

# Bureau of Customs and Border Protection

## *General Notices*

**19 CFR 133**

**RIN 1505-AB51**

### **RECORDATION OF COPYRIGHTS AND ENFORCEMENT PROCEDURES TO PREVENT THE IMPORTATION OF PIRATIONAL ARTICLES**

**AGENCY:** Bureau of Customs and Border Protection, Department of Homeland Security.

**ACTION:** Proposed rule.

**SUMMARY:** As a result of technological advances available to those pirating copyrighted works, there has been a global increase in the importation of piratical works. Because of this increased risk to owners of protected copyrighted works and because most owners of copyrights in non-U.S. works do not register their copyrights as a matter of course, the Bureau of Customs and Border Protection (CBP) is proposing regulations that allow CBP to be more responsive to claims of piracy.

The CBP Regulations currently require that in order to be eligible for border protection all claims to copyright, foreign and domestic, be registered with the U.S. Copyright Office. This document proposes to allow sound recordings and motion pictures or similar audio-visual works to be recorded with CBP while pending registration with the U.S. Copyright Office. This document also proposes to amend the CBP Regulations to enhance the protection of all non-U.S. works by allowing recordation without requiring registration with the U.S. Copyright Office. Lastly, the proposed regulations set forth changes to CBP's enforcement procedures, including, among other things, enhanced disclosure provisions, protection for live musical performances and provisions to enforce the Digital Millennium Copyright Act.

**DATES:** Written comments must be submitted on or before November 4, 2004.

**ADDRESSES:** You may submit comments, identified by RIN 1505–AB51, by either of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Mail: Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW. (Mint Annex), Washington, DC 20229.

Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Paul Pizzeck, Esq. or George F. McCray, Esq., Intellectual Property Rights Branch, Office of Regulations and Rulings, 202–572–8710.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

Due to a global increase in piracy and an increased risk to owners of protected copyrighted works as a result of technological advances available to those pirating such works, the Bureau of Customs and Border Protection (CBP) is proposing regulations that allow CBP to be more responsive to claims of piracy. In this document, CBP is proposing changes designed to better facilitate the recordation process with CBP for certain works and to strengthen the enforcement procedures to protect those rights.

**Recordation of Protected Copyrighted Works**

CBP is proposing several changes to subpart D of part 133 of the CBP Regulations regarding the recordation process, as set forth below.

Protection of Sound Recordings and Motion Pictures or Similar Audio-Visual Works Pending Registration With the U.S. Copyright Office

Presently, the CBP Regulations provide that only those claims to copyright, foreign and domestic, which have been registered with the U.S. Copyright Office may be recorded with CBP. Subparts D and E of part 133, CBP Regulations (19 CFR part 133, subparts D and E) prohibit the importation of piratical works that have been properly registered and recorded. However, piratical copies of sound recordings and motion pictures or similar audio-visual works are often found in the market before the owner of a copyright in those works can effect registration of the copyright with the U.S. Copyright Office. Although the copyrightability of these types of works is rarely a substantive issue, because of the time lapse between the application

for registration and the granting of registration with the U.S. Copyright Office, significant imports of piratical articles can often occur before the copyright owner is able to secure registration with the U.S. Copyright Office.

For these types of works, it is during the periods of time prior to and immediately following the release of the work in which piracy is most likely to occur. As a result, pre-release copyright registration applications are generally avoided due to concerns about leaks arising from the sample copies submitted with the application which are made available to the public.

Securing border protection simultaneously with (or in some cases prior to) the commercial release of sound recordings and motion pictures or similar audio-visual works should help to prevent the importation into the U.S. of piratical goods. As a result, CBP is proposing to revise subparts D and E of part 133, CBP Regulations, in order to provide for border enforcement of U.S. copyrights for sound recordings and motion pictures or similar audio-visual works in which copyrightability is rarely a substantive issue, that are pending registration with the U.S. Copyright Office.

Concerning sound recordings and motion pictures or similar audio-visual works, CBP intends to accept a copy of a valid application for registration that has been filed with the U.S. Copyright Office as evidence of a copyrightable interest entitled to protection by CBP. The proposed regulations require that an applicant provide to CBP proof of registration with the U.S. Copyright Office no later than six months after the date of the application for recordation. If the applicant fails to provide proof of registration in a timely manner, CBP would cancel the related recordation. In addition, CBP proposes to reserve the right to cancel any recordation which it determines to have been obtained in any manner contrary to law. Permitting copyright owners of those certain categories of works, for which copyrightability is rarely a substantive issue, to make an initial recordation with CBP based on a filed, pending application for copyright registration rather than a perfected certificate of registration, will allow CBP to prevent the importation of piratical goods prior to the completion of the registration process.

Accordingly, in § 133.32 which covers the recordation procedure for protected copyrighted works, a new paragraph (b)(4) is proposed to include claims to copyright in sound recordings and motion pictures or similar audio-visual works which are not yet registered with the U.S. Copyright Office.

CBP notes that the above proposed change may result in an increased number of applications for recordation and, as each application is required to be accompanied by a \$190 fee, an increased administrative burden in the processing of an increased number of individual payments. In order to mitigate processing costs for business and government, we are considering allowing alternative fee ar-

rangements. For example, one annual payment may be made in lieu of individual application fees. The difference between the amount paid per recordation under the alternative arrangement and the standard single recordation fee (currently, \$190) would not exceed the difference in processing costs. We are particularly interested in any comments on the fairness, equity, and potential administrative efficiency of such arrangements under 31 USC 9701.

#### Non-U.S. Works Entitled to Border Enforcement Protection

Under the current regulations, in order to seek protection from the importation of piratical copies, non-U.S. claimants holding a copyright entitled to enforcement are required to provide CBP with a valid certificate of registration issued by the U.S. Copyright Office and to record such registration with CBP. However, because most countries do not have registration systems and most non-U.S. copyright claimants do not register their works in the U.S. as a matter of course, and at the same time, due to technological advances available for pirating such works, there is an overall global increase in piracy and increased risk to owners of protected copyrighted works originating from throughout the world. Accordingly, CBP believes that it would be appropriate for non-U.S. claimants holding copyrights in such works to be entitled to record their claims with CBP regardless of whether they have registered their copyrights with the U.S. Copyright Office at the time of recordation.

Accordingly, in § 133.31(a) covering protected copyrighted works eligible for recordation, new regulatory text is proposed to include, among other things, certain claims to copyright in non-U.S. works that have not been registered with the U.S. Copyright Office, but which are recognized under the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention).

#### Recordation Application Process

Based on the above described changes, CBP is also proposing to amend § 133.32 of the CBP Regulations (19 CFR 133.32) which outlines the procedure for recordation and the information required in all applications to record a copyright with CBP. To carry out CBP protection of claims to copyright in certain U.S. works pending registration with the U.S. Copyright Office and claims to copyright in non-U.S. works which are entitled to protection under 17 U.S.C. 104, new paragraphs (b)(3) and (4) are proposed to be added to expand § 133.32 to provide for such claims.

New paragraph (b)(3) would permit owners of claims to copyrights in non-U.S. works to apply for recordation with CBP for the enforcement of such claims, even if not registered with the U.S. Copyright Office. This new paragraph sets forth that non-U.S. works will be entitled to border enforcement protection when sufficient evidence of ownership of copyright in those works is provided to CBP through recordation with CBP. Sufficient evidence of ownership consists of a

written affidavit (in English), appropriately sworn to by a duly authorized party, validating the existence, ownership, and nature of the rights claimed.

