



ASCDI NATD
THE GLOBAL ALLIANCE OF THE IT CHANNEL

June 25, 2012

Docket number USCBP 2012-0011

BY ELECTRONIC SUBMISSION to www.regulations.gov and by FEDERAL EXPRESS TO:

Commercial Regulations Branch
Office of International Trade, Regulations & Rulings
United States Customs and Border Protection
799 9th Street NW (Mint Annex)
Washington DC 20229-1179

Re: USCBP-2012-0011] Comments of Association of Service and Computer Dealers
International Regarding Proposed Regulations, *Disclosure of Information for Certain
Intellectual Property Rights Enforced at the Border*

Dear Sirs,

These comments are submitted by the Association of Service and Computer Dealers International, Inc., (“ASCDI”) of 131 NW 1st Avenue, Delray Beach, Florida 33444. ASCDI is an Internal Revenue Code 501(c)(6) not-for-profit trade association with 400 members worldwide. ASCDI members include brokers, dealers, manufacturer authorized and independent resellers, maintainers, independent service organizations and manufacturers of information technology (“IT”) and telecommunications products and services. ASCDI member customers include business and industry, governmental agencies and subdivisions in the United States and throughout the world. This letter represents ASCDI’s response to Customs’ request for comments concerning the agency’s interim regulations on *Disclosure of Information for Certain Intellectual Property Rights Enforced at the Border*. The interim regulations were published in the *Federal Register* on April 24, 2012. ASCDI appreciates the opportunity to submit these comments.

Page 1 of 6

131 NW First Avenue Ñ Delray Beach Ñ Florida Ñ 33444
Phone 561-266-9016 Ñ Fax 561-431-6302
www.ascdi.com Ñ jmarion@ascdi.com

For the reasons set forth below, ASCDI submits that several amendments should be made to the proposed regulations.

Background Information of the ASCDI

ASCDI was formed in 1980 to promote legal and ethical business practices in the resale of IT and telecommunications products and services carried on by its members. In many cases ASCDI's members resell both used and new products in competition with the manufacturers, who are the property rights (trademark) holders.

Early on when products were manufactured in the United States, infringement and counterfeiting were not issues in the technology resale industry. Lately however, with most technology equipment being manufactured outside of the U.S., counterfeit products and infringement of third party intellectual property rights, including patents and copyrightable software, trademarks and logos have become an issue of concern.

In response to changing market conditions, ASCDI adopted a number of policies governing its members including a no tolerance Intellectual Property Infringement Policy and an Anti-Counterfeiting Policy. The Anti-Counterfeiting Policy requires ASCDI members to honor and abide by the Policy in order to eliminate, or mitigate the impact of, counterfeit goods and develop best practices and strategies to identify, inspect, test, properly dispose of and report encounters with counterfeit products to law enforcement. The ASCDI further requires that all of its members adopt individual corporate Anti-Counterfeiting Policy governing internal operations. These Anti-Counterfeiting Policies reflect the dedication of the ASCDI and its members to maintain the highest level of integrity and responsibility toward the IT and telecommunications industry, their customers and members of public and private enterprises.

The individual member Anti-Counterfeiting Policy requires that every product purchased undergo a rigid audit of its hardware and software capabilities, to ensure that the product is genuine. Any goods determined to be counterfeit are rejected and quarantined on-premise to prevent re-entry into the supply chain and they may be made available to law enforcement authorities. Goods deemed counterfeit cannot be returned for credit and will be destroyed. ASCDI and its members have an abiding interest in ensuring the effective enforcement of intellectual property rights at the border, and in preventing the abuse of such rights.

While Customs rightly detains and seizes goods which are determined to be counterfeit or trademark infringing, importers have a right to engage in the lawful importation of used and new products for which the trademark owners have been compensated for the value of their rights. It has been the ASCDI's experience that Customs officers frequently detain, and in some cases

Page 2 of 6

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seize, goods which are suspected of being counterfeit or infringing, but which upon examination turn out to be used products which may have undergone refurbishing or other operations constituting “permissible repair”. Sometimes these products turn out to be new products, legally sold by an agent of the trademark holder but unbeknownst to the trademark holder.

ASCDI believes the interim regulations can be strengthened in several ways, discussed below.

Rights of Trademark Holders

The Regulations give intellectual property rights owners the right to obtain samples of seized or detained merchandise in order to allow trademark owners the opportunity to examine imported goods and make a determination regarding the products authenticity and to advise CBP officers accordingly.

