

state law must be determined by the juvenile court based on applicable state law.

- Clarify that DHS consent to the grant of SIJ classification is only warranted when the petitioner demonstrates that the state court order was sought primarily for the purpose of obtaining relief from abuse, neglect, abandonment or some similar basis under state law and not primarily for the purpose of obtaining lawful immigration status; and that the evidence otherwise demonstrates that there is a bona fide basis for granting SIJ classification.

- Clarify that USCIS may seek or consider additional evidence if the evidence presented is not sufficient to establish a reasonable basis for DHS consent.

- Remove automatic revocation under 8 CFR 205.1(a)(3)(iv)(A) and (C) to the extent that they pertain to a juvenile's age and are inconsistent with age-out protections under TVPRA 2008.

- Implement statutory revisions exempting SIJ adjustment-of-status applicants from four additional grounds of inadmissibility and clarify grounds of inadmissibility that cannot be waived.

- Improve the application process by clearly listing required initial evidence that must accompany Form I-360 and amend what constitutes supporting documentation; and

- Make technical and procedural changes; and conform terminology.

DHS is reopening the comment period to refresh this proposed rule and allow interested persons to provide up-to-date comments in recognition of the time that has lapsed since the initial publication of the proposed rule. Both the public and the Government will benefit from clarifications regarding eligibility and procedures for the SIJ classification. Due to the lapse in time since the NPRM was issued, DHS seeks to reengage the public and allow further input on the proposed changes.

**Kevin K. McAleenan,**

*Acting Secretary.*

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## DEPARTMENT OF HOMELAND SECURITY

### U.S. Customs and Border Protection

## DEPARTMENT OF THE TREASURY

### 19 CFR Parts 113, 133, 148, 151 and 177

[USCBP-2019-0037]

RIN 1515-AE26

### Enforcement of Copyrights and the Digital Millennium Copyright Act

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document proposes to amend the U.S. Customs and Border Protection (CBP) regulations pertaining to importations of merchandise that violate or are suspected of violating the copyright laws, including the Digital Millennium Copyright Act (DMCA), in accordance with Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The proposed amendments set forth in this document are intended to clarify the definition of “piratical articles,” simplify the detention process involving goods suspected of violating the copyright laws, and prescribe new regulations enforcing the DMCA.

**DATES:** Comments on the proposed rule must be received on or before December 16, 2019.

**ADDRESSES:** You may submit comments, identified by docket number, by *one* of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments via docket number USCBP-2019-0037.

- *Mail:* Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE, 10th Floor, Washington, DC 20229-1177.

*Instructions:* All submissions received must include the agency name and docket number for this proposed rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. For detailed instructions on submitting comments and additional information on the proposed rulemaking process, see the “Public Participation” heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to read background documents or

comments received, go to <http://www.regulations.gov>. Submitted comments may also be inspected during regular business days between the hours of 9 a.m. and 4:30 p.m. at the Trade and Commercial Regulations Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, 90 K Street NE, 10th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Joseph Clark at (202) 325-0118.

**FOR FURTHER INFORMATION CONTACT:** Alex Bamiagis, Intellectual Property Rights Branch, Regulations and Rulings, Office of Trade, U.S. Customs and Border Protection, (202) 325-0415.

### SUPPLEMENTARY INFORMATION:

#### Public Participation

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of the proposed rule. CBP also invites comments that relate to the economic, environmental, or federalism effects that might result from this proposed rule. If appropriate to a specific comment, the commenter should reference the specific portion of the proposed rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

#### Background

##### I. Purpose of Proposed Amendments

U.S. Customs and Border Protection (CBP) has responsibilities for border enforcement of intellectual property rights (IPR) laws and regulations. The majority of the CBP regulations regarding these efforts are found in part 133 of title 19 of the Code of Federal Regulations (19 CFR part 133). Part 133 provides for the recordation of trademarks, trade names, and copyrights with CBP and prescribes the enforcement procedures applicable to suspected infringing merchandise. Part 133 also sets forth procedures for the seizure and disposition of articles bearing prohibited marks or names, and piratical articles, including release to the importer in appropriate circumstances.

CBP is proposing amendments to part 133 of the CBP regulations pursuant to Title III of the Trade Facilitation and Trade Enforcement Act of 2015 (Pub. L. 114-125; 130 Stat. 122; Section 628a of the Tariff Act of 1930 (19 U.S.C. 1628a), as amended) (TFTEA). Among the changes made by TFTEA are certain provisions regarding enforcement of the Digital Millennium Copyright Act (Pub.

L. 105–304, 112 Stat. 2860, as amended by Pub. L. 106–113, 113 Stat. 1536, (codified at 17 U.S.C. 1201)) (DMCA). Among other things, the DMCA prohibits the importation of devices used to circumvent the technological measures used by certain copyright owners to protect their works (“copyright protection measures”). Section 303(a) of TFTEA specifically provides that CBP may seize merchandise containing a circumvention device violating the DMCA.

TFTEA requires CBP to make certain pre-seizure disclosures to right holders if CBP determines that these disclosures would assist the agency in determining whether imported merchandise violates the copyright laws, including the DMCA. These disclosures assist CBP in determining whether certain goods are, in fact, in violation of the copyright laws, including the DMCA.

The proposed amendments to part 133 of the CBP regulations provide for such disclosures upon detention of merchandise suspected of violating the copyright laws, including the DMCA. In accordance with TFTEA, these pre-seizure disclosures may only be made where the copyright has been recorded with CBP. In accordance with TFTEA, CBP will not provide these disclosures when doing so would compromise an ongoing law enforcement investigation or national security.

As noted above, TFTEA provides for seizure of merchandise containing a circumvention device in violation of the DMCA. TFTEA directs CBP to disclose to persons injured by merchandise seized for violation of the DMCA information equivalent to the information disclosed to copyright owners when merchandise is seized for violation of the copyright laws. To identify those persons eligible to receive these post-seizure disclosures, TFTEA directs CBP to create a list of persons eligible to receive disclosures when injured by violations of the DMCA resulting in seizure of the violative merchandise. Section 133.47 of the proposed regulations provide for such disclosures and the establishment of the list. CBP will publish a notice in the **Federal Register** when the list is established, and again any time the list is revised.

On October 5, 2004, CBP published a proposed rulemaking in the **Federal Register** (69 FR 59562) proposing amendments to part 133 of 19 CFR to set forth changes to CBP’s enforcement procedures, including enhanced disclosure provisions and provisions to enforce the DMCA. Although comments were solicited and received from the

public on the proposed amendments, CBP did not publish a final rule adopting the proposal. Due to the passage of time since the publication of the 2004 proposed rulemaking, CBP is proposing new amendments to part 133 of the CBP regulations.

## II. Disclosure of Information Pertaining to Certain Intellectual Property Rights Enforced at the Border

### A. The Trade Secrets Act and Disclosure Under the Current Regulations

The Trade Secrets Act (18 U.S.C. 1905) bars the unauthorized disclosure by government officials of any information received in the course of their employment or official duties when such information “concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.” 18 U.S.C. 1905.

Specifically, the Trade Secrets Act protects those required to furnish commercial or financial information to the government by shielding them from the competitive disadvantage that could result from disclosure of that information by the government. In turn, this protection encourages those providing information to the government to furnish accurate and reliable information that is useful to the government.

The Trade Secrets Act, however, permits those covered by the Act to disclose protected information when the disclosure is otherwise “authorized by law,” which includes both statutes expressly authorizing disclosure and properly promulgated substantive agency regulations authorizing disclosure based on a valid statutory interpretation. *See Chrysler v. Brown*, 441 U.S. 281, 294–316 (1979). For example, the current CBP regulations set forth in 19 CFR 133.21 allow disclosure to a right holder of certain information that may comprise information otherwise protected by the Trade

Secrets Act for the purposes of assisting CBP in determining whether merchandise bears a counterfeit mark. *See* CBP Dec. 15–12, published in the **Federal Register** (80 FR 56370) on September 18, 2015, effective October 19, 2015, for background information.

### B. Statutory Analysis Concerning Disclosure of Commercial or Financial Information

The Secretary of the Treasury has authority to disclose information otherwise protected under the Trade

Secrets Act when such disclosures are authorized by law.

Disclosures meeting the “authorized by law” standard of the Trade Secrets Act include those made under regulations that are: (1) In compliance with the provisions of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*); and (2) based on a valid statute. *Chrysler*, 441 U.S. at 294–96 and 301–03. Various provisions in titles 15 and 19 of the United States Code authorize CBP to promulgate regulations to prohibit the importation of merchandise that infringes intellectual property rights. Among these, TFTEA provides statutory authority for information disclosure, amending provisions in title 19 of the United States Code (U.S.C.) to permit, and in some instances require, CBP to provide information otherwise protected under the Trade Secrets Act to IPR owners under specified conditions.

