

A Brief Primer on US Border Enforcement Measures for Intellectual Property Rights

By Professor Doris Estelle Long*

The protection of intellectual property rights is a critical trade issue. The unauthorized importation of pirated, counterfeit and infringing goods not only undermines US domestic industries, but often poses serious threats to consumer health and safety. Customs border measures often serve as one of the first lines of defense in the battle against manufacture and distribution of counterfeit and pirated goods.

International Obligations for Border Control Measures Under TRIPS

There are numerous international treaties that govern the protection of intellectual property internationally. However, in the area of international standards for protection of intellectual property, the Agreement on Trade Related Aspects of Intellectual Property Rights, referred to as “TRIPS” and administered by the World Trade Organization (WTO), establishes the international norms for intellectual property and its enforcement. These are standards that have been agreed upon by the members of the WTO as representing the minimum requirements for protection of intellectual property rights. All members of WTO, and those who wish to be members in the future must meet these standards. This means that over 155 countries have agreed to be bound by the enforcement procedures and standards that TRIPS has established, including those for border enforcement.

TRIPS requires that WTO member countries adopt fair and equitable procedures to enforce rights at the customs border. These procedures must not be unreasonably burdensome, so that they meet the goals of deterring further infringements under TRIPS provisions. TRIPS allows WTO member countries to grant their customs officials *ex officio* power to initiate investigations and suspend the importation of infringing goods, including counterfeit trademarked goods and pirated copyrighted goods. TRIPS also allows WTO member countries to establish procedures controlling the exportation of goods to assist in achieving the goals of rights protection and deterrence of further infringements.

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At a minimum, TRIPS requires that fair and equitable procedures be in place to enable an intellectual property rights holder to lodge a written application with the appropriate authority to suspend the importation of counterfeit trademark and pirated copyrighted goods. Such application must be filed with the designated court or administrative agency under domestic law.

To obtain suspension based on the written application by the right holder, the right holder must provide adequate evidence to demonstrate a *prima facie* case of infringement of the intellectual property right at issue. The right holder must also supply a sufficiently detailed description of the goods “to make them readily recognizable by the customs authorities.” Within a reasonable period of time the authority with whom the application for suspension of importation of the goods is filed must notify the applicant whether they have accepted the application and the period for which they will take action to suspend the free civil circulation of the goods at issue.

TRIPS allows the relevant authority to require the intellectual property owner to provide a security or its equivalent sufficient to protect against abuse. The security requirements cannot be so burdensome in nature that they deter intellectual property owners from seeking suspension of importation of the goods. TRIPS further requires the destruction of the illegal goods or their disposal outside the channels of commerce. Counterfeit good cannot be re-exported without their alteration except in exceptional circumstances.

To assure the protection of the importer, TRIPS requires the applicant (the intellectual property rights holder) be ordered to pay the importer, consignee and owner “appropriate compensation” for any injury caused through the wrongful detention of the goods. Where suspension of importation of the goods is granted, both the importer and applicant (rights owner) must be promptly notified of the suspension. The right holder must be given the opportunity to have the detained goods examined to substantiate his claims. The importer also must be granted an opportunity of inspection.

TRIPS does not require a final decision when goods are detained. To the contrary, in order to assure that goods are quickly removed from civil circulation, TRIPS provides that the applicant (or his representative) has ten working days from the date of service of the notice of suspension within which to begin the appropriate proceedings in the appropriate authority (which may be the Court, Customs or some other authorized agency, depending on national law) and provide notice to Customs of such initiation. In the alternative, within this same ten day period, the applicant must at least inform Customs that “the duly empowered authority” has taken provisional measures for prolonging the suspension of the goods. In the absence of these measures, TRIP provides that “in appropriate cases” the time limits may be extended another 10 working days.

If the necessary proceedings or provisional measures have not been granted within the required time limits, the goods must be released, provided that all other conditions for importation or exportation have been met. Even if the necessary proceedings have been initiated, on motion of the defendant, a review of the provisional suspension measures must be granted to determine whether such measures must be modified, revoked or confirmed. This review must be conducted “within a reasonable period.”

