

GAO

Report to Selected Congressional  
Subcommittees

May 1986

INTERNATIONAL  
TRADE

U.S. Firms' Views on  
Customs' Protection of  
Intellectual Property  
Rights



035429





United States  
General Accounting Office  
Washington, D.C. 20548

National Security and  
International Affairs Division

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May 14, 1986

The Honorable James Abdnor  
Chairman, Subcommittee on Treasury,  
Postal Service & General Government  
Senate Committee on Appropriations

The Honorable Edward R. Roybal  
Chairman, Subcommittee on Treasury,  
Postal Service & General Government  
House Committee on Appropriations

The Honorable John C. Danforth  
Chairman, Subcommittee on  
International Trade  
Senate Committee on Finance

The Honorable Sam M. Gibbons  
Chairman, Subcommittee on Trade  
House Committee on Ways and Means

As part of an ongoing review of U.S. government efforts to help firms protect their intellectual property rights (e.g., patents, trademarks, and copyrights) in international trade, we surveyed firms to obtain their perspectives on the Customs Service's ability to stop counterfeit and infringing goods from entering the country. This report provides information on the results of our surveys. We provided you earlier with a draft of this report for your use in carrying out your oversight responsibilities during the fiscal year 1987 authorization and appropriations process.

Firms use two separate methods to obtain Customs' assistance in protecting intellectual property rights.

1. Recordation: Owners of trademarks and copyrights that have previously been registered with the federal government can record their rights directly with the Customs Service for a small fee. In protecting trademarks and copyrights, Customs can exclude shipments of counterfeit or infringing goods from the country and, in certain instances, can seize such shipments, which may be forfeited to the government.

2. Section 337 exclusion orders: Owners of other types of intellectual property rights, most notably patents, who want Customs' assistance

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must first obtain exclusion orders from the International Trade Commission. To obtain such orders, they must participate in year-long (18 months in "complicated" cases) adversarial proceedings under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337), in which they must demonstrate that they meet certain statutory criteria. Exclusion orders give Customs the authority to exclude, but not seize, shipments of goods that counterfeit or infringe the intellectual property rights covered by the orders.

We conducted separate surveys of firms that have used each method. (See apps. II and III.) Of the firms responding to the survey on Customs' recordation system,<sup>1</sup> nearly 80 percent of those that indicated they had a basis to judge reported that counterfeit and infringing goods continued to enter the country after recordation. Of these firms, over half of those that indicated they had a basis to judge reported that the value of counterfeit and infringing imports at least remained the same, with about 31 percent of them stating that the value of these imports increased after recordation.

Survey respondents valued their sales losses caused by these imports at less than \$100,000 to \$15 million. Of the firms that reported continued imports of counterfeit and infringing goods, over 85 percent of those that indicated they had a basis to judge reported that these imports damaged their sales to at least some extent, with 60 percent of them reporting a moderate to very great loss in sales. Nearly 80 percent of these firms that indicated they had a basis to judge reported that these imports appreciably damaged consumer confidence in their products.

Of the firms responding to the section 337 survey,<sup>2</sup> over 65 percent of those that indicated they had a basis to judge reported that counterfeit and infringing goods covered by the exclusion orders continued to enter the country after the orders were issued. About 71 percent of these

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<sup>1</sup>This survey included all firms, or their outside legal counsels, that had recorded trademarks or copyrights with Customs from January 1, 1980, to April 10, 1985, and alleged that the rights were being infringed at the time of recordation. Of the 208 firms we surveyed, nearly 72 percent returned completed questionnaires, about 5 percent informed us that the information sought was not available, and 23 percent did not respond. For the individual questions used in this report, the proportion of respondents indicating that they had no basis upon which to provide answers averaged about 30 percent and in no instance exceeded 36 percent.

<sup>2</sup>This survey included all firms that had obtained exclusion orders in cases starting January 1, 1975, with all litigation concluded as of April 25, 1985. Of the 42 firms we surveyed, 84 percent returned completed questionnaires, 7 percent informed us that the information sought was no longer available, and about 9 percent did not respond. For the individual questions used in this report, the proportion of respondents indicating that they had no basis upon which to provide an answer averaged about 20 percent and in no instance exceeded 26 percent.

firms that indicated they had a basis to judge reported a substantial decrease in the value of such imports, in some cases due to the willingness of importers to voluntarily abide by the International Trade Commission determinations. Approximately 29 percent reported little change.

Survey respondents valued their sales losses caused by these imports at less than \$100,000 to as much as \$5 million. Of the firms that reported continued imports of counterfeit and infringing goods, nearly 75 percent of those that indicated they had a basis to judge reported that these imports damaged their sales to at least some extent, with over 45 percent of them stating that their sales were hurt to a moderate or substantial extent. Company officials informed us that the continued presence of illegitimate goods in the domestic marketplace, sometimes in a form virtually indistinguishable from the original, caused consumers to lose confidence in the authentic products.

Survey respondents generally held Customs' inspection staff in high regard and pointed to staff availability as the foremost limitation on Customs' ability to protect intellectual property rights. This finding was reflected in hearings held during June 1983 to September 1984 by the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce. Based on these hearings and on its own investigation, the Subcommittee concluded that the Customs Service has the resources to inspect only about 2 percent of shipments entering the country. Further, while its staff for inspecting shipments has remained static, Customs' formal entry workload (i.e., import transactions exceeding \$250 in value) increased approximately 40 percent from fiscal years 1981 to 1984 and, according to Customs officials, overall incoming shipments increased in fiscal year 1985.

Customs has tried to compensate for its staffing situation. One such effort is "Operation Tripwire," a special initiative to detect all types of commercial fraud, including the import of counterfeit and infringing goods. As part of this effort, the Commercial Fraud Investigation Center at Customs headquarters coordinates the activities of commercial fraud teams, located at the regional and district levels, which assess incoming intelligence on shipments containing contraband goods (i.e., goods prohibited by law from being imported) and also assist port inspectors in determining whether questionable goods are indeed contraband. Customs is also installing a computerized selective cargo inspection system to identify import shipments most likely to contain mislabeled, counterfeit, infringing, or otherwise contraband goods. However, this system

targets about 20 percent of shipments as needing physical inspection; thus, port inspectors, who inspect only about 2 percent of shipments, often must override recommendations and perform no inspections or only limited inspections of such shipments.

Survey respondents supported the following proposals to further enhance the ability of the Customs Service's present staff to protect intellectual property rights from counterfeit and infringing imports.

- Amend section 337 to authorize the International Trade Commission to direct the Customs Service to seize goods when enforcing exclusion orders.
- Shorten the 2 to 3 months Customs now takes to disseminate notices of newly recorded trademarks and copyrights to the ports.
- Intensify Customs' efforts to enlist the support of intellectual property rights owners in identifying shipments containing counterfeit or infringing products.

We are continuing our work on these and other matters and plan to issue reports on overall government efforts in the intellectual property area and on International Trade Commission administration of section 337 of the Tariff Act of 1930.

Appendix I contains more detailed information about the results of our surveys.

The Department of the Treasury, the Customs Service's parent agency, and the International Trade Commission commented on a draft of this report. (See apps. IV and V.) The Treasury Department did not take issue with our overall findings but commented that they should be viewed in the context of Customs' total responsibilities. Treasury also elaborated on the difficulties it faces in protecting intellectual property rights and particularly in enforcing exclusion orders. The Commission expressed doubts that the level of counterfeit and infringing imports entering the country in violation of exclusion orders is on the scale reported by our section 337 survey respondents. The Commission theorized that respondents reported the volume of all competitive imports rather than reporting just those imports subject to exclusion orders. To assure that this did not occur, we pretested the language used in our questionnaires with dozens of company officials from potential respondents to ensure clarity and minimize response error. Our follow-up efforts confirmed that the questionnaires were understood and that the responses were based on the respondents' informed judgement.

Both agencies commented on the suggestions for strengthening Customs' efforts to protect intellectual property rights. Treasury explained that Customs takes 2 to 3 months to process a recordation because the number of applications in 1985 was more than double the number in 1984. Treasury added that Customs is now in the process of putting all recordations on a computer, which will eventually be accessible to the various ports of entry. In commenting on the observation that Customs intensify its efforts to enlist the support of intellectual property rights owners in identifying shipments of counterfeit and infringing products, Treasury stated that Customs already provides information on its enforcement program to firms recording trademarks or copyrights. We believe that something more is needed; this information, which consists of a confirmation letter and a copy of the notice sent out to the ports, is too sparse to give firms a sufficient understanding of Customs' enforcement abilities.

The Commission commented that the Customs Service, rather than the International Trade Commission, should determine when it is appropriate to seize counterfeit and/or infringing imports in enforcing an exclusion order. We note that section 337 authorizes the Commission to grant relief against unfair trade acts and to determine the appropriate form of relief; Customs simply carries out the Commission's instructions. We do not believe the Commission should be relinquishing to the Customs Service part of its responsibility to determine what form of relief is needed to protect U.S. firms under section 337. It would be ceding control over the use of a harsher remedy that we believe should be used only in extraordinary circumstances, i.e., when foreign firms on more than one occasion knowingly bring counterfeit or infringing goods into the country in violation of an exclusion order.

This report has been revised to reflect these comments, as appropriate. The agencies' comments and our evaluation are more fully discussed in appendix I.

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Copies of this report are being sent to the Secretary of the Treasury, the Chairwoman of the International Trade Commission, various congressional committees, and other interested parties. Copies will be made available to others upon request.



