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Proposed Bill Would Empower U.S. Customs to Seize Products Infringing Design Patents at the Border

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On December 5, 2019, the Counterfeit Goods Seizure Act of 2019 (CGSA) was introduced to the U.S. Senate. If enacted into law, the CGSA would allow U.S. Customs and Border Protection (CBP) to enforce U.S. design patents at the U.S. border. The CGSA is bipartisan legislation co-sponsored by Senators Thom Tillis (R-NC), Chris Coons (D-DE), Bill Cassidy (R-LA), and Mazie Hirono (D-HI). The CGSA proposes amending 19 U.S.C. § 1595(a)(c)(2)(C) to allow CBP the discretionary power to seize and detain imported goods that infringe a recorded U.S. design patent.¹ CBP currently exercises a similar discretionary power for registered trademarks and copyrights. The CGSA is also publicly supported by companies, including Nike Inc., 3M Company, Wolverine Worldwide, Columbia Sportswear, Deckers Brands, and by professional associations, including the Footwear Distributors & Retailers of America, the Intellectual Property Owners Association, the International Trademark Association, and the American Intellectual Property Law Association.²

Current Protections with CBP Include Copyrights and Trademarks

Currently, 19 U.S.C. § 1595(a)(c)(2)(C) allows CBP to enforce only copyrights and trademarks—including trade dress rights—that are *recorded* with the agency (see below).^{3,4}

Trademark owners may record their marks with CBP to seize imported goods with infringing marks after the owners have registered their marks with the Principal Register at the U.S. Patent and Trademark Office.⁵ Copyrights may also be recorded with CBP, but unlike trademarks, copyrights may be recorded as long as the owner has *applied* for registration of the copyright with the U.S. Copyright Office.⁶ The CBP recordation database includes images of the marks, registration numbers, names and addresses of rights owners, place(s) of manufacture, and the names and addresses of individuals and companies authorized to use the trademark and/or copyright.⁷ CBP officers at each of the 317 ports of entry in the United States can access the recordation database. The public has access to the recordation database through the Intellectual Property Rights Search—the public form of the database (see below).^{8,9}

Typically, after the mark or copyright is registered with CBP, rights owners may arrange a meeting with CBP professionals to provide educational materials used to train CBP officials to determine the difference between legitimate and counterfeit products.

Today, there is no similar system in place for design patent holders to record their rights with CBP or for CBP to enforce those rights against importers. To receive protection at the U.S. ports of entry, patent holders must file a complaint and go to trial at the U.S. International Trade Commission (ITC) for an exclusion order—an import ban—relating to specific patents. If the ITC finds infringement of the patents (and other statutory requirements are met), the ITC

Welcome to the Intellectual Property Rights e-Recordation (IPRR) application.



The filing of this electronic application will begin the administrative recordation process with CBP. A separate application is required for each recordation sought. Applications will be processed in the order in which they are received. The recordation fee for copyrights is \$190. The recordation fee for trademarks is \$190 per International Class of goods.

We recommend that you have the following materials and information readily available before you begin the application process:

- U.S. Patent & Trademark Office Registration Number or the U.S. Copyright Office Registration Number
- Digital images of the protected mark/work in ".jpg," ".gif" or ".pdf" format that accurately depict the right to be protected. Individual image files are limited to 2MB.
- Evidence of a pending application for registration at the U.S. Copyright Office, if recording an unregistered copyright with CBP.
- Familiarization with the applicable regulations: Trademarks: 19 CFR 133.1 et seq. Copyrights: 19 CFR 133.31 et seq.

FORM OF PAYMENT

The recordation fee may be made either by credit card or check. Please be advised that applications paid for by check could be delayed up to six weeks. All incoming mail is processed through CBP's mailroom at the Ronald Reagan Building, which includes irradiation and sorting. It is then transferred to the Office of Trade, Regulations & Rulings, where it is sorted again for final delivery to the IPR Branch. We apologize in advance for any delay this may cause in providing enforcement. On the other hand, applications paid for on-line with a credit card are generally processed within three (3) business days.

RENEWALS OF EXISTING TRADEMARK AND COPYRIGHT RECORDATIONS

A separate recordation application is required for each recordation renewal sought. Applications will be processed in the order in which they are received. The renewal fee for an unexpired copyright recordation is \$80 and \$190 for an expired copyright. For unexpired trademark recordations, the renewal fee is \$80 per previously recorded International Class (IC) of goods and \$190 for any additional IC's added to a renewal not previously recorded. For expired trademark recordations, the fee is \$190 per International Class of goods.

TEMPORARY RECORDATION OF UNREGISTERED COPYRIGHTS

Temporary recordation of unregistered Copyrights is now available while your application for registration is pending at the U.S. Copyright Office (USCO). Upon request (email to iprrquestions@cbp.dhs.gov), you will receive instructions for submitting an application for recordation of your copyright with CBP for border enforcement purposes. Proof of application to register your Copyright at the USCO is required.

