repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required within the next 100 hours time-in-service (TIS) after the effective date of this AD, or within the next 1,000 hours TIS after the last inspection required in accordance with AD 93–10–11, Amendment 39–8592, whichever occurs later, unless already accomplished, and thereafter at intervals not to exceed 1,000 hours TIS.

To prevent structural cracks in the wing spars, which, if not corrected, could lead to loss of a wing and loss of control of the airplane, accomplish the following:

(a) Inspect the upper and lower wing surfaces of both wing spars for cracks in accordance with Avions Mudry & Cie (Avions) Service Bulletin (SB) CAP10B–57–003, Revision 1, dated April 3, 1996.

(b) If any cracks are found, prior to further flight, repair the cracks with a repair scheme obtained from the manufacturer through the FAA Project Officer at the Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106.

Note 2: The compliance times required in this AD take precedence over the compliance times stated in Avions SB CAP10B–57–003, Revision 1, dated April 3, 1996.

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(d) An alternative method of compliance or adjustment of the compliance times that provides an equivalent level of safety may be approved by the Manager, Small Airplane Directorate, 1201 Walnut, suite 900, Kansas City, Missouri 64106. The request shall be forwarded through an appropriate FAA Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate. Alternative methods of compliance approved in accordance with AD 93–10–11 are not considered approved as alternative methods of compliance for this AD.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Small Airplane Directorate.

(e) Questions or technical information related to Avions Mudry & Cie Service Bulletin CAP10B–57–003, Revision 1, dated April 3, 1996, should be directed to Avions Mudry & Cie, B.P. 214, 27300 Bernay, France: telephone (33) 32 43 47 34; facsimile (33) 32 43 47 90. This service information may be examined at the FAA, Central Region, Office of the Regional Counsel, Room 1558, 601 E. 12th Street, Kansas City, Missouri 64106.

(f) This amendment supersedes AD 93–10–11, Amendment 39–8592.

Note 4: The subject of this AD is addressed in French AD 92–240(A)R1, dated October 22, 1997.

Issued in Kansas City, Missouri, on March 19, 1998.

Marvin R. Nuss,

Acting Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 98–7889 Filed 3–25–98; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 133

RIN 1515–AB49

Gray Market Imports and Other Trademarked Goods

AGENCY: Customs Service, Department of the Treasury.

ACTION: Proposed rule.

SUMMARY: This document proposes to amend the Customs Regulations in light of the 1993 decision of the U.S. Court of Appeals for the District of Columbia in *Lever Bros. Co.* v. *United States.* In line with that decision, the proposed rule would, upon application by the U.S trademark owner, restrict importation of certain gray market articles that bear genuine trademarks identical to or substantially indistinguishable from those appearing on articles authorized by the U.S. trademark owner for importation or sale in the U.S., and that thereby create a likelihood of consumer confusion, in circumstances where the gray market articles and those bearing the authorized U.S trademark are physically and materially different. The proposed restrictions would apply notwithstanding that the U.S. and foreign trademark owners are the same, are parent and subsidiary companies, or are otherwise subject to common ownership or control. The proposed restrictions would not be applicable if the otherwise restricted articles are labeled in accordance with proposed standards to eliminate consumer confusion.

In addition, it is proposed to reorganize the Customs Regulations, with respect to importations bearing recorded trademarks or trade names, in order to clarify Customs enforcement of trademark rights as they relate to products bearing counterfeit, copying, or simulating marks and trade names, and to clarify Customs enforcement against gray market goods.

DATES: Comments must be received on or before May 26, 1998.

ADDRESSES: Comments (preferably in triplicate) must be submitted to and may be inspected at the Regulations Branch, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20229.

FOR FURTHER INFORMATION CONTACT: Michael Smith, Intellectual Property Rights Branch, (202–927–2330).

SUPPLEMENTARY INFORMATION:

Background

On January 15, 1993, the United States Court of Appeals for the District of Columbia issued a decision in *Lever Bros. Co.* v. *United States*, 981 F.2d 1330 (D.C. Cir. 1993) (*Lever*) regarding certain prohibitions against the importation of certain ''gray market'' goods. In general, gray market goods are articles that are genuine but are not authorized for importation by the U.S trademark owner. In light of this decision, a number of regulatory changes to part 133, Customs Regulations (19 CFR part 133) are proposed.