Rights of Importers

Importers must have the same rights as trademark holders. Allowing property rights owners to be the sole determining factor with regard to the authenticity of products does not take into consideration the fact that in many cases the property rights holder has a conflict of interest. As mentioned above, members of the technology resale industry import and resell product in competition with the manufacturer of the product. Importers must have the same right to obtain samples of detained or seized goods under bond in order to give Customs a balanced opinion as to the authenticity of a product.

In many cases, Customs detains goods on suspicion of IP violations before the importer has had an opportunity to inspect the goods. Often, the goods detained or seized have been shipped to the importer by foreign sellers under conditions where the importer has not had the opportunity to inspect the goods prior to shipment. While foreign shippers may warrant that the goods are genuine, the importer cannot confirm this until the goods are received. ASCDI's antic-

Page 3 of 6

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counterfeiting policies anticipate and provide for such situations.

At present, Customs officials do not make samples of the product available to importers to examine. This is unacceptable, especially when Customs is making samples available to the rights holder. In many cases if importers were given information concerning the goods seized, they could quickly demonstrate their authenticity to CBP.

Delays encountered under current practice and under the proposed Rule modifications cause importers to lose substantial value as IT and telecommunications goods decline in value on a daily basis.

For this reason, the interim regulations should be amended to provide importers of record and consignees with the same right accorded to trademark owners, to obtain a sample of the goods under bond. This right should be accorded immediately upon the detention of the goods. ASCDI believes that this would allow the goods to be tested at a member's audit facility allowing the member to provide prompt information and commentary to Customs concerning the status of the goods under intellectual property laws.

Allowing importers access to their goods under bond will improve the quality of the Customs enforcement process, provide additional information for the agency's review, and ensure greater fairness in the enforcement process.

Format of Rights Owners' Statements to Customs

The goods which members of the technology resale industry import are either new "in-box" goods or are goods which are in used or refurbished condition. In both of these cases, the goods are not "counterfeit" but rather genuine versions of the goods which the trademark owner sells under the mark in the United States, or goods which, following a trademark-exhausting "first sale", have been physically altered by subsequent purchasers. In both cases, the goods are legitimately traded, and do not infringe any trademark rights.

Page 4 of 6

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As stated above, the goods which are being imported are genuine, but perhaps legitimately modified versions of trademarked goods. The goods may have label changes, legitimately upgraded software, or replaced components. The modifications stated above do not violate the trademark holder's rights, do not cause consumer confusion and do not materially change the goods sold under trademark in the United States.

ASCDI Members have found that when Customs contacts trademark holders to question the authenticity of imported goods, trademark holders often characterize these goods as "unauthentic" or "non-genuine" to secure seizure action. These are descriptions which have no meaning under the law but are used to deceive Customs and dupe them into seizing the goods.

Customs should amend the interim regulations to require trademark holders to provide certifications, under penalty of perjury, that goods are "counterfeit", and contain spuriously-applied versions of the specific marks recorded with Customs.

Disclosure of Information

The interim regulation gives importers the opportunity to establish, within seven (7) days (excluding weekends and holidays) of a notice of detention to establish to Customs' satisfaction that the marks are not counterfeit. The seven day period is not sufficient, since Customs frequently sends notices of detention by mail, over great distances, and to multiple recipients, and it can take several days for the notices to reach the importer. A thirty (30) day period measured from issuance of the notice of detention, would be more appropriate.

CBP should commit itself to a thirty day (30) fixed time period for the final resolution of seizures based on claims of Intellectual Property violations and should consistently specify the reasons for the detention. It should adhere to these commitments uniformly regardless of the port of entry of the products.

Page 5 of 6

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Finally, Customs proposes to make certain information available to the trademark holder before issuing a notice of detention to the importer. This is patently unfair. We are a country grounded in principles of equal treatment under the law. The information to be made available should be limited to the date of importation; the port of entry; the description of the merchandise from the entry; and the country of origin of the merchandise. ASCDI and its members see no reason why the quantity of merchandise involved needs to be disclosed to the rights holder; this is competitive data based upon the legitimate actions of the importer with no relevance to the issue of trademark holder rights or the character of the goods.

Conclusion

We welcome the opportunity to provide this information. We stand ready to furnish any additional information which Customs may require in considering the final adoption of the interim regulation.

Very truly yours,

Joseph Marion
ASCDI President
www.ascdi.com

Page 6 of 6

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