



# MOTION PICTURE ASSOCIATION

December 16, 2019

**Via Regulations.gov (Docket No. USCBP-2019-0037)**

Robert E. Perez  
Deputy Commissioner  
U.S. Customs and Border Protection

Timothy E. Skud  
Deputy Assistant Secretary of the Treasury

**Re: U.S. Customs and Border Protection, Department of Homeland Security;  
Department of the Treasury, Notice of Proposed Rulemaking: Enforcement of  
Copyright and the Digital Millennium Copyright Act, 84 Fed. Reg. 55251 (October  
16, 2019)**

Dear Sirs:

The Motion Picture Association (MPA) submits the following response to the Notice of Proposed Rulemaking issued October 16, 2019, by the Office of the Department of Homeland Security and the Department of Treasury, inviting comments on a proposed rule implementing certain provisions of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).

The American motion picture and television industry is a major U.S. employer that supported 2.6 million jobs and \$177 billion in total wages in 2017. Nearly 340,000 jobs are in the core business of producing, marketing, and manufacturing of motion pictures and television shows. Another nearly 587,000 jobs were engaged in the distribution of motion pictures and television shows to consumers, including people employed at movie theaters, video retail and rental operations, television broadcasters, cable companies, and online video services. The industry also supports indirect jobs in the thousands of companies that do business with the industry, such as caterers, dry cleaners, florists, hardware and lumber suppliers, and retailers.

The motion picture and television industry is a community of creators and innovators who work tirelessly at the art and craft of storytelling. MPA fully supports the ongoing efforts by U.S. Customs and Border Protection (CBP) to combat the trade in counterfeit and pirated goods and other unlawful goods that enable unauthorized access to motion picture and television content. These products are a threat to legitimate commerce, and are part of a piracy ecosystem that threatens the very heart of our industry and the livelihoods of the people who give it life. As discussed below, full implementation of the TFTEA would enhance CBP's ability to interdict

these unlawfully imported goods at the U.S. border and, in so doing, contribute to the sustainability of the U.S. motion picture and television industry.

## I. Disclosure of Information to Rights Holders

Although the illicit online dissemination of copyrighted content presents the most pressing threat to the U.S. movie and television industry, pirated and counterfeit hard goods remain a problem. High quality DVDs, Blu-ray discs, and box sets of containing unauthorized copies audiovisual materials continue to be manufactured in China and exported to the United States. These products have high quality packaging and are often indistinguishable from legitimate product. The U.S. motion picture and television industry has also produced some of the most famous and iconic brands in the world and engages in the retail and licensing of consumer products representing billions of dollars in sales. Pirated and counterfeit products can be purchased from websites and online sales platforms, sometimes even legitimate ones. The sales are often fulfilled through small-package shipments from U.S.-based sellers obtaining their inventory from overseas, which obfuscates their origin and presents significant challenges for customs authorities to detect and interdict the illicit shipments.

MPA supports CBP's implementation of Section 302 of TFTEA, which requires CBP to provide unredacted samples of suspected infringing merchandise to assist CBP in making these very difficult determinations regarding whether merchandise is pirated. In particular, the new regulations will allow CBP officers to share unredacted information, including photographs, images, or samples (including packaging and labels). High quality DVDs, Blu-ray discs, box sets containing unauthorized copies of audiovisual materials, and other piratical goods are very difficult to distinguish from legitimate merchandise. It is often essential for CBP officers to seek assistance from rights holders to assist in making these infringement determinations. The ability for CBP officers to share unredacted information, including samples, will make this cooperation much more effective. Effective cooperation between rights holders and customs officials is critical for meaningful enforcement and MPA welcomes this change to the CBP regulations.

## II. Border Enforcement Against Circumvention Devices

MPA also supports the implementation of Section 303 of TFTEA, which provides for seizure and forfeiture of devices that violate the circumvention prohibitions of the DMCA (17 U.S.C. 1201). As outlined below, however, CBP should revise the definition of "copyright protection measure" to fully implement the TFTEA and to ensure effective border enforcement against all unlawfully imported circumvention devices.

Today, more consumers enjoy authorized access to more copyright works, including motion picture and television content, in more diverse ways and at more affordable price points than ever before. A major reason for this progress is the widespread use of Technological Protection Measures (TPMs), which foster many of the innovative products and services

available online by allowing creators to control and manage access to copyrighted works and to diversify products and services. New business models depend on such controls. TPMs ensure that works made available in hard goods (DVDs and Blu-ray discs), in the online or mobile environment, or through on-demand or conditional access (e.g., Pay-TV, Pay-per-View) are not easily stolen. Unfortunately, illicit businesses around the world manufacture and distribute technologies, software, devices, components, or tools, to circumvent TPMs in order to gain unlawful access to the content or to copy it without authorization. China is a hub for the manufacture of a host of circumvention devices exported to the United States.