The Lever Decision

Lever Brothers Company (''Lever U.S.'') owned the domestic trademarks ''SHIELD'' and ''SUNLIGHT,'' and manufactured products in the United States bearing those trademarks. Lever Brothers Limited (''Lever U.K.'') owned the foreign trademarks ''SHIELD'' and ''SUNLIGHT,'' and manufactured products abroad bearing those trademarks. Lever U.S. and Lever U.K. were affiliated through Unilever, a Dutch company. The *Lever* court proceeded on the uncontested assumption that the articles produced for the U.S. and foreign markets respectively differed in terms of composition, and performance characteristics, among other things.

A third party, unrelated to either Lever U.S. or Lever U.K., imported into the United States, without the authorization of Lever U.S., ''SHIELD'' deodorant soap and ''SUNLIGHT'' dishwashing products manufactured abroad by Lever U.K. Customs declined to restrict these importations, based on § 133.21(c)(2) of the Customs Regulations, 19 CFR 133.21(c)(2), which states that no protection against unauthorized genuine goods bearing otherwise restricted marks is provided when the foreign and domestic trademark owners are subject to common ownership or control.

Lever U.S. brought suit to compel Customs to deny entry, claiming that the differences between the Lever U.K. and Lever U.S. products resulted in consumer confusion and deception about the nature and origin of the imported merchandise, thereby constituting a violation of section 42 of

the Lanham Act, 15 U.S.C. 1124. The Appellate Court found that section 42 of the Lanham Act precludes the application of Customs' affiliate exception with respect to physically, materially different goods. The Court of Appeals affirmed the District Court's ruling that section 42 of the Lanham Act bars the importation of such goods. The District Court was directed to issue an injunction requiring Customs to exclude from entry the ''SHIELD'' and ''SUNLIGHT'' products at issue.

Protection Against Gray Market Goods

Currently, Customs enforces restrictions against trademarked gray market goods with two exceptions found in § 133.21(c): the ''affiliate'' exception of § 133.21(c)(2), and the ''same owner'' exception of § 133.21(c)(1). (In this document, for the sake of simplicity, except where the ''same owner'' exception and the ''affiliate'' exception are separately mentioned and distinguished, these exceptions will be referred to generically as the ''affiliate exception'', the term used in Lever.)

Restrictions Under Section 42 and the Lever Decision

Section 42 of the Lanham Act, 15 U.S.C. 1124, protects against consumer deception or confusion about an article's origin or sponsorship by restricting the importation of trademarked goods under certain circumstances. When an article is the domestic product of the U.S. trademark owner, that owner exercises control over the use of the trademark and the resulting goodwill. Similarly, Customs has taken the position that an article bearing an identical trademark and produced abroad by the U.S. trademark owner, a parent or subsidiary of the U.S. trademark owner, or a party subject to common ownership or control with the U.S. trademark owner, would be under the constructive control of either the U.S. trademark owner or a party who owned or controlled the U.S. trademark owner. Enforcement of the distribution rights of such an article produced abroad by a party related to the U.S. trademark holder was a matter to be addressed through private remedies. Therefore, Customs regulations do not provide for restrictions on the importation of such gray market goods. Prior to *Lever*, the applicability of this ''affiliate exception'' depended simply on the presence of the genuine trademark and the existence of the relevant intracompany relationship, and was not contingent on whether the gray market articles were the same as, or different from, the articles authorized for importation or sale in the United States.

However, the Court of Appeals in *Lever* drew a distinction between identical goods produced abroad under one of the scenarios contemplated by the affiliate exception and goods that are physically and materially different from the goods authorized by the U.S. trademark owner. Although the injunction in *Lever* was specifically limited to the articles at issue therein—''SHIELD'' deodorant soap and ''SUNLIGHT'' detergent—the Court of Appeals'' interpretation of the Lanham Act was not so limited and, absent some specially differentiating feature, would apply equally to other physically and materially different ''gray market'' goods. In addition, it seems clear that the *Lever* opinion should also apply not only to the ''affiliate'' exception of § 133.21(c)(2), but also to the ''same owner'' exception of § 133.21(c)(1). Customs proposes to make its regulations consistent with *Lever* to protect against consumer confusion as to the source or sponsorship of imported goods—notwithstanding that they are (1) produced by the owner of the U.S. trademark, (2) a parent or subsidiary of the U.S. trademark owner, or (3) a party subject to common ownership or control with the U.S. trademark owner—when the goods bear a mark identical to, or substantially indistinguishable from, a domestically registered trademark and are found to be physically and materially different from goods authorized by the U.S. trademark owner.