Frank C. Conahan  
Director





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# U.S. Firms' Views on Customs' Protection of Intellectual Property Rights

Firms responding to GAO's surveys reported that counterfeit and infringing goods<sup>1</sup> continued to enter the country, often in large quantities, after these firms had obtained Customs Service assistance in protecting their intellectual property rights (e.g., patents, trademarks, and copyrights). The firms also reported that these counterfeit and infringing imports caused lost sales and loss of consumer confidence in the legitimate products. They indicated that Customs' efforts were limited foremost by the availability of staff, a finding reflected in hearings held by the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce. In addition, survey respondents supported several proposals to enhance the ability of the Customs Service's present staff to protect intellectual property rights.

## Background

Protection of intellectual property rights against counterfeit and infringing imports is only one of the Customs Service's many responsibilities. Customs, which is organized into 7 regions and 46 subordinate district or area offices covering the entire United States, performs a wide variety of law enforcement and trade control functions, ranging from enforcing export control laws to combating drug smuggling.<sup>2</sup> Customs officials have testified that the Customs Service is responsible for administering and enforcing over 400 provisions of law and regulations for 40 government agencies.

There are two methods for obtaining Customs Service assistance in protecting intellectual property rights.

1. Recordation: Owners of trademarks and copyrights that have previously been registered with the federal government<sup>3</sup> can record such

<sup>1</sup>Trademark counterfeiting generally refers to the deliberate unauthorized duplication of another's trademark or packaging; trademark infringement generally refers to the unauthorized use of a trademark that is so similar to an existing trademark of another that, considering the relationship of the products of each, confusion is likely to occur. Copyright infringement generally refers to the unauthorized use or copying of a copyrighted work; patent infringement generally refers to the unauthorized manufacture, use, or sale in the United States of all devices embodying the patented invention, whether copied from authorized devices or resulting from independent development.

<sup>2</sup>In its comments (see app. IV), Treasury provided a fuller enumeration of Customs' responsibilities, which include prohibiting traffic in illegal narcotics, certain foods and drugs, hazardous substances, counterfeit money, and obscenity; controlling exports, including high technology exports to the Soviet bloc; controlling illegal immigration; enforcing auto safety and emission standards; enforcing flammable fabric, quota, marking of country of origin, and animal and plant quarantine restrictions; and protecting endangered species of wildlife.

<sup>3</sup>Trademarks registered with the U.S. Patent and Trademark Office of the Department of Commerce and copyrights registered with the Copyright Office of the Library of Congress or unregistered claims

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**Appendix I**  
**U.S. Firms' Views on Customs' Protection of**  
**Intellectual Property Rights**

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property rights directly with the Customs Service for a fee of \$190.<sup>4</sup> Upon receipt of the fee, certain information on the intellectual property right, and proof of registration, Customs prints notices containing the needed information and mails them to the ports. In protecting trademarks and copyrights, Customs can exclude shipments of counterfeit or infringing goods from the country and, in certain instances, can seize such shipments, which may be forfeited to the government.<sup>5</sup> Customs officials estimate that they are currently responsible for protecting 7,000 to 8,000 trademarks and copyrights.

2. Section 337 exclusion orders: Owners of other types of intellectual property rights, most notably patents,<sup>6</sup> must first obtain exclusion orders from the U.S. International Trade Commission.<sup>7</sup> To obtain such an order, the owner must participate in a year-long adversarial proceeding under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) in which it must demonstrate, among other things, that a valid and enforceable intellectual property right has been infringed by imports.<sup>8</sup> Should the Commission find in favor of the firm bringing the complaint, it can, among other things, instruct the Customs Service to exclude counterfeit and/or infringing goods from entering the country. Upon receipt of an exclusion order, Customs telexes a notice to the ports and subsequently sends additional information through the mail. Exclusion orders give Customs the authority to exclude, but not to seize, shipments of goods that counterfeit or infringe the intellectual property rights covered by the orders. As of April 1985, Customs was responsible for enforcing 43 exclusion orders.

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to copyrights in works entitled to protection under the Universal Copyright Convention may be recorded with Customs.

<sup>4</sup>Customs does not operate a similar recordation system for other types of intellectual property rights, including patents, largely because the validity of such rights is often unclear. Patents present an additional problem because of the difficulty in determining whether a product infringes a patent.

<sup>5</sup>Customs' regulations in this area are complex and provide for different treatment of imports that (1) bear counterfeit marks (i.e., marks that are identical or substantially identical to registered trademarks), (2) bear marks which are merely likely to be confused with authentic trademarks, and (3) infringe copyrights. Generally, the regulations provide for notification of interested parties and several levels of appeals before final disposition of the imports is determined.

<sup>6</sup>Includes patents, common law (i.e., unregistered) trademarks, trade secrets, and mask works (i.e., the pattern on the surface of a semiconductor chip).

<sup>7</sup>Section 337 has been used in rare cases to protect trademarks that had previously been registered with the federal government, such as in Miniature Plug-in Blade Fuses and in Power Woodworking Tools, Their Parts, Accessories and Special Purpose Tools.

<sup>8</sup>By law, section 337 proceedings must be concluded within one year unless the International Trade Commission deems them to be "more complicated," in which case they can take as long as 18 months.

## Objectives, Scope, and Methodology

The objective of this review was to obtain the perspectives of firms on the Customs Service's ability to stop counterfeit and infringing goods from entering the country.<sup>9</sup>

To obtain background information on Customs Service operations and procedures, we reviewed hearings held by the Subcommittee on Oversight and Investigations. These hearings addressed, among other things, Customs' staffing limitations and their impact on Customs' ability to interdict counterfeit and infringing goods. We also reviewed hearings on the Customs Service's appropriations for fiscal year 1986. We reviewed the laws and regulations governing Customs' operation of its recordation system and enforcement of exclusion orders. We conducted interviews and reviewed pertinent documents at Customs headquarters and at the International Trade Commission. We also conducted interviews and reviewed inspection procedures at Customs inspection sites in metropolitan Chicago.

To obtain the perspective of firms on the Customs Service's ability to stop imports of goods that counterfeit or infringe registered trademarks and copyrights, we surveyed firms that had recorded such rights with Customs from January 1, 1980 to April 10, 1985. (See app. II.) Our universe included all firms, or their outside legal counsels, that had recorded trademarks or copyrights with Customs and alleged that the rights were being infringed at the time of the recordation.<sup>10</sup> We did not include firms that routinely registered rights with Customs (i.e., without alleging infringement) since, according to Customs officials, it was very likely that these firms did not keep close watch on the levels of counterfeit and infringing goods entering the country. Nearly 72 percent of the 208 firms we surveyed<sup>11</sup> returned completed questionnaires, about 5 percent informed us that the information we were seeking was not available to them, and 23 percent did not respond. For the questions used in this report, the proportion of respondents indicating that they had no basis upon which to provide answers averaged about 30 percent and in

<sup>9</sup>Our review did not extend to the issues surrounding "grey market" goods, which are foreign-made goods bearing authentic U.S.-registered trademarks that are diverted from their intended foreign markets and imported and sold in the United States by third parties without authorization from the U.S. trademark owners.

<sup>10</sup>To reduce the burden on those firms that had recorded more than one trademark or copyright with Customs, we asked them to respond on the basis of their most recent recordation. Where an outside attorney was responsible for the recordings of more than one firm in our survey, we selected at random the trademark or copyright that was to be the subject of their response.

<sup>11</sup>We excluded from our survey universe 12 firms for which we could not find current addresses. These firms represented less than 6 percent of those that met our criteria.

no instance exceeded 36 percent. We conducted in-depth, follow-up interviews with representatives from 6 firms that provided noteworthy responses to our survey to verify and amplify the information provided.

To obtain the perspectives of firms on Customs' ability to enforce section 337 exclusion orders, we surveyed firms that had obtained exclusion orders in section 337 proceedings initiated since 1975. (See app. III.) This survey was part of a larger effort which also addressed many aspects of the International Trade Commission's administration of section 337 proceedings. Our universe included all firms that had obtained exclusion orders to protect intellectual property rights in cases starting January 1, 1975, with all litigation concluded as of April 25, 1985. Nearly 84 percent of the 42 firms we surveyed<sup>12</sup> returned completed questionnaires, about 7 percent informed us that the information we were seeking was no longer available, and 9 percent did not respond. For the questions used in this report, the proportion of respondents indicating that they had no basis upon which to provide answers averaged about 20 percent and in no instance exceeded 26 percent. We conducted in-depth, follow-up interviews with representatives from 5 firms that provided noteworthy responses to verify and amplify the information provided.

Our review was made in accordance with generally accepted government audit standards.

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### **Staff Availability Limits Customs' Ability to Stop Counterfeit and Infringing Imports**

The majority of our survey respondents reported that counterfeit and infringing goods continued to enter the country after they had enlisted the assistance of the Customs Service. Most of these firms reported that these imports caused appreciable losses in sales and in consumer confidence in their products. However, nearly 80 percent of the firms that provided assistance to Customs and expressed an opinion reported that they were satisfied with Customs' response to the assistance provided.

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### **Inspection Staff Remains Small as the Number of Import Shipments Grows**

Survey respondents' comments indicated that, despite the efforts of port inspectors, Customs' ability to stop counterfeit and infringing goods from entering the country is limited by the availability of staff. Respondents to both surveys expressed high regard for the work of port inspectors and generally noted the competence and helpfulness of port

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<sup>12</sup>We excluded from our survey universe 4 firms for which we could not find current addresses. These firms represented less than 9 percent of those that met our criteria.

personnel. Reflecting these comments, one firm stated that it has "been impressed with the cooperative spirit and willingness to help exhibited by the Customs Service personnel."

Respondents' comments pointed to staffing as the primary limitation on Customs' ability to protect intellectual property rights. One firm wrote that "individuals at the Customs Service are most cooperative . . . but shortage of manpower has resulted in less than satisfactory results overall." Another stated that "it appears that the Customs Service may do what it can but with current staffing and funding . . . it is difficult for Customs to remember and intercept infringing goods." Still another recommended that "we need more trained import specialists at ports of entry; need more trained inspectors at the major ports." Finally, one firm commented that "the only impediment to even better enforcement of the laws by Customs is the lack and shortage of personnel."

