

*What Every Member of the
Trade Community Should Know About:*
**CBP Enforcement of
Intellectual Property
Rights**



AN INFORMED COMPLIANCE PUBLICATION

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U.S. CUSTOMS and BORDER PROTECTION

NOTICE:

This publication is intended to provide guidance and information to the trade community. It reflects the position on or interpretation of the applicable laws or regulations by U.S. Customs and Border Protection (CBP) as of the date of publication, which is shown on the front cover. It does not in any way replace or supersede those laws or regulations. Only the latest official version of the laws or regulations is authoritative.

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PREFACE

On December 8, 1993, Title VI of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), also known as the Customs Modernization or “Mod” Act, became effective. These provisions amended many sections of the Tariff Act of 1930 and related laws.

Two new concepts that emerge from the Mod Act are “informed compliance” and “shared responsibility,” which are premised on the idea that in order to maximize voluntary compliance with laws and regulations of U.S. Customs and Border Protection, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the Mod Act imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s rights and responsibilities under customs regulations and related laws. In addition, both the trade and U.S. Customs and Border Protection share responsibility for carrying out these requirements. For example, under Section 484 of the Tariff Act, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and determine the value of imported merchandise and to provide any other information necessary to enable U.S. Customs and Border Protection to properly assess duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP is then responsible for fixing the final classification and value of the merchandise. An importer of record’s failure to exercise reasonable care could delay release of the merchandise and, in some cases, could result in the imposition of penalties.

Regulations and Rulings (RR) of the Office of International Trade has been given a major role in meeting the informed compliance responsibilities of U.S. Customs and Border Protection. In order to provide information to the public, CBP has issued a series of informed compliance publications on new or revised requirements, regulations or procedures, and a variety of classification and valuation issues.

This publication, prepared by the National Commodity Specialist Division of Regulations and Rulings is entitled “*Insert Title Here*”. It provides guidance regarding the classification of these items. We sincerely hope that this material, together with seminars and increased access to rulings of U.S. Customs and Border Protection, will help the trade community to improve voluntary compliance with customs laws and to understand the relevant administrative processes.

The material in this publication is provided for general information purposes only. Because many complicated factors can be involved in customs issues, an importer may wish to obtain a ruling under Regulations of U.S. Customs and Border Protection, 19 C.F.R. Part 177, or to obtain advice from an expert who specializes in customs matters, for example, a licensed customs broker, attorney or consultant.

Comments and suggestions are welcomed and should be addressed to U.S. Customs and Border Protection, Office of International Trade, Executive Director, Regulations and Rulings, 799 9th Street N.W. 7th floor, Washington, D.C. 20229-1177.

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I. Background and Introduction

Stopping the flow of fake goods is a priority for the U.S. government. U.S. Customs and Border Protection (CBP), a component of the Department of Homeland Security, has a multi-layered approach to IPR enforcement that includes seizing fake goods at the border, pushing the border outward through audits of infringing importers, risk modeling, and cooperation with our international trading partners. CBP partners with industry and other government agencies to enhance these efforts.

In the international arena, CBP collaborates with international organizations and foreign governments to enhance IPR border enforcement efforts globally. Domestically, CBP coordinates enforcement efforts with U.S. government trade policy and law enforcement agencies, and works closely both with U.S. Immigration and Customs Enforcement (ICE) to carry out investigative IPR enforcement actions, and with the trade community. CBP conducts industry outreach by partnering with rights owners and industry organizations both to collaborate on IPR education, and share information on trends, and where appropriate, on individual cases of suspected IPR infringement. Members of the public may inform CBP of potential intellectual property rights violations via CBP's on-line trade violation reporting mechanism called e-Allegations. The public may access e-Allegations and additional relevant information at http://www.cbp.gov/xp/cgov/trade/trade_programs/e_allegations/. CBP also maintains an on-line recordation system, Intellectual Property Rights e-Recordation, which allows rights owners to electronically record their trademarks and copyrights with CBP, and facilitates IPR seizures by making IPR recordation information readily available to CBP personnel. CBP's on-line recordation system is available at <https://apps.cbp.gov/e-recordations/>.

As an administrative agency with law enforcement powers, CBP has the powers of search, seizure, and arrest, and the legal authority to make substantive determinations regarding infringement of trademarks and copyrights, pursuant to the Tariff Act of 1930, the Lanham Act of 1946, the Copyright Act of 1976, and the Digital Millennium Copyright Act of 1998. CBP enforces patents pursuant to Section 337 exclusion orders issued by the U.S. International Trade Commission (ITC). CBP issues reasoned written decisions on substantive issues of trademark and copyright infringement, as well as decisions relative to the enforcement and scope of ITC exclusion orders. There follows below an overview of the legal framework of CBP's border enforcement of IPR.

