

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

IPR Working Group Background Document
July 15, 2020



COAC Intellectual Property Rights (IPR Working Group)

The IPR Working Group has over 75 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 (CBP) included the Office of Trade, Office of Trade Relations, Centers of Excellence and Expertise, and Office of Field Operations.

Since the COAC meeting on April 15, 2020, the IPR Working Group created Team 3 to continue our work and review of the following initiatives.

- [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.](#)

IPR Restricted & Prohibited Party List (IPR RPP List)

At the April meetings, COAC unanimously passed a recommendation that CBP should program the Automated Commercial Environment (ACE) to reject entries for any importers that are suspended or debarred from doing business with CBP as identified within any applicable database. COAC submitted this recommendation in response to the DHS report issued January 24, 2020. The DHS Report also found that [Executive Order 12549, Debarment and Suspension](#) should be amended to clarify the scope of suspension and debarment to:

- prevent participation in the importer of record program
- require regulated entities to screen their customers against the list
- explicitly bar suspended and debarred persons from participating in the importer of record program.

We understand the [Suspension and Debarment List](#) only includes importers of record and no other parties. For instance, foreign or intermediary sellers, resellers, and domestic consignees, that may be facilitating the trade of counterfeit or piratical goods are not included on this list. Further, the list includes numerous parties that have been suspended or debarred for reasons completely unrelated to IPR, or even CBP enforcement.

Accordingly, the COAC IPR Working Group reflected further on these issues and is pleased to present the following recommendations:

- 1) **IPR Restricted and Prohibited Parties List:** COAC recommends that CBP should seek and obtain the legal authority to create and enforce a comprehensive “IPR Restricted and Prohibited Parties List” (hereinafter called the **IPR RPP List**) consisting of foreign and domestic parties (i.e., individuals, companies or organizations) who are known offenders due to repeat violations. There are troves of information about counterfeiters by the trade, CBP, ICE and other agencies that can be put to more effective use through a consolidated approach and system. Known counterfeiters like terrorists, proliferators, and other bad actors, present a threat to U.S. health, safety, security, and the economy. The **IPR RPP List** would serve to deter and reduce the numbers of de minimis (Section 321) as well as other informal and formal entries of counterfeit shipments flooding the country.

- 2) **Public Lists:** COAC recommends that CBP create and enforce the **IPR RPP List** based on the successful use of other lists created for “denied parties” from entities such as Bureau of Industry and Security (BIS), Directorate of Defense Trade Controls (DDTC), Office of Foreign Assets Control (OFAC) and CBP’s own Debarred or Suspended Importers list.
- 3) **CBP IPR Database Portal:** COAC recommends the **IPR RPP List** be developed with information that contains data from numerous sources including the IPR rights holder’s own internal investigations. This list would be housed in a new CBP IPR Database Portal, and would complement CBP’s IPR eRecordation Application, which serves as CBP’s system of record for IPR administration and enforcement.
- 4) **IPR RPP List Criteria:** COAC recommends CBP develop a process and criteria to place parties on the **IPR RPP List** based on information gleaned from the CBP IPR Database Portal as well as CBP’s own internal resources from [IPR Seizure Statistics](#) and targeting intel. Such criteria should be made public and consider violations, such as:
 - a. Shipments without valid licensing agreements (if required)
 - b. Repeat offenders with more than three (3) seizures and/or uncontested detention notices.
 - c. Foreign shippers or consolidators of violative goods even if consolidated and co-mingled with legitimate merchandise due to repeat violations.
 - d. Any seizures reported on CBP’s annual IPR Seizure Statistics report, which currently only provides commodity, country of origin, and value details, not any list of the violators.
- 5) **Trusted IPR Vendor List:** In support of prior recommendation 10437, COAC recommends that CBP should complement the **IPR RPP List** with a Trusted IPR Vendor list. In addition to the criteria from our prior recommendation, CBP could also consider the receipt of ruling requests from the trade community concerning prospective transactions. Under 19 CFR Part 177, the Office of Regulations & Rulings may issue binding rulings in respect to a specifically described transaction, that constitute a definitive interpretation of applicable law.
- 6) **Appeal Process:** COAC recommends that CBP develop an appeals process to allow for parties to be removed from the **IPR RPP List** and ensure due process. The appeal process should be made public and consider the criteria to be removed from the **IPR RPP List** and timeframe for doing so to avoid unnecessary hardship on the trade. Such criteria should include:
 - a. Party provides receipt of proper IPR licensing
 - b. Party changes sourcing to an approved or licensed supplier or distributor
 - c. Party can remove violative goods from co-mingled shipments and correct problems with co-mingled and/or consolidated shipments.
- 7) **Publicly Available:** COAC recommends that CBP make the **IPR RPP List** publicly available, like the BIS, OFAC, and other lists. **The IPR RPP List** should include the entity names and addresses and be downloadable so these lists can be managed in proprietary software for vetting purposes.