This finding was reflected in hearings held during June 1983 to September 1984 by the Subcommittee on Oversight and Investigations. Based on these hearings and its own investigation,<sup>13</sup> the Subcommittee concluded that "despite the best efforts of the Customs Service's competent and dedicated personnel, the agency has neither the people nor the other resources to stop the flood of counterfeit products." The Subcommittee found that the Customs Service has sufficient staff to inspect only about 2 percent of incoming shipments. Further, while the size of Customs' port inspection staff has remained static, Customs' formal entry workload (import transactions exceeding \$250 in value)<sup>14</sup> increased approximately 40 percent from fiscal years 1981 to 1984 and, according to Customs officials, overall incoming shipments increased in fiscal year 1985.

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**Survey of Firms That Have  
Recorded Intellectual  
Property Rights With  
Customs**

Given the relatively small fee for recording registered trademarks or copyrights with Customs, a number of our survey respondents stated that they did not have high expectations regarding Customs' ability to protect these rights. The following comment typifies this opinion.

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<sup>13</sup>These hearings were summarized in a Feb. 1984 Committee print, entitled Stealing American Intellectual Property: Imitation Is Not Flattery (Print 98-V), and in an Apr. 1985 Committee Print, entitled Criminal Components of America's Trade Problem (Print 99-H).

<sup>14</sup>Customs increased its threshold value for formal entries to \$1,000 in fiscal year 1985.



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"In view of the huge task facing Customs and since the relative expense [of] client's using Customs is not substantial, anything which Customs can perform to help a client is considered . . . of substantial benefit."

Of the survey respondents indicating they had a basis to judge, about 21 percent reported that counterfeit and infringing goods had ceased to enter the country. One firm commented that:

"I think [Customs] did a fine job. [The recordation system] allows a small company to effectively deal on an even footing with large companies. From a practical (cost) standpoint, it is the only way many owners of trademarks and copyrights can effectively enforce their rights."

Another stated that:

"I have been very satisfied with the action of the Customs Service and have used [its] services for years. [Its] excellent response has clearly minimized the scope of trademark infringement for my clients."

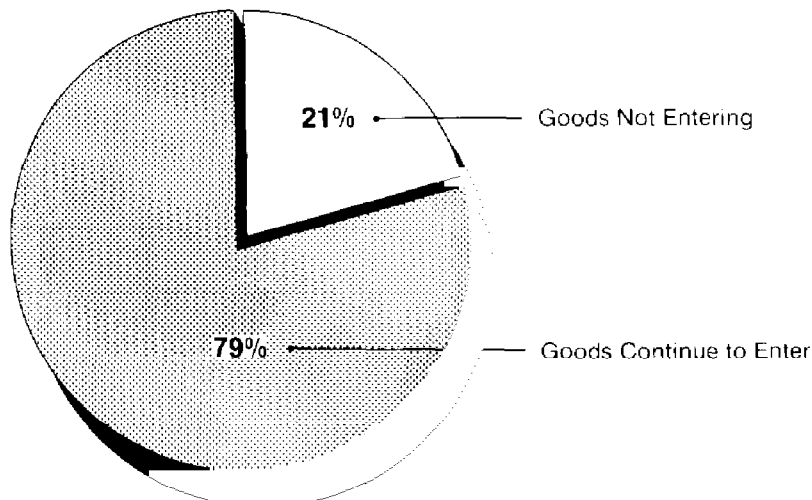
The remaining 79 percent of these firms reported that counterfeit and infringing goods continued to enter the country after recordation with the Customs Service. Of these firms, over half reported that the value of counterfeit and infringing imports at least remained the same, with about 31 percent stating that the level actually increased. Another 15 percent reported that the value of counterfeit and infringing goods decreased only moderately. (See fig. I.1.)

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U.S. Firms' Views on Customs' Protection of  
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**Figure I.1: Selected Responses From Recordation Survey<sup>a</sup>**

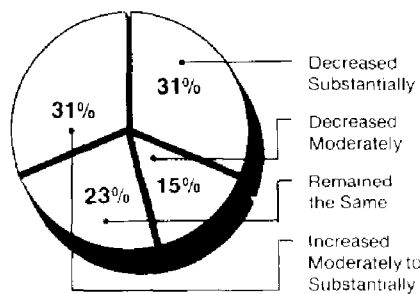
Firms responding to the survey

Imports entering after recordation?

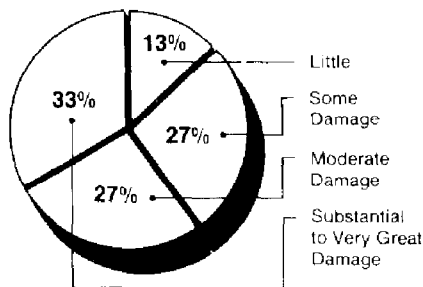


Firms indicating that counterfeit/infringing goods continued to enter country after recordation<sup>b</sup>

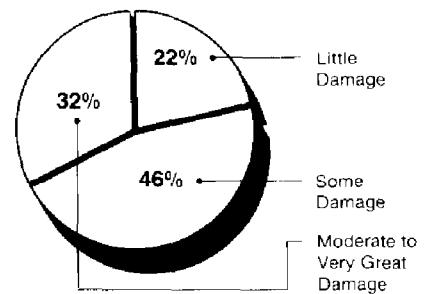
Value of Counterfeit/  
infringing goods



Damage to sales



Damage to consumer confidence



<sup>a</sup>Figures do not include those firms indicating that they had no basis to judge.

<sup>b</sup>Figures represent those respondents indicating that goods continued to enter the country (see shaded area in the first pie chart).

Firms indicating that imports of counterfeit and infringing goods continued to enter the country valued their sales losses caused by these imports at less than \$100,000 to \$15 million. Of these firms, about 87 percent reported that the counterfeit and infringing goods did at least some damage to sales, with 60 percent of them characterizing the loss in

sales as moderate to very great. Similarly, about 78 percent of these firms reported that infringing imports did at least some damage to consumer confidence in their products, with over 30 percent of them characterizing the damage as moderate to very great. (See fig. I.1.)

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**Survey of Firms That Have  
Obtained Section 337  
Exclusion Orders**

Firms initiating section 337 proceedings do so with the objective that, should they win, the exclusion orders will effectively stop counterfeit and/or infringing goods from entering the country. The president of one such company characterized an exclusion order as a "wall around the country." The high cost of litigating section 337 cases—generally between \$100,000 and \$1 million, with a few costing over \$2.5 million—contributes to this expectation. A firm would not spend such a sum of money unless it believed the relief would be effective.

Although some firms voluntarily stop importing counterfeit or infringing goods covered by exclusion orders, others ignore the orders, placing the enforcement burden on Customs port inspectors. An exclusion order, which authorizes Customs to exclude, but not to seize, counterfeit and infringing goods, often is not an effective deterrent to importing such goods. Since Customs cannot seize these goods, foreign infringers who have shipments stopped by Customs are required only to re-export the goods and, thus, lose only the shipping charges.

Indeed, foreign infringers have been known to "port shop," that is, ship the counterfeit or infringing goods from port to port until they gain entry. In testimony before the Subcommittee on Oversight and Investigations, the General Counsel of Apple Computer, Inc. stated that:

"[International Trade Commission] exclusion orders, which provide for the re-export of the illicit goods rather than for seizure or forfeiture, invite importers to 'port shop' for an entry point that is understaffed or ill-equipped to detect and intercept infringing merchandise."

We also understand that foreign infringers sometimes repackage the goods that are returned to the country of origin and attempt to export them to the United States at a later date. A number of knowledgeable business officials have commented that protection of intellectual property is uneven from port to port.

Of the survey respondents that indicated they had a basis to judge, about 35 percent reported that counterfeit or infringing goods had not entered the country since their exclusion orders were issued. Although

several firms reported that the foreign firms voluntarily discontinued exporting such goods to the United States, others were pleased with Customs' ability to stop infringing goods from entering the country. One firm commented that "Customs reacted quickly and forcefully." Another reported a "definite reduction of piratical goods from the source 337 covered." Still another stated that "Were it not for the . . . Exclusion Orders it is doubtful that [my company] and the whole manufacturing industry it services could have continued to exist in their present form."

The remaining two-thirds of the firms that indicated they had a basis to judge reported that counterfeit or infringing goods covered by their exclusion orders continued to enter the country, causing some to question the usefulness of section 337 as a trade remedy. About 71 percent of these firms reported substantial decreases in the value of such imports after the exclusion orders were issued, in some cases due to the willingness of importers to abide by the orders. Approximately 29 percent reported little change. One firm commented that "Many shipments have gotten past Customs." Another stated that "We suspect that only 1% of infringing imports are actually being denied entry." (See fig. I.2.)

