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Egypt and the Implementation of TRIPS Border Measures

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Executive Summary

As a Member of the World Trade Organization, Egypt is obligated to adopt border measures, that is, procedures to prevent trade in goods that infringe intellectual property rights. These border measures must apply at least to trademark counterfeit and copyright pirated goods and may apply to other forms of intellectual property infringement. The procedures must at least respond to a written complaint by the holder of intellectual property rights and may permit customs authorities to take action on their own initiative. Egypt's obligation to adopt border measures to prevent trade in infringing goods became effective January 1, 2000.

Despite strengthened enforcement, copyright piracy in Egypt remains in excess of 50 percent in many fields. Widespread copyright piracy imperils Egypt's cultural leadership, particularly its film, music, and publishing industries, and hinders its ability to develop leadership in the computer software industry. Shortcomings in Egypt's intellectual property system, particularly trademarks, impede Egypt's ability to attract foreign investment and promote trade. The failure to meet TRIPS obligations required to be in place by January 1, 2000, also interferes with Egypt's ability to conclude favorable trade arrangements, such as free trade agreements, which generally presume commitments above the minimum standards set in the TRIPS Agreement, often described as *TRIPS-plus*.

The influx of pirated and counterfeit goods also harms Egypt's consumers, who do not receive the benefit of their bargain and who may be physically harmed by counterfeit products such as pharmaceuticals and automotive parts that flood the Egyptian market, generally from the Far East. Widespread infringement takes its greatest toll in the Egyptian economy by its effect on the small and medium-sized enterprises (SMEs) that make up the bulk of the economy. When labels are unreliable, consumers become reluctant to make purchases, creating a drag on the domestic market that is least tolerated by SMEs and making it increasingly difficult to start new businesses that are an index of the health of the economy.

1. Introduction

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), an Annex to the Agreement Establishing the World Trade Organization (WTO), requires all WTO Members to implement *border measures*, that is, procedures to prevent trade in infringing goods. WTO Members must adopt procedures to suspend the release from customs into free circulation of goods that infringe intellectual property rights. These border measures must apply at least to trademark counterfeit goods and copyright pirated goods. They may also be made applicable to other forms of intellectual property infringement. WTO Members must require customs authorities to take action at least in response to a written complaint by the holder of intellectual property rights. They may also require their customs authorities to take action on their own initiative. WTO Members must at least adopt procedures directed toward the importation of infringing goods. They may apply them as well to goods being exported or goods in transit.

As a WTO Member, Egypt was obligated to implement border measures by January 1, 2000. No such procedures are yet in place. This is a serious omission, as preventing trade in infringing goods is a major purpose of the TRIPS Agreement. There is therefore an urgent need to implement procedures now. The effect of noncompliance with an entire chapter of the TRIPS Agreement places Egypt in danger of being subject to a complaint under the WTO, the consequence of which could be the imposition of “compensation” in the form of tariffs on Egyptian products.

This omission also is detrimental to Egypt’s ability to attract foreign investment and promote trade. Favorable trade agreements with developed-country trading partners generally require commitments above the minimum standards set in the TRIPS Agreement. The lack of effective border measures also damages Egypt’s domestic industries, which must compete with substandard products sold at lower prices. When labels are unreliable, consumers become reluctant to make purchases, creating a drag on the domestic market. This takes its greatest toll on the small and medium-sized enterprises (SMEs) that make up the bulk of the Egyptian economy.

The lack of effective border measures also leaves Egypt’s consumers vulnerable to an influx of counterfeit goods from foreign countries, particularly from the Far East. This problem is particularly serious for goods such as pharmaceuticals and automobile parts, where substandard products may result in physical injury or death. Although Egypt has in place mechanisms to remove counterfeit and pirated goods from the domestic market, it is far more efficient and effective to prevent the entry of these goods by stopping shipments at the borders than to attempt to remove them item by item once they reach the retail market.

Although there is a significant problem with the domestic production and sale of infringing goods, it appears that Egypt is primarily a victim of the most serious forms of infringement—trademark counterfeiting and copyright piracy—practiced in other countries and imported into Egypt. Thus, it is Egyptian consumers whose health and safety are jeopardized by counterfeit pharmaceuticals

or automotive parts produced by corrupt foreign interests and exported to Egypt, Egyptian businesses harmed by acts of unfair competition by foreign corrupt interests, and the Egyptian economy that suffers as a result of unethical trade practices in foreign countries.

As important as it is for Egypt to adopt effective border measures—and it is crucial to the health of Egypt’s trade and economy—it is also important that border measures be implemented in a way that does not add to the already lengthy time required to clear non-infringing goods through the ports. This is consistent with the objectives of the TRIPS Agreement, noted in its first paragraph, that WTO Members both desire “to reduce distortions and impediments to international trade” and “to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.” Timeliness is also a requirement because TRIPS sets strict time limits for accomplishing all procedures related to intellectual property border measures. Such a system can best be developed by adopting and implementing procedures that represent international best practices, as discussed below.

EGYPT’S INTERNATIONAL TRADE

Egypt imported goods worth an estimated \$19.21 billion f.o.b. in 2004.¹ “Leading imports include capital goods, machinery, and agricultural commodities,” with consumer goods accounting for only about one sixth of all imports.² The European Union is Egypt’s largest trading partner, typically accounting for around 35–40 percent of imports and exports, and this seems likely to increase in view of the recently concluded Partnership Agreement. The United States is Egypt’s second largest trading partner, (Egypt’s largest trading partner as a country), accounting for around 20 percent of imports and 10–15 percent of exports. “Asian countries account for around 25 percent of both imports and exports. Countries in the Middle East take 13 percent of exports and account for about 6 percent of imports, while Africa, Latin America, and Australia account for less than 5 percent each of imports and exports.”³

The actual time for goods to complete Egypt’s different port procedures varies considerably, depending on the type of goods and the port through which the goods enter. On average, however, a shipment entering Egypt completes port procedures in 6.6 days, customs procedures in 12.5 days, and GOEIC procedures in 9.1 days.⁴ Importers complain about the amount of time required to complete procedures, the number of separate inspection agencies, and the number of documents that must be supplied. Burdensome procedures and delays in obtaining the release of goods from customs add to the cost of imported goods. When these goods are imported for use in manufacturing, port clearance delays and requirements increase the cost of goods produced in Egypt, making them less competitive on the global market. When the goods are imported for resale, the added costs are passed along to consumers, contributing to an increasing cost of living for the Egyptian public.

Imported goods primarily enter Egypt through its six maritime ports (i.e., Alexandria, Dekheila, Damietta, Port Said, Suez, and Ein Sokhna), and through the Cairo Airport. Egypt has operational

¹ “Egypt,” The World Factbook, <http://www.cia.gov/cia/publications/factbook/geos/eg.html#Econ>.

² Trade Information Center, U.S. Department of Commerce, Country Commercial Guide 2004, <http://www.buyusainfo.net/info.cfm?id=121527&keyx=084475327AFC4D16F1D39F9C94EBD92F&dbf=cg1&loadnav=no>.

³ *Id.*

⁴ Sahar Tohamy and Abdel Wahab Heikal, ATR Time of Release Survey, Cairo, December 2004.

customs facilities at each of these sites. While some goods undoubtedly enter Egypt elsewhere, via land routes, it is these sites that should be the primary focus for border measures to interrupt the flow of infringing goods in significant measure.

TRIPS REQUIREMENTS REGARDING BORDER MEASURES

Special requirements related to border measures are found in Section 4 of the TRIPS Agreement, Articles 51-59.

WTO Members must adopt procedures permitting a holder of intellectual property rights (including a federation or association with legal standing to assert intellectual property rights), with valid grounds to suspect that the importation of counterfeit trademark or pirated copyright goods may take place, to file a written request for the competent authorities to suspend the release of such goods into free circulation. TRIPS Article 51.

For purposes of the TRIPS Agreement,

"counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;

"pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation. TRIPS Article 51, FN 14.

WTO Members may make these procedures applicable to the suspension of goods involving the infringement of other types of intellectual property rights (e.g., patent rights, plant variety rights, neighboring rights, etc.) or for the export of infringing goods. TRIPS Article 51.

The intellectual property right holder who makes such an application must be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right, and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. Once such an application has been filed, the competent authorities are required to inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action. TRIPS Article 52.

The competent authorities must have legal authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse, but not in an amount that would unreasonably deter recourse to these procedures. Payment of the security must not prejudice any other remedy available to the right holder, and the security must be released if the right holder fails to pursue the right of action within a reasonable period of time. TRIPS Article 53.

Both the importer and the applicant must be promptly notified of the suspension of the release of goods. TRIPS Article 54.

The complainant has a period of ten working days from the time of being served notice that the goods have been suspended from release in which to initiate other proceedings leading to a decision on the merits. If the competent authorities are not informed that such proceedings have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods must be released, provided that all other conditions for importation or exportation have been complied with. In appropriate cases, this time limit may be extended by another 10 working days. TRIPS Article 55.

If proceedings leading to a decision on the merits of the case have been initiated, a review must take place upon the request of the defendant to decide whether the measures that have been taken—suspension from release or some other decision—should be modified, revoked or confirmed. The review must take place within a reasonable period and must accord the defendant a right to be heard. TRIPS Article 55.

Notwithstanding the foregoing, if proceedings leading to a decision on the merits of the case are carried out or continued in accordance with certain provisional judicial measures and proceedings leading to a decision on the merits of the case have not been initiated within a reasonable period, then upon request by the defendant, the suspension must be revoked or otherwise cease to have effect. This provision applies where the provisional judicial measure

is taken to prevent an infringement of any intellectual property right from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance, or

is taken to preserve relevant evidence in regard to the alleged infringement, or

is adopted without a hearing by the other party, and in particular where any delay is likely to cause irreparable harm to the holder of the intellectual property right or where there is a demonstrable risk of evidence being destroyed.

This “reasonable period” is to be determined by the judicial authority ordering the measures where national law permits or, in the absence of such a determination, must not exceed 20 working days or 31 calendar days, whichever is the longer. TRIPS Article 55 and TRIPS Article 50.6.

Where an application relates to the release of goods involving industrial designs, patents, layout-designs or undisclosed information, release of those goods into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period specified in Article 55 has expired without the granting of provisional relief by the duly empowered authority, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement, provided that all other conditions for importation have been complied with. Payment of such security does not prejudice any other remedy available to the right holder, and the security must be released if the right holder fails to pursue the right of action within a reasonable period of time. TRIPS Article 53.

The relevant authorities must have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released because proceedings were not instituted in the time allowed. TRIPS Article 56.

The competent authorities must also have the authority to allow the right holder to have an inspection of goods that have been detained in order to substantiate the right holder's claims. This right is subject to protecting confidential information. The authorities must also have the right to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, the law may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of the goods in question. TRIPS Article 57.

The provisions on border measures also provide for the possibility that the competent authorities may be required to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed. In such cases, the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers. The importer and the right holder must be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension must be subject to the same conditions of notification and release, within the same time periods, as those described for goods where a complaint is made by an intellectual property rights holder. Also in these cases, it is permitted to exempt both public authorities and officials from liability, but only for appropriate remedial measures where actions are taken or intended in good faith. TRIPS Article 58.

If the goods are found to be noninfringing, they must promptly be released and the complainant should be ordered to compensate the owner for any losses as a result of the complaint. TRIPS Articles 55 and 58.

If the goods are found to be infringing, they should be disposed of outside the normal channels of commerce in a way that does not prejudice the interests of the legitimate intellectual property owner. In most cases, it will not be sufficient to de-mark (i.e., remove the trademark from the goods, or obliterate the mark) counterfeit trademark goods. The competent authorities must have the authority to order the destruction or disposal of infringing goods. In regard to counterfeit trademark goods, the authorities are not permitted to allow the re-exportation of the infringing goods in an unaltered state or subject them to different customs procedures, other than in exceptional circumstances. TRIPS Articles 46 and 59.

WTO Members are permitted to exclude from the application of the above provisions small quantities of goods of a non-commercial nature contained in travelers' personal luggage or sent in small consignments. TRIPS Article 60.

Provisions on border measures are also subject to certain other general requirements of the TRIPS Agreement, including national treatment, provided in TRIPS Article 3, most-favored nation treatment, provided in TRIPS Article 4, and the transparency requirements of TRIPS Article 63. These measures may also be subject to certain provisions relating to various types of intellectual property, such as the nondiscrimination provisions for patents found in TRIPS Article 27.

WTO Members must also maintain records on actions taken in accordance with these measures in order to implement the information exchange and cooperation functions of TRIPS Article 69, which provides that

Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights. For this purpose, they shall establish and notify contact points in their administrations and be ready to exchange information on trade in infringing goods. They shall, in particular, promote the

exchange of information and cooperation between customs authorities with regard to trade in counterfeit trademark goods and pirated copyright goods.

2. International Best Practices

TRANSPARENCY

TRIPS border measures should be implemented in a manner that is transparent. This requires, at a minimum, that terms be defined so as to provide clarity. The World Customs Organization (WCO) has produced a set of Model Provisions for National Legislation to Implement Fair and Effective Border Measures Consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights, a copy of which is attached as Appendix A. Egypt should prepare a set of definitions consistent with those in the model provisions.

Transparency also requires that the agency adopt detailed procedures and standards for taking action, and that these procedures be made publicly available. The procedures should contain sufficient detail that employees charged with implementing border measures clearly understand the requirements of their positions, and that both complainants and importers clearly understand the procedures. The procedures should describe the both who is responsible for taking action, who is eligible to bring an infringement matter to the attention of the responsible organization, what information or evidence must be provided, what standard will be applied in assessing that information or evidence, the action that will be taken at each step of the proceedings, the periods of time in which action must be taken, and the consequences or remedies available if those time periods are not observed.

In addition, the responsible organization should be publicly identified, and the Government of Egypt should announce the identity of the responsible agency, contact information, the information and documents required before action will be taken, and the procedures that have been adopted for carrying out TRIPS border measures. The announcement should be made through several channels: to the World Trade Organization, through the ordinary channels of announcing legal measures in Egypt, and through releases to the media.

CONSISTENCY

Border measures must be consistent with requirements of the TRIPS Agreement and consistent with Law 82/2002. They should also be applied in a manner that will lead to consistency between similar cases, so that outcomes are predictable. Finally, it is important to develop procedures that will lead to consistency between border procedures and procedures in the domestic market.

Otherwise, there is a risk that infringing goods might pass inspection and be admitted into the domestic market, where they would be difficult to track, or that non-infringing goods might pass inspection and be released, only to be seized later on the same grounds. Even if the non-infringing goods were eventually found by a court to be non-infringing, it would be unfair to subject importers of legitimate goods to multiple proceedings on the same issue. An effort should therefore be made to assure both that the standards for enforcement are the same between ports and the domestic market, and that the individuals responsible for enforcement have the same

understanding of those standards. This could be done through training or, better, a common system of supervision or oversight.