Customs proposes regulations that will continue to apply the current restrictions on the importation of gray market goods bearing legitimate trademarks that are identical to or substantially indistinguishable from trademarks on articles authorized for importation or sale in the United States under scenarios where the affiliate exception does not apply. The new restrictions that are being proposed also will ban, upon application by the trademark owner, even in affiliate exception scenarios, the importation into the United States of articles bearing genuine trademarks but that are materially and physically different and which are not authorized by the U.S. trademark owner. In the latter case, however, the restrictions will not apply when the imported article also bears a label that would inform the ultimate retail purchaser in the United States of the gray market identity of the product. This exception is contained in an exception to the restrictions that is outlined more fully below.

The Proposed Labeling Exception

In *Lever*, the Court of Appeals specifically notes that section 42 of the Lanham Act forbids importation of merchandise bearing a mark that shall copy or simulate a trademark registered in accordance with its provisions. In the Court's opinion, the Lanham Act appears on its face to aim at deceit and consumer confusion; when identical trademarks have acquired different meanings in different countries, one who imports the foreign version to sell it under that trademark will (in the absence of some ''specially differentiating feature'') cause the confusion Congress sought to avoid. The Customs Service believes that an informative label appearing prominently on such trademarked gray market goods would constitute a ''specially differentiating feature'' of the kind referred to by the Court.

Customs believes that a label can serve as an appropriate means of eliminating potential harm if the label makes clear that an article is materially and physically different from the product authorized by the trademark owner for importation or sale in the U.S. and is imported without authorization. Customs believes that a labeling exception to the new restrictions is consistent with the principles enunciated in *Lever*. In other words, where an article which is produced abroad by a party authorized to do so, bearing a genuine trademark, and imported without the authorization of the U.S. trademark owner, also bears a label in accordance with the proposed rule, Customs will regard the label as qualifying possible erroneous inferences regarding the characteristics of the article that might be drawn by the consumer from the trademark alone. Where such a label is present to modify the message regarding product characteristics that ordinarily may be communicated by the trademark standing alone, so as to eliminate the likelihood of consumer confusion, the Customs Service will conclude that the trademark, under those circumstances, does not ''copy or simulate'' the U.S.-registered mark. Such a label would modify any inference that may be drawn by the consumer from the trademark so as to eliminate the likelihood of consumer confusion.

The proposed regulations implement the responsibility of the Customs Service as the agency charged with the enforcement of the law to do so in a reasonable manner, and to promulgate appropriate rules regarding how it will interpret and apply section 42 of the Lanham Act. The proposed rules

establish the criteria that Customs will apply in carrying out its responsibilities concerning the importation of gray market goods. These rules are limited to the importation requirements of section 42 of the Lanham Act and do not apply to other provisions of the Act. To be eligible for the exception to the restriction, the label must be conspicuous and legible and appear in proximity to the trademark in its most prominent location on the article or retail packaging of the product. Where the likelihood of consumer confusion is eliminated by an acceptable, qualifying label which clearly informs the consumer about the nature of a product, Customs will except the product bearing such a label from the restrictions on importing physically and materially different gray market products.

The Customs Service is not imposing a regulatory requirement for the labeling of gray market goods. Customs proposes herein an exception to the new restriction on physically and materially different gray market products as described above. The proposed rule is intended to ensure that an acceptable label will be sufficiently conspicuous and legible and in sufficient proximity to the most prominent display of the trademark on the good or its package so as to eliminate inferences which might be drawn in the absence of such label.

In the view of Customs, the information conveyed by a label of the type proposed herein would eliminate consumer confusion and inform any reasonably alert or informed customer as to the characteristics of the goods. Armed with that information, the consumer would then be free to proceed based on his own determination of self-interest, weighing quality, price and other factors. The proposed exception for conspicuously labeled gray market imports would preserve the integrity and commercial value of the U.S. registered mark and eliminate consumer confusion regarding the source or sponsorship of the goods. Further, it would prevent the Lanham Act protection from being invoked inappropriately as a barrier to trade, while permitting consumer choice, promoting price competition, and avoiding injecting the Customs Service into intracompany world market division arrangements or disputes.

Customs is proposing standard language for the label that will except gray market goods from the new restriction on importation of such goods that are physically and materially different. The purpose of the proposed rule is to implement the *Lever* decision, and the label language has been designed to address simply and narrowly the factors on which the Court of Appeals for the D.C. Circuit focused in its ruling, namely, the gray market identity of the goods and the fact of physical and material difference. To the extent that an individual importer chooses to design a label that contains additional, product specific data, this is expressly permitted by the proposed rule.

A single label will reduce the administrative burden on Customs and promote consistency in the treatment of gray market imports subject to the rules. Customs believes that it will simplify the labeling process for importers, reducing costs and the risk that a process of individual label review and approval by Customs could cause delay and serve as a barrier to trade. Finally, Customs believes that a single label may achieve general recognition among consumers as a gray market label whereas a multiplicity of individual labels actually might create consumer confusion as to the significance of the labels.

