

Though Team 2 will deal with information exchange in the broader environment, Team 1 wishes to make sure that the electronic systems used as a registry of IPR to be enforced by CBP is also multi-functional. That electronic system should also be the registry for enforcement targeting data such as:

- U.S. licensees of the IPR;
- Authorized manufacturing locations;
- Known offender data;
- Unique identifiers or verifiable credentials that promote more secure trade by providing greater insights into importers of genuine articles and their histories; and
- IPR owner contacts associated with IPR to assist with determinations of authenticity.

The system should also make it easier for CBP to research and locate information filed by IPR owners such as brand identification guides. Using automation to allow CBP officers to enter a search term and be brought automatically to the relevant page of an IP owners Brand Identification Training Guide uploaded to CBP's systems. Right now, one visible problem is that frontline officers don't have the time to search through detailed brand manuals to find what they're examining. We need to make this easier for them.

As an example data could be linked to keys that could be shared with brokers and then transmitted to CBP in the entry filing process in ACE. The keys would identify to the authorized licensee/importer (validate to IOR) and item level (to extent the holder loads this info). The key would link directly to the appropriate locations in the recordation database that could automate release or allow officers to very quickly make determinations. Shrinks the haystack and allows CBP to focus its efforts on potential bad actors. Also, it is essential that the system for maintaining the data is user friendly for SME's and automated for use by folks with lots of data to share.

This same system would also help effectuate the implementation of new enforcement tools such as debarment and a new "IPR denied parties" list. There are troves of information about counterfeiters by the trade, CBP, ICE and other agencies that can be put to more effective use. Known counterfeiters, like terrorists, proliferators and other bad actors, present a threat to U.S. health and safety. There should be included in a Denied Parties list, these known offenders. This would stop couriers, to cite one prime example, from unwittingly carrying the increasing numbers of low value (321 exemption type) counterfeit shipments flooding the country.

The above is also consistent with current COAC recommendation: **eRecordation Automation 10374:** COAC recommends the CBP receive budget and resources to make the following improvements to the eRecordation system: **Electronic Updates:** Allow rights holders to update information electronically on specific products, such as adding new, or deleting former, licensees, manufacturers or subsidiaries, in a secure mode. **Renewal Prompts:** Provide prompts or alerts of the renewal process enabling rights holders to electronically take subsequent responsive actions. **Interactive Recordation System:** Make the eRecordation system more interactive with the rights holder, permitting an exchange of more detailed information, in a secure mode, about products contained in the system in order to assist customs officers in identifying legitimate merchandise.

### **A Hub for Information from CBP**

IPR owners want to be able to connect/trace detentions to seizures. There's needless frustration experienced by brand owners contacted by Customs to authenticate detained imports suspected to be counterfeits. For all of our efforts, we do not and cannot know whether our feedback results in a seizure because the seizure notices do not link back to detention notices.

Problems arise when CBP officials are not sure whether imports are real or fake. When imports are suspected to be counterfeits, CBP officers will regularly detain the goods and ask the IPR holders for help in authenticating them. In response, IPR holders provide feedback but frequently do not learn whether that feedback was effective as they are often not informed of the results. Moreover, if they receive notice of

seizure, the notice does not refer back or tie to detentions. In short, there are limited meaningful methods for IPR holders to gauge the effectiveness of their efforts to help CBP.

We would like to see this remedied: CBP should report the results of assistance rendered by IPR holders so that the latter can track and trace on a transaction basis from detention to seizure or release. With this information, IPR holders will know better how the assistance provided to CBP should be refined or improved. They will be able to show their management that the resources invested in helping the government are well spent and will be in a better position to evaluate increases in resourcing (either personnel or budgetary). They will be incentivized to continue to work together with CBP in a two-way collaborative effort in which responses to CBP requests are conditioned to best achieve the objective of protecting U.S. businesses and consumers.

In addition, currently, there is no access for brokers who play an integral part in the Customs clearance and enforcement process. As key trade partners to importers and CBP, often with access to data very early in the supply chain, brokers are equally concerned with ensuring the facilitation of legitimate goods and enforcement against bad actors. Lack of access to current information inhibits the broker's ability to properly vet importers and act as an effective force multiplier in preventing the importation of infringing goods. Customs brokers should also have access to information about rights holders recorded goods, something that would add a layer of enforcement, help to facilitate trade and automate screening processes.

#### **A Vehicle for Real Time Communication with IPR Owners of Record and Between CBP Offices**

The electronic system can be used to send and receive e-messages for purposes of authentication of detained goods. It can also be used for issue notices of seizure to IPR holders. In either case, functionality could include the ability of IPR owners to request additional information such as photographs and samples. IPR bond information can also reside in the system.

