

**INTELLECTUAL PROPERTY AT THE BORDER;
U.S. CUSTOMS AND BORDER PROTECTION
ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS**

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U.S. CUSTOMS PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

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INTRODUCTION: INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT AT THE BORDER

Intellectual property – including trademarks, trade names, service marks, patents, copyrights, and maskworks – is a driving force in global commerce. A clever new invention, creative software app, or manufacturing method can become the basis for establishment of multibillion-dollar industries. Smart design and branding can breathe new life into tired product sectors and generate enormous sales. In an Information Age economy, intellectual property is king.

Creators and owners of intellectual property (IP) zealously invoke the protections of United States law to safeguard their inventions. Patents, trademarks and copyrights are registered, advertised, and enforced. Licensees pay billions of dollars for the right to practice technologies, or apply brand names to their goods. Infringers and counterfeiters are pursued in the civil courts and, in some cases, punished with criminal sanctions.

However, the world beyond United States borders can be a dark and dangerous place for American IP owners. Infringers, knockoff artists and software pirates abound. Counterfeiters create bogus – and often dangerous – versions of well-known goods. And many foreign countries have less intellectual property protection than afforded under United States law; in places, officials and court systems turn a blind (or blinking) eye to blatant counterfeiting and piracy.

What can be done about infringement from offshore? Quite a lot, actually.

Congress has given United States Customs and Border Protection important and broad-reaching responsibilities and powers concerning the enforcement of United States intellectual property rights (IPR) – including the power to exclude infringing goods from entry into the United States, and the right to seize, forfeit and destroy counterfeit goods. Customs' powers can be put to the service of IP owners at little or no cost, and can be superior, in some ways, to conventional IP litigation in the Federal courts. Even where private litigation is pursued, Customs-enforced remedies should be a significant part of any corporate IP protection program.

This booklet describes the various Customs-administered IP remedies, and explains how American rights holders can most effectively use them.

I. CBP PROTECTION OF TRADEMARKS

A. Trademark Recordation: “The \$190 Injunction”

Both the Lanham Act¹ – the United States basic trademark statute – and the Tariff Act of 1930² authorize CBP to exclude from entry into the United States articles which infringe trademarks registered in the United States – provided the trademark owner “records” its mark with CBP for import protection.

The recordation process involves the payment of a fee of \$190 for each trademark class for which protection is sought – leading some to refer to the recordation process as “the \$190 injunction”. The name derives from the fact that Customs’ exclusion of infringing goods is equivalent, in many ways, to the protection that a trademark owner would receive if it pursued the more difficult and expensive option of seeking and obtaining a preliminary injunction in Federal court, prohibiting importation and sale of infringing goods.

For many companies, the process of obtaining trademark protection is not considered complete until the mark has been recorded with Customs for import protection.

B. Recording the Mark – A Simple Process

How does an IP owner record its trademark with Customs for import protection? It’s a simple procedure.

¹ See 15 U.S.C. §1120 et seq.

² Section 526(a) of the Tariff Act of 1930, as amended [19 U.S.C. §1526(a)] provides:

1526. Merchandise bearing American trade-mark

(a) Importation prohibited

Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

Section 133.21 of the Customs Regulations [19 U.S.C. §133.21] requires the IP owner to submit an application for recordation of a mark – usually in the form of a letter. A mark registered on the Principal Register of the United States Patent and Trademark Office (USPTO)³ can be recorded with CBP. The application to record must contain the following elements:

Information Required in Application to Record Trademark with CBP	Regulatory Authority
<p>Must be addressed to:</p> <p>Intellectual Property Rights (IPR) & Restricted Merchandise Branch, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229</p>	<p>19 C.F.R. §133.2(a)</p>
<p>Name Complete business address Citizenship of the trademark owner or owners (if a partnership, the citizenship of each partner; if an association or corporation the State, country, or other political jurisdiction within which it was organized, incorporated, or created)</p>	<p>19 C.F.R. §133.2(b)</p>
<p>The places of manufacture of goods bearing the recorded trademark (i.e., legitimate goods);</p>	<p>19 C.F.R. §133.2(c)</p>
<p>The name and principal business address of each foreign person or business entity authorized or licensed to use the trademark and a statement as to the use authorized</p>	<p>19 C.F.R. §133.2(c)</p>

³ Trademarks on the USPTO's Supplemental Register [i.e., number marks used to designate models of a good] may not be recorded with Customs.

<p>Identity of any parent or subsidiary company or other foreign company under common ownership or control which uses the trademark abroad.</p> <p>“Common ownership” requires a 50% or greater ownership of the entity;</p> <p>“Common control” requires common control over policy and is not necessarily synonymous with common ownership.</p>	19 C.F.R. §133.2(d)
A status copy of the certificate of registration certified by the U.S. Patent and Trademark Office showing title to be presently in the name of the applicant	19 C.F.R. §133.3(a)(1)
Five (5) copies of the certificate of registration, reproduced on approximately 8-1/2" x 10-1/2" paper	19 C.F.R. §133.3(a)(2)
Registration fee of \$190 for each class of merchandise for which Customs enforcement is requested (as shown on face of the trademark certificate)	19 C.F.R. §133.3(b)

CBP publishes monthly a list of trademark and trade name recordations [see sample listing at Exhibit A].

C. Recordation and Enforcement of “Service Marks”

Customs also records and enforces “service marks”. A service mark is a mark which is applied to a good to indicate that the good meets some standard or is in some way approved. Usually, the issuer of a service mark is a service provider, who does not itself produce a trademarked good.

Examples of service marks include the Underwriters’ Laboratories (UL) service and registration marks, applied to electrical products, and certification marks issued by trade associations and private standards-setting agencies, such as the Juvenile Product Manufacturers Association (JPMA). The courts have held that service marks, like conventional trademarks, can be recorded with CBP for import enforcement purposes, and enforced at the border by Customs inspectors and

agents.⁴

In enforcing recorded service marks, CBP officers often look beyond the mark itself, and look to the terms of the licensing agreements which authorized users of the mark itself have signed. For example, if a company is authorized to apply the UL mark to radios made in one factory, but applies the mark to radios made in a different factory not approved by UL, CBP will seize the radios as infringing or even counterfeit⁵. Similarly, if a licensing agreement calls for a particular inspection to be performed, and this is not done, CBP may exclude the goods as infringing or counterfeit. This type of enforcement is somewhat controversial, since critics argue that CBP is not really enforcing the trademark or service mark *per se*, but undertaking enforcement of contractual provisions better left to private litigation. However, the courts have as yet given no indication that they will limit CBP's ability to seize and forfeit goods bearing a service mark based on violations of contractual undertakings which support the issuance of the marks.

D. Customs Enforcement – What Will the Agency Do?

What type of protection does the trademark owner get from recording its mark with Customs for import protection? Quite a lot actually.

First, Customs will generally exclude from entry any goods bearing the marks if they are not imported by the recordant, or a person authorized by the recordant. In some cases, as discussed below, this exclusion may even apply to genuine “gray market” goods manufactured by the trademark owner or under its authority.

Customs will also exclude from entry goods bearing marks which are “confusingly similar” to the recorded mark. This allows Customs to make determinations of infringement, and to take action accordingly. For example, a watch bearing the name “ROLET” might be deemed infringing of the registered mark for “ROLEX” watches, and excluded from entry.

In making determinations of infringement, Customs is expected to make a comparison of the language appearing on the imported goods under consideration with the mark as it actually appears on genuine goods – not just the mark as it appears on the USPTO registration or the CBP recordation.⁶

⁴ See, e.g., *United States v. 10,510 Packaged Computer Towers*, 152 F. Supp. 2d 1159 (N.D.Cal. 2001); *United States v. 4500 Audek Model 5601 AM/FM Clock Radios*, 220 F.3d 529 (7th Cir. 2000).

⁵ *United States v. 4500 Audek Model 5601 AM/FM Clock Radios*, 220 F.3d 529 (7th Cir. 2000).

⁶ See *Ross Cosmetics Distribution Centers, Inc. v. United States*, 17 CIT 966 (1993); *Montres Rolex v. Snyder*, 718 F.2d 524, 527-28 (2d Cir.1983) cert. denied 465 U.S. 1100 (1984).

Goods excluded as “infringing” are not automatically subject to seizure and forfeiture. Arguably, the importer should be free to export the goods back to their source, or to some other market outside of CBP’s jurisdiction. However, in many cases, CBP will attempt to seize and forfeit these goods, relying upon discretionary authority set out in Section 596 of the Tariff Act⁷. In some cases, the factual and legal predicate for such seizures and forfeitures is questionable at best. However, IPR owners often benefit from Customs’ actions, which in private litigation often could

⁷ Customs frequently relies on 19 U.S.C. §1595a(c), which provides in pertinent part:

1595a. Forfeitures and other penalties.

