November 6, 2019

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

Docket Number: USCBP 2019-0031

To Whom It May Concern:

This letter is on behalf of the American Bar Association (the “ABA”) Section of Intellectual Property Law (the “Section”) in response to the United States Customs and Border Protection’s (the “Agency’s”) request for comments concerning Disclosure of Information Regarding Abandoned Merchandise, published at 84 Fed. Reg. 44790 (Docket No. USCBP 2019-0031, August 27, 2019) (the “Notice”). The views expressed herein are presented on behalf of the Section of Intellectual Property Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

Since 1894, the ABA-IPL Section has advanced the development and improvement of intellectual property laws and their fair and just administration. As the forum for rich perspectives and balanced insight on the full spectrum of intellectual property law, the Section serves within the ABA as a highly respected voice within the intellectual property profession, before policy makers, and with the public.

The Section strongly supports the Agency’s goal of enforcing intellectual property rights laws and regulations at the border pursuant to 19 CFR 133. To that end, the Section supports the Agency’s proposed rulemaking to develop a procedure to disclose information to a trademark owner in cases where counterfeit merchandise has been voluntarily abandoned as described in 19 CFR 127.12(b).

In support of the Agency’s goal and proposed rulemaking, the Section respectfully submits the following comments.
SUPPORT OF PROPOSED RULEMAKING GOAL

The current regulation pertaining to the issue, 19 CFR 133.21 already provides that the Agency may detain merchandise suspected of bearing counterfeit marks. In that event, the Agency sends a notice to the shipping party requesting proof that the merchandise is authentic. If the merchandise is seized and deemed counterfeit, the Agency provides “comprehensive importation information” to the trademark owner. Furthermore, the Agency may disclose limited information to the owner of the mark to ascertain whether the imported good bears a counterfeit mark. If the merchandise is deemed counterfeit, the Agency will provide the trademark owner with additional information about the merchandise itself, the location from which it came, and the party who sent the merchandise.

19 CFR 133.21 is silent on whether the Agency can provide the “comprehensive importation information” of the suspected counterfeit merchandise to the trademark owner in the context of low-value merchandise that has been voluntarily abandoned. The rulemaking notes that in these cases “the cost of demonstrating to CBP that a shipment is legitimate may outweigh the importation’s value, and importers frequently fail to respond to CBP inquiries.” As a result, many of these shipments of suspected counterfeit merchandise become voluntarily abandoned. The proposed rulemaking seeks to clarify the Agency’s protocol in cases of abandoned merchandise, which involves the disclosure of the same “comprehensive importation information” to the trademark owner as in cases of seized merchandise.

Because the proposed rule would allow the Agency to provide the enhanced information to the trademark owner in the context of low-value seizures of abandoned counterfeit merchandise, the Section supports this proposed rulemaking.

SUPPORT OF DISCLOSURE MEASURES FOR VOLUNTARILY ABANDONED MERCHANDISE

Because the Section supports preventing the importation of goods into the United States in violation of laws that protect intellectual property rights, the Section supports the enactment of measures to ensure improved communication between the Agency and trademark owners in efforts to identify suspected counterfeit merchandise before its importation into the country.

Therefore, the Section supports the disclosure by the Agency to trademark owners of unredacted samples, packaging and photographs of goods suspected of being imported into the United States in violation of laws that protect U.S. intellectual property rights, including voluntarily abandoned merchandise. Additionally, the Section supports expedited disclosure by the Agency to trademark owners, of potentially harmful or dangerous suspected counterfeit merchandise, including suspected counterfeit merchandise that is voluntarily abandoned.
CLOSING

The proposed rulemaking would enhance communication and transparency between the Agency and trademark owners, which in turn helps protect the brand interests of American companies. From a business perspective, the proposed rulemaking would provide trademark owners with the information to prevent counterfeiters from damaging their brands. Without any information on abandoned counterfeit merchandise at the border, trademark owners do not have the opportunity to prevent future infringements and potential tarnishment of their intellectual property. Additionally, if counterfeit merchandise is not strictly regulated, companies working to protect their intellectual property rights may choose other countries in which to invest and innovate.

The Section commends the Agency for its consideration of these issues and appreciates the opportunity to offer these comments.

Sincerely,

George W. Jordan III
Chair, ABA Section of Intellectual Property Law