TIMELINESS

Border measures must be completed within the time frame set by the TRIPS Agreement. In most cases, procedures should be efficient enough to identify goods while they are in the ports. At least with regard to copyright piracy and trademark counterfeiting, a preliminary decision on infringement should be made almost immediately—within 24 hours. To avoid harm to importers of legitimate goods, the rightholder should be notified as quickly as possible, since this notification begins the time during which the goods can be suspended from release. While it is reasonable to send a registered letter of notification, faster means of notification should be used wherever possible. These should include telephone, fax, or email if available. Finally, the procedures for making a final determination on the merits of the case must also be quick, since otherwise the importer of legitimate goods may lose valuable business opportunities, which may be even greater than the entire market value of the shipment. Such a situation would also increase the need to require a security from the rightholder, and in some cases, the amount of security to be required. This would, in some cases, deter access to the system by the rightholder, contrary to TRIPS Article 53, which provides, “Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.”

OPTIONAL DATABASE

Complying with the time limits set forth in the TRIPS Agreement would be substantially easier if the relevant authority had access to reliable information on the ownership of the intellectual property alleged to be infringed, and to contact information to enable them to make expeditious notifications. This could be facilitated by the establishment of a computer database and giving rightholders the option to record their rights with the customs authorities. Such a system would not address all instances of alleged infringement but would be helpful with regard to those intellectual property rights that are recorded. A reasonable fee could be charged for the recordation, thus making the data base pay for its own operation as well as reducing the difficulty of handling many cases of infringement.

AIPPI, the International Association for the Protection of Industrial Property, recommends that WTO Members establish a system of preemptive recordation of intellectual property rights with the customs authorities (see Appendix B).⁵ Such a system is in use in the United States, where it appears to work effectively. Under this system, an intellectual property rightholder can record his or her trademark or copyright registration with the customs authority. The registration is against the payment of a fee and is valid for a limited period of time. During this period of time, the U.S. Customs and Border Protection will focus its enforcement efforts on these goods and will intercept, detain, seize and forfeit shipments of such goods. Rightholders are encouraged to notify the customs authorities of infringing shipments and to provide samples of infringing goods where available so as to assist officials in their work.

Recordation is not a requirement for an intellectual property owner to obtain suspension of goods. However, recordation means that the customs authorities will actively monitor shipments to

⁵ “The Effectiveness of Border Measures After TRIPS,” AIPPI Yearbook 2000/I, Q147 (Sorrento, April 8–15, 2000) pages 543–546, http://www.aippi.org/reports/resolutions/Q147_E.pdf.

prevent the importation or exportation of infringing goods. It also means that some of the information that would need to be provided is already in the hands of the customs authorities, thus expediting action on complaints.

This procedure appears to be effective. Under its aggressive enforcement program, U.S. Customs and Border Protection seized nearly \$100 million in infringing products in 2002, over three-fourths of those goods from three Asian countries.⁶

PROVISIONAL MEASURES AND CONDITIONAL RELEASE

It is often useful to have a means for a court or administrative body to take action to preserve evidence, for example, by ordering the seizure of evidence. This should be followed promptly by a hearing on the merits where both parties have the opportunity to be represented.

It is also possible to provide for the provisional release of goods, upon posting of a security. However, this option should be exercised only under limited conditions and not where there is a significant risk that the goods will be found to be counterfeit or pirated and will be released into the domestic market, where they cannot be easily recovered.

SECURITY OR EQUIVALENT ASSURANCE

TRIPS provides for the rightholder to provide “a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse.” TRIPS Article 53.1. This does not always require that the rightholder post a monetary security. In its comments, the WCO Model Law points out that the purpose of a security or equivalent assurance “is mainly to shield customs and legitimate businesses against” abuse of border measures” and that the “security required by customs should be reasonable and should be set at a level that does not unreasonably deter recourse to customs procedures.” The WCO therefore recommends that in applying the requirement for a security, the customs authorities should be able to “give full recognition to any of the following:

- The provision of a continuous security, to avoid the need for individual bonds for each shipment;
- Guarantees ... as described in Article 8;
- Foreign bank guarantees including those issued by the bank in the country in which the right holder is established;
- Counter-guarantees by a branch office of the bank in the country of establishment of the right owner;
- Certified documents showing that the applicant has sufficient assets to cover a possible damage claim;
- Statements from properly certified accountancies.”

The WCO Model Law comments also point out that another reason for requiring a security or equivalent assurance is to address the situation in which the infringer cannot be contacted. In this case, the “costs incurred should not normally fall to Customs and as an alternative to seeking a

⁶http://www.customs.gov/linkhandler/cgov/import/commercial_enforcement/ipr/seizure/trading/IPR_Stats.ctt/iprstats.pdf.

bank guarantee, Customs may ask the right holder to sign an undertaking to accept the actual costs incurred; these may include storage, handling, destruction and other operational costs incurred. The undertaking may be requested at the time of making the application, at the time when goods are being suspended from clearance or at a later time.”⁷

When counterfeit goods are seized, U.S. Customs and Border Protection is required to provide the rightholder with information about the importer and manufacturer, if known. It may also provide the rightholder with a sample of the goods, in which case it requires the rightholder to post a security of 120 percent of the CIF value of the sample, plus duty and other applicable fees (but not lower than \$100).⁸ If the sample is lost, damaged, or destroyed, the bond will normally be forfeited.

In those few cases where conditional release is permitted, U.S. Customs and Border Protection requires the importer to post a security of 300 percent of the value of the shipment.⁹

DISPOSITION OF INFRINGING GOODS

TRIPS Article 46 notes the need for “proportionality between the seriousness of the infringement and the remedies ordered.” However, “In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.” TRIPS Article 59 provides,

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. In regard to counterfeit trademark goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

The WCO Model Law comments, in Notes on Article 11, that “As a rule infringing goods should be destroyed or made unusable, and not be let back into the chain of commerce or used in any other manner without the right holder’s express consent.” However, it also calls attention to the need for great care to be exercised in making the determination of infringement and recommends the use of an opposition procedure to address the rights of the importer or alleged infringer.

DE MINIMIS IMPORTS

TRIPS Article 60 permits WTO Members to refrain from applying border measures to *de minimis* imports, that is, “small quantities of goods of a non-commercial nature contained in travelers’ personal luggage or sent in small consignment.” AEPPI recommends that WTO Members not make this exception.¹⁰ The WCO Model Law contains a provision limiting the application of

⁷ WCO Model Law, Note on Article 5.

⁸ “Trademark and Trade Name Protection,” Customs Directive No. 2310-008A, U.S. Customs and Border Protection, April 7, 2000, <http://www.customs.gov/linkhandler/cgov/toolbox/legal/directives/2310-008a.ctt/2310-008a.doc>.

⁹ “Release of merchandise to premises designated by the importer shall be used sparingly and only upon the filing of a single entry bond for three times the entered value of the merchandise and a written agreement not to dispose of the merchandise without Customs permission.” “Trademark and Trade Name Protection,” Customs Directive No. 2310-008A, U.S. Customs and Border Protection, April 7, 2000, <http://www.customs.gov/linkhandler/cgov/toolbox/legal/directives/2310-008a.ctt/2310-008a.doc>.

¹⁰ “The Effectiveness of Border Measures after TRIPS,” AIPPI Yearbook 2000/I, Q147 (Sorrento, April 8-15, 2000) pages 543–546, http://www.aippi.org/reports/resolutions/Q147_E.pdf.

border measures in the case of *de minimis* imports. However, it recommends that customs officials “develop a clear policy with regard to this issue so that traffickers of counterfeit products cannot exploit the eventual *de minimis* limit as a legal loophole.” If the exception is adopted, the WCO recommends that “It should be limited to a single copy of a work made by a person using his own means and intended strictly for his own private and personal use (e.g., the importation of multiple identical copies of the same product should not be allowed under the exception).

AUTHORITATIVE SOURCES OF INFORMATION

It is essential that procedures identify how customs officials will determine what sources of information are authoritative, particularly in view of the “false license” issue. Normally, the rightholder will be the most authoritative source of information about the rightholder’s own products (e.g., whether a particular item is or is not legitimately produced by the rightholder or under the rightholder’s authorization). The issue of parallel importation should only be reached if raised by the importer or owner of the goods, in which case, the investigation should more properly be handled in the decision on the merits of the case.

Egypt’s industrial property offices—the Patent and Industrial Models Office, Trademark Office, Industrial Designs Office, and Plant Variety Protection Office—will be authoritative sources on whether the intellectual property rights claimed are, in fact, registered (or patented) in Egypt and whether their protection remains in effect.

For copyrighted works, and for cases where a defense is raised either that the goods are licensed or are parallel imports, it will be useful to have established a reliable database. The optional recordation mentioned above is one means of addressing this issue. In determining whether there is a true license or false license, the only reliable means of addressing the issue is to trace title to the originator. A legitimate rightholder or licensee will be able to show an appropriate chain of title all the way to the author, designer, breeder, or inventor. A person claiming rights granted by someone who is not in privity with the originator—that is, has no contractual relationship passing title or a license—will not be able to make such a showing.

OTHER ISSUES

AIPPI recommends that border measures be applied to all forms of intellectual property, not merely to copyright piracy and trademark counterfeiting, and that customs officials be authorized to take action on their own initiative.¹¹

The WCO Model Law also provides for border measures to be applied to other forms of intellectual property infringement. It provides, at Article 9, for customs to suspend release, on its own initiative, when “it has acquired prima facie evidence that an intellectual property right has been infringed or is about to be infringed or that the goods are protection-defeating devices,” and that they may suspend release when there is “reasonable grounds to suspect that the goods are infringing goods or protection-defeating devices.”

¹¹ “The Effectiveness of Border Measures After TRIPS,” AIPPI Yearbook 2000/I, Q147 (Sorrento, April 8-15, 2000) pages 543–546, http://www.aippi.org/reports/resolutions/Q147_E.pdf.

OUTLINE OF PROCEDURES

Initiating a Case

In the general situation, goods should be released into free circulation in a reasonable period. The application to suspend release interrupts that process. The suspension of goods should be initiated in one of two ways: a written application by the rightholder, or customs officials observe facts that constitute a *prima facie* case of infringement or at least create a reasonable suspicion of infringement and independently initiate suspension of the goods.

Identification of Goods

No action is possible until the goods have been identified. If the goods are identified and do not correspond, even generally, to the rightholder's application, Customs should notify the applicant of this fact and that the complaint is being dismissed. If the goods do correspond to the applicant's description, they should be evaluated to determine whether there is a *prima facie* case of infringement, in which case release should be suspended and both parties notified.

Because of the risk that infringing goods will reach the domestic market, customs officials should ideally be able to act immediately to suspend release of infringing goods. While release should not be suspended unless there is at least a reasonable suspicion that the goods identified are infringing, additional information may be needed to determine whether there is a *prima facie* case of infringement. This is particularly true if the customs officials act on their own initiative. In that case, it may be necessary to contact the rightholder and obtain the needed information. Procedures should offer the possibility of a brief detention of goods for these circumstances. The U.S. procedures provide a good model:

If a Customs officer can articulate a basis for having such "reasonable suspicion" at the time of presentation to Customs, he may formally detain the goods at that time. Where a Customs officer is unsure whether to formally detain the goods at the time of presentation to Customs, he may detain the goods for a 5-day period ... to determine whether such "reasonable suspicion" exists.¹²

If this action is taken, Customs must issue an official notification to the importer within the 5-day period.

Notification of Parties

The customs authorities must immediately notify both the importer and the applicant of the suspension of the release of goods. TRIPS Article 54.

Security or Equivalent Assurance

In appropriate cases, the applicant may be required to provide a security or equivalent assurance, as discussed above.

¹² "Trademark and Trade Name Protection," Customs Directive No. 2310-008A, U.S. Customs and Border Protection, April 7, 2000, <http://www.customs.gov/linkhandler/cgov/toolbox/legal/directives/2310-008a.ctt/2310-008a.doc>.

Proceedings Leading to a Decision on the Merits

The complainant has a period of ten working days from the time of being served notice that the goods have been suspended from release in which to initiate proceedings leading to a decision on the merits. In appropriate cases, this time limit may be extended by another 10 working days. TRIPS Article 55. Although goods are properly suspended on the basis of a finding that there is a *prima facie* case of infringement, the importer and owner of the goods are entitled to present other evidence in a hearing before an administrative or judicial tribunal. This tribunal should be a judicial or quasi-judicial body, not a committee, which is not able to handle these issues expeditiously enough. Tribunal members should be attorneys with sufficient experience and knowledge of intellectual property and contract law to evaluate legal issue, and the tribunal should have access to subject matter experts (e.g., patent, trademark, or plant variety experts). Bearing in mind that the importer and owner are subject to financial losses due to the suspension, this decision on the merits should be made quickly. If it is made by an administrative tribunal, the parties are entitled to appeal to the courts.

Appeals

Either party should be entitled to an appeal to the courts of the decision on the merits. Provision must be made for the goods pending this appeal. The procedures should also provide for expedited procedures in appropriate cases.

Release of Goods

Once goods have been suspended from release into free circulation, if all other conditions for importation or exportation have been complied with, the goods **must** be released under four circumstances:

- Following a decision on the merits of the case in which the defendant prevails.
- Pursuant to **TRIPS Article 55**, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, if the customs authorities have not been informed that
 - Proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or
 - The duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods.

In appropriate cases, this time-limit may be extended by another 10 working days.

- Pursuant to TRIPS Article 50.6,
 - If the suspension is carried out under a provisional judicial measure, and
 - The defendant requests that the provisional measures be revoked or cease to have effect because proceedings leading to a decision on the merits have not been initiated within 20 working days or 31 calendar days, whichever is longer.
- Pursuant to TRIPS Article 53.2,
 - Where the goods involve industrial designs, patents, layout-designs or undisclosed information,
 - Release into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and

- The period provided for in **TRIPS Article 55** (10 days with possible extension of another 10 working days) has expired without the granting of provisional relief by the duly empowered authority, and
- The owner, importer, or consignee of the goods posts a security in an amount sufficient to protect the right holder for any infringement.

Disposition of Goods

If the decision on the merits is that the goods are infringing, they must be disposed of outside normal channels of commerce, as described above.

PRESENT LEGAL FRAMEWORK

It is not clear which organizations have legal responsibility for border measures in Egypt. If the legal responsibility were clear, it is likely that at least one organization would have undertaken this responsibility by now.

Intellectual property is governed by Law 82/2002, a comprehensive intellectual property code; its implementing regulations, presently Cabinet Decree No. 1366/2003; and implementing decrees to be issued by each of the responsible ministries. Responsibility for implementation of Law 82/2002 is divided according to subject matter among five ministries, plus the Ministry of Justice. Law 82/2002 does not mention border measures or specify which Ministry (or Ministries) may have the authority to enforce intellectual property rights at the borders.

