

Subpart E—Importations Violating Copyright Laws

§ 133.41 [Reserved]

§ 133.42 Infringing copies or phonorecords.

(a) *Definition.* Infringing copies or phonorecords are “piratical” articles, i.e., copies or phonorecords which are unlawfully made (without the authorization of the copyright owner).

(b) *Importation prohibited.* The importation of infringing copies or phonorecords of works copyrighted in the U.S. is prohibited by Customs. The importation of lawfully made copies is not a Customs violation.

(c) *Seizure and forfeiture.* The port director shall seize any imported article which he determines is an infringing copy or phonorecord of a copyrighted work protected by Customs. The port director also shall seize an imported article if the importer does not deny a representation that the article is an infringing copy or phonorecord as provided in § 133.43(a). In either case, the port director also shall institute forfeiture proceedings in accordance with part 162 of this chapter. Lawfully made copies are not subject to seizure and forfeiture by Customs.

(d) *Disclosure.* When merchandise is seized under this section, Customs shall disclose to the owner of the copyright 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.

(e) *Samples available to the copyright owner.* At any time following seizure of the merchandise, Customs may provide a sample of the suspect merchandise to the owner of the copyright for examination, testing, or any other use in pursuit of a related private civil rem-

edy for copyright infringement. To obtain a sample under this section, the copyright owner must furnish to 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 copyright 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 copyright infringement. In the event that the sample is damaged, destroyed, or lost while in the possession of the copyright owner, the owner shall, in lieu of return of the sample, certify to Customs that: “The sample described as [insert description] provided pursuant to 19 CFR 133.42(e) was (damaged/destroyed/lost) during examination, testing, or other use.”

(f) *Referral to the U.S. Attorney.* In the event that phonorecords or copies of motion pictures arrive in the U.S. bearing counterfeit labels, Customs officers should consider referring the violation to the U.S. Attorney, Department of Justice, for possible criminal prosecution pursuant to the “Piracy and Counterfeiting Amendments Act of 1982” (18 U.S.C. 2318). This law provides a minimum fine of \$25,000 or imprisonment for not more than one year, or both, for willful infringement of a copyright for commercial advantage, and a maximum fine of \$250,000 or imprisonment for not more than 5 years, or both, where trafficking in counterfeit labels for phonorecords or copies of motion pictures or other audiovisual works is involved.

[T.D. 87-40, 52 FR 9475, Mar. 25, 1987; 52 FR 10668, Apr. 2, 1987, as amended by T.D. 97-30, 62 FR 19493, Apr. 22, 1997; T.D. 98-21, 63 FR 12000, Mar. 12, 1998]

§ 133.43 Procedure on suspicion of infringing copies.

(a) *Notice to the importer.* If the port director has any reason to believe that an imported article may be an infringing copy or phonorecord of a recorded copyrighted work, he shall withhold

delivery, notify the importer of his action, and advise him that if the facts so warrant he may file a statement denying that the article is in fact an infringing copy and alleging that the detention of the article will result in a material depreciation of its value, or a loss or damage to him. The port director also shall advise the importer that in the absence of receipt within 30 days of a denial by the importer that the article constitutes an infringing copy or phonorecord, it shall be considered to be such a copy and shall be subject to seizure and forfeiture.

(b) *Notice to copyright owner.* If the importer of suspected infringing copies or phonorecords files a denial as provided in paragraph (a) of this section, the port director shall furnish to the copyright owner the following information, if available, within 30 days, excluding weekends and holidays, of the receipt of the importer's denial:

- (1) The date of importation;
- (2) The port of entry;
- (3) A description of the merchandise;
- (4) The quantity involved;
- (5) The country of origin of the merchandise; and
- (6) Notice that the imported article will be released to the importer unless, within 30 days from the date of the notice, the copyright owner files with the port director:

(i) A written demand for the exclusion from entry of the detained imported article; and

(ii) A bond, in the form and amount specified by the port director, conditioned to hold the importer or owner of the imported article harmless from any loss or damage resulting from Customs detention in the event the Commissioner or his designee determines that the article is not an infringing copy prohibited importation under section 602 of the Copyright Act of 1976 (17 U.S.C. 602) (See part 113 of this chapter).

(c) *Samples available to the copyright 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 copyright for examination or testing to assist in determining whether the article imported is a piratical copy. To ob-

tain a sample under this section, the copyright 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 copyright 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 copyright owner, the owner shall, in lieu of return of the sample, certify to Customs that: "The sample described as [insert description] provided pursuant to 19 CFR 133.43(c) was (damaged/destroyed/lost) during examination or testing for copyright infringement.