Title III of TFTEA permits, and in some instances requires, CBP to disclose information to IPR owners, to allow them to assist with enforcement. CBP enforces statutes prohibiting the importation of infringing merchandise. Specifically, 19 U.S.C. 1526 prohibits the importation of merchandise that infringes a trademark, 17 U.S.C. 602 prohibits the importation of merchandise that infringes a copyright under that title, and lastly, 17 U.S.C. 1201 prohibits the importation of devices that circumvent copyright protection systems. In order to aid CBP in enforcing these prohibitions, 17 U.S.C. 602(b) permits the Secretary of the Treasury to prescribe a procedure by which CBP will notify an interested party (which CBP has defined as the owner of the copyright) of the importation of articles that appear to be copies or phonorecords of a copyrighted work. *See* Copyright Act of 1976, Public Law 94–553, 90 Stat. 2541 (Oct. 19, 1976). The disclosure of information mandated by TFTEA is only available where the underlying trademark or copyright has been recorded with CBP.

Section 302 of TFTEA amended the Tariff Act of 1930 by inserting section 628a (19 U.S.C. 1628a) after section 628 (19 U.S.C. 1628), requiring CBP to provide IPR owners with information appearing on imported articles or their packaging and labels, including unredacted images of those articles, if the examination of the merchandise by the IPR owner would assist CBP in determining if those articles violate IPR laws enforced by CBP. Section 302 of TFTEA also permits CBP to provide to the IPR owner unredacted samples of the merchandise, subject to applicable bonding requirements, if the IPR

owner's help would assist CBP in determining if the importations occurred in violation of 17 U.S.C. 602 (copyright), 17 U.S.C. 1201 (circumvention devices), or 19 U.S.C. 1526 (trademark). The information may only be released where the underlying trademark or copyright has been recorded with CBP. CBP may not disclose information, photographs, or samples when such disclosure would compromise an ongoing law enforcement investigation or national security.

In 2015, CBP finalized new regulations for trademark enforcement, providing for disclosure of information to mark owners. CBP has proposed to update 19 CFR 133.21 to include updated bond provisions in keeping with the TFTEA disclosures, to limit disclosure of information to owners of properly recorded trademarks, as required by 19 U.S.C. 1628a(c), and to conform 19 CFR 133.21 to the copyright and DMCA provisions proposed in 19 CFR 133.42 and 133.47, respectively. For more information on prior changes to trademark enforcement, see CBP Dec. 15–12, published in the **Federal Register** (80 FR 56370) on September 18, 2015, effective October 19, 2015.

Section 303(a) of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding subparagraph G (19 U.S.C. 1595a(c)(2)(G)), which provides for the seizure of articles containing circumvention devices imported in violation of the DMCA (17 U.S.C. 1201). Correspondingly, section 303(b) of TFTEA requires that when merchandise containing a circumvention device is seized pursuant to 19 U.S.C. 1595a(c)(2)(G), CBP must disclose to the parties injured by that circumvention device information regarding the seized merchandise that is equivalent to information that CBP currently provides to copyright owners upon seizure of merchandise for violation of the copyright laws. (For more information regarding the information provided to copyright owners, see proposed 19 CFR 133.42(e) in this document.) Section 303(b)(2) of TFTEA directs CBP to establish and maintain a list of persons eligible to receive such disclosures, and section 303(b)(3) of TFTEA requires the Secretary of the Treasury to prescribe regulations establishing procedures to implement these practices. Section 624 of the Tariff Act of 1930 (19 U.S.C. 1624), as amended, also authorizes the Secretary of the Treasury to promulgate regulations to carry out the provisions of the Tariff Act of 1930, as amended, and provides authority for further

regulations implementing the changes directed by TFTEA.

This proposed rule is intended to authorize, and in some cases require, CBP personnel to disclose, either at the time of detention of suspect merchandise or after seizure of violative merchandise, information that might reveal commercial or financial information otherwise protected by the Trade Secrets Act. The proposed rule replicates the procedural safeguards implemented in the trademark regulations at 19 CFR 133.21 to mitigate potential risks from the disclosure of protected information. For more information on these safeguards, see CBP Dec. 15–12, published in the **Federal Register** (80 FR 56370) on September 18, 2015, effective October 19, 2015.

### III. Description of Proposed Amendments to Part 133

CBP is proposing changes to part 133 of the CBP regulations to implement certain provisions of TFTEA. First, CBP is proposing to amend the scope provision at § 133.0 to include TFTEA-mandated disclosures. Next, CBP is proposing to amend subpart E of part 133 regarding detention of merchandise suspected of violating the copyright laws, seizure of such violative merchandise, and disclosure of information to right holders. The proposed changes are intended to require pre-seizure disclosure of certain information to right holders if review of the information, or examination or testing of the imported merchandise, by the right holder would assist CBP in its determination as to whether suspect merchandise does, in fact, violate the copyright laws. The proposed amendments to subpart E also provide procedural safeguards to limit the release of information concerning non-violative shipments and simplify the detention process relative to goods suspected of violating the copyright laws.

Also, CBP is proposing a new subpart F to part 133 (existing subpart F is proposed to be redesignated as new subpart G). Proposed subpart F prescribes the disclosure of information, and potential provision of samples, upon detention or seizure of goods suspected of violating the DMCA to enhance CBP's ability to prohibit circumvention devices from being entered into the United States. Prior to seizure, CBP will disclose information appearing on the imported merchandise to the owner of the recorded copyright who employs the copyright protection measure that the imported merchandise is suspected of circumventing, if it will

assist CBP in determining whether the merchandise is violative. Similarly, when CBP seizes violative merchandise, it will disclose information appearing on the imported merchandise, as well as information received in connection with the importation, to certain right holders.

#### A. Subpart E to Part 133: Importations Violating Copyright Laws

CBP is proposing several amendments to subpart E of part 133 of the CBP regulations. The proposed changes would simplify procedures and strengthen CBP's ability to enforce the copyright laws and the prohibition against the importation of piratical articles.

##### 1. Definition of "Piratical Articles"

Section 133.42(a) currently provides that "[i]nfringing copies or phonorecords are 'piratical' articles." To more accurately define "piratical articles" for enforcement purposes, CBP is proposing to amend paragraph (a) of § 133.42 to define "piratical articles" as those that constitute unlawful (made without the authorization of the copyright owner) copies or phonorecords of a recorded copyright. Eligible copyrights may be recorded with CBP using the Intellectual Property Rights e-Recordation (IPRR) application found at <https://iprr.cbp.gov/>.

##### 2. Procedures on Suspicion of Piratical Copies

Existing § 133.43 sets forth the procedures CBP employs when it suspects that imported articles may be infringing copies or phonorecords of recorded copyrights and provides for: (1) Notice of detention of suspected articles to the importer and to the copyright owner, including the disclosure of certain information; (2) the release of redacted samples of suspected articles to the copyright owner; (3) the release of the goods in the case of inaction by the copyright owner; (4) in cases where the copyright owner makes a written demand for the exclusion of the suspected articles, a bonding requirement and exchange of briefs process culminating in submission to CBP for administrative review; and (5) alternative procedures to the administrative process (court action).

CBP believes that the procedure requiring a copyright owner to file a written demand for exclusion of the suspected infringing copies, and requiring an exchange of additional evidence, briefs, and other pertinent material to substantiate a claim or denial of piracy between the parties is ineffective for enforcing the Copyright Act of 1976 and is inconsistent with

TFTEA. CBP believes that these procedures are an outdated and inefficient mechanism to address situations where CBP has a suspicion that certain goods may be piratical. These provisions are rarely used and unduly burdensome on CBP and all other parties involved. Essentially, these procedures limit CBP's ability to conduct the required examination and render its decision in a timely and efficient manner. The related provision, § 133.44, prescribes the actions to be taken when CBP sustains or denies a claim of piracy under § 133.43. Accordingly, CBP is proposing to remove §§ 133.43 and 133.44 in their entirety from title 19 of the CFR.

However, CBP proposes to retain the procedures regarding detention of suspected infringing copies or phonorecords of recorded copyrights, notice of such detention to the importer and to the copyright owner, and the disclosure of certain information and release of redacted samples to the copyright owner currently provided for in § 133.43 in a revised § 133.42. Section 133.42 currently provides that the importation of infringing copies or phonorecords of works copyrighted in the United States is prohibited and sets forth provisions regarding the seizure and forfeiture of such infringing works. CBP proposes to amend and expand § 133.42 as follows to provide more comprehensive regulations on the manner in which it detains suspected piratical articles, seizes piratical articles, and exchanges information with affected parties:

- Proposed § 133.42(a) sets forth definitions for purposes of part 133.
- Proposed § 133.42(b)(1) prescribes that CBP may detain imported articles suspected of constituting a piratical copy of a copyrighted work for which a claim to copyright has been recorded with CBP.
- Proposed § 133.42(b)(2)(i)(A) specifies that, pursuant to 19 CFR 151.16(c) and 19 U.S.C. 1499(c)(2), a notice of detention is issued to the importer within five business days from the date of CBP's decision to detain suspect merchandise. CBP will also inform the importer that certain information may already have been disclosed to the owner of the recorded copyright, and in any event, CBP will disclose such information to the owner no later than the date of issuance of the detention notice.
- Proposed § 133.42(b)(2)(i)(B) sets forth that CBP may disclose to the owner of the recorded copyright information that appears on the detained merchandise and/or its retail packaging, including unredacted

photographs, images, or samples, as described in proposed paragraph (b)(3) of this section, unless the importer provides information within seven business days of issuance of the detention notice that is sufficient for CBP to determine that the detained merchandise is not piratical.

