

Custom Seizures:
Doing Business While Under
Surveillance Panel
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Understanding Customs and Border Protection

- U.S. Customs & Border Protection (“CBP”) is a part of the Department of Homeland Security – (1) protect revenue and (2) security and protect consumers.
 - Counterfeit parts are a priority trade issue for CBP and the federal government as a whole
 - Why?
 - Protect the government (sales)
 - Protect health and welfare
 - Protect legitimate industry

Statistics

- In FY2010 – CBP performed 19,959 seizures
- China is the number one source of counterfeit products
- Top 10 categories include:
 - Consumer electronics
 - Computer/hardware

Import Basics

- MUST UNDERSTAND: NO Constitutional right to import (or conduct international trade)
 - Search and seizure protections limited
- Who is the Importer of Recorder?
 - Direct liability to the Government (and third parties)
 - Standing to object
- Express Consignment Process
 - Problem: The carrier (FedEx or UPS) are between the real importer and CBP

Understanding of the Law

- Tariff Act of 1930 (19 USC 1526)
- Tariff Classification
- North American Free Trade Agreement Implementation Act (1993)
 - Informed Compliance (i.e., not hiding the ball)
 - Shared Responsibility
- Civil Asset Forfeiture Reform Act (2000)
- Anti-counterfeiting Consumer Protection Act (1996)
- Difference between “detention” and “seizure”
- Notice and Understanding rights (19 CFR 133.21)
 - Whose responsibility?
- Third party lawsuits?

Understanding “Counterfeits”

- Counterfeits, simulations, and gray goods
- Counterfeits = always illegal (but, if not records with CBP, will usually be admitted)
- Simulations = can be conformed to be lawful
- Gray Goods (parallel imports) = usually, but, not always, legal to import
- The issue of testing
 - 19 CFR 133.21 – testing (interpreted as owner only)
 - 19 USC 1499 (b) – testing allowed by importer

Detentions

- CBP may detain any article (domestic or foreign manufacture) presented for importation bearing a suspected counterfeit mark that is registered with USPTO and recorded with CBP
- Notification within five (5) days of decision
- Importer has seven (7) days to present evidence that it is genuine
- CBP may disclose specific information of suspected counterfeit good to OEM (or Trademark owner)

Section 1595a(c) - Seizures

- Mandatory
 - Stolen
 - Smuggled
 - Clandestinely imported and introduced
 - Contraband article
 - Plastic explosive

Section 1595a(c) – Seizures (cont.)

- May be seized (i.e., discretion):
 - Health, safety, or conservations (not in compliance)
 - No license, permit, or other authorization
 - “merchandise or packaging in which copyright, trademark, or trade name protection violated are involved”
 - Violation of court order
 - Marked intentionally in violation of 19 USC 1304
 - Previous violations of 19 USC 1304

Notice of Seizure (options)

- Fines, Forfeiture and Penalties
- Petition
- Offer in compromise (not available for counterfeit goods)
- Abandonment
- Judicial Relief
 - Bond (not available for counterfeit goods)
- Do Nothing
- Timeframe: 30 Days (with extensions)

Penalty Phase

- Notice of Demand of Penalty
- 1st Offense = value of the merchandise based on the MSRP of the genuine merchandise at the time of seizure
- 2nd + Offense = Twice (2 X) the Value
- If there is mitigation and no aggravating factors, normal disposition penalties can apply.
- Added issue (separate from aggravating factors) = “knowledge” the goods were counterfeit

What can the Industry do?

- Proactively work with CBP and Center of Excellence
- Educate policy makers and CBP
- Advocate for changes in interpretation of laws and regulations (*i.e.*, access to testing information)
 - Respond to Notices of Rule Changes
- Advocate for changes in the law to protect industry and give more rights
- Challenge Trademark owners on (1) information and (2) “value”

THANK YOU

- QUESTIONS:

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