New paragraph (b)(4) would allow owners of claims to copyrights in U.S. sound recordings and motion pictures or similar audio-visual works, for which copyrightability is rarely a substantive issue, and for which securing border protection on an immediate basis is essential for purposes of preventing the importation of piratical articles, to record these works with CBP when registration is pending with the U.S. Copyright Office. The filing of such a claim will require the submission to CBP of a copy of a valid registration application officially filed with the U.S. Copyright Office for the specific work. Claims for protection made pursuant to either provision ((b)(3) or (4)) will be subject to independent verification by CBP, which will maintain sole discretion as to whether to accept such claims for enforcement.

In addition, to further clarify and simplify the recordation process and reduce the burden on those applying for recordation of claims to copyright, CBP is proposing other changes to §§ 133.32 and 133.33 which would: (1) allow a “duly appointed representative” to record a claim to copyright for the copyright owner thereby eliminating the need for the copyright owner to personally file the application; (2) eliminate the requirement that an applicant supply four additional photocopies (or likenesses) of the protected copyrighted work with the application; (3) update the address to which completed applications are submitted; and (4) update the name of the agency to which fees are submitted for recordation of copyright to reflect the new name of the former U.S. Customs Service.

CBP is also proposing to require information regarding the citizenship of a copyright owner. Moreover, the current regulation requires that photographic or other likenesses be provided with an application for recordation in order to ensure that CBP has adequate information regarding a claim to copyright to enforce such rights. Works such as books, magazines, periodicals and sound recordings are exempted from this requirement. CBP is proposing to require that, as appropriate, either a sample, a digital image, or photograph of the protected work be submitted with the application to record the copyright. CBP is further proposing to require samples of sound recordings.

#### **Enforcing the Prohibition on the Importation of Piratical Articles**

CBP is proposing several changes to subpart E of part 133 of the CBP Regulations to achieve consistency with the above proposed changes concerning subpart D of part 133. The proposed changes, as set forth below, also serve to strengthen CBP’s ability to enforce the prohibition against the importation of piratical articles.

#### Definition of “Protected Copyrighted Works”

Section 133.42(a) currently provides that “Infringing copies or phonorecords are ‘piratical’ articles.” In order to more accurately and completely define “piratical articles,” CBP is proposing to revise paragraph (a) of § 133.42 to define “piratical articles” as those which constitute unlawful copies (made without the authorization of the copyright owner) or phonorecords of “protected copyrighted works.” The proposed amended language defines “protected copyrighted works” to encompass works registered with the U.S. Copyright Office and recorded with CBP, non-U.S. works which are entitled to protection under 17 U.S.C. 104 (including sound recordings and motion pictures or similar audio-visual works) for which relevant ownership information is recorded with CBP, and certain U.S. works pending registration with the U.S. Copyright Office that are duly recorded with CBP.

#### Disclosure to Copyright Owners Upon Infringement

CBP has determined that, in order to pursue all avenues of relief from copyright infringement, including seeking criminal prosecution of violators and pursuing private civil remedies for copyright infringement, an affected copyright owner must have access to certain information regarding parties attempting to import infringing piratical articles. In cases involving seizures of articles that circumvent copyright protection systems (technological measures) under the Digital Millennium Copyright Act (Pub. L. 105–304, 112 Stat. 2860, DMCA) (see Other Proposed Changes to the Regulations below), such information would be provided to the producers, or their duly authorized agents, of such copyright protection systems. Accordingly, CBP is proposing to amend its disclosure provisions regarding copyright violations in order to expand the information provided to copyright owners, or, in the case of articles seized pursuant to 19 CFR 133.42(c)(3) information provided to duly authorized agents of producers of copyright protection systems (technical measures), when merchandise violating their rights is seized at the border including information regarding articles seized for violation of the DMCA.

Currently § 133.42(d) provides that, when CBP seizes goods under that section, CBP will disclose to the owner of the copyright:

- (1) the date of importation;
- (2) the port of entry;
- (3) a description of the merchandise;
- (4) the quantity involved;
- (5) the name and address of the manufacturer;
- (6) the country of origin of the merchandise;
- (7) the name and address of the exporter; and
- (8) the name and address of the importer.

CBP is proposing to amend § 133.42(d) to provide that, in addition to the information above, when CBP seizes goods under that section, CBP will also disclose to the copyright owner or, for merchandise

seized pursuant to § 133.42(c)(3), to the producer of the copyright protection system: (9) information from available shipping documents (such as manifests, air waybills, and bills of lading), including mode or method of shipping (such as airline carrier and flight number) and the intended final destination of the merchandise.

#### Procedures on the Suspicion of Piratical Copies

Section 133.43 contains the current procedures to be employed when CBP suspects that certain articles may be piratical articles. The current § 133.43 provides for: (1) notice of detention of suspected articles to an importer and to a copyright owner, including the disclosure of certain information; (2) the disclosure of samples of suspected articles to the copyright owner; (3) the release of the goods in the case of inaction by the copyright owner, and in cases where the copyright owner makes a written demand for the exclusion of the suspected articles, a bonding requirement and exchange of briefs process; and (4) alternative procedures to the administrative process (court action). In general, the current regulations provide that upon notification by a port director that CBP has reason to believe that an imported article may be a piratical copy or phonorecord of a copyrighted work, the copyright owner may file a written demand for exclusion of the suspected infringing copies. Additional evidence, legal briefs, and other pertinent material to substantiate a claim or denial of piracy are then exchanged between the parties and eventually submitted to CBP for administrative review.

CBP believes that the existing procedures contained in § 133.43 are an outdated and inefficient mechanism to address the situation where CBP has a suspicion that certain goods may be piratical. These provisions are rarely used and unduly burdensome on CBP and all other parties involved. Essentially, these procedures interfere with CBP's ability to conduct the required investigation in a timely and efficient manner. Moreover, the process inhibits CBP from applying its expertise in an expedient manner to determine whether or not merchandise is piratical. Most importantly, these procedures are ineffective in aiding CBP in resolving the issue of whether certain merchandise is indeed piratical.

Likewise, § 133.44 outlines the actions to be taken when a claim of piracy under § 133.43 is sustained or denied.

Accordingly, CBP is proposing to remove § 133.43 and § 133.44 in their entirety. Instead, CBP is proposing regulations allowing CBP to detain merchandise when CBP has reasonable suspicion to believe that the merchandise is piratical and to seize merchandise that it determines to be piratical. In addition, the proposed regulations would facilitate the exchange of information between the copyright owners and CBP in order to assist CBP in making this determination.

### Detention of Sound Recordings and Motion Pictures or Similar Audio Visual Works

CBP is proposing to add regulatory text in a newly created paragraph (b)(2) to § 133.42 that specifies CBP's power to detain articles that appear to be piratical copies of sound recordings, motion pictures, or similar audio-visual works to conduct further investigation. Accordingly, paragraph (b)(2) in § 133.42 proposes to allow CBP to detain, for up to 30 days, sound recordings and motion pictures or similar audio-visual works prior to registration with the U.S. Copyright Office when CBP has reasonable suspicion to believe that they constitute piratical copies even though there is no underlying copyright registration or recordation on file with CBP. Reasonable suspicion that certain articles are piratical may be based upon factors such as poor product quality, substandard packaging, irregular invoicing, methods of shipment, or other indicia of piracy.