- Proposed § 133.42(b)(2)(ii) provides that if the importer does not provide information to CBP within seven business days of issuance of the detention notice that is sufficient for CBP to determine that the detained merchandise is not piratical, and CBP still suspects the merchandise to be violative, CBP will proceed with disclosure to the owner of the recorded copyright as described in proposed paragraph (b)(3) of this section, if CBP concludes that disclosure would assist CBP in determining whether the merchandise is piratical, and such disclosure would not compromise an ongoing law enforcement investigation or national security.

- Proposed § 133.42(b)(3) sets forth the information CBP will disclose to the owner of the recorded copyright pursuant to paragraph (b)(2)(ii) if CBP concludes that disclosure would assist CBP in determining whether the merchandise is piratical, and such disclosure would not compromise an ongoing law enforcement investigation or national security. This includes information appearing on the goods and their retail packaging and unredacted images or photographs of the merchandise. Proposed § 133.42(b)(3) also provides that CBP may release a sample to the owner of the recorded copyright, subject to the bonding and return requirements of proposed § 133.42(c).

- Proposed § 133.42(b)(4) describes the basic importation information to be disclosed to the owner of the recorded copyright.

- Proposed § 133.42(b)(5) provides for disclosure of redacted photographs or images, or the provision of redacted samples, including retail packaging or labels, to the owner of the recorded copyright. Identifying information to be redacted would include serial numbers; dates of manufacture; lot codes; batch numbers; universal product codes; the name or address of the manufacturer, exporter, or importer of the merchandise; or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise. CBP may release the sample identified in this paragraph when the owner of the recorded copyright furnishes to CBP a bond in the form and amount specified by CBP. CBP

may demand the return of the sample at any time.

- Proposed § 133.42(c) pertains to the disclosure of unredacted photographs or images, or the provision of unredacted samples, including retail packaging or labels, to the owner of the recorded copyright under paragraph (b) of this section. Paragraph (c) provides that, with the disclosure of the photographs or images, or provision of the sample, CBP will notify the owner of the recorded copyright that some or all of the information it receives may be subject to the protections of the Trade Secrets Act, is being issued to the owner of the recorded copyright by CBP under an exception to the Trade Secrets Act, and is not to be used by the owner of the recorded copyright (nor by parties related to the owner of the recorded copyright or agents thereof) for any purpose other than to assist CBP in determining whether the merchandise described in the notice of detention is piratical. CBP will release the sample identified in this paragraph when the owner of the recorded copyright furnishes to CBP a bond in the form and amount specified by CBP. CBP may demand the return of the sample at any time.

- Proposed § 133.42(d) provides for disclosure of unredacted photographs or images, including photographs or images of retail packaging or labels, to the importer any time after presentation of the suspect goods to CBP for examination. Proposed § 133.42(d) also provides that, upon the importer's request, CBP will provide samples to the importer, including samples of retail packaging or labels, any time after presentation of the suspect goods to CBP for examination.

- Proposed § 133.42(e) provides that, in cases involving the seizure of piratical articles, CBP will disclose to the owner of the recorded copyright certain limited information pertaining to the attempted importation.

- Proposed § 133.42(f) provides that, after seizure, CBP will provide—upon receipt of a request by the owner of the recorded copyright and upon that owner furnishing a bond to CBP in the form and amount specified by CBP—photographs, images, or samples, including retail packaging or labels, to the owner of the recorded copyright. CBP may demand the return of the sample at any time.

- Proposed § 133.42(g) provides for the consent of the owner of the recorded copyright to allow entry of the seized and forfeited merchandise, or other disposition subject to the importer's right to petition for relief under § 171.

*B. New Re-Designated Subpart F to Part 133: Enforcement Provisions for the Digital Millennium Copyright Act (DMCA)*

In 1998, Congress enacted the DMCA. Among other things, the DMCA prohibits the circumvention of technological measures used by copyright owners to protect their works. Section 1201(a)(3)(B) of title 17 of the United States Code (17 U.S.C. 1201(a)(3)(B)) provides that, “[a] technological measure ‘effectively controls access to a work’ if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.” Section 1201(b)(2)(B) of title 17 of the United States Code (17 U.S.C. 1201(b)(2)(B)) provides that “[a] technological measure ‘effectively protects a right of a copyright owner under this title’ if the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title.” Pursuant to section 303(b)(3) of TFTEA, the Secretary of the Treasury must prescribe regulations establishing procedures relative to the seizure of articles the importation of which is prohibited by and found to violate the DMCA.

Although the current CBP regulations do not specifically provide for the detention and seizure of articles that constitute violations of the DMCA, CBP has implemented the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce the DMCA. Where CBP finds that certain devices violate the DMCA by circumventing a recorded copyright owner’s copyright protection measure, the goods are currently subject to seizure and forfeiture under 19 U.S.C. 1595a(c)(2)(C) for a violation of the DMCA (17 U.S.C. 1201). Section 303 of TFTEA amended section 596(c)(2) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)(2)) by adding subparagraph G (19 U.S.C. 1595a(c)(2)(G)) for DMCA violations, which, in essence, accomplishes the same enforcement as that carried out under the internal enforcement guidelines. However, the current CBP internal enforcement guidelines and advice on how to enforce the DMCA include neither the post-seizure DMCA disclosure to those persons injured by DMCA violations nor the establishment of a list of those persons approved to receive information post-seizure, as provided for in section 303 of TFTEA. When final, the proposed

regulations will replace the existing internal enforcement guidelines.

Pursuant to 19 U.S.C. 1628a, CBP is proposing to add regulatory provisions for the detention and seizure of articles that constitute violations under the DMCA. Specifically, CBP is proposing to re-designate existing subpart F in part 133, which contains regulations pertaining to procedures following forfeiture or assessment of liquidated damages, as a new subpart G, and to add a new subpart F with a new § 133.47, setting forth regulatory provisions that prescribe the detention and seizure of certain articles that violate the DMCA. The regulatory provisions proposed in § 133.47 closely mirror the comparable provisions for trademark as laid out in § 133.21 and copyright as laid out in proposed § 133.42, described above. Pursuant to 19 U.S.C. 1499(c)(2), CBP will issue a notice of detention to the importer within five business days from the date of CBP’s decision to detain suspect merchandise. CBP will inform the importer that the importer may provide information within seven business days of issuance of the detention notice to help CBP to determine whether the detained merchandise violates the DMCA. After that period, if CBP still suspects the merchandise may be violative, CBP will disclose information appearing on the detained merchandise and/or its retail packaging to the owner of the recorded copyright who employs a copyright protection measure, if CBP concludes that the disclosure would assist CBP in its determination and disclosure would not compromise and ongoing law enforcement investigation or national security. Disclosed information may also include unredacted samples, if necessary to assist CBP in determining whether or not the detained merchandise violates the DMCA. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for purposes of 19 U.S.C. 1514(a)(4).

In the event that CBP determines that such detained articles violate 17 U.S.C. 1201, CBP will seize the articles under 19 U.S.C. 1595a(c)(2)(G) and institute forfeiture proceedings in accordance with 19 CFR part 162. CBP will, within 30 business days of the seizure, notify the person CBP determines is injured by the violation of the DMCA and will disclose certain information regarding the shipment to such person, provided that person meets the requirements detailed below. In the event that articles

released from CBP custody are determined to be violative, proposed § 133.48 provides for redelivery of the articles. Articles determined by CBP not to violate 17 U.S.C. 1201 will be released. Importers may petition for relief from the seizure and forfeiture under the provisions of 19 CFR part 171. Articles that have been seized and forfeited to the U.S. Government under part 133 will be disposed of in accordance with 19 CFR 133.52(b).

The proposed regulations define persons eligible for pre-seizure and post-seizure DMCA disclosures. Under the proposed regulations, a person eligible for pre-seizure disclosures is the owner of a recorded copyright who employs a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA. Likewise, the proposed regulations define an injured person authorized to receive post-seizure DMCA disclosures as 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, and who has successfully applied to CBP for DMCA protections.

