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U.S. Customs Service Extends Its Reach: Product Catalogs Are Now Fair Game for Import Penalties

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There is nothing miniature about the potential customs penalties that may result from misrepresentations made in product catalogs—just ask the Nippon Miniature Bearing Corporation. (Nippon). In 1996, the U.S. Customs Service (Customs) brought a penalty case against that company in the U.S. Court of International Trade (CIT) and alleged that imports of its ball bearings were subject to a monetary penalty in part because of claims made in the company's product catalogs. Although the case recently settled, the reported opinions addressing pretrial issues show that Customs may be extending the reach of its penalty jurisdiction into an area that most importers would consider to be beyond the purview of Customs' authority—product catalogs that are never presented to Customs upon entry of their goods into the United States.¹ Given the large monetary penalties that Customs can assess, prudent importers should take heed of this case and consider whether claims made in product catalogs subject them to a risk of a Customs penalty.²

Background

In the late 1980s, Nippon imported miniature steel ball bearings composed of a certain steel alloy. According to the reported opinions, Nippon described the bearings in the customs entry documentation and the product catalogs that it provided to sales affiliates with the prefix "SS," which is a designation used in the steel industry to indicate that a product is made of a certain chemical composition—in this case "440C stainless steel." However, Nippon also included some disclaimers in the catalogs that the company reserved the right to change the specifications of the bearings without notice.

Customs investigated Nippon's import practices and concluded that Nippon had actually substituted "DD" quality bearings for 440C stainless steel. Citing to an infrequently used statute regulating unfair trade practices, Customs seized 19 import shipments as importations contrary to law under the Lanham Act—15 U.S.C. § 1125 (false designations of origin and false descriptions forbidden). In addition, Customs discovered that Nippon had already imported approximately

¹The reported opinions are *United States v. Nippon Miniature Bearing Corp.*, Slip Op. 01-73 (Ct. Int'l Trade June 19, 2001); *United States v. Nippon Miniature Bearing Corp.*, Slip Op. 01-72 (Ct. Int'l Trade June 19, 2001); *Nippon Miniature Bearing Corp. v. Weise*, 230 F.3d 1131 (9th Cir. 2000); and *United States v. Nippon Miniature Bearing Corp.*, 3 F. Supp. 2d 1448 (Ct. Int'l Trade 1998). This article relies on the facts and law as discussed in those opinions.

²The primary Customs monetary penalty statute is 19 U.S.C. § 1592 (penalties for fraud, gross negligence and negligence). Under the statute, Customs can assess monetary penalties up to the domestic value of the imported merchandise. In pertinent part, it provides that "without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence—(a) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of (i) any document written or oral statement, or act which is material and false, or (ii) any omission which is material."

numerous other shipments. For those shipments, Customs issued penalty notices under 19 U.S.C. § 1592 to both Nippon and its parent company Minebea. Customs subsequently sued Nippon and Minebea in the CIT to collect on the penalty claim. Customs alleged that the statements made in the product catalogs were made to Customs in connection with the presentation of the invoices and that the defendants had a continuing obligation to produce to Customs information showing that the statements made in the customs entries and the product catalogs were not true or correct.³ At the heart of Customs' case was the notion that the customs entries and the product catalogs falsely described the bearings as 440C stainless steel and that this alleged falsity was material because the bearings were potentially inadmissible into the United States under the Lanham Act.

Although the CIT never ruled on the merits of Customs' claim, the case is important for the importing community for three reasons. First, Customs reveals that it may look beyond the documentation that an importer submits to commercial advertising information, such as product catalogs, in order to verify whether the claims made in customs entries and those product catalogs are true and accurate. Second, if they are not accurate and they relate to specific imports, Customs may deny entry of the products and seize them for violation of the Lanham Act—particularly where the products, such as steel, raise concerns about safety or other national priorities. Third, Customs may even allege that the potential inadmissibility of the products under the Lanham Act is a sufficient basis upon which to impose a penalty under the Customs penalty statute.