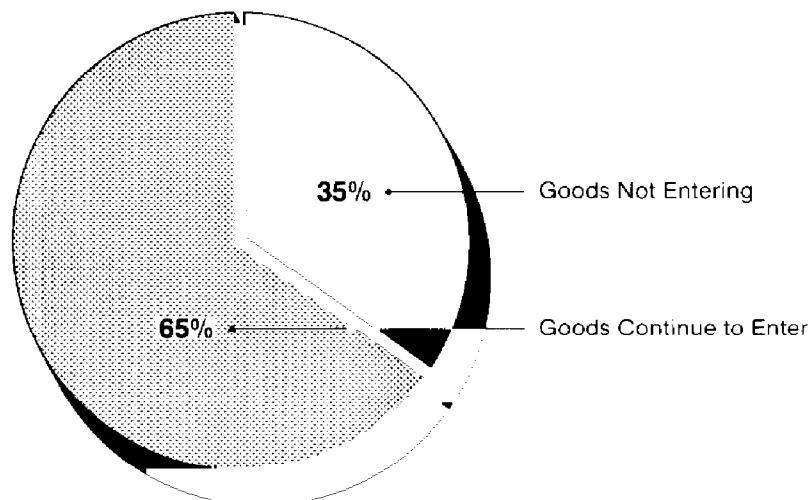
Firms indicating that imports of counterfeit and infringing goods continued valued their sales losses caused by these imports at less than \$100,000 to as much as \$5 million. Of these firms, about 73 percent reported that these imports damaged their sales to at least some extent, with about 46 percent of them stating that their sales were injured to a moderate or substantial extent. One company official commented that, despite the exclusion order, infringing imports have cut so deeply into sales that the company has experienced no growth during the past 2 years. Company officials told us that the continued presence of illegitimate goods in the domestic marketplace, sometimes in a form virtually indistinguishable from the original, caused consumers to lose confidence in the authentic products. (See fig. I.2.)

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**Figure I.2: Selected Responses From  
Section 337 Survey<sup>a, b</sup>**

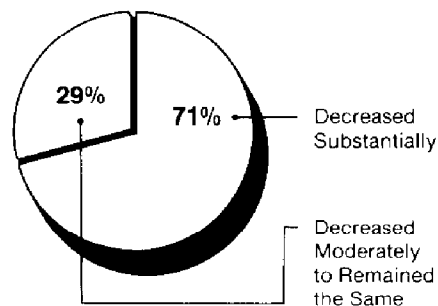
Firms responding to the survey

Imports entering after exclusion order?

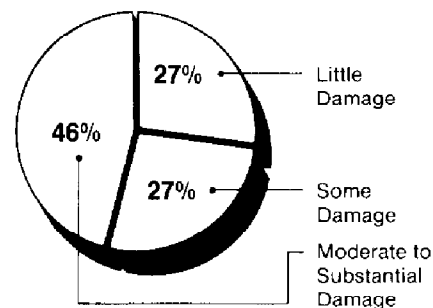


Firms indicating that counterfeit/infringing goods continued to enter the country after issuance of exclusion orders<sup>c</sup>

Value of counterfeit/infringing goods



Damage to sales



<sup>a</sup>Figures do not include firms indicating they had no basis to judge.

<sup>b</sup>The level of damage to consumer confidence in the product was not assessed in this survey.

<sup>c</sup>Figures represent those firms responding that goods continued to enter the country (see shaded area in first pie chart).

Several firms complained that Customs' inability to enforce their exclusion orders undermined the effectiveness of section 337 as a trade remedy. One firm commented that:

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"There was no [Customs] enforcement whatsoever. . . [For] the time and money involved for a small firm like ours, the end result was of little benefit because of the lack of enforcement by the Customs Service."

Another stated that:

"[W]e believe that the efforts and money expended to obtain the exclusion ruling from the [International Trade Commission] . . . certainly did not provide the protection we expected."

Because of the lack of enforcement and high cost, firms commented that they would not use section 337 again to deal with imports of other types of counterfeit or infringing products. One stated that:

"There are now many of our products being copied identically. Because of the cost of the [International Trade Commission] case and the lack of enforcement by Customs it doesn't seem fruitful to take these other items to the [Commission]. Yet, we are being hurt and sales are suffering and people are being laid off."

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**Firms That Provide  
Information to Customs Are  
More Satisfied**

Customs' performance reportedly improves when it is assisted by the owner of the intellectual property right. Over 25 percent of the firms receiving exclusion orders and 35 percent of the firms that had recorded trademarks and copyrights undertook independent investigations and provided the results to Customs. Such information could include the names of companies importing counterfeit or infringing goods or information on particular shipments of such goods. Nearly 80 percent of the firms that provided information to Customs and expressed an opinion were satisfied with Customs' response to the information provided. One firm commented that:

"Customs is most cooperative and efficient when placed on notice. However, their ability to spot infringing or counterfeit goods without notice is extremely erratic."

Another stated that:

"Customs usually must be informed and prodded to be effective, however, once informed and prodded, Customs is helpful."

## Customs Has Attempted to Compensate for Lack of Staffing

Customs has tried to enhance the ability of its port inspectors to interdict counterfeit and infringing imports and, in its comments, points to some successes. Customs notes that it has seized counterfeit and infringing textile products, electronics, watches, toys, perfume, and other items and also has referred counterfeiting cases to the Department of Justice for criminal prosecution under the Trademark Counterfeiting Act of 1984.

The Custom Service's primary effort in this area is "Operation Tripwire," a special initiative to detect all types of commercial fraud, including imports of counterfeit and infringing goods.<sup>15</sup> As part of this effort, the Commercial Fraud Investigation Center at Customs headquarters coordinates the activities of commercial fraud teams, located at the regional and district levels, which assess incoming intelligence on shipments containing contraband goods (i.e., goods prohibited by law from being imported) and also assist port inspectors in determining whether questionable goods are indeed contraband.

Possibly of greater importance, Customs is installing a computerized selective cargo inspection system, which is aimed at better focusing the efforts of port inspectors by identifying import shipments most likely to contain mislabeled, counterfeit, infringing, or otherwise contraband products. Customs hopes to eventually install this system at all ports which have 200 entries or more a day. Using this system, port inspectors enter information, such as the product type, importer, and country of origin, into a computer terminal linked to a centralized data base. The computer then indicates the type of inspection the shipments should receive. However, according to a knowledgeable Customs official, this system targets about 20 percent of shipments for physical inspection. Since Customs has the manpower to inspect only about 2 percent of shipments, port inspectors must use their discretion in acting on the recommendations. They often perform only cursory inspections or no inspections of shipments that have been identified as warranting physical inspection.

Further, although the U.S. tariff schedules used by this system to categorize goods are highly detailed, Customs inspectors experience difficulty detecting counterfeit and infringing goods that are classified in

<sup>15</sup>In its comments, Customs reported that Operation Tripwire has been effective in detecting and deterring counterfeit and infringing imports. The value of Customs' seizures for copyright and trademark violations for calendar year 1985 totaled \$37,553,963, an increase of about \$15 million over 1984. We did not review the effectiveness of this program or the methodology used in arriving at these totals.

“basket categories” (i.e., categories that contain many items under a common heading). One firm that received an exclusion order covering its staple guns reported that:

“The counterfeit copies are shipped in under a general classification “Hand Tools” and Customs says there is no way they can check everything in a shipment to see if infringing staple guns are part of it.”

Firms also reported that importers have attempted to disguise or conceal infringing imports to escape Customs' scrutiny.

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## **Survey Respondents Support Other Measures to Improve Customs' Effectiveness**

Survey respondents supported three proposals, two of which they volunteered, for enhancing the ability of Customs' present staff to protect U.S. intellectual property rights from counterfeit and infringing imports. We are continuing our work on these and other matters and plan to issue reports on overall U.S. government efforts to help firms protect their intellectual property rights in international trade and on the International Trade Commission's administration of section 337 of the Tariff Act of 1930.

A number of bills<sup>16</sup> recently introduced in the 99th Congress would authorize the International Trade Commission to direct the Customs Service to seize goods and cause them to be forfeited when enforcing exclusion orders. Such authority is intended to strengthen the deterrent effect of the exclusion order. If such a proposal were to become law, infringers would not only face the prospect of losing shipping costs but also the possibility that Customs would seize and dispose of their entire shipments. Over 90 percent of our survey respondents who expressed an opinion believed that allowing Customs to seize and take custody of counterfeit or infringing goods under section 337 would improve Customs' ability to enforce exclusion orders.

Several survey respondents suggested that Customs needs to shorten the 2 to 3 months it now takes to inform the ports of a newly recorded trademark or copyright. A number of firms cited this delay as a major problem. One stated that “One of the biggest problems is the unjustifiable delay in having a trademark or copyright recorded at Customs headquarters.” Another stated “In my experience, it takes about 2-3 months to register a [copyright] with Customs. That is too long . . . piratical copies slip by Customs.” During this period, counterfeit and

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<sup>16</sup>These include H.R.3776 and H.R.4093 and S.1647, S.1860, S.1869, and S.2033.



infringing goods may continue to enter the country even though the intellectual property right is legally protected from the time Customs approves the application for recordation. This delay can undermine the effectiveness of a recordation. Until they are notified, port inspectors have no knowledge that they are to protect a particular trademark or copyright from infringing imports. In some cases, 3 months may constitute a significant portion of the entire market life of a product. Some consumer goods, such as those marketed in conjunction with newly-released movies, have very short market lives.

The survey responses also indicated that Customs could improve its performance by intensifying its efforts to elicit the support of intellectual property rights owners in identifying shipments containing counterfeit or infringing goods. This could be accomplished by providing an informational brochure or similar document to firms obtaining Customs' assistance. Under current procedures, there is no formal mechanism for firms initiating section 337 proceedings to obtain any information from Customs. Firms recording trademarks or copyrights with Customs receive only confirmation letters and copies of the notice sent to the ports. As a result, they may not have realistic expectations of Customs' abilities or appreciate the need to provide assistance.

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## Agency Comments and Our Evaluation

The Department of the Treasury, the Customs Service's parent agency, and the International Trade Commission provided comments on a draft of this report. (See apps. IV and V.)

The Treasury Department did not take issue with our overall findings but commented that they should be viewed in the context of Customs' overall responsibilities. Treasury stated that protecting intellectual property rights is only one of Customs' many responsibilities, so it must "manage [its] limited resources . . . to accomplish its total mission." It added that, despite resource limitations, Customs' efforts have resulted in the interdiction of shipments of counterfeit and infringing goods valued over \$37 million in 1985 and referral of several counterfeiting cases to the Department of Justice for criminal prosecution under the Trademark Counterfeiting Act of 1984. We have expanded our discussion of Customs' overall responsibilities, noted in our report the comments regarding successful interdictions of counterfeit and infringing goods, and reflected the generally positive comments of our survey respondents about Customs port staff.