Without prejudice to the protection of right to confidential information (commercial secret), the intellectual property right holder must be granted a “sufficient opportunity” to have the detained goods inspected in order to substantiate the right holder’s claims of infringement. The same right of inspection must also be extended to the goods importer. In addition, the names and addresses of the consignor, the importer and the consignee may be provided to the rights holder, as well as the quantity of the goods being held in suspension.

While TRIPS establishes the minimum standards for enforcement of intellectual property rights at the border, many countries, including the United States, have established a much stronger border protection system. These stronger systems include the critical ability of customs officials to act ex officio (without a specific complaint by the IPR owner) as well as export control regulations as well.

A General Introduction to US Copyright Law

Under US copyright law, copyright protection is extended to “original works of authorship fixed in any tangible medium of expression now known or later developed from which they can be perceived, reproduced or otherwise communicated...” (17 U.S.C. §102(a)) Copyright protection does not extend to “any idea, procedure, process, system, method of operation, concept, principle or discovery.” (17 U.S.C. §102(b)) In essence, so long as a work has been recorded, filmed, written or otherwise set out in a tangible form, it may be subject to protection under US copyright law. Consequently, literary, dramatic, musical, artistic or other intellectual works, including original collections of information may be protected. Thus, under US copyright law, such diverse works as computer software, paintings, choreography, maps, poetry and sound recordings may be protected so long as such works are “original” and contain “expression.” Such protection applies to both published and unpublished works. Furthermore, no registration or notice on the work is required for the work to be protected. Instead, creation of the work alone is sufficient.

Upon the creation of a copyright protectable work the author (or copyright owner) is entitled to a bundle of six rights. These rights include the exclusive right to do or authorize the following acts:

- The right to reproduce, in whole or in part, the work in copies;
- The right to prepare derivative works based upon the original;
- The right to distribute copies of the work to the public;
- The right to perform the work publicly;
- The right to display the work publicly;
- In the case of sound recordings, the right to perform the work publicly by means of a digital audio transmission.

While copyright registration is not required for protection, US authors are required to register their works before seeking legal relief for infringement. . Copyright registration is controlled by the US Copyright Office and can be done over the Internet.

US Copyright law provides for a complete panoply of remedies for copyright infringement, including injunctive relief, seizure and destruction of the infringing copies as well as all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which infringing copies or phonorecords may be created, actual damages (including lost profits), statutory damages, up to \$150,000 per infringement for willful infringement....costs and reasonable attorneys' fees. The parties that may be held liable for copyright infringement include the party which committed the infringing act (referred to as a "direct infringer"), the party which knew of the infringing activity and induces, causes or materially contributes to it (referred to as a contributory infringer) and the party which has the right and ability to supervise the parties engaged in the infringing activities and who had a direct financial interest in the exploitation of the copyrighted material (referred to as "vicarious liability").

Does Customs enforce copyright against imports?

TRIPS requires that procedures be available to stop the illegal importation of pirated goods. It also allows border enforcement measures to prohibit the unauthorized importation of copyright infringing goods. In addition TRIPS permits customs officials to be granted ex officio power to stop the importation of illegal goods. In the United States, as detailed more completely below, customs officials are given strong powers to prohibit the importation of infringing goods, including the power to conduct ex officio investigations without waiting for information from the copyright owner about shipments containing illegal goods. Customs officials often work with prosecutors and police in the United States to coordinate enforcement activities against pirates.

A General Introduction to US Trademark Law

Trademark protection in United States is based on the Lanham (Federal Trademark) Act, a federal (national) statute that went into effect in 1948 and has been amended numerous times. This law is found at 15 U.S.C. §§1051, et seq. The Lanham Act, in general, prohibits the imitation and unauthorized use of a trademark which is defined as "any word, name, symbol or device or any combination [used] to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." If the trademark is used to identify the source of services being offered to the public, it is known more specifically as a service mark. The purpose of a trademark is to signify to consumers that a good comes from a single source and contains a certain level of quality.

Trademarks, unlike other forms of intellectual property, are always connected to some commercial activity or item and have no function or independent existence apart from such goods or services. To be granted trademark protection, an applicant must demonstrate that the mark is actually used, and has been continuously used, in commerce. As discussed more fully below, remedies for infringement may include injunctive relief; monetary relief in the form of damages (lost profits); profits (gained by defendant in excess of lost profits) or statutory damages (trebled when appropriate); seizure and destruction of infringing material; criminal penalties; and attorney's fees and costs.