II. Intellectual Property Rights

Intellectual property refers to creations of the mind: Inventions, literary and artistic works, and symbols, names, images, and designs used in commerce. Under U.S. law, a trademark is defined as a word, name, symbol, device, color or combination thereof used to identify and distinguish goods from those manufactured or sold by others and to indicate the origin and source of goods, even if that source is unknown. CBP protects

trademarks which are registered on the principal register of the United States Patent and Trademark Office. Registration of a trademark covers a specific class or classes of goods, and a registration granted on or after November 16, 1989, lasts for a period of ten years and is renewable. CBP's border enforcement of trademarks is primarily concentrated on marks that have been recorded with the agency.

A trade name is the name under which a company does business. Trade names are not registered with the U.S. Patent and Trademark Office but may be recorded with CBP if the name has been used to identify a trade or manufacturer for at least six months. Notice of tentative recordation of a trade name shall be published in the Federal Register and the *Customs Bulletin and Decisions (Customs Bulletin)* to provide notice to the public and give interested parties an opportunity to oppose the recordation.

A copyright is a form of intellectual property that protects "original works of authorship," which include literary, dramatic, musical, artistic, pictorial, graphic and sculptural works, motion pictures and other audio visual works, sound recordings, and architectural works. Copyright protection for U.S. works commences the moment the work is fixed in any tangible medium of expression, and extends only to the expression of ideas -- words, pictures, and sounds -- but not to the ideas themselves. The term of copyright protection for current U.S. works created by an individual is the life of the author plus 70 years. If the work is anonymous or made for hire, copyright protection lasts 95 years from first publication or 120 years from its creation, whichever expires first. Thereafter, the work enters the public domain and may be freely used by anyone. CBP's border enforcement of copyrights is primarily concentrated on works that have been recorded with the agency. Non-expired claims to copyrights that are registered with the U.S. Copyright Office may be recorded with CBP.

A patent registered with the U.S. Patent and Trademark Office may not be recorded with CBP. However, CBP enforces exclusion orders issued by the ITC pursuant to Section 337 of the Tariff Act of 1930 (19 U.S.C. §1337), which provides relief to U.S. industries which have established the existence of unfair trade practices in importing. ITC exclusion orders are issued for findings of infringement, among other things, of patents. Accordingly, CBP has authority to exclude from entry articles infringing a patent pursuant to an exclusion order issued by the ITC.

III. CBP Enforcement of Intellectual Property: How Does CBP Respond to Intellectual Property Rights Infringement?

A. Trademarks

CBP is vested with the authority to exclude from entry, detain and/or seize violative trademarked merchandise. In this regard, CBP recognizes three levels of infringement in its enforcement of trademarks: counterfeit marks; copying or simulating marks; and restricted gray market goods (i.e., parallel imports).

1. Counterfeit Marks

Pursuant to Title 15, United States Code, section 1127 (15 U.S.C. § 1127), a counterfeit mark is defined as a spurious mark that is identical with, or substantially indistinguishable from, a federally registered and recorded trademark. Merchandise imported into the United States bearing marks “counterfeit” of a federally registered trademark recorded with CBP shall be seized and forfeiture proceedings instituted pursuant to Section 526(e) of the Tariff Act of 1930 (19 U.S.C. §1526(e)), as implemented by 19 CFR § 133.21. Such merchandise shall be seized and, absent the trademark owner’s written consent to import the merchandise, forfeited for violation of customs laws. After forfeiture, CBP shall destroy the merchandise. Alternatively, if the imported merchandise is safe, poses no health hazard, and the trademark owner consents, CBP may obliterate the counterfeit mark where feasible and dispose of the seized goods by (1) delivering the merchandise to any Federal, State, or local government agency, (2) donating the merchandise to a charitable institution, or (3) selling the merchandise at public auction provided more than 90 days have passed since the date of forfeiture, and no Federal, State, or local government agency or charitable institution has a need for such merchandise. CBP may impose a civil fine against any person who directs, assists financially or otherwise, or aids and abets the importation of merchandise bearing a counterfeit mark that is seized under section 1526(e) and 19 CFR § 133.21. T.D. 99-76, 33 Cust. B. & Dec. No. 379 (Customs Bulletin and Decisions 1999).