Treasury also pointed out the difficulties it faces in performing this responsibility, particularly enforcing exclusion orders. It specifically stated that deciding whether particular items infringe patents covered by exclusion orders is often difficult, often requiring special analyses. Treasury emphasized that, in enforcing exclusion orders, as well as in protecting recorded trademarks and copyrights, Customs is most effective when "it is provided with all available information concerning shipments of alleged infringing goods." Treasury added that Customs encourages firms to provide this information and that such information is included in the notices that are issued to Customs field offices.

The International Trade Commission questioned the response to our survey regarding Customs' enforcement of exclusion orders. It expressed doubt that the level of counterfeit and infringing imports entering the country in violation of exclusion orders "is on the scale reported by the [section 337] survey," and theorized that "Quite probably, the survey respondents are reporting importation of products which are in competition with their products, and not those products which actually infringe their proprietary rights."

To assure that this did not occur, we pretested the language used in our survey questionnaires with dozens of company officials from potential respondents to ensure that our questions were readily understood and the responses would be uniform. As with any survey, there may have been isolated instances where individual respondents did not fully comprehend the meaning of a question. However, we do not agree that there was wholesale misunderstanding of the section 337 survey, as the Commission suggests. Our post-tests of the surveys confirmed that the questions were understood and the responses based on the informed judgement of survey respondents.

Treasury and the Commission also commented on the suggestions supported by our survey respondents for strengthening Customs' efforts to protect intellectual property rights. Treasury explained that Customs takes 2 to 3 months to process a recordation because "the number of applications in 1985 . . . was more than double the number received in 1984," and that it is "in the process of putting all trademark and copyright recordations on a computer which will eventually be accessible by the various ports of entry."

Treasury also commented that Customs at one time attempted to give priority consideration to applicants who expressed concern that they

would suffer considerable damage while Customs processes the recordation. Customs had to discontinue this practice when "it became apparent that most applicants for copyright and trademark protection accompanied their applications with statements to the effect that . . . serious economic harm will ensue unless Customs is able to grant immediate protection." Treasury suggests that "copyright and trademark owners should note the required processing time, and anticipate some delay in the effective dates of their recordations when submitting their applications."

Treasury also commented on the suggestion that it intensify efforts to enlist the support of intellectual property rights owners, possibly by providing an informational brochure or similar document to firms obtaining Customs assistance. Treasury explained that a firm recording a trademark or copyright "receives an explanation of the Customs enforcement program." Treasury did not state that Customs provides such information to firms seeking exclusion orders. In response to this comment, we revised this report to reflect that Customs provides confirmation letters and copies of the notices sent to the ports to firms recording trademarks and copyrights. Nonetheless, in our opinion, this information is too sparse to give firms a sufficient understanding of Customs' enforcement abilities. We believe Customs should explicitly inform firms that it can inspect only a very small percentage of shipments and that it can be most effective in stopping the imports of counterfeit and infringing goods if firms can provide Customs with information on shipments of such products.

The Commission commented on the suggestion that it be given statutory authority to direct the Customs Service to seize goods when enforcing exclusion orders, stating that "Customs and not the Commission should determine when it is appropriate to exercise seizure authority." We believe that the Commission, and not the Customs Service, should exercise control over the use of exclusion orders to seize foreign parties' goods. Section 337 authorizes the Commission to grant relief against unfair trade acts and to determine the appropriate form of relief; Customs simply carries out the Commission's instructions. By allowing Customs to determine when seizure is appropriate, the Commission would be relinquishing to the Customs Service part of its responsibility to determine what form of relief is needed to protect U.S. firms under section 337. It would be ceding control over the use of a harsher remedy that we believe should be used under section 337 only in extraordinary

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**Appendix I**  
**U.S. Firms' Views on Customs' Protection of**  
**Intellectual Property Rights**

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circumstances, i.e., when foreign firms on more than one occasion knowingly bring counterfeit or infringing goods into the country in violation of exclusion orders.

The agencies had two other comments. The Commission stated that the draft report implied that "relief for infringement of registered trademarks may only be had by recordation of these marks with the U.S. Customs Service, and not under Section 337" and pointed out that relief is available under section 337 for registered trademarks. We have revised the report to reflect this comment. Treasury commented that it is "studying the feasibility of increasing the recordation fee above the current level (\$190), and obtaining authority to spend the fees collected for increased intellectual property enforcement." It pointed out that "currently, the fees collected go into the general revenue and may not be used to defray enforcement costs." We have no comment on this proposal.

# Survey of Firms That Have Registered Trademarks or Copyrights With the Customs Service



**U.S. GENERAL ACCOUNTING OFFICE**

**SURVEY OF FIRMS THAT HAVE REGISTERED  
TRADEMARKS OR COPYRIGHTS WITH THE CUSTOMS SERVICE**

Please respond to questions 2 to 11 with respect to the following trademark or copyright:

**INTRODUCTION/INSTRUCTIONS**

The U.S. General Accounting Office, an agency of Congress, is studying Government efforts to help U.S. companies protect their intellectual property rights--such as patents, trademarks and copyrights--in international trade. As part of this study, we have developed this questionnaire to help us assess the Customs Service's ability to keep goods that violate U.S.-held trademarks or copyrights from entering the country.

Based upon our initial research, we have identified 270 cases for study. We have defined a case as a specific request for Customs assistance in protecting a registered trademark or copyright against counterfeit or otherwise infringing imports anytime from January 1, 1980 to April 1, 1985. We subsequently identified a company official or outside attorney associated with each case. Most potential respondents were linked to a single case. However, several were associated with more than one case. In these instances, we randomly selected one case for each respondent in order to minimize the burden placed on any single respondent.

Please respond to questions 2 to 11 based on your experiences with the trademark or copyright cited on the label on this page. Note that questions 12 and 13 relate to your experiences in general and not necessarily to only the cited case. Some of the questions may require that you contact the firm or outside counsel to respond completely and accurately. The questionnaire can be completed in about 15 minutes. Nearly all of the questions can be completed by

checking a box or filling in a short blank. A few require a brief narrative. Some of the questions are to be skipped depending upon your answer to a previous question. Therefore we ask that you pay particular attention to the skip instructions within the questionnaire.

Please complete the questionnaire and return it in the enclosed business reply envelope within 10 days. The return address is:

U.S. General Accounting Office  
441 G Street, N.W.  
Room 4148  
Washington, D.C. 20548

ATTN: Joseph Natalicchio

If you have any questions about our work or the questionnaire itself, don't hesitate to call Mr. Natalicchio at (202) 275-5889. Thank you for your cooperation and assistance.

**BACKGROUND**

1. Please provide the name, title, and phone number of the person who completes the questionnaire. If more than one person helps, identify the person you suggest we contact for clarification or additional information about the responses to the questionnaire.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Phone no: \_\_\_\_\_

**Appendix II  
Survey of Firms That Have Registered  
Trademarks or Copyrights With the  
Customs Service**

**CUSTOMS SERVICE EFFORTS TO PROTECT  
REGISTERED TRADEMARKS AND COPYRIGHTS**

2. Since January 1, 1980, (or the date of recordation with Customs, if later), have goods that counterfeited or otherwise infringed the registered trademark or copyright (not gray market or parallel goods) entered the country? (CHECK ONE)

- 1.  Yes
- 2.  No
- 3.  Don't know

(SKIP TO Q. 7)

3. What is your estimate of the value of lost sales due to counterfeit or otherwise infringing imports from January 1, 1980, (or the date of recordation with Customs, if later) to June 30, 1985? (CHECK ONE)

- 1.  \$100,000 or less
- 2.  \$100,001 - 500,000
- 3.  \$500,001 - 1,000,000
- 4.  \$1,000,001 - 5,000,000
- 5.  More than \$5,000,000  
(Specify to nearest million: \_\_\_\_\_)
- 6.  No basis to estimate

4. To what degree has the value of counterfeit or otherwise infringing imports entering the marketplace increased or decreased since you registered the trademark or copyright? (COMPARE A RECENT TIME PERIOD TO A SIMILAR TIME PERIOD JUST BEFORE YOU REGISTERED THE TRADEMARK OR COPYRIGHT) (CHECK ONE)

- 1.  Increased substantially
- 2.  Increased moderately
- 3.  Remained about the same
- 4.  Decreased moderately
- 5.  Decreased substantially
- 6.  No basis to judge

5. To what extent, if any, have imports that counterfeited or otherwise infringed the registered trademark or copyright hurt the company's sales since January 1, 1980 (or the date of recordation with Customs, if later)? (CHECK ONE)

- 1.  Little or no extent
- 2.  Some extent
- 3.  Moderate extent
- 4.  Substantial extent
- 5.  Very great extent
- 6.  No basis to judge

6. To what extent, if any, have imports that counterfeited or otherwise infringing the registered trademark or copyright hurt the product's reputation with consumers since January 1, 1980 (or the date of recordation with Customs, if later)? (CHECK ONE)

- 1.  Little or no extent
- 2.  Some extent
- 3.  Moderate extent
- 4.  Substantial extent
- 5.  Very great extent
- 6.  No basis to judge

**Appendix II  
Survey of Firms That Have Registered  
Trademarks or Copyrights With the  
Customs Service**

7. Has intelligence developed by your firm (or the trademark/copyright owner) led Customs to interdict shipments of goods that counterfeited or otherwise infringed the registered trademark or copyright? (CHECK ONE)

- 1.  Yes
- 2.  No (SKIP TO Q. 9)

8. What is your level of satisfaction with Customs' response to your information that counterfeit or otherwise infringing goods are entering the country? (CHECK ONE)

- 1.  Very satisfied
- 2.  Satisfied
- 3.  Neither satisfied nor dissatisfied
- 4.  Dissatisfied
- 5.  Very dissatisfied

9. To what extent, if any, has Customs interdicted shipments of goods that counterfeited or otherwise infringed the trademark or copyright registered with Customs without being prewarned by your firm (or the trademark/copyright owner)? (CHECK ONE)

- 1.  Very great extent
- 2.  Substantial extent
- 3.  Moderate extent
- 4.  Some extent
- 5.  Little or no extent
- 6.  No basis to judge

10. Overall, taking into account Customs' handling of your registered trademark or copyright, including its ability to keep counterfeit or otherwise infringing goods out of the country, how satisfied or dissatisfied were/are you with the ability of the Customs Service to protect intellectual property rights? (CHECK ONE)

- 1.  Very satisfied
- 2.  Satisfied
- 3.  Neither satisfied nor dissatisfied
- 4.  Dissatisfied
- 5.  Very dissatisfied

11. What is the major reason(s) for your satisfaction or dissatisfaction with the ability of the Customs Service to respond to your needs.