Time Zone: Please note that all online applications are processed in our system on the Eastern Standard Time (EST) zone.

Once your recordation application has been approved, you may view your CBP recordation using the Intellectual Property Rights Search (IPRS) database at: [IPRS](#)

Requests for assistance with the recordation application process should be directed to the Intellectual Property Rights Branch via email iprrquestions@cbp.dhs.gov or call (202)325-0216.

IPRS Intellectual Property Rights

Search

Keyword:

GO

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SEARCH:	All	Title	Product	Description	Owner	Contact Name	Firm Name	Recordation No.	Agency Registration No.
FILTER:	Show All	Trademarks	Copyrights	Tradenames	Exclusion Orders	Exclude Expired	Include Expired		

What's New

The total number of searchable IPR recordations in this database is 40976

Recordations

In order to record a new recordation or to renew your existing recordation, please navigate to e-Recordations. CBP's IPR e-Recordation program is administered by the Intellectual Property Rights Branch within the Regulations and Ruling Directorate, Office of Trade. For assistance please email: iprrquestions@cbp.dhs.gov, or call (202) 325-0216.

About the Intellectual Property Rights Search (IPRS)

IPRS is a searchable database containing public versions of U.S. Customs and Border Protection intellectual property rights recordations. Recordations can be retrieved based on simple or complex search characteristics using keywords and Boolean operators. IPRS has the added functionality of restricting searches to specific fields and record types. IPRS contains expired as well as current records and by default excludes expired records. For more information about features or how to use IPRS, please visit the HELP section.

Note:

The IPRS database is updated nightly (except Saturday and Sunday) at approx. 4:00 a.m. eastern standard time. Those basing import/exports transactions based upon data contained within IPRS are reminded that recordation information is updated by CBP IPR Branch personnel daily.

Related CBPAPPS Information:

U.S Customs & Border Protection (CBP) IPR Enforcement

Please submit any technical concerns related to IPRS to [CBP website technical questions](#).

will issue an exclusion order excluding importation of infringing products. CBP is responsible for enforcing the ITC's exclusion order. Although the ITC is generally considered much faster than most federal district courts, the ITC process may still be too complicated, particularly for smaller companies or those involved in a fast-changing industry, such

as the fashion industry.¹⁰ Moreover, ITC trials can be expensive. A typical ITC investigation lasts between fifteen to eighteen months, costing patent holders millions of dollars in litigation costs and lost profits while unauthorized importers continue to bring infringing products across the borders.¹¹ If CBP had the discretion to enforce design patents, it could seize

infringing goods at the border immediately, rather than allow counterfeiters to continue to import and sell infringing goods for an additional fifteen to eighteen months.

Impact on the U.S. and Global Economy

The counterfeit market has a significant impact on the U.S. and global economies. The total estimated value in counterfeit and pirated goods was more than \$1 trillion in 2013 and is estimated to reach \$2 trillion by 2022, according to the February 2017 Frontier Economics report.¹² The market in fake goods is estimated to be 3.3% of all global commerce.¹³ According to a report from the Organisation for Economic Co-operation and Development (OECD), footwear and clothing are the top trades in counterfeit goods.¹⁴ For example, in a single case, counterfeiters imported more than \$70 million in fake Nike shoes in 2018.¹⁵ Other commonly traded counterfeit goods consist of leather goods, electrical equipment, watches, medical equipment, and other industries such as pharmaceuticals.¹⁶

Counterfeit Goods Impact Consumer Safety

Another cause for concern regarding counterfeit goods is their impact on consumer safety. Many of these counterfeit goods pose several risks to consumer safety since they tend to include personal care products, consumer electronics, automotive parts, and other products that could otherwise be protected by design patents by CBP.¹⁷ Many of the personal care products (e.g., sunscreen, cosmetics, perfume) contain dangerous contaminants (e.g., carcinogens, urine, bacteria) or lack effective ingredients.¹⁸ Consumer electronics (e.g., power adapters, chargers, and devices) may fail or overheat, presenting significant fire and electrocution risks.¹⁹ Automotive parts (e.g., wheels, headlights, windshields) also often have higher failure and malfunction rates than genuine parts.²⁰ If the holder of a design patent on these products brings an ITC action, these counterfeit goods will continue to enter the U.S. borders while the patent holder waits for the ITC to issue exclusion orders for CBP to enforce.

