

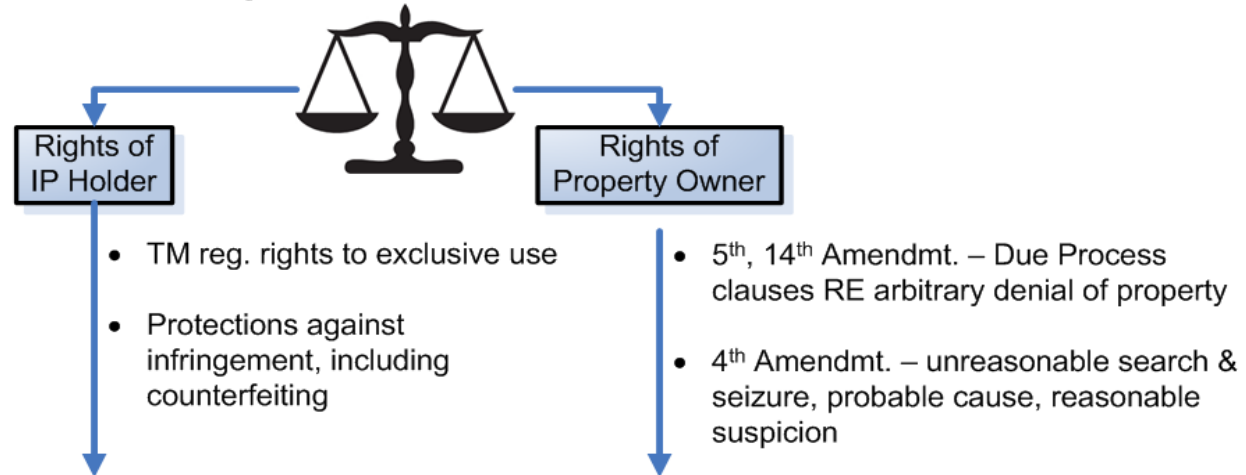


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CBP Statutory Authority & Regulatory Guidelines