Where administratively feasible and appropriate, CBP is authorized to seize merchandise bearing a mark that is counterfeit of a federally registered trademark that is not recorded with CBP. In certain limited circumstances CBP may seize such merchandise pursuant to 19 U.S.C. § 1595a(c)(2)(C) for a violation of 18 U.S.C. § 2320.

2. Copying or Simulating Marks

In addition, pursuant to 15 U.S.C. § 1124, as implemented by 19 CFR § 133.22, a copying or simulating mark or trade name is one that so resembles a recorded mark or name as to be likely to cause the public to associate the copying or simulating mark or name with the recorded mark or name. Merchandise bearing a copying or simulating mark is subject to detention and possible seizure.

Specifically, under 19 CFR § 133.22, merchandise bearing a copying or simulating mark shall be denied entry and detained for 30 days from the date on which the goods are presented for examination by CBP, during which time the importer shall be afforded the opportunity, before expiration of the 30-day period, to establish that any of the circumstances described in 19 CFR § 133.22(c) are applicable, e.g., the objectionable mark is removed or obliterated as a condition to entry in such a manner as to be illegible and incapable of being reconstituted, or the recordant gives written consent to importation of the merchandise. If the importer has not obtained release of the merchandise within the 30-day detention period, the merchandise shall be seized and

forfeiture proceedings instituted. Imported merchandise or packaging in which trademark or trade name violations are involved may be seized and forfeited pursuant to 19 U.S.C. § 1595a(c)(2)(C) and 19 CFR § 133.22(f). Merchandise bearing a mark which is confusingly similar to a trademark registered with the United States Patent and Trademark Office, but which is not recorded with CBP is not subject to detention or seizure.

3. Restricted Gray Market Articles (“Parallel Imports”)

Gray market goods are defined as foreign-manufactured goods bearing a genuine trademark or trade name identical with, or substantially indistinguishable from, one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States which are imported into the U.S. without the authorization of the U.S. trademark owner. In other words, gray market goods are genuine products bearing a trademark/name which has been applied with the approval of the right owner for use in a country other than the United States. Goods bearing counterfeit marks, on the other hand, are never genuine as these are marks (identical to or substantially indistinguishable from the genuine trademark) which have been applied without the authority of the trademark/trade name owner. CBP provides limited protection to trademark owners against importations of certain gray market goods pursuant to 19 U.S.C. § 1526(a), as implemented by 19 CFR § 133.23.

Only trademarks and trade names that are recorded with CBP are entitled to gray market protection. Gray market status is determined at the time of recordation with CBP. Gray market protection is conferred where (1) the U.S. and foreign trademarks are not owned by the same person, and (2) the U.S. and foreign trademark owners are not a parent or subsidiary, or otherwise subject to common ownership or control. “Common ownership” means individual or aggregate ownership of more than fifty percent of the business entity. “Common control” means effective control in policy and operations and is not necessarily synonymous with common ownership.

If a trademark/name receives gray market protection, foreign-made goods bearing the protected mark or name that are imported into the U.S. will be detained pursuant to 19 CFR § 133.23 and 19 CFR § 133.25, except as provided in 19 CFR §133.23(b), and are subject to potential seizure and forfeiture under 19 U.S.C. § 1526(b) (see also 19 CFR § 133.23(f)).

4. Lever Rule Protection

An exception to the common control provision of the gray market regulations is the *Lever*-rule. Goods bearing marks not entitled to gray market protection, and thus allowed unrestricted importation, may, in certain cases, be refused entry into the United States when it is established that such goods are “physically and materially” different from goods produced for the U.S. market under authority of the U.S. trademark owner. Part 133 of CBP regulations provides that, even in affiliate exception cases, upon application of the trademark owner and a finding that specific gray market goods are

“physically and materially” different from goods authorized by the U.S. trademark owner for importation into the U.S., CBP will restrict the importation of the gray market goods. In this instance, gray market goods will only be permitted entry into the commerce of the United States if the labeling requirements set forth in 19 CFR § 133.23(b) have been satisfied.

When applying for Lever-rule protection for *specific products*, a trademark owner must (1) state the basis for this claim with particularity; (2) support the claim by competent evidence; and (3) provide CBP with summaries of the alleged physical and material differences that exist between the merchandise authorized for sale in the United States and those intended for other markets. “Physical and material” differences between merchandise authorized for sale in the United States and those intended for other markets may include, but are not limited to:

- The specific composition of both the authorized and gray market product(s) (including chemical composition);
- Formulation, product construction, structure, or composite product components, of both the authorized and gray market product;
- Performance and/or operational characteristics of both the authorized and gray market product;
- Differences resulting from legal or regulatory requirements, certification, etc.;
- Other distinguishing and explicitly defined factors that would likely result in consumer deception or confusion as proscribed under applicable law.