* * *

(c) Merchandise introduced contrary to law

Merchandise which is introduced or attempted to be introduced into the United States contrary to law shall be treated as follows:

- (1) The merchandise **shall** be seized and forfeited if it -
 - (A) is stolen, smuggled, or clandestinely imported or introduced;
 - (B) is a controlled substance, as defined in the Controlled Substances Act (21 U.S.C. 801 et seq.), and is not imported in accordance with applicable law;
 - (C) is a contraband article, as defined in section 80302 of title 49; or
 - (D) is a plastic explosive, as defined in section 841(q) of title 18, which does not contain a detection agent, as defined in section 841(p) of such title.
- (2) The merchandise **may** be seized and forfeited if -

* * *

- (C) it is merchandise or packaging in which copyright, trademark, or trade name protection violations are involved (including, but not limited to, violations of section 1124, 1125, or 1127 of title 15, section 506 or 509 of title 17, or section 2318 or 2320 of title 18);
- (D) it is trade dress merchandise involved in the violation of a court order citing section 1125 of title 15;

* * *

It is important to note that the statute distinguishes cases where CBP “shall” seize and forfeit merchandise from cases where the agency has discretion, i.e., “may” seize and forfeit merchandise, but is not obligated to do so. Intellectual property rights violations other than counterfeiting do not require seizure and forfeiture.

not be secured by means of an injunction.

Where goods are deemed to bear *counterfeit* versions of trademarks (whether or not registered with CBP), Customs is obligated not only to exclude the goods, but to seize and forfeit same. Seizure authority is contained both in civil statutes, viz. Section 526(e) of the Tariff Act⁸, but also in the Federal Criminal Code⁹.

Obviously, with thousands of marks recorded for import protection, CBP officers – who administer not only the Customs laws, but laws for more than 60 other Federal agencies – cannot be expected to detect and stop every infringing product. For this reason, it is important that IPR holders who want Customs to aggressively enforce their marks work closely with the agency to help train Customs agents in detecting infringing goods, and provide specific investigative tips regarding sources of infringing merchandise. CBP has established a specialized IPR website, which contains publicly-available information concerning marks recorded for import protection. The intranet portion of the website contains confidential enforcement information for use by CBP inspectors at ports of entry nationwide.

⁸ 19 U.S.C. §1526(e) provides:

(e) Merchandise bearing counterfeit mark; seizure and forfeiture; disposition of seized goods

Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of title 15) imported into the United States in violation of the provisions of section 1124 of title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized -

(1) by delivery to such Federal, State, and local government agencies as in the opinion of the Secretary have a need for such merchandise,

(2) by gift to such eleemosynary institutions as in the opinion of the Secretary have a need for such merchandise, or

(3) more than 90 days after the date of forfeiture, by sale by the Customs Service at public auction under such regulations as the Secretary prescribes, except that before making any such sale the Secretary shall determine that no Federal, State, or local government agency or eleemosynary institution has established a need for such merchandise under paragraph (1) or (2).

⁹ 18 U.S.C. §2320(b) provides criminal penalties for persons who intentionally traffic in counterfeit merchandise, and contains a separate seizure and forfeiture authority relating to such merchandise. The courts have held that CBP may exercise this authority to seize counterfeit goods, even if criminal charges are not brought. See *Ross Cosmetics Distribution Centers v. United States*, 17 CIT 996 (1993).

IPR owners often prepare Powerpoint or similar presentations which depict their goods and infringing versions, and provide them to CBP for dissemination to inspectors via the intranet site. In addition, with CBP's approval (and sometimes participation), IPR owners may get the chance to conduct some internal training for CBP officers concerning how to spot infringing goods. These presentations can be useful tools for helping to train CBP officials concerning subtle or complex issues of trademark law.

We discuss in a separate section how importers can deal with CBP detentions and seizures of goods accused of IPR violations.

E. Access to Samples of Suspected Infringing or Counterfeit Merchandise

Assume that CBP officers have detained and seized merchandise at a distant port which is suspected of being counterfeit. Is it truly counterfeit? Is it genuine "gray market" merchandise? Merely infringing? Obviously, the answer to this question will determine how the shipment will be handled and disposed of.

Where Customs seizes merchandise, it provides the IPR holder with extensive information concerning the merchandise seized¹⁰, so that the IPR holder can advise Customs as to whether the product is genuine, counterfeit, or infringing.

Often, the CBP inspectors will not be in a position to know the answer to this question, but

¹⁰ Section 133.21 (c) of the Customs Regulations [19 C.F.R. §133.21(c)] provides:

(c) Notice to trademark owner. When merchandise is seized under this section, Customs shall disclose to the owner of the trademark the following information, if available, within 30 days, excluding weekends and holidays, of the date of the notice of seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) A description of the merchandise;
- (4) The quantity involved;
- (5) The name and address of the manufacturer;
- (6) The country of origin of the merchandise;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

the IPR holder could readily answer it. Alternatively, Customs may have already decided that the good is a “counterfeit” subject to seizure and forfeiture, but the IPR owner may want to obtain a sample of the goods to use in connection with private litigation against the importer. The Customs regulations contain a provision which allows the IPR owner to obtain a sample of the merchandise from the detained shipment. Section 133.21(d) of the Customs Regulations [19 C.F.R. §133.21(d)] provides:

(d) Samples available to the trademark owner. At any time following seizure of the merchandise, Customs may provide a sample of the suspect merchandise to the owner of the trademark for examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. To obtain a sample under this section, the trademark/trade name owner must furnish Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by Customs to the trademark owner. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark owner, the owner shall, in lieu of return of the sample, certify to Customs that: "The sample described as [insert description] and provided pursuant to 19 CFR 133.21(d) was (damaged/destroyed/lost) during examination, testing, or other use."

Recording a mark with CBP for import protection, or availing itself of Customs enforcement of its intellectual property, in no way precludes an IPR owner from pursuing its private remedies against suspected infringers or counterfeiters¹¹. Obtaining a sample from Customs can be an excellent way to gain information concerning the claims that can be brought against infringers.

F. Customs' Exclusion of Genuine “Gray Market” Goods

Under certain circumstances, Customs will exclude genuine “gray market” versions of goods bearing marks which have been recorded with the agency for import protection. However, to avoid promoting secondary price discrimination, Customs’ regulations indicate that the agency will not

¹¹ In this regard, it should be borne in mind that, absent a court order directing Customs to act, the agency has discretion in enforcing intellectual property rights. In particular cases, the agency may decline to undertake enforcement and leave the trademark owner to its private remedies. See, e.g., *Weil Ceramics & Glass, Inc. v. Dash*, 878 F.2d 659, 11 USPQ2d 1001 (3d Cir. 1989).

At present, however, Customs has identified IPR enforcement as a priority area for the agency and is devoting substantial resources to detecting, excluding and, where appropriate, seizing and forfeiting infringing and counterfeit goods.

exclude genuine gray market goods when the U.S. and foreign owner of the trademark are the “same person” or are under “common ownership and control”¹².

For purposes of this limitation, the term “common ownership” is defined in the Customs regulations as “[i]ndividual or aggregate ownership of more than 50 percent of the business entity; and “common control” means “effective control in policy and operations and is not necessarily synonymous with common ownership”¹³.

The United States Supreme Court, in *Kmart v. Cartier*¹⁴, upheld the Customs’ regulations to the extent that they decline Customs enforcement of trademarks against “gray market” goods in particular cases where foreign and domestic trademark owners are the same person or subject to common ownership or control. .

G. “Lever Rule” Protection: The Exception to the Exception

As noted above, while Customs generally will not exclude “gray market” goods in cases where the U.S. and foreign trademark owner are the “same person” or under “common ownership or control”, the law creates an exception for cases where the gray market goods offered for importation into the United States are physically or materially different from goods sold under the mark in the United States. In these cases, the sale of the genuine “gray market” good in the United States still has the potential to damage the reputation of goods bearing the trademark.

This so-called “Lever rule” exception is based on the decision in *Lever Brothers Co. v. United States*, 981 F.2d 1330, 25 USPQ2d 1579 (D.C. Cir. 1993). In *Lever*, Customs declined to exclude certain imports of “Sunlight” dish detergent from the United Kingdom on the ground that the same person – Lever Brothers, Inc. – owned the “Sunlight” mark in the United States and abroad.