Counterfeiters have become more sophisticated in bypassing CBP with new counterfeiting techniques, as exemplified through the actions of trademark infringers, emphasizing CBP's need for additional

discretion over design patent enforcement. According to the U.S. Joint Strategic Plan on IP Enforcement report from the White House, counterfeiters cover or obscure infringing trademarks, later removing the obfuscation after the counterfeit goods clear CBP.²¹ Counterfeiters also minimize detection by CBP through shipping infringing marks separately from the goods, relying on in-country assembly and distribution after importation of the separate components.²² In 2018, five individuals were arrested in connection with importing more than \$70 million in counterfeit Nike Air Jordans from China through New Jersey.²³ The counterfeit shoes resembled the Nike Air Jordans but were manufactured without any identifying marks that could be flagged by CBP.²⁴ The fake logos were added to the shoes after they came through the port and were sold to people throughout the United States.²⁵ In a separate case involving boots, counterfeiters had glued a shoe insert over a fake Timberland logo on the bottom of the boots.²⁶ CBP discovered this technique only after removing the inserts on the heel-side of the boots.²⁷ Counterfeiters also have tried to minimize detection by CBP by intentionally mislabeling shipping containers. In Los Angeles and in Long Beach, CBP seized fake Nike shoes that were incorrectly labeled as napkins on the shipping containers in an attempt to disguise the counterfeit goods.²⁸

CBP inspectors frequently encounter counterfeit goods that are left in a generic form that cannot be flagged at Customs. Under the CGSA, CBP could enforce design patents to stop the entry of counterfeit goods using the previously mentioned techniques, without resorting to exclusion orders that can be complicated and time consuming to obtain.

Considerations of Adding Design Patent Protection at CBP

Because the Federal Circuit simplified the test for infringement in 2008, evaluating goods to determine design patent infringement would be a manageable task for CBP.²⁹ Design patents protect the nonfunctional appearance of a product, which, unlike utility patents, does not require a technical understanding of the device's function. The ordinary observer test is used to determine design patent infringement. Under this test, when an ordinary observer would find the accused design to be substantially similar to the patented design in overall appearance, the accused design infringes the design patent. This is similar to

the analysis CBP already undertakes for determining trademark infringement. Furthermore, CBP officers have effectively demonstrated the ability to determine design patent infringement through the design patent exclusion orders issued by the ITC. In addition, the proposed amendment of the CGSA grants CBP the discretion to seize the goods, and thus CBP could simply decline to seize borderline cases of infringement. CBP operates with the discretion to seize or not seize goods violating copyrights and trademarks, and could handle the same discretion in cases of design patent infringement.³⁰

Design Patent Holders Face Difficulties in Enforcing Their Rights in the United States

To stop counterfeiters and other design patent infringers with close copycat products, enforcement at the U.S. border would be more time and cost efficient than existing enforcement forums. In addition to the ITC, design patent owners may also file in district court, but such enforcement has challenges. For example, accused infringers may not appear to defend themselves, such as in *Deckers Outdoor Corp. v. Alphabetdeal.com, Inc.* There, the District Court of the Central District of California entered default judgment in favor of Deckers, awarding both monetary damages and injunctive relief.³¹ In other situations, the sellers and importers of accused products may be difficult to identify on third-party marketplace websites, and rights holders must resort to suing the marketplace. In *Altinex Inc. v. Alibaba.com Hong Kong Ltd.*, because the plaintiffs could not identify third-party sellers, the court entered judgment as a matter of law in favor of Alibaba.com.³² In some cases, plaintiffs will file suit against shipping companies who import illegal goods on behalf of counterfeiters that may be unidentifiable. In *Nike Inc. v. Eastern Ports Customs Brokers, Inc.*, Nike sued a customs broker and shippers who imported containers listing “ceramic tiles” that actually contained counterfeit Nike footwear.³³ The court granted Nike’s motion for summary judgment as to liability of the shippers and also granted Nike’s motion for default judgment against the customs broker.³⁴ In each case, patent owners are seeking recourse only after the counterfeit goods have entered the United States, rather than having the ability to stop the counterfeit goods at the U.S. border.

U.S. companies recognize that design patents can provide substantial protection for their products.

The total number of design patent filings at the U.S. Patent and Trademark office has steadily increased, especially in the areas of automobiles, computers, cosmetics, and clothing product areas.³⁵ In 2019, the U.S. Court of Appeals for the Federal Circuit affirmed the district court in *Automotive Body Parts Association v. Ford Global Technologies LLC*, highlighting the increasing importance of design patents.³⁶ Automotive Body Parts Association (ABPA) sued Ford for a declaratory judgment, claiming that Ford’s design patents on individual parts of its truck were invalid or unenforceable. The district court held that ABPA infringed Ford’s design patents for distributing replacement parts for Ford’s trucks covered by these design patents. The Federal Circuit rejected ABPA’s arguments that the patents were invalid for functionality based on consumer preference for matching aesthetic appeal, but ABPA has asked the Supreme Court to review this decision. This case demonstrates the value that design patents add to patent portfolios and their ability to defend against threats from aftermarket suppliers.