Pursuant to section 303(b) of TFTEA, CBP will establish and maintain a list of the persons who have successfully applied to CBP to receive disclosures from CBP when injured by violations of the DMCA. Under proposed § 133.47(b)(2)(iii), CBP will publish a notice in the **Federal Register** announcing the establishment of a list of approved persons. Persons who believe they have been injured by a DMCA violation may request to be added to the list through a separate application to the IPR Branch supplemental to an application to record a copyright. After the list has been established, CBP will publish a notice in the **Federal Register** when the list is revised.

#### IV. Other Amendments

As a consequence of the proposed removal of §§ 133.43 and 133.44, it is also proposed to revise a related provision in § 113.70, which sets forth bond conditions to indemnify the United States for detention of copyrighted material. CBP proposes to revise 19 CFR 113.70 to set forth, in one centralized location, the bond conditions for an IPR owner to obtain samples of imported merchandise suspected of being infringing. Currently, there is bond language that pertains to IPR sample bonds in various provisions throughout 19 CFR part 133. To reduce redundancy, CBP is proposing to add a

cross reference to the new IPR sample bond conditions set forth in § 113.70 in proposed § 133.21(b)(5), (c)(2), and (f), § 133.25(c), § 133.42(b)(5), (c)(2), and (f), and § 133.47(b)(5), (c)(2), and (f), and to consolidate duplicated bond condition language from these provisions. Accordingly, CBP is proposing to remove references to § 133.43 in existing § 113.42.

As noted above, CBP is proposing additional amendments to 19 CFR 133.21 to clarify the “identifying information” that CBP will redact prior to disclosing information pursuant to § 133.21(b)(5). Section 133.21(b)(5) provides examples of information that CBP would redact prior to disclosure under this provision, including “any mark that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise.” CBP is proposing to replace the word “mark” with the more general term “markings,” as “mark” is a more narrowly defined term of art. CBP is proposing further changes to conform § 133.21(b) and (f) to the related copyright (§ 133.42(b) and (f)) and DMCA (§ 133.47(b) and (f)) provisions proposed in this document.

In addition, CBP is proposing conforming amendments to § 133.25. These include replacing “trademark owner” with “owner of the recorded mark” and replacing references to the legacy Customs Service with CBP. CBP is proposing to amend § 133.51(a), to reflect the addition of proposed § 133.48, which will provide for redelivery of merchandise found to violate the DMCA. Similarly, CBP is proposing to amend § 133.52(b) to account for the alternative dispositions of seized merchandise reflected in proposed §§ 133.42(g) and 133.47(g).

Section 151.16 of title 19 of the CFR provides for the detention of merchandise, and states that CBP will make a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented to CBP for examination. Within § 151.16, paragraph (a) identifies certain categories of articles that are excepted from this provision, including detentions arising from “possibly piratical copies (see part 133, subpart E, of this Chapter).” The current detention procedures in subpart E of 19 CFR part 133 allow up to 120 days for an importer or right holder of a suspect article to provide CBP with evidence, briefs, or other pertinent information to substantiate a claim or denial of infringement, prior to CBP’s issuance of an admissibility determination. Due to the proposed amendments to § 133.42, discussed above, which shorten many of

the data exchange time frames and require CBP to issue a final determination with respect to the admissibility of detained merchandise within 30 days after the merchandise has been presented to CBP for examination, there is no longer any reason to exempt possibly piratical copies or phonorecords from the 30-day detention period set forth in § 151.16. Accordingly, this document proposes to amend 19 CFR 151.16(a) by removing the reference to “possibly piratical copies (see part 133, subpart E, of this Chapter)” and by adding a cross-reference to 19 CFR 151.16(c) to the notice provisions set forth in §§ 133.42(b)(2) and 133.47(b)(2). This document also proposes non-substantive editorial changes to § 151.16.

Likewise, this document proposes to amend 19 CFR 177.0 by removing the existing exception for copyright determinations under part 133. Currently, § 133.43 provides a unique process for determinations of copyright infringement, an exception to the rulings process laid out in part 177. As a consequence of the proposed changes to §§ 133.42 and 133.43, that process will be replaced. As a result, rulings related to copyright determinations may be requested pursuant to part 177, and no longer constitute an exception to the process laid out therein.

In addition, this document proposes to augment the existing personal use exemption in 19 CFR 148.55, and clarify its application. Currently, this exemption provides for the entry of limited quantities of merchandise that otherwise would be prohibited from entry for trademark violations, when the merchandise accompanies any individual arriving in the United States. However, 17 U.S.C. 602(a)(3)(B) provides a similar personal use exemption permitting the entry of merchandise otherwise prohibited for violating copyright law, under certain conditions. CBP has proposed amendments to § 148.55, to reflect this statutory exemption. The conditions are set forth in existing § 148.55(b), which is not being proposed for amendment. The conditions are that (1) the exemption “shall not be granted to any person who has taken advantage of the exemption for the same type of article within the 30-day period immediately prior to his arrival in the United States,” and (2) “[i]f an article which has been exempted is sold within one year of the date of importation, the article or its value (to be recovered from the importer), is subject to forfeiture” (except in the case of a “sale subject to

judicial order or in the liquidation of an estate”).

This document also proposes amendments to the general and specific authority citations to part 133 to more accurately reflect the statutory authority that pertains to the part and that which pertains more specifically to particular sections within part 133.

#### **Executive Orders 12866, 13563, and 13771**

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) 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 rule is a significant regulatory action under section 3(f) of Executive Order 12866. Accordingly, OMB has reviewed this regulation. As the impacts of this rule are de minimis, this rule is exempt from Executive Order 13771. See OMB’s Memorandum, “Guidance Implementing Executive Order 13771, Titled ‘Reducing Regulation and Controlling Regulatory Costs’” (April 5, 2017).

One of CBP’s roles is to safeguard the U.S. economy from the importation of goods that violate intellectual property rights. Under current regulations, if CBP suspects that a shipment may be violative, it can share redacted samples of the suspect imported good with a right holder.<sup>1</sup> To implement TFTEA’s intellectual property rights provisions, CBP is proposing regulatory changes that will, among other things, allow it to share unredacted images of suspect imports with right holders, if examination by right holders would assist CBP’s determination.

<sup>1</sup>Note that this rule does not alter CBP’s ability to provide redacted samples of an import to a right holder without prior notification to the importer.

Sharing these unredacted samples and images with right holders may provide access to information about the importer protected by the Trade Secrets Act. The proposed rule establishes a procedure under which, following the notice to the importer required by 19 U.S.C. 1499, the importer has seven business days to establish to CBP that the suspect imports are not piratical and are instead admissible. If the importer is unable to demonstrate the admissibility of its imports within this timeframe, CBP will share information with the right holder by disclosing or releasing unredacted samples of the imports in question.

As CBP is establishing a new process for copyrights, it does not have data on the number of times CBP suspects shipments are piratical. However, in 2012 CBP published an interim final rule that established similar procedures for trademarks. (77 FR 24375, September 24, 2012). For analytical purposes, CBP can assume that this rule will have similar effects after adjusting for the differing volumes. Between fiscal years 2014 and 2018, CBP sent out an average of 824 detention letters every fiscal year for suspected trademark infringements. Based on the proportion of live trademark recordations<sup>2</sup> available to support the agency's IPR seizures every fiscal year, relative to the copyright recordations, CBP estimates an average of approximately 21,423 seizures based on trademark, 8,881 based on copyright, and 116 DMCA seizures. If the number of detention letters is proportional to the number of seizures, CBP would estimate that this rule will result in 345 more detention letters for possible copyright infringing importations.

CBP estimates that the procedure to demonstrate that the imports are not piratical will take two hours per affected importer at a cost of \$29.76 per hour.<sup>3 4</sup>

<sup>2</sup> Source: CBP's IPRiS database. Sampling methodology averaged five equally spaced dates in every fiscal year to estimate the IPRiS live recordations available for IPR seizures (95% CI, p = 0.05) annually. CBP took several sample counts per year as opposed to a single annual count to ensure a representative measure as IPRiS recordations enter and expire throughout the year.

<sup>3</sup> Source: U.S. Bureau of Labor Statistics. Occupational Employment Statistics, "May 2017 National Occupational Employment and Wage Estimates, United States- Median Hourly Wage by Occupation Code." Updated March 30, 2018. Available at [https://www.bls.gov/oes/2017/may/oes\\_nat.htm](https://www.bls.gov/oes/2017/may/oes_nat.htm). Accessed June 11, 2018.

<sup>4</sup> The total compensation to wages and salaries ratio is equal to the calculated average of the 2017 quarterly estimates (shown under Mar., June, Sep., Dec.) of the total compensation cost per hour worked for Office and Administrative Support occupations (\$26,2600) divided by the calculated average of the 2017 quarterly estimates (shown under Mar., June, Sep., Dec.) of wages and salaries cost per hour worked for the same occupation

This is based on the existing information collection for the Notice of Detention (OMB Control Number 1651-0073), which is being updated for this rulemaking. CBP estimates that importers will bear an opportunity cost as a result of the higher number of detention notices caused by this rule. CBP estimates that this opportunity cost will total \$20,534 ( $345 * 2 * \$29.76$ ) for copyright detentions and \$238 ( $4 * 2 * 29.76$ ) for DMCA detentions for a total monetized cost of \$20,534.