¹² Section 133.21(d)(1) of the Customs regulations establishes the exception to protection for gray market goods sold abroad by a recordant. It provides:

(d) Relief from detention of gray market articles. Gray market goods subject to the restrictions of this section shall be detained for 30 days from the date on which the goods are presented for Customs examination, to permit the importer to establish that any of the following exceptions, as well as the circumstances described above in §133.22(c), are applicable:

(1) The trademark or trade name was applied under the authority of a foreign trademark or trade name owner who is the same as the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner (in an instance covered by §§133.2(d) and 133.12(d) of this part);

¹³ See 19 C.F.R. §133.2(d).

¹⁴ 486 U.S. 281 (1988).

However, the Sunlight detergent sold abroad differed from the United States product in that it was not designed to produce a lot of suds during washing. As a result of this physical difference, American consumers who purchased the non-sudsing imported product believed they had received defective goods. Under these circumstances, the Court ruled, Customs could be ordered to exclude the gray market goods.

In response to the *Lever* decision, Customs has amended its regulations to provide that firms which record their marks for import protection may also seek “Lever rule” protection against genuine goods bearing the mark, which may be “materially or physically different” than the goods bearing the mark in the United States. Indeed, some recent decisions have watered down the requirement for *Lever*-rule protection to a simple “material” difference, which need not be physical. Thus, differences in the packaging of goods, or in the safety warnings accompanying them, may be sufficient to obtain exclusion of gray market product¹⁵. Indeed, a number of recent decisions indicate that a physical difference is not required; it is sufficient if there is a material difference in such intangible qualities as warranty coverage and the like.¹⁶

If a company recording its mark with CBP for import protection wishes to receive “Lever rule” protection against imports of genuine but materially different goods bearing the mark, it must make specific application for such protection. This application may be made with the initial application to record the mark, or as a separate application for a mark already recorded.

Section 133.2(e) of the Customs Regulations identifies the information which must be submitted to CBP in connection with an application for Customs-administered “*Lever*-rule” protection. This information can be summarized as follows:

¹⁵ See, e.g., *Gamut Trading Inc. v. United States Int’l Trade Comm.*, 200 F.3d 775 (Fed. Cir. 1999).

¹⁶ See, e.g., *SKF-USA v. United States Int’l Trade Comm.*, 423 F.3d 1307 (Fed. Cir. 2005); see also *Beltronics USA v. Midwest Inventory Distribution Co.*, 562 F.3d 1067 (10th Cir. 2009); *Boudreau Bros v. United States Int’l Trade Comm.*, 444 F.3d 1317 (Fed. Cir. 2006).

INFORMATION REQUIRED FOR “LEVER-RULE” PROTECTION APPLICATION

Information Required	Regulatory Authority
(1) The specific composition of both the authorized and gray market product(s) (including chemical composition)	19 C.F.R. §133.2(e)(1)
(2) Formulation, product construction, structure, or composite product components, of both the authorized and gray market product;	19 C.F.R. §133.2(e)(2)
(3) Performance and/or operational characteristics of both the authorized and gray market product;	19 C.F.R. §133.3(e)(3)
(4) Differences resulting from legal or regulatory requirements, certification, etc.;	19 C.F.R. §133.3(e)(4)
(5) Other distinguishing and explicitly defined factors that would likely result in consumer deception or confusion as proscribed under applicable law.	19 C.F.R. §133.3(e)(5).

While Customs’ regulations appear to assume a physical difference in the goods in question, it is unclear whether a simple material difference in conditions such as warrant coverage, performance and the like, might support a claim for Customs-administered *Lever*-rule protection. Presumably, it would be sufficient under factors (4) and (5), above. It is also unclear whether a Customs application is the exclusive way to obtain *Lever*-rule protection, or whether the agency may simply be sued in court to seek an injunction compelling such enforcement.

When Customs receives a request for *Lever*-rule protection, it publishes notice of the application in the *Customs Bulletin* and solicits public comment. One question on which comments are typically solicited is whether there are measures other than exclusion which could address the concerns of consumer confusion. In some cases, the use of disclaimer labels, for instance, has been ruled an effective remedy.

II. CBP PROTECTION OF TRADE NAMES

The Customs Regulations provide a similar protection mechanism for “trade names” – names or styles used to identify a class of products which have not been reduced to a formal trademark recorded with the USPTO.

A. Trade Name Recordation – Another “\$190 Injunction”

The process for recordation of a trade name involves names which have been in use for at least six (6) months. It also involves the payment of a \$190 fee for the recordation – another type of “\$190 injunction”.

B. Requirements for Recording a Trade Name

An application to record a trade name with CBP for import protection must be sent to Customs’ Headquarters Intellectual Property Rights Branch in Washington, D.C.

The name or trade style used for at least 6 months to identify a manufacturer or trader may be recorded with the United States Customs Service. Words or designs used as trademarks, whether or not registered in the U.S. Patent and Trademark Office shall not be accepted for recordation as a trade name. Generally, the complete business name will be recorded unless convincing proof establishes that only a part of the complete name is customarily used.¹⁷ The regulatory requirements for recording a trade name for import protection can be summarized as follows:

Information Required in Application to Record Trade name with CBP	Regulatory Authority
Must be addressed to: Intellectual Property Rights (IPR) & Restricted Merchandise Branch, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue, NW., Washington, DC 20229	19 C.F.R. §133.12(a)
The trade name or style to be recorded	19 C.F.R. §133.12(b)

¹⁷ See 19 C.F.R. §133.11.

The name and principal business address of each foreign person or business entity authorized or licensed to use the trade name and a statement as to the use authorized;	19 C.F.R. §133.12(c)
(d) The identity of any parent or subsidiary company, or other foreign company under common ownership or control which uses the trade name abroad (see §133.2(d))	19 C.F.R. §133.12(d)
A description of the merchandise for which the trade name is recorded	19 C.F.R. §133.12(e)
<p>a statement of the owner, partners, or principal corporate officer, and by statements by at least two other persons not associated with or related to the applicant but having actual knowledge of the facts, stating that to his best knowledge and belief:</p> <p>(1) The applicant has used the trade name in connection with the class or kind of merchandise described in the application for at least 6 months;</p> <p>(2) The trade name is not identical or confusingly similar to any other trade name or registered trademark used in connection with such class or kind of merchandise; and</p> <p>(3) The applicant has the sole and exclusive right to the use of such trade name in connection with the merchandise of that class or kind.</p>	19 C.F.R. §133.13(a)
Registration fee of \$190 for each class trade name to be recorded	19 C.F.R. §133.13(b)

C. Enforcement – What Will Customs Do?

Customs will exclude from entry merchandise bearing a recorded trade name which is

imported without consent of the trade name recordant. Seizure and forfeiture is also possible in particular cases.

As with other types of Customs IPR enforcement, a recordant's chances of obtaining effective Customs enforcement are improved if it can feed the agency investigative tips concerning potentially infringing goods.

Customs publishes applications to record trade names in the *Customs Bulletin* for public comment. Interested parties may offer comments supporting or opposing the recordation. See 19 C.F.R. §133.14.

Protection for a recorded trade name remains in force as long as the trade name is used. The recordation shall be canceled upon request of the recordant or upon evidence of disuse. From time to time, the IPR & Restricted Merchandise Branch may request the trade name owner to advise whether the name is still in use. The failure of a trade name owner to respond to such a request shall be regarded as evidence of disuse. 19 C.F.R. §133.15.

III. CBP PROTECTION OF COPYRIGHTS

A. Copyright Recordation and Anti-Piracy Measures

Claims for copyright which have been registered under the terms of the Copyright act may be recorded with Customs for import protection. See 19 C.F.R. §133.31(a).

Persons eligible to record a copyright with Customs include “[t]he copyright owner, including any person who has acquired copyright ownership through an exclusive license, assignment, or otherwise, and claims actual or potential injury because of actual or contemplated importations of copies (or phonorecords) of eligible works . . . “ 19 C.F.R. §133.31(b).