30,000-Ft View of Seizure Issue

Legal Balance at the Border

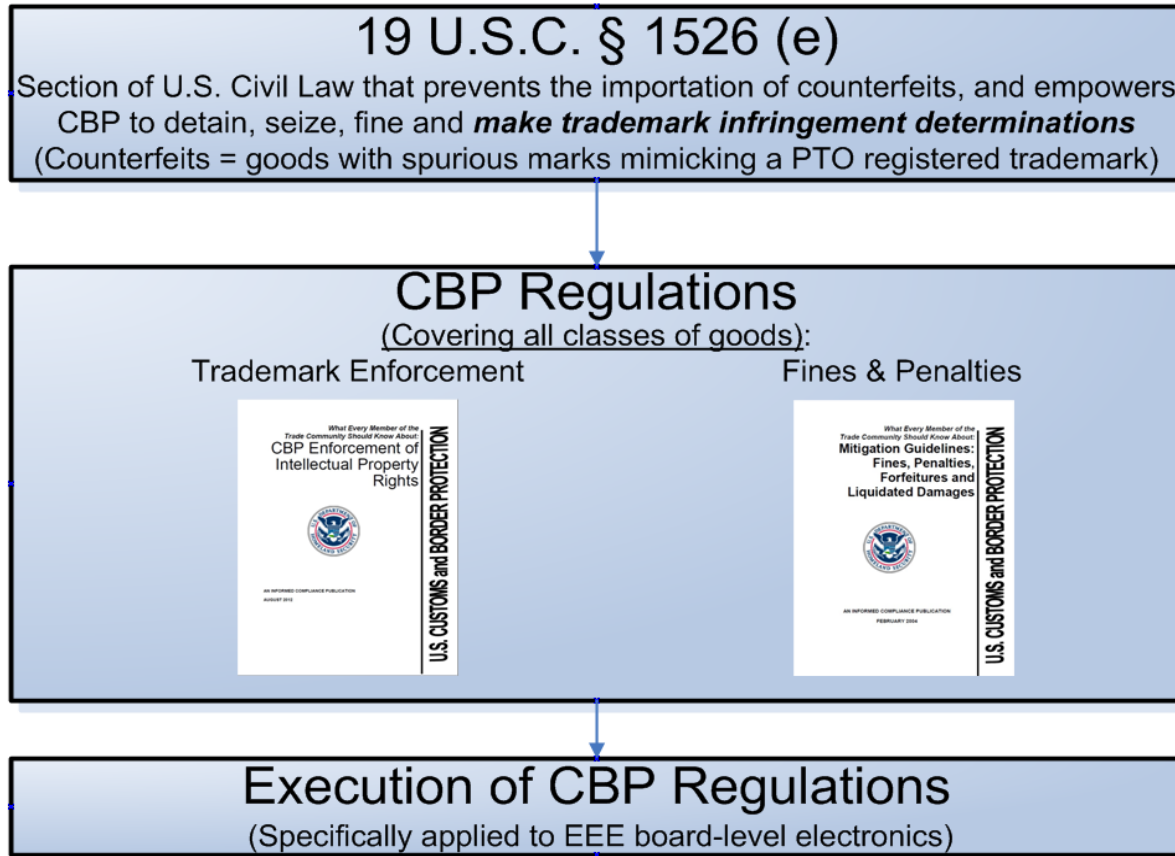


“As an administrative agency with law enforcement powers, CBP has the powers of search, seizure, and arrest, and the legal authority to make substantive determinations regarding infringement of trademarks”
 -- “CBP Enforcement of Intellectual Property Rights”, Aug. 2012 CBP Informed Compliance Publication

- Unusual for a law enforcement agency to be empowered to enforce, detain, search/examine, adjudicate, seize, cause forfeiture, and assess fines
- What are the U.S. laws that:
 - Grant powers to CBP?
 - Specify requirements for above legal balance:
 - . Burden of Proof?
 - . Timeliness?
 - . Transparency regarding the process?
 - . Due process?

CBP Statutory & Regulatory Framework

CBP detentions and seizures of electronics are authorized and executed within a much larger context.



To be clear, the balance of my comments reflect my own observations of key requirements, and several anomalies and omissions of the statute and the CBP Regs doc (covering all goods), and not Electronics CEE, which is in the difficult position of applying them to an extremely atypical market, which was not considered at time of publication.

Highlights of Civil Law 19 U.S.C. § 1526 (e)

1526 is broad, and empowers CBP, with virtually no caveats or guidelines for subsequent CBP implementation.

- (a) Unlawful to import PTO-trademarked products manufactured overseas, unless written permission from trademark owner presented at time of entry to U.S.

- (d) Exemptions for small quantity for personal consumption, not resale

- (e) Items bearing a counterfeit mark are seized (no ID of burden of proof or due process)

- (f) Civil penalties (inserted via Anti-counterfeiting Consumer Protection Act of 1996)
 - Applies to any person or entity who aids or abets importation
 - For 1st seizure, max fine of 100% of MSRP; for 2nd, 3rd, etc capped at 200% of MSRP
 - CBP imposes fines (giving it broad authority on TM infringement determinations)

 - (Seizure history never expires, as there is no consideration of expiration/timeframe/MPN of seizures for fine calculation, and no mention of knowledge or intent).

Application of 1526 (e) to EEE Parts

1526 presupposes conditions not applicable to EEE. It is also void of any specifics that might address unique EEE characteristics.

(a) Unlawful to import PTO-trademarked products ..., unless written permission...

- This works when a commercial quantity indicates probable cause on its face.
- It is absurd when applied to EEE, ...for the ID, for the CM, and for the OEM when importing legitimately

(e) Items bearing a counterfeit mark are seized

- Here again, non-authorized distribution of commercial quantities might normally represent probable cause suspicion on its face, but does not apply to EEE.
- Separately, this pre-supposes relatively easier counterfeit determinations of recently manufactured items, which does not apply to EEE.
- This overlooks possibility of a certified test lab sometimes having better detection methods & historical facts (photos, samples) than the OCM, for a 10+ year EOL part

(f) Civil penalties

- MSRP is a retail/consumer concept, that does not apply to wholesale-only EEE parts

Highlights of CBP TM Enforcement Regs

CPB Enforcement guidelines apply to all classes of products.

