

**INTELLECTUAL PROPERTY RIGHTS
TECHNICAL INFORMATION FOR PRE-ASSESSMENT SURVEY (TIPS)**

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INTELLECTUAL PROPERTY RIGHTS (IPR) TECHNICAL INFORMATION FOR PRE-ASSESSMENT SURVEY (TIPS)

PART 1 IPR OVERVIEW

Intellectual property right is a descriptive term covering inventive, artistic, descriptive and novel works indicating ownership of a particular right. Customs protects IPR at the border. The IPR that Customs enforces include trademarks, trade names, copyrights, and patents.

IPR infringement involves the use of a protected intellectual property right without the authorization of the owner of the right. Customs has legal authority to determine infringement of trademarks, trade names and copyrights. Its authority to enforce patent rights is limited to providing protection pursuant to exclusion orders issued by the U.S. International Trade Commission.

Owners of federally registered trademarks and copyrights may also record their rights with Customs. The ACS IPR module contains information on recorded rights. Agency policy is to focus IPR enforcement efforts on recorded trademarks, trade names and copyrights. As such, recorded trademarks and copyrights receive a higher level of protection than unrecorded rights. However, Customs may take action to protect registered but unrecorded trademarks and copyrights against counterfeit trademarks and clearly piratical copies, but not against “confusingly similar” marks or “possibly piratical” copies.

The following is a summary of each of the IPR protected by Customs:

A. TRADEMARKS AND TRADE NAMES

A trademark is a word, name, symbol, device, color or combination thereof used to identify and distinguish goods from those manufactured or sold by others and to indicate the source of the goods. Trademarks must be registered with the United States Patent and Trademark Office (PTO) on the Principal Register to receive IPR protection from Customs.

A trade name is the name under which a company does business. Trade names are not registered with the Patent and Trademark Office, but may be recorded with Customs if the name has been used to identify a trade or manufacturer for at least six months.

B. COPYRIGHT

Copyrights protect original works of authorship such as literary, musical, sculptural and pictorial works, motion pictures, sound recordings, computer software, and videogame software that have been fixed in a tangible medium of expression. Copyrights are registered with the United States Copyright Office.

C. PATENTS

A patent is a legal monopoly, granted by the U.S. Government, which secures to an inventor for a term of years the exclusive right to make, use, or sell his invention. The U.S. Patent and Trademark Office issues patents for novel, useful, non-obvious inventions, including processes, machines, manufactures, compositions of matter, or improvements thereof.

Customs authority to enforce patents is much more limited than its authority to enforce trademarks and copyrights. Customs may not make legal determinations of patent infringement. Its patent enforcement authority is limited to enforcing exclusion orders issued by the U.S. International Trade Commission (ITC).

D. EXCLUSION ORDERS

Under Section 337 of the Tariff Act of 1930, as amended, unfair methods of competition and unfair practices in the importation or sale of articles, the effect or tendency of which is to destroy, substantially injure, or prevent the establishment of an efficiently and economically operated in U.S. industry, or to restrain or monopolize trade and commerce in the United States, are unlawful. The ITC investigates alleged violations of Section 337, determines violations, and, with the President's approval, issues orders to exclude violative goods from entry into the U.S. Exclusion orders may be "general" or "limited". Under a general order, all goods of a certain description must be denied entry. Under a limited order, all goods of a certain description imported by a specified company or companies, or manufactured or exported by a certain company or companies, must be denied entry. Exclusion orders may protect patents, trademarks or copyrights.

The ITC may also issue Seizure and Forfeiture Orders. These may be issued when an importer, after having had goods in denied entry under an Exclusion Order and having been notified that future attempted entries could result in seizure and forfeiture, attempts to import goods similar to those subject to the Exclusion Order.

PART 2 EXAMPLES OF BEST PRACTICES

- Internal controls over IPR:
 - ✓ Are in writing,
 - ✓ Include procedures for monitoring and feedback, and
 - ✓ Are monitored by management.
- One manager is ultimately responsible for control of the Import Department, including ensuring the adherence to IPR laws and guidelines. That manager has knowledge of Customs matters and the authority to assure internal control procedures for imports are established and followed by all company departments.
- Written internal control procedures assign duties and tasks to a position rather than a specific person.
- Company has good interdepartmental communication about Customs matters, including IPR issues.
- Company and import department has access to IPR laws, guidelines, and procedures governing imported merchandise subject to IPR analysis.
- Company conducts and documents periodic reviews of its imported merchandise, having IPR implications, and uses the results to make corrections to entries and changes to their import operations as appropriate.
- Company or its suppliers receive authorization of the merchandise subject to IPR by appropriate agreements with the owner of the trademark, trade name, copyright or patent prior to the importation and the company maintains documentation for the agreement.
- Company verifies (on a recurring basis) agreements between it or its suppliers and the owner of the trademark, trade name, copyright or patent are still current and valid for the time period of the importation as well as maintaining documentation to show the verification was done.
- Royalties, proceeds, and indirect payments related to the use of the IPR are accounted for, and where applicable included in the price actually paid or payable.
- Import department has access to, and can readily produce:
 - ✓ Detailed description of imported merchandise identifying type of IPR and its specific requirements and issues, including license agreements
 - ✓ Listing of all imported merchandise having IPR implications, and
 - ✓ Documentation supporting authorization for the use of the trademark, trade name, copyright or patent.
- Contract(s) and/or other formal documentation indicating agreed to IPR importation practices and activities between the company and its foreign supplier(s).
- Prior to importation, the importer determines whether goods it plans to import involve any protected trademarks or copyrights, or are subject to any ITC exclusion order.
- The importer is licensed for all trademarks or copyrights used in goods it imports; or the importer requires that the manufacturer or supplier provide written proof that any trademarks or copyrights used are licensed by the right owner, and independently verifies this with the right owner.
- When the manufacturer or supplier is not authorized to use a trademark or copyright, the importer obtains, or requires the manufacturer or supplier to obtain, authorization from the right owner to use the trademark or copyright.