The requirements for an application to record a copyright (including a phonorecord) with Customs for import protection can be summarized as follows:

Information Required	Regulatory Authority
Application addressed to: IPR & Restricted Merchandise Branch, U.S. Customs and Border Protection 1300 Pennsylvania Avenue Washington, DC 20229	19 C.F.R. §133.32
Name and address of copyright owner(s)	19 C.F.R. §133.32(a)
Statement setting forth the circumstances of actual or potential injury from importation of goods or recordings infringing the copyrights, if actual injury is contemplated	19 C.F.R. §133.32(b)
The country of manufacture of genuine copies or phonorecords of the protected work	19 C.F.R. §133.32(c)
The name and principal address of any foreign person or business entity authorized or licensed to use the protected work, and a statement as to the exclusive rights authorized	19 C.F.R. §133.32(d)
The foreign title of the work, if different from the U.S. title	19 C.F.R. §133.32(e)

In the case of an application to record a copyright in a sound recording, a statement setting forth the name(s) of the performing artist(s), and any other identifying names appearing on the surface of reproduction of the sound recording, or its label or container.	19 C.F.R. §133.32(e)
An "additional certificate" of copyright registration issued by the U.S. Copyright Office. If the name of the applicant differs from the name of the copyright owner identified in the certificate, the application shall be accompanied by a certified copy of any assignment, exclusive license, or other document recorded in the U.S. Copyright Office showing that the applicant has acquired copyright ownership in the copyright	19 C.F.R. §133.33(a)(1)
Five photographic or other likenesses reproduced on paper approximately 8-1/2 inch; by 10-1/2 inch; in size of any copyrighted work. An application shall be excepted from this requirement if it covers a work such as a book, magazine, periodical, or similar copyrighted matter readily identifiable by title and author or if it covers a sound recording. Five likenesses of a component part of a copyrighted work, together with the name or title, if any, by which the part depicted is identifiable, may accompany an application covering an entire copyrighted work.	19 C.F.R. §133.33(a)(2)
A fee of \$190 for each copyright to be recorded, check made payable to "U.S. Customs and Border Protection	19 C.F.R. §133.32(b).

A recordation becomes effective when received. It remains in force for up to twenty (20) years, or until such time as the recordant ceases to own the copyright.

Separate application rules are provided for cases where ownership of a copyright is transferred, and the new owner wishes to continue recordation and enforcement of the copyright

B. Procedure When Suspected Piratical Copy is Imported.

The importation of piratical copies of copyrighted works is a violation of the Customs laws. By contrast, importation of lawfully made copies is permissible. Infringing copies of copyrighted goods are subject to seizure and forfeiture.

Whenever Customs seizes goods for suspected violation of copyright, the port director of Customs must, within 30 days of such seizure, notify the copyright owner of the following information:

- (1) The date of importation;
- (2) The port of entry;
- (3) A description of the merchandise;
- (4) The quantity involved;
- (5) The name and address of the manufacturer;
- (6) The country of origin of the merchandise;
- (7) The name and address of the exporter; and
- (8) The name and address of the importer.

In addition, Customs will make samples of the suspected infringing works available to the copyright recordant. In order to obtain a sample, the copyright owner must provide Customs with a bond and hold harmless agreement. The sample must be returned to Customs upon conclusion of the seizure case, or of any civil action relating to the imported goods.

Where records or motion pictures arriving in the United States bear counterfeit labels, Customs officers are directed to consider making a report to the United States attorney, for the possible initiation of criminal proceedings. See 19 C.F.R. §133.42.

Where imported works are suspected of being infringing/piratical copies of copyrighted works, the Port Director of Customs must advise the importer that it is considering detention and exclusion of the goods. The importer may then, if it wishes, file a declaration that the goods are not infringing.

If the importer files a declaration that goods are not infringing, the Port Director of Customs will provide the copyright owner with information concerning the imported merchandise. 19 C.F.R. §133.43(a), as follows:

- (1) The date of importation;
- (2) The port of entry;
- (3) A description of the merchandise;
- (4) The quantity involved;
- (5) The country of origin of the merchandise; and
- (6) Notice that the imported article will be released to the importer unless, within 30 days from the date of the notice, the copyright owner files with the port director:
 - (i) A written demand for the exclusion from entry of the detained imported article; and
 - (ii) A bond, in the form and amount specified by the port director, conditioned to hold the importer or owner of the imported article harmless from any loss or damage resulting from Customs detention in the event the Commissioner or his designee determines that the article is not an infringing copy prohibited importation under section 602 of the Copyright Act of 1976 (17 U.S.C. 602) . . .

See 19 C.F.R. §133.43(b).

If the copyright owner thereafter files the required bond, Customs will then conduct an administrative proceeding to address the question of whether the imported copies are infringing or piratical copies. The importer and the copyright owner are obligated to exchange information regarding the imported goods and the claims of infringement, and have the right to submit briefs to Customs¹⁸. addressing the question of infringement.

¹⁸ Thus, Section 133.43(d)(1) provides in pertinent part that:

1) Demand and bond; exchange of briefs. If the copyright owner files a written demand for exclusion of the suspected infringing copies together with a proper bond, the port director shall promptly notify the importer and copyright owner that, during a specified time limited to not more than 30 days, they may submit any evidence, legal briefs or other pertinent material to substantiate the claim or denial of infringement. The burden of proof shall be upon the party claiming that the article is in fact an infringing copy.

Within 30 days after the briefs are submitted, Customs will transmit the matter to the Customs Headquarters IPR branch, for a determination of infringement.

In order to secure Customs' detention of the goods, the copyright owner must file a statement that the goods are infringing or piratical, and a bond to hold Customs harmless from liability for the seizure.

Thus, by posting a bond, the copyright owner has the power to detain an import shipment of goods suspected of infringing the copyright. However, if its claim is not sustained, the full amount of the bond is then paid over to the importer of the suspected merchandise. In contrast to trademark exclusions, where the importer has little direct recourse to the IPR owner, the Customs procedure for copyright enforcement requires the IP owner to assume risk, and to make its case that a copy is piratical.

(i) Exchange of briefs. Before timely submitting the additional evidence, legal briefs, or other pertinent material to Customs, pursuant to paragraph (c)(1) of this section, in regard to the disputed claim of infringement, the importer and the copyright owner shall first provide each other with a copy of all such information, including the importer's denial of infringement and the copyright owner's demand for exclusion. The subsequent submission of this information to Customs shall be accompanied by a written statement confirming that a copy has already been provided to the opposing party. The port director shall notify the importer and the copyright owner that they shall have additional time, not to exceed 30 days, in which to provide a response to the arguments submitted by the opposing party, and that rebuttal arguments, timely submitted, shall be fully considered in the decision-making process. During this rebuttal period and before timely submitting the rebuttal arguments to Customs, the importer and the copyright owner shall first provide each other with a copy of all such material. The submission of this rebuttal material to Customs shall be accompanied by a written statement confirming that a copy has been provided to the opposing party. The port director shall not accept any additional material from the parties to substantiate the claim or denial of infringement after the final 30-day rebuttal period expires.

(ii) Decision. Upon receipt of rebuttal arguments, or 30 days after notification if no rebuttal arguments are submitted, the port director shall forward the entire file, together with a sample of each style that is considered possibly infringing, to CBP Headquarters, (Attention: Border Security and Trade Compliance Division, Regulations and Rulings, Office of International Trade), for decision on the disputed claim of infringement. The final decision on the disputed claim of infringement shall be forwarded to the port director who shall send a copy thereof to the copyright owner as well as to the importer.

IV. PATENTS: CBP ENFORCEMENT OF SECTION 337 ORDERS

A. Section 337 of the Tariff Act of 1930

Section 337 of the Tariff Act of 1930 authorizes the United States International Trade Commission (ITC), an independent government agency, to investigate allegations that goods imported into the United States are being traded by unfair competition or unfair acts. Although Section 337 can conceivably be invoked against a wide range of practices, most commonly the statute is used against imported goods alleged to infringe patents or other intellectual property rights owned by United States firms.

Section 337 investigations are typically commenced following the filing of a complaint with the ITC¹⁹. Upon initiating a Section 337 investigation, the ITC appoints an Administrative Law

¹⁹ Section 337 [19 U.S.C. §1337] provides:

(b) Investigation of violations by Commission

(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation and make its determination under this section at the earliest practicable time after the date of publication of notice of such investigation. To promote expeditious adjudication, the Commission shall, within 45 days after an investigation is initiated, establish a target date for its final determination.

(2) During the course of each investigation under this section, the Commission shall consult with, and seek advice and information from, the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and such other departments and agencies as it considers appropriate.

(3) Whenever, in the course of an investigation under this section, the Commission has reason to believe, based on information before it, that a matter, in whole or in part, may come within the purview of part II of subtitle IV of this chapter, it shall promptly notify the Secretary of Commerce so that such action may be taken as is otherwise authorized by such part II. If the Commission has reason to believe that the matter before it (A) is based solely on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, or (B) relates to an alleged copyright infringement with respect to which action is prohibited by section 1008 of title 17, the Commission shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 1671 or 1673 of this title, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the Secretary or the administering authority (as defined in section 1677(1) of this title) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. Any final decision by the administering authority under section 1671 or 1673 of this title with respect to the matter within such section 1671 or 1673 of this title of which the

Judge (ALJ) to investigate the Complaint and issue findings and recommendations thereon²⁰. What follows is an intensive trial before the ALJ, typically conducted on an expedited basis, with extensive pretrial discovery and a trial-type hearing²¹.