The Customs Service believes that the proposed rule extends the appropriate protection under the trademark laws to owners of a U.S. trademark while not permitting those laws to be used as a shield against competition. In eliminating the risk of consumer confusion, the interest of the consumer in product choice and price competition in the marketplace should be considered along with the interest of the U.S. trademark holder in protecting its goodwill and reputation. The Customs Service believes that the right of the mark owner is limited to protection that addresses the potential damage to the mark owner. The identity and reputation of the domestic mark owner can be preserved and the public interest served by effectuating open and informed competition.

The Proposed Amendments

A critical step in applying the *Lever* decision is defining the scope of ''physically and materially different.'' The *Lever* court did not provide specific criteria for determining when products should be considered physically and materially different. Customs recognizes that no bright line test can be established which would delineate the relevant difference(s) among the multitude of products that may be involved in the gray market. Such determinations are inherently fact specific and must be made on a case-by-case basis. Customs also recognizes, however, that without certain guidelines, the importing public cannot reasonably expect Customs consistently to protect owners of U.S.-registered trademarks while facilitating the flow of legitimate commercial trade. With that in mind, Customs proposes to amend its regulations to include categories of information that trademark owners may provide to Customs for consideration in its determination as to whether certain trademarks may be entitled to protection under the rationale of *Lever* and the new rules promulgated herein (''*Lever*-rule'' protection).

Thus, in addition to the current information described in § 133.2, Customs Regulations (19 CFR 133.2), Customs will consider the following:

1. The composition of both the authorized and gray market product(s) (including chemical composition);
2. Formulation, product construction, structure, or composite product components, of both the authorized and gray market product(s);
3. The performance and operational characteristics of both the authorized and gray market product(s);
4. Differences between the authorized and gray market products resulting from legal or regulatory requirements, certification, etc.;
5. Other characteristics that can be described with particularity by the U.S. owner claiming gray market protection. Such characteristics must clearly distinguish authorized articles from gray market articles, applying criteria which establishes the protection of the statute, namely protection from consumer confusion and deception.

In each case, any proffered characteristic must be supported by competent evidence. Customs recognizes that it cannot anticipate all of the considerations that may lead to a finding of ''physical and material difference,'' but *Lever* suggests certain categories of information which are appropriate. The last criterion above leaves open the possibility that unspecified information may be considered at Customs' discretion.

Owners claiming gray market protection under the proposed provision should be aware that Customs will require the grounds for claiming physical and material differences to be stated with particularity. Any such request lacking in specificity will be rejected.

T.D. 92–60

On June 26, 1992, Customs published in the **Federal Register** (57 FR 28605) a Notice of Court Order, notifying owners of trademarks recorded with Customs that the *Lever* court had ordered Customs to provide protection against physically and materially different gray market products. To date, two applications have been received,

requesting protection. The first, on behalf of the owner of the ''Duracell'' trademark, was denied. See 57 FR 46063. The second, on behalf of the owner of the ''Yamaha'' trademark, was suspended following the public comment period, following the issuance of the decision of the appellate court in *Lever*. Customs will no longer accept applications under the June 26, 1992, **Federal Register** notice. Any further applications must be made after the final amendments resulting from this notice of proposed rulemaking become effective, and must be in compliance therewith. The ''Yamaha'' application will be evaluated in this fashion, and a decision thereon published in the **Federal Register**.

Proposed Amendment of Recordations

Customs anticipates that the owners of U.S. registered trademarks currently recorded with Customs who believe that they may now be entitled to protection (''*Lever*-rule'' protection) from gray market importations under the regulatory changes, if adopted, may submit requests to Customs concerning their eligibility, along with detailed explanations of the reasons for their perceived eligibility. Any party applying for ''*Lever*-rule'' protection must also submit a summary of the physical and material differences relied on in support of its application. At approximately 30-day intervals, Customs will publish in the **Federal Register** a list of those trademarks for which ''*Lever*-rule'' protection for physically and materially different gray market products has been requested including summaries of the physical and material differences. Interested parties shall then have 30 days in which to comment on the request(s). At the end of the 30-day comment period, Customs shall examine the request(s) and any comments from the public before issuing a determination on whether ''*Lever*-rule'' protection is granted. For parties requesting protection, the application for trademark protection will not take effect until Customs has made and issued this determination.