### Waiver of Bond Requirement for Samples Less Than \$50.00

Section 133.42(e) of the CBP Regulations (19 CFR 133.42(e)) allows CBP to provide a sample of suspect merchandise to the owner of the copyright. The copyright owner seeking to obtain a sample is required to furnish a bond to CBP. CBP is proposing to allow port directors, at their discretion, to waive the bond requirement where the value of the sample is less than \$50.00.

## **Other Proposed Changes to the Regulations**

### Adding DMCA Violations to Enforcement Provisions of Subpart E

In 1998, Congress enacted the DMCA. Among other things, the DMCA prohibits the circumvention of technological measures used by copyright owners to protect their works. A technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

Although the current CBP Regulations do not specifically provide for detention and seizure of articles that constitute violations of the DMCA, CBP has implemented the DMCA by providing CBP personnel with internal enforcement guidelines and advice on how to enforce DMCA violations. Where CBP finds that certain devices violate the DMCA, the goods are subject to seizure and forfeiture under 19 U.S.C. 1595a(c)(2)(C) for a violation of the DMCA (17 U.S.C. 1201(b)(1)).

Accordingly, CBP is proposing to include provisions for the detention and seizure of articles that constitute violations under the DMCA to the enforcement provisions of subpart E. Specifically, CBP is proposing to add paragraph (b)(3) to § 133.42 to provide for the detention of articles that CBP reasonably believes constitute violations of 17 U.S.C. 1201(b)(1). Such detentions will be limited to 30

days in duration. In the event that the Intellectual Property Rights (IPR) Branch within CBP's Office of Regulations & Rulings determines that such detained articles violate 17 U.S.C. 1201(b)(1), CBP will then seize them and institute forfeiture proceedings in accordance with part 162 of chapter I of the CBP Regulations. Articles determined by the IPR Branch not to violate 17 U.S.C. 1201(b)(1), will be released.

CBP is also proposing to add paragraph (c)(3) to § 133.42 to provide for the seizure of articles that the IPR Branch determines to violate 17 U.S.C. 1201(b)(1). Importers may petition for relief from the seizure and forfeiture under the provisions of part 171 of chapter I. Articles that have been seized and forfeited to the U.S. Government under part 133 will be disposed of in accordance with § 133.52(b).

#### Adding Recordings of Live Musical Performances in Violation of 18 U.S.C. 2319A to Enforcement Provisions of Subpart E

Section 2319A of title 18 (18 U.S.C. 2319A) states that copies of live musical performance that are "fixed" outside of the U.S. without the consent of the performer or performers involved are subject to seizure and forfeiture in the same manner as property imported in violation of the customs laws. Although CBP has had enforcement guidelines in place for several years, CBP has not promulgated regulations implementing section 2319A.

Accordingly, CBP is proposing to add, at § 133.52(c)(2)(iii), recordings of live musical performances determined by CBP to be in violation of 18 U.S.C. 2319A to the types of sound recordings subject to seizure.

### **COMMENTS**

Before adopting this proposed regulation as a final rule, consideration will be given to any written comments timely submitted to CBP, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552) and § 103.11(b), CBP Regulations (19 CFR 103.11(b)), on normal business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 799 9th Street, NW., 5th Floor, Washington, DC. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572-8768.

### **EXECUTIVE ORDER 12866**

This document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

### **REGULATORY FLEXIBILITY ACT**

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that these proposed amendments will not have a significant economic impact on a substantial number of small entities. The regulatory amendments reflect, implement, or clarify existing statutory and regulatory requirements created to protect the rights of legitimate copyright owners. Accordingly, the amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

### **SIGNING AUTHORITY**

The authority to approve regulations concerning copyright enforcement, was retained by the Secretary of the Treasury. The signing authority for these amendments, therefore, falls under § 0.1(a)(1), CBP Regulations (19 CFR 0.1(a)(1)). Accordingly, this document is signed by the Secretary of Homeland Security (or his or her delegate) and the Secretary of the Treasury (or his or her delegate).

### **PAPERWORK REDUCTION ACT**

The collection of information in this document is contained in § 133.32(b) of title 19 (19 CFR 133.32(b)). Under § 133.32(b), the information would be required and used to record copyrights with CBP for border enforcement protection of copyrights. The collection of this information would ensure that CBP has adequate information regarding a claim to copyright in order to protect the copyright owner's rights.

The collection of information encompassed within this proposed rule has been submitted to the Office of Management and Budget (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

*Estimated annual reporting and/or recordkeeping burden:* 4,000 hours.

*Estimated average annual burden per respondent/recordkeeper:* 2 hours.

*Estimated number of respondents and/or recordkeepers:* 2,000.

*Estimated annual frequency of responses:* 1.

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer of the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, NW.

(Mint Annex), Washington, DC 20229. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

Comments are invited on: (a) whether the collection is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or startup costs and costs of operations, maintenance, and purchases of services to provides information.

Part 178, CBP Regulations (19 CFR part 178), containing the list of approved information collections, would be revised to add an appropriate reference to 133.32(b), upon adoption of the proposal as a final rule.

### **LIST OF SUBJECTS IN 19 CFR PART 133**

Copying or simulating trademarks, Copyrights, Counterfeit trademarks, Customs duties and inspection, Detentions, Fees assessment, Imports, Labeling, Penalties, Piratical articles, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Seizures and forfeitures, Trademarks.

### **PROPOSED AMENDMENTS TO THE REGULATIONS**

It is proposed to amend part 133 of the Customs and Border Protection Regulations (19 CFR part 133), as discussed above and set forth below. For the reasons stated in the preamble, part 133 of the CBP Regulations (19 CFR part 133) is proposed to be amended to read as follows:

#### **PART 133 – TRADEMARKS, TRADE NAMES, AND COPYRIGHTS**

1. The general authority citation for part 133 and the specific citation for § 133.42 is revised to read as follows:

**AUTHORITY:** 15 U.S.C. 1124, 1125; 17 U.S.C. 101, 106, 501, 601, 602, 603; 19 U.S.C. 66, 1499, 1595a, 1526, 1624; 31 U.S.C. 9701.

\* \* \* \* \*

Section 133.42 also issued under 17 U.S.C. 1201(b), 18 U.S.C. 2319A.

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2. The heading to subpart D is revised to read as follows:

**Subpart D – Recordation of Protected Copyrighted Works**

3. Section 133.31 is revised to read as follows:

**§ 133.31 Recordation of protected copyrighted works.**

(a) Eligible works. The following works, collectively referred to in this part as “protected copyrighted works”, when properly recorded with the Bureau of Customs and Border Protection (CBP) in accordance with the provisions of § 133.32, are eligible for border enforcement by CBP in accordance with the provisions of § 133.42:

(1) Non-expired claims to copyright in U.S. works which are registered with the U.S. Copyright Office and recorded with CBP;

(2) Claims to copyright in non-U.S. works entitled to protection under 17 U.S.C. 104 which are recorded with CBP; and

(3) Claims to copyright in sound recordings and motion pictures or similar audio-visual works eligible for recordation under the provisions of § 133.32.

(b) Persons eligible to record. The owner of a copyright registered with the U.S. Copyright Office, including any person who has acquired copyright ownership through an exclusive license, assignment, or otherwise, who has registered that ownership interest with the U.S. Copyright Office, or their duly appointed representative may file an application to record that registered copyright. In addition, claimants to copyright in non-US works protected under 17 U.S.C. 104 and claimants to copyright in sound recordings and motion pictures or similar audio-visual works may also file an alternative application to record such claims in accordance with the provisions of § 133.32 of this subpart. The term “copyright owner,” with respect to any of the exclusive rights comprised in a copyright (see 17 U.S.C. 106), refers to the owner of a particular right protected under title 17.