Following trial (or, in exceptional cases, following summary determination), the ALJ will issue an “Initial Determination” (ID), setting forth proposed findings of fact and conclusions of law, and making a recommendation concerning what remedy, if any, the ITC should impose²². The ITC

Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

²⁰ See 19 C.F.R. §§211.9 - 211.11.

²¹ See Generally 19 C.F.R. Part 210. For an excellent exposition of Section 337 procedures, see also Herrington and Thompson, *Intellectual Property Rights and United States International Trade Laws* (Oceana Press, 2002)

²² Section 210.42(a) of the ITC’s regulations provides in pertinent part:

§ 210.42 Initial determinations.

(a)(1)(I) On issues concerning violation of section 337. Unless otherwise ordered by the Commission, the administrative law judge shall certify the record to the Commission and shall file an initial determination on whether there is a violation of section 337 of the Tariff Act of 1930 no later than 3 months before the target date set pursuant to § 210.51(a) if the target date is 15 months or less from the date of institution, and no later than 4 months before the target date if the target date is more than 15 months from the date of institution.

(ii) Recommended determination on issues concerning permanent relief and bonding. Unless the Commission orders otherwise, within 14 days after issuance of the initial determination on violation of section 337 of the Tariff Act of 1930, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning—

(A) The appropriate remedy in the event that the Commission finds a violation of section 337, and

(B) The amount of the bond to be posted by the respondents during Presidential review of Commission action under section 337(j) of the Tariff Act.

The regulation also provides in pertinent part that:

(d) Contents. The initial determination shall include: an opinion stating findings (with specific page references to principal supporting items of evidence in the record) and conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record; and a statement that, pursuant to § 210.42(h), the initial determination shall become the determination of the Commission unless a party files a petition for

is then given the opportunity to review the ID²³. The Commission may elect not to review the ID (effectively adopting the ID as its own decision), may modify or alter the ID, or may remand the matter to the ALJ for further proceedings.

All of these Section 337 investigation activities take place in a highly-compressed time period. Generally, only between 12 and 14 months elapse from the initiation of an investigation to its conclusion, and the issuance of a final determination. In this respect, Section 337 investigations are nearly twice as quick as conventional patent litigation involving the same issues²⁴.

review of the initial determination pursuant to § 210.43(a) or the Commission, pursuant to § 210.44, orders on its own motion a review of the initial determination or certain issues therein.

²³ The ITC's regulations provide:

§ 210.44 Commission review on its own motion of initial determinations on matters other than temporary relief.

Within the time provided in § 210.43(d)(1), the Commission on its own initiative may order review of an initial determination, or certain issues in the initial determination, when at least one of the participating Commissioners votes for ordering review. A self-initiated Commission review of an initial determination will be ordered if it appears that an error or abuse of the kind described in § 210.43(b)(1) is present or the initial determination raises a policy matter which the Commission thinks is necessary or appropriate to address.

§ 210.45 Review of initial determinations on matters other than temporary relief.

(a) Briefs and oral argument. In the event the Commission orders review of an initial determination pertaining to issues other than temporary relief, the parties may be requested to file briefs on the issues under review at a time and of a size and nature specified in the notice of review. The parties, within the time provided for filing the review briefs, may submit a written request for a hearing to present oral argument before the Commission, which the Commission in its discretion may grant or deny. The Commission shall grant the request when at least one of the participating Commissioners votes in favor of granting the request.

(b) Scope of review. Only the issues set forth in the notice of review, and all subsidiary issues therein, will be considered by the Commission.

(c) Determination on review. On review, the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the administrative law judge. The Commission also may make any findings or conclusions that in its judgment are proper based on the record in the proceeding. If the Commission's determination on review terminates the investigation in its entirety, a notice will be published in the Federal Register.

²⁴ While Section 337 actions do not provide a forum for a patent owner to seek monetary damages for infringement, they provide a way in which final injunctive relief may be obtained more quickly than in conventional patent litigation in the Federal courts. However, intellectual property rights (IPR) owners can maintain separate suits for damages resulting from infringement proven in Section 337 proceedings. IPR owners also find

Domestic and foreign respondents have the option, but not the obligation, to appear and participate in the Section 337 investigation. Named respondents who do not participate run the risk that a default finding of infringement will be entered against them²⁵.

Where the ITC finds that imports have been traded by unfair means, in violation of Section 337, there are two primary types of relief it can order - Exclusion Orders and Cease and Desist Orders.

Exclusion Orders prohibit the importation of goods which infringe a given patent or other intellectual property right²⁶. They are of two kinds. General Exclusion Orders (GEOs) prohibit the

Section 337 proceedings to be advantageous from a competitive perspective, since respondents cannot counterclaim for restraint of trade.

²⁵ See 19 C.F.R. §§210.16, 210.17. Section 337(g) of the Tariff Act specifies certain circumstances where a party will be found in default, and specifies the consequences of such default. In cases where the complainant is not seeking a general exclusion order as relief, a default may be entered against a named respondent if (1) the respondent fails to respond to or appear to answer a complaint and notice of investigation, after service thereof, (2) the respondent fails to show good cause why it should not be held in default, and (3) the complainant seeks relief limited solely to that person. Under those circumstances, the Commission, considering the facts pleaded in the complaint to be true, may issue a cease and desist order against the defaulting respondent, unless it determines, based on certain public interest factors, that no default should be entered. 19 U.S.C. §1337(g)(1).

Where a general exclusion order is sought, and no respondent appears, the ITC may not issue such an order unless (1) a violation of Section 337 is proven by substantial, reliable and probative evidence, and (2) the requirements of 19 U.S.C. §1337(d)(2), relating to issuance of general exclusion orders are met.

In addition to these "statutory" forms of default, the Commission may also draw adverse inference and issue adverse findings against respondents who fail to take particular actions. 19 C.F.R. § 210.17.

²⁶ Section 337(d) [19 U.S.C. §1337] provides:

(d) Exclusion of articles from entry

(1) If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers refuse such entry.

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that -

importation of infringing goods by all persons, without regard of the identity of the manufacturer or importer. They thus cover all known importers, as well as any importer of infringing goods which might appear in the future. Limited Exclusion Orders (LEOs) prohibit the importation of infringing merchandise produced, exported or imported by certain named entities. Section 337(d) expresses a preference for the issuance of Limited Exclusion Orders, unless the ITC determines that a General Exclusion Order is necessary eliminate the unfair practice. A General Exclusion Order is an *in rem* sanction, focusing on the merchandise rather than on the persons involved with the merchandise.

In addition to, or in lieu of, an Exclusion Order, the ITC may issue a Cease and Desist Order, an *in personam* remedy addressed to domestic parties (who are subject to the ITC's jurisdiction) and which have been determined to have infringed an intellectual property right²⁷.

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

²⁷ Cease and Desist Orders are provided for in 19 U.S.C. §1337(f), as follows:

(f) Cease and desist orders; civil penalty for violation of orders

(1) In addition to, or in lieu of, taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued. The Commission may at any time, upon such notice and in such manner as it deems proper, modify or revoke any such order, and, in the case of a revocation, may take action under subsection (d) or (e) of this section, as the case may be. If a temporary cease and desist order is issued in addition to, or in lieu of, an exclusion order under subsection (e) of this section, the Commission may require the complainant to post a bond, in an amount determined by the Commission to be sufficient to protect the respondent from any injury, as a prerequisite to the issuance of an order under this subsection. If the Commission later determines that the respondent has not violated the provisions of this section, the bond may be forfeited to the respondent. The Commission shall prescribe the terms and conditions under which the bonds may be forfeited under this paragraph.

(2) Any person who violates an order issued by the Commission under paragraph (1) after it has become final shall forfeit and pay to the United States a civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order of not more than the greater of \$100,000 or twice the domestic value of the articles entered or sold on such day in violation of the order. Such penalty shall accrue to the United States and may be recovered for the United States in a civil action brought by the Commission in the Federal District Court for the District of Columbia or for the district in which the violation occurs. In such actions, the United States district courts may issue mandatory injunctions incorporating the relief sought by the Commission as they deem appropriate in the enforcement of such final orders of the Commission.

A Cease and Desist Order directs one or more named violators to cease and desist from the manufacture, importation, sale, or offer for sale, of articles deemed to infringe the patents or other intellectual property rights involved in the investigation. Violations of Cease and Desist Orders may be punished by the ITC through the imposition of a civil penalty in an amount not to exceed \$100,000 for each day the Order is violated²⁸.