If protection is granted, Customs will publish in the **Federal Register** a notice that a trademark will receive ''*Lever*-rule'' protection. Subsequent importations of physically and materially different products will be denied entry; the merchandise will be detained under the procedures described in proposed § 133.25 of the Customs Regulations (proposed 19 CFR 133.25), and be subject to seizure after 30 days pursuant to 19 U.S.C. 1595a(c)(2)(C), unless the physically and materially different product bears in a conspicuous location a legible label stating that ''This product is not the product authorized by the United States trademark owner for importation and is physically and materially different.'' Other information designed to dispel consumer confusion may also be added. Proposed § 133.23(d) will permit an importer to establish, during the 30-day detention period, that the detained merchandise is not physically and materially different from the product authorized for importation or sale in the U.S. by the U.S. trademark owner. Merchandise seized under the regulations may be subject to a petition for relief under the provisions of §§ 133.51 and 133.52 and part 171, Customs Regulations (19 CFR part 171).

Additional Proposed Regulatory Changes

In addition to the gray market regulation changes being proposed herein, Customs proposes to reorganize and renumber the remainder of subpart C, part 133. These changes are intended to clarify Customs enforcement of trademark rights as they relate to products bearing counterfeit, or copying or simulating marks and names, and to clarify Customs enforcement generally against gray market goods. None of the clerical proposals made in this connection, other than those stemming from the *Lever* decision, alters Customs enforcement practices.

Comments

Before adopting this proposal, consideration will be given to any written comments that are timely submitted to Customs. All such comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), during regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, 1300 Pennsylvania Avenue, NW., 3rd Floor, Washington, DC 20229.

Regulatory Flexibility Act and Executive Order 12866

The proposed rule would generally reflect case law intended to protect products with valid U.S. trademarks against infringing imports. Hence, pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is hereby certified that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities. Accordingly, the rule is not subject to the regulatory analysis requirements of 5 U.S.C. 603 and 604. Nor does the proposed rule meet the criteria for a ''significant regulatory action'' as specified in E.O. 12866.

Paperwork Reduction Act

The collection of information related to this notice of proposed rulemaking has been previously reviewed and approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 and assigned OMB Control Number 1515–0114. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by OMB. Although this document restates the collection(s) of information without substantive change, comments are specifically requested concerning:

Whether the collection of information is necessary for the proper performance of the functions of the Customs Service, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proposed collection of information (see below);

How to enhance the quality, utility, and clarity of the information to be collected;

How to minimize the burden of complying with the proposed collection of information, including the application of automated collection techniques or other forms of information technology; and

Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information related to this proposed regulation is in § 133.2. This information is necessary in order to enable Customs to protect products with valid U.S. trademarks against infringing imports. The collection of information is voluntary. The likely respondents are businesses.

Estimated total annual reporting and/or recordkeeping burden: _____ hours.

Estimated average annual burden hours per respondent and/or recordkeeper:

Estimated number of respondents and/or recordkeepers:

Estimated annual frequency of responses:

Comments on the collection of information should be directed to the Office of Management and Budget, Attention: Desk officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503. A copy should also be sent to the Regulations Branch,

Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, NW., Washington, DC 20229. Comments should be submitted within the same time frame as comments on the substance of the proposal.

Drafting Information

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 133

Copyrights, Customs duties and inspection, Fees assessment, Imports, Penalties, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise (counterfeit goods), Seizures and forfeitures, Trademarks, Trade names, Unfair competition.

Proposed Amendment

It is proposed to amend part 133, Customs Regulations (19 CFR part 133), as set forth below.

PART 133—TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The general authority citation for part 133 would continue to read as follows, and the specific sectional authority for part 133 would be revised to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

Section 133.1 also issued under 15 U.S.C. 1096, 1124;

Sections 133.2 through 133.7, 133.11 through 133.13, and 133.15 also issued under 15 U.S.C. 1124;

Sections 133.21 through 133.25 also issued under 15 U.S.C. 1124, 19 U.S.C. 1526;

Sections 133.26 and 133.46 also issued under 19 U.S.C. 1623;

Section 133.52 also issued under 19 U.S.C. 1526;

Section 133.53 also issued under 19 U.S.C. 1558(a).

2. It is proposed to amend § 133.2 by adding new paragraphs (e) and (f) to read as follows:

§ 133.2 Application to record trademark.