CBP will publish in the *CBP Bulletin* a notice listing the trademark(s) and specific product(s) for which *Lever-rule* protection has been requested and granted.

5. Personal Use Exemption from Trademark Restrictions

Under 19 U.S.C. § 1526(d), a traveler arriving in the United States with merchandise bearing a protected trademark may be granted an exemption to the import restrictions. Under the personal use exemption, a traveler may import one article of the type bearing a protected trademark. For example, a person arriving in the U.S. with three watches bearing an unauthorized mark (whether each watch bears the same mark or different marks) is allowed to retain only watch. This exemption applies to goods bearing a counterfeit or confusingly similar version of a registered and recorded trademark, or otherwise restricted gray market article. The exemption is applicable only if the article (1) accompanies a traveler to the United States, (2) is for personal use and not for sale, and if (3) the traveler has not been granted an exemption for the same type of article within 30 days preceding his or her arrival. See 19 CFR § 148.55.

B. Copyrights

CBP is vested with the authority to detain and/or seize piratical copies of protected copyrighted works. For CBP purposes, “piratical copies” are identical or substantially

similar copies of a registered copyrighted work which are produced and imported without authorization of the copyright owner.

While copyright protection exists the moment a work is fixed in any tangible medium of expression, CBP focuses its enforcement of copyrights on works that have been recorded with the agency. It is important to note that CBP only records claims to copyrights which are federally registered with the U.S. Copyright Office.

Copyright law gives the author the right to prevent copying of a copyrighted work in any medium; however, the determination of copyright piracy is complex. The basic test for copyright infringement is whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work. Two steps are involved in the test for infringement: (1) access to the copyrighted work, and (2) substantial similarity not only of general ideas, but the expression of those ideas as well. Access to the copyrighted work may be presumed even without direct evidence in cases where it is apparent that the importer has ample opportunity to view the copyrighted work, and the substantial similarities between the works are so striking as to preclude the possibility that they were arrived at independently.

As a general matter, CBP regulations provide for the possibility of border enforcement action to enforce the Copyright Act of 1976 where the suspect work is (1) clearly piratical or (2) possibly piratical of the protected work.

1. Clearly Piratical

"Clearly Piratical" is defined as overwhelming and substantial similarity between the copyrighted elements of the protected work and the suspect item so as to clearly indicate that one work was based upon the other. Imported merchandise constituting "clearly piratical" copies of a federally registered copyright recorded with CBP is subject to seizure and forfeiture pursuant to 19 U.S.C. § 1595a(c)(2)(C) for a violation of 17 U.S.C. § 602, as implemented by 19 CFR § 133.42. It should be noted that a person arriving in the United States may import one infringing copyrighted work as long as the infringing work is part of the traveler's personal luggage, and is for private use and not for distribution.

If administratively feasible and appropriate, where a federally registered copyright has not been recorded with CBP and an agency determination is made that the merchandise is clearly piratical, such merchandise is subject to seizure pursuant to 19 U.S.C. § 1595a(c)(2)(C) for violation of 17 U.S.C. § 501.

2. Possibly Piratical

"Possibly Piratical" encompasses situations in which CBP has "reasonable suspicion" to believe that imported merchandise is piratical of copyrighted works recorded with CBP. In this instance, possibly piratical copies shall be detained and the process outlined in 19 CFR § 133.43 is to be followed. If such merchandise is determined to be piratical, it

may be seized and forfeited pursuant to 19 U.S.C. § 1595a(c)(2)(C) for a violation of 17 U.S.C. § 602.

3. Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA), among other things, prohibits gaining unauthorized access to a copyrighted work by circumventing a technological protection measure put in place by the copyright owner that is designed to control access to the copyrighted work.

Specifically, section 1201(a)(2) of Title 17 prohibits the manufacture or importation of devices, the provision of services, or trafficking in any technology, product, service, device, component, or part thereof, that circumvents technological measure that effectively control access to a work. To violate section 1201(a)(2), the suspect technology, service, device, or product must (1) be primarily designed or produced for the purpose of circumventing such technological measures, (2) have only limited commercially significant purpose or use other than to circumvent such measures, or (3) be marketed by the defendant or another acting in concert with that person's knowledge for use in circumventing a technological measure. Where CBP determines a device violates the DMCA, such device is subject to seizure and forfeiture under 19 U.S.C. § 1595a(c)(2)(C) for a violation of 17 U.S.C. § 1201.

