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N I N T H C I R C U I T S T R I K E S A N C G R A Y M A R K E T P R O T E C T

by
Oscar Gonzalez, Attorney

Excuse the violent metaphor in this article's title, but the Super Bowl just ended and my head still reverberates with all the sounds and grotesque images from the game. You know, concussions, broken wrists, Beast Mode, deflated footballs, and, worst of all, stale guacamole.

GRAY MARKET GOODS

Over the past few decades, our courts and legislative bodies have fortified intellectual property rights in a myriad of ways, including at the border. However, there is one notable exception: gray market goods. Gray market goods or parallel imports are imported products bought legitimately in another country on the cheap and then imported into the USA for sale. Manufacturers do not like how gray market goods disrupt and undercut their domestic distribution arrangements. Gray market goods are not knockoffs. We are not talking about piratical products. Gray market goods are genuine. Which begs the question: if a manufacturer loses all proprietary interests when it sells its goods (because someone else now owns them), how can the manufacturer dictate what happens to those goods thereafter? Does the law provide an invisible tether to yank goods back into the manufacturer's lap?

Well, sort of. At least it did until two years ago when the U.S. Supreme Court suddenly realized that, hey, this kind of restriction contravenes the "I bought it, it's mine to do with as I wish" precept that all of us grew up to expect and that powers our economy and disposable culture.

The case was *Kirtsaeng v. John Wiley & Sons*, and the U.S. Supreme Court decided that copyright law cannot be used to ban imported goods after the first sale.

US Customs and Border Protection still has regulations to keep gray market goods out. Whether the agency continues to enforce those regulations is not clear, but manufacturers are trying to find a way around *Kirtsaeng*.

With little luck. The Ninth Circuit Court of Appeals, one level down from the U.S. Supreme Court, just decided *Omega v. Costco*. Isn't that a wonderfully comic book-like title for a court case? You almost expect Thor and Iron Man to represent opposing sides.

The Omega in this case was the manufacturer of luxury watches. Costco is where you likely bought the guacamole that I mentioned earlier. It seems that Costco purchased 117 Omega watches on the gray market and then had the audacity to import and offer them for sale at their stores at a tempting discount, all without first getting Omega's ok, not that an ok would ever have come.

The court dispensed with Omega's challenge, citing to *Kirtsaeng*: "Thus, application of the first sale doctrine disposes of Omega's claim, resolves this case in Costco's favor, and conclusively reaffirms that copyright holders cannot use their rights to fix resale prices in the downstream market."

Gray market earns another nail in the coffin. Now I'm mixing my metaphors. Must be the stale guacamole.

I cannot proclaim with complete certainty that gray market is dead. Omega engraved its copyrighted design into each of the watches hoping that an infringement claim would be enough to keep the goods out of the country. The strategy didn't fly with the 9th Circuit, but we attorneys are a crafty and insistent lot, like raccoons that somehow find their way into your attic. Lawyers are busily investigating whether trademark or contract law can prop up gray market law. It's an uphill battle, like trying to turn stale guacamole back into an avocado.

Did you know



CBP's Examination of an Importer's Records

Did you know that under federal law, CBP must give reasonable notice if it wants to examine any records? See 19 USC §1509.

Did you know that under federal regulations, CBP must give 30 days' written notice and

that CBP can give less than 30 days' written notice only if the entry records are required in connection with a determination regarding the admissibility or release of merchandise? Did you know that under federal regulations, CBP is allowed to

verbally request entry records, but that any such demand shall be followed by a written or electronic demand? See 19 CFR § 163.6.

C B P B R U S H E S A N T I - D U M P I N G

U.S. Customs and Border just published, available for free on its website, the first edition of AD/CVD Update. As instructed by the U.S. Congress, CBP is redoubling its efforts to collect all antidumping duties and countervailing duties owed and to punish violators. Among the highlights:

**ANTIDUMPING
ALERT!**

- In 2014, CBP audited 78 importers of AD/CVD commodities with AD/CVD discrepancies of \$24.6 million.
- The U.S. Department of Justice, on behalf of U.S. Customs and Border Protection (CBP), is seeking to recover antidumping duties and penalties levied by CBP in four cases involving imports of steel butt-weld pipe fittings, wire hangers, and polyethylene retail carrier bags from China. A combined total of about \$3.5 million of penalties and duties is being sought for collection.

[Read the latest AD/CVD Update here.](#)

AD/CVD Scam Alert



SCAM ALERT



(this is an official alert from CBP)

Did You Receive an Email Offering a "Solution" to Avoid Antidumping Duties?

Sample text of scam email:

Dear purchasing manager,

We have been exporting for many years from China, especially USA and Canada. If you need this product, please tell me, so I can quote you.

Please do not worry about the dumping duties. This order will be operated through the intermediary trade. We will send the goods to a third country; the forwarder will repack our goods for export with other company title from that third country. It is a legit business.

Contact Us,

Sales Representative

THIS IS A VIOLATION OF U.S. LAW.

KNOWINGLY ENGAGING IN ACTIVITIES DESIGNED TO EVADE THE PAYMENT OF ANTIDUMPING OR COUNTERVAILING DUTIES IS A FEDERAL CRIME. VIOLATIONS INVOLVING DUTY EVASION MAY RESULT IN CIVIL AND CRIMINAL PENALTIES.