* * * * *

(e) *''Lever-rule'' protection.* For owners of U.S trademarks who desire protection against gray market articles on the basis of physical and material differences (see *Lever Bros. Co.* v. *United States,* 981 F.2d 1330 (D.C. Cir. 1993)), a description of any physical and material difference between the articles authorized for importation or sale in the United States and those not so authorized. In each instance, owners who assert that physical and material differences exist must state the basis for such a claim with particularity, and must support such assertions by competent evidence and provide summaries of physical and material differences for publication. Customs determination of physical and material differences may include, but is not limited to, considerations of:

(1) The composition of both the authorized and gray market product(s) (including chemical composition);

(2) Formulation, product construction, structure, or composite product components, of both the authorized and gray market product;

(3) Performance and/or operational characteristics of both the authorized and gray market product;

(4) Differences resulting from legal or regulatory requirements, certification, etc.;

(5) Other distinguishing and explicitly defined factors that would likely result in consumer deception or confusion as proscribed under applicable law.

(f) At approximately 30-day intervals, Customs will publish in the **Federal Register** a list of those trademarks for which gray market protection for physically and materially different products has been requested and summaries of physical and material differences. Interested parties shall then have 30 days in which to comment on the request(s). At the end of the 30-day comment period, Customs shall examine the request(s) and any comments from the public before issuing a determination whether gray market protection is granted. For parties requesting protection, the application for trademark protection will not take effect until Customs has made and issued this determination. If protection is granted, Customs will publish in the **Federal Register** a notice that a trademark will receive *Lever* rule protection.

3. It is proposed to amend part 133 by revising subpart C to read as follows:

Subpart C—Importations Bearing Recorded Trademarks or Trade Names

Sec.

Subpart C—Importations Bearing Recorded Trademarks or Trade Names

§ 133.21 Articles bearing counterfeit trademarks.

(a) *Counterfeit trademark defined.* A ''counterfeit trademark'' is a spurious trademark that is identical to, or substantially indistinguishable from, a registered trademark.

(b) *Seizure.* Any article of domestic or foreign manufacture imported into the United States bearing a counterfeit trademark shall be seized and, in the absence of the written consent of the trademark owner, forfeited for violation of the customs laws.

(c) *Notice to trademark owner.* When merchandise is seized under this section, Customs shall disclose to the owner of the trademark the following information, if available, within 30 days, excluding weekends and holidays, of the date of the notice of seizure:

(1) The date of importation;

(2) The port of entry;

(3) A description of the merchandise;

(4) The quantity involved;

(5) The name and address of the manufacturer;

(6) The country of origin of the merchandise;

(7) The name and address of the exporter; and

(8) The name and address of the importer.

(d) *Samples available to the trademark owner.* At any time following seizure of the merchandise, Customs may provide a sample of the suspect merchandise to the owner of the trademark for examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. To obtain a sample under this section, the trademark/trade name owner must furnish Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by Customs to the trademark owner. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination, testing, or other use in pursuit of a related private civil remedy for trademark infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark owner, the owner shall, in lieu of return of the sample, certify to Customs that: ''The sample described as (insert description) and provided pursuant to 19 CFR 133.21(d) was (damaged/

destroyed/lost) during examination, testing, or other use.''

(e) *Failure to make appropriate disposition.* Unless the trademark owner, within 30 days of notification, provides written consent to importation of the articles, exportation, entry after obliteration of the trademark, or other appropriate disposition, the articles shall be disposed of in accordance with § 133.52, subject to the importer's right to petition for relief from the forfeiture under the provisions of part 171 of this chapter.

§ 133.22 Restrictions on importation of articles bearing copying or simulating trademarks.

(a) *Copying or simulating trademark or trade name defined.* A ''copying or simulating'' trademark or trade name is one which may so resemble a recorded mark or name as to be likely to cause the public to associate the copying or simulating mark or name with the recorded mark or name.

(b) *Denial of entry.* Any articles of foreign or domestic manufacture imported into the United States bearing a mark or name copying or simulating a recorded mark or name shall be denied entry and subject to detention as provided in § 133.25.

(c) *Relief from detention of articles bearing copying or simulating trademarks.* Articles subject to the restrictions of this section shall be detained for 30 days from the date on which the goods are presented for Customs examination, to permit the importer to establish that any of the following circumstances are applicable:

(1) The objectionable mark is removed or obliterated as a condition to entry in such a manner as to be illegible and incapable of being reconstituted, for example by:

(i) Grinding off imprinted trademarks wherever they appear;

(ii) Removing and disposing of plates bearing a trademark or trade name;

(2) The merchandise is imported by the recordant of the trademark or trade name or his designate;

(3) The recordant gives written consent to an importation of articles otherwise subject to the restrictions set forth in paragraph (b) of this section or § 133.23(c) of this subpart, and such consent is furnished to appropriate Customs officials;

(4) The articles of foreign manufacture bear a recorded trademark and the one-item personal exemption is claimed and allowed under § 148.55 of this chapter.

