

## CLIENT ALERT

### Import-Related Protection of IP Rights Strengthened in New Trade Law

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On February 24, President Obama signed the Trade Facilitation and Trade Enforcement Act of 2015 (TFTE), a major customs and international trade bill designed to modernize U.S. Customs and Border Protection (CBP) procedures, promote trade facilitation, prioritize certain trade issues, and strengthen enforcement of U.S. international trade laws.

Under Title III of the TFTE, "Import-Related Protection of Intellectual Property Rights," the Tariff Act of 1930 has been amended such that when CBP suspects merchandise is being imported in violation of an intellectual property right, CBP has the authority to provide samples of potentially infringing goods to owners of these rights for assistance in determining whether a violation has taken place.

The TFTE has also amended the Tariff Act of 1930 to provide CBP additional authority to seize items designed to circumvent copyrights. CBP has been directed to craft regulations allowing it to notify any party injured by a seized circumvention device, to be issued no later than February 24, 2017.

The TFTE further tasks CBP with drafting and implementing new regulations that treat applicants for a copyright in the same manner as a holder of an existing copyright. The TFTE directs CBP to publish this new process by August 24, 2016.

Finally, the bill includes several other measures designed to strengthen CBP's ability to protect intellectual property rights from being infringed by goods imported into the U.S.

1. Section 302 of the TFTE amends the Tariff Act of 1930 to include a new section (628A) titled "Exchange of Information related to Trade Enforcement" stating that if CBP suspects that merchandise being imported into the United States is:

- a. Merchandise of foreign manufacture and bearing a trademark owned in the U.S. and registered with the U.S. Patent and Trademark Office (19 U.S.C. § 1526).
- b. Infringing "importation or exportation of copies or phonorecords" (17 U.S.C. § 602).
- c. Circumventing copyright protection systems (17 U.S.C. § 1201(a)(2) or (b)(1)).

**AND** CBP concludes that the examination or testing of the merchandise would assist in determining if the merchandise is being imported in violation of the applicable statute, then CBP:

1. Shall provide information that appears on the merchandise and its packaging and labels, including unredacted images of the merchandise and its packaging and labels to the owner of the trademark or copyright.
2. May, subject to any applicable bonding requirements, provide unredacted samples of the merchandise to the owner of the trademark or copyright.

Owners of intellectual property rights should take note that Section 302 only applies with respect to merchandise suspected of infringing a trademark or copyright that is recorded with CBP. Trademark registration with the U.S. Patent and Trademark Office (USPTO) or registration with the U.S. Copyright Office is not sufficient.

CBP has already issued a final rule for the disclosure to rights holders of samples of goods suspected of bearing infringing trademarks. The final rule was published on September 18, 2015, and modified both 19 C.F.R. parts 133 and 151.

2. Regarding the circumvention of copyright protection, Section 303 of the TFTE has amended 19 U.S.C. § 1595a(c)(2). The legislation grants CBP additional authority to seize any device designed to circumvent copyright protections, as defined in 17 U.S.C. § 1201(a)(2) or (b)(1).

Section 303 also provides that persons injured by the violation of 17 U.S.C. § 1201(a)(2) or (b)(1) that resulted in the seizure of merchandise shall be provided information if that person is included on a list to be established by CBP, which will be published in the Federal Register, along with subsequent revisions. The Section directs CBP to publish regulations allowing for this notification no later than February 24, 2017.

3. Section 305 of the TFTE states that CBP shall treat copyright applicants in the same manner as holders of registered copyrights. The TFTE gives CBP until August 24, 2016 to establish a process that shall enforce a copyright for which the owner has submitted an application for registration with the U.S. Copyright Office.

4. Other measures related to intellectual property protection include:

- a. Section 305 of the TFTE provides statutory authorization for the already existing National Intellectual Property Rights Coordination Center, which synchronizes U.S. federal agency activities in the prevention of the importation and exportation of goods that infringe intellectual property rights.
- b. Section 306 requires the drafting of a “Joint Strategic Plan for the Enforcement of Intellectual Property Rights.”
- c. Section 307 provides for “Additional Personnel Dedicated to the Enforcement of Intellectual Property Rights.”
- d. Section 308 provides for “Training with Respect to the Enforcement of Intellectual Property Rights,” including consultation with the private sector on the identification of new technologies to detect and identify infringing merchandise at U.S. ports.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Alexander H. Schaefer**

Partner – Washington, D.C.  
Phone: +1 202.624.2773  
Email: [aschaefer@crowell.com](mailto:aschaefer@crowell.com)

**Michael H. Jacobs**

Partner – Washington, D.C.  
Phone: +1 202.624.2568  
Email: [mjacobs@crowell.com](mailto:mjacobs@crowell.com)

**Aaron Marx**

Counsel – Washington, D.C.  
Phone: +1 202.624.2751  
Email: [amarx@crowell.com](mailto:amarx@crowell.com)

**Omar A. Galiano**

Counsel – Washington, D.C.  
Phone: +1 202.624.2946  
Email: [ogaliano@crowell.com](mailto:ogaliano@crowell.com)