B. CBP Enforcement of Section 337 Exclusion Orders

Section 337(d) of the Tariff Act provides that, upon issuing an Exclusion Order, the ITC must provide notice of that order to the Secretary of the Treasury²⁹, who must then arrange to have the order enforced by appropriate officers. Historically, the Secretary has empowered CBP officers [now including officers of the Immigration and Customs Enforcement (ICE) Bureau of the Department of Homeland Security], to enforce General and Limited Exclusion Orders. Section 337 enforcement activities are coordinated by CBP's Intellectual Property Rights (IPR) Branch, based in Customs Headquarters in Washington D.C.

Customs' IPR branch is a small office, staffed with just a handful of attorneys, who are responsible for coordinating all agency Intellectual Property rights enforcement nationwide³⁰. The IPR Branch's responsibilities extend to the exclusion of unauthorized "gray market" imports and processing of petitions for protection from gray market goods which are materially and physically different from goods sold under a trademark in the United States³¹. The IPR Branch also has responsibility for the exclusion of piratical copies of copyrighted works³², as well as the seizure,

²⁸ 19 U.S.C. §1337(f)(2); see also 19 C.F.R. §210.75 (dealing with Commission enforcement of cease and desist orders).

²⁹ While United States Customs and Border Protection has been merged into the Department of Homeland Security, Customs' former parent, the Treasury Department, retains responsibility for various Customs revenue and enforcement functions.

³⁰ These responsibilities not only include enforcement of Section 337 Exclusion Orders, but also the detection, exclusion and seizure of counterfeit goods pursuant to 19 U.S.C. §1526, the recording of trademarks and copyrights by United States intellectual property rights owners seeking protection against infringing or piratical imports, and the detection and exclusion of goods which infringe registered and recorded intellectual property rights.

³¹ See 19 C.F.R. Part 133.

³² See 17 U.S.C. §101 et seq.; 19 C.F.R. §133.42. See also *Customs Directive 2310-005A* (April 7, 2000)(providing for the seizure of items which are "clearly piratical").

forfeiture and destruction of counterfeit goods sought to be entered into the United States³³.

An important part of IPR Branch responsibilities is coordinating with ICE Agents and CBP Import Specialists nationwide, to educate them concerning what goods are subject to exclusion, and to review particular exclusion actions which are proposed or have been taken. This can be a particularly complex task with respect to Section 337 Exclusion Orders, which are highly individualized, often contain internal exceptions, and which often turn on the particular claim construction on which the ITC relied in issuing the order. Customs does this in several ways, including the communication of information to enforcement officials using a powerful intranet tool, which is available for use by the public for very limited purposes³⁴. Obviously, given the complexities of patent construction, as well as doctrines of exhaustion of intellectual property rights, the information appearing in the Customs IPR intranet site can be confusing, and can require considerable interpretation by enforcement officials.

Additional complexities arise where Section 337 Exclusion Orders are based on process patents or software patents. In these cases, the question of infringement often cannot be determined from a physical examination of a good in its condition as imported. Often, foreign producers and importers revise product designs in order to engineer around patents, and CBP officers must determine whether these “design-arounds” fall outside the scope of an exclusion order. Furthermore, the Federal Circuit acknowledged, in *Jazz Photo Corporation v. United States*³⁵, that exclusion orders are also subject to the well-established patent law defense of “permissible repair”, providing an additional category of claims which CBP officers may be required to evaluate.

While only parts of Customs’ IPR website are available for public review, the website contains extensive enforcement information provided for the guidance of agency personnel. Much of the information made available to Customs officials is provided by the IRP holders themselves, and while Customs requires such information to contain a disclaimer, this information is not subject to public scrutiny for accuracy or completeness. Thus importers and others are often unable to determine whether information appearing on the intranet website and being used by Customs officials to conduct enforcement activities accurately reflects the substance of a Section 337 Exclusion Order or governing law.

While enforcement of Section 337 orders is an important part of Customs’ intellectual property role, there are virtually no regulations which specify how Customs is to perform this function. Indeed, the only regulatory reference to Section 337 in the Customs regulations appears in a single regulation setting out general information concerning Section 337 exclusion orders and

³³ See 19 U.S.C. §1526(e), (f); see also 18 U.S.C. §2320.

³⁴ See <http://iprs.cbp.gov/>. The principal public features of the website are searchable databases containing information concerning applications for intellectual property rights protection filed with Customs.

³⁵ 264 F.2d 1094 (Fed. Cir. 2001).

dealing with situations in which Customs may order the seizure of goods previously excluded from entry under authority of a Section 337 Order, and which an importer has attempted to reimport surreptitiously³⁶.

CBP regulations at present furnish no well-developed mechanism for interested parties to communicate with the IPR Branch or with agency field officers regarding Section 337 enforcement matters. As a result, most communications with the agency are conducted on an *ex parte* basis, a practice which recent case law shows to have yielded some unfortunate results.

C. Ensuring CBP Enforcement of Section 337 Exclusion Orders

Patent issues are complex and often defy simple explanation. For an IPR owner who has obtained the protection of a Section 337 exclusion order, an important – but often overlooked – aspect of such orders is obtaining effective Customs enforcement. As previously noted, CBP officials have many enforcement responsibilities, and securing their assistance in enforcing a Section 337 exclusion order often requires that the IPR owner educate Customs officials concerning what to look for, and when to exclude goods.

Customs and Border Protection’s Intellectual Property Rights internet site is an important tool for enforcement. IPR owners can prepare and submit presentations showing how to identify and exclude infringing goods, and arrange for Customs to post it on the agency-only “intranet” portion of the site.

In addition, CBP from time to time allows IPR owners to train Customs inspectors and enforcement officials concerning how to detect and exclude infringing goods. As in all cases, investigative tips provided to CBP officials in the field are the surest way of having particular claims investigated.

A number of controversies have erupted in recent years concerning CBP enforcement of Section 337 orders. The courts have held that importers whose goods are excluded from the United States for violation of a Section 337 order can obtain judicial review of the exclusion by protesting Customs’ exclusion and bringing suit in the United States Court of International Trade (CIT) to challenge the denial of its protest.³⁷ In addition, there has been substantial controversy concerning whether Customs can unilaterally alter documentation requirements relating to goods substantially subject to Section 337 Order – such as process certifications – without following notice and comment rulemaking procedures set out in the Administrative Procedure Act.

³⁶ See 19 C.F.R. §12.39.

³⁷ See *Jazz Photo Corp. v. United States*, 353 F.Supp.2d 1327 (Ct. Int’l Tr. 2004, *aff’d*, 439 F.3d 1344 (Fed. Cir. 2006).

V. CUSTOMS ANTI-COUNTERFEITING ACTIVITY

A. What is a Counterfeit? How is it Distinguished from Merely “Infringing” Goods?

Customs and Border Protection officers have broad authority to exclude, seize and forfeit merchandise bearing “counterfeit” marks. There is no requirement that a mark have been recorded with Customs for import protection in order for CBP to take action against “counterfeits”.

The Lanham Act³⁸ and the Customs Regulations³⁹ define a “counterfeit” mark as “a spurious mark that is identical with, or substantially indistinguishable from, a registered mark.” In this regard, “counterfeits” are distinguished from merely “infringing” marks which may be “confusingly similar” marks which, although neither identical nor substantially indistinguishable from protected marks, may nonetheless violate the Lanham Act⁴⁰. While recordation of a mark is normally a prerequisite for obtaining Customs enforcement against “infringing” goods, it is not required for Customs to take action against a “counterfeit”.

Section 526(e) of the Tariff Act⁴¹ authorizes Customs to seize and forfeit goods bearing counterfeit marks. The Courts have held that Section 526(e) “incorporates two other statutes, 15 U.S.C. § 1127 and 15 U.S.C. § 1124. Both are part of the Trademark Act of 1946, known as the Lanham Act, and neither contains an identity of goods or services requirement. The Tariff Act

³⁸ 15 U.S.C. 1127

³⁹ 19 CFR 133.21(a).

⁴⁰ 15 U.S.C. 1114, 1125, 1127. 19 CFR 133.22.

⁴¹ 19 U.S.C. §1526(e) authorizes Customs to seize, forfeit and destroy goods bearing a counterfeit mark. It provides in part:

(e) Merchandise bearing counterfeit mark; seizure and forfeiture; disposition of seized goods

Any such merchandise bearing a counterfeit mark (within the meaning of section 1127 of title 15) imported into the United States in violation of the provisions of section 1124 of title 15, shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violations of the customs laws. Upon seizure of such merchandise, the Secretary shall notify the owner of the trademark, and shall, after forfeiture, destroy the merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Secretary has the consent of the trademark owner, the Secretary may obliterate the trademark where feasible and dispose of the goods seized -

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incorporates the definition of the term "counterfeit" from the first statute: *15 U.S.C. § 1127*⁴².