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**USE OF PRIVATE INVESTIGATIVE GROUP TO PROTECT TRADEMARKS AND COPYRIGHTS**

12. Does your firm (or the trademark/copyright owner) use an inhouse or outside investigative group to identify foreign-made counterfeit or otherwise infringing copies of goods destined for the United States? (CHECK ONE)

- 1.  Yes
- 2.  No (SKIP TO Q. 14)

**Appendix II  
Survey of Firms That Have Registered  
Trademarks or Copyrights With the  
Customs Service**

13. That is your estimate of the approximate total cost of this investigative group during the company's most recently completed fiscal year? (FILL IN THE BLANK OR CHECK THE BLOCK)

\$ \_\_\_\_\_ (dollars)

No basis to estimate

**ADDITIONAL INFORMATION**

14. If you would like to receive a copy of our report on this matter, please check the box below and provide a mailing address.

Yes, send us a copy of your report.

Please provide the name and address of the person to receive the report:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

15. Please use the space below to provide us with any additional comments related to the questionnaire or to provide us with other comments related to Customs' handling of the registered trademark or copyright. Thank you for your cooperation and assistance.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

HRM 7/85



# Survey of Firms That Have Initiated Section 337 Proceedings



U.S. GENERAL ACCOUNTING OFFICE  
SURVEY OF FIRMS THAT HAVE INITIATED  
SECTION 337 PROCEEDINGS

Please respond to the questions with respect to the following Section 337 proceeding:

INTRODUCTION/INSTRUCTIONS

The U.S. General Accounting Office, an agency of Congress, is studying Government efforts to help U.S. firms protect their intellectual property rights--such as patents, trademarks or copyrights--in international trade. As part of this study, we have developed this questionnaire to help assess: (1) the International Trade Commission's (ITC) procedures for providing relief under Section 337 of the Tariff Act of 1930 and (2) the Customs Service's enforcement of Section 337 exclusion orders. The questionnaire solicits the views of officials of companies, like yours, that have initiated Section 337 proceedings.

The questionnaire should be completed with respect to the Section 337 proceedings outlined on the label attached above. It can be completed in about 20 minutes. Nearly all of the questions can be answered by checking a box or filling in a short blank. A few require a brief narrative. Some of the questions are to be skipped depending upon your answer to a previous question. Therefore, we ask that you pay particular attention to the skip instructions within the questionnaire.

Please complete the questionnaire and return it in the enclosed business reply envelope within 10 days. The return address is:

U.S. General Accounting Office  
441 G Street, N.W.  
Room 4148  
Washington, D.C. 20548

ATTN: Joseph Natalicchio

If you have any questions about our work or the questionnaire itself, don't hesitate to call Mr. Natalicchio at (202) 275-5889. Thank you for your cooperation and assistance.

BACKGROUND

1. Please provide the name, title, and phone number of the person who completes the questionnaire. If more than one person helps, identify the person you suggest we contact for clarification or additional information about your responses to the questionnaire.

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Phone number: \_\_\_\_\_

**Appendix III  
Survey of Firms That Have Initiated Section  
337 Proceedings**

2. What is your estimate of the total cost to your company of participating in Section 337 proceedings through the time of ITC's final disposition of your request for relief? (INCLUDE BUT DO NOT LIMIT YOUR ESTIMATE TO THE COST OF OUTSIDE COUNSEL) (CHECK ONE)

1.  \$100,000 or less
2.  \$100,001 - 250,000
3.  \$250,001 - 500,000
4.  \$500,001 - 1,000,000
5.  \$1,000,001 - 2,500,000
6.  More than \$2,500,000  
(Specify to nearest million:  
\_\_\_\_\_)

**ITC ADMINISTRATION OF SECTION 337**

This section solicits information on the actions of ITC after you requested relief under Section 337 and the impact of their actions on your firm.

**ITC provision of expedited relief**

3. Did your firm seek expedited relief in the form of a temporary exclusion order from ITC? (RECALL THAT MANY FIRMS DO NOT SEEK EXPEDITED RELIEF, BUT RATHER INITIALLY SEEK PERMANENT RELIEF) (CHECK ONE AND COMPLETE AS APPLICABLE)

1.  Yes, date of request:

\_\_\_\_\_  
Mo. Yr.

2.  No (SKIP TO Q. 9)

4. Did your firm receive a temporary exclusion order from ITC? (CHECK ONE AND COMPLETE AS APPLICABLE)

1.  Yes, date of receipt:

\_\_\_\_\_  
/

2.  No (SKIP TO Q. 10)

5. Between the dates your firm requested and received the temporary exclusion order, was your firm being injured by the unfair trade practice being adjudicated under Section 337? (CHECK ONE)

1.  Yes

2.  No (SKIP TO Q. 20)

6. What is your estimate of the value of your firm's lost sales between the dates of your request and receipt of the temporary exclusion order? (CHECK ONE)

1.  \$100,000 or less

2.  \$100,001 - 500,000

3.  \$500,001 - 1,000,000

4.  \$1,000,001 - 5,000,000

5.  More than \$5,000,000  
(Specify to nearest million:  
\_\_\_\_\_)

6.  No basis to estimate

7. To what extent, if any, did counterfeit or infringing imports hurt the product's reputation with consumers between the dates of your request and receipt of the temporary exclusion order? (CHECK ONE)

1.  Little or no extent

2.  Some extent

3.  Moderate extent

4.  Substantial extent

5.  Very great extent

6.  No basis to judge

**Appendix III  
Survey of Firms That Have Initiated Section  
337 Proceedings**

8. Describe how, in your view, the product's reputation with consumers was hurt by counterfeit or infringing imports between the dates of your request and receipt of the temporary exclusion order.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**SKIP TO Q. 20**

9. Which of the following were major reasons your firm did not seek expedited relief in the form of a temporary exclusion order from ITC? (CHECK ALL THAT APPLY)

- 1.  Expedited relief was not necessary
- 2.  Took too long to obtain
- 3.  Cost too much to obtain
- 4.  Requirements for obtaining a temporary order were too stringent
- 5.  Other, please specify:  
\_\_\_\_\_  
\_\_\_\_\_

**ITC provision of permanent relief**

10. Did your firm receive a permanent exclusion order and/or a cease-and-desist order from ITC? (CHECK ONE)

- 1.  Yes
- 2.  No (SKIP TO Q. 16)

11. What was the date of the final disposition by ITC?

\_\_\_\_\_/\_\_\_\_\_  
Mo. Yr.

12. Between the dates your firm requested relief and received permanent relief was your firm being injured by the unfair trade practice being adjudicated under Section 337? (CHECK ONE)

- 1.  Yes
- 2.  No (SKIP TO Q. 20)

13. What is your estimate of the value of your firm's lost sales between the dates of your request and receipt of the permanent relief? (CHECK ONE)

- 1.  \$100,000 or less
- 2.  \$100,001 - 500,000
- 3.  \$500,001 - 1,000,000
- 4.  \$1,000,001 - 5,000,000
- 5.  More than \$5,000,000  
(Specify to nearest million: \_\_\_\_\_)
- 6.  No basis to estimate

14. To what extent, if at all, did counterfeit or infringing imports hurt the product's reputation with consumers between the dates of your request and receipt of the permanent relief? (CHECK ONE)

- 1.  Little or no extent
- 2.  Some extent
- 3.  Moderate extent
- 4.  Substantial extent
- 5.  Very great extent
- 6.  No basis to judge

Appendix III  
Survey of Firms That Have Initiated Section  
337 Proceedings

15. Describe how, in your view, the product's reputation with consumers was hurt by counterfeit or infringing imports between the dates of your request and receipt of the permanent relief.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

SKIP TO Q. 20

16. Did your firm settle the dispute through a settlement, consent order, and/or licensing agreement? (CHECK ONE)

1.  Yes  
2.  No (SKIP TO Q. 18)

17. What was the major reason your firm chose to settle the Section 337 proceedings before the ITC made its final determination? (CHECK ONE)

1.  The agreement(s) resolved the problem to our satisfaction.  
2.  Although the agreement(s) was not fully satisfactory, we believed it was in our best interest because we needed immediate action.  
3.  Although the agreement(s) was not fully satisfactory, we believed it was in our best interest because we could not afford to litigate the case through final determination.  
4.  Other, please specify:  
\_\_\_\_\_

SKIP TO Q. 20

18. Did your firm voluntarily terminate the Section 337 proceedings? (CHECK ONE)

1.  Yes  
2.  No (SKIP TO Q. 20)

19. What was the major reason(s) your firm chose to terminate the Section 337 proceedings before the ITC made its final determination? (CHECK ALL THAT APPLY)

1.  We did not believe that we could support the validity of the intellectual property right in question.  
2.  We did not believe that we could demonstrate that our firm constituted a "domestic industry" for Section 337 purposes.  
3.  We did not believe that we could demonstrate that our firm was efficiently and economically operated.  
4.  We did not believe that we could demonstrate sufficient injury to an industry to obtain relief.  
5.  Other, please specify:  
\_\_\_\_\_  
\_\_\_\_\_

20. Overall, taking into account ITC's handling of your request, the timeliness of their response and other aspects of the ITC proceedings you consider relevant, how satisfied or dissatisfied were/are you with the ability of ITC to respond to your needs under Section 337? (CHECK ONE)

1.  Very satisfied  
2.  Satisfied  
3.  Neither satisfied nor dissatisfied  
4.  Dissatisfied  
5.  Very dissatisfied

**Appendix III  
Survey of Firms That Have Initiated Section  
337 Proceedings**

21. What is the major reason(s) for your satisfaction or dissatisfaction with ITC's implementation of Section 337?

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**CUSTOMS SERVICE ENFORCEMENT OF  
EXCLUSION ORDERS**

This section solicits information on the actions of the Customs Service after your firm received a permanent exclusion order from ITC.