Ports procedures are divided among several organizations. Customs inspects all goods, and the General Organization for Export and Import Control (GOEIC) inspects a large fraction of goods entering Egypt. In addition, the ports include representatives from the police (Ministry of Interior) and the Ministries of Health and Agriculture. Each of these organizations acts within a limited framework, e.g., assessing customs duties or inspections for safety or consistency with standards, but no organization has a clear mandate directing it to take action regarding goods where there is a reasonable basis to believe the goods are infringing. Consequently, authorities in the ports are not clear about which organizations—if any—have authority to respond to written applications and complaints concerning the importation of goods that infringe intellectual property rights.

3. Implementation

The implementation of TRIPS border measures raises a number of practical issues:

- How will Egypt address those issues that are left to the discretion of each WTO Member:
 - The choice of subject matter for enforcement,
 - Whether to enforce only on the basis of complaints or to authorize enforcement based on the customs authorities' own observation, and
 - Whether to implement border measures for exported as well as imported goods?
- Which organization(s) will have responsibility for the various tasks involved in implementation? How will those responsibilities be allocated among the various organizations? What qualifications are needed for personnel to implement their new responsibilities?
- What procedures will be adopted to ensure that border measures are implemented in a manner that is predictable, transparent, fair to all parties, and TRIPS-consistent? How will Egypt prioritize the work of its customs authorities to achieve the most effective, efficient, and cost-effective implementation, without impeding trade? How can these measures be implemented in a way that is fair to all parties?

These implementation decisions can have a profound effect both on Egypt's intellectual property system and on its broader environment for trade and commerce. In many cases, the answers to these questions are interrelated and require a balance between two (or sometimes more) competing objectives. For example,

- Requiring a complainant to provide a security provides protection against abuse. A higher security may better deter abuse, but the greater burden on the complainant may deter the use of border measures to protect the interests of intellectual property rightholders and the public.
- More inspections could result in the identification and exclusion of more goods but increase the time for customs clearance of all goods.
- Extending border measures to include more types of intellectual property will provide greater protection but will require a higher level of skill to evaluate.

This portion of the report will address these implementation-related issues.

DISCRETIONARY ISSUES

The TRIPS Agreement sets forth minimum requirements for border measures but leaves several areas to the discretion of each WTO Member. Egypt must therefore make a decision as to what course of action it will follow on the following areas.

Subject Matter

TRIPS requires WTO Members to exclude entry of trademark counterfeit and copyright pirated goods and permits WTO Members to exclude entry of goods that infringe in other ways. These include trademark infringement that does not amount to counterfeiting, copyright infringement that does not amount to piracy, as well as the infringement of other forms of intellectual property—the infringement of patents, industrial designs, or geographical indications, or the misappropriation of undisclosed information.

Adopting stronger protection would be beneficial to Egypt's business environment but would impose a greater burden in administering a more complex system. Two issues that should be considered are the extent to which Egypt's interests are affected by the infringement of other forms of intellectual property, and the complexity of implementation.

Trademark counterfeiting and copyright piracy are the two most serious forms of infringement, with substantial amounts of trademark counterfeit and copyright pirated goods being imported from the Far East. MFTI officials report that there are also substantial imports of goods that infringe registered industrial designs. There are as yet no reports of significant problems involving the importation of goods that infringe patents, plant variety protection, or semiconductor topographies, or that misappropriate undisclosed information. There is concern about goods that misappropriate geographical indications, but it was felt that this problem is adequately addressed for the present by the fact that Egypt already enforces against false designations of origin.

The second issue concerns complexity of the enforcement process. The infringement of a patent, semiconductor topography, or plant variety will almost always require an analysis and opinion by a technical expert in the relevant field of technology. Trademark infringement and copyright infringement that do not relate to counterfeiting or piracy likewise require an opinion by an attorney with experience in trademark or copyright law. By contrast, determination of trademark counterfeiting and copyright piracy is relatively straightforward. Bearing in mind the definition of trademark counterfeit goods and copyright pirated goods,¹³ the copying involved in trademark counterfeit and copyright piracy will be identical, or virtually identical, to the mark or copyrighted work of the original and therefore does not require a determination by an expert. That is, the standard for trademark counterfeiting should be whether an ordinary person would find the marks on the imported goods identical to, or virtually indistinguishable from, the protected mark. For copyright piracy, the goods would also be identical, or nearly so, if made from an original or authorized copy.

For industrial designs, the standard for infringement is similar to that for trademarks and turns on whether the designs would appear to be similar to an ordinary person. If Egypt wants to extend TRIPS border measures to industrial designs, it may be advisable to adopt the same approach that TRIPS applied in the case of trademark infringement and limit customs enforcement to designs that are either identical or indistinguishable in their essential aspects.

¹³ "Counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation; "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation." TRIPS Article 51, FN 14.

Exclusion of *De Minimis* Imports

WTO Members are permitted, but not required, to exclude from TRIPS border measures “small quantities of goods of a noncommercial nature contained in travelers' personal luggage or sent in small consignment.”¹⁴ An advantage of excluding *de minimis* imports is that it reduces the burden of searching small packages. The disadvantage is that for some products, such as software, jewelry, or pharmaceutical products, a large economic value may be involved in even a small package. If Egypt wants to exclude *de minimis* imports, it should specify both the number of items per shipment and the value of the shipment that will be admitted as a *de minimis* import.

Complaint-based vs. *Ex Officio* Enforcement

TRIPS requires that WTO Members provide a procedure for responding to complaints but permits them to take *ex officio* action to exclude the entry of infringing goods. It is simplest to make border enforcement depend strictly on complaints but preferable to have a system that permits customs officials to take action *ex officio* when infringing goods are identified. A possible compromise would be to implement a system that responds to complaints and a limited system of *ex officio* enforcement that would allow customs officials to respond to the most egregious cases or those for which they have been alerted to be on the lookout. This could be combined with a system of recordation such as that used in the United States or with any other system of prioritizing the work of the customs authorities. (See Priorities, below.)

Border Measures for Exported Goods

Depending on how responsibilities are implemented, Egypt may wish to implement border measures to ensure that Egypt does not export counterfeit or pirated goods. The disadvantage of export enforcement is that this would impose additional burdens on Egypt's exports. The advantage is that such a system would help to reduce the incidence of counterfeiting and piracy, activities that adversely affect Egypt's business environment and could lead to disputes under the TRIPS Agreement.

RESPONSIBILITIES

TRIPS Article 51 requires WTO Members to “adopt procedures to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods.” The designation of the “competent authorities,” and the development of procedures, is left to the individual WTO Member. Egypt should exercise its discretion in this area to allocate responsibilities in a manner that will take best advantage of the intellectual property framework it already has in place, and the expertise it already possesses in intellectual property.

Implementation of TRIPS border measures will require the following functions:

1. Receiving complaints from rightholders and informing the applicant whether the complaint has been accepted, and communicating the complaint to the customs authorities if it has been received by another organization
2. Identifying goods that are the subject of a complaint

¹⁴ TRIPS Article 60.

3. If Egypt chooses to permit *ex officio* action, identifying infringing goods as they enter Egypt
4. Determining whether there is a *prima facie* case of infringement
5. Suspending goods from release
6. Notification of the importer and applicant of a suspension
7. Receiving and holding the security or equivalent assurance
8. Determining whether to require a security or equivalent assurance, and determining the amount to be required
9. Receiving notification that a party other than the defendant has initiated a proceeding leading to a decision on the merits of the case, and notifying the customs authorities whether or not that notification has been received within the required period of time
10. Receiving requests for extensions of time to initiate a proceeding leading to a determination on the merits, and determining whether or not to grant an extension of time
11. Determining whether or not to order indemnification of the importer or owner of goods, and the amount of such indemnification
12. Releasing the security or equivalent assurance, either as indemnification or refund
13. Providing for information and inspection of the goods as provided in TRIPS Article 57
14. Releasing the goods if they are found to be noninfringing, or there is no notification that a party other than the defendant has filed initiated a proceeding leading to a decision on the merits within the applicable time period, and if the decisions regarding time limits are made by an organization other than the customs authorities, communicating the decision to release the goods to the customs authorities
15. Rendering a decision on the merits of the case
16. Providing for the destruction of counterfeit and pirated goods, or the return of the goods to the owner or importer
17. Providing information to the public, including potential complainants and importers, on the procedures adopted

It is not necessary or even desirable that all of the foregoing functions be performed by a single organization, but the procedures must provide for someone to carry out each of these functions.

As a practical matter, Customs inspectors are in the best position to carry out the identification of infringing goods and to suspend them from Customs release (items 2, 3, 5, and 14). Also as a practical matter, there should be a central point for receiving applications and informing the applicant whether the application has been accepted and communicating the complaint to the customs authorities; notifying the applicant and importer of a suspension; receiving notification that a party other than the defendant has initiated a proceeding leading to a decision on the merits of the case, and notifying the customs authorities whether or not that notification has been received within the required period of time; receiving requests for extensions of time to initiate a proceeding leading to a determination on the merits, determining whether or not to grant an extension of time; arranging for inspection and information, and notifying the customs authorities of the requirement to suspend or release the goods (items 1, 6, 9, 10, 13, and the notification of customs under item 14). This organization—a secretariat—should also provide information to the public to enable rightholders and complainants to understand the system (item 17). This

organization could also deal with the security or equivalent assurance (items 8, 11, and 12), or it could handle the communications functions related to the security or equivalent assurance. A decision on the merits should be preferably made by a court (item 15), and information regarding that decision—either release of the goods or their destruction—should be made by this same organization. Additionally, if decisions regarding the security or equivalent assurance are made by a different organization, this secretariat should communicate that information to the relevant parties.

A decision as to whether there is a *prima facie* case of infringement (item 4) could be made either by Customs authorities or by the secretariat, with technical advice from the competent authority for the particular type of intellectual property that forms the basis for the complaint or *ex officio* action.

The competent authorities include the following:

Ministry of Trade and Supply	• Trademarks
Trademark Office	• Industrial designs
Industrial Designs Office	• Inspection of domestic markets
General Department for Intellectual Property	• Trade statements
Ministry of Culture	• Licensing and inspection of domestic markets
Central Department for Audiovisual Censorship	• Copyright
Copyright Protection Office	• Copyright in respect of computer software and databases
Ministry of Information	• Copyright in respect of broadcasting
Computer Software and Database Protection Office	
Ministry of Communications and Information	
Audio, Visual and Audiovisual Works Protection Office	
Ministry of Higher Education and Scientific Research	• Patents for inventions and utility models
Patent and Utility Models Office	
Ministry of Agriculture	• Plant variety protection
Plant Variety Protection Office	

HUMAN RESOURCES AND FACILITIES

Customs inspectors must have training in identifying infringing goods and in the procedures that are adopted. They should also receive training on how to secure evidence and maintain a chain of custody of evidentiary materials.

Employees of the secretariat must be able to perform the primarily clerical function of tracking complaints and assuring that the various notifications are made in a timely manner. These employees must also have training on the new procedures and on maintaining a chain of custody.

The determination of a *prima facie* case can be made by customs authorities or by the secretariat. The individuals responsible for this determination should preferably be attorneys and should have training in intellectual property and international requirements as well as the new procedures.

The secretariat will need to have access to good telephone communications—preferably a telephone line for each attorney, and a telephone on each desk, not merely a central line for the office—as well as fax and email communication. These employees must be able to receive complaints and communicate efficiently with the customs authorities, the various intellectual property offices, intellectual property rightholders, the courts, and other parties as needed.

A communications system must also be provided to enable prompt communication with inspectors in the ports.

PRIORITIES

Egypt might consider prioritizing its efforts to enable it to identify the greatest number of infringing goods with available resources. One way to prioritize efforts would be to identify the items that pose the greatest problems on the domestic market. This information could be obtained through communication with the relevant enforcement agencies. For trademarks, trade statements, and industrial designs, this is the General Department for Intellectual Property (GDIP), in the Ministry of Trade and Supply (MOTS). The GDIP is the department that controls a large number of supply inspectors who are charged with removing nonconforming goods—that is, infringing goods and goods that are improperly labeled—from the domestic market. For copyright, the appropriate organization is the Central Department for Audio-Visual Censorship, in the Ministry of Culture. The Ministry of Interior also has teams of police who are tasked with criminal enforcement of intellectual property rights in the domestic market.

Another method of prioritizing efforts would be through a system of recordation such as that in place in the United States. Under this system, the rightholder could register a trademark, copyright, or industrial design and then record with the customs authorities evidence of that registration. The customs authorities would then undertake to look for goods bearing those marks, or copying the works, or incorporating or bearing the design that has been recorded. Under this system, the customs authorities do not undertake any examination of the mark, design, or copyright but rely on the examination already conducted by the Trademark or Industrial Designs Office. A fee may be charged for this service. The service is offered for a fixed term—ten years or the expiration of the present registration, whichever is sooner—and is renewable. The responsibility for notifying the customs authorities of authorized use of the intellectual property is with the rightholder. A major advantage of this system for the applicant is that the customs authorities will actively search for infringing goods and that the rightholder's name and address are already on file in the event that infringing goods are identified. The advantage for the customs authorities is that it alerts the customs authorities to items for which there is a higher risk of importing infringing goods and provides a simple means for notifying the rightholder and determining whether goods are legitimate or not. A summary of the US system of recordation with Customs and Border Patrol, and instructions and templates for recording marks and copyrights, are attached as Appendix C. A searchable database of recorded copyrights and trademarks can be accessed at <http://iprs.cbp.gov/>.

PROCEDURES

Egypt's procedures should be “user-friendly” and flexible. They should not require applicants to submit more documents than necessary, or require legalization of those documents unless there is doubt about the authenticity of the documents submitted. The procedures should be published and available to complainants, potential complainants, and importers. Decisions—whether or not to accept a complaint, whether or not a *prima facie* case has been established—should be in writing

and should include reasons for the decisions. In addition, the procedures must address the following questions:

- What substantive law will be applied to make determinations of infringement?
- What evidentiary standards will be adopted?

Substantive Law

The substantive intellectual property law applied to border measures cases should be the same as the intellectual property law applied in the domestic market. Procedures should clearly spell out the elements of a *prima facie* case of infringement for each type of intellectual property that will subject to the procedures.

Evidentiary Standards

The procedures should also clearly inform applicants and officials as to what types of evidence will be required, and how it will be evaluated. Official records—for example, a trademark registration or patent—should be adequate evidence of both ownership and entitlement to use the invention or mark. However, it will also be necessary to make a determination as to whether goods are genuine or imitated. The best source of this information will be the rightholder.

In the case of works protected by copyright and infringement of well-known marks, there is no requirement of registration, and the procedures should permit the attorney who evaluates the complaint to rely on other sources of information, such as the internet or information provided by the complainant.