- 8) **ACE Integration:** Similar to recommendation 10446, COAC recommends that CBP program ACE to reject any entries for any parties on the **IPR RPP List** and have an automated process to remove them from the list through the appeals process.

Postal Shipments

eCommerce sales have contributed to large volumes of low-value packages imported into the United States. In FY 2019, CBP processed over 144 million express shipments and 463 million international mail shipments. As part of executing CBP's overall eCommerce strategy, CBP announced a Section 321 Data Pilot in collaboration with online marketplaces, carriers, technology firms, and logistics providers to secure eCommerce supply chains and protect American consumers. The pilot will allow CBP to test whether receiving additional advance data, (beyond the current required manifest data) will improve targeting on Section 321 shipments.

Due to differing requirements for advance electronic information, a significant risk-assessment gap for low-value shipments exists today between air cargo and mail. Currently, approximately two times the number of shipments are interdicted in the express air cargo environment than in mail, despite the fact that express cargo volumes are significantly lower than mail volumes. This statistic attests not only to the risk-assessment value of the data that is currently provided by express air carriers to CBP for shipment clearance, but also to the strong likelihood that CBP is failing to interdict a considerable number of non-compliant mail shipments due to advance data deficiencies. With CBP's increased focus on combatting trafficking in counterfeit and pirated goods, the urgency to close this risk-assessment gap has grown.

In 2018, Congress acted to compel the provision of data for mail risk targeting. The 2018 Synthetic Trafficking and Overdose Protection Act (STOP Act) required USPS to transmit advance electronic data to CBP for 70% of all inbound mail shipments by the end of 2018, including 100% of shipments from China. Further, the STOP Act required that implementing regulations be promulgated no later than October 2019, and that advance electronic data be provided for 100% of shipments into the U.S. by December 2020. Although the STOP Act contemplated that its provisions might place the United States in violation of existing postal treaties and conventions, it also made clear that work to amend such documents did not permit a delay to the implementation of the Act's provisions.

The COAC understands from publicly-available documentation that today, advance electronic data is still not provided for a significant percentage of mail arriving into the U.S. from China and other origins. Additionally, there are quality issues with the data that is provided, and not all mail shipments tagged by CBP are actually interdicted by USPS and presented for inspection. Further, we note that as of July 2020, CBP has not promulgated the required regulations to secure the mandatory implementation of the STOP Act's provisions. With this backdrop in mind and with over 76% of eCommerce shipments arriving via international mail, COAC puts forth the following recommendations:

- 9) **STOP Act:** COAC recommends that CBP promulgate regulations to implement the requirements set forth in the Synthetic Trafficking and Overdose Protection (STOP) Act. Such regulations should ensure that USPS provides advance electronic data for risk assessment for 100% of mail parcels that enter the United States, with the level of information provided comparable to that already required of inbound air cargo.

