

Questions for the Record from Rep. Darrell Issa for Mr. Lord
Hearing on “Intellectual Property: Enforcement Activities by the Executive Branch”
May 7, 2024

1. Since 2021, there has been a decrease in the number of seizures and a decrease in the value of goods seized for IP infringement, despite an increase in international trade. What is driving this decrease?

Response: U.S. Customs and Border Protection (CBP) intellectual property rights (IPR) seizures have decreased since Fiscal Year (FY) 2021, as that FY experienced a surge in IPR seizures as a result of the COVID-19 pandemic. In FYs 2021 and 2022, CBP seized millions of counterfeit face masks and medical masks which surged in demand during the COVID-19 pandemic. However, CBP IPR seizures have significantly increased over a broader five-year period since FY 2019 (prior to the pandemic). During that five-year period, the total number of goods seized for IPR violations has more than doubled, and the total manufacturer suggested retail price of goods seized for IPR violations annually has increased by almost 80 percent.

2. What resource constraints for processing of imports are there that prevent CBP from more fully addressing the issue of counterfeit and copyright piracy goods?

Response: Since FY 2015, the volume of shipments entering the U.S. claiming the de minimis administrative exemption under 19 U.S.C. 1321(a)(2)(C) have increased by more than 660 percent. In FY 2023, CBP processed over one billion de minimis shipments, a record we anticipate surpassing this year. In FY 2023, 90 percent of CBP’s IPR seizures in the cargo environment occurred in the de minimis environment. While the volume of de minimis shipments has increased dramatically, CBP’s resources, automated tools, and legal authorities have remained largely unchanged. Advances are needed across all three of these areas to address the challenges CBP faces in the de minimis environment, including IPR enforcement. CBP would be pleased to further discuss the specific statutory proposals that were submitted to Congress in late April 2024, as part of the Detect and Defeat Counter-Fentanyl Proposal, that address some of these issues.

3. Does the fact that CBP needs approval from the Secretary of Treasury as well as the Secretary of Homeland Security, to issue new rules addressing trade, including the processing of counterfeit goods, have an impact on CBP’s ability to address the problems of counterfeit and copyright piracy goods entering the U.S.?

Response: The existing approval process between the Secretary of the Treasury and the Secretary of Homeland Security does not negatively impact CBP’s IPR enforcement work.

4. How many steps are involved in the seizure and forfeiture process for IP infringing goods, and how burdensome is that process?

Response: There are several steps involved in the seizure and forfeiture process for IP infringing goods. Prior to seizure of the goods, targeting and examination of the shipment is required. Goods may then be detained for up to 30 days while CBP determines admissibility. Once a

determination to seize is made, the goods must be inventoried by category of goods and registered/recorded marks. An appraisal is then created to proceed with the seizure and the goods are then transferred to a secure storage facility. A notice of seizure is then sent to all interested parties (consignee, shipper, property rights holder, etc.) and a notice of forfeiture is posted to Forfeiture.gov to advise any interested party not originally known before the Government may perfect title. If received, any petitions and supplemental petitions for the return of the property by interested parties are decided by CBP. For supplemental petitions, if the remission is denied at the local level, which depends on delegated authority, the supplemental petition is reviewed by headquarters personnel. The written decision to either remit the forfeiture and return property or deny the petition is sent to the petitioner.

After the above steps are completed, the forfeiture declaration is signed, and goods are destroyed. When CBP imposes civil penalties following the seizure of goods, there are additional notification and petition processes applicable to the imposition of the penalty. Typically, this entire process takes 180 days to complete from physical examination to ultimate disposition of the merchandise (i.e., remit or destroy) plus an additional 30 days when goods are detained. CBP's administrative costs associated with forfeiture average approximately \$2,300 per seizure regardless of merchandise value. The cost to store goods during the administrative process and the eventual destruction costs are a burden on CBP and the Treasury Forfeiture Fund.

5. How does the length, complexity, and cost of the seizure and forfeiture process affect CBP's ability to target and combat counterfeit and copyright piracy goods?