DETERMINING A PRIMA FACIE CASE OF INFRINGEMENT

To establish a *prima facie* case of infringement, the complaint must include evidence of the elements of infringement. These elements are not the same for different types of intellectual property. The elements necessary for a *prima facie* case of infringement are summarized briefly below for copyright, trademarks, and industrial designs:

Copyright Infringement

- Access to the protected work
- Substantial similarity to the original
- No permission from the owner

Access can be inferred when there is a high degree of similarity to the original. Copyright piracy is a type of copyright infringement where the copy is made from an original. According to TRIPS, "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.'

Trademark Infringement

- Similar or identical mark
- Similar or identical or related goods and services

- No permission from the owner

Trademark counterfeiting is a type of trademark infringement where the mark and goods are identical or practically indistinguishable. According to TRIPS, "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation.' The question of infringement is not a simple one, and it would be advisable to consult the Trademark Office in all but the simplest and most straightforward cases.

Industrial Designs Infringement

- Design is essentially the same in its important respects
- No permission from the owner

The standard for determining a prima facie case of infringement of an industrial design is the overall appearance of the design, not the design's component parts.

Appendix A. World Customs Organization Model Provisions

For National Legislation to Implement Fair and Effective Border Measures Consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights

PURPOSE

The purpose of this model legislation is to provide national authorities in charge of the preparation and modernisation of customs and/or intellectual property legislation worldwide with recommendations for the implementation of border measures for the protection of intellectual property rights. This guide is intended both for authorities that are introducing border measures for the enforcement of intellectual property rights (IPR) for the first time as well as for those that are conducting or considering legislative reviews or reforms.

INTRODUCTION

The role of customs administrations in fighting counterfeiting and piracy in international trade has been discussed in various fora at the international level, notably in the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and the World Customs Organization (WCO).

WTO membership requires Governments to implement “Special Border Measures” consistent with a prescribed minimum standard as defined in the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement). The experience of customs administrations in numerous countries has indicated, however, that only by granting certain powers and measures that go beyond the minimum requirement set forth in the TRIPs Agreement, Governments can provide an effective and efficient level of IPR protection and enforcement at their borders.

As underscored by the provisions of the TRIPs Agreement, customs administrations can play a vital and effective role in combating counterfeiting and piracy. For this reason, and in line with the relevant international obligations, Governments are now undertaking to enact legislation that grants their customs authorities the necessary powers to effectively fight counterfeiting and piracy.

For its part, in 1988 the WCO set out to prepare model legislation in order to assist Governments with the preparation of national legislation that grants customs authorities appropriate powers to fight counterfeiting and piracy of intellectual property rights.

In the context of multilateral negotiations during the GATT (WTO) Uruguay Round, Governments, seeking to reduce distortions and impediments to international trade, to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not become barriers to legitimate trade, recognised the need to establish new rules and measures for the effective protection of intellectual property rights at borders. These new rules and measures were set out in the TRIPs Agreement.

In order to assist Governments with the implementation of the provisions in the TRIPs Agreement concerning border measures, the WCO developed in 1995 a prior version of this model legislation to assist with the preparation of national legislation consistent with the TRIPs Agreement. In 2001, taking into account the most recent developments and experiences in implementing customs laws in different regions of the world, the WCO undertook to revise the model legislation and the result is contained herein.

The WCO aims to keep this model legislation updated by conducting reviews to ensure that the model legislation adequately addresses the evolving needs of customs administrations and the holders of intellectual property rights alike in the rapidly changing enforcement environment while retaining the basic considerations, set out below, that have influenced the scope and content of the model legislation to the extent possible. These considerations should also be taken into account when preparing national legislation.

Among such considerations, first and foremost is the recognition that although customs authorities can contribute effectively in the fight against counterfeiting and piracy, the role of customs has to be defined very precisely if customs' intervention is not to hinder the smooth flow of trade in legitimate goods. In order to address the concern of Governments that measures taken by customs authorities might result in the creation of barriers to international trade, the model legislation has been crafted in such a way so that it provides effective border enforcement of intellectual property rights without unduly hindering the flow of trade in legitimate goods.

A second consideration is that the holders of intellectual property rights have the primary responsibility to take measures to protect their rights. Such measures include, e.g., the registration of trademarks as prescribed by trademark law and the submission of enforcement applications to customs authorities in order to protect established rights. However, Governments have recognised that it is in the public interest that customs authorities have the power, in appropriate cases, to assume an active role and take action on their own initiative in cases involving counterfeiting and piracy.

Thirdly, the extent and effectiveness of customs' intervention will be dependent on the resources available to the customs administrations. The model legislation introduces provisions that should facilitate the most effective use of the existing resources in the WCO Member States.

Finally, it is considered that where goods infringing intellectual property rights are under the control of customs authorities, whether they be imported, destined for exportation or re-exportation, or in transit, they should be subject to effective enforcement measures and procedures. Guidance on the required levels of enforcement is provided in Article 41 of the TRIPs Agreement.

PART I. DEFINITIONS AND INTERPRETATIONS

Note on Definitions and Interpretations

- (1) For the purposes of this model legislation, wherever possible the definitions are taken from the TRIPs Agreement, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty (the “WIPO Treaties”), and the WCO Glossary. The definitions and interpretation are set out for the purposes of these Model Provisions; the definitions and articles contained in national laws on intellectual property rights are also applicable.
- (2) The term **Clearance of Goods** includes goods that are in transit (see also the note below in paragraph 1).
- (3) The term **Customs** is also used when referring to any part of the Customs service or its main or subsidiary offices. This term is also used adjectivally in connection with officials of Customs, import or export duties or controls on goods, or any other matter within the purview of Customs (Customs officer, Customs duties, Customs office, Customs declaration).
- (4) As regards the term **Goods infringing intellectual property rights** it should be noted that the scope and content of intellectual property rights, as well as what constitutes an infringement of such rights shall be determined according to the applicable substantive laws. The interpretation given here serves merely to clarify that Customs can seize goods if the goods therein are made or distributed under such circumstances that had the acts been undertaken in [the country] the goods would be infringing goods under the national intellectual property laws.
- (5) It is understood that under the generally accepted legal principles—such as the Law of Agency—the term **Right Holder** should also include an individual, corporation or association representing a right holder, and therefore such natural or legal person may also submit applications to Customs requesting enforcement actions.
- (6) Although the TRIPs Agreement does not oblige Member States to protect technical measures used by right holders, the 1996 WIPO Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) require that Contracting Parties make available adequate legal protection and effective legal remedies to protect technologies used by right holders. An essential element of adequate protection and effective remedies is legal protection against **devices that circumvent technological measures**. It is therefore only natural that border measures be extended to cover also devices the primary purposes of which is to defeat such technologies used by right holders to protect their intellectual property.
- (7) To ensure that Customs have the tools necessary to fight effectively the growing problem of cross-border counterfeiting and piracy, it is of paramount importance that Customs have the ability to suspend counterfeit and pirated **goods destined for export and goods which are in transit**. Practical experience, notably the figures from the European Union customs seizures, demonstrates the importance of customs intervention also with respect to goods in transit. However, it should be noted that the TRIPs Agreement does not, in spite of the reasons stated above, oblige Member States to make border measures available with respect to goods destined for export and goods in transit.

(8) Examples covered by the definition of transit would be:

1. Goods that reside in a Customs controlled area in a port or airport
2. Goods that are under Customs procedures, such as inward processing, outward processing, period entry, and various simplified procedures

(9) To ensure that the Customs authorities and the right holders also in practice can rely on the provisions enabling Customs to suspend good in transit, WCO Member States are encouraged to amend their substantive intellectual property laws, where necessary, so as to define as infringing, goods that are in transit and that have been manufactured or put into circulation without the right holders permission.

Definitions and interpretations

For the purposes of this law:

Clearance (Of Goods) shall mean:

The accomplishment of the Customs formalities necessary to allow goods to be exported, to enter home use or to be placed under another Customs procedure, such as Customs transit across the territory of <country>.

Customs shall mean:

The Government Service which is responsible for the administration of Customs law and the collection of duties and taxes and which also has the responsibility for the application of other laws and regulations relating to the importation, exportation, movement or storage of goods.

Customs Law shall mean:

Customs law means the statutory and regulatory provisions relating to the importation, exportation, movement or storage of goods, the administration and enforcement of which are specifically charged to the Customs, and any regulations made by the Customs under their statutory powers.

Exportation shall mean:

The act of taking any goods out of [a territory to which this law shall apply].

Goods Infringing Intellectual Property Rights shall mean:

Any goods which are made, reproduced, put into circulation or otherwise used in breach of the intellectual property laws and without the consent of the right holder or a person duly authorised to do so by the right holder. If such making, reproduction, use or putting into circulation of the goods took place outside [the country] the goods are deemed to be infringing if the acts would have constituted an infringement in [the country] had they been undertaken in the country.

For the purposes of this law goods protected with copyright or related rights with respect to which the rights management information they may incorporate has been removed, altered, or added without the right holders' authorisation shall be deemed to be goods infringing the said intellectual property rights.

Importation shall mean:

Importation: the act of bringing or causing any goods to be brought into [a territory to which this law shall apply].

Intellectual Property shall mean:

Any intellectual property rights as defined in the national laws such as copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout-designs (topographies) of integrated circuits and protection of undisclosed information.

Protection Defeating Devices shall mean:

Devices, products, components or parts, such as unauthorised smart cards, set top decoders or circumvention software, which are primarily designed or adapted to circumvent any technological measure, and shall be deemed to include any illegitimate authentication means.

Right Holder shall mean:

A natural person or a legal entity which, according to the [applicable law] is to be regarded as the owner of protected intellectual or industrial property right, its successors in title, or its duly authorised exclusive licensee as well as an individual, a corporation or an association authorised by any of the aforementioned persons to protect its rights.

Technological Measure shall mean:

Any technology, device or component that in the normal course of its operation, either controls access to a protected work or subject matter protected by related rights, or protects any copyright or any related rights or facilitate the detection of counterfeit trademark goods or goods protected by a copyright or related right.

Customs Transit shall mean:

The Customs procedure under which goods are transported under Customs control from one Customs office to another.

PART II. APPLICATIONS FOR INTERVENTION BY CUSTOMS

Note on Article 1

1.01 The TRIPs Agreement obliges Contracting Parties to enable right holders to lodge applications for border seizures to competent authorities. Under this model law application for enforcement actions shall be submitted directly to the customs that will process the applications and decide whether to take the requested actions or refuse the application. Other solutions are naturally also possible. For instance in some countries applications for border seizures are dealt with by the courts. However, practical experience has shown that authorising customs to deal with this task ensures that the applications are processed in a fair and effective manner without unnecessary burdening the courts. Naturally the decisions by the customs should be subject to a judicial review by administrative or civil courts.

- 1.02 The TRIPs Agreement does not oblige member states to make available border measures concerning exports or goods in transit. It has, however, become apparent that the minimum level of protection provided by the TRIPs Agreement is no longer adequate to fight current cross-border traffic in counterfeit and pirated goods. For instance, in the European Union, where customs is empowered to suspend goods that are being exported or are in transit, the majority of goods seized by customs are goods in transit. In order to enable customs to fight counterfeiting and piracy effectively, customs needs the authority to suspend goods destined for export and goods in transit, as well as imported goods.**
- 1.03 As regards to the procedure under Article 1.3 and especially with respect to geographical indications, and particularly in the case of goods in transit, it is understood that it is not sufficient to provide evidence of a right in one or more WTO Member States. The applicant must provide evidence that the use of the geographical indication is a violation of national law in the country of origin, and where the release of the goods is suspended upon exportation, that the use of the geographical indication is a violation of national law in the country of ultimate destination/sale.
- 1.04 It is recommended that customs establish a centralised system for managing intellectual property rights applications. Under such a system, recordation by the right holder should be possible without a prior showing of prima facie evidence of counterfeiting, pirating or infringement of the intellectual property right being recorded.

Article 1

- (1) A right holder may submit applications to Customs, in accordance with the procedures and under the conditions set out in this law, for the suspension of the customs clearance and the detention of imported goods, goods destined for exportation and goods in transit.
- (2) A right holder may submit an application to Customs:
- a. requesting that Customs suspend clearance of goods that are suspected of infringing the rights in the trademark, or
 - b. requesting that Customs suspend clearance of goods that are suspected of infringing his copyright or related rights or suspected of being protection-defeating devices,
 - c. requesting that Customs suspend the clearance of goods infringing intellectual property rights other than those set out in subparagraphs a. and b., provided that in the case of [geographical indications] the applicant must provide evidence that the goods are in violation of national law in the country of origin, and where the release of the goods is suspended upon exportation or transit, that the use of the geographical indication is a violation of national law in the country of ultimate destination/sale.
- (3) Customs shall establish a centralised system for managing applications for the suspension of the customs clearance referred to paragraphs 1 and 2 above. The details of centralised system shall be prescribed in regulations issued by [the competent authority].

Note on Article 2

- 2.01 The TRIPs Agreement remains silent as to the length of the period during which the competent authorities shall take action. It is recommended that this period be sufficiently

long, not less than one year, so as to minimise unnecessary administrative burdens for Customs and right holders alike. A period which is too short would mean that Customs must handle, and right holders must complete, complex series of applications frequently, even when there is no change in the underlying information. It is further recommended that a simplified process of obtaining extensions be made available to right holders following the initial period of assistance (see article 14). To obtain such an extension, an applicant should be able to file a brief statement indicating any relevant updates, without having to file a completely new application.

- 2.02 It should be noted that failure by the right holder to inform Customs of material changes in the status of his intellectual property right may significantly impair the ability of Customs to provide effective enforcement. It is therefore recommended that express references to the requirement to inform customs in accordance with subparagraph 2 be made in the application form and in the indemnity letter referred to in Article 5.

Article 2

- (1) Customs shall specify how long it will provide assistance regarding applications made under Article 1. The minimum duration for such assistance shall be no less than one year, unless the applicant requests a shorter period for assistance or applies for action in cases of specific shipments.
- (2) The right holder is required to inform Customs when his intellectual property right ceases to be valid or if he ceases to be the owner of the intellectual property right for any reason whatsoever.

Note on Article 3

- 3.01 Article 3 deals with two different kinds of application, namely those of a general nature where an infringement is not yet imminent and cannot be substantiated because samples of, and concrete information on, infringing goods is not yet available, and those in which action in case of specific shipments is requested. Article 52 of the TRIPS Agreement requires right holders to provide adequate evidence that there is *prima facie* an infringement of intellectual property rights in cases in which specific information is available. In the case of general applications for protection, it would be impossible for right holders to provide such *prima facie evidence* as these applications are made absent of any specific evidence of infringement.
- 3.02 It should be considered adequate evidence of the existence of the right and ownership if the applicant provides Customs with a copy of the registration certificate.
- 3.03 Right holders should be encouraged to provide as much evidence as possible in their application in order to assist Customs' targeting. However, applications should not be rejected and enforcement should not be withheld solely due to the absence of specific details of the shipment or the goods. Examples of evidence which, whenever available, may be presented (and which may be originals or copies, depending on availability) are as follows:
- A sample article bearing the registered trademark or a copy of a photographic or other likeness of the trademark, as it is used on genuine goods;

- The place of manufacture of genuine goods and the identity of the manufacturer(s); and;
- The name and principal business address of each foreign person or business entity authorized or licensed to use the intellectual property right and a statement as to the authorized or licensed uses;
- The name and business address of the importer(s) and/or consignee(s) of the allegedly infringing goods;
- A sufficiently detailed description of the suspect goods in order to make them readily recognisable by Customs, including a sample of the infringing article(s), a photograph or other likeness;
- The country or countries of origin of the suspect goods or the country or countries of manufacture of the allegedly infringing goods;
- The name and principal business address of each foreign person or business entity involved in the manufacture and/or distribution of suspect goods;
- The mode of transportation and the identity of the transporter(s) of the allegedly infringing goods;
- The Customs office where it is anticipated that the suspect articles will be presented to Customs.