(c) Notice of recordation and other action. Applicants will be notified of the approval or denial of an application filed in accordance with § 133.32 upon completion of review.

4. Section 133.32 is revised to read as follows:

**§ 133.32 Procedure for recording protected copyrighted works.**

(a) Address. Applications to record protected copyrighted works under this section must be submitted in writing, addressed to the Intellectual Property Rights Branch, Office of Regulations and Rulings, Bureau of Customs and Border Protection, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

(b) Contents; format.

(1) All recordation applications must include the following information (an electronic copyright recordation template can be found at the CBP website ([www.cbp.gov](http://www.cbp.gov))):

(i) The name, complete business address, and citizenship of the copyright owner (or owners) or claimants to copyright for pro-

tected works (if a partnership, the citizenship of each partner; if an association or corporation, the state, country, or other political jurisdiction within which it was organized, incorporated, or created);

(ii) A complete description of the rights asserted which adequately identifies the work including, as appropriate, either: a sample of the article(s) containing the claimed protected work; a digital image of same; or a photograph of same reproduced on paper no larger than 8 1/2" × 11" in size (an application will be excepted from this requirement if the subject matter is a work such as a book, magazine, periodical, or similar copyrighted matter readily identifiable by title and author);

(iii) The foreign title of the work, if different from the U.S. title;

(iv) In the case of copyright in a sound recording, a statement setting forth the name(s) of the performing artist(s), and any other information identifying the content thereof appearing on the reproduction surface of the sound recording, or its label or container; and

(v) The place(s) of manufacture of genuine copyrighted articles and the identity of the manufacturer(s).

(2) For claims to copyright in U.S. works which have been registered with the U.S. Copyright Office, recordation applications must also contain an additional certificate of registration issued by the U.S. Copyright Office. Where the name of the applicant differs from the name of the copyright owner identified in the registration certificate issued by the U.S. Copyright Office, the application must be accompanied by a certified copy of any assignment, exclusive license, or other document showing that the applicant has acquired an ownership interest in the copyright.

(3) For claims to copyright in non-U.S. works, including sound recordings and motion pictures or similar audio-visual works, entitled to protection under 17 U.S.C. 104, recordation applications must also contain a written affidavit (in English), appropriately sworn to by a duly authorized party, validating the existence, ownership, and nature of the rights claimed. Claims for protection made under this provision are subject to independent verification by CBP, which maintains sole discretion as to whether to accept such claims for enforcement. CBP may require additional information where the written affidavit fails to provide sufficient clarity as to the nature or ownership of the work for which enforcement is being sought.

(4) For claims to copyright in U.S. sound recordings and motion pictures or similar audio-visual works pending registration with the U.S. Copyright Office, recordation applications must also contain a copy of a valid registration application with respect to the work and acceptable proof that such has been officially filed with the U.S. Copyright Office. Claims for protection made under this section are subject to independent verification by CBP, which maintains sole discretion as to whether to accept such claims for enforcement. CBP

may require additional information where the copy of the registration application provided fails to provide sufficient clarity as to the nature or ownership of the work for which enforcement is being sought. The applicant must provide proof of registration with the U.S. Copyright Office no later than six months after the date of the application for recordation. Such proof will consist of an "additional certificate of registration" (see 17 U.S.C. 706.) issued by the U.S. Copyright Office. In the event that the applicant fails to provide CBP with proof that a registration has been issued by the U.S. Copyright Office, CBP will cancel the related recordation. Where the name of the applicant for CBP recordation differs from the name of the copyright owner identified in the registration application filed with the U.S. Copyright Office, the application for recordation must be accompanied by a certified copy of any assignment, exclusive license, or other document showing that the party applying for recordation has acquired an ownership interest in the copyright.

(c) CBP reserves the right to cancel any recordation which it determines has been obtained in any manner contrary to law.

(d) Fee. Applications to record protected copyrighted works with CBP must be accompanied by a fee of \$190 in the form of a check or money order made payable to the Bureau of Customs and Border Protection for each claim to copyright to be recorded. In order to reduce processing costs for business and government, CBP may enter into alternative fee arrangements with persons, companies, agents, or associations. Such alternative fee structures will be subject to review on a periodic basis to ensure fairness, equity, and administrative efficiency. Fees in any such alternative structure will reflect costs for services provided in processing the applications for recordation, including data input, tracking of amounts paid, review for sufficiency, interface with field officers (principally, maintenance of intranet and internet databases for field and trade use), record maintenance, and any correspondence and associated administrative costs regarding filing, issue resolution, and recordation. Any recordation under such an alternative arrangement will remain in effect for twenty years or until the copyright ownership expires. Any lump sum fee arrangement will be valid only for renewable annual periods. No such alternative arrangement will become effective until published in the **Federal Register** by DHS/CBP, with Treasury concurrence. The difference in the per recordation rate under the alternative arrangement and the standard single recordation fee should not exceed the difference in processing costs. If the difference in the per recordation rate under the alternative arrangement and the standard single recordation fee exceeds the difference in processing costs, the alternative arrangement fees in the following year will be adjusted to compensate for that difference.

5. Section 133.33 is removed and reserved.

6. The heading to subpart E is revised to read as follows:

**Subpart E – Enforcement of the Prohibition on Importation of Infringing Copies or Phonorecords**

7. Section 133.42 is revised to read as follows:

**§ 133.42 Piratical articles; Unlawful copies or phonorecords of protected copyrighted works.**

(a) Definition. “Piratical articles” are those which are unlawfully made (without the authorization of the copyright owner) copies or phonorecords of protected copyrighted works. “Protected copyrighted works” for these purposes refers to works falling into any of the following categories:

(1) U.S. works registered with the U.S. Copyright Office and duly recorded with CBP pursuant to § 133.32;

(2) Non-U.S. works that are protected under 17 U.S.C. 104 (including sound recordings and motion pictures or similar audio-visual works) and where relevant ownership information is recorded with CPB pursuant to § 133.32;

(3) U.S. sound recordings and motion pictures or similar audio-visual works which have been duly recorded with CBP pursuant to § 133.32.

(b) Detention.

(1) Detention of suspected piratical articles (other than sound recordings and motion pictures or similar audio-visual works) that are recorded with CBP. Imported articles appearing to be piratical copies of protected copyrighted works, other than sound recordings and motion pictures or similar audio-visual works, for which a claim to copyright has previously been recorded with CBP pursuant to § 133.32, may be detained for a period not to exceed 30 days, if CBP has reasonable suspicion to believe that they constitute piratical copies. Upon determination by the IPR Branch, CBP Office of Regulations & Rulings, that such detained articles constitute piratical copies, CBP will seize them and institute forfeiture proceedings in accordance with part 162 of this chapter. Articles that are not determined by the IPR Branch within 30 days to be piratical copies will be released.

(2) Detention of suspected piratical sound recordings and motion pictures or similar audio-visual works. Imported articles consisting of sound recordings and motion pictures or similar audio-visual works may be detained for a period not to exceed 30 days if CBP has reasonable suspicion to believe that they constitute piratical copies. Where the genuine works or sound recordings are not recorded with CBP at the time of detention of suspected piratical copies, recordation must take place no later than 30 days after the date on which the suspect articles were detained. Upon determination by CBP that such detained articles constitute piratical copies, CBP will seize them and institute forfeiture proceedings in accordance with part 162 of this chapter, provided that the copyright has been recorded with CBP pursuant to § 133.32. Articles not recorded with

CBP within 30 days or articles which are not determined by CBP to be piratical copies will be released.