Enacted in 1998, the Digital Millennium Copyright Act (DMCA) prohibits the circumvention of TPMs, which has enabled the new business models described above to flourish. Importantly, the DMCA includes prohibitions against the importation of devices that circumvent two distinct types of TPMs. 17 USC §1201(a)(2) prohibits the importation of technologies, products, or services that circumvent a TPM that effectively controls access to a copyrighted work. Known as “access controls,” these TPMs include, for example, authentication protections (e.g., requiring a user name and password) to limit access to a streaming service, such as Netflix or Disney +, to subscribers of the service. Separately, 17 USC §1201(b)(1) prohibits the importation of technologies, products, or services that circumvent a TPM that effectively protects the exclusive rights of a copyright owner. Known as “copy controls,” these TPMs include, for example, encryption on DVDs that prevents a user from making an unauthorized copy of the motion picture or television content.

Congress enacted Section 303 of the TFTEA to explicitly authorize CBP to seize and forfeit merchandise that is prohibited under **both** 17 USC §1201(a)(2) and 17 USC §1201(b)(1).<sup>1</sup> Unfortunately, the definition of “copyright protection measure” in proposed 19 CFR §133.47(a) references only access controls, not copy controls. As a result, contrary to Section 303 of the TFTEA, the proposed regulations would only apply to the seizure and forfeiture of imported merchandise that circumvents access controls. Accordingly, to adequately implement the TFTEA and ensure effective border enforcement is available against all circumvention devices that violate the DMCA, CBP should revise the definition of “copyright protection measure” to include copyright controls. MPA therefore proposes the following amendment:

*“(1) Copyright protection measure. A technological measure that effectively controls access to a copyrighted work for which the copyright has been recorded with CBP, **or effectively protects a right of a copyright owner in a copyrighted work or a portion thereof for which the copyright has been recorded with CBP.**”*

Notwithstanding this concern, MPA recognizes that the proposed rule includes a number of provisions that will improve border enforcement against unlawfully imported circumvention devices. Determining whether a device violates the circumvention prohibitions of the DMCA is difficult, and rights holder assistance is often critical. Thus, the proposed regulations will enhance enforcement by authorizing CBP officers to share unredacted information regarding suspected circumvention devices to assist in determining whether a suspected article violates the

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<sup>1</sup>See 19 USC §1595a(c)(2)(G).

DMCA. Furthermore, the proposed provisions requiring post-seizure disclosure of information to injured rights holders will significantly improve follow-on enforcement efforts against manufacturers and distributors of these unlawful circumvention technologies. As discussed, however, for these important provisions to apply to unlawfully imported devices that circumvent copy controls, CBP must revise the definition of “copyright protection measure” in accordance with the amendment proposed above.

### III. Enhanced Border Enforcement Against Piracy Devices

MPA is hopeful that these proposed regulations will enhance border enforcement against Piracy Devices (also referred to as “illicit streaming devices” (ISDs) or in some cases “Kodi boxes”). These devices enable users to stream, download, or otherwise access unauthorized content from the Internet. The U.S. Trade Representative has focused on this problem and in 2017 estimated that Piracy Devices had a market penetration rate at 6.5% in North America with annual losses inflicted by these devices on the North American entertainment industry estimated at \$4-5 billion.<sup>2</sup> Piracy Devices and apps provide illegal access to movie and television content through a variety of means, including downloading and streaming content as well as unauthorized streaming of live television and sporting events, thus undermining the licensing fees paid by distributors on which content creators depend. MPA members continue to suffer enormously from a growing threat of these devices and apps.

Piracy Devices that are preloaded with infringing apps enabling access to television and VOD subscription services can be found online and in stores. China is a hub for the manufacture of these devices, many of which are exported to the United States, as well as for the development of the piracy apps and add-ons that allow these devices to be used to pirate content. Piracy Devices loaded with infringing apps allow a user to connect to a supporting over-the-top (OTT) online infrastructure that provides users with instant access to infringing audiovisual and other content.

Piracy devices and apps are fully integrated into the larger digital piracy ecosystem. A 2019 report found that approximately 26.6 billion viewings of U.S.-produced movies and 126.7 billion viewing of U.S.-produced television episodes are pirated digitally each year.<sup>3</sup> This same study estimated that digital video piracy results in losses to the U.S. economy of between 230,000 and 560,000 jobs, and between \$47.5 billion and \$115.3 billion in reduced gross domestic product each year.<sup>4</sup> It is critical for CBP to use all available tools, including the new tools available through this rulemaking process, to disrupt the flow of Piracy Devices into the United States.

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<sup>2</sup>See U.S. Trade Representative 2017 Notorious Market Report, 8-9, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf>.

<sup>3</sup> See Impacts of Digital Video Piracy on the U.S. Economy. June 2019. <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.

<sup>4</sup> Id.

MPA is grateful for CBP's efforts to combat illicit trade in counterfeit and pirated goods as well as goods that violate the DMCA, and looks forward to continuing to work with CBP to fully implement TFTEA. MPA appreciates the opportunity to comment in this rulemaking process and is ready to provide further information or answer questions as requested.

Sincerely,

A handwritten signature in black ink, appearing to read 'Anissa Brennan', with a long horizontal flourish extending to the right.

Anissa Brennan  
Senior Vice President  
International Affairs and Trade Policy

O (202) 378-9130  
E [anissa\\_brennan@motionpictures.org](mailto:anissa_brennan@motionpictures.org)