(d) *Exceptions for articles bearing counterfeit trademarks.* The provisions of paragraph (c)(1) of this section are not applicable to articles bearing counterfeit trademarks at the time of importation (see § 133.26).

(e) *Release of detained articles.* Articles detained in accordance with § 133.25 may be released to the importer during the 30-day period of detention if any of the circumstances allowing exemption from trademark or trade name restriction set forth in paragraph (c) of this section are established.

(f) *Seizure.* If the importer has not obtained release of detained articles within the 30-day period of detention, the merchandise shall be seized and forfeiture proceedings instituted. The importer shall be promptly notified of the seizure and liability to forfeiture and his right to petition for relief in accordance with the provisions of part 171 of this chapter.

§ 133.23 Restrictions on importation of gray market articles.

(a) *Restricted gray market articles defined.* ''Restricted gray market articles'' are foreign-made articles bearing a genuine trademark or trade name identical with or substantially indistinguishable from one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States and imported without the authorization of the U.S. owner. ''Restricted gray market goods'' include goods bearing a genuine trademark or trade name which is:

(1) *Independent licensee.* Applied by a licensee (including a manufacturer) independent of the U.S. owner, or

(2) *Foreign owner.* Applied under the authority of a foreign trademark or trade name owner other than the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner (see §§ 133.2(d) and 133.12(d) of this part), from whom the U.S. owner acquired the domestic title, or to whom the U.S. owner sold the foreign title(s); or

(3) *''Lever-rule''.* Applied by the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner (see §§ 133.2(d) and 133.12(d) of this part), to goods that the Customs Service has determined to be physically and materially different from the articles authorized by the U.S. trademark owner for importation or sale in the U.S. (as defined in § 133.2 of this part).

(b) *Labeling of physically and materially different goods.* Goods determined by the Customs Service to be physically and materially different under the procedures of this part, bearing a genuine mark applied under the authority of the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner (see §§ 133.2(d) and 133.12(d) of this part), shall not be detained under the provisions of paragraph (c) of this section where the merchandise or its packaging bears a conspicuous and legible label designed to remain on the product until the first point of sale to a retail consumer in the United States stating that:

''This product is not the product authorized by the United States trademark owner for importation and is physically and materially different.''

The label must be in close proximity to the trademark as it appears in its most prominent location on the article itself or the retail package or container. Other information designed to dispel consumer confusion may also be added.

(c) *Denial of entry.* All restricted gray market goods imported into the United States shall be denied entry and subject to detention as provided in § 133.25, except as provided in paragraph (b) of this section.

(d) *Relief from detention of gray market articles.* Gray market goods subject to the restrictions of this section shall be detained for 30 days from the date on which the goods are presented for Customs examination, to permit the importer to establish that any of the following exceptions, as well as the circumstances described above in § 133.22(c), are applicable:

(1) The trademark or trade name was applied under the authority of a foreign trademark or trade name owner who is the same as the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner (in an instance covered by §§ 133.2(d) and 133.12(d) of this part); and/or

(2) For goods bearing a genuine mark applied under the authority of the U.S. owner, a parent or subsidiary of the U.S. owner, or a party otherwise subject to common ownership or control with the U.S. owner, that the merchandise as imported is not physically and materially different, as described in § 133.2(e), from articles authorized by the U.S. owner for importation or sale in the United States.

(e) *Release of detained articles.* Articles detained in accordance with § 133.25 may be released to the importer during the 30-day period of detention if any of the circumstances allowing exemption from trademark restriction set forth in § 133.22(c) of this subpart or in paragraph (d) of this section are established.

(f) *Seizure.* If the importer has not obtained release of detained articles within the 30-day period of detention, the merchandise shall be seized and forfeiture proceedings instituted. The importer shall be notified of the seizure and liability of forfeiture and his right to petition for relief in accordance with the provisions of part 171 of this chapter.

§ 133.24 Restrictions on articles accompanying importer and mail importations.

(a) *Detention.* Articles accompanying importer and mail importations subject to the restrictions of §§ 133.22 and 133.23 shall be detained for 30 days from the date of notice that such restrictions apply, to permit the establishment of whether any of the circumstances described in § 133.22(c) or § 133.23(d) are applicable.

(b) *Notice of detention.* Notice of detention shall be given in the following manner:

(1) *Articles accompanying importer.* When the articles are carried as accompanying baggage or on the person of persons arriving in the United States, the Customs inspector shall orally advise the importer that the articles are subject to detention.