IPR owners who've recorded contact information can indicate email addresses and mobile device IDs for purposes of automatic distribution of the above-mentioned messages from CBP. Consistent with current COAC recommendation eRecordation 10356 the system would foster internal CBP communications.

eRecordation 10356 stated as follows: COAC recommends that CBP improve communication with the ports of entry through the designated CBP Centers when onboarding new rights holders who register their brand through the eRecordation process. This should encourage participation in the eRecordation program by avoiding unnecessary delays, detentions or seizures.

#### **Possible Solutions for Discussion Related to Above**

Until the CBP system can be automatically updated with registered IPR for automatic enforcement, certain interim steps need to be considered. To modernize the Customs operations around IPR enforcement, the Working Group has already suggested an interactive eRecordation portal that would reduce the lag-time in recording trademarks and allow for real-time updates of authorized user information. In addition, Team 1 recommends the elimination of trademark-by-trademark recordation. The IPR owner should be able to record multiples marks and trademarks simultaneously.

Another solution would be a portal that would allow rights holders to file their IPR and other information at the same time. Additionally, it has been proposed that the Automated Commercial Environment (ACE) be updated to carry the capability of recording IPR, including the renewal of marks as well as the expiration and renewal of license agreements, etc. thus alleviating the need for separate systems.

## **Team 2 Background to Recommendations**

Team 2 was established to discuss and review recommendations for Data Sharing, the DHS Report on Combatting Trafficking in Counterfeit and Pirated Goods, and the Presidential Executive Order on Ensuring Safe and Lawful eCommerce for U.S. Consumers, Businesses, Government Supply Chains, and Intellectual Property Rights. The background to each recommendation is provide below.

### **Recommendation 12 on Blockchain Example**

In the world of electronic equipment, this could be serial numbers applied by the Rights Holder for specific models of legitimate goods such as servers, routers, switches, disk drives, etc. For electronic components such as integrated circuits, capacitors, etc. the data would include date code and lot code for specific part numbers of legitimate product. For non-electronic products, this approach could be applied to anything with a unique identifier such as a serial number or production code. The Importer and/or CBP would interrogate the Blockchain database as follows:

- Before an order is placed, or before shipment, the overseas supplier provides the serial number, model number, date code, part number, etc. to the Importer. The Importer queries the Blockchain database. If there is a match, then the order is placed and shipment proceeds. If there is not a match, then the order is cancelled and the shipment never happens. CBP does not have to deal with the product at all.
- After the shipment begins from the overseas port, the carrier (e.g., UPS, FedEx, DHL, other) provides the commercial invoice to CBP for preclearance. CBP uses optical character recognition to capture the serial number, model number, date code, part number, etc., and interrogate the Blockchain database. If there is not a match, then the shipment is targeted for further inspection upon arrival at the port of entry. If there is a match, the shipment proceeds without further inspection or proceeds to visual inspection upon arrival.
- If scenarios 1 or 2 are not possible, then the Import Specialist at the port of entry could interrogate the Blockchain database during the physical inspection process.

### **Recommendation #13 Data Sharing Background**

Although CBP has well-drafted regulations and timelines for sharing data with both importers and IP owners, those regulations have not been reasonably implemented and suffer from lack of automation. In particular, CBP regulations provide for notice of detention to the Importer with a seven-day period to respond before disclosing information to the IP owner (19 CFR 133.21(b) but

- The same detailed information is not provided to the importer
- The information often goes to an intermediary (e.g. express carrier) rather than the importer/consignee
- The information is not shared timely or through an automated system with either the importer or IP owner

### **Recommendation #14 Trusted IPR Vendor Background:**

What one company considers a “bad actor” might actually be a contractual issue. We suggest focusing on a “Known” Vendor list, which would allow CBP to focus more closely on the importers who are not authorized or otherwise known to CBP with prior importation history. CBP has a history of repeatedly detaining genuine goods based upon reasonable suspicions that the goods are counterfeit because they are goods traded lawfully in the secondary, unauthorized, parallel or gray market. The goods are often regarded as suspicious because the importer is “unknown” to CBP or the goods are older, reconditioned or refurbished models. The importers are often long-time importers who share the interests of CBP and IP rights holders in stopping counterfeit goods. CBP’s effort to focus on and find counterfeit goods would be greatly enhanced by diminishing the number of inspections, detention, seizure and forfeiture actions involving goods ultimately determined to be genuine.

The below example provides some background scenarios on why this could be useful.