(3) Detention of articles suspected of constituting violations of the Digital Millennium Copyright Act (17 U.S.C. 1201(b)(1)). Imported articles appearing to constitute violations of 17 U.S.C. 1201(b)(1) may be detained for a period not to exceed 30 days if CBP reasonably believes that such articles are primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner; have only limited commercially significant purpose or use other than to circumvent such protection; or are marketed by the importer or trafficker, or another acting in concert with the importer or trafficker, for use in circumventing such protection. Upon determination by the IPR Branch, CBP Office of Regulations & Rulings, that such detained articles constitute violations of 17 U.S.C. 1201(b)(1) CBP will seize them and institute forfeiture proceedings in accordance with part 162 of this chapter. Articles that are not determined by the IPR Branch to constitute violations of 17 U.S.C. 1201(b)(1) will be released.

(c) Seizure and forfeiture. Articles which have been seized and forfeited to the U.S. Government will be disposed of in accordance with § 133.52 of this part, subject to the importer's right to petition for relief from the seizure and forfeiture under the provisions of part 171 of this chapter.

(1) Seizure of copies of articles (other than sound recordings and motion pictures or similar audio-visual works).

(i) Imported articles which, at the time of presentment to CBP, clearly constitute piratical copies of protected copyrighted works other than sound recordings and audio-visual works, for which a claim to copyright has previously been recorded with CBP pursuant to § 133.32 are subject to immediate seizure. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(ii) Imported articles detained pursuant to § 133.42(b)(1) that are determined by CBP to constitute piratical copies are subject to seizure. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(2) Seizure of sound recordings and motion pictures or similar audio-visual works.

(i) Imported articles which, at the time of presentment to CBP, clearly constitute piratical copies or phonorecords of protected copyrighted works, for which a claim to copyright has previously been recorded with CBP pursuant to § 133.32 are subject to immediate seizure. After seizure, piratical goods are subject to forfeiture

proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(ii) Imported articles which have been detained pursuant to § 133.42(b)(2), for which a claim to copyright has been recorded with CBP within 30 days after the date on which the suspect articles were detained, that are determined by CBP to constitute piratical copies are subject to seizure. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(iii) Recordings of live musical performances determined by CBP to be in violation of 18 U.S.C. 2319A will be subject to seizure regardless of the recordation of any right with CBP. After seizure, piratical goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(3) Seizure of articles determined by CBP to constitute violations of the Digital Millennium Copyright Act (17 U.S.C. 1201(b)(1)). Imported articles determined by the IPR Branch, CBP Office of Regulations & Rulings to constitute violations of 17 U.S.C. 1201(b)(1) are subject to seizure regardless of the recordation of any right with CBP. After seizure, such goods are subject to forfeiture proceedings in accordance with part 162 of this chapter. CBP will notify the importer of the seizure in accordance with part 162 of this chapter.

(d) Disclosure. When merchandise is seized under this section, CBP will disclose to the owner of the protected copyrighted work (in the case of copyright piracy) or the producer, or duly authorized agent thereof, of circumvented copyright protection systems (in seizures effected for DMCA violations), the following information, if available, within 30 days, excluding weekends and holidays, of the date of the notice of seizure:

- (1) The date of importation;
- (2) The port of entry;
- (3) A description of the merchandise;
- (4) The quantity involved;
- (5) The name and address of the manufacturer;
- (6) The country of origin of the merchandise, if known;
- (7) The name and address of the exporter;
- (8) The name and address of the importer; and

(9) Information from available shipping documents (such as manifests, air waybills, and bills of lading), including mode or method of shipping (such as airline carrier and flight number) and the intended final destination of the merchandise.

(e) Samples available to the copyright owner. At any time following detention or seizure of the merchandise, CBP may provide a

sample of the suspect merchandise to the owner of the protected work for examination, testing, or any other use in pursuit of a related private civil remedy for copyright infringement. To obtain a sample under this section, the owner of the protected work must furnish to CBP a bond in the form and amount specified by the port director at the port of importation, conditioned to hold the U.S., its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by CBP to the copyright owner. This requirement may be waived at the discretion of the port director where the value of the sample is less than \$50.00. CBP may demand the return of the sample at any time. The owner of the protected work must return the sample to CBP upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for copyright infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the owner of the protected work, the owner of the protected work must, in lieu of return of the sample, certify to CBP that: "The sample described as [insert description] provided by CBP pursuant to § 133.42(e) of the CBP Regulations was (damaged/destroyed/lost) during examination, testing, or other use."

(f) Parallel Imports. Copies or phonorecords made lawfully and imported into the U.S. without the consent of the owner of the protected copyrighted work, are not subject to detention, seizure, or forfeiture by CBP.

8. Section 133.43 is removed and reserved.
9. Section 133.44 is removed and reserved.
10. Section 133.46 is revised to read as follows:

**§ 133.46 Demand for redelivery of released articles.**

If CBP determines that articles which have been released from CBP custody are subject to the prohibitions or restrictions of this subpart, the appropriate field officer will promptly make demand for redelivery of the articles pursuant to § 141.113 of this chapter, under the terms of the bond on CBP Form 301, containing the bond conditions set forth in § 113.62 of this chapter. If the articles are not redelivered to CBP custody, a claim for liquidated damages may be made in accordance with § 141.113(h) of this chapter.

ROBERT C. BONNER,  
*Commissioner of Customs and Border Protection.*

Approved: September 30, 2004

TIMOTHY E. SKUD,  
*Deputy Assistant Secretary of the Treasury*

[Published in the Federal Register, October 5, 2004 (69 FR 59562)]

**PROPOSED COLLECTION; COMMENT REQUEST****Canadian Border Boat Landing Permit**

**ACTION:** Notice and request for comments.

**SUMMARY:** As part of its continuing effort to reduce paperwork and respondent burden, Bureau of Customs and Border Protection (CBP) invites the general public and other Federal agencies to comment on an information collection requirement concerning the Canadian Border Boat Landing Permit. This request for comment is being made pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)).

**DATES:** Written comments should be received on or before December 6, 2004, to be assured of consideration.

**ADDRESS:** Direct all written comments to Bureau of Customs and Border Protection, Information Services Group, Room 3.2.C, 1300 Pennsylvania Avenue, NW, Washington, D.C. 20229.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional information should be directed to Bureau of Customs and Border Protection, Attn.: Tracey Denning, Room 3.2.C, 1300 Pennsylvania Avenue NW, Washington, D.C. 20229, Tel. (202) 927-1429.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (Public Law 104-13; 44 U.S.C. 3505(c)(2)). The comments should address: (1) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimates of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden including the use of automated collection techniques or the use of other forms of information technology; and (e) estimates of capital or start-up costs and costs of operations, maintenance, and purchase of services to provide information. The comments that are submitted will be summarized and included in the CBP request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this document CBP is soliciting comments concerning the following information collection:

**Title:** Canadian Border Boat Landing Permit

**OMB Number:** 1651-0108

**Form Number:** Form I-68

**Abstract:** This collection involves information from individuals who desire to enter the United States from Canada in a small pleasure craft.