(V.A.) Outlines regulations for disclosure of information

- CBP notifies importer within 5 days of Detention date (no burden of proof ID'ed)
- Upon Detention notice, CBP provides importer with 7-day window, during which Importer can provide CBP with info. establishing authenticity, to CBP's satisfaction (no CBP burden of proof ID'ed RE level; but, owner burden is ID'ed, without level)
- At end of 7 days, if CBP not satisfied, mark holder is contacted to assist with counterfeit determination (no burden of proof ID'ed)
- Notice of Seizure (no burden of proof ID'ed, no due process steps ID'ed)

(VII.) Penalties

- CBP may impose fines per 1526, in addition to forfeiture
- Fine guidelines via reference to PDF doc "Mitigation Guidelines: Fines, Penalties..."

Highlights of CBP Fines Guidelines

CPB fines guidelines apply to all classes of products.

(III.C) All parties who exercise control are subject to fines.

(III.D and .E) Fine amounts per 1526.

- Lack of intent or knowledge does not shield one from fines, or from recordation of offense, which effects future potential fines
- No statute of limitations on past seizures as an aggravating factor.

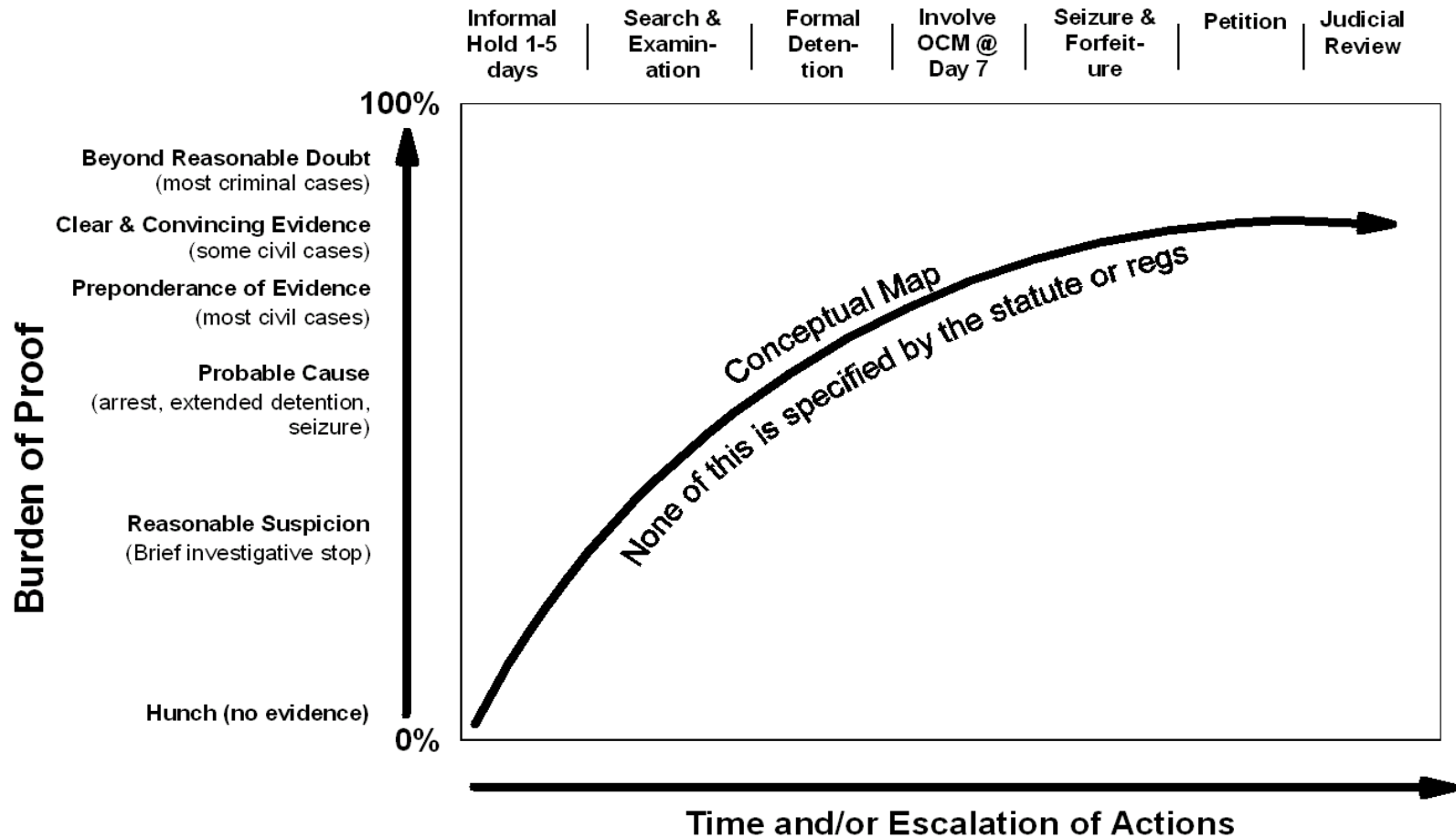
1526 & CBP Regs -- Omissions

Due to the broad scope (of product classes) neither Congress nor CPB has specified key requirements for balance between the rights of IP holder vs. that of importer (property owner).

- ***No mention of CBP Probable Cause / Burden of Proof*** required (at various stages) (but, *property owner* burden of proof at day 7 ID'ed, without defining the level)
- ***No mention of CBP Timeliness*** (max duration of Detention, Petition, etc.)
- ***No mention of CBP Due Process steps*** required (especially seizure stage)
- Barring any judicial case law, this is tantamount to no requirements for any of them.
- Meaning that Electronics CEE has the burden of interpreting the broadly written 1526 and CBP Regs (written for all product classes) for the unique attributes of EEE parts.
 - Congress envisioned 10,000 fake current-release Nike sneakers or James Bond DVDs, where the quantity is highly suspicious on its face, when coming from non-authorized sources.