Article 3

- (1) Any application in respect of goods infringing intellectual property rights including protection defeating devices shall be presented in writing and shall be accompanied, where appropriate, by:
- a. details concerning the applicant and appropriate contact information,
 - b. where the applicant is an authorized representative, authorization from the right holder in accordance with the applicable law,
 - c. adequate evidence of the existence and ownership of a valid intellectual property right by, or on behalf of, the applicant,
 - d. a statement of the grounds for the application for border measures related to shipments in general, or
 - e. in the case of a specific shipment of allegedly infringing goods a statement of the grounds for the application, including prima facie evidence showing that such intellectual property rights have been infringed or that rights are about to be infringed or that the shipment contains protection defeating devices,
 - f. a sufficiently detailed description of the goods in respect of which an intellectual property right applies, together—where appropriate—with a sample of a genuine product, and**
 - g. the prescribed fee, if any.**

- (2) In the event any of the information listed above in paragraph 1 is not provided with the application Customs authorities shall, if such information is deemed materially necessary, ask the applicant to complement the application. Customs shall not reject an application without further examination on the basis that the applicant has not provided some of the information listed above.

Note on Article 4

- 4.01 The TRIPs Agreement does not explicitly distinguish between a general and a specific time limit for handling applications. However Article 52 of the TRIPs Agreement requires authorities to reply to the applicant within a reasonable period. Further, Article 41 of the TRIPs Agreement sets a general obligation that enforcement procedures shall not entail unreasonable time limits or unwarranted delays. Against this background it seems justified to distinguish between the different types of applications for assistance. With respect to applications of a general nature a thirty (30) day time limit should be considered reasonable, while a shorter time limit of three (3) calendar days is required with respect to applications concerning specific shipments. This is due to the fact that specific applications by their very nature require immediate intervention by Customs.
- 4.02 The situations where urgent action with respect to specified shipments is required—and no valid application has been filed— could thus be handled either:
 - (1) By right holders' notifying Customs of a suspect shipment after which Customs suspends the goods ex officio and the required procedure is initiated, or;
 - (2) By an urgent application ("fast track") procedure with shorter deadlines for making decisions regarding such applications.
- 4.03 Especially concerning the first alternative mentioned above, it is acknowledged that right holders may obtain specific information regarding the imminent import, export, re-exportation, or transit of infringing goods. In such cases, the filing of an application, followed by a delay of even three working days pending notification by Customs, may mean that the shipment is released before Customs can suspend it. In such cases, right holders should be encouraged to contact Customs directly and Customs should be authorised to act ex officio, pursuant to Article 9 of the model legislation, without awaiting the filing of an application by the right holder.

Article 4

- (1) Within a reasonable period of time, not to exceed thirty (30) working days from the receipt of an application under Article 1 Customs shall notify the applicant whether the application has been granted or rejected.
- (2) For urgent applications in which immediate action is required and where sufficiently specific information concerning known shipments containing allegedly infringing goods is provided, applications shall be assessed immediately by Customs, and notification by Customs to the rights holder shall be made as soon as possible and no later than three (3) working days. If the application is granted, it shall be effective for such period as specified. If the application is rejected, the reasons should be clearly stated.
- (3) Customs shall inform immediately after the granting of an application all its offices of the details of the application and of the goods referred to in the application.

Note on Article 5

5.01 As required by the TRIPs Agreement customs shall have the authority to ask the applicant to provide a security. The purpose of this article is mainly to shield customs and legitimate businesses against the abuse of the measures provided herein. However an eventual security required by customs should be reasonable and should be set at a level that does not unreasonably deter recourse to customs procedures. To implement a fair and flexible mechanism for the provision of securities customs may give full recognition to any of the following:

- The provision of a continuous security, to avoid the need for individual bonds for each shipment;
- Guarantees may be required as described in Article 8;
- Foreign bank guarantees including those issued by the bank in the country in which the right holder is established;
- Counter-guarantees by a branch office of the bank in the country of establishment of the right owner;
- Certified documents showing that the applicant has sufficient assets to cover a possible damage claim;
- Statements from properly certified accountancies.

5.02 The costs of legal actions against infringers should be borne primarily by the infringers themselves. This is also the starting point under the TRIPs Agreement (see Article 45.2). In some instances, however, the infringing party cannot be contacted. This Article is intended to cover also this situation. The costs incurred should not normally fall to Customs and as an alternative to seeking a bank guarantee, Customs may ask the right holder to sign an undertaking to accept the actual costs incurred; these may include storage, handling, destruction and other operational costs incurred. The undertaking may be requested at the time of making the application, at the time when goods are being suspended from clearance or at a later time.

Article 5

Customs may require an applicant to provide a security or equivalent assurance or an undertaking, sufficient to protect the importer, consignee, consignor, exporter or owner of the goods and the competent authorities. However, such security or equivalent assurance shall not be fixed at an amount which would unreasonably deter recourse to these procedures.

Note on Article 6

6.01 Article 6 defines at practical level the actions Customs shall take following the granting of an application for the suspension of customs clearance.

6.02 Article 6 also implements Article 54 of the TRIPs Agreement.

Article 6

(1) Where Customs is satisfied, after consulting with the applicant if necessary, that the imported or exported goods or the goods in transit are suspected to infringe an intellectual property right covered by the decision granting the application, it shall suspend the

clearance of the goods referred to in the application. The suspension shall remain in force for the initial period, and any extension thereof, as specified by Customs.

- (2) Customs shall immediately inform the importer, exporter, consignee or the consignor and the applicant of the suspension of the clearance of the goods or of the detention of goods destined for exports or goods in transit and shall state the reasons for such suspension or detention.

Note on Article 7

7.01 This article implements Articles 50(6), 53(2) and 55 of the TRIPs Agreement.

Article 7

- (1) Subject to the procedure set out in Article 11 (2), if, within a period of ten (10) working days after the applicant has been served notice of the suspension, Customs has not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant or that the duly empowered authority has taken provisions or measures prolonging the suspension of the release of the goods, the goods shall be released; provided that all other conditions for importation or exportation have been complied with. This article also applies in cases including the detention of goods in the course of any criminal investigation. The time limit may be extended by another ten (10) working days in appropriate cases. In the case of perishable goods suspected of infringing an intellectual property right, the period shall be three (3) working days. That period may not be extended.
- (2) If proceedings leading to a decision on the merits of the case have been initiated, a review, including a hearing if requested, shall take place, upon request of the defendant, with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a [provisional seizure order], this period will be determined by the court ordering the measure. In the absence of such a determination, the period shall not exceed twenty (20) working days or thirty-one (31) calendar days, whichever is longer.
- (3) Where, pursuant to an application the clearance of goods involving other intellectual property rights than trademarks, copyright and related rights has been suspended by Customs, and the period provided for in paragraphs (1) and (2) above has expired without the competent Court having granted a provisional seizure order, and provided that all other conditions for importation have been complied with, the owner, exporter, importer, consignee or consignor of such goods shall be entitled to clearance on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue his right of action within a reasonable period of time.

Note on Article 8

8.01 Article 57 of the TRIPs Agreement vests Customs with powers to give right holders the possibility to inspect suspended goods. The ability to inspect a sample of the goods in a timely fashion is vital so that the right holder is able to proceed effectively with legal

proceedings in order to substantiate his claims of infringement. Further, in order to be able to carry out sufficiently thorough inspections, it is important that Customs officers are authorised to give right holders samples of the suspended goods and, in addition, may, upon a right holder's request, provide where feasible (digital) photographs of the goods so that right holders may assist in the determination of whether the goods are pirated or counterfeit or otherwise infringe an intellectual property right. The ability to provide samples to right holders or other outside experts is increasingly important as it becomes more difficult to distinguish the counterfeit or pirate goods from the legitimate products.

- 8.02 Articles 47 and 57 of the TRIPs Agreement enable Customs to provide information to right holders within the framework of the laws applicable to confidential and personal information in a country. Sufficient information concerning (a) the infringing nature of the goods, (b) details of the consignment and (c) the parties involved will assist the applicant in deciding whether legal action is appropriate, and in bringing all the persons involved in the infringing activities before the court. Although the provision in Article 47 of the TRIPs Agreement does not oblige Member Countries to provide for such a procedure offers a fair and effective tool for the right holders, and it recommended that WCO Members States incorporate the "right of information" in their national laws dealing with border measures. In fact, a number of WCO Member States have already done so (see for instance Article 6.1 of the European Union Customs Regulation 3295/94).
- 8.03 According to Article 57 of the TRIPs Agreement Member States may authorise Customs to disclose to the right holders information about third parties involved in the infringing activities. As the provision of such information is vital in the fight against counterfeiting and piracy, Customs should, following a request from the right holder, provide information that can reasonably be deemed to assist in the investigation of further infringements and in the detection of third persons involved in the infringing activities, within the limits set by the national laws on the processing of confidential or personal information. Once again the European Union Customs Regulation (Article 9.3) serves as an example of a "national" law that includes provisions to this effect.
- 8.04 Policy advisers within the Customs administration may wish to consider and specify in more detail what information may be disclosed to right holders and at what point in the process.

Article 8

- (1) Without prejudice to the protection of confidential information, customs shall allow a right holder, importer or exporter to examine the goods, the clearance of which has been suspended in accordance with Article 11, and may provide samples for examination, testing and analysis to assist in the determination of whether the goods are pirated, counterfeit or otherwise infringe an intellectual property right or whether the goods are protection-defeating devices.
- (2) Without prejudice to the protection of confidential information and personal data, and in accordance with national legislation and procedures, customs shall notify the right holder, at the right holder's request, of the name and address of the declarant. At the right holder's request, customs may also provide additional information relating to the

consignment which has been suspended from clearance, where such information would assist the right holder in pursuing claims of infringement.

- (3) Where a positive determination has been made by the competent Court that goods infringe an intellectual property right, or that the goods are protection-defeating devices, Customs shall at the right holder's request inform the right holder of the names and addresses of the exporter, the importer, the consignee, and the consignor and of the estimated quantity of the goods in question.
- (4) Right holders are permitted to use the data obtained on the basis of paragraphs 1, 2, and 3 above solely for the purpose of investigating and bringing legal actions concerning alleged infringements of their intellectual property rights.

PART III. EX-OFFICIO ACTION

Note on Article 9

- 9.01 Customs' powers to act *ex officio* are a key feature of effective border enforcement regime. In the vast majority of cases Customs officers are the only ones to know when and which allegedly infringing goods are transported. Therefore unless Customs are empowered and obliged to act on their own to stop suspected shipments at the borders, the border measures will remain ineffective. TRIPs Agreement Article 58 introduces the possibility to give Customs *ex officio* powers, as such powers are an essential feature of effective border measures it is recommended that WCO Members States include a provision to that effect in the national laws.
- 9.02 Prima facie evidence must adequately demonstrate that an intellectual property right has been, or may be, infringed.
- 9.03 As a complement to the clear-cut *ex officio* powers recommended here WCO Member States may also wish to consider a procedure whereby Customs, when they have sufficient grounds for suspecting that goods are infringing, may detain a shipment for a predetermined period of time (for instance for 3 working days) to allow the right holder, following a notification from the Customs, to lodge an application for suspension of the shipment. Such a procedure has been implemented for instance in the European Union Customs Regulation (Article 4).

Article 9

Customs shall, on its own initiative, suspend the clearance of goods in respect of which it has acquired prima facie evidence that an intellectual property right has been infringed or is about to be infringed or that the goods are protection-defeating devices. Customs may, on its own initiative, also suspend the clearance of goods whenever there are reasonable grounds to suspect that the goods are infringing goods or protection-defeating devices.

Note on Article 10

- 10.01 Article 10 defines further the powers and obligations of Customs authorities when taking actions *ex officio*.

Article 10

- (1) Where the clearance of goods has been suspended in accordance with Article 9, customs may, where it acts on its own initiative, seek from the right holder the provision of any information or assistance, including technical expertise and facilities for the purpose of determining whether suspect goods are counterfeit or pirated or otherwise infringe an intellectual property right.
- (2) Where customs act in accordance with the procedure set out in Article 9 above, the provisions Articles 6 to 8 of this law apply.
- (3) Customs shall immediately inform the right holder or his representative and the declarant, importer or exporter of the place and the date of the suspension of Customs clearance.

PART IV. DISPOSAL OF INFRINGING GOODS

Note on Article 11

- 11.01 As a rule infringing goods should be destroyed or made unusable, and not be let back into the chain of commerce or used in any other manner without the right holder's express consent.
- 11.02. It should be noted that in many countries, judicial systems allow for the possibility for settlements to be made out of court. The intention of such settlements is that where the parties agree that the goods are infringing, such goods can be destroyed speedily in order to minimise additional costs. Such settlements are without prejudice to any other action that customs or other competent authorities might take, in respect of criminal and other sanctions.
- 11.03 Customs should exercise extreme care in obtaining an accurate determination that the goods are infringing. Here the right holder plays a vital role in assisting with the determination and providing evidence. Where appropriate, samples should be retained. Article 5 provides the possibility of obtaining an indemnity and an undertaking as a guarantee with respect to the destruction process.
- 11.04 In the a number of cases, the fact that the suspended goods are pirated or counterfeits is not disputed. Experiences from WCO member states demonstrate that the opposition procedure suggested here offers a fair and efficient way of dealing with seizures and destruction of infringing goods. Such a procedure has the added benefit of reducing the cost incurred by customs from the storage of the infringing goods.