The Tariff Act incorporates from the second statute the requirement that the offending merchandise "copy or simulate" a registered trademark, which amounts to a requirement that the offending merchandise be likely to cause confusion. The second statute provides: "[N]o article of imported merchandise . . . which shall copy or simulate a trademark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States" *15 U.S.C. § 1124*.

A product which is a complete duplicate of a good sold in commerce under a trademark, and which is not authorized by the trademark owner is obviously a "counterfeit"⁴³. However, the courts have ruled that the unauthorized use of a mark can constitute a "counterfeit" use. Thus, in *United States v. Able Time, Inc.*⁴⁴, Customs seized imported watches bearing the mark "TOMMY" which was registered to Tommy Hilfiger, Inc. At the time in question, Tommy Hilfiger did not manufacture or license watches bearing its trademarks. The importer argued that the Tariff Act should have been interpreted as incorporating an "identity of goods or services" requirement, meaning that the mark must have been applied to goods of the same kind which bear the mark in commerce. The Ninth Circuit rejected this argument, holding the watches to be counterfeit and subject to Customs exclusion.

The definition of "counterfeit" has been extended, in various cases, to products such as "overruns" of goods whose production was initially authorized, or which were shipped without the opportunity for inspection by the trademark owner.

Counterfeit goods are given particular emphasis in Customs IPR enforcement, since counterfeit goods may often be dangerous – for example, counterfeit pesticides have led to the destruction of crops, and localized famines in various countries.

B. Seizure and Forfeiture of Counterfeit Goods

While "infringing" goods are subject to exclusion from the United States, goods deemed "counterfeit" are also subject to forfeiture by the government and destruction. While merely "infringing" goods are also subject to seizure for violation of the Customs laws in certain circumstances, there is a much greater possibility that an importer may be able to have a seizure remitted, for example, by re-exporting goods, or by expunging offending trademarks, or by labeling

⁴² See *United States v. Able Time, Inc.*, 545 F.3d 824 (9th Cir. 2008), *cert. denied.*, 2009 U.S. LEXIS 4760 (2009).

⁴³ See *Ross Cosmetics Distrib. Ctrs., Inc. v. United States ("Ross I")*, 17 C.I.T. 814, 817-18 (1993); *Ross Cosmetics Distrib. Ctrs., Inc. v. United States ("Ross II")*, 18 C.I.T. 979, 984-85 (1994).

⁴⁴ 545 F.3d 824 (9th Cir. 2008), *cert. denied.*, 2009 U.S. LEXIS 4760 (2009).

goods with disclaimers.. Similar options are not offered where counterfeit goods are involved. Accordingly, the distinction between goods which are “counterfeit” and which are merely “infringing” can be significant, in terms of possible relief and retention of goods⁴⁵.

In addition to the seizure and forfeiture provisions of the Tariff Act, CBP officers are also authorized to seize and forfeit counterfeit goods under criminal counterfeiting statutes, most significantly 18 U.S.C. §2320⁴⁶. This is so even if no criminal prosecution is brought. However, the criminal seizure provisions are limited to products which are deliberate and exact copies of trademarked goods.

C. Civil Customs Penalties for Trafficking in Counterfeit Goods

The Anti-Counterfeiting Consumer Protection Act amended Section 526 of the Tariff Act to provide that, in addition to seizing and forfeiting counterfeit goods, CBP officers may impose sever civil fines on persons involved in the trafficking of counterfeit goods. Section 526(f) of the Tariff Act⁴⁷ provides:

(f) Civil penalties

(1) Any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that is seized under subsection (e) of this section shall be subject to a civil fine.

(2) For the first such seizure, the fine shall be not more than the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, determined under regulations promulgated by the Secretary.

(3) For the second seizure and thereafter, the fine shall be not more than twice the value that the merchandise would have had if it were genuine, as determined under regulations promulgated by the

⁴⁵ Thus, in *Ross Cosmetics Distrib. Ctrs., Inc. v. United States ("Ross II")*, 18 C.I.T. 979, 984-85 (1994), the question presented was whether certain “smell alike” fragrances were subject to exclusion as “counterfeit” goods. The fragrances were marketed under non-famous names, but featured labels inviting purchasers to compare them to famous fragrances. [For example, “If you like GIORGIO, you’ll love GORGEOUS”. The Court of International Trade held that the goods were not counterfeit and further, that the placement of disclaimer labels could overcome the possibility of consumer confusion, and thus allow the importation of the goods.

⁴⁶ See *Ross Cosmetics, supra*.

⁴⁷ 19 U.S.C. §1526(f).

Secretary.

(4) The imposition of a fine under this subsection shall be within the discretion of the Customs Service, and shall be in addition to any other civil or criminal penalty or other remedy authorized by law.

While CBP has not hesitated to impose civil fines under Section 526(f), the statute has been controversial, and a number of issues have developed. The statute has been criticized as vague, in terms of the persons who can be subject for civil penalties.

Another problem relates to the measure of penalties – twice the “manufacturer’s suggested retail price” (MSRP) for genuine goods. There are many goods for which no MSRP is ever established – how does one determine the maximum penalty in such cases? Furthermore, the statute itself indicates that penalties are to be predicated on the MSRP under regulations to be promulgated – but no such regulations have yet issued.

One issue which has been resolved involves the question of whether a forfeiture must be effected before a Section 526(f) penalty can be imposed. The courts have said no. In *United States v. Able Time Inc*⁴⁸, CBP seized watches claimed to be counterfeit. Following the submission of petitions for relief from the seizure, the watches were returned to the importer. Subsequently, CBP imposed a civil penalty against the importer under Section 526(f) of the Tariff Act. The courts ruled that the remission of the seizure did not prevent Customs from imposing the Section 526(f) penalty.

⁴⁸ 545 F.3d 824 (9th Cir. 2008), *cert. denied.*, 2009 U.S. LEXIS 4760 (2009).

VI. DEFENDING CUSTOMS SEIZURES AND PENALTIES IN IPR CASES

Each year, Customs and Border Protection excludes and seizes thousands of shipments of merchandise on suspicion of intellectual property rights violations. These may be seizures based on claims that imported goods are counterfeit, in violation of 19 U.S.C. §1526(e), or that the goods are infringing, in violation of 19 U.S.C. §1526(a) and are subject to forfeiture under 19 U.S.C. §1595a.

When your products are seized for an IPR violation, what should you do?

A. Customs Detention, Exclusion and Seizure Procedures

Under Section 484 of the Tariff Act of 1930, as amended, CBP is supposed to make a decision on whether to release goods within five (5) days after entry documents are presented at the port of entry. If, after 5 days, Customs has not released the goods, they are considered to be “detained”. CBP has 30 days from the date of entry to determine whether goods should be released to the importer.

If, after 30 days, goods have not been released to the importer, they are by law deemed to be “excluded” from entry. The importer may file a protest challenging the exclusion of its merchandise from entry. If its protest is denied, the importer may proceed to the United States Court of International Trade (CIT), to challenge the denial of its exclusion protest.

However, while the importer may protest the exclusion of its merchandise, the CIT lacks jurisdiction in cases where Customs effects a “seizure” of the merchandise, for violations of the Customs laws. Customs seizures are resolved by the United States District Courts in the District where the seizure occurred⁴⁹.

1. Notice of Seizure

When CBP seizes goods, it is required to issue, to all parties who may have an interest in the property, a Notice of Seizure. The notice must identify the goods seized, and the basis for the seizure (laws and regulations allegedly violated). CBP will usually provide the importer or its Customhouse broker with a Receipt for Seized Property.

A representative Notice of Seizure in an IPR case is appended at Exhibit B

2. Election of Remedies

The Election of Remedies notice, which is transmitted with the Notice of Seizure, will

⁴⁹ See, e.g., *H&H Wholesale Serv. v. United States*, Slip. Op. 06-77 (Ct. Int’l Tr. 2006); see also *Milin Indus., Inc. v. United States*, 12 CIT 658, 659, 691 F. Supp. 1454, 1454 (1988). A Customs protest might lie against “exclusion” of merchandise, but this provides little help in cases where the goods are also seized.

generally provide the importer with a choice of remedies to pursue. Constitutional due process requirements dictate that, after seizing goods, the government must, within a reasonable time, bring administrative or judicial action to forfeit goods. The importer and other interested parties then have a right to file claims to the merchandise, enter appearances in the forfeiture proceeding, and demonstrate to the court why the seized goods should not be forfeited.