Response: Most IPR seizures occur in the de minimis environment. Under current law, CBP must follow the same seizure and forfeiture process used in the traditional containerized environment for every small package seized. CBP needs statutory authority to dispose of low-valued goods more expeditiously and efficiently in the small package environment. CBP seeks authority: (1) to obtain title to detained goods in the de minimis environment if no response is received from interested parties within 15 days and subsequently to dispose of those goods in accordance with law; and (2) to summarily forfeit certain violative small packages, including those that are IPR-violative, rather than undergoing a lengthy administrative forfeiture process. These legislative proposals have cleared interagency review and CBP would be pleased to provide technical drafting assistance to your staff if desired. Within its current legal authorities, CBP is exploring alternatives to its operational processes to more efficiently process seizures and forfeitures.

6. Why did CBP cancel the voluntary abandonment pilot for suspected IP-infringing goods encountered in small parcels, and what is the status of the proposed rule to allow for data sharing with rights holders following a voluntary abandonment?

Response: CBP is no longer conducting the voluntary abandonment pilot for suspected IP-infringing goods in the small package environment. CBP uses alternatives to seizure, such as the abandonment process, for low-value shipments in the small package environment, where appropriate. CBP determined that statutory changes, as described above, would streamline the process for IP-infringing shipments in the small package environment. CBP seeks statutory authority to obtain ownership of detained de minimis goods if no response is received from

interested parties within 15 days (vs. the typical 30-day window provided under current law) and to dispose of those goods more quickly in accordance with law. This proposal was fully vetted by the 21st Century Customs Framework Working Group of the Commercial Customs Operations Advisory Committee – CBP’s Federal Advisory Committee and is currently under interagency review.

CBP published the Disclosure of Information Regarding Abandoned Merchandise Notice of Proposed Rulemaking in the Federal Register on August 27, 2019. After extending the comment period once, to November 15, 2019, CBP received eight public comments on the proposed rule. CBP is considering the comments but has not yet finalized the proposed rule.

7. Under section 628A of Public Law 114-125, the Trade Facilitation and Trade Enforcement Act (TFTEA) of 2015, CBP is required to share information with copyright owners regarding the seizure of circumvention devices at the border. Has CBP fully implemented TFTEA, and does CBP currently share section 628A information with copyright owners?

Response: CBP has implemented the contemplated pre-seizure exchange of information with the copyright owner (noting that section 628A is limited to pre-seizure information sharing). On June 24, 2024, CBP published the Enforcement of Copyrights and the Digital Millennium Copyright Act (DMCA) Final Rule in the Federal Register. (89 Fed Reg. 52364) The final rule includes changes to part 133 of title 19 of the Code of Federal Regulations (CFR) (19 CFR part 133) to implement the applicable provisions of Title III of the Trade Facilitation and Trade Enforcement Act (TFTEA), including the seizure of circumvention devices violating the DMCA; and disclosure of information to the owner of a recorded copyright who employs a copyright protection measure that has been circumvented or attempted to be circumvented by articles seized for violation of the importation prohibitions of the DMCA. The final rule went into effect on August 23, 2024.

The post-seizure information sharing authority is provided under TFTEA Section 303. This is a new authority, as it applies to copyright owners injured by a seized DMCA-prohibited copyright circumvention device. Currently, seizures of DMCA-prohibited copyright circumvention devices invariably include notification to copyright owners whose works were already downloaded on the device at the time of importation, as provided for in 19 CFR 133.42(d) - (e). TFTEA Section 303 provides new authority for CBP to share seizure information with all copyright owners whose works would have been accessible by the illicit device, provided their works are recorded with CBP and they registered to receive such notice. The final rule discussed above also provides the necessary regulatory authority to implement Section 303.

Prior to the publication of the Final Rule, CBP had the authority to share section 628A information with copyright owners, at CBP’s discretion and prior to seizure, subject to the formalities currently contained in 19 CFR 133.43(a) - (b). Whether CBP exercised this authority depended upon the facts and circumstances of a particular case.