C. Exclusion Orders

Under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), unfair methods of competition and unfair practices in the importation or sale of goods, the effect or tendency of which is to destroy, substantially injure, or prevent the establishment of an efficiently and economically operated U.S. industry, or to restrain or monopolize trade and commerce in the United States, are unlawful. Additionally, Section 337 declares unlawful the importation into the United States of goods which infringe a U.S. patent, registered trademark, copyright, or mask work. Subsequent to an investigation of an alleged violation under Section 337, where the U.S. International Trade Commission (ITC) determines that Section 337 has been violated, it shall issue an order directing the Secretary of the Treasury, as delegated to the Secretary of Homeland Security, to exclude the subject goods from entry into the United States. The ITC may also issue seizure and forfeiture orders against specific importers where, after previously having had goods denied entry pursuant to an exclusion order and having been notified by CBP that seizure and forfeiture could result from future attempted entries of such goods, the importer attempts a subsequent importation of the same or similar goods which are the subject of the exclusion order. Once a seizure and forfeiture notice has been issued, importation of the subject goods by the identified importer will be subject to forfeiture pursuant to 19 U.S.C. § 1337(i), as implemented by 19 CFR § 12.39(c).

Unlike trademarks and copyrights, patents registered with the U.S. Patent and Trademark Office may not be recorded with CBP. Thus, CBP's action with respect to patents is limited to the enforcement of ITC exclusion orders. In this regard, however,

CBP, upon written request from an importer or interested party, may issue rulings pursuant to 19 CFR Part 177, regarding whether prospective importations fall within the scope of an exclusion order issued by the ITC.

D. Criminal Enforcement

CBP may seize merchandise that meets the criteria for criminal seizure under the provisions of 19 U.S.C. § 1595a(c)(2)(C) for violation of the applicable criminal copyright or trademark statute. The determination to initiate criminal prosecution for a violation of an intellectual property right law is made by the United States Department of Justice through the United States Attorney for the jurisdiction where the violation occurred.

IV. Right Holders and Intellectual Property Rights

Following registration of a trademark or copyright, which relates to the official act of filing or having been granted (1) a trademark with the U.S. Patent & Trademark Office or (2) a copyright with the U.S. Copyright Office for a federal registration, a right holder may record its right (trademark or copyright) with CBP.

A. Recordation

While CBP regulations provide for the submission of written recordation applications, an applicant may also avail themselves of CBP's on-line recordation system as an alternative method of filing via the Intellectual Property e-Recordation (IPRR), an on-line recordation system. The web-based IPRR tool:

- Eliminates paper applications and the need for supporting documents (including registration certificates);
- Allows right holders to upload images of the protected rights;
- Reduces time from filing of the application to enforcement by field personnel; and
- Allows for on-line payment by credit card or by submission of a check or money order after the filing of the application.

IPRR is available at CBP's website homepage (<https://apps.cbp.gov/e-recordations/>).

1. Trademarks

In regard to trademarks, the information required to record a mark with CBP includes, but is not limited to, the following:

- The name, complete business address and citizenship of the trademark owner;
- The place of manufacture of goods bearing the recorded trademark;
- The names and addresses of any persons or companies authorized to use the trademark;
- The identity of any parent or subsidiary company or other foreign company under

- common ownership or control which uses the trademark abroad; and
- A fee of \$190 for each class of goods of a trademark the applicant wishes to record.

Trademarks that are registered on the principal register of the U.S. Patent and Trademark Office are eligible for recordation with CBP. To record a trademark with CBP, an applicant must include the following in its application. See 19 CFR §§ 133.1-133.2.

- The name, complete business address, and 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);
- The places of manufacture of goods bearing the recorded trademark;
- 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; and
- The identity of any parent or subsidiary company or other foreign company under common ownership or control which uses the trademark abroad.

2. Copyright

In regard to copyrights, the information required to record with CBP includes, but is not limited to, the following:

- The name, complete business address and citizenship of the copyright owner;
- The country of manufacture genuine copies or phonorecords of the protected work;
- A fee of \$190 for each class of goods of a trademark the applicant wishes to record.

Copyrights registered with the U.S. Copyright Office are eligible for recordation with CBP. The 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, may file a recordation application. To record a copyright with CBP, an applicant must include the following in its application. 19 CFR §§ 133.31, 133.32.