(d) *Result of action or inaction by copyright owner.* After notice to the copyright owner that delivery is being withheld for imported articles suspected of being infringing copies of his recorded copyrighted work, the port director shall proceed in accordance with the following procedures:

(1) *Demand and bond; exchange of briefs.* If the copyright owner files a written demand for exclusion of the suspected infringing copies together with a proper bond, the port director shall promptly notify the importer and copyright owner that, during a specified time limited to not more than 30 days, they may submit any evidence, legal briefs or other pertinent material to substantiate the claim or denial of infringement. The burden of proof shall be upon the party claiming that the article is in fact an infringing copy.

(i) *Exchange of briefs.* Before timely submitting the additional evidence, legal briefs, or other pertinent material to Customs, pursuant to paragraph (c)(1) of this section, in regard to the disputed claim of infringement, the importer and the copyright owner shall first provide each other with a copy of all such information, including the importer's denial of infringement and the copyright owner's demand for exclusion. The subsequent submission of this

information to Customs shall be accompanied by a written statement confirming that a copy has already been provided to the opposing party. The port director shall notify the importer and the copyright owner that they shall have additional time, not to exceed 30 days, in which to provide a response to the arguments submitted by the opposing party, and that rebuttal arguments, timely submitted, shall be fully considered in the decision-making process. During this rebuttal period and before timely submitting the rebuttal arguments to Customs, the importer and the copyright owner shall first provide each other with a copy of all such material. The submission of this rebuttal material to Customs shall be accompanied by a written statement confirming that a copy has been provided to the opposing party. The port director shall not accept any additional material from the parties to substantiate the claim or denial of infringement after the final 30-day rebuttal period expires.

(ii) *Decision.* Upon receipt of rebuttal arguments, or 30 days after notification if no rebuttal arguments are submitted, the port director shall forward the entire file, together with a sample of each style that is considered possibly infringing, to Customs Headquarters, (Attention: International Trade Compliance Division, Office of Regulations and Rulings), for decision on the disputed claim of infringement. The final decision on the disputed claim of infringement shall be forwarded to the port director who shall send a copy thereof to the copyright owner as well as to the importer.

(2) *Infringement disclaimed or unsupported.* If the copyright owner disclaims that the specified imported article is an infringing copy of his recorded copyrighted work, or fails to present sufficient evidence or proof to substantiate a claim of infringement, the port director shall release the detained shipment to the importer and all further importations of the same article, by whomsoever imported, without further notice to the copyright owner.

(3) *Failure to file demand or bond.* If the copyright owner fails to file a written demand for exclusion and bond as required by paragraph (b) of this sec-

tion, the port director shall release the detained articles to the importer and notify the copyright owner of the release.

(4) *Withdrawal of bond.* Where the copyright owner has posted a bond on the grounds that the imported article is infringing, the copyright owner may not withdraw the bond until a decision on the issue of infringement has been reached.

(e) *Alternative procedure: court action.* As an alternative to the administrative procedure described in this section, the copyright owner, whether or not he has recorded his copyright with Customs, may seek a court order enjoining importation of the article. To obtain Customs enforcement of an injunction, the copyright owner shall submit a certified copy of the court order to the Commissioner of Customs, Attention: Office of the Chief Counsel, Washington, DC 20229. In addition, if the copyright in question is not recorded with Customs, the copyright owner shall submit the \$190 fee required by §133.33(b) and, if the work is a three-dimensional or other work not readily identifiable by title and author, 5 photographic or other likenesses reproduced on paper approximately 8" x 10½" in size.

[T.D. 87-40, 52 FR 9475, Mar. 25, 1987, as amended by T.D. 93-87, 58 FR 57740, Oct. 27, 1993; T.D. 98-21, 63 FR 12000, Mar. 12, 1998; 63 FR 15088, Mar. 30, 1998]

§ 133.44 Decision of disputed claim of infringement.

(a) *Claim of infringement sustained.* Upon determination by the Commissioner of Customs or his designee that the detained article forwarded in accordance with §133.43(c)(1) is an infringing copy, the port director shall seize the imported article and institute forfeiture proceedings in accordance with part 162 of this chapter. The bond of the copyright owner shall be returned.

(b) *Denial of infringement sustained.* Upon determination by the Commissioner of Customs or his designee that the detained article forwarded in accordance with §133.43(c)(1) is not an infringing copy, the port director shall release all detained merchandise and