The Lanham Act and the 19 Seizures

Section 43 of the Lanham Act prohibits the use of false or misleading facts when such representations are likely to cause confusion, mistake, or deceit.⁴ In addition, misrepresentations of the nature, character, qualities, or origin of goods in commercial advertising or promotion are also violations of Section 43(a). To supplement this section, Section 43(b) provides that goods in contravention of this section cannot be imported into the United States.⁵

Customs argued that the use of the prefix SS in the customs entries and Nippon's product catalogs were misrepresentations of the character and qualities of its steel bearings and a violation of the Section 43(a). This alleged misrepresentation arguably had the potential to confuse and deceive purchasers and Customs also argued that Nippon's use of the SS prefix in its

³19 U.S.C. § 1485(a)(4).

⁴Section 43 of the Lanham Act reads as follows: (a)(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act... (b) Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized. 15 U.S.C. § 1125 (2001).

⁵Under separate statutes, Customs has the authority to seize and forfeit merchandise imported in violation of the Lanham Act. 18 U.S.C. § 545 and 19 U.S.C. § 1595a(c).

commercial advertising and promotion misrepresented the physical quality of the actual steel bearings, also in violation of the section. Because of these alleged falsities, Customs seized the 19 shipments whose value exceeded \$1 million.

While Nippon contested Customs' seizure, Nippon ultimately paid Customs more than \$1 million as a substitute *res* for the seizure and then contested that payment in federal district court in California. It is not clear, however, whether the apparent settlement of the case in the CIT includes settlement of that aspect of this case. But the CIT did reaffirm the principle that Customs does have the independent authority to prohibit the importation of goods in violation of the Lanham Act.

Customs Penalty Case

Customs asserted that Nippon violated a statutory obligation to correct misleading statements made in invoices. Customs also alleged that the failure to report this information was material under 19 U.S.C. § 1592 because it may have prevented Customs from determining whether the goods were admissible into the United States under the Lanham Act. Under 19 U.S.C. § 1485(a)(4), which requires importers to correct any untrue statements made to Customs, the CIT suggested that, as a matter of law, it is possible that the statements made in the product catalogs could become part of the invoices. If so, then the CIT also suggested that Nippon arguably could not disclaim its legal obligations to report the substitution of DD quality steel for 440C quality steel. Thus, the CIT clearly suggested that, as a matter of law, misrepresentations such as those in this case may have to be reported and that the mere presence of a disclaimer in a product catalog is not necessarily a sufficient basis on which to claim the absence of a violation of the Lanham Act, and thus a lack of materiality under the penalty statute.

Materiality and Section 1592

The parties devoted considerable effort to contesting whether the alleged misrepresentations were material under 19 U.S.C. § 1592. The CIT's suggestion that the simple possibility of a violation of the Lanham Act is a sufficient basis for establishing materiality under section 1592 is ample warning that importers should always consider which import practices are likely to raise the possibility of a violation. In order to determine what kinds of misrepresentations could result in penalties, importers should look to the Customs regulations on materiality—which are found in Appendix B of Part 171, 19 C.F.R.

A document, statement, act or omission in connection with the importation of merchandise is material if “it has the *natural tendency to influence* or is *capable of influencing* agency action.” (Emphasis added.) Although Customs does not provide definitions for “natural tendency to influence,” or for “capable of influencing,” these definitions provide Customs with considerable discretion in determining what is material.

The Customs regulations further provide specific examples of materiality as statements, acts, or omissions that have the natural tendency or are capable of influencing determinations as to 1) classification, appraisement, or admissibility; 2) an importer's liability for duty; 3) the collection and reporting of trade statistics; 4) the source, origin, or quality of merchandise; 5) whether an unfair trade practice has been committed. Given the vast array of unfair trade practice laws (e.g., antidumping, intellectual property rights infringement and the Lanham Act), Customs' authority to claim materiality is quite potent.

The Impact of the Nippon Case

The Nippon case highlights the perils of potentially misleading Customs entries and product literature that describe goods that have been imported—particularly with respect to sensitive products that raise concerns about safety or other national priorities. Armed with the Lanham Act, Customs may not only seek to deny entry of products that are misrepresented to Customs and to purchasers in downstream sales, but may also use the allegation of a Lanham Act violation as basis on which to seize and forfeit the goods. Customs may even issue penalties under section 1592 for these violations.

The prudent importer should therefore consider the Nippon case and take steps as part of an overall import compliance program to minimize the risk that Customs will consider product catalogs or other literature that relate to imported products as a basis on which to claim a Lanham Act violation. The consequences of such a claim are by no means miniature.

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