Under US law anyone who violates any of the exclusive rights of the trademark owner is an infringer. In addition to direct infringement, courts recognize claims for vicarious and contributory infringement. Thus, the person who induces another to infringe someone's rights, or who assists in such infringement (such as by producing the illegal goods at the request of another) is equally liable. US law also provides heightened penalties for civil trademark counterfeiting.

Protectable Trademarks

US law protects trademarks, service marks, collective marks and certification marks. Under US law protectable trademarks include "any word, name, symbol, or device, or any combination thereof" used "to identify and distinguish his or her goods" and "to indicate the source of the goods, even if that source is unknown." (15 U.S.C. §1127) This definition provides for a broad scope of protectable marks, including sound marks, smell marks, multi-media marks, and trade dress.

To qualify for trademark protection a mark must be distinctive -- it cannot be deceptive and it must be used in commerce in connection with the relevant

goods and services. To be distinctive a mark must be either inherently distinctive (which means that it is considered distinctive immediately upon use of the mark) or it must have acquired distinctiveness. Inherently distinctive marks include those marks which are arbitrary or fanciful, or which merely suggest a quality or characteristic of the goods or services in question. Marks which are descriptive may also be protected upon proof of secondary meaning. A mark has acquired secondary meaning, if “in the minds of the public, the primary significance of a product feature or term is to identify the *source* of the product, rather than the product itself.” Such secondary meaning is generally established through evidence of use.

Registration is not required for trademark protection to attach. Instead, it is sufficient for the mark to be used in commerce. Such protection without registration applies regardless of whether the mark is famous.

Counterfeit Goods and Marks

Counterfeiting is a particularly egregious form of trademark infringement where an identical or nearly identical mark is used on identical goods, generally in an effort to pass off inferior goods as legitimate ones. Because of the special harm to consumers that counterfeit goods pose, TRIPS requires that civil, criminal and border measures be available to combat the harm caused by counterfeit goods. At the heart of a claim of counterfeiting is the unauthorized use of a mark which is virtually indistinguishable in its essential aspects from another’s mark. For example, the use of the term ROLEXX on watches qualifies as a counterfeit version of the ROLEX mark for watches. Since counterfeiters do not generally care about the harm that may be caused by their goods, they exercise no quality control over them and provide no guarantees as to the safety or effectiveness of their goods. Consequently, counterfeit goods are often of inferior or even harmful quality.

The counterfeit nature of the goods in question is often demonstrated by a physical examination of the goods themselves. Counterfeit products are often created of inferior materials or of shoddy workmanship. Thus, a side-by-side comparison of the counterfeit product with legitimate goods often demonstrates the counterfeit nature of the goods. In addition, the counterfeit mark may be misspelled or may vary slightly from the legitimate mark. Labels may be poorly printed or of shoddy quality. Sometimes the goods on the surface may appear legitimate, but an examination of the inner workings of, for example, a watch may demonstrate that the counterfeit product is created from plastic. Similarly, counterfeit drugs may be ineffective and counterfeit food, liquor or cigarette products may not taste the same as legitimate products. In addition, such products often contain harmful ingredients since counterfeit goods are not usually subject to quality control.

Special Damages for Counterfeiting in the United States

Trademark counterfeiting is treated as a particularly egregious form of trademark infringement in the United States. A counterfeit mark under US law is defined as a “spurious mark ... that is identical with or substantially indistinguishable from” another. The marks do not have to be identical to qualify as counterfeit. However, because counterfeiting results in special remedies, the mark must be registered. The counterfeiting of unregistered marks results in the same civil liabilities applicable to trademark infringement.

To prove civil counterfeiting the plaintiff must prove ownership of a registered mark and unauthorized use of a counterfeit or spurious version of that mark in connection with the same goods or services for which the mark is registered. This use must create a likelihood of confusion. Where the identical (or virtually identical) mark is used on the same goods or services for which the mark is registered, likelihood of confusion is presumed. Successful plaintiffs are entitled to the same types of relief granted in trademark infringement cases, including injunctive relief, money damages, seizure, destruction, attorneys fees and costs. Injunctive relief, including, in particular, *ex parte* temporary restraining orders (without notice to the defendant) are routinely granted in cases of counterfeiting. *Ex parte* seizures of the goods and marks involved in the violation, including the means of making such marks and records documenting the manufacture, sale or receipt of things involved in such violation, are also routinely granted.