Additionally, as CBP further develops its e-commerce strategy and contemplates the potential adoption of new data requirements for e-commerce shipments, it should ensure that such requirements are applied simultaneously in the cargo and mail environments. In particular, COAC recommends that additional requirements not be placed on air cargo until the technical, legal and practical barriers for mail data requirements have been resolved satisfactorily, such that advance data requirements—both current and new—can be mandatorily applied to 100% of mail shipments arriving in the U.S.

Finally, as part of its ongoing COAC e-commerce and IPR work, CBP should collaborate with COAC and/or Working Groups dedicated to the topic of advance data for mail in order to consult and issue recommendations in this regard.

IPR RPP List Background Paper

A. CBP and Other Government Agencies Have Successfully Utilized Denied, Restricted, Debarred or Suspended Party Lists to Prohibit Trade with Bad Actors

For export control purposes the Bureau of Industry & Security, Department of Commerce (BIS), Department of State, Directorate of Defense Trade Controls, Department of State (DDTC) and Office of Foreign Assets Controls, Department of Treasury (OFAC) among others have utilized denied party lists to enable regulators to restrict and/or prohibit trade with bad actors. Such lists include the specially designated nationals and blocked persons list per the existing OFAC type procedures https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_lists.aspx#sdn.

Freight forwarders are required to screen against these lists for export purposes and customs brokers, couriers and other third parties may verify against these lists where imports may involve these parties. As there is no importer or exporter number provided, these lists can only be tracked by name and address.

Meanwhile, CBP maintains a debarred or suspended importers list. Debarred parties may not import or do business with CBP. However, this list alone will not address section 321 IPR issues because it is not a comprehensive list that includes counterfeiters and is limited only to importers, exclusive of overseas parties. See CBP.gov for information on the S.A.M. database that manages debarred and suspended importers. <https://www.cbp.gov/trade/programs-administration/suspension-and-debarment>.

We note that up until about twenty (20) years ago, CBP did issue 1592(a) and (b) lists including foreign factories that had been issued, or against whom CBP attempted to issue, 19 USC 1592 commercial negligence or fraud penalties. CBP required importers sourcing product from such companies to demonstrate a heightened level of reasonable care to demonstrate to CBP that merchandise procured from such entities complied with CBP laws and regulations.

B. To Combat Trafficking in Counterfeit and Pirated Goods CBP Should Adopt an IPR Restricted and Prohibited Party List

Known IPR violators represent a similar type of danger to the U.S. as parties (e.g., narcotics traffickers, money launderers, export control violators) subject to the OFAC or other lists, because the importation and sale of many counterfeit goods are a threat to health, safety, security and the economy. What one company considers a “bad actor” might actually reflect a contractual issue or dispute. We suggest focusing on an “IPR Restricted or Prohibited Party List” which would allow CBP to focus more closely on the foreign parties who are unauthorized manufacturers as well as domestic parties sourcing from these entities that are not otherwise known to CBP without prior importation history. Perhaps parties who have been found to deal with counterfeit goods subject to a lesser offense (administrative detention or seizure) initially could be placed on the restricted list warranting automatic detention for all future shipments until further notice. Parties found to traffic in counterfeit goods subject to a higher offense (civil liability or criminal prosecution) or repetitious violations could be placed on the prohibited list barring future shipment until further notice.

On a cautionary note, 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 IPR rights holders in stopping counterfeit goods. CBP’s effort to focus upon 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.

A restricted or prohibited IPR party list would be critical to halt counterfeit trade in the section 321 as well as informal and formal entry context. The trade community as well as CBP needs a paradigm change that moves us from what is an in rem (against the property) approach, which only evaluates whether the merchandise itself is violative, as opposed to an in personam (against the person) approach which considers the parties involved in the transaction. We need more dedicated and energetic action against actual violators in addition to actions against violative goods. Such an effort would also be intended to assist the many key players in international commerce who do not have a sanctioned way to identify violators.

For example, express consignment carriers complain that they are not put on notice about the identity of bad actors such that they can refuse shipment tender. An IPR Restricted and Prohibited Parties List would constitute such notice. In addition, shipments involving bad actors would be presumptively inadmissible, clearing up CBP’s resources to identify whether goods are counterfeit. The mere risk of being put on a list might chill illegal conduct.