CBP is also proposing to formalize the existing practices used to enforce the DMCA. As discussed above, in 1998, Congress enacted the DMCA. The DMCA prohibits the importation of devices used to circumvent the copyright protection measures copyright owners use to protect their works. Although current regulations do not specifically provide for detention and seizure of articles that constitute violations of the DMCA, CBP has enforced the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce DMCA violations. In FY 2016 there were approximately 70 DMCA seizures. It is possible that the provisions of this rule that were already discussed will result in a small increase in DMCA seizures. TFTEA requires CBP to formalize the foregoing processes with respect to the DMCA. The formalization of these existing practices in regulations does not change current practice, so this provision will not have additional impacts if this rule is finalized.

In addition to the proposed use of unredacted samples, CBP is proposing to amend the detention procedures applicable to imported articles that are suspected of being a piratical copy or phonorecord of a copyrighted work. The current detention procedures in the regulations allow up to 120 days for an importer or right holder of a suspect article to provide CBP with evidence, briefs, or other pertinent information to substantiate a claim or denial of infringement, prior to CBP's issuance of an admissibility determination. To expedite this process, CBP is proposing to amend the regulations to require the agency to render an admissibility decision within 30 days from the date

category (\$17,7425). Source of total compensation to wages and salaries ratio data: U.S. Bureau of Labor Statistics. Employer Costs for Employee Compensation. Employer Costs for Employee Compensation Historical Listing March 2004–March 2018, "Table 3. Civilian workers, by occupational group: employer costs per hours worked for employee compensation and costs as a percentage of total compensation, 2004–2018 by retirement type." March 2018. Available at <https://www.bls.gov/web/ecec/ececqrtn.pdf>. Accessed June 11, 2018.

the articles are presented to CBP for examination. As the current detention procedures are seldom used, according to CBP subject matter experts, CBP does not believe the proposed changes will impose a significant effect on the public.

### The Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*) (RFA), 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). Section 604 of the RFA requires an agency to perform a regulatory flexibility analysis for a rule unless the agency certifies under section 605(b) that the regulatory action would not have a significant economic impact on a substantial number of small entities.

As described in the Executive Orders 12866, 13563, and 13771 analysis above, CBP estimates that this rule will result in the issuance of 345 additional notices of detention. CBP's current examination policies, use of shared enforcement systems, and targeting criteria that take into account previous examinations when determining risk make it unlikely that an importer who receives a notice of detention with this rule will be required to repeatedly prove the admissibility of their imports.<sup>5</sup> As such, CBP assumes for the purposes of this analysis that the number of affected importers from this rule will be equal to the number of additional detention notices resulting from this rule—345—with each importer receiving only one detention notice. To the extent that an importer must prove the admissibility of their imports more than once with this rule, the number of importers affected by this rule would be lower and the cost of this rule per affected importer would be higher.

These importers are not centered in any particular industry; any importer of goods covered by a recorded copyright may be affected by this rule if CBP has a reasonable suspicion to believe their

<sup>5</sup> CBP reserves the right to detain any imported merchandise, even if an importer has previously shown that its merchandise is admissible. This will depend on the particulars of the importation. Previous importations are taken into account in the risk profile, so having proven the authenticity of an importation in the past makes it less likely that an importer will receive a Notice of Detention for subsequent importations.

imported merchandise may constitute a piratical copy and CBP cannot determine if an import is a piratical copy or prohibited circumvention device without the use of the provisions of this rule. CBP has conducted a study of importers to determine how many are small entities and has concluded that the vast majority (about 88 percent) of importers are small entities.<sup>6</sup> Therefore, CBP believes this rule may affect a substantial number of small entities.

Although the proposed rule, if adopted, may affect a substantial number of small entities, CBP believes the economic impact would not be significant. As described in the Executive Orders 12866, 13563, and 13771 section of this document, CBP estimates that it takes an importer two hours to provide proof of the admissibility of an import to CBP. CBP estimates the average wage of an importer is \$29.76 per hour. Thus, CBP estimates it will cost a small entity \$59.52 to prove the admissibility of its import with this rule. CBP does not believe \$59.52 constitutes a significant economic impact.

CBP recognizes that repeated inquiries into the admissibility of an importer's imports could eventually rise to the level of a significant economic impact. However, it is unlikely that importers will be repeatedly required to prove the admissibility of their imports, as previously mentioned. Additionally, CBP does not anticipate law-abiding importers to be subject to the provisions in this rule on a repeated basis. Once CBP has determined the admissibility of an importation, it will record that information in the system so it can be viewed by CBP import specialists on future importations and successful previous importations are a favorable factor in the importation's risk profile. Further, CBP notes that providing this information to CBP is optional on the part of the importer. Therefore, CBP believes there will not be a significant economic impact on small entities.

Accordingly, although this rule may have an effect on a substantial number of small entities, as discussed above, CBP believes that an estimated cost of \$59.52 to an importer does not constitute a significant economic impact. Thus, CBP certifies this regulation would not have a significant economic impact on a substantial number of small entities.

### Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), the collections of information for this document are included in an existing collection for Notices of Detention (OMB control number 1651-0073). 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. The burden hours related to the Notice of Detention for OMB control number 1651-0073 are as follows:

*Number of Respondents:* 1,695.

*Number of Responses:* 1.

*Time per Response:* 2 hours.

*Total Annual Burden Hours:* 3,390.

Because CBP estimates that the availability of the procedures in this proposed rule will increase the number of Notices of Detention issued for IPR violations, there is an increase in burden hours under this collection with this proposed rule.

### Signing Authority

This rulemaking is being issued in accordance with 19 CFR 0.1(a)(1), pertaining to the authority of the Secretary of the Treasury (or that of his or her delegate) to approve regulations concerning copyright enforcement.

### List of Subjects

#### 19 CFR Part 113

Bonds, Customs duties and inspection, Imports, Surety bonds.

#### 19 CFR Part 133

Bonds, Circumvention devices, Copy or simulating trademarks, Copyrights, Counterfeit goods, Customs duties and inspection, Demand for redelivery, Detentions, Disclosure, Labeling, Liquidated damages, Piratical copies, Phonorecords, Recordation, Restricted merchandise, Seizures and forfeitures, Trademarks, Trade names.

#### 19 CFR Part 148

Copyright, Customs duties and inspection, Trademarks.

#### 19 CFR Part 151

Customs duties and inspection, Examination, Imports, Penalties, Reporting and recordkeeping requirements, Sampling and testing.

#### 19 CFR Part 177

Administrative practice and procedure, Government procurement, Reporting and recordkeeping requirements.

### Proposed Amendments to the CBP Regulations

For the reasons stated above in the preamble, CBP proposes to amend 19 CFR parts 113, 133, 148, 151 and 177 as follows:

#### PART 113—CBP BONDS

- 1. The general authority citation for part 113 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1623, 1624.

\* \* \* \* \*

- 2. Section 113.42 is revised to read as follows:

#### § 113.42 Time period for production of documents.

Except when another period is fixed by law or regulations, any document for the production of which a bond or stipulation is given must be delivered within 120 days from the date of notice from CBP requesting such document. If the period ends on a Saturday, Sunday, or holiday, delivery on the next business day will be accepted as timely.

- 3. Section 113.70 is revised to read as follows:

#### § 113.70 Bond conditions for owners of recorded marks or recorded copyrights to obtain samples from CBP relating to importation of merchandise suspected of infringing recorded marks or recorded copyrights, or circumventing copyright protection measures.

Prior to obtaining samples of imported merchandise pursuant to §§ 133.21, 133.25, 133.42, or 133.47 of this chapter, for suspected infringement of a recorded mark or recorded copyright, or suspected circumvention of a protection measure safeguarding a recorded copyright, the owner of the recorded mark or the recorded copyright must furnish to CBP a single transaction bond in the amount specified by CBP containing the conditions listed in this section.

#### Bond Conditions for Owners of Recorded Marks or Recorded Copyrights To Obtain Samples From CBP Relating to Importation of Merchandise Suspected of Infringing Such Recorded Marks or Recorded Copyrights, or Circumventing Copyright Protection Measures

(a) *Agreement to use sample for limited purpose of assisting CBP.* If CBP provides to an owner of a recorded mark or a recorded copyright a sample of imported merchandise suspected of infringing the recorded mark or copyright, or suspected of circumventing a copyright protection measure, including samples provided pursuant to §§ 133.21, 133.25, 133.42, or

<sup>6</sup> See "CBP Analysis of Small Importers," November 2018. Available in the docket of this rulemaking.

133.47 of this chapter, the obligors (principal and surety) agree that such samples may only be used for the limited purpose of providing assistance to CBP in enforcing intellectual property rights.