Because of the egregious nature of the harm to consumers and trademark owners caused by trademark counterfeiting, in addition to severe criminal penalties, US law provides for special civil penalties for trademark counterfeiting. For registered marks, in the event of proof of counterfeiting, any money damages, by statute, must be tripled. In lieu of actual damages, the plaintiff may recover statutory (pre-established) damages of not less than \$1,000 or more than \$200,000 per counterfeit mark, per type of good or services sold, offered for sale or distributed. In the case of willful trademark counterfeiting, statutory damages may be raised to not more than \$2,000,000 per counterfeit mark, per type of good or service sold, offered for sale or distributed.

In determining the amount of statutory damages to award in cases of trademark counterfeiting, courts consider several factors including: (1) the amount of loss by all of the victims, including diminution of market share; (2) the total number of counterfeit goods manufactured or sold; (3) the quality of the infringing goods; (4) the price at which they were sold; (5) the normal retail price for non-infringing goods; (6) the market to which such infringing products were sold; and (7) the impact of the items' release on potential demand for the legitimate goods.

What is the difference between an infringing trademark and a counterfeit trademark?

Every counterfeit mark is an infringing mark. A counterfeit mark is an infringing mark because its use presumptively results in a likelihood of confusion under international standards. Every infringing mark, however, is not a counterfeit mark. To qualify as a counterfeit mark, the mark must be identical or virtually indistinguishable from the genuine mark in its essential elements and must be used without authorization on the same goods or services as the trademark owner. Counterfeit marks can often be determined by a physical examination of the goods at issue. Counterfeit goods are usually of lower quality than legitimate goods, and contain blurred or misspelled marks.

Does Customs enforce trademarks against imports?

TRIPS requires that procedures be available to stop the illegal importation of counterfeit trademarked goods. It also allows border enforcement measures to prohibit the unauthorized importation of trademark infringing goods. In addition TRIPS permits customs officials to be granted *ex officio* power to stop the importation of illegal goods. In the United States, as described in greater detail below, customs officials are given strong powers to prohibit the importation of infringing goods, including the power to conduct *ex officio* investigations without waiting for information from the trademark owner about shipments containing illegal goods. Customs officials often work with prosecutors and police in the United States to coordinate enforcement activities against counterfeiters.

Investigatory and Enforcement Powers of U.S. Customs

The U.S. Customs Service enforces intellectual property rights and related laws in at the US border. In addition to responding to requests for assistance in suspending the importation of counterfeit and pirated goods, which is required under TRIPS, U.S. Customs also has broad *ex officio* powers. Under these powers, it may initiate its own investigations and may also suspend the importation of goods on its own initiative. While TRIPS *requires* that border measures be available to prohibit the importation of counterfeit trademarked goods and pirated copyrighted goods, U.S. Customs, like the customs services in many other countries, also has the authority to prohibit the importation of goods which infringe trademarks, trade names, copyrights and/or patents.

Whether Customs acts pursuant to a request by an intellectual property right holder, or *ex officio* (on its own initiative), Customs officers often work closely with intellectual property owners to identify illegal product. U.S. Customs often also works in coordination with other law enforcement officials in order to assist in tracking illegal goods from the border through its domestic distribution chain. For example, by its own regulations, Customs is urged to consult with the

appropriate prosecutors when the Customs officials discover pirated copyrighted works or counterfeit trademarked goods in order to assist in the potential criminal prosecution of the importers and others in the chain of distribution.

To assist Customs officers in determining the legality of goods crossing the border, U.S. Customs maintains a central database designed to be accessible around the United States at Customs Field Offices. This central database is one of the primary tools which the Customs Service uses to enforce intellectual property rights. Associated with the central database, the Customs Service may issue alerts to field offices regarding enforcement actions pertaining to shipments.