The final decision as to who is placed on the restricted or prohibited IPR party list would rest with CBP with input from the trade community, such input fostered by functionality in the new IPR portal. Regarding the above-mentioned concern about false positives (e.g., gray market importers), we have not and do not suggest that IPR holders designate such parties.

The IPR Working Group has advanced the concept that IPR holders may provide reliable evidence of counterfeiting. Evidence submitted by multiple IPR holders (multiple types of evidence, multiple instances) would be filed in a single system (the portal), consolidating evidence from multiple sources about the same violators. This is absolutely critical, akin to shared criminal data bases relied upon by law enforcement.

CBP can verify and assign weights to various forms of evidence (i.e., cease and desist order from a court versus prior CBP seizures versus criminal prosecutions at federal, state, and local levels). Statutory mandate and regulatory action will be necessary. However, the concept may be explained by borrowing from BIS and OFAC type procedures. For example, see https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_lists.aspx#sdn.

We reiterate that debarring or suspending parties who do not import or conduct business with CBP is a start to curbing the flow of counterfeit merchandise, but this action will not solve the Section 321 IPR problems or address overseas counterfeiters. Accordingly, we recommend a restricted or prohibited party list modeled after the OFAC specially designated nationals and blocked party lists as well as other similar lists.

Finally, an IPR Trusted Vendor concept should complement the IPR RPP List. CBP should continue to seek and/or receive authorized/licensed imports/importer information. IPR holders should be able to green-list such parties to make CBP's and trade's job easier. Parties do this already on eCommerce sites. Further, CBP should be fully engaged in developing and administering the IPR Trusted Vendor process so that parties may be removed from the list as appropriate or recognized as compliant parties to avoid being placed on the list to begin with.

Several factors could indicate whether a party should be considered a Trusted IPR Vendor such as receipt of a binding ruling from the Office of Regulations & Rulings confirming the genuine nature of merchandise. While this does not resolve the false positive issue attributable to gray market goods, it does not presumptively demand more enforcement attention to gray market goods and would provide an avenue for such parties to demonstrate they do not engage in the trade of counterfeit or piratical goods.

C. CBP Would Need to Develop a Uniform Process as well as Criteria to Place Parties on the IPR Restricted and Prohibited Parties List

The IPR RPP List should include bad actors, both foreign and domestic entities, that are repeat violators, including entities receiving seizure and detention notices as well as being subject to other administrative or judicial proceedings. They should be included on this list for customs brokers, express carriers, and freight forwarders to identify and not conduct business with them.

CBP has a wealth of targeting information on the domestic and foreign side due to repeat detentions and seizures they manage. CBP publishes annual IPR statistics that provide the top commodities, values, modes of transit, etc. From that same list, there should also be entities that caused these detention and seizures that could be included in an IPR RPP List.

On the domestic side, trade would need to ensure a sufficient vetting process to make sure neither the trade nor CBP are improperly capturing gray market importers and the like who can legally import. Neither should smaller users that innocently ordered something that turned out to be counterfeit be automatically included on the list.

The IPR RPP List can also include information from trademark owners concerning entities that are trafficking in counterfeit goods. This could include information that CBP is unaware of and will help them target and examine those goods and, if found to be counterfeit, seize them and start to develop records on those individuals. For example, IPR holders may be working with a joint taskforce between ICE and local law enforcement on conducting criminal investigations or raids that could result in prosecution by the local district attorney and conviction of the party. While at the same time, this party could be violating other IPR holders' rights that might result in multiple seizures.

CBP must provide this list because they have the only holistic view of information. Any one party will only have limited information that is more reactive than proactive based on past history. CBP can provide a more comprehensive list through an automated process. Pending the development of the new CBP IPR database portal that would complement CBP's IPR e-Recordation Application, which serves as CBP's system of record for IPR administration and enforcement, CBP should explore how ACE be used short-term to maintain this list.