(b) *Agreement to indemnify*—(1) *Improper use of sample*. If the sample identified in paragraph (a) of this section is used by the owner of the recorded mark or the recorded copyright for any purpose other than to provide assistance to CBP in enforcing intellectual property rights, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any loss or damage resulting from the improper use.

(2) *Physical loss, damage, or destruction of disclosed sample*. The owner of a recorded mark or a recorded copyright must return any sample identified in paragraph (a) of this section upon demand by CBP or at the conclusion of any examination, testing, or similar procedure performed on the sample. If the sample identified in paragraph (a) of this section is lost, damaged, or destroyed as a result of CBP's furnishing it to such owner, the obligors (principal and surety) agree to indemnify the importer or owner of the imported merchandise, in the amount specified by CBP, against any resulting loss or damage.

#### PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

■ 4. The general authority citation for part 133 is revised to read as follows, the specific authority for §§ 133.21 to 133.25 is removed, and a specific authority citation for § 133.47 is added to read as follows:

**Authority:** 15 U.S.C. 1124, 1125, 1127; 17 U.S.C. 101, 104, 106, 601, 602, 603; 18 U.S.C. 1905; 19 U.S.C. 66, 1202, 1499, 1526, 1595a, 1623, 1624, 1628a; 31 U.S.C. 9701.

Section 133.47 also issued under 17 U.S.C. 1201.

\* \* \* \* \*

#### § 133.0 Scope.

■ 5. In § 133.0, revise the last sentence to read as follows:  
\* \* \* It also sets forth the procedures for the disposition, including release to the importer in appropriate circumstances, of articles bearing prohibited marks or names, piratical articles, and prohibited circumvention devices, as well as the disclosure of information concerning such articles when such disclosure would not compromise an ongoing law enforcement investigation or national security.

■ 6. Amend § 133.21 by:

■ a. Removing the words “owner of the mark” wherever they appear and adding in their place the words “owner of the recorded mark”;

■ b. Revising paragraphs (b)(2)(ii) and (b)(3) and the second sentence of paragraph (b)(4) introductory text;

■ c. Removing the word “mark” and adding in its place the word “markings” in the second sentence of paragraph (b)(5);

■ d. Revising the third sentence of paragraph (b)(5) and the first sentence of paragraph (c)(2) and paragraph (f).

The revisions read as follows:

#### § 133.21 Articles suspected of bearing counterfeit marks.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

(ii) *Failure of importer to respond or insufficient response to notice*. Where the importer does not provide information within the seven business day response period, or the information is insufficient for CBP to determine that the merchandise does not bear a counterfeit mark, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded mark if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded mark of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples*. CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the owner of the mark as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the owner of the recorded mark. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial

numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) \* \* \* If the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. \* \* \*

\* \* \* \* \*

(5) \* \* \* CBP may release a sample under this paragraph when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. \* \* \*

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \* CBP may release a sample under paragraphs (b)(2)(ii) and (3) of this section when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. \* \* \*

\* \* \* \* \*

(f) *Disclosure to owner of the recorded mark, following seizure, of unredacted photographs, images, and samples*. At any time following a seizure of merchandise bearing a counterfeit mark under this section, and upon receipt of a proper request from the owner of the recorded mark, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the recorded mark. CBP may release a sample under this paragraph when the owner of the recorded mark furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded mark must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded mark, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.21(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

\* \* \* \* \*

#### § 133.25 [Amended]

■ 7. Section 133.25 is amended:

■ a. By removing the word “Customs” wherever it appears, and in its place adding the word “CBP”;

- b. In paragraph (b) by removing the words “owner of the trademark” wherever it appears, and adding in their place the words “owner of the recorded mark”; and
- c. In paragraph (c):
  - i. By removing the words “trademark or trade name owner” and adding in their place the words “owner of the recorded mark or trade name” in the paragraph heading;
  - ii. By removing the words “owner of the trademark” and adding in their place “owner of the recorded mark” in the first sentence;
  - iii. By revising the second sentence; and
  - iv. By removing the words “trademark or trade name owner” and adding in their place the words “owner of the recorded mark or trade name” in the fifth sentence.

The revision reads as follows:

**§ 133.25 Procedure on detention of articles subject to restriction.**

\* \* \* \* \*

(c) \* \* \* CBP may release a sample under this paragraph when the owner of the recorded mark or trade name furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. \* \* \*

\* \* \* \* \*

■ 8. Section 133.42 is revised to read as follows:

**§ 133.42 Piratical articles; Unlawful copies or phonorecords of recorded copyrighted works.**

(a) *Definition.* A “piratical article,” for purposes of this part, is an unlawfully made (without the authorization of the copyright owner) copy or phonorecord of a recorded copyrighted work, importation of which is prohibited by the Copyright Act of 1976, as amended.

(b) *Detention, notice, and disclosure of information—(1) Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that is suspected of constituting a piratical article in violation of a copyright recorded with CBP. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to owner of the recorded copyrighted work—(i) Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise,

CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise is a piratical article:

(A) CBP may have previously disclosed to the owner of the recorded copyright, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise, as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the owner of the recorded copyright, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the owner of the recorded copyright information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise is not piratical.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to determine that the merchandise is not piratical, CBP will proceed with the disclosure of information as described in paragraph (b)(3) of this section to the owner of the recorded copyright, if CBP concludes that the disclosure would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(3) *Disclosure to owner of the recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels), and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the owner of the recorded copyright as described in paragraph (b)(2)(ii) of this section would assist CBP in its determination, and provided that disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail

packaging in its condition as presented for examination to the owner of the recorded copyright. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to owner of recorded copyright of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the owner of the recorded copyright limited importation information to obtain assistance in determining whether an imported article is a piratical article. If the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the owner of the recorded copyright consists of:

(i) The date of importation;

(ii) The port of entry;

(iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to owner of recorded copyright of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article is a piratical article and at any time after presentation of the merchandise for examination, provide to the owner of the recorded copyright photographs, images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been

removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(b)(5) was (damaged/destroyed/lost) during examination, testing, or other use.”

(c) *Conditions of disclosure to owner of recorded copyright of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in piratical merchandise determinations.* In accordance with paragraphs (b)(2)(ii) and (b)(3) of this section, when CBP discloses information to the owner of the recorded copyright prior to seizure, CBP will notify the owner of the recorded copyright that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the owner of the recorded copyright for the purpose of assisting CBP in determining whether the merchandise is a piratical article.

(2) *Bond.* CBP may release a sample under paragraphs (b)(2)(ii) and (3) of this section when the owner of the recorded copyright furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged,

destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(c) was (damaged/destroyed/lost) during examination, testing, or other use.”

(d) *Disclosure to importer of unredacted photographs, images, and samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of being a piratical article at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to owner of the recorded copyright of comprehensive importation information.* Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States is a piratical article, CBP will seize such merchandise and, in the absence of the written consent of the owner of the recorded copyright (see paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the owner of the recorded copyright the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

(f) *Disclosure to owner of recorded copyright, following seizure, of*

*unredacted photographs, images, and samples.* At any time following a seizure of a piratical article under this section, and upon receipt of a proper request from the owner of the recorded copyright, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging, in its condition as presented for examination, to the owner of the recorded copyright. CBP may release a sample under this paragraph when the owner of the recorded copyright furnishes to CBP a bond in the amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The owner of the recorded copyright must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the recorded copyright, the owner must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.42(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within thirty days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, entry after obliteration of the recorded copyright, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52, subject to the importer’s right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

#### **§§ 133.43 and 133.44 [Removed and Reserved]**

- 9. Sections 133.43 and 133.44 are removed and reserved.
- 10. Redesignate subpart F as subpart G and add new subpart F, consisting of §§ 133.47 and 133.48, to read as follows:

#### **Subpart F—Enforcement of the Prohibition on Importation of Merchandise Capable of Circumventing Technological Measures for Protection of Copyright**

##### **§ 133.47 Articles suspected of violating the Digital Millennium Copyright Act**

(a) *Definitions*—(1) *Copyright protection measure.* A technological measure that effectively controls access

to a copyrighted work for which the copyright has been recorded with CBP.

(2) *Articles that violate the DMCA.* Articles that violate the importation prohibitions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. 1201, consist of products, devices, components, or parts thereof primarily designed or produced for the purpose of circumventing a copyright protection measure, or which have only a limited commercially significant purpose or use other than such circumvention, or which are knowingly marketed by the manufacturer, importer, consignee, or other trafficker in such articles, or another acting in concert with the manufacturer importer, consignee, or trafficker for use in such circumvention.

(3) *Eligible person.* The owner of a recorded copyright, who employs a copyright protection measure that may have been circumvented or attempted to be circumvented by articles that violate the importation prohibitions of the DMCA.

(4) *Injured person.* 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, and who has successfully applied to CBP for DMCA protections pursuant to paragraph (b)(2)(iii) of this section.