- The name and complete address of the copyright owner or owners;
- If the applicant is a person claiming actual or potential injury by reason of actual or contemplated importations of copies or phonorecords of the eligible work, a statement setting forth the circumstances of such actual or potential injury;
- The country of manufacture of genuine copies or phonorecords of the federally registered copyright;

- The name and principal address of any foreign person or business entity authorized or licensed to use the federally registered copyright, and a statement as to the exclusive rights authorized;
- The foreign title of the federally registered copyright, if different from the U.S. title; and
- 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.

B. Intellectual Property Rights Search Database (IPRS)

The Intellectual Property Rights Search (IPRS) database contains CBP recorded trademarks, trade names, and copyrights which are available for viewing by right holders and the public. These recordations can be retrieved based on simple or complex search characteristics using keywords and Boolean operators. IPRS is available to right holders and the general public at <http://iprs.cbp.gov/>.

V. Disclosure of Information

CBP regulations provide for disclosure of certain information where merchandise is detained and/or seized for violations of the trademark laws.

A. Counterfeit Marks

Where merchandise is suspected of bearing a mark that is counterfeit of a recorded trademark, CBP will provide the trademark owner prior to seizure with any information appearing on the merchandise or its retail packaging, or a sample of the merchandise including its retail packaging, for the purpose of determining whether the imported merchandise bears or consists of a counterfeit mark.

Within five days from the date of the decision to detain the suspect merchandise, CBP will notify the importer in writing of the detention. 19 CFR § 133.21(b)(1). The notice will inform the importer that a disclosure of information concerning the detained merchandise may be made to the owner of the mark to assist CBP in determining whether any marks are counterfeit, unless the importer presents information within seven days of the notification (excluding weekends and holidays) establishing to CBP's satisfaction that the detained merchandise does not bear a counterfeit mark. 19 CFR § 133.21(b)(1). CBP may disclose information appearing on the merchandise and/or its retail packaging, images (including photographs) of the merchandise and/or its retail packaging in its condition as presented for examination, or a sample of the merchandise and/or its retail packaging in its condition as presented for examination. CBP will release to the owner of the mark a sample when the owner furnishes CBP a bond in the form and amount specified by the port director, to hold the United States its officers and employees, and the importer, harmless from any loss or damage resulting from furnishing of the sample. 19 CFR §§ 133.21(b)(1), 133.21(c).

Where the importer does not timely provide information or the information provided is insufficient for CBP to determine that the merchandise does bear a counterfeit mark, CBP may proceed with the disclosure to the owner of the mark and will so notify the importer. Disclosure may include any serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, or other identifying marks appearing on the merchandise or its retail packaging, in alphanumeric or other formats. 19 CFR § 133.21(b)(1).

From the time merchandise is presented for examination until the time a notice of detention is issued, CBP may disclose to the owner of the mark any of the following information in order to obtain assistance in determining whether an imported article bears a counterfeit mark. Once a notice of detention is issued, CBP will disclose to the owner of the mark the following information, if available, within thirty days of the date of detention:

- Date of importation
- Port of Entry
- Description of Merchandise
- Quantity
- Country of Origin

19 CFR § 133.21(b)(2).

Notwithstanding the notice and seven-day response procedure described above, CBP may, at any time after presentation of the merchandise for examination but prior to the issuance of a detention notice, provide to the owner of the mark images or a sample of the detained merchandise or its retail packaging, provided that identifying information has been removed, obliterated, or otherwise obscured. Identifying information includes, but is not limited to, serial numbers, dates of manufacture, lot codes, batch numbers, universal product codes, the name or address of the manufacturer, exporter, or importer of the merchandise, in alphanumeric or other formats. CBP will release to the owner of the mark a sample when the owner furnishes CBP a bond in the form and amount specified by the port director, to hold the United States its officers and employees, and the importer, harmless from any loss or damage resulting from furnishing of the sample. 19 CFR §§ 133.21(b)(3).

Where merchandise is seized because it bears a mark that is counterfeit of a recorded trademark, CBP shall provide the right owner the following information, if available, within 30 business days (excluding weekends and holidays) of the date of the seizure:

- Date of importation
- Port of Entry
- Description of Merchandise
- Quantity
- Country of Origin

- Name and address of manufacturer
- Name and address of exporter
- Name and address of importer

19 CFR § 133.21(d).

Any time following seizure of the merchandise, CBP may provide a sample of the suspect merchandise to the right owner for examination, testing, or other use in pursuit of a related private civil remedy. If a request for sample is made, the right owner must provide CBP with a bond in the form and amount specified by the port director, to hold the United States its officers and employees, and the importer, harmless from any loss or damage resulting from furnishing of the sample. 19 CFR § 133.21(e).

