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## JOURNAL

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### ENFORCEMENT

Trade data allows members of the intellectual property and legal communities to deliver results that cannot be obtained anywhere else. Not only is the information actionable, it is timely and affordable enough for nearly every situation.

## Protecting IP Through Trade Data Intelligence

By PAUL RASMUSSEN

**P**rotecting intellectual property in the international business environment is extremely difficult—jurisdictions and borders blur the lines of enforcement. As products are brought into the United States some clarity begins to enter the picture. However, finding the evidence and taking effective actions can be difficult without knowing exactly how a brand is being damaged and by whom. Analyzing the trade data provided by the U.S. government can be a productive method of investigation and evidentiary collection.

Trade data information provides a clear picture of what products are being imported and exported to and from the United States and can be used to lay the ground work needed to prove an intellectual property case. To begin using trade data in these situations, one must first fully understand what trade data is, what in-

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formation can be derived from it, how to procure the information, and how other legal professionals have used the information to cost effectively pursue cases. Trade data can drive results for both attorneys and their clients with uses that extend beyond the IP world.

### What Is Trade Data?

Trade data provides information on the movement of physical goods (raw materials and finished products) from one country to another, including exports and imports. This information can come in the form of high-level statistical data (outlining total trade volumes between countries or for a given commodity code) or very detailed shipment reports (outlining actual companies and products at a bill of lading/manifest level). Mostly, this information is collected by government sources; however, it is typically disseminated by private companies that work with government agencies.

While the most common form of trade data is U.S. Census merchandise trade data from which a significant portion of the U.S. trade deficit is derived, U.S. Customs data, also known as manifest or bill of lading data, has the most value for members of the IP community. This information can be used to prove companies have exported goods to the United States or to show

that a product has been received by a U.S.-based party, thus showing shipment histories.

U.S. Customs and Border Protection collects information on every shipment entering the United States at a bill of lading level using the Automated Manifest System (AMS). This information shows who (Consignee) imported what, how much, and from where it came (Shipper). U.S. Customs data, as it is commonly known, is the most detailed source of information that international trade professionals can access.

While the high level of detail on this information is great, there is no significant standardization of how companies document product and commodity names. Importers are responsible for the information provided.

In addition, only waterborne imports are electronically provided by U.S. Customs, which encompasses over 70 percent of import activity. However, this data does not include truck, rail, air, or export activity.

U.S. Customs manifest trade data is available through the Freedom of Information Act and is purchased directly from the U.S. government. In accordance with U.S. government regulations, individual importers can have some information removed from the dataset, specifically the names of companies involved with the transaction.

Below is a sample of the manifest data that is provided by U.S. Customs:

<b>Bill of Lading:</b> MAEU527808639		<b>(Master B/L: MAEU858013910)</b>		<b>House/Master:</b> House	<b>Estimated Arrival:</b> 090413	<b>Actual Arrival:</b> 4/13/2009
<b>Arrival:</b> 4/13/2009	<b>Carrier:</b> MAEU	<b>Vessel:</b> Maersk Carolina		<b>Vessel Code:</b> 9155133	<b>Voyage:</b> 0906	<b>Mode of Transportation:</b> 10
<b>Shipper</b>		<b>Consignee</b>		<b>Notify</b>		<b>Notify 2</b>
Kim Chemicals Ltd 213, Princess Street, Mumbai - 400 002, India Tel: 2201 8671 Fax: 2206 1840 91-2222018671 Telex 91-2222061840		Vini Health And Beauty Inc. 660 White Plains Road Suite 455 Tarrytown, Ny 10591, Usa 1-7326030810 Telex 1-7326030820		Singham Corporation, 127, Harbor Road, Port Washington, Ny 11050 1-7326030810 Telex 1-7326030820		
<b>Port:</b> 53313 - Jawaharlal Nehru, India		<b>Port:</b> 4601 - Newark, NJ		<b>In Bond:</b>		<b>Weight:</b> 32176 (LB)
<b>Place Receipt:</b> Jawaharlal Nehru				<b>US Dist Port:</b>		<b>Quantity:</b> 1502 (CASES)
				<b>Foreign Port:</b>		<b>Measurement:</b> 20 (CM)
						<b>TEU:</b> 1.0
<b>Container Number</b>	<b>Quantity</b>	<b>Product Description</b>				<b>Marks and Numbers</b>
POCU0463748	1502	Baby Oil 12 Fl Oz 797 C/s X 24 Btl's X 12 Fl Oz Baby Oil 17 Fl Oz 705 C/s X 24 Btl's X 17 Fl Oz. (made Out Of Light Liquid Paraffin/light White Oil) Invoice No. 107 Dt. 23/03/ 2009 Net.wt: 12658.000 Kgs				Elizabeth