Once a trademark, trade name, or copyright is recorded with Customs and entered into the database, the Customs Service has the legal authority to suspend the importation of infringing, counterfeit and pirated goods, with or without any action by the intellectual property owner. Thus, a customs agent who is familiar with recorded trademarks may initiate an enforcement action on his own accord, by identifying and detaining or seizing merchandise that appears, in his judgment to be infringing, counterfeit or pirated. As noted above, this investigatory power is beyond the limited requirements of TRIPS for action based on a written request by the intellectual property rights holder. Such broad powers, however, serve as strong method for assuring that unlawful products do not cross the border, thus helping to reduce the number of internal (domestic) actions required to combat intellectual property infringement.

While recordation with Customs is strongly recommended, it is not absolutely required for Customs to be able to suspend the importation of an infringing or counterfeit trademark. However, lack of recordation makes it less likely that Customs will have adequate knowledge of the mark to be able to suspend importation of illegal goods, without specific action by the intellectual property owner alerting Customs to the potential illegal shipment[s]. Recordation can be achieved on line at <https://apps.cbp.gov/e-recordations>. Recordation fees are presently \$190 per mark, per class, and \$190 per copyrighted work.

Although recordation of intellectual property rights with Customs is a critical first step in the protection of such rights at the border, it is also critical that the IPR owner be available to assist Customs officers in identifying lawful and unlawful goods, particularly if such goods have been suspended for importation. The smooth flow of licit trade over borders can only be achieved if the IPR owner works together with Customs, providing such needed support as identification of lawful importers and goods, training programs to assist Customs officers to identify counterfeit and pirated copies and other expert informational assistance.

Detention, Seizure and Destruction of Illegal Goods

In the United States, Customs may suspend from circulation any goods which it suspects infringe a party's trademark, trade name or copyright. Such suspension is allowed regardless of whether Customs is acting on request of the intellectual property owner or on its own initiative. Within five (5) days of such suspension, Customs must notify the importer of its decision to retain the goods. Within 30 days the importer may establish that its importation is lawful. Extensions of this 30-day time period may be freely granted for good cause shown. From the time goods are presented for Customs inspection, until the time a notice of detention is issued, Customs may disclose to the owner of the intellectual property at issue the following information:

- (1) The date of importation;
- (2) The port of entry;
- (3) A description of the merchandise;
- (4) The quantity involved; and
- (5) The country of origin of the merchandise.

Once a notice of detention issues, Customs must disclose the above listed information within 30 days of the date of detention to the intellectual property owner. In addition, on payment of a reasonable bond by the intellectual property owner, at any time following presentation of the merchandise for Customs examination, but prior to seizure, Customs may provide a sample of the suspect merchandise to the intellectual property owner for examination or testing to assist in determining whether the article imported is infringing. Customs may demand the return of the sample at any time. The sample must be returned to Customs upon demand or at the conclusion of the examination or testing. In the event that the sample is damaged, destroyed, or lost while in the possession of the intellectual property owner, the owner must certify its loss or destruction.

If Customs determines that the goods are infringing, it seizes the goods. Goods that are seized and forfeited are routinely destroyed, unless the intellectual property right owner gives permission for other disposition, such as a charitable donation. In addition to seizure and destruction of the goods, significant monetary penalties may also be assessed against the importer. (See Generally 19 CFR §133 et seq.)

Controlling the Exportation of Infringing Goods

TRIPS does not require the use of export remedies to reduce the circulation of infringing goods. It does, however, allow such remedies. Many countries, including the United States, prohibit the exportation of illegal goods and grant Customs the authority to seize such products. In addition, in order to control the creation of pirated or counterfeit products domestically, many countries limit the importation of the raw materials used to create optical media to those who are authorized to create legal products.

How does Customs deal with smuggling activities over the Internet (Cybersmuggling)?

U.S. Customs has created a Cyber Smuggling Center to deal with illegal trafficking in counterfeit and copyright and trademark protected merchandise. This is a major new priority of the Customs Service. The Cyber Smuggling Center identifies the people, organizations and methods of smuggling on the Internet and targets them for investigation. In a manner much like an ordinary investigation, the U.S. Customs has investigatory power when there is a violation of intellectual property rights via the Internet.