The **Notice of Seizure** will generally give the importer three principal options:

- > **Abandon the merchandise** to the government. In cases involving alleged “counterfeit” goods, an importer’s decision to abandon goods does not insulate it from the possibility of a civil fine under 19 U.S.C. §1526(f).
- > **Waive the right to prompt referral for forfeiture proceedings**, so that the government can consider an administrative petition for relief; and
- > **Require the prompt referral of the matter for judicial forfeiture proceedings in the District Court**. The importer or other claimant must submit a refundable \$5000 “cost bond” to secure such referral.

If the importer does not submit an “Election of Remedies” form to CBP, the agency will proceed with summary administrative forfeiture proceedings. These proceedings generally require that notice of seizure be published, in a newspaper of public record, three consecutive times, usually in two week intervals. Unless the importer submits an “Election of Remedies” form within that time, the goods are deemed forfeited to the government. A representative “Election of Remedies” form is appended at Exhibit C.

B. Which Remedy Should an Importer Select?

The remedy which an importer should choose will depend on the facts of the case.

In some cases, the importer may have been deceived by a foreign vendor, who provided it with counterfeit goods. If the importer has not paid its vendor for the goods, its best course of action may simply be to assent to forfeiture, or to take no position at all – in effect, tendering the defense of the case to its foreign vendor.

Bearing in mind, however, that persons trafficking in counterfeit goods may be subjected to civil penalties under 19 U.S.C. §1526(f), in addition to forfeiture of goods, innocent importers may want to furnish CBP with an explanation of their role in a transaction, even if they intend to assent to forfeiture of the goods. The explanation may help to dissuade Customs officials from pursuing such penalties, at least against the importer.

In some cases, the importer may have reason to believe that CBP’s seizure of its goods is wrongful, and that the goods are genuine, or non-infringing. The first step in such cases is to make

a determination as to whether CBP might be receptive to an administrative petition for relief. If there is reason to believe that CBP might change its mind and remit a seizure, then the importer will want to waive its right to prompt forfeiture, and petition administratively for relief from the seizure.

Sometimes, however, even if the importer has a good defense to a seizure, CBP may have taken a position – either generally or in a specific circumstance – which suggests that the agency will not be inclined to remit the penalty. In these cases, the importer who desires to recover its goods may elect to file the required \$5000 cost bond, and have its case referred for prompt institution of judicial forfeiture proceedings in United States District Court.

Generally, the facts of the case should be reviewed with counsel in order to make a decision on the appropriate course of action.

C. Administrative Petitions for Relief

Section 618 of the Tariff Act of 1930, as amended⁵⁰ provides that a persons whose goods have been seized may petition administratively for remission of the seizure and release of the goods. A petition for relief from the seizure will be entertained by CBP only where the importer or other interested person has filed an “Election of Remedies”, waiving its right to a prompt referral for judicial forfeiture proceedings.

The petition should contain a full description of the goods, and factual and legal arguments showing why no violation of the intellectual property laws occurred, and why the goods should be released. In appropriate cases, the petition may set forth reasons why, in lieu of seizure and forfeiture, the goods should be released for export, or released for consumption with an appropriate eradication of the trademark, or disclaimer.

A petition for relief will typically be filed with the Port Director of CBP for the port in which the goods were seized. and should state reasons why the seizure is unlawful, why no violation of the law exists, or why some remedy other than forfeiture is appropriate. The relevant Port Director of Customs will generally grant the petitioner an informal hearing to discuss the petition.

After considering the petition for relief, the Port Director of Customs will either determine to grant relief, or to deny relief. In the latter case, the matter will be referred for forfeiture proceedings.

An importer who files an Election of Remedies and asks Customs to consider its petition may, if its petition is denied, thereafter file a cost bond, and request that the matter be referred for judicial forfeiture proceedings.

⁵⁰ 19 U.S.C. §1618.

D. Judicial Forfeiture Proceedings

Where an importer requests that seizures be referred for judicial forfeiture proceedings, the United States Attorney for the district where the goods were seized will, upon posting of the \$5000 cost bond, file a lawsuit in United States District Court seeking to have the goods forfeited to the government. Constitutional due process requirements obligate the government to bring such proceedings within a reasonable time after the seizure is effected. What constitutes a “reasonable time” varies based on the claims involved, the nature of the merchandise in question, and the hardship to the owner of having access to the merchandise curtailed.

The judicial forfeiture proceeding will name the seized goods as the “defendant” in the lawsuit. The importer or other person with an interest in the goods may enter an appearance before the court, making a claim to the goods. The burden rests on the claimant to demonstrate why the goods should not be forfeited.

In cases involving allegations of importing counterfeit merchandise, some importers will, rather than abandoning merchandise to Customs, request referral for judicial forfeiture with a view toward negotiating a settlement with the government that prevents the assessment of 19 U.S.C. §1526(f) civil fines.

E. Administrative Proceedings for Remission of Seizure or Mitigation of Civil Fines

Importers whose merchandise is seized may petition for the release of their merchandise, by waiving their right to prompt forfeiture, and filing a petition with Customs and Border Protection for release of the goods. These petitions are generally considered by the CBP Fines, Penalties and Forfeitures branch at the port of entry where the seizure took place. Typically, the port officers will seek guidance from Customs Headquarters’ Intellectual Property Rights (IPR) branch.

Where CBP considers goods to be “counterfeit”, remission of the seizure is unlikely. However, where goods are merely “infringing”, it is often possible for the importer to work out a settlement which allows the goods to be released for exportation, or, admitted for entry based on eradication of infringing marks or the labeling of goods with disclaimers, as the situation may warrant. In some cases, remission of a forfeiture may be accompanied by an agreement to pay CBP a monetary penalty.

Wherever CBP determines to release merchandise to the importer, it generally requires the importer to execute a “Hold Harmless Agreement”, and to pay costs of storage of the goods (which are usually deposited in a Customs-specified General Order Warehouse). The Hold Harmless Agreement generally requires that importers waive any right to bring any action or claim against the government relating to the detention and seizure of the merchandise.

In cases where administrative petitioning does not yield acceptable results, the importer has the right to withdraw its election of remedies, post a \$5000 cost bond, and have the matter referred for judicial forfeiture proceedings.

The assessment of civil penalties for trafficking in counterfeit goods, imposed pursuant to 19 U.S.C. §1526(f), works in much the same manner. The Customs Regulations require these penalties to be treated in the same manner as other civil Customs penalties arising out of the importation of merchandise. In cases involving an initial violation, the Customs regulations specify that the penalty should not exceed the Manufacturer's Suggested Retail Price (MSRP)⁵¹ the good would have were it genuine; for repeated violations, the penalty can increase to as much as twice the MSRP.⁵²

Customs has established Mitigation Guidelines for civil penalty cases [Exhibit D], which include a guideline for reducing penalties in particular cases. For a first violation, in the absence of aggravating factors, a fine will often be reduced to one-half the MSRP of genuine goods.

As noted above, a number of issues have arisen concerning Section 526(f) penalties, including the question of whether CBP must establish regulations for defining MSRP, and how to set penalty maxima for goods in respect of which no MSRP has been established.

⁵¹ This is not an insubstantial penalty. If, for example, a bottle of cologne valued at \$2.00 were accused of being a counterfeit version of a well-known fragrance with an MSRP of \$100 a bottle, the penalty, for a first offense, could be 50 times the value of the imported goods.

⁵² Section 133.27 of the Customs Regulations provides:

§ 133.27 Civil fines for those involved in the importation of merchandise bearing a counterfeit mark.

In addition to any other penalty or remedy authorized by law, CBP may impose a civil fine under 19 U.S.C. 1526(f) on any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise for sale or public distribution that bears a counterfeit mark resulting in a seizure of the merchandise under 19 U.S.C. 1526(e) (see §133.21 of this subpart), as follows:

(a) First violation. For the first seizure of merchandise under this section, the fine imposed will not be more than the value the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price in the United States at the time of seizure.

(b) Subsequent violations: For the second and each subsequent seizure under this section, the fine imposed will not be more than twice the value the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price in the United States at the time of seizure.

Actions to collect Section 526(f) penalties are brought in United States District Courts, rather than the U.S. Court of International Trade⁵³.

⁵³ Similarly the United States Court of International Trade lacks subject matter jurisdiction to hear importers' cases challenging the assessment of Section 526(f) penalties. See, e.g., *Sakar International v. United States*, 516 F.3d 1340 (Fed. Cir. 2008), cert den. 129 S. Ct. 488 (2008).