Article 11

- (1) Where it is determined by a court order that the goods detained under [this law] are subject to confiscation as goods that are infringing intellectual property rights or that the goods are protection-defeating devices, customs may upon application by the right holder and provided it would not be contrary to existing constitutional requirements, destroy them under official supervision or dispose of them in such other manner as may be within the competence of customs; provided that:

- a. disposal shall be outside the normal channels of commerce and in such a manner so as to minimise the risks of further infringements,
 - b. such manner of disposal shall be without detriment to the right holder,
 - c. the right holder is allowed to suggest an appropriate manner of disposal of the goods, and
 - d. customs does not allow the re-exportation of the infringing goods in an unaltered state, or subject them to a different customs procedure, other than in exceptional circumstances.
- (2) Customs may at the request of the right holder forfeit and subsequently destroy the detained goods or place them outside the channels of commerce, or have them destroyed by the right holder under customs' supervision, ex officio and without a court order, wherever:
- a. the right holder has provided adequate evidence to prove that the goods are infringing goods, and;
 - b. the importer, the exporter, the consignee, the consignor, the owner of the goods, or the declarant has been served by customs with the notice of suspension referred to in Article 6.2, has been informed about the possibility of confiscation and destruction or disposal outside the channels of commerce by default of the allegedly infringing goods and he does not oppose the measure within twenty (20) working days after having been served the notice, or alternatively if after reasonable efforts by customs the importer, exporter, consignee, consignor, the owner of the goods, or the declarant has not been identified.

In the event the applicant is granted an extension of the time limit for taking legal actions, such extension is automatically applied to the opposition procedure referred to in this paragraph.

- (3) Right holders may, prior to the destruction or the disposal of the suspended goods, apply for a retention of samples, insofar as and to the extent that such samples are needed as evidence in pending or future legal actions regarding infringements of intellectual property rights.

PART V. INTERNATIONAL COOPERATION

Note on Article 12

Taking into account the increasingly international nature of intellectual property infringements Customs authorities are encouraged to cooperate cross borders. Indeed, Article 69 of the TRIPs Agreement obliges Member Countries to establish and notify contact points, with a view to promote the exchange of information and cooperation between customs authorities.

Article 12

Customs shall establish contact points for the exchange of information on trade in goods infringing intellectual property rights, and to conduct and coordinate cooperation between Customs authorities.

PART VI. FINAL PROVISIONS

Note on Article 13

13.01 Markets for legitimate products are very often harmed in numerous countries because infringing goods are being imported in large quantities from third countries under the guise of ‘personal’ goods. This problem is particularly acute in countries that border countries with high levels of piracy. The problem is further compounded in particular with respect to goods protected by a copyright or related rights as products are increasingly produced and used in digital form. A pirate can bring a small shipment of pirated digital goods from one country to another, invoking the personal goods exemption, and then use these few counterfeits to produce thousands of other illegal copies. Ultimately, the cumulative effect of the movement of pirated and counterfeit goods in travellers’ luggage can be a source of great commercial harm to right holders.

13.02 Article 60 of the TRIPs Agreement allows the Contracting Parties to exclude so called *de minimis* imports from scope of application of the border measures. It is recommended that customs administrations develop a clear policy with regard to this issue so that traffickers of counterfeit products cannot exploit the eventual *de minimis* limit as a legal loophole. Care should therefore be taken towards the drafting and interpretation of this exception — should it be adopted. It should be limited to a single copy of a work made by a person using his own means and intended strictly for his own private and personal use; e.g., the importation of multiple identical copies of the same product should not be allowed under the exception.

Article 13

Infringing goods of a non-commercial nature and intended for the importer’s or consignee’s own personal use contained in personal luggage or sent in small consignments are not subject to the suspension procedure provided by this Act.

Note on Article 14

14.01 Competent authorities should have the power to issue instructions or regulations regarding the practical application of this law. It is particularly important that such instructions are given in a swift manner as regards the form and content of the applications, and the simplified process for the renewal or extension of the applications.

Article 14

The [State Council or other competent authority] after recommendations by Customs shall issue instructions or regulations:

- a. prescribing a simplified process for the renewal, extension of the period of assistance, or revision of the applications referred to in Article 1 of this law,

- b. prescribing the form in which applications referred in Article 6 of this law are to be made and requiring the person making an application to furnish evidence as to the ownership or the exclusive licence and to comply with such other conditions as may be specified which may include the payment of a reasonable fee to cover the administrative costs of Customs,
- c. where appropriate on other issues relating to the practical application of this law.

Note on Article 15

15.01 Customs should be exempted from civil or criminal liability for actions they have taken in good faith and following the procedures set out in this law. Article 58 of the TRIPs Agreement includes a broadly similar liability limitation.

Article 15

- (1) Whether or not an application has been received under Article 1 Customs, when acting in good faith and having followed the procedures set out in this Act and in the relevant regulations, shall not be liable for:
 - a. any failure to detect goods infringing intellectual property rights or protection-defeating devices,
 - b. the inadvertent release of such goods or protection-defeating devices, and
 - c. any other action in respect of such goods or protection-defeating devices.

Note on Article 16

16.01 Wrongful detention means: the suspension, pursuant to an application by the right holder of the release of goods when the substantive decision by the competent Court has established that the goods are not infringing goods.

Article 16

- (1) An importer, exporter, consignee, consignor or the owner of the goods may seek appropriate monetary compensation for injury caused to them through wrongful detention of goods or circumvention devices in [the Court of first Instance].
- (2) Customs shall order the owner, the importer, the exporter, the consignee or the consignor to pay the costs of storage and destruction of any goods suspended and determined to be counterfeit, pirated or otherwise infringing intellectual property rights.

Note on Article 17

17.01 It is recommended that trade in counterfeit and pirated goods be defined as a customs offence. This measure enables Customs to continue to proceed with cases subsequent to seizure under the supervision of public prosecutors or other competent authorities in order to avoid the unnecessary delays and confusion that may result when a case is transferred from Customs to other authorities.

Article 17

The import, export or transit of infringing goods shall be punishable as a customs offence according to the relevant provisions in [the applicable law(s)].

Appendix B. Key Provisions of AIPPI

The International Association for the Protection of Industrial Property

27. AIPPI calls upon those countries which do not fully and effectively comply with their obligations under TRIPS in connection with Section IV to do so forthwith.

28. AIPPI calls upon countries to have their customs authorities sufficiently educated to ensure the full implementation of the TRIPS provisions.

29. AIPPI recommends that all Countries make use of the right under Article 1.1 of TRIPS to provide more extensive protection than is required by the TRIPS Agreement, in particular:

29.1 AIPPI recommends as a particularly effective measure the detention of goods at the borders through a procedure of a pre-emptive recordal before the customs authorities of the intellectual property rights and urges countries to adopt it forthwith.

29.2 AIPPI recommends that border measures be extended to well-known marks within the meaning of Article 6bis of the Paris Convention, as well as to marks which have not been registered but which otherwise enjoy protection under national law of the country of importation.

29.3 AIPPI recommends that all countries extend border measures to goods in transit and to goods intended to be exported, which would otherwise infringe intellectual property rights in the country of transit, or in the country of export, respectively.

30. AIPPI recommends that all countries apply border measures also to De Minimis imports.

31. AIPPI recommends further study of application of border measures to intellectual property rights other than those infringed by counterfeit trademark goods and pirated copyright goods within the meaning of Note 14 to Article 51 of the TRIPS Agreement.

“The Effectiveness of Border Measures After TRIPS,” AIPPI Yearbook 2000/I, Q147 (Sorrento, April 8-15, 2000) pages 543–546, http://www.aippi.org/reports/resolutions/Q147_E.pdf.

Appendix C. Summary of U.S. System of Recordation with Customs and Border Patrol

*And Instructions and Templates for Recording Marks and
Copyrights*

Trademark and Tradename Protection

Customs Directive No. 2310-008A

Date: April 7, 2000

Originating Office: OR&R

Supersedes: 2300-08 Jan 16, 1999

Review Date: April 2002

1. PURPOSE. To provide relevant information and guidelines on Customs policies and procedures with respect to trademark and trade name protection.

POLICY

2.1 In order to fulfill its statutory, regulatory, and treaty-based obligations of preventing the importation of merchandise which violates certain trademark and trade name rights which have been registered with the U.S. Patent and Trademark Office, U.S. Customs is vested with the authority to: (1) exclude from entry, (2) detain, and/or (3) seize, violative trademarked goods. In order to most effectively provide protection against such violative imports, Customs has established an intellectual property rights (IPR) enforcement regime which offers rights holders a two-tiered enforcement option, while providing Customs officers with up-to-date, detailed information about the rights being protected.

2.2 The first tier of this two-tiered approach is Customs protection afforded pursuant to the "recordation process." Under this system, trademark holders, once having duly registered their trademark rights with the U.S. Patent & Trademark Office, and tradename holders, may request that Customs collect and retain information relative to those rights for a specified time, during which Customs shall, either of its own initiative, or with the assistance of the trademark holder, actively monitor imports in order to prevent the importation of violative articles.

2.3 The second tier is Customs "application process." Under this system, trademark holders, once having duly registered their trademark rights with the U.S. Patent & Trademark Office and recorded same with U.S. Customs, and tradename holders, may provide Customs with information relative to the importation of violative imports so that Customs can prevent such importation.

3. AUTHORITIES/REFERENCES. Relevant statutory and regulatory citations associated with Customs enforcement of trademarks and trade names are listed below. The narratives listed below are synopses of the statutory/regulatory mandates; care should be used to cite actual

language of statutory/regulatory provisions in the course of enforcement actions. Officers should undertake to review the descriptions of laws and regulations contained within this Directive in order to gain a comprehensive understanding of their intent and purpose.

3.1 UNITED STATES CODE

3.1.1 Title 19 U.S.C. §§ 1526(a) and (b) - Prohibits the importation, with certain exceptions noted in section 133.23(d) of the Customs Regulations, of foreign-made merchandise, if the merchandise, or its packaging or labeling, bears a registered trademark or trade name owned by a U.S. citizen or corporation, which is recorded with U.S. Customs. Any such merchandise imported into the United States in violation of the provisions of this section shall be subject to detention pursuant to 19 CFR § 133.25. Failure to meet conditions set forth in 19 CFR § 133.23(d) shall lead to seizure and forfeiture pursuant to 19 CFR § 133.23(f).

3.1.2 Title 19 U.S.C. § 1526(e) - Subjects to seizure and forfeiture any merchandise bearing a counterfeit mark. (Title 15 U.S.C. Section 1127 defines “counterfeit” as a spurious mark, which is identical with, or substantially indistinguishable from, a registered mark).

3.1.3 Title 19 U.S.C. § 1526(f) - Provides for imposition of civil fines in cases when goods are seized and forfeited under § 1526(e).

3.1.4 Title 15 U.S.C. § 1124 - Provides that no [article] of imported merchandise which shall copy or simulate a trade name or a trademark registered in accordance with provisions of this chapter, shall be admitted to entry at any customhouse (this covers both domestic and foreign-made articles).

3.1.5 Title 15 U.S.C. § 1125 - Proscribes importations or entry at any customhouse of the United States, goods or containers which use words, terms, or descriptions which are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation or sponsorship.

3.1.6 Title 19 U.S.C. § 1595a(a) - Provides for seizures and forfeiture of conveyances if used in, to aid in, or to facilitate, the importation of any article contrary to law.

3.1.7 Title 19 U.S.C. § 1595a(b) - Provides Customs with the authority to issue civil penalties equal to the value of the merchandise attempted to be introduced contrary to law.

3.1.8 Title 19 U.S.C. § 1595a(c)(2)(C) - Provides seizure and forfeiture authority for articles introduced or attempted to be introduced which violate trademarks, trade names, or copyrights.

3.1.9 Title 18 U.S.C. § 2320 - Prohibits the intentional trafficking or attempts at trafficking in goods bearing counterfeit trademarks and provides criminal sanctions.

3.2 CODE OF FEDERAL REGULATIONS

3.2.1 Customs Regulations 19 CFR §§ 133.1 – 133.7 - Recordation of trademarks with Customs.

3.2.2 Customs Regulations 19 CFR §§ 133.11 – 133.15 - Recordation of trade names with Customs.

3.2.3 Customs Regulations 19 CFR § 133.21 - Seizure of articles bearing counterfeit trademarks and related disclosure information.

3.2.4 Customs Regulations 19 CFR § 133.22 - Detention of articles bearing “confusingly similar” marks subject to restrictions and related disclosure information.

3.2.5 Customs Regulations 19 CFR § 133.23 - Restrictions on importations of gray market articles.

3.2.6 Customs Regulations 19 CFR § 133.24 - Restrictions on articles accompanying importers and mail importations.

3.2.7 Customs Regulations 19 CFR § 133.25 - Procedures on detention of articles subject to restriction.

3.2.8 Customs Regulations 19 CFR § 133.26 - Demand for Redelivery of released merchandise.

3.2.9 Customs Regulations 19 CFR § 133.27 - Civil fines for those involved in the importation of counterfeit trademark goods.

4. ENFORCEMENT

4.1 In General. Agency policy dictates that U.S. Customs focus its enforcement efforts on trademarks and trade names that are "recorded" with Customs. Unrecorded trademarks which have been registered with the U.S. Patent and Trademark Office on the Principal Register, while not a priority, may be enforced, if and when possible, and in such a manner as the sound administration of the Customs laws shall not be compromised. Customs policy mandates that the majority of resources and emphasis should be placed upon the enforcement of recorded trademarks.

4.1.2 Prior to the initiation of any IPR action, the IPR Module should be consulted to ascertain whether the trademark in question is in fact recorded with Customs, and if so, the extent of protection the trademark is entitled to. The “IPR Module” is a function located within the Automated Commercial System (ACS), which contains individual records and information relative to all IPRs recorded with Customs.

4.1.3 When undertaking a trademark enforcement action, officers should accurately note the trademark recordation number(s) involved and accurately record same in records of the case. Similarly, officers seeking IPR Branch assistance in arriving at infringement determinations are expected to have consulted the IPR Module prior to seeking assistance and should be prepared to accurately cite specific information from the relevant IPR recordation.

4.2 Processing an IPR Case: When to Take Action

4.2.1 Customs policy mandates that suspect trademark-violative goods can only be detained upon a "reasonable suspicion" that said goods bear marks which violate a federally registered trademark.

4.2.2 If a Customs officer can articulate a basis for having such "reasonable suspicion" at the time of presentation to Customs, he may formally detain the goods at that time. Where a Customs officer is unsure whether to formally detain the goods at the time of presentation to Customs, he

may detain the goods for a 5-day period pursuant to 19 U.S.C. § 1499 to determine whether such "reasonable suspicion" exists.

4.2.3 If Customs determines that such "reasonable suspicion" exists, Customs shall issue a formal letter of detention to the importer before the expiration of the 5-day period. A sample "Notification of Detention" letter, to be sent to the importer, is attached to this Directive at Appendix 1.

4.2.4 In accordance with 19 U.S.C. § 1499, the goods must be disposed of in accordance with relevant statute and regulation. The nature of the violation, if any, will determine the manner of disposition.

4.3 Characterizing the Violation and Taking Action Against the Goods.

As a general matter, Customs presently recognizes two standards of trademark infringement in its enforcement of U.S. trademark law: "Counterfeit" and "Confusingly Similar." Gray market violations are treated separately.

4.3.1 "Counterfeit"—Legal Definition: A spurious (false, non-genuine) trademark which is identical to, or substantially indistinguishable from, a federally registered U.S. trademark (15 U.S.C. § 1127).