(b) *Detention, notice, and disclosure of information—(1) Detention period.* CBP may detain any article of domestic or foreign manufacture imported into the United States that it suspects is in violation of the DMCA, as described in paragraph (a)(1) of this section. The detention will be for a period of up to 30 days from the date on which the merchandise is presented for examination. In accordance with 19 U.S.C. 1499(c), if, after the detention period, the article is not released, the article will be deemed excluded for the purposes of 19 U.S.C. 1514(a)(4).

(2) *Notice of detention to importer and disclosure to eligible persons—(i) Notice and seven business day response period.* Within five business days from the date of a decision to detain suspect merchandise, CBP will notify the importer in writing of the detention as set forth in § 151.16(c) of this chapter and 19 U.S.C. 1499. CBP will also inform the importer that for purposes of assisting CBP in determining whether the detained merchandise violates the DMCA:

(A) CBP may have previously disclosed to the eligible person, prior to issuance of the notice of detention, limited importation information concerning the detained merchandise,

as described in paragraph (b)(4) of this section, and, in any event, such information may be released to the eligible person, if available, no later than the date of issuance of the notice of detention; and

(B) CBP may disclose to the eligible person information that appears on the detained merchandise and/or its retail packaging, including unredacted photographs, images, or samples, as described in paragraph (b)(3) of this section, unless the importer provides information within seven business days of the notification establishing that the detained merchandise does not violate the DMCA.

(ii) *Failure of importer to respond or insufficient response to notice.* Where the importer does not provide information within the seven business day response period, or the information provided is insufficient for CBP to determine that the merchandise does not violate the DMCA, CBP will proceed with the disclosure of information, as described in paragraph (b)(3) of this section, to the eligible person if CBP concludes that the disclosure would assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP will notify the importer in case of any such disclosure.

(iii) *Request for DMCA protections and establishment of a list of persons approved for post-seizure disclosures.* Eligible persons may apply to receive post-seizure disclosures from CBP by attaching a letter requesting such disclosures to an application to record copyright. CBP will add those persons CBP approves for such disclosures to a list that CBP will maintain. CBP will provide the post-seizure disclosures described in this section to injured persons, as defined in this part, appearing on the list. CBP will publish notice of the establishment of the list in the **Federal Register**. After the list has been established, CBP will publish notice of revisions to the list in the **Federal Register**.

(3) *Disclosure to eligible persons of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images or samples.* CBP will disclose information appearing on the merchandise and/or its retail packaging (including labels) and images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination (*i.e.*, an unredacted condition) if CBP concludes that the disclosure of information to the eligible person as described in paragraph (b)(2)(ii) of this section would

assist CBP in its determination, and provided that the disclosure would not compromise an ongoing law enforcement investigation or national security. CBP may also provide a sample of the merchandise and/or its retail packaging in its condition as presented for examination to the eligible person. The release of a sample will be in accordance with, and subject to, the bond and return requirements of paragraph (c) of this section. The disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying markings appearing on the merchandise or its retail packaging (including labels), in alphanumeric or other formats.

(4) *Disclosure to eligible person of limited importation information.* From the time merchandise is presented for examination, CBP may disclose to the eligible person limited importation information in order to obtain assistance in determining whether an imported article violates the DMCA. If the information is unavailable at the time the notice of detention is issued, CBP may release the information after issuance of the notice of detention. The limited importation information CBP may disclose to the eligible person consists of:

(i) The date of importation;  
 (ii) The port of entry;  
 (iii) The description of the merchandise, for merchandise not yet detained, from the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information or other entry document as appropriate, or, for detained merchandise, from the notice of detention;

(iv) The quantity, for merchandise not yet detained, as declared on the paper or electronic equivalent of the entry (as defined in § 142.3(a)(1) or (b) of this chapter), the CBP Form 7512, cargo manifest, advance electronic information, or other entry document as appropriate, or, for detained merchandise, from the notice of detention; and

(v) The country of origin of the merchandise.

(5) *Disclosure to eligible person of redacted photographs, images and samples.* Notwithstanding the notice and seven business day response procedure of paragraph (b)(2) of this section, CBP may, in order to obtain assistance in determining whether an imported article violates the DMCA and at any time after presentation of the merchandise for examination, provide to the eligible person photographs,

images, or a sample of the suspect merchandise or its retail packaging (including labels), provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, or any markings that could reveal the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP may release a sample under this paragraph when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(b)(5) was (damaged/destroyed/lost) during examination, testing, or other use.”

(c) *Conditions of disclosure to eligible person of information appearing on detained merchandise and/or its retail packaging, including unredacted photographs, images and samples*—(1) *Disclosure for limited purpose of assisting CBP in DMCA determinations.* In accordance with paragraphs (b)(2)(ii) and (3) of this section, when CBP discloses information to an eligible person prior to seizure, CBP will notify the eligible person that some or all of the information being released may be subject to the protections of the Trade Secrets Act, and that CBP is only disclosing the information to the eligible person for the purpose of assisting CBP in determining whether the merchandise violates the DMCA.

(2) *Bond.* CBP may release a sample under paragraphs (b)(2)(ii) and (3) of this section when the eligible person furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The eligible person must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the

possession of the eligible person, the eligible person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(c) was (damaged/destroyed/lost) during examination, testing, or other use.”

(d) *Disclosure to importer of unredacted photographs, images or samples.* CBP will disclose to the importer unredacted photographs, images, or an unredacted sample of imported merchandise suspected of violating the DMCA at any time after the merchandise is presented to CBP for examination. CBP may demand the return of the sample at any time. The importer must return the sample to CBP upon demand or at the conclusion of any examination, testing, or similar procedure performed on the sample. In the event that the sample is damaged, destroyed, or lost while in the possession of the importer, the importer must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(d) was (damaged/destroyed/lost) during examination, testing, or other use.”

(e) *Seizure and disclosure to injured person of comprehensive importation information.* Upon a determination by CBP, made any time after the merchandise has been presented for examination, that an article of domestic or foreign manufacture imported into the United States violates the DMCA as described in paragraph (a)(1) of this section, CBP will seize such merchandise and, in the absence of written consent of the injured person (see paragraph (g) of this section), forfeit the seized merchandise in accordance with the customs laws. When merchandise is seized under this section, CBP will disclose to the injured person the following comprehensive importation information, if available, within 30 business days from the date of the notice of the seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) The description of the merchandise from the notice of seizure;
- (4) The quantity as set forth in the notice of seizure;
- (5) The country of origin of the merchandise;
- (6) The name and address of the manufacturer;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

(f) *Disclosure to injured person, following seizure, of unredacted photographs, images and samples.* At

any time following a seizure of DMCA-violative merchandise under this section, and upon receipt of a proper request from the injured person, CBP may provide, if available, photographs, images, or a sample of the seized merchandise and its retail packaging or labels, in its condition as presented for examination, to the injured person. CBP may release a sample under this paragraph when the injured party furnishes to CBP a bond in an amount specified by CBP and containing the conditions set forth in § 113.70 of this chapter. CBP may demand the return of the sample at any time. The injured person must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use. In the event that the sample is damaged, destroyed, or lost while in the possession of the injured person, the injured person must, in lieu of return of the sample, certify to CBP that: “The sample described as [insert description] and provided pursuant to 19 CFR 133.47(f) was (damaged/destroyed/lost) during examination, testing, or other use.”

(g) *Consent of the owner of the recorded copyright; failure to make appropriate disposition.* The owner of the recorded copyright, within thirty days from notification of seizure, may provide written consent to the importer allowing the importation of the seized merchandise in its condition as imported or its exportation, entry after obliteration of the recorded copyright, or other appropriate disposition. Otherwise, the merchandise will be disposed of in accordance with § 133.52 of this part, subject to the importer’s right to petition for relief from forfeiture under the provisions of part 171 of this chapter.

#### **§ 133.48 Demand for redelivery of released articles**

If it is determined that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, an authorized CBP official will promptly make demand for redelivery of the articles in accordance with § 141.113 of this chapter. If the articles are not redelivered to CBP custody under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62 of this chapter, a claim for liquidated damages will be made in accordance with § 141.113 of this chapter.

#### **§ 133.51 [Amended]**

■ 11. Section 133.51 is amended in paragraph (a) by:

- a. Adding the words "including the DMCA," after the words "trademark or copyright laws,"; and
- b. Removing the phrase "§ 133.24 or § 133.46." and adding in its place the phrase "§§ 133.24, 133.46, or 133.48 of this part."

§ 133.52 [Amended]

- 12. Section 133.52 is amended in paragraph (b) by adding the phrase "except as provided in §§ 133.42(g) and 133.47(g) of this part" after the word "destroyed".

PART 148—PERSONAL DECLARATIONS AND EXEMPTIONS

- 13. The general authority citation for part 148 continues and new specific authority is added for § 148.55, to read as follows:

**Authority:** 19 U.S.C. 66, 1496, 1498, 1624. The provisions of this part, except for subpart C, are also issued under 19 U.S.C. 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States).