**Example 1:** UNIM Corporation (Unauthorized Importer) has been in business for ten (10) years routinely importing brand name electronics, health and beauty aids into the US. UNIM has a strong policy against buying and selling counterfeit goods and has no history with CBP of seizures involving counterfeit goods. It also consistently checks CBP recordations to avoid products which are gray market restricted or subject to the Lever Rule.

UNIM has received many detention notices from CBP based upon a suspicion that its goods were counterfeit. In most instances they obtained release of the goods by proving authenticity (either during the detention stage or after seizure). On a few occasions, they have abandoned such goods where the value of the shipments were very small and the evidence of authenticity was unavailable, or found unacceptable by CBP, and the cost of further pursuit of the issue was prohibitive. On one occasion a shipment included goods concededly counterfeit: UNIM abandoned those goods upon learning that counterfeit goods had been shipped and cooperated with CBP in its investigation of the transaction.

Also, UNIM has often been sued, and successfully defended against, claims that the goods which they bought and sold were counterfeit or infringing. There have been many cases involving counterfeit claims which were essentially claims to further restrict unauthorized trade in genuine goods.

**Scenario 1:** UNIM imported a small shipment of used computer equipment (\$25,000 value) which had been refurbished abroad. CBP determined that the goods were counterfeit based upon a proprietary test provided to it by the brand owner.

- Based upon that decision, CBP issued a seizure notice and skipped the detention notice process.
- The notice to UNIM provided no information regarding the basis for determining the goods were counterfeit.
- UNIM requested samples, images or photos and the FPF office denied the request, advised UNIM to file a FOIA request, its FOIA request was denied and the CEE subsequently provided images.
- A request for an explanation of the basis of the determination that the goods were counterfeit was denied on the grounds that the information provided to CBP by the brand owner is confidential.

**Scenario 2:** UNIM imported a shipment of fragrance products which CBP detained based upon a suspicion that the goods were counterfeit. The goods were detained and a detention notice placed in the mail stating that the goods were detained for possible violation of the trademark laws and with an accompanying notice that the importer had 7 days to respond to the notice before CBP would provide detailed information to the IP owner.

- UNIM received the detention/7-day notice five days later and immediately requested a sample, images or photos to determine whether to contest or concede the detention.
- Forty-five days later, with no response to the request for a sample, photos or images, CBP issued a seizure notice.
- The importer repeatedly spoke to CBP on the phone, filed written requests for extensions of time to respond to the detention notice; filed responsive petitions to the detention and seizure notices.
- Images were provided six months after the detention and based upon those images, the importer conceded that the goods were counterfeit and abandoned the goods.

#### **Issues:**

1. Does CBP have defined authority to dispense with the detention notice process? When should it exercise that authority?
2. Does CBP have good information to provide detention notices electronically on the date of detention, and if not, can it do so?
3. Can CBP share more detailed information in its detention notice, allowing the importer to understand the reason for CBP's suspicion so that it may respond to that suspicion?
4. CBP currently does not take advantage of its authority to share samples, photos or images with the importer to enable it to resolve the problem during the 7-day period for an importer's response to a detention notice (19 CFR 133.21(a)(1)). Can it, or should it, do so?

5. CBP currently does not take advantage of its authority to share samples, photos or images with the IP owner in a timely fashion to promote early resolution of its suspicions (19 CFR 133.21(a)(3) for redacted samples and 19 CFR 133.21 and 19 CFR 133.21(c) and (e) for unredacted. Can it, or should it, do so?
6. CBP currently does not have a way to treat a company like UNIM as low risk, and in fact, more than likely treats it as high-risk, resulting in unnecessary devotion of substantial resources into prolonged detention-petition-seizure-petition-release procedures. Can CBP develop risk assessment criteria that lowers its risk assessment of companies like UNIM?

**Example 2:** In many instances, a shipment of goods may be detained due to the presence of what CBP determines to be a potentially infringing accessory. By way of example, a shipment of portable wireless speakers may be packaged with an adaptor that is claimed to bear an infringing certification mark or a manual that is alleged to include an infringing reference to another’s trademark.

In these types of situations, the importer typically had no intent to purchase/import goods with potentially infringing marks. Often the main article, in this case the speakers, bear the importer’s own branding, so there is no attempt to trade off the allegedly infringed mark. In the example, it is unlikely that the adaptor or the manual would have been visible to a potential purchaser. The speakers themselves are not counterfeit.