 - Congress did not envision 4,000 legit. EOL 1999 EEPROM's shipped from Sanmina to HP.

Appropriate Burden of Proof (by Stage)?

One might infer that, in the absence of Congress specifying burden of proof, none is required (prior to judicial review).





Appropriate Due Process (by Stage)?


Neither 1526 nor CBP Regs specify key elements of due process


- Most elements are not appropriate at every stage (legal concept of govt. shutdown)
- But clearly, many elements are appropriate at one stage or another, ...short of judicial review requiring the potential for multiple years, and 10's or 100's of thousands in legal fees.


Basic Due Process Rights (Judge Friendly)	Informal Hold 1-5 Days	Search & Examination	Formal Detention	Involve OCM @ Day 7	Seizure & Forfeiture	Admin. Petition	Judicial Review
1. An unbiased tribunal. -- Does OCM have financial incentive to opine "counterfeit"?							
2. Notice of proposed action and grounds asserted for it. -- Anomalies observed that indicate counterfeit?						?	
3. Opportunity to present reasons why the proposed action should not be taken. -- Industry and govt-codified and accepted test standards?						OK ?	
4. The right to present evidence, including the right to call witnesses. -- Samples allowed for 3rd party testing? -- Importer or Third-Party test results? -- Ability to question OCM, its data, its logic						?	
5. The right to know opposing evidence. -- OCM rejection framework vs proprietary info? Lab reports?						?	
6. The right to cross-examine adverse witnesses. -- Inspector certifications? Facility certifications? -- Recognized test methods used? -- Voracity of OCM opinions, assertions, factual evidence?						?	
7. A decision based exclusively on the evidence presented. -- OCM opinion vs OCM documented evidence?							
8. Opportunity to be represented by counsel.						OK	
9. Requirement that the tribunal prepare a record of the evidence presented. -- Photos of anomalies observed (a la IDEA-STD-1010B)						?	
10. Requirement that the tribunal prepare written findings of fact and reasons for its decision. -- OCM-provided smoking guns -- CBP lab smoking guns RE "counterfeit conclusion"						?	