- Communication exists between different departments of the company, e.g., engineering/design, purchasing, legal, and import compliance, so that information pertaining to IPR issues is appropriately distributed. For example, which divisions are notified if a right owner terminates a license agreement or serves the company with a cease and desist order?

PART 3 INTERNAL CONTROL PROCEDURES EXAMPLE

The following is an example of internal control procedures that can be provided to the importer during the audit. However, the importer should be instructed to use these procedures as a guide in developing procedures that are applicable to its specific organization and operations.

Intellectual Property Rights

Unique Importer Inc (UII) respects the Intellectual Property Rights of others and expects this same respect for those of UII. Accordingly, UII has the stated policy of maintaining current licenses and authorizations for any trademarks, trade names and copyrighted works incorporated in the merchandise it imports.

Moreover, UII is not to issue a Purchase Order (PO) for merchandise incorporating a licensed property without:

1. a) First having verified that the appropriate license is current and applicable to the type of merchandise at issue; and,
b) Obtaining specific approval for the label and design layout of the property, if so required by the license; and,
2. The Department Head and Import Department signing off on the PO.

Customs Enforcement

Customs enforces laws relating to the protection of intellectual property rights at the border. Customs protects trademarks that are registered with the United States Patent and Trademark Office. Customs administrative enforcement entitles certification marks, service marks and collective marks to the same protection as trademarks.

Agency policy dictates that Customs focus its border enforcement efforts on trademarks, trade names and copyrights that are recorded with Customs. Unrecorded trademarks and copyrights, while not a priority, may be enforced, if and when possible, and in such a manner that the sound administration of the Customs laws is not compromised.

Customs is vested with the legal authority to make infringement determinations relating to trademark, trade name and copyright infringement. Customs on its own accord may initiate enforcement actions relating to the detention or seizure of merchandise that infringes a federally registered trademark or copyright. In association with the recordation process, Customs may issue alerts to field offices regarding enforcement actions pertaining to shipments of goods that infringe trademarks, trade names and copyrights.

Significant monetary penalties may be assessed for violations involving the importation of goods bearing counterfeit marks.

Responsibilities of Import Manager:

The responsibilities of the Import Manager include the following:

- Holding the ultimate responsibility for ensuring adherence to IPR laws and guidelines. The manager (and all other import department staff) will maintain a working knowledge of Customs matters in order to assure internal control procedures for imports are established and followed by all company departments.
- Ensuring that he/she and all other import department staff attend on-going training in order to ensure that they have knowledge of current Customs issues and regulations.
- Ensuring that all company personnel have access to IPR laws, guidelines, and procedures governing imported merchandise subject to IPR.
- Ensuring overseas suppliers/manufacturers comply with company requirements on authorized use of trademarks, trade names, copyrights, etc. as well as ensuring license agreements are consistently received from those suppliers/manufacturers.
- Providing training regarding legitimate trademarks, trade names, copyrights, etc. to the quality control group, key manufacturers, and employees involved in handling imports (including the warehouse personnel).
- Ensuring that the accounting/finance departments properly account for royalties, proceeds, and indirect payments related to the use of the IPR, and where applicable, these payments are declared in the price actually paid or payable.

Overseas Suppliers/Manufacturer Reviews:

The import manager (or another party designated in writing to act on the import manager's behalf) will conduct quality control reviews of overseas suppliers/manufacturers. During the reviews, the import manager will specifically look for items bearing marks that could be potentially infringing on registered and recorded trademarks. For any marks found, the import manager will ensure that the suppliers/manufacturers can provide license agreements. The import manager will provide instructions to manufacturers regarding authorized use of trademarks. At the end of each review, the import manager will document the results of the reviews and maintain copies of all reviews for the period of five years.

Importations of Merchandise Subject to IPR:

The import department will maintain a database containing:

- A detailed description of imported merchandise that clearly identifies the type of IPR and its specific requirements and issues; and
- Contract(s) and/or other formal documentation indicating agreed-upon IPR importation practices between the company and its foreign supplier(s).

This database will be updated as new items are added to the company's product lines. Further, the import department will analyze the authorizations prior to the importation of the new products in order to ensure authenticity. As needed, the import department will contact the right-holders to verify that the license agreements are authentic and value. The import department will document the results of its verification that the actual suppliers/ manufacturers are licensed to use the marks in question.

If the overseas supplier/manufacturer cannot obtain authorization from the right-holder, the import department will contact the owner of the trademark, trade name, copyright or patent and obtain authorization for the merchandise subject to IPR prior to the importation. Further, the Import Department will maintain copies of all license agreement, with signatures. These license agreements must be verified prior to every importation to ensure that the agreement is still valid and merchandise will not being imported after the expiration date of the agreement.

The import department will also conduct and document periodic reviews of its regularly imported merchandise that have IPR implications. These post importation reviews will be conducted, on a sample basis, and the results documented. If these reviews disclose errors in the entries, the import department will make corrections to entries and change its import operations as appropriate. If the post importation reviews disclose that infringing merchandise was imported, the import department will contact CBP to determine what actions to take.