22. Did your firm receive a Section 337 permanent exclusion order from ITC? (CHECK ONE)

- 1.  Yes
- 2.  No (SKIP TO Q. 35)

23. Since your firm received the permanent exclusion order, have counterfeit or infringing goods covered by the order entered the country? (CHECK ONE)

- 1.  Yes
- 2.  No
- 3.  No basis to judge

(SKIP TO Q. 27)

24. What is your estimate of the value of lost sales due to counterfeit or infringing imports between the dates you received the permanent exclusion order and June 30, 1985? (CHECK ONE)

- 1.  \$100,000 or less
- 2.  \$100,001 - 500,000
- 3.  \$500,001 - 1,000,000
- 4.  \$1,000,001 - 5,000,000
- 5.  More than \$5,000,000 (Specify to nearest million: \_\_\_\_\_)
- 6.  No basis to estimate

25. To what degree has the value of counterfeit or infringing imports entering the marketplace increased or decreased since the permanent exclusion order was issued? (FOR THE PRODUCT COVERED BY THIS ORDER, COMPARE A RECENT TIME PERIOD TO A SIMILAR TIME PERIOD JUST BEFORE THE ORDER WAS ISSUED) (CHECK ONE)

- 1.  Increased substantially
- 2.  Increased moderately
- 3.  Remained about the same
- 4.  Decreased moderately
- 5.  Decreased substantially
- 6.  No basis to judge

Appendix III  
Survey of Firms That Have Initiated Section  
337 Proceedings

26. To what extent have counterfeit or infringing imports covered by the ITC exclusion order hurt your company's sales since the permanent exclusion order was issued? (CHECK ONE)
- Little or no extent
  - Some extent
  - Moderate extent
  - Substantial extent
  - Very great extent
  - No basis to judge
27. Has an inhouse or outside investigative group been used to identify foreign-made counterfeit or infringing goods covered by the exclusion order that were intended for sale in the United States? (CHECK ONE)
- Yes
  - No (SKIP TO Q. 32)
28. What is your estimate of the approximate total cost to your firm to maintain this investigative group during your firm's most recently completed fiscal year? (FILL IN THE BLANK OR CHECK THE BLOCK)
- \$ \_\_\_\_\_ (dollars)
- No basis to estimate
29. Has your firm provided information to Customs based on intelligence developed through your investigative group that has led to Customs interdicting shipments of goods covered by your permanent exclusion order? (CHECK ONE)
- Yes
  - No (SKIP TO Q. 31)
30. What is your firm's level of satisfaction with Customs' response to your information that goods covered the permanent exclusion order are entering the country? (CHECK ONE)
- Very satisfied
  - Satisfied
  - Neither satisfied nor dissatisfied
  - Dissatisfied
  - Very dissatisfied
31. In enforcing an exclusion order, Customs can exclude counterfeit or infringing goods, but cannot seize and destroy them. In your opinion would giving Customs the authority to seize and destroy counterfeit or infringing goods covered by Section 337 permanent exclusion orders improve their ability to help firms protect intellectual property rights? (CHECK ONE)
- Definitely no
  - Probably no
  - Not sure
  - Probably yes
  - Definitely yes
  - No basis to judge
32. Would you favor giving Customs the authority to seize and destroy counterfeit or infringing goods covered by Section 337 permanent exclusion orders? (CHECK ONE)
- Definitely no
  - Probably no
  - Not sure
  - Probably yes
  - Definitely yes

Appendix III  
Survey of Firms That Have Initiated Section  
337 Proceedings

33. Overall, taking into account Customs' handling of your permanent exclusion order, including their ability to keep counterfeit or infringing goods out of the country, how satisfied or dissatisfied were/are you with the ability of the Customs Service to respond to your needs under the Section 337 permanent exclusion order? (CHECK ONE)

- 1.  Very satisfied
- 2.  Satisfied
- 3.  Neither satisfied nor dissatisfied
- 4.  Dissatisfied
- 5.  Very dissatisfied

34. What is the major reason(s) for your satisfaction or dissatisfaction with Customs' enforcement of your exclusion order?

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**ADDITIONAL INFORMATION**

35. If you would like to receive a copy of our report on this matter, please check the box below and provide a mailing address.

Yes, send us a copy of your report.

Please provide the name and mailing address of the person to receive the report.

Name: \_\_\_\_\_

Address: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

36. Please use the space below to provide us with any additional comments related to the questionnaire or to provide us with other comments related to ITC's implementation of Section 337 or Customs' enforcement of exclusion orders. Attach additional sheets if necessary. Thank you for your cooperation and assistance.

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HRM 7/85

# Comments From the Department of the Treasury



DEPARTMENT OF THE TREASURY  
WASHINGTON

ASSISTANT SECRETARY

April 15, 1986

Re: Draft of a Proposed Report  
International Trade: Results of Surveys on Customs  
Protection of Intellectual Property Rights (483402)  
February 14, 1986

Dear Mr. Anderson:

We have reviewed the subject Draft of a Proposed Report prepared by your staff which gives the results of surveys conducted by the General Accounting Office in which copyright, trademark and patent owners were asked for their comments on the subject of Customs Protection of Intellectual Property Rights. The final report will be directed to the Chairmen of the Senate Committees on Appropriations and Finance and the House Committees on Appropriations and Ways and Means.

The draft report outlines the procedures of the Customs Service which permit owners of intellectual property rights to record their copyrights and trademarks with Customs for a "small" fee (\$190). Customs will then undertake to provide protection against the unauthorized importation of articles that infringe those intellectual property rights. In the copyright and trademark areas, infringing articles detected by Customs are seized and forfeited to the Government. Articles subject to exclusion orders issued by the U.S. International Trade Commission (ITC) are excluded from entering the United States.

The report points out that nearly 80 percent of those firms responding to the survey, that had a basis to judge, reported that counterfeit and other infringing goods continued to enter the country after recordation. However, those firms that provided information concerning incoming shipments of counterfeit or other infringing goods reported that they were almost always satisfied with Customs' response. Other areas of apparent dissatisfaction with Customs enforcement efforts concern a delay of 2 to 3 months in informing ports of entry about newly recorded copyrights and trademarks, and ineffectiveness in excluding articles subject to ITC exclusion orders. The high cost of



Appendix IV  
Comments From the Department of  
the Treasury

litigating and obtaining exclusion orders pursuant to section 337 of the Tariff Act of 1930 (between \$100,000 and \$500,000), creates the expectation that exclusion orders, once obtained, will effectively stop counterfeit or other infringing goods from entering the country.

In order to put Customs' efforts to detect importations of products that violate the rights of copyright, trademark and patent owners in proper perspective, we should point out that the traditional mission of the U.S. Customs Service, established by the Second Act of the First Congress in 1789, remains the same:

- \* To assess and collect customs duties on imported merchandise;
- \* To prevent fraud and smuggling; and
- \* To control carriers, persons and articles entering and departing the United States.

As the principal border enforcement agency, Customs' mission has been extended over the years to assisting in the administration and enforcement of some 400 provisions of law on behalf of more than 40 Government agencies. Additional duties include prohibiting traffic in illegal narcotics, certain foods and drugs, hazardous substances, counterfeit money, and obscenity; controlling exports, including high technology exports to the Soviet block; controlling illegal immigration; enforcing auto safety and emission standards; enforcing flammable fabric, quota, marking of country of origin, and animal and plant quarantine restrictions; and protecting endangered species of wildlife.

The Customs Service must carefully manage the limited resources (personnel, equipment and facilities) available to the agency, in order to accomplish its total mission. Operation Tripwire was established as part of the Customs Fraud Investigation Center and continues to be effective in detecting and deterring fraudulent importations of foreign products that violate U.S. copyright and trademark laws. The domestic value of Customs commercial seizures for copyright and trademark violations for the period October 1, 1985 through February 28, 1986, totalled \$25,527,098. Seizures included textile products, electronics, watches, toys, perfume, and other miscellaneous commodities. Seizures for calendar year 1985 totalled \$37,553,963. This represents an increase of about \$15,000,000 over the 1984 total (\$22,981,021).

Customs enforcement effort in this area will never be 100 percent effective. When a copyright or trademark owner applies for a Customs recordation to protect his intellectual property,

**Appendix IV  
Comments From the Department of  
the Treasury**

he receives an explanation of the Customs enforcement program. Customs can be more effective, of course, if it is provided with all available information concerning shipments of alleged infringing goods which are on their way to the United States. We encourage applicants to provide this information, and it is included in the notices that are issued to Customs field offices. Customs also asks applicants to provide information concerning the source of legitimate goods, which helps the agency detect counterfeits. The number of applications received has increased dramatically in 1985 and 1986.