B. Copying or Simulating Marks

Where merchandise is detained for bearing a mark confusingly similar to a recorded trademark, CBP may disclose to the owner of the mark the following information prior to issuing a detention notice. However, once a detention notice is issued, CBP shall disclose to the right owner the following information, if available, within 30 business days (excluding weekends and holidays) of the date of detention:

- Date of Importation
- Port of Entry
- Description of Merchandise
- Quantity
- Country of Origin

19 CFR § 133.25.

Any time after presentation of the merchandise for CBP examination, but prior to seizure, CBP may provide a sample to the owner of the mark for examination or testing. If a request for a sample is made, the mark owner must provide CBP with 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, harmless from any loss or damage resulting from furnishing of the sample. 19 C.F.R. § 133.25(c). Prior to release of the sample, CBP shall remove or obliterate any information indicating the name and/or address of the manufacturer, exporter, and/or importer.

C. Clearly Piratical Works

Where merchandise is seized because it is piratical of a work protected by a recorded copyright, CBP shall provide the right owner the following information, if available, within 30 business days (excluding weekends and holidays) of the date of the seizure:

- Date of importation
- Port of Entry

- Description of Merchandise
- Quantity
- Country of Origin
- Name and address of manufacturer
- Name and address of exporter
- Name and address of importer

19 CFR § 133.42(d).

Any time following seizure of the merchandise, CBP may provide a sample of the suspect merchandise to the right owner for examination, testing, or other use in pursuit of a related private civil remedy. If a request for sample is made, the right owner must provide CBP with a bond in the form and amount specified by the port director, to hold the United States its officers and employees, and the importer, harmless from any loss or damage resulting from furnishing of the sample. 19 CFR § 133.42(e).

D. Possibly Piratical Works

Where merchandise is detained because it is piratical of a work protected by a recorded copyright, CBP may disclose to the copyright owner the following information prior to issuing a detention notice. However, once a detention notice is issued, CBP shall disclose to the copyright owner the following information, if available, within 30 business days (excluding weekends and holidays) of the date of detention:

- Date of Importation
- Port of Entry
- Description of Merchandise
- Quantity
- Country of Origin

19 CFR § 133.43(b).

Any time after presentation of the merchandise for CBP examination, but prior to seizure, CBP may provide a sample to the copyright owner for examination or testing. If a request for sample is made, the right owner must provide CBP with 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, harmless from any loss or damage resulting from furnishing of the sample. Prior to release of the sample, CBP shall remove or obliterate any information indicating the name and/or address of the manufacturer, exporter, and/or importer. 19 CFR § 133.43(c).

VI. Remedies Following the Seizure of Merchandise

Upon receiving a seizure notice, an importer may choose to do one of the following:

- Request administrative forfeiture proceedings as provided under 19 U.S.C. § 1607 and 19 CFR § 162.45;
- File a claim and cost bond requesting that CBP immediately refer the case to the United States Attorney for court action;
- File a petition for administrative relief with the Port Director of CBP pursuant to 19 U.S.C. § 1618 and 19 CFR § 171.11; or
- Tender an offer in compromise to the Commissioner of Customs through the Fines, Penalties, and Forfeitures at the port of seizure pursuant to 19 U.S.C. § 1617 and 19 CFR § 161.5.

VII. Penalties

In accordance with 19 CFR § 133.27, CBP, as authorized by 19 U.S.C. § 1526(f), may impose a civil fine relative to seizures effected for merchandise bearing counterfeit marks pursuant to 19 U.S. § 1526(e). For the first seizure of such merchandise, the fine shall be no more than the domestic value the merchandise would have had if it were genuine, based upon the manufacturer's suggested retail price (MSRP) at the time of seizure. For second and subsequent violations, the fine shall not be more than twice such value.

Additional information concerning civil monetary fines and mitigation guidelines for trademark violations, as well as, a chart outlining the parameters for levying such fines are set forth in the ICP entitled *Mitigation Guidelines: Fines, Penalties, Forfeitures and Liquidated Damages*

http://www.cbp.gov/linkhandler/cgov/trade/legal/informed_compliance_pubs/icp069.ctt/icp069.pdf.

ADDITIONAL INFORMATION

The Internet

The home page of U.S. Customs and Border Protection on the Internet's World Wide Web, provides the trade community with current, relevant information regarding CBP operations and items of special interest. The site posts information -- which includes proposed regulations, news releases, publications and notices, etc. -- that can be searched, read on-line, printed or downloaded to your personal computer. The web site was established as a trade-friendly mechanism to assist the importing and exporting community. The web site also links to the home pages of many other agencies whose importing or exporting regulations that U.S. Customs and Border Protection helps to enforce. The web site also contains a wealth of information of interest to a broader public than the trade community. For instance, the "Know Before You Go" publication and traveler awareness campaign is designed to help educate international travelers.