See for yourself:

- 5 Defendants Plead Guilty to Smuggling Aluminum Extrusions
- Texas Honey Broker Sentenced in Illinois to 3 Years in Prison for Evading Nearly \$38 million in Tariffs on Chinese-origin Honey
- Trade Allegation Leads to Conviction of Businessman

Report antidumping scams to U.S. Customs and Border Protection at:

- CBP e-Allegations
- Homeland Security Investigations/IPR Center Referrals

For more information on Antidumping duties, see:

- CBP AD/CVD Frequently Asked Questions
- USITC AD/CVD Frequently Asked Questions

C U B A N R E G U L A T I O N S R E

The Office of Foreign Assets Control amended the Cuban Assets Control Regulation. According to the Federal Register Notice, "These amendments



facilitate travel to Cuba for authorized purposes, facilitate the provision by travel agents and airlines of authorized travel services and the forwarding by certain entities of authorized remittances, raise the limit on certain categories of remittances to Cuba, allow U.S. financial institutions to open

correspondent accounts at Cuban financial institutions to facilitate the processing of authorized transactions, authorize certain transactions with Cuban nationals located outside of Cuba, and allow a number of other activities related to, among other areas, telecommunications, financial services, trade, and shipping."

The Bureau of Industry and Security amended the Export Administration Regulations as applied to Cuba. According to the Federal Register Notice, this rule creates, "License Exception Support for the Cuban People (SCP) to authorize the export and reexport of certain items to Cuba that are intended to improve the living conditions of the Cuban people; support independent economic activity and strengthen civil society in Cuba; and improve the free flow of information to, from, and among the Cuban people. It also amends existing License Exception Consumer Communications Devices (CCD) by eliminating the donation requirement, thereby authorizing sales of certain communications items to eligible end users in Cuba. Additionally, it amends License Exception Gift Parcels and Humanitarian Donations (GFT) to authorize exports of multiple gift parcels in a

single shipment. Lastly, this rule establishes a general policy of approval for exports and reexports to Cuba of items for the environmental protection of U.S. and international air quality, and waters, and coastlines."

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U.S. Department of Justice
PRESS RELEASE



FOR IMMEDIATE RELEASE
Friday, January 30, 2015

Ocean Shipping Executive Pleads Guilty to Price Fixing on

Ocean Shipping Services for Cars and Trucks

An executive of Japan-based Kawasaki Kisen Kaisha Ltd. (K-Line) pleaded guilty today and was sentenced to 18 months in a U.S. prison for his involvement in a conspiracy to fix prices, allocate customers and rig bids of international ocean shipping services for roll-on, roll-off cargo, such as cars and trucks, to and from the United States and elsewhere, the Department of Justice announced today.

According to the one-count felony charge filed today in U.S. District Court for the District of Maryland in Baltimore, Hiroshige Tanioka, who was at various times an assistant manager, team leader and general manager in K-Line's car carrier division, conspired to allocate customers and routes, rig bids and fix prices for the sale of international ocean shipments of roll-on, roll-off cargo to and from the United States and elsewhere, including the Port of Baltimore. Tanioka participated in the conspiracy from at least as early as April 1998 until at least April 2012.

Roll-on, roll-off cargo is non-containerized cargo that can be both rolled onto and off of an ocean-going vessel. Examples of this cargo include new and used cars and trucks and construction and agricultural equipment.

"For more than a decade this conspiracy has raised the cost of importing cars and trucks into the United States," said Assistant Attorney General Bill Baer for the Department of Justice's Antitrust Division. "Today's sentencing is a first step in our continuing efforts to ensure that the executives responsible for this misconduct are held accountable."

Today's sentence was the first to be imposed against an individual in the division's ocean shipping investigation. Previously, three corporations have agreed to plead guilty and to pay criminal fines totaling more than \$136 million, including Tanioka's employer K-Line, which was sentenced to pay a criminal fine of \$67.7 million in November 2014.

Pursuant to the plea agreement, which was accepted by the court today, Tanioka was sentenced to serve an 18-month prison term and pay a \$20,000 criminal fine for his participation in the conspiracy. In addition, Tanioka has agreed to assist

the department in its ongoing investigation into the ocean shipping industry.

Tanioka was charged with a violation of the Sherman Act, which carries a maximum sentence of 10 years in prison and a \$1 million criminal fine for an individual. The maximum fine may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime, if either of those amounts is greater than the statutory maximum fine.

Today's plea agreement is the result of an ongoing federal antitrust investigation into price fixing, bid rigging and other anticompetitive conduct in the international roll-on, roll-off ocean shipping industry, which is being conducted by the Antitrust Division's Washington Criminal I Section and the FBI's Baltimore Field Office, along with assistance from the U.S. Customs and Border Protection Office of Internal Affairs, Washington Field Office/Special Investigations Unit. Anyone with information in connection with this investigation is urged to call the Antitrust Division's Washington Criminal I Section at 202-307-6694, visit www.justice.gov/atr/contact/newcase.html or call the FBI's Baltimore Field Office at 410-265-8080.

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C o p y r i g h t N o t i c e

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