**Current Actions:** This is an extension of a currently approved information collection.

**Affected Public:** Individuals or Households

**Estimated Number of Respondents:** 68,000

**Estimated Time Per Respondent:** 10 minutes

**Estimated Total Annual Burden Hours:** 11,288

Dated: October 8, 2004

TRACEY DENNING,  
*Agency Clearance Officer,*  
*Information Services Group.*

[Published in the Federal Register, October 5, 2004 (69 FR 59605)]

DEPARTMENT OF HOMELAND SECURITY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS.

*Washington, DC, October 6, 2004,*

The following documents of the Bureau of Customs and Border Protection (“CBP”), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Sandra L. Bell for MICHAEL T. SCHMITZ,  
*Assistant Commissioner,  
Office of Regulations and Rulings.*

**REVOCATION OF A RULING LETTER AND REVOCATION  
OF TREATMENT RELATING TO THE COUNTRY OF  
ORIGIN MARKING OF FLAT FLEXIBLE MAGNETS**

**AGENCY:** Bureau of Customs and Border Protection; Department of Homeland Security.

**ACTION:** Notice of revocation of a country of origin marking ruling letter and revocation of treatment relating to the country of origin marking of flat flexible magnets.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), this notice advises interested parties that Customs and Border Protection (CBP) is revoking one ruling letter relating to the country of origin marking of flat flexible magnets. Similarly, CBP is revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed revocation was published in the *Customs Bulletin* on February 18, 2004, Vol. 38, No. 8. Seven comments were received.

**EFFECTIVE DATE:** This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after December 19, 2004.

**FOR FURTHER INFORMATION CONTACT:** Shari Suzuki, Special Classification and Marking Branch: (202) 572-8818.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter “Title VI”), became effective.

Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are “**informed compliance**” and “**shared responsibility**.” These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community’s responsibilities and rights under the Customs and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice proposing to revoke Headquarters Ruling Letter (HQ) 562537, dated December 12, 2002, was published on February 18, 2004, in Vol. 38, No. 8, of the *Customs Bulletin*.

As stated in the notice of proposed revocation, this revocation covers any rulings on this merchandise which may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. Any party who has received an interpretive ruling or decision (*i.e.*, a ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised CBP during the notice period that closed on March 19, 2004.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by CBP to substantially identical transactions. This treatment may, among other reasons, be the result of the importer’s reliance on a ruling issued to a third party, CBP personnel applying a ruling of a third party to importations of the same or similar merchandise or the importer’s or CBP’s previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should have advised CBP during the notice period. An importer’s failure to advise CBP of substantially identical merchandise or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 562537, CBP ruled that imported sheets and rolls of “magnetized rubber material” were substantially transformed into new

and different articles of U.S. origin when further processed in the U.S. by cutting and printing operations. CBP believed that the sheeting was not a finished object but rather a raw material with a variety of potential applications. After reviewing the ruling, additional information and comments received in response to the notice of proposed revocation, CBP has determined that the cited ruling is in error as it pertains to the country of origin marking. The imported flat flexible magnet material in sheets and rolls are not raw materials with a wide variety of uses. The use of the flat flexible magnet is pre-determined by the character of the imported flat flexible magnetic sheeting. The application of printed advertising material to the surface of the imported magnetic sheeting does not change the character or use of the flat flexible magnetic sheeting. The imported article already has its final character and is dedicated to its specific use as a magnet at the time of import and the operations performed in the United States are merely finishing operations which do not confer origin. Accordingly, the articles must be properly marked to indicate the country of origin to the ultimate purchaser.

Pursuant to 19 U.S.C. 1625(c)(1), CBP is revoking HQ 562537 and any other ruling not specifically identified, to reflect the proper country of origin marking pursuant to the analysis set forth in HQ 562803, set forth as Attachment A to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical merchandise.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective sixty (60) days after its publication in the *Customs Bulletin*.

**DATED:** September 30, 2004

Monika R. Brenner for MYLES B. HARMON,  
*Director;*  
*Commercial Rulings Division.*

Attachment

DEPARTMENT OF HOMELAND SECURITY,  
BUREAU OF CUSTOMS AND BORDER PROTECTION,  
HQ 562803  
September 30, 2004  
MAR-05 RR:CR:SM 562803 SS  
CATEGORY: Marking

WILLIAM A. ZEITLER, ESQ.  
SULLIVAN & WORCESTER  
1666 K Street NW  
Washington DC 20006

RE: Revocation of HQ 562537 (December 12, 2002); Country of origin marking requirements applicable to flexible magnets manufactured in the U.S. from imported flat flexible magnet material in sheets and rolls

DEAR MR. ZEITLER:

This is in reference to Headquarters Ruling Letter (“HQ”) 562537, issued to you on behalf of Magnet LLC on December 12, 2002, regarding the country of origin marking requirements applicable to flexible magnets.

In HQ 562537, Customs found that imported sheets and rolls of “magnetized rubber material” were substantially transformed into new and different articles of U.S. origin when further processed in the U.S. by cutting and printing operations.

We have had an opportunity to review the previous ruling and additional information and now believe the ruling to be incorrect for the reasons explained below. This ruling also provides the correct marking determination for the flexible magnets.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of HQ 562537, as described below, was published in the Customs Bulletin, Volume 38, No. 8, on February 18, 2004. CBP received seven comments. Six comments supported the proposed revocation. One comment opposed the proposed revocation. We note that we also met with counsel and representatives of Magnet LLC on August 19, 2004.

FACTS:

The flexible magnets were described in HQ 562537 as follows:

We are informed that Magnet LLC is a U.S. producer and importer of promotional products such as key chains, flat flexible magnets, pens, and desk accessories. You indicate that Magnet LLC plans to import flat sheets and/or rolls of magnetized rubber material from China into the U.S. for further processing into flexible magnets. The finished magnets will be custom-made to the specifications of its customers to advertise and display specific customer products, services, trademarks, trade names and logos.

Subsequent to importation into the U.S., the flat sheets/rolls of magnetized rubber material are subject to a variety of processing operations that include designing, cutting, shaping, silk screening and printing, which result in the creation of promotional magnets.

The flat flexible magnets, whether or not in sheet or roll form, are thermo-plastic bonded, permanent ferrite magnets with a multi-pole magnetic arrangement designed to grip metallic surfaces. Flat flexible magnets are magnetic materials that are consolidated in polymeric binders by blending and then formed by calendaring.

Flat flexible magnets are made by a process that begins with ferric oxide and yields sheets or rolls of flexible magnets. The manufacturing process begins with the preparation of strontium ferrite by milling iron oxide and strontium carbonate to desired particle size and combining the milled ingredients. This slurry is fired in kilns to produce strontium ferrite.

The strontium ferrite is ground to a prescribed uniform particle size to create a fine magnetic ferrite powder. The precise composition and quality of the powder is one determinant of the uniformity and strength of a flexible magnet. The powder is combined with a binder of rubber, plastic and/or other components into a blended material of uniform composition. The composition of the binder affects the magnet's ultimate attractive power, mechanical characteristics, compatibility with adhesives, resistance to chemical attack and ability to meet child safety requirements. The binder utilized in the instant flat flexible magnets is suitable for magnets used in advertising applications.

After blending, the resulting magnetic material is ground into a particulate. The magnetic particulate is fed into a calendar where it is pressed between two large steel rolls in a heated, temperature-controlled environment, so as to produce a magnetic sheeting of uniform thickness and surface finish. The flat flexible magnet material is wound up on a roll as it exits the calendar. The operating conditions of the calendar are significant determinants of the quality and functionality of the flat magnet produced. The roll of flat flexible magnet material is taken from the calendar to a line where it is magnetized by passing it through magnetic rolls that orient the ferrite particles in the magnet.