(2) *Mail importations.* When the articles arrive by mail in noncommercial shipments, or in commercial shipments valued at $250 or less, notice of the detention shall be given on Customs Form 8.

(c) *Release of detained articles.*—(1) *General.* Articles detained in accordance with paragraph (a) of this section may be released to the importer during the 30-day period of detention if any of the circumstances allowing exemption from trademark or trade name restriction(s) set forth in § 133.22(c) or § 133.23(d) of this subpart are established.

(2) *Articles accompanying importer.* Articles arriving as accompanying baggage or on the person of the importer may be exported or destroyed under Customs supervision at the request of the importer, or may be released if:

(i) The importer removes or obliterates the marks in a manner acceptable to the Customs officer at the time of examination of the articles; or

(ii) The request of the importer to obtain skillful removal of the marks is granted by the port director under such conditions as he may deem necessary, and upon return of the article to Customs for verification, the marks are found to be satisfactorily removed.

(3) *Mail importations.* Articles arriving by mail in noncommercial shipments, or in commercial shipments valued at $250 or less, may be exported or destroyed at the request of the addressee or may be released if:

(i) The addressee appears in person at the appropriate Customs office and at that time removes or obliterates the marks in a manner acceptable to the Customs officer; or

(ii) The request of the addressee appearing in person to obtain skillful removal of the marks is granted by the port director under such conditions as he may deem necessary, and upon return of the article to Customs for verification, the marks are found to be satisfactorily removed.

(d) *Seizure.* If the importer has not obtained release of detained articles within the 30-day period of detention, the merchandise shall be seized and forfeiture proceedings instituted. The importer shall be promptly notified of the seizure and liability to forfeiture and his right to petition for relief in accordance with the provisions of part 171 of this chapter.

§ 133.25 Procedure on detention of articles subject to restriction.

(a) *In general.* Articles subject to the restrictions of §§ 133.22 and 133.23 shall be detained for 30 days from the date on which the merchandise is presented for Customs examination. The importer shall be notified of the decision to detain within 5 days of the decision that such restrictions apply. The importer may, during the 30-day period, establish that any of the circumstances described in § 133.22(c) or § 133.23(d) are applicable. Extensions of the 30-day time period may be freely granted for good cause shown.

(b) *Notice of detention and disclosure of information.* From the time merchandise is presented for Customs examination until the time a notice of detention is issued, Customs may disclose to the owner of the trademark or trade name any of the following information in order to obtain assistance in determining whether an imported article bears an infringing trademark or trade name. Once a notice of detention is issued, Customs shall disclose to the owner of the trademark or trade name the following information, if available, within 30 days, excluding weekends and holidays, of the date of detention:

(1) The date of importation;

(2) The port of entry;

(3) A description of the merchandise;

(4) The quantity involved; and

(5) The country of origin of the merchandise.

(c) *Samples available to the trademark or trade name owner.* At any time following presentation of the merchandise for Customs examination, but prior to seizure, Customs may provide a sample of the suspect merchandise to the owner of the trademark or trade name for examination or testing to assist in determining whether the article imported bears an infringing trademark or trade name. To obtain a sample under this section, the trademark/trade name owner must furnish Customs a bond in the form and amount specified by the port director, conditioned to hold the United States, its officers and employees, and the importer or owner of the imported article harmless from any loss or damage resulting from the furnishing of a sample by Customs to the trademark owner. Customs may demand the return of the sample at any time. The owner must return the sample to Customs upon demand or at the conclusion of the examination or testing. In the event that the sample is damaged, destroyed, or lost while in the possession of the trademark or trade name owner, the owner shall, in lieu of return of the sample, certify to Customs that: ''The sample described as (insert description) and provided pursuant to 19 CFR 133.25(c) was (damaged/destroyed/lost) during examination or testing for trademark infringement.''

(d) *Form of notice.* Notice of detention of articles found subject to the restrictions of § 133.22 or § 133.23 shall be given the importer in writing.

§ 133.26 Demand for redelivery of released merchandise.

If it is determined that merchandise which has been released from Customs custody is subject to the restrictions of § 133.22 or § 133.23 of this subpart, the port director shall promptly make demand for the redelivery of the merchandise under the terms of the bond on Customs Form 301, containing the bond conditions set forth in § 133.62 of this chapter, in accordance with § 141.113 of this chapter. If the merchandise is not redelivered to Customs custody, a claim for liquidated damages shall be made in accordance with § 141.113(g) of this chapter.

Samuel H. Banks,

Acting Commissioner of Customs.

Approved: March 5, 1998.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.

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