 Right Explicitly or Implicitly Granted

 Right Unspecified

 Right Explicitly Denied

 Appears to be Granted In Practice

 Unclear if Denied In Practice

Summary of EU & UK IP Border Enforcement

In contrast, EU and UK legislate reasonable suspicion & due process.

- EU statute No 608/2013 (June 2013) applies to all 28 member states, including UK
- Burden of proof, due process steps, timeliness, etc are not omitted (as with U.S.), and statute section covering Detentions & Seizures is not a few sentences, but many pages
- Excludes gray market goods -- manufactured , but not distributed with consent
- **Must have reasonable suspicion to detain**
- Must notify importer and IP holder of detention within 1 day
- **Detention is 10 days, after which parts must be released**
- Gives all parties right to inspect
- During 10 days, rights holder can notify Customs parts are infringing and should be destroyed
- If importer objects to destruction, rights holder must provide Customs with evidence it has started court proceedings, else Detention ends & parts released
- so **onus of lawsuit prior to seizure is on the IP holder, not the importer**
- Border Enforcement does not perform counterfeit determination; courts do. **But...**
- If rights holder asserts counterfeit, and agrees to destruction, and **importer fails to respond within the 10 days, parts are destroyed.**
- Importer has right to contact the rights holder to discuss options.
- Customs may extend detention for rights holder by a max. of 10 more days (for total of 20).
- Under UK jurisprudence, if IP holder loses lawsuit, it may owe legal/other costs to importer

U.S. vs R.O.W. IP Border Enforcement

U.S. stands alone vs other 1st world countries RE lack of explicit specificity in protecting importer's rights

	<u>EU Statute</u>	<u>UK Statute</u>	<u>UK Published Border Regs</u>	<u>US Statute</u>	<u>US Published Border Regs</u>	
Detention						
Burden of Proof specified (who has it)	C/IPHldr	C/IPHldr	CBP/IP Hldr		owner	Yes (specified)
Burden of Proof specified (what level)	RS	RS	RS			
Timeliness specified (expected duration)	10	10	10 days		30 days	
Timeliness specified (maximum extension)	10	10	10 days		60-90 days	No (not specified)
Transparency: Steps specified in detail						
Due Process specified (appropriate to actions taken)						XX Explicit or Implied Amount
Seizure (Pre-judicial review)						
Burden of Proof specified						
Timeliness specified (maximum duration)	N/A	N/A	N/A		90-120+ days	
Timeliness specified (maximum extension)	N/A	N/A	N/A			
Transparency: Process specified in detail						
Due Process specified (appropriate to actions taken)						

Conclusions

- Authors of 1526 and CBP Regs (in 1996 and later) were motivated by faked consumer products, with a focus on recent releases of products.
- EEE Parts do not fit the mold, particularly RE the difficulty of counterfeit detection, and the universality of commercial quantities given parts are solely wholesale and not retail
- US statutes, and CBP regs implementing them (across all goods) do not specify burden of proof, timeliness, detailed process steps, or due process, effectively meaning there are no explicit protections of many rights of the importer
- In contrast, EU and UK statutes make every step explicit, balancing the rights of both parties, while aggressively and effectively reducing counterfeits.
- Yet Electronics CEE is charged with applying the broad statutes and guidelines to this very atypical industry.
- Electronics CEE brings a dramatically higher level of consistency, professionalism, and rigor to CBP actions, particularly with their 2015 centralization of such actions nationally.
- I don't envy their task, but am hopeful that CBP and industry can work together to craft a solution, that achieves the original objective, while giving fair consideration to the complexity of this market, along with an appropriate burden of proof and due process.

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