At the conclusion of these processes, the finished product is flat flexible magnet material in sheets or rolls. Its magnetic properties are set and the product will adhere to metal objects. The sheets or rolls can be cut into smaller shapes or used in sheet form (for example, advertising applied to the side of a commercial motor vehicle). The flat flexible magnet material can be printed and laminated.

#### ISSUE:

Whether the flat flexible magnet material imported in rolls or sheets are substantially transformed by printing and cutting operations performed in the United States?

#### LAW & ANALYSIS :

Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), provides that, unless excepted, every article of foreign origin imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit, in such a manner as to indicate to the ultimate purchaser in the United States the English name of the country of origin of the article. Congressional intent in enacting 19 U.S.C. 1304 was "that the ultimate purchaser should be able to know by an inspection of the marking on the imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing

where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will." *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 (1940).

Part 134, Customs Regulations (19 CFR Part 134), implements the requirements and exceptions of 19 U.S.C. 1304. "Country of origin" is defined in 19 C.F.R. 134.1(b) as follows:

"Country of origin" means the country of manufacture, production or growth of any article of foreign origin entering the United States. Further work or material added to an article in another country must effect a substantial transformation in order to render such other country the "country of origin" within the meaning of this part.

As stated in HQ 562537, a substantial transformation occurs "when an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing." The question in this case is whether the flat flexible magnet material imported in rolls or sheets is substantially transformed by the printing and cutting operations that occur in the United States.

In HQ 562537, the ruling that is being revoked, we stated that the sheets or rolls of flat flexible magnet material were substantially transformed because we believed that the sheeting was not a finished object but rather a raw material with a variety of potential applications. We indicated that the sheeting possessed little or nothing in its character to indicate its ultimate shape or use. We also indicated that the flat flexible magnets' essential character as promotional material was permanently determined only after the U.S. processing.

However, we now find that the imported flat flexible magnet material in sheets or rolls is not a raw material with a wide variety of uses. The composition and manufacturing process create a specific type of magnet differentiated from other types of magnets. The selection of the magnetic ferrite powder and binders serve to pre-determine the performance characteristics and applications of the resulting magnet. Thus, the use of the flat flexible magnet is pre-determined by the character of the imported flat flexible magnet sheeting.

You contend that Customs erroneously concludes that the rolls or sheets of flat flexible magnet material are finished products. In the notice of proposed revocation, Customs did not find that the rolls or sheets were finished products, but rather that they were not raw materials with a wide variety of uses. While we agree that the rolls and sheets must be further processed to be used as promotional magnets, the imported sheets or rolls have been processed to the point where their future use is determined. You argue that flat flexible magnets have a variety of applications such as point of purchase displays, visual aids, retail signage, bin markers, menus and message boards. However, flat flexible magnets are used in all these applications because they are magnetic and can be applied and removed repeatedly without damage to the articles on which they are placed and because they have a flat surface on which information or designs can be displayed.

The ruling that is being revoked cited to rulings which support the view that cutting or shaping materials to defined shapes or patterns suitable for use in making finished articles, as opposed to mere cutting to length or width which does not render the article suitable for a particular use, constitutes a substantial transformation. The rationale was that prior to the cut-

ting or shaping operations, the imported material was a raw material which possessed nothing in its character which indicated anything regarding its final use. However, we now find those rulings to be inapplicable.

In each of the cited rulings, the imported material was a raw, multi-use material which was not dedicated to a particular use. Multiple and substantial manufacturing operations were carried out on the material. The manufacturing operations not only changed the form or shape of the material into a newly recognizable product but also changed the material's character. The finished items (gift bags, components for a high-density hydraulic baler, venetian blind slats) were clearly distinguishable from the material from which they were made (decorative paper, steel plates, aluminum strip). Furthermore, the cutting and shaping of the metal sheets or strips transformed the material into identifiable components used in making finished goods. In contrast, the imported flexible magnet material in sheets or rolls are not raw materials. The flat flexible magnet material is at an advanced stage of manufacture. It is committed to a single use, as a magnet, at the time of import.

Furthermore, the cutting process differs dramatically from the complex shaping processes described in the cited rulings. The cutting performed in the instant case merely serves to make smaller magnets out of larger magnet sheeting. The process typically involves nothing more than stamping smaller shapes (e.g., business card-sized magnets) out of large sheets. Customs has held that cutting sheets of trading cards into individual cards does not effect a substantial transformation of imported card stock. HQ 560155, dated April 10, 1997. The cutting process does not affect the magnet's fundamental character and use as a magnet.

Additionally, the printing of advertising information on the magnets does not constitute a substantial transformation. The printing does not materially alter the name, character or use of the imported articles. At the time of importation, the articles have magnetic properties. The use of the articles is as magnets. After the printing of the advertising information, they remain articles properly referred to as magnets. The fact that the magnets may also be used for advertising purposes does not materially change their underlying use as magnets. The printing does not transform the imported article so that it is no longer the essence of the final product. Customs has held that similar promotional items processed and printed in the United States were not substantially transformed. See HQ 735401, dated April 5, 1994, HQ 734053, dated September 20, 1991, and HQ 734202, dated November 12, 1991. Both before and after the printing, the essence of the article in question is a finished magnet. Based on these considerations, we find that printing is merely a minor manufacturing process which leaves the identity of the imported articles intact.

In the notice of proposed revocation, we indicated that the processes performed in the U.S. were "not as many or as character-altering as originally believed." We stated that the cutting and printing were "modest finishing operations" which were in stark contrast to the complex manufacturing operations performed in producing the rolls of flexible magnetic material.

In your comments and during our meeting, you presented evidence that supported the view that the processing in the United States is complex and adds value. You described a multi-step process that is performed on the imported rolls and sheets which includes artistry and design. You indicated that the sheets and rolls represent less than 20 percent of the total expenses

in producing the finished magnets. You emphasized a high labor component and the use of complex machines. Upon review of all the information you submitted, we agree that the production that occurs in the U.S. is significant. However, the question is whether or not that production is enough to effect a substantial transformation. The answer in this case comes down to whether the essence of the product is the advertising or the magnet. You emphasized that the products are sold as "advertising." However, the medium for the "advertising" that you chose is a magnet. Customs finds that the manufacturing operations involved in creating the rolls or sheets of flexible magnet material establish the essential character and fundamental use of the product which remain unchanged after the essentially decorative processing that occurs in the United States.

In HQ 734091, dated June 2, 1992, Customs ruled that the production of stainless steel sheets with a mirror finish from sheets of stainless steel was not a substantial transformation. Customs stated that although the processing was complex involving considerable time, skill and complicated machines, the basic character of the stainless steel did not change. The commodity was still a sheet of stainless steel. Customs also relied on the fact that the importer had not changed the underlying chemical, physical and mechanical properties or structure of the stainless steel. Customs stated that cosmetic changes in metal products are generally not considered significant in light of predetermined qualities and specifications. The importer argued that the complexity of the process and the increase in value of the product should establish that the product was substantially transformed. Customs stated that "[a]lthough the processing may be complex and adds significant value, these are secondary criteria which are not dispositive of a substantial transformation." Similarly, in the instant case, we find that the processing in the United States does not effect a substantial transformation because it does not change the character of the magnet. Despite the complex processing that may have been done, the products do not lose their identity as magnets.