In such circumstances, we propose that the importer be given the opportunity to manipulate the shipment to remove and destroy the allegedly infringing accessory/manual under Customs’ supervision at the CES or at a local bonded warehouse to resolve the detention outside of the seizure process. Under the Customs laws and regulations, such manipulation is permissible where goods are considered confusingly similar (*See* 19 C.F.R. §133.22). Under this proposal, no infringing goods would enter U.S. commerce and any potential health and safety concerns would be eliminated. Seizure is inefficient and expensive for both the importer and CBP. Implementation of this proposal would help promote greater Government efficiencies.

#### **Rights/Brandholder Concerns about a Trusted IRP Vendor Program**

- At the July 27, 2016, quarterly meeting, the IPR Working Group concluded its efforts on the proposed IPR Known Importer Program, stating that “after extensive exploration and discussion, the COAC recommends that the Known Importer Program initiative cannot be managed uniformly by all trade associations to pilot and/or implement the program at such time.”
- At the August 23, 2017, quarterly meeting, the COAC recommended that the IPR Working Group continue to consider other approaches to developing a known IPR supply chain program that includes working with the National IPR Center to extend Trade Association participants to promote the “Report IP Theft” campaign and encourage real-time reporting of IPR violations through a newly established 800 Hotline.
- CBP provided the IPR Working Group information on using CBP’s e-Allegations system as a way to report IPR-related trade violations, in addition to IPR Center’s “Report IP Theft” button. CBP also informed the working group of its efforts to promote the use of e-Allegations by the trade community and the public.
- During March 2020 discussions, the IPR Working Group suggested focusing on a “Trusted IPR Vendor List”, which would allow CBP to focus more closely on the importers who are not authorized or otherwise known to CBP with prior importation history.
- If the COAC decides to move forward with the recommendation, we offer the following guidance:
  - Seller and importer vetting are of the utmost importance to the genuine supply chain. The current recommendation designates responsibility to various Centers of Excellence to make a vetting determination without standards or guidelines as to the process of vetting. If implemented, the COAC should establish clear standards and definitions for vetting.

- A trade group membership or other similar organization cannot be relied on for vetting because they do not have the expertise or bandwidth to manage this detailed and technical process. Mere affiliation with an organization cannot substitute proper vetting.
- Scale is critical. The stated purpose of the recommendation is to reduce the number of shipments CBP must open to detect counterfeits. The only way to accomplish this objective, is if the program has thousands of companies and importers on the list. If the companies lack proper vetting, this recommendation could be used directly against the state purpose, to import additional counterfeit goods.
- In the past, counterfeiters have been able to capture “cleared” or “known actor” lists. Counterfeit importers who are not on the list could hijack the identity of an importer on the list to ship counterfeits into the U.S.
- If adopted, COAC should recommend recertification as a requirement every 3-6 months.
- COAC should consider how a non-compliant actor would be removed from the list. If the current recommendation stands as written, once a vendor becomes verified, you may remain on the list indefinitely. Policies that should be considered include: one strike and you're out, an appeal process, barring an importer if failure to comply, etc.

#### **Additional Discussion Points**

- Industry partners and CBP can work together to increase the accuracy and completeness of information provided to CBP on small shipments entering the United States with the goals of decreasing unnecessary IPR exams, increasing CBP’s ability to target shipments containing IPR-infringing goods, and reducing processing costs without the adoption of this recommendation.
- CBP and the IPR Working Group members can explore how other mechanisms such as block chain may be used to promote partnership on the secure provision of IPR-related supply chain data between CBP, rights holders, and potentially e-commerce platforms.

#### **Background to Recommendation #22 on Co-Mingling**

For sales made via eCommerce platforms that are fulfilled by the platform by one of its warehouses, the online merchant has the option of maintaining segregated inventory in the warehouse (barcoded and stickered with their specific merchant ID), or going “stickerless” which allows their inventory to be co-mingled with that of other merchants who sell the same SKU. The primary reason for doing this is to allow the eCommerce platform to fulfill a sale from the closest warehouse to the customer, allowing for faster delivery. Merchants see this as a way to provide better service to their customer because people want things as fast as possible. The risk, of course, is that the well-intended merchant’s inventory can get co-mingled with a less scrupulous merchant’s counterfeit inventory. In turn, their customer can end up getting counterfeit product. For the online customer, it’s impossible to know how their order will be fulfilled. They can’t tell if the inventory has been co-mingled or not.

#### **Background to Recommendation #25 on Suspension and Debarment**

CBP has instituted an operational approach to combating trade violations, safeguarding economic security and detecting, deterring, and disrupting illicit trade practices. In line with this strategy, CBP has incorporated non-procurement suspension and debarment (S&D) procedures into the trade enforcement process as an added defense measure. These are captured into the SAM database that CBP uses to manage these cases.