Other countries and governmental entities recognize the importance of design patents and currently enforce design rights at their borders, such as the European Union (EU), Japan, South Korea, China, India, Mexico, Turkey, Argentina, South Africa, Switzerland, and Panama. Article 51 of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires member states of the World Trade Organization (WTO) to provide procedures for right holders to apply to customs authorities to suspend the release of imported counterfeit trademark or pirated copyright goods.³⁷ Although not required under TRIPS, the Agreement does contemplate that member states will implement border measures for design patent rights. Such measures are permitted so long as they satisfy due process protections under the general obligations of the TRIPS Agreement.³⁸

In China, for example, design rights holders may record their design patents with the General Administration of Customs (GAC) database.³⁹ This database maintains design patent records for the term of the design patent and is accessible by all customs officials.⁴⁰ GAC can decide to seize potentially infringing goods at the Chinese border.⁴¹ Alternatively, a design patentee may also apply for detention of the infringing goods with GAC with evidence of the infringement at the place of entry or exit of the infringing goods.⁴²

Owners of Registered Community designs in the EU may also initiate customs seizures of infringing goods at the EU border.⁴³ Rights holders are required

to file an application to the national customs office of the Member States to add the design to the EU-wide information database named the Anti-Counterfeit and Piracy Information System (COPIS).⁴⁴ The offices across the EU are linked to COPIS and assist the national customs authorities with identifying infringing goods.⁴⁵ The importer/exporter has the opportunity to oppose seizure, and if done, forces the rights holder to initiate court proceedings to establish infringement.⁴⁶ If the importer/exporter does not oppose seizure, the goods are destroyed.⁴⁷

Predictions and Ramifications That May Alter Current Licensing Practices

The CGSA fits with the framework and provides consistency with trademark and copyright enforcement. Generally in the United States, CBP acts as a first pass at stopping infringing marks that are clear violations. For potentially infringing marks that are difficult to determine, CBP has the discretion not to seize the potentially infringing mark. For example, trademark parody cases may be difficult for CBP to determine alone and may be more suitable for the ITC before an Administrative Law Judge. Similarly, CBP could use its discretion to stop copycat products that clearly infringe design patents, while leaving the difficult determinations for the ITC if the rights holder chooses.

CBP officers could also access the authorized licensees of design patents, as they do currently for authorized licensees of trademarks and copyrights. When rights are recorded with CBP, the rights holder may provide a list of authorized licensees or other authorized users and importers of the relevant goods.⁴⁸ Under the CGSA, design patents could also be recorded with CBP, listing the authorized licensees and importers in connection to the respective design patent number. In practice, while this information is not always provided by rights holders, under the CGSA, it may become more important for legitimate importers of similar goods to understand this new potential enforcement venue.

Seizure of goods allegedly infringing a design patent should follow a similar process to goods allegedly violating trademarks and copyrights, as this complies with the due process obligation of Article 51 of TRIPS. For example, when CBP uses its discretion

to seize articles that potentially infringe a recorded copyright, notice is sent to that importer, who then has thirty days to file a denial of infringement.⁴⁹ If the importer of suspected infringing articles files a denial of infringement, CBP then sends a notice of the importer's denial to the copyright owner, who then has thirty days to file a demand for exclusion order with CBP.⁵⁰ If a seizure is improper, the copyright owner may be subject to paying damages to the importer.⁵¹ If a seizure is proper, the importer, however, may try to negotiate a license with the copyright holder before the infringing articles are forfeited and destroyed.⁵²

If the CGSA is adopted, it would give CBP another tool to seize goods, likely also increasing the risk to legitimate importers who sell similar "knock-off" goods. These legitimate importers may also want to consider securing a license from the rights holders so that they may also present the license to CBP officials in response to a seizure and notice to the importer.⁵³ In situations where a legitimate importer's goods have been seized, the importer may present the appropriate license to CBP for review under 19 U.S.C. § 1595(a)(c)(3) to suspend the seizure.

Conclusion

The CGSA comes at a time when trade tensions are high between the United States and China, setting the tone for this Bill before the Senate. In its Federal Register notice on December 21, 2018, CBP recognized the need to improve enforcement efforts to stay modern and address the challenges of the evolving trade landscape.⁵⁴ Because the CGSA is bipartisan legislation that protects American individuals and businesses and has public support from industry and associations, the bill is consistent with CBP's stated goals.

The burden of the proposed amendment is minimal, as CBP officials already train to enforce design patent exclusion orders from the ITC and to determine design patent infringement. This would be consistent with CBP's current enforcement of recorded trademarks and copyrights. Given the nature of the design patent infringement test, enforcing design patents is well within the capabilities of CBP officials. Finally, CBP would have the discretion to not seize potentially infringing goods, leaving design patent holders with the usual course of relief through the ITC for more difficult infringement determinations.

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