4.3.2 "Confusingly Similar" --Legal Definition: A mark which is similar to the genuine trademark such that it is likely to cause confusion as to source or sponsorship (15 U.S.C. §§ 1114, 1127).

4.3.3 Upon presentation, or at the time of detention or seizure of suspect violative goods, it is incumbent upon the acting officer to **characterize** the nature of the alleged violation. Violative goods should be ascribed to one of the following four characterizations:

4.3.3.1 Counterfeit trademark violation; protected trademark recorded with Customs;

4.3.3.2 Counterfeit trademark violation; protected trademark not recorded with Customs;

4.3.3.3 Confusingly similar trademark violation; protected trademark recorded with Customs;

4.3.3.4 Confusingly similar trademark violation; protected trademark not recorded with Customs.

4.3.4 Counterfeit marks:

4.3.4.1 Articles bearing "counterfeit" marks of trademarks recorded with Customs shall be seized and forfeiture proceedings instituted under 19 U.S.C. § 1526(e), as implemented by 19 CFR § 133.21. Civil penalties shall routinely be imposed pursuant to 19 U.S.C. § 1526(f).

4.3.4.2 Counterfeit trademark violation; protected trademark not recorded with Customs. Where administratively feasible and appropriate, such goods may be seized pursuant to 19 U.S.C. § 1595a(c)(2)(C) for a violation of 18 U.S.C. § 2320, as implemented by 19 CFR § 133.21(a).

4.3.4.3 Cases involving suspected criminal counterfeiting should be referred to the

Office of Investigations (OI). Information relative to forwarding cases to OI is detailed in the IPR handbook.

4.3.4.4 A sample "Notification of Seizure" letter to be sent to the trademark holder, is attached to this Directive at Appendix 2. A sample "Notification of Seizure" letter to be sent to the importer, is attached to this Directive at Appendix 3.

4.3.5 Civil Fines. In accordance with 19 CFR § 133.27, Customs, as authorized by 19 U.S.C. § 1526(f), may impose a civil fine relative to seizures effected in **counterfeit cases only** pursuant to 19 U.S.C. § 1526(e). For the first seizure of such merchandise, the fine shall be not more than the domestic value of the merchandise as if it had been genuine based upon the manufacturer's suggested retail price (MSRP) at time of seizure. For second and subsequent violations, the fine shall not be more than twice such value. A chart outlining the parameters for levying such fines is contained in the IPR handbook.

4.3.6 Confusingly Similar Marks:

4.3.6.1 Confusingly similar trademark; protected trademark recorded with Customs.

4.3.6.1.2 Under 19 CFR § 133.22, such goods shall be detained for 30 days 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.

4.3.6.1.3 A sample "Notification of Detention" letter, to be sent to the importer, is attached to this Directive at Appendix 1. A sample "Notification of Detention" letter, to be sent to the trademark holder, is attached to this Directive at Appendix 4.

4.3.6.1.4 Failure to establish an exception under 19 CFR § 133.22(c) subjects the goods to seizure in accordance with 19 U.S.C. § 1595a(c)(2)(C) for a violation of 15 U.S.C. § 1124, as implemented by 19 CFR § 133.22(f). A sample "Notification of Seizure" letter, to be sent to the importer, is attached to this Directive at Appendix 5.

4.3.6.2 Confusingly similar trademark; protected trademark not recorded with Customs. Customs policy is to neither detain nor seize goods bearing such marks.

5. DISCLOSURE OF INFORMATION AND PROVIDING SAMPLES TO TRADEMARK HOLDERS. Customs Regulations 19 CFR §§ 133.21 and 133.22 provide for disclosure of certain information in cases where goods are detained and/or seized for violations of the trademark laws.

5.1 Disclosure of Counterfeit Cases. When counterfeit articles are seized in accordance with 19 CFR § 133.21, Customs officers SHALL disclose to the trademark holder in writing the following information within 30 business days of the date of the seizure as required in 19 CFR § 133.21(c). See Appendix 1 for sample letter.

Date of Importation:

Port of Entry:

Description of Merchandise:

Quantity:

Name and address of Manufacturer:

Name and address of Exporter:

Name and address of Importer: (Note: If importer of record is broker or nominal consignee, provide the ultimate consignee if known)

Country of Origin:

5.1.1 Any time after seizure of the merchandise for examination, Customs MAY provide a sample to the trademark holder for exam, testing, etc. If a request for sample is made, the trademark holder MUST provide Customs with a bond as required in 19 CFR § 133.21(d).

5.1.2 Amount of the bond is to be specified by the area/port director. The bond is normally set at 120 percent (120%) of the CIF value of the sample, plus duty and other applicable fees (but not lower than \$100). In cases where the value of the sample is less than \$100, a cash deposit may be accepted by Customs. Customs may demand return of the sample at any time. The holder must return the sample after exam, testing, etc. If the sample is damaged, lost or destroyed, in lieu of its return, the holder must certify to Customs that “the sample described as (full description) and provided pursuant to 19 CFR § 133.21(d) was damaged, destroyed or lost during examination, testing or other use.” If the sample is not returned, Customs officers should proceed to forfeit the bond.

5.2 Disclosure: Confusingly Similar cases (copying or simulating Trademarks or trade names). When articles are subject to the restrictions under 19 CFR § 133.22, Customs officers MAY disclose to the trademark holder the following information prior to the time that a detention notice is issued under 19 CFR § 133.25. Once a notice of detention is issued, Customs SHALL disclose to the holder of the trademark or tradename the following information within 30 days, excluding weekends and holidays, of the date of the detention. See Appendix 4 for sample letter (internal only).

Date of Importation:

Port of Entry:

Description of Merchandise:

Quantity:

Country of Origin:

5.2.1 Any time after presentation of the merchandise for examination, Customs MAY provide a sample to the trademark holder for exam, testing, etc. If a request for sample is made, the trademark holder MUST provide Customs with a bond as required in 19 CFR § 133.25.

5.2.2 Amount of the bond is to be specified by the area/port director. The bond is normally set at 120 percent (120%) of the CIF value of the sample, plus duty and other applicable fees (but not lower than \$100). In cases where the value of the sample is less than \$100, a cash deposit may be accepted by Customs. Customs may demand return of the sample at any time. The holder must return the sample after exam, testing, etc. If the sample is damaged, lost or destroyed, in lieu of its return, the holder must certify to Customs that “the sample described as (full description) and provided pursuant to 19 CFR § 133.25(c) was damaged, destroyed or lost during examination, testing, or other use.” If the sample is not returned, Customs officers should proceed to forfeit the bond.

5.2.3 Prior to release of the sample, Customs officers should remove or obliterate any information indicating the name and/or address of the manufacturer, exporter, and/or importer, including all bar codes or other identifying marks.

6. RESTRICTED “GRAY MARKET” ARTICLES/GOODS, (AKA “PARALLEL IMPORTS” OR “DIVERTED GOODS”)

6.1 In General. Restricted “Gray Market” articles (a.k.a. "Parallel Imports" or "Diverted Goods") are foreign-made articles 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 without the authorization of the U.S. holder.

6.1.1 It is important to understand the difference between Gray Market goods and goods bearing Counterfeit marks. First, by definition, gray market goods will always be genuine. They bear a trademark which has been applied with the approval of the trademark holder, but the approval to use the mark is intended to apply to sale in a country other than the United States. Goods bearing counterfeit marks, on the other hand, are never genuine; the marks, which are usually identical versions of the genuine trademark, have been applied without the authority of the trademark holder. **6.1.2** Only trademarks which are recorded with U.S. Customs are entitled to gray market protection. The IPR Branch determines gray market status at the time of recordation. Claims or questions regarding the validity of gray market protection afforded to particular trademarks are to be forwarded to the OR&R IPR Branch.

6.2 Processing a Typical Gray Market Case

6.2.1 The first step in processing a gray market case is to determine whether the trademark in question is entitled to gray market protection by U.S. Customs. To do this, Customs field officers must consult the ACS IPR Module. Within each ACS IPR Module trademark recordation file screen, there exists a section entitled "GENUINE TRADEMARKED ARTICLES RESTRICTED". If the box associated with that section is marked with a “Y”, this indicates that no one except the trademark holder or his designee may import genuine articles bearing that trademark. If the box is marked with an “N”, this indicates that gray market goods bearing that trademark may be imported by anyone without restriction. If the box is marked with an “L”, this indicates that *Lever-rule* protection has been granted. Please refer to the next section for a detailed explanation.

6.2.2 The next task for Customs officers in the disposition of a gray market case is to determine whether the goods are genuine; if not, the goods should be treated as a counterfeit trademark violation, as appropriate. If the goods are genuine, and a "Y" appears in the trademark recordation screen, the goods may not be imported without the U.S. trademark owner’s consent. If the goods are genuine and an "N" appears in the trademark screen, the goods may be imported by anyone regardless of whether the trademark holder consents. Customs officers should consult the IPR handbook for advice relative to distinguishing genuine from non-genuine goods. Advice is also available from the OR&R, IPR Branch.

6.2.3 Imported goods subject to gray market protection should be detained pursuant to 19 CFR § 133.23 and potentially seized and forfeited under 19 U.S.C. § 1526(b), as implemented by 19 CFR § 133.23(f). Sample "Notification of Detention" letters are attached to this Directive at Appendix 1 and Appendix 4 (for the importer and trademark holder, respectively) and a sample "Notification of Seizure" letter for the importer is attached at Appendix 5.

6.3 “Lever-rule” Cases in General. Pursuant to a court decision on March 26, 1999 (*Lever Brothers Co. v. U.S.* 981 F.2d 1330 (1993)), Customs amended its regulations to prevent the

importation of gray market goods which are "physically and materially different" from similar goods authorized for importation into the United States absent clear notice to the consumer. Customs will determine whether physical or material differences exist.

6.3.1 This determination may include, but is not limited to: composition of both the authorized and gray market products (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., and other distinguishing and explicitly defined factors that would likely result in consumer deception or confusion as proscribed under applicable law.

6.3.2 19 CFR § 133.2(f) provides that Customs will publish in the Customs Bulletin a notice listing any trademarks for which *Lever-rule* protection has been requested and the specific products for which gray market protection for physically and materially different products has been requested. Customs will examine the requests before issuing a determination on whether *Lever-rule* protection is granted.

6.3.3 For parties requesting protection, the application for trademark protection will not take effect until Customs has made and issued this determination. If protection is granted, Customs will publish in the Customs Bulletin a notice that a trademark will receive *Lever-rule* protection with regard to a specific product.

6.3.4 The new regulation, 19 CFR § 133.23(b), provides that the restriction to importation will not apply where a label is placed on the product informing the ultimate purchaser in the United States that the "product is not the product authorized by the U.S. trademark holder for importation, and is physically and materially different." Under the new regulation, where this label is placed on goods which would be excluded under *Lever-rule* protection, the goods could then be entered into the United States. The label is to be placed in close proximity to the trademark as it appears in its most prominent location on the article itself or the retail package or container. Other information may be added to dispel consumer confusion. The label is to remain on the product until the first point of sale to a retail consumer in the United States.

7. MISCELLANEOUS

7.1 Merchandise; Product vs. Packaging. The term "merchandise" encompasses any goods, articles, etc., which: (1) themselves bear violative marks, or (2) whether themselves bearing violative marks or not, are contained within packaging which bears violative marks. That is, goods which themselves do not bear violative marks, but are contained within packaging which does bear violative marks, are not segregable and both product and packaging are considered an entirety under the trademark laws and should, without exception, be seized and subjected to forfeiture under the applicable statutory authority.

7.2 Forfeited Goods vs. Goods which are Subject to Forfeiture. Please note that, in accordance with 19 CFR § 133.21(b) and 19 U.S.C. § 1526(e), goods bearing counterfeit trademarks, whether recorded or not, which have been seized, in the absence of the written consent of the trademark holder, shall be *subject to forfeiture*, not "forfeited" at that moment. Thus, only after goods have been *forfeited* (i.e., the forfeiture has been "perfected"), are the goods subject to the methods of disposition contained in 19 CFR § 133.52.

7.3 Merchandise Not in Customs Custody; Demand for Redelivery. Where Customs, after goods have been released, determines that a violation was likely to have existed, it may order the redelivery of the goods by sending a Notice to Redeliver (CF 4647) to the importer within 30 days of release of the goods. In cases where a laboratory analysis conducted subsequent to release indicates infringement, the notice to redeliver may properly be issued within 30 days of the date of such report. The importer has 30 days in which to redeliver the merchandise into Customs custody. If the importer does not redeliver the merchandise, a claim for liquidated damages shall be initiated. The local OI will be notified immediately of all shipments of counterfeit merchandise which have been released from Customs custody.

7.4 Personal Use Exemption from Trademark Restrictions. Under Public Law 95-410 effective October 3, 1978 (19 U.S.C. § 1526(d)), a traveler arriving in the United States with a protected trademark article may be granted an exemption to the import restrictions. Under this exemption, a traveler may import one article of the type bearing a protected trademark. These exemptions would apply to an article bearing a counterfeit or confusingly similar trademark, as well as an otherwise restricted gray market article (19 CFR § 148.55). This exemption applies if the article:

7.4.1 Accompanies a traveler to the United States,

7.4.2 If it is for personal use and not for sale, and

7.4.3 If the traveler has not been granted an exemption for the same type of article within 30 days preceding his or her arrival.

7.4.4 Further information concerning the personal use exemption is contained in Customs Directive 2310-011A.

7.5 OTO-1 Bulletin Board. Periodically, special alerts pertaining to specific trademarks or commodities may be posted to the Office of Field Operations (OFO) OTO-1 Bulletin Board. Officers should routinely monitor the OTO-1 Bulletin Board to keep abreast of important developments in IPR enforcement.

8. RESPONSIBILITIES. Area/Port directors, assistant port directors (trade operations), supervisory import specialists, and supervisory inspectors are responsible for ensuring that their staffs are aware of the content of this Directive and adhere to the guidelines provided.

9. ENFORCEMENT ADVICE. Release of merchandise to premises designated by the importer shall be used sparingly and only upon the filing of a single entry bond for three times the entered value of the merchandise and a written agreement not to dispose of the merchandise without Customs permission. No other "constructive custody" release shall be allowed. Advice may be obtained from the Office of Regulations & Rulings, Intellectual Property Rights Branch, at 202-927-2330; fax 202-927-1875.

Signed

Commissioner of Customs

U.S. CUSTOMS AND BORDER PROTECTION¹⁵ COPYRIGHT RECORDATION APPLICATION TEMPLATE

To facilitate the filing of copyright recordations with CBP, the following electronic template has been created.

The filing of a recordation application will begin the administrative recordation process with CBP and lead to faster processing of applications.

At this time, CBP cannot accept the electronic submission of this template; therefore, electronic filing is not currently available.