Most applicants feel that obtaining a Customs watch on imports and, perhaps, the seizure or exclusion of infringing goods is well worth the recordation fee (\$190). Seizures of large shipments of counterfeit goods by Customs (e.g., Cabbage Patch Kids, Cartier watches) have been given widespread publicity. Also, Customs has been able to refer several large counterfeiting cases to the Department of Justice for criminal prosecution under the Trademark Counterfeiting Act of 1984. The deterrent effect of publicity of this nature on potential violators cannot be overlooked.

With regard to the question of Customs ability to enforce ITC exclusion orders, we must mention again that Customs is most effective when information is provided regarding incoming shipments of infringing goods. Many of the exclusion orders are based on patent infringement. Since there is nothing in the appearance of imported articles which exposes a patent violation, the mechanism of the imported article must be examined. Customs officers often have to remove protective covers to examine the mechanisms. Once the mechanical parts are exposed a decision has to be made regarding whether or not the patent has been infringed. Understandably, this type of decision is difficult. Questionable articles must be sent to a Customs laboratory for analysis. The findings of the laboratory must be carefully reviewed by staff attorneys before a legal decision can be reached as to whether the patent exclusion order has been violated. Exclusion orders based on copyright or trademark infringement are less difficult to enforce.

Several respondents to your survey mentioned a delay of 2 to 3 months in getting notices of new Customs copyright and trademark recordations out to all ports of entry. This has occurred because the number of applications in 1985 to record trademarks and copyrights in 1985 was more than double the

Appendix IV  
Comments From the Department of  
the Treasury

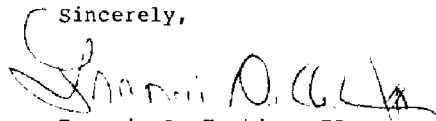
number received in 1984. Moreover, there has been a substantial increase in the number of inquiries from Customs officers in the field. Customs is in the process of putting all copyright and trademark recordations on a computer which will eventually be accessible by the various ports of entry.

Other respondents are concerned that the delay referred to above may, in fact, allow large shipments of infringing goods to enter the United States without restriction, perhaps with severe financial loss to the copyright or trademark owner. We might point out that at one time Customs attempted to give priority consideration to applicants who expressed such concerns. However, Customs ended this practice when it became apparent that most applicants for copyright and trademark protection accompanied their applications with statements to the effect that infringing goods are about to arrive in the United States, and that serious economic harm will ensue unless Customs is able to grant immediate protection. We would suggest that copyright and trademark owners should note the required processing time, and anticipate some delay in the effective dates of their recordations when submitting their applications. For example, we note that there is a 6 month delay at the U.S. Patent Office in processing patent applications, and that this fact is well known.

We are currently studying the feasibility of increasing the recordation fee above the current level (\$190), and obtaining authority to spend the fees collected for increased intellectual property enforcement. Currently, the fees collected go into the general revenue and may not be used to defray enforcement costs. Funds for enforcement purposes must be allocated to Customs through the budget process.

In conclusion, we respectfully request that our comments accompany the final report when it is submitted to the Congress.

Sincerely,



Francis A. Keating, II  
Assistant Secretary  
(Enforcement)

Mr. William J. Anderson  
Director  
General Government Division  
General Accounting Office  
Washington, D.C. 20548

# Comments From the International Trade Commission

CHAIRWOMAN



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

March 10, 1986

Frank C. Conahan, Director  
National Security and  
International Affairs Division  
United States General Accounting Office  
Washington, D.C. 20548

Dear Mr. Conahan:

This refers to your letter to me dated February 19, 1986, in which you enclosed for our review and comments a copy of your draft report "International Trade: Results of Surveys on Customs Protection of Intellectual Property Rights" (Code 483402).

There is a reference on p. 2 of the draft report to relief available under section 337 to "Owners of . . . unregistered trademarks." This reference is also contained on p. 11 of Appendix I. Both follow a discussion of relief available to owners of registered trademarks by recordation of their marks with the U.S. Customs Service. Thus, some readers may incorrectly infer that relief for infringement of registered trademarks may only be had by recordation of these marks with the U.S. Customs Service, and not under Section 337. In point of fact, relief may also be had under Section 337 for infringement of registered trademarks. Miniature Plug-in Blade Fuses, Inv. No. 337-TA-114 (1983), and Power Woodworking Tools, Their Parts, Accessories and Special Purpose Tools, Inv. No. 337-TA-115. (1974)

The draft report also contains the results of a survey showing the perception of a number of firms that there was continued importation of infringing goods notwithstanding that exclusion orders under Section 337 were in effect. Also, the value of sales losses caused by these imports are reportedly quite substantial. While it is possible that infringing imports may continue to enter the U.S., we doubt that it is on the scale reported by the survey. Quite probably, the survey respondents are reporting importation of products which are in competition with their products, and not those products which actually infringe their proprietary rights. The latter

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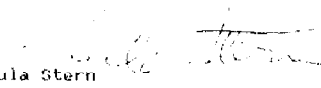
**Appendix V  
Comments From the International  
Trade Commission**

category would be those products actually covered by exclusion orders, and this category tends to be narrower in most cases than all competitive products. In general, our experience is that the U.S. Customs Service is doing an effective job in enforcing existing Commission exclusion orders, and we have heard of no reports of wholesale evasion of exclusion orders such as is suggested in the survey.

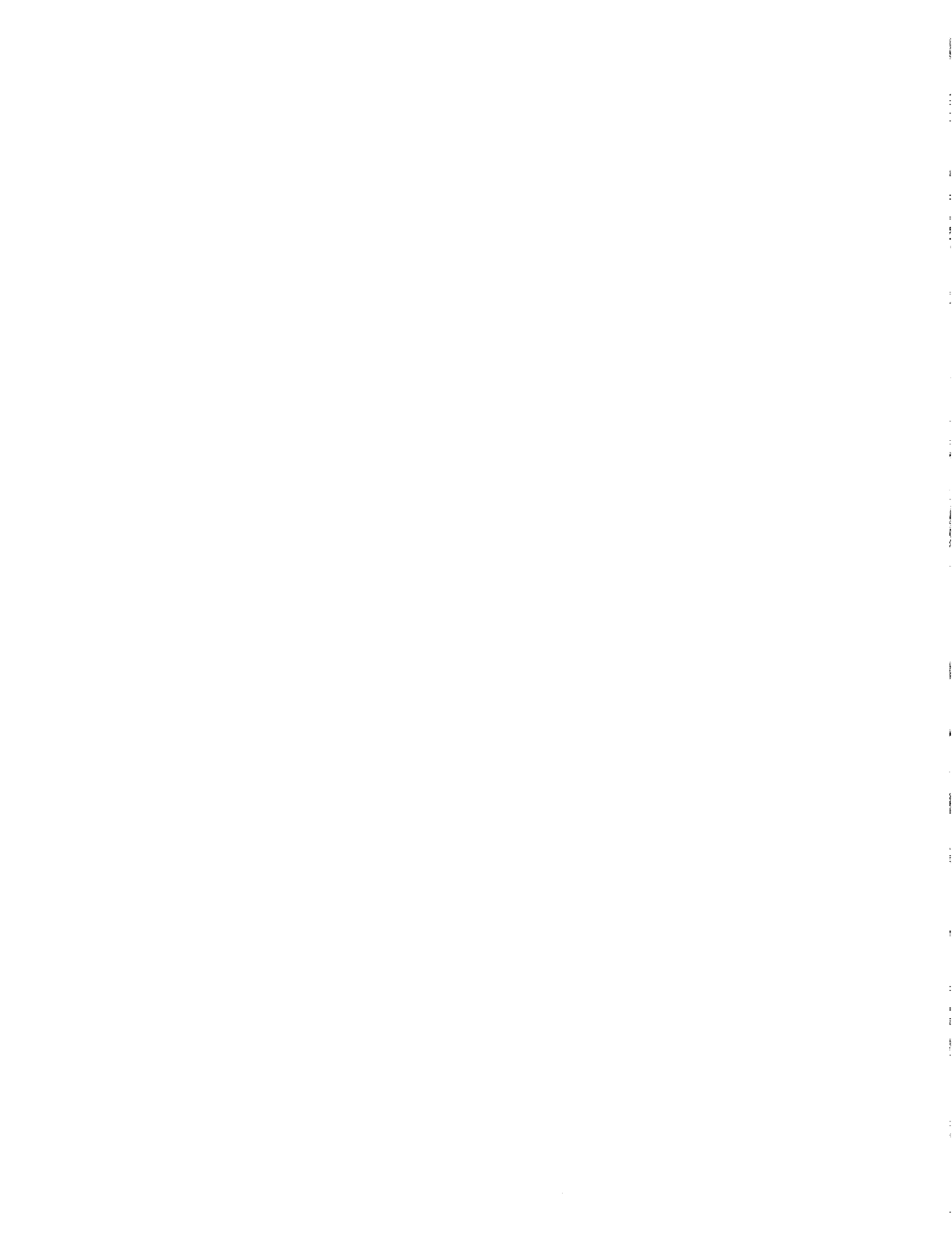
Finally, the draft report contains a recommendation made by firms in the GAO survey which would authorize the Commission to direct the U.S. Customs Service to seize goods when enforcing exclusion orders. This proposal is the subject of pending legislation before Congress (H.R. 3776). My personal views on this matter are contained on p. 24 of my Statement for the Subcommittee On Courts, Civil Liberties, and the Administration of Justice, House Judiciary Committee (Feb. 19, 1986), copy of which is attached. However, as with other seizure provisions, Customs and not the Commission should determine when it is appropriate to exercise the seizure authority.

Please let me know if you have any questions as to the above.

Sincerely yours,



Paula Stern  
Chairwoman



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