The web address of U.S. Customs and Border Protection is <http://www.cbp.gov>

Customs Regulations

The current edition of Customs and Border Protection Regulations of the United States is a loose-leaf, subscription publication available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402; telephone (202) 512-1800. A bound edition of Title 19, Code of Federal Regulations is also available for sale from the same address. All proposed and final regulations are published in the Federal Register, which is published daily by the Office of the Federal Register, National Archives and Records Administration, and distributed by the Superintendent of Documents. Information about on-line access to the Federal Register may be obtained by calling (202) 512-1530 between 7 a.m. and 5 p.m. Eastern time. These notices are also published in the weekly Customs Bulletin described below.

Customs Bulletin

The Customs Bulletin and Decisions ("Customs Bulletin") is a weekly publication that contains decisions, rulings, regulatory proposals, notices and other information of interest to the trade community. It also contains decisions issued by the U.S. Court of International Trade, as well as customs-related decisions of the U.S. Court of Appeals for the Federal Circuit. Each year, the Government Printing Office publishes bound volumes of the Customs Bulletin. Subscriptions may be purchased from the Superintendent of Documents at the address and phone number listed above.

Importing into the United States

This publication provides an overview of the importing process and contains general information about import requirements. The current edition of *Importing Into the United States* contains much new and revised material brought about pursuant to the Customs Modernization Act ("Mod Act"). The Mod Act has fundamentally altered the relationship between importers and U.S. Customs and Border Protection by shifting to the importer the legal responsibility for declaring the value, classification, and rate of duty applicable to entered merchandise.

The current edition contains a section entitled "Informed Compliance." A key component of informed compliance is the shared responsibility between U.S. Customs and Border Protection and the import community, wherein CBP communicates its requirements to the importer, and the importer, in turn, uses reasonable care to assure that CBP is provided accurate and timely data pertaining to his or her importation.

Single copies may be obtained from local offices of U.S. Customs and Border Protection, or from the Office of Public Affairs, U.S. Customs and Border Protection, 1300 Pennsylvania Avenue NW, Washington, DC 20229. An on-line version is available at the CBP web site. *Importing into the United States* is also available for sale, in single copies or bulk orders, from the Superintendent of Documents by calling (202) 512-1800, or by mail from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 979050, St. Louis, MO 63197-9000.

Informed Compliance Publications

U.S. Customs and Border Protection has prepared a number of Informed Compliance publications in the "*What Every Member of the Trade Community Should Know About:...*" series. Check the Internet web site <http://www.cbp.gov> for current publications.

Value Publications

Customs Valuation under the Trade Agreements Act of 1979 is a 96-page book containing a detailed narrative description of the customs valuation system, the customs valuation title of the Trade Agreements Act (§402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979 (19 U.S.C. §1401a)), the Statement of Administrative Action which was sent to the U.S. Congress in conjunction with the TAA, regulations (19 C.F.R. §§152.000-152.108) implementing the valuation system (a few sections of the regulations have been amended subsequent to the publication of the book) and questions and answers concerning the valuation system.

Customs Valuation Encyclopedia (with updates) is comprised of relevant statutory provisions, CBP Regulations implementing the statute, portions of the Customs Valuation Code, judicial precedent, and administrative rulings involving application of valuation law. A copy may be purchased for a nominal charge from the Superintendent of Documents, Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7054. This publication is also available on the Internet web site of U.S. Customs and Border Protection.

The information provided in this publication is for general information purposes only. Recognizing that many complicated factors may be involved in customs issues, an importer may wish to obtain a ruling under CBP Regulations, 19 C.F.R. Part 177, or obtain advice from an expert (such as a licensed Customs Broker, attorney or consultant) who specializes in customs matters. Reliance solely on the general information in this pamphlet may not be considered reasonable care.

Additional information may also be obtained from U.S. Customs and Border Protection ports of entry. Please consult your telephone directory for an office near you. The listing will be found under U.S. Government, Department of Homeland Security.

“Your Comments are Important”

The Small Business and Regulatory Enforcement Ombudsman and 10 regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement activities and rate each agency’s responsiveness to small business. If you wish to comment on the enforcement actions of U.S. Customs and Border Protection, call 1-888-REG-FAIR (1-888-734-3247).

REPORT SMUGGLING 1-800-BE-ALERT



Visit our Internet web site: <http://www.cbp.gov>