\* \* \* \* \*

Section 148.55 also issued under 17 U.S.C. 602 and 19 U.S.C. 1526;

\* \* \* \* \*

- 14. Amend § 148.55 by revising the section heading and paragraphs (a) and (c) to read as follows:

§ 148.55 Exemption for articles embodying American trademark or copyright.

(a) *Application of Exemption.* An exemption is provided for articles bearing a counterfeit mark (as defined in § 133.21(a) of this chapter) or piratical articles (as defined in § 133.42(a) of this chapter) accompanying any person arriving in the United States which would be prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602. The exemption may be applied either to those piratical articles or to those articles bearing a counterfeit mark that are of foreign manufacture and bear a recorded mark owned by a citizen of, or a corporation or association created or organized within, the United States, when imported for the arriving person's personal use in the quantities provided in paragraph (c) of this section.

\* \* \* \* \*

(c) *Quantities.* Generally, every 30 days, persons arriving in the United States may apply the exemption to the following: one piratical article of each type, or one article of each type bearing a counterfeit mark, and/or one piratical article of each type that is also an article bearing a counterfeit mark. The Commissioner shall determine if more than one article may be entered and,

with the approval of the Secretary of the Treasury, publish in the **Federal Register** a list of types of articles and the quantities of each entitled to the exemption. If the owner of a recorded mark or recorded copyright allows importation of more than one article normally prohibited entry under 19 U.S.C. 1526, 15 U.S.C. 1124, or 17 U.S.C. 602, the total of those articles authorized by the owner may be entered without penalty.

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

- 15. The general authority citation for part 151 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1202 (General Note 3(i) and (j), Harmonized Tariff Schedule of the United States (HTSUS), 1624;

\* \* \* \* \*

- 16. Amend § 151.16 by:

- a. Revising paragraphs (a), (b), and (c);
- b. Removing the word "Customs" wherever it appears and adding in its place the term "CBP", and removing the word "shall" wherever it appears and adding in its place the word "will" in paragraph (d);
- c. Removing the word "Customs" and adding in its place the term "CBP" in paragraph (e);
- d. Removing the word "Customs" wherever it appears and adding in its place the term "CBP", and removing the word "shall" and adding in its place the word "will" in paragraph (f);
- e. Removing the word "shall" and adding in its place the word "will" in paragraph (g);
- f. Removing the word "Customs" and adding in its place the term "CBP" in paragraph (h);
- g. Removing the word "Customs" and adding in its place the term "CBP", and removing the word "shall" and adding in its place the word "will" in paragraph (i); and
- h. Removing the word "Customs" and adding in its place the term "CBP" in paragraph (j).

The revisions read as follows:

§ 151.16 Detention of merchandise.

(a) *Exemptions from applicability.* The provisions of this section are not applicable to detentions effected by CBP on behalf of other agencies of the U.S. Government in whom the determination of admissibility is vested.

(b) *Decision to detain or release.* Within five business days from the date on which merchandise is presented for CBP examination, CBP will decide whether to release or detain merchandise. Merchandise that is not

released within the five business day period will be considered to be detained merchandise under 19 U.S.C. 1499(c)(1). For purposes of this section, merchandise will be considered to be presented for CBP examination when it is in a condition to be viewed and examined by a CBP officer. Mere presentation to the examining officer of a cargo van, container, or instrument of international traffic in which the merchandise to be examined is contained will not be considered to be presentation of merchandise for CBP examination for purposes of this section. Except when merchandise is examined at the public stores, the importer must pay all costs relating to the preparation and transportation of merchandise for CBP examination.

(c) *Notice of detention.* If a decision to detain merchandise is made, or the merchandise is not released within the five business day period described in paragraph (b) of this section, CBP will issue a notice to the importer or other party having an interest in such merchandise within five business days from such decision or failure to release. Issuance of a notice of detention is not to be construed as a final determination as to admissibility of the merchandise. The notice will be prepared by the CBP officer detaining the merchandise and will advise the importer or other interested party of the:

- (1) Initiation of the detention, including the date the merchandise was presented for examination;
- (2) Specific reason for the detention;
- (3) Anticipated length of the detention;
- (4) Nature of the tests or inquiries to be conducted; and
- (5) Nature of any information which, if supplied to CBP, may accelerate the disposition of the detention.

\* \* \* \* \*

PART 177—ADMINISTRATIVE RULINGS

- 17. The general authority citation for part 177 continues to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

\* \* \* \* \*

§ 177.0 [Amended]

- 18. In § 177.0 remove the words "part 133 (relating to disputed claims of

piratical copying of copyrighted matter);”.

**Robert E. Perez,**

*Deputy Commissioner, U.S. Customs and Border Protection.*

Approved: October 2, 2019.

**Timothy E. Skud,**

*Deputy Assistant Secretary of the Treasury.*

[FR Doc. 2019–21980 Filed 10–15–19; 8:45 am]

**BILLING CODE 9111–14–P**

## NATIONAL LABOR RELATIONS BOARD

### 29 CFR Part 103

RIN 3142–AA15

#### Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies; Correction and Extension of Comment Period

**AGENCY:** National Labor Relations Board.

**ACTION:** Notice of proposed rulemaking; Correction; extension of comment period.

**SUMMARY:** This document corrects the preamble to a proposed rule published in the **Federal Register** of September 23, 2019, regarding Nonemployee Status of University and College Students Working in Connection with Their Studies. This correction revises the Regulatory Flexibility Act section in the preamble of the proposed rule to substitute an Initial Regulatory Flexibility Analysis. The date to submit responses to the Notice of Proposed Rulemaking is also extended for 60 days.

**DATES:** The comment period for the notice of proposed rulemaking published at 84 FR 49691 is extended. Comments must be received by the Board on or before Monday, December 16, 2019. Comments replying to comments submitted during the initial comment period must be received by the Board on or before Monday, December 30, 2019.

**FOR FURTHER INFORMATION CONTACT:** Roxanne Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570–0001, (202) 273–1940 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

#### SUPPLEMENTARY INFORMATION:

##### Correction

In proposed rule FR 2019–20510, beginning on page 49691 in the issue of September 23, 2019, make the following

correction, in the **SUPPLEMENTARY INFORMATION** section. On page 49699, in the 1st column, revise the text between “*Regulatory Flexibility Act*” and “*Paperwork Reduction Act*” to read as follows:

##### A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601, *et seq.*, ensures that agencies “review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].”<sup>1</sup> It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (“IRFA”) and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities.<sup>2</sup> However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.<sup>3</sup> The RFA does not define either “significant economic impact” or “substantial number of small entities.”<sup>4</sup> Additionally, “[i]n the absence of statutory specificity, what is ‘significant’ will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.”<sup>5</sup>

As discussed below, the Board believes its proposed rule will likely not have a significant economic impact on a substantial number of small entities but is not certain. The Board assumes for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule because at a minimum, they will need to review and understand the effect of the proposed standard as it relates to undergraduate and graduate students who perform services for compensation in connection with their studies. Additionally, there may be compliance costs that are unknown to the Board.

<sup>1</sup> E.O. 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”).

<sup>2</sup> Under the RFA, the term “small entity” has the same meaning as “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. 601(6).

<sup>3</sup> 5 U.S.C. 605(b).

<sup>4</sup> 5 U.S.C. 601.

<sup>5</sup> Small Business Administration Office of Advocacy, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act” (“SBA Guide”) at 18, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

For these reasons, the Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule.<sup>6</sup> An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities.<sup>7</sup> An IRFA also presents an opportunity for the public to provide comments that will shed light on impacted entities and potential compliance costs that are unknown to the Board or on any other part of the IRFA.

Detailed descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained in the **SUMMARY** and **SUPPLEMENTAL INFORMATION** sections of the Notice of Proposed Rulemaking. See 84 FR 49691. In brief, the proposed rule states that students who perform any services, including teaching or research assistance, at a private college or university related to their studies are not statutory employees subject to jurisdiction of the Board. The Board has concluded that this rule—providing that undergraduate and graduate students performing services in connection with their studies are not statutory employees—is more consistent with the purposes and policies of the National Labor Relations Act (Act or NLRA), which contemplates jurisdiction over economic relationships not those that are primarily educational in nature.

##### B. Description and Estimate of Number of Small Entities to Which the Rule Applies

To evaluate the impact of the proposed rule, the Board first identified the universe of small entities that could be impacted by the determination that students who perform services at a private college or university in connection with their studies are not statutory employees. The United States Census Bureau does not specifically define “small business” but does break down its data into firms with fewer than

<sup>6</sup> After a review of the comments, the Board may elect to certify that the rule will not have a significant economic impact on a substantial number of small entities in the publication of the final rule. 5 U.S.C. 605(b).

<sup>7</sup> 5 U.S.C. 603(b).