A separate Application is required for each recordation sought. Applications will be processed in the order received. In addition to the Application in accordance with 19 CFR 133.32 and 133.33, recordants must provide CBP with an “additional certificate”¹⁶ of registration issued by the U.S. Copyright Office showing title to be in the name of the applicant¹⁷; five photocopies or other likenesses of the copyrighted work, and an application fee of \$190 for each copyright for which recordation is sought.

After the application template below, you will find a checklist of information and documents that should accompany your new recordation application.

All documentation concerning recordations should be submitted to:

U. S. Customs and Border Protection
Office of Regulations & Rulings
Attention: Chief, Intellectual Property Rights Branch
Mint Annex Building

1300 Pennsylvania Avenue, NW
Washington, D.C. 20229

Copyright Recordation Application Template

1. Name/Description of copyright registered with the U.S. Copyright Office:
 2. U.S. Copyright Office Registration No:
 3. Date of issuance of copyright registration:
 4. Name of owner(s) of copyright registration:
 5. Complete business address of owner(s) of copyright registration:
-

¹⁵ Note: On March 1, 2003 the U.S. Customs Service became U.S. Customs and Border Protection.

¹⁶ An “additional certificate” is an official copy of the registration certificate issued by the U.S. Copyright Office, not a photocopy of said certificate.

¹⁷ 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.

6. Is the applicant the copyright owner(s)? If not, what is the applicant's relationship to the copyright owner?

7. Has this copyright previously been recorded with CBP (formerly U.S. Customs)?

Yes No

8. If so, what is the previous recordation number?

9. Place(s) of manufacture of genuine copies or phonorecords of the protected work:

10. Name(s) and address(es) of licensees authorized to use the copyright (If there are 25 or less licensees please list them here, if over 25 attach separately, but indicate below that the information is attached:

11. The names and principal business addresses of any persons or companies, foreign or domestic, authorized or licensed to use the protected work, and a description of the exclusive rights authorized:

12. The foreign title of the work, if different from the U.S. title:

13. 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:

14. 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:

15. Provide the name, address, telephone number, facsimile number, and email address of the contact person to whom CBP should send inquires regarding potentially infringing merchandise and notices of detention and seizure pursuant to 19 CFR Part 133.

Signature of Applicant/Date

Signature of Owner/Date

Notice: The discovery of any false statements, omissions, and/or inaccurate information provided to Customs in any application for trademark, trade name or copyright recordation may lead to invalidation of any such applications and/or recordations and may result in fines and/or prosecution under 18 U.S.C. 1001.

Recordation Application Checklist

- Have you included a certified certificate of copyright registration issued by the U.S. Copyright Office showing title to be presently in the name of the applicant?
- Have you submitted five copies of the certificate of copyright registration attached?

- Have you submitted five photographic copies or other likenesses of copyrighted work attached.
- Have you submitted the required fee; submission fee (\$190) is for the recordation of one copyright?
- Have you submitted the required fee of (\$80) for a renewal?
- Are you renewing your recordation (\$80), or has it previously expired and you are instead re-recording (\$190) your copyright?
- Have you attached your check?
- Has your check been made payable to “U.S. Customs Service?”

Please consult the Customs Regulations, Subpart D of Part 133 (19 CFR Part 133) for further information. If you need further assistance, we can be reached at (202) 572-8710. Upon receipt of your complete application, your recordation will be assigned and processed.

U.S. CUSTOMS AND BORDER PROTECTION TRADEMARK RECORDATION APPLICATION TEMPLATE

To facilitate the filing of trademark recordations with the CBP, the following electronic template has been created.

The filing of a recordation application will begin the administrative recordation process with the CBP and lead to faster processing of applications.

At this time, CBP cannot accept the electronic submission of this template; therefore, electronic filing is not currently available.

A separate application is required for each recordation sought. Applications will be processed in the order received. In addition to the application in accordance with 19 CFR 133.2 and 133.3, recordants must provide the CBP with a “status copy”¹⁸ (or “certified copy”) of the certificate of registration issued by the U.S. Patent & Trademark Office showing title to be in the name of the applicant; five photocopies of the “status copy” (or “certified copy”), and an application fee of \$190 to cover each class for which trademark recordation is sought.

After the application template below, you will find a checklist of information and documents that should accompany your new recordation application.

All documentation concerning recordations should be submitted to:

Department of Homeland Security
U.S. Customs and Border Protection
Office of Regulations & Rulings
Intellectual Property Rights Branch
1300 Pennsylvania Ave., NW
Mint Annex Building
Washington DC 20229

Please note: You must provide CBP with one actual certified copy of your certificate of registration for each trademark you wish to record. Applications which lack the actual certified copy issued by the U.S. Patent & Trademark Office will be returned.

Trademark Recordation Application Template¹⁹

1. Name/Description of trademark registered with the U.S. Patent & Trademark Office:
2. Name and complete business address of trademark owner(s):
3. Citizenship (corporate or personal) of trademark owner(s):
4. Is the applicant the trademark owner(s)? If not, what is the applicant’s relationship to the trademark owner?

¹⁸ A status copy or certified copy is an official copy of the registration certificate issued by the U.S. Patent & Trademark Office, not a photocopy of said certificate.

¹⁹ Includes certification marks, service marks and collective marks.

5. Has this trademark previously been recorded with U.S. Customs and Border Protection (CBP) (formerly, the U.S. Customs Service)? Yes No

6. If so, what is the previous recordation number?

7. Is the trademark a typed "word mark" (i.e., does it appear stylized, or does it incorporate a design)? Yes No

8. U.S. Patent & Trademark Registration No:

9. International class(es) (IC) of goods covered by the trademark registration²⁰:

10. International class(es) (IC) of goods for which recordation is sought and a complete description of the merchandise within the class(es) of goods:

11. Date of issuance of trademark registration:

12. of expiration of trademark registration:

13. Place(s) of manufacture of goods bearing the trademark:

14. Name(s) and address(es) of licensees who use the trademark (If there are 25 or fewer licensees please list them here, if over 25 attach separately, but please indicate below that the information is attached):

15. The names and principal business addresses of any persons or business entities, foreign or domestic, who use the trademark and a description as to those use(s):

16. Is the subject trademark now, or has it ever been, owned, used, or otherwise claimed by the trademark owner outside the United States (this may include a pending registration abroad)?

Yes No

17. The name(s) of any parent companies, subsidiaries, or other entities, foreign or domestic, that are under common control²¹ with, or share any type of ownership²² interest or relationship with, the U.S. trademark owner

18. Is the subject trademark owned, used, or otherwise claimed by any parent company, subsidiary, or other entity, foreign or domestic, that is under common control or common ownership with, or shares any common control or common ownership with, the U.S. trademark owner?

Yes No

19. If "Yes" in Question 18, provide the name of the foreign owner, user or claimant(s):

²⁰ Note that a fee of \$190 is required for each class of goods for which recordation is requested.

²¹ Common control includes effective control as to policy or operations and is not necessarily synonymous with common ownership.

²² Common ownership includes individual or aggregate ownership of more than 50 percent of the business entity.

20. Provide the name, address, telephone number, facsimile number, and email address of the contact person to whom CBP should send inquires regarding potentially infringing merchandise and notices of detention and seizure pursuant to 19 CFR 133.24.

21. Do you wish to inform us of any potentially infringing merchandise that is being imported?

Yes No

22. If yes, do you have samples of the allegedly infringing merchandise that can be submitted for CBP review, or digital images of the merchandise?

23. Do you have the name, and address of the manufacturer, importer, and/or consignee of the allegedly infringing merchandise? Do you have any other pertinent information, such as ports of entry, tariff classification, or dates of importation?

Signature of Applicant/Date

Signature of Owner/Date

Notice: The discovery of any false statements, omissions, and/or inaccurate information provided to BCBP in any application for trademark, trade name or copyright recordation may lead to invalidation of any such applications and/or recordations and may result in fines and/or prosecution under 18 U.S.C. 1001.

Recordation Application Checklist:

- Did you include a status copy of certificate of registration **certified** by the U.S. Patent and Trademark Office showing title to be presently in the name of the applicant? **In order to record the trademark we need a certified certificate** affixed with the U.S. Patent and Trademark Office’s gold seal. A photocopy of the trademark registration is not sufficient for U.S. Customs and Border Protection (CBP) recordation.
- Is your trademark ineligible to be recorded with CBP because it is registered on the SUPPLEMENTAL Register of the U.S. Patent and Trademark Office rather than on the PRINCIPAL Register? CBP can only enforce federally registered trademarks on the Principal Register.
- Has all of the required information in the recordation application, which is based on 19 CFR 133.2 through 133.7 been provided?
- Are you sure the certificate of registration is current, or has it expired?
- Have you included three photocopies of the status copy of certificate of registration?
- Have you submitted the correct fee? Submission of fee (\$190) is for the recordation of **one** trademark for **one** international class(IC) of goods?
- If this is a renewal of a recordation, have you submitted the required fee of (\$80)?
- Are you sure the trademark has not already been recorded with CBP (formerly, U.S. Customs Service), and therefore does not need to be recorded at this time?

- Are you renewing your recordation (\$80), or has it previously expired and you are instead re-recording (\$190) your trademark?
- Have you attached your check?
- Have you made your check payable to “U.S. Customs and Border Protection?”
- Is your check negotiable or is it void because it is over 6-months old?

Please consult 19 CFR Part 133 for further information. If you need further assistance, we can be reached at (202) 572-8710. Upon receipt of your complete application, your recordation will be assigned and processed.

Exclusion Orders

Customs Directive No. 2310-006A

Date: December 16, 1999

Originating Office: OR&R

Supersedes: 2310-006 Nov 21, 1989

Review Date: December 2001

1. PURPOSE. To present information on Customs policies and procedures concerning Exclusion Orders issued by the International Trade Commission.

2. AUTHORITY. Title 19, United States Code, Section 1337; 19 CFR § 12.39.

3. BACKGROUND. Under Section 337 of the Tariff Act of 1930 (19 USC § 1337), unfair methods of competition and unfair practices in the importation or sale of articles, 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 articles 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, the Commission may issue orders directing the Secretary of the Treasury to exclude the subject goods from entry into the United States.

3.1 Under Section 337 of the Tariff Act of 1930, as amended, unfair methods of competition and unfair practices in the importation or sale of articles, 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.

3.2 Exclusion Orders issued by the ITC are sent to the President for review. During the 60 day review period, if the order is not disapproved by the President or if the President affirmatively approves the order during this period, the order becomes final. Customs enforces Exclusion Orders both prior and subsequent to their becoming final. In cases involving importations which occur within the 60 day Presidential review period, the otherwise excludable articles may be entered under a single entry bond on Customs Form 301, containing the bond conditions set forth in 19 CFR § 113.62 in an amount determined by the ITC. After the Presidential review period, where the Exclusion Order becomes final, the bond conditions no longer apply and the goods are subject to exclusion.

3.3 Exclusion Orders may be either “General” (meaning all goods of a certain description must be denied entry, with specified exceptions) or “Limited” (meaning all goods of a certain description imported by a certain company or companies must be denied entry). Limited exclusion orders are sometimes directed against goods manufactured by or exported by a certain company or

companies. The nature of the Exclusion Order itself, and the parameters of enforcement, will be detailed in the Exclusion Order Notice.

3.4 Seizure and Forfeiture Orders. In addition to issuing Exclusion Orders, the ITC may also issue Seizure and Forfeiture Orders where the importer attempts, after previously having had the same goods denied entry pursuant to an Exclusion Order, and having been notified by Customs that seizure and forfeiture could result from future attempted entries, a subsequent importation of similar goods which are the subject of the Exclusion Order. Importations of articles in contravention of Seizure and Forfeiture Orders should be seized and forfeited under 19 U.S.C. §1337(i), as implemented by 19 CFR §12.39(c).

4. ENFORCEMENT. In general, Exclusion Orders issued by the ITC are administered by the Office of Regulations & Rulings, IPR Branch, but are processed by the Office of Field Operations. Upon receipt of orders from the ITC, an “Exclusion Order Notice” is released to the field through the Office of Field Operations. Notices regarding the enforcement of exclusion orders are to be transmitted to the field via the U.S. Customs Bulletin Board (Trade Enforcement, OTO1). Exclusion Order Notices will provide details relative to the enforcement of a particular order. Exclusion Orders are catalogued within the ACS/IPR module in the same manner as trademarks and copyrights.

4.1 Procedures. The strategic operational analysis staff (SOAS) will update cargo and/or summary selectivity criteria to include exclusion order information.

4.1.1 Given the highly technical nature of articles which are the subject of most Exclusion Orders, Customs officers should seek the advice of Customs laboratories, which provide technical assistance in determining whether goods meet the parameters of the subject patent. Field officers may contact the designated field laboratory servicing their geographic area or the Laboratories and Scientific Services at Customs Headquarters for advice.

4.1.2 Where goods determined to be subject to an Exclusion Order are presented to Customs, field officers must exclude the goods from entry into the United States and permit export. Note that “in bond” movements of restricted merchandise subject to an Exclusion Order, although transported through the United States, do not enter the United States and are thereby considered excluded from the United States.

4.1.3 Written notification of such exclusion must be provided to the importer. A sample letter to be issued to the importer in such a case is attached to this Directive.

4.1.4 Copies of denial of entry letters sent pursuant to Exclusion Orders are to be sent by the Port to:

4.1.4.1 U.S. Customs Service, Office of Regulations & Rulings, IPR Branch, Room 3.4A, 1300 Pennsylvania Ave., NW., Washington, D.C. 20229

4.1.4.2 U.S. International Trade Commission, Office of General Counsel 500 E Street, SW., Washington, D.C. 20436

5. RESPONSIBILITIES. Customs field officers are responsible for following this Directive. Area/Port Directors, Assistant Port Directors (Trade Operations), supervisory import specialists,

and supervisory inspectors are responsible for ensuring that their staffs are aware of the content of this Directive and adhere to the guidelines provided.

Signed

Commissioner of Customs

DEPARTMENT OF THE TREASURY U.S. CUSTOMS SERVICE

(IMPORTER)

Sir/Madam:

This is to advise you that the following shipment is deemed excludable from entry into the United States by Order of the U.S. International Trade Commission for violation of 337-TA-, an Exclusion Order:

Patent/Trademark/Copyright Registration Number: U.S. International Trade Commission Case No: 337-TA- Article Denied Entry: Quantity: Vessel/Airline: Bill of Lading: Date of Denial of Entry:

You have 30 days from the date of this letter to export the subject merchandise from the United States. If the merchandise is not exported within 30 days, it will be disposed of under Customs supervision pursuant to 19 CFR § 12.39(b)(3) and (c)(5).

A copy of this notice is being furnished to the U.S. International Trade Commission. You are hereby notified that any future attempt to import such articles may result in the articles being seized and forfeited.

Sincerely,

Area/Port Director

cc: U.S. International Trade Commission
U.S. Customs, Office of
Regulations & Rulings