How can a customs agent determine if illegal goods are contained in a particular container?

There are many ways to determine if illegal goods are contained in a particular container. One is on the basis of information provided by the intellectual property owner to Customs regarding the sources of legitimate goods. Containers with goods from other sources are inspected and detained until confirmation of their legal or illegal nature is obtained. Another method is by acting on confidential information from the intellectual property owner or other members of the public warning that illegal goods will be entering a particular port(s) during a particular time period. One of the most prevalent methods for discovering illegal goods is by examining those containers whose documentation is suspicious. Documentation may be suspicious if it contains errors regarding the place of shipment, weight, tariff classification, or other indications that the documents contain false information about the goods or their place of origin. Usually those who import illegal goods do not properly disclose the nature, source or value of those goods.

Once a customs agent opens a container, how can he tell if the goods inside violate intellectual property rights?

There are several methods for determining the legitimacy of inspected goods. Assuming the documentation for the goods is correct, a customs agent may be able to determine the illegal nature of the goods simply through a visual

inspection. Pirated or counterfeit goods often differ significantly from legitimate versions. They may lack labels or other identifying indicia; their packaging may be of inferior material; the printing may be poor; instruction manuals or other printed materials may be missing; or the goods may be of clearly inferior manufacture. For other ways to identify infringing goods, see Chapter I and the relevant portions of the chapters on trademark and copyright enforcement dealing with infringing goods. In case of doubt, Customs officials with the authority to do so under domestic law may detain the goods and seek assistance from the intellectual property owner, including providing a sample for examination and testing.

What assistance can an intellectual property owner, or his representative, be expected to provide Customs?

The intellectual property owner, or his representative, can provide useful assistance in border enforcement efforts. The owner can identify distinguishing characteristics of legitimate or illegal products. He can also identify legitimate sources of manufacture or importation for the goods. If provided with a sample, he can examine the sample or test it to determine if it is lawful product.

If goods are counterfeit or pirated, can they simply be refused entry and allowed to be re-exported to another country without violating international obligations?

No. If the goods are counterfeit or pirated, they must be seized and removed from circulation or destroyed. They cannot be re-exported except in extraordinary circumstances.

If the importer provides a bond, should he be allowed to import the goods subject to a monetary fine if the goods later prove to be illegal?

Allowing the importation of goods which are illegal, subject only to the imposition of a civil fine does not meet the requirements of “effective enforcement” under TRIPS. The harm caused by the release of illegal products into commerce cannot be compensated for simply with money damages. If this were true, TRIPS would not require the removal from commercial circulation of infringing goods (including pirated and counterfeit goods).

Once the goods are actually in transit across the border, is the role of Customs in border enforcement concluded?

While TRIPS does not require that Customs exercise authority over goods in transit, many countries, including the United States, grant their customs service the power to detain goods in transit. In addition, Customs can help reduce domestic intellectual property efforts by providing information and otherwise working in coordination with other enforcement officials. For example, in the United States, Customs routinely advises local federal prosecutors of the presence of pirated sound recordings, and coordinates investigative activities to help trace the manufacturing source or distribution networks for such pirated works.

What types of information can Customs demand from the intellectual property right holder before it suspends from circulation goods suspected of being unlawful?

Where the goods are suspended on the basis of written application to Customs, TRIPS provides that Customs may demand evidence of prima facie infringement of the intellectual property right holder's rights. It may also demand that the right holder provide "a sufficiently detailed description of the goods to make them readily recognizable." While intellectual property right holders should be able to provide a description of the intellectual property right at issue so that pirated counterfeit goods can be recognized, realistically, intellectual property owners do not often have detailed information about suspected illegal shipments. Requiring specific information about such shipments, such as the name of the importer, or the ship or flight on which such illegal goods will be transported, before any action may be taken places an unreasonable burden on the intellectual property holder. Because of these limitations, as noted above, many countries grant their customs agents *ex officio* power so that they can act when circumstances warrant. In addition, Customs also often requires intellectual property holders to record information regarding their intellectual property to assist Customs in monitoring the legality of shipments of potentially infringing goods.

Does TRIPS require export control over goods?

TRIPS does not require specific measures of export control. However, most countries, including the United States, seize illegal product that is being exported from the country.