In HQ 561025, dated October 21, 1998, Customs considered whether the processing of bulk film into 110 and 135 photographic film cartridges constituted a substantial transformation. Bulk photographic film was imported into the U.S. in "jumbo" rolls. The jumbo rolls were slit into smaller rolls, cut to exact lengths, subjected to latent image flashing (where images such as frame numbers and arrows were printed on the film), and assembled into film cartridges. Customs stated:

Accordingly, following the three-pronged test of name, character and use, it is our opinion that the imported product is the "essence" of the completed article, and thus does not undergo a substantial transformation. While commercially identified as a "jumbo" upon importation and when completed as "cartridge film" or "film cartridge," we do not find this fact significant as the imported product is bulk color photographic print film with a predetermined use which has the essential chemical properties of the completed product. The chemical and physical changes which occur in the U.S. do not change its character or its intended use as photographic film. As in *Superior Wire*, supra, the imported and finished articles may be viewed as different stages of the same product.

Applying this rationale to the present case, Customs finds that the processing of the large rolls of flexible magnetic material into smaller promotional magnets does not create a product with a new name, character and use. The changes which occur in the U.S. do not change the imported product's character or its intended use as magnets.

In *Superior Wire v. United States*, 867 F.2d. 1409 (Fed.Cir. 1989) the Court of Appeals for the Federal Circuit affirmed the Court of International Trade holding that the drawing of wire rod into wire does not substantially transform wire rod into a new product for the purpose of determining the country of origin. The CAFC stated:

The Court of International Trade considered the "transformation of wire rod to be minor rather than substantial." . . . The court found there was no significant change in use or character, but there was a change in name, . . . and concluded that "wire rod and wire may be viewed as different stages of the same product." . . .

Although noting that "the wire emerges stronger and rounder after" drawing the wire rod, the court found "its strength characteristic . . . is . . . metallurgically predetermined . . . through the fabrication of the wire rod." . . . The court explained that "the chemical content of the rod and the cooling processes used in its manufacture . . . determine the properties that the wire will have after drawing." . . . There was evidence of record to show that the rod producer determines the tensile strength of the drawn wire by the chemistry of the steel, particularly by the mix of carbon and manganese in the molten steel rods, and that the properties desired in the drawn wire dictate the selection of the scrap grade.

867 F.2d. at 1414 (citations omitted). It concluded that there was ample evidence from which the Court of International Trade could determine that there is no change in use between the wire rod and the wire. The Court reasoned that the end use of the wire is generally known before the rolling stage and the specifications are frequently determined by reference to the end product for which the drawn wire will be used.

Similar to the wire, the key characteristic of the flat flexible magnets processed in the United States is predetermined by the nature of the imported flexible magnetic sheeting. The chemical/metallurgical composition, resistance to heat or chemicals, thickness, consistency or dimension, resistance to tearing, and, most importantly, the magnetic properties, have been predetermined and are not and cannot be altered by the finishing processes performed in the United States. The composition of the binder is a critical factor in determining the magnet's strength. Furthermore, one of the comments received indicates that the grade of iron oxide powders will affect the performance characteristics of the strontium ferrite powder produced, and ultimately, the flat flexible magnet produced. There is no change in use between the flexible magnetic sheeting and the flat flexible magnets sold by the distributors/printers. Both are magnets and are used as such.

In *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556 (1908), the issue was whether the operations performed on hand cut corks in order to make them suitable for use in bottling beer constituted "manufacture" in the United States. The operations included sorting, branding with a brewer's name and logo, removing dust and bugs, and coating in order to prevent a cork taste from migrating to the beer. The Appellant argued that

the corks were not suitable for use to bottle beer until these processes were performed. The Court held that, "A cork put through the claimants process is still a cork." *Id.* at 562. The corks did not become articles of U.S. manufacture "by reason of the special treatment to which they had been subjected, making them better or necessary for their purpose." *Id.* at 563. Similarly, the imported flat flexible magnets are still flat flexible magnets after being put through the cutting and printing processes. They retain their essential characteristic. The ultimate consumer uses them mainly for their magnetic properties. Printing a magnet with advertising information is no more a substantial transformation than branding a cork with a brewer's name and logo.

In *Ferrostaal Metals Corp. v. United States*, 11 C.I.T. 470, 664 F. Supp. 535 (1987), the Court addressed whether hard cold-rolled steel was substantially transformed when it was processed into continuous hot-dip galvanized steel. The processing consisted of galvanizing and annealing. The Court found that strength and ductility constituted important characteristics of the steel and that annealing significantly affected the character by dedicating the sheet to uses compatible with the strength and ductility of the steel. The Court also found that the alloy-bonded zinc coating affected the character of the sheet by changing its chemical composition and by providing corrosion resistance. The Court held that the continuous hot-dip galvanizing process transforms a strong, brittle product which cannot be formed into a durable, corrosion-resistant product which is less hard, but formable for a range of commercial applications. It had a different character from the standpoint of durability. The Court found that the annealing and galvanizing process resulted in a change in character by significantly altering the mechanical properties and chemical composition of the steel sheet. In contrast, the mechanical properties and chemical composition of the imported rolls or sheets of flexible magnet material are not altered by the cutting and printing operations that occur in the United States.

Customs finds that there is no material change in the name<sup>1</sup>, essential character or use of the imported articles that results from printing them with promotional material and cutting them to make smaller flat flexible magnets. As imported, the flexible magnetic sheeting fully evidences its ultimate use by consumers as magnets. Although the size of the resulting magnets may not be fully established on importation, their thickness and maximum length and breadth, the degree to which they are flexible, their magnetic characteristics, and such properties as tensile strength, child safety, and resistance to heat or chemicals all have been fixed prior to that time. The imported article already has its final character and is dedicated to its specific use as a magnet at the time of import. Accordingly, the operations performed in the United States do not substantially transform the imported rolls or sheets of flat flexible magnet material.

We note that the processing in the United States will not result in a change of tariff classification. Both the imported product and the finished good are classified under subheading 8505.19.0040, HTSUSA, as flexible

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<sup>1</sup>The original ruling request referred to the imported material as "magnetized rubber material" to suggest a change in the name of the product. However, a commenter indicates that such terminology is not used in the trade. The imported product is flat flexible magnet in sheet form. Flexible magnet in sheet form is already a "flat flexible magnet." Regardless of the size or length of the sheet or whether the sheet is in a roll, the imported material is flat flexible magnet.

permanent magnets. Although a change in tariff classification is not required in order for there to be a substantial transformation, we find the fact that there is no change in tariff classification to be an additional factor to consider in this case. You objected to this argument stating that change in classification was only relevant in the NAFTA context. However, in *Ferrostaal*, the Court stated that it also considered relevant whether the operations underlying the asserted transformation had effected a change in the classification of the merchandise and stated that change in tariff classification may be considered as a factor in the substantial transformation analysis. *Id.* at 478.

HOLDING:

HQ 562537, dated December 12, 2002, is hereby revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Based on the facts provided, imported flat flexible magnet material in sheets and rolls are not substantially transformed into new and different articles of U.S. origin when further processed in the U.S. by printing and cutting operations to form flexible promotional magnets. Accordingly, the flat flexible magnets must be properly marked to indicate the country of origin to the person who receives them as a promotional item.

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Monika R. Brenner for MYLES B. HARMON,  
*Director,*  
*Commercial Rulings Division.*