## Procuring Trade Data

Purchasing U.S. Customs trade data from the government is cost-prohibitive for nearly every importer, legal professional, and transportation company. There are a select set of trade data providers that supply this information to the public via subscription access or selling reports on specific criterion. Typically, the preferred method of delivery for IP professionals is subscription access, as it allows for ongoing monitoring, but reports, in the form of PDF or Microsoft Excel® documents, can have significant value for specific cases.

Providing timely data is a huge challenge; U.S. Customs releases the data to providers on a daily basis and different providers expose this information for their customers at different rates. The sheer volume of import trade transactions (around a million a month), requires providers to take storage and processing constraints into consideration and this impacts how timely the data is (within days or weeks of shipment arrival) and how much history they provide (from the last 12 months or up to six years). Finding a provider that meets the requirements of the situation is an important part of using trade data.

How legal professionals use trade data in different types of cases:

## Anti-Counterfeiting

Working on counterfeiting cases is a common use of trade data. Users appreciate the ability to see the actual shipment data that the counterfeiters and their customers submitted to U.S. Customs. This use of the data has greatly expanded over the last five years and coincides with U.S. Customs' increase in seizures.

Working with authorities allows importers and their legal counsel to take swift action against the violators of their brands. They use the data as evidence in seizure cases presented to U.S. Customs or in court.

How IP practitioners use trade data is a two-step process. They search specifically for the parties that are suspected of counterfeiting their goods. This shows them exactly how the counterfeiters have listed their products for the period they believe the shipments entered. This can include looking at specific locations and parties that are suspected of being used in the counterfeiting or transportation of the products.

Once they have identified all the parties and types of shipments involved, they look at the shipment history to define a timeline and ascertain the depth of the violation. Finally, they present their findings to proper authorities.

## Brand Protection

Protecting one's brand with trade data is a proactive and continual process. Instead of looking at a specific importer or shipper, brand protection teams look for instances that their products are being imported.

Often times, the specific brands are listed in the product descriptions by the parties involved. If the imports are not authorized uses of the brand, actions can be taken by U.S. Customs to seize the goods, sometimes before they reach the consignee of the merchandise.

Continuous vigilance is needed to effectively protect brands with trade data. In practice, this usually means that the assigned individuals log into the trade data tool that they have subscribed to on a weekly or monthly basis. They search and download the most up-to-date information; this shows them the shipments based on their criteria that entered the United States in the last week. They then conduct new searches based on the information in the data and investigate any new brands or companies that others have identified.

## Gray Market or Parallel Trade

When products that are legally produced for a specific market are imported or diverted back without authorization to the United States, a case of gray or parallel trade has occurred. For example, packaging and labeling requirements differ from one country to another and if products are imported with information that does

not meet U.S. standards, penalties can be leveled against the brand holder. Another damaging situation is if the ingredients or the composition are not within U.S. guidelines.

Trade data is used to ensure that customers and distributors are correctly sending products to the United States. This requires tracking shipment data for products and specific companies using a U.S. Customs trade data application.

Users pay specific attention to shipments that have an origin where authorized products are not produced or the products produced for those markets do not meet U.S. standards. In addition, shipments that transit through locations that they should not have are indications that a shipment could be gray market.

### **Anti-Dumping**

While not an intellectual property issue, antidumping is an important issue for many commodity-based industries. To develop the information needed for an anti-dumping case, trade data can be a cost-effective method to show products that have been illegally imported at below market prices. This requires using U.S. Census trade data to show the imports from a specific country of a single harmonized tariff code. Then, U.S. Customs trade data can show which companies were involved in the shipments for the same timeframe, making for a detailed case that can be brought to the World Trade Organization.

In-depth pricing analysis can be done using U.S. Census data to show the average price per kilogram for a specific product for a country of origin. For example, if an industry is investigating low commodity prices, it does a series of analyses of the import data for that country. First, it looks at the average price for the product over a period of time and then combines it with the total amount of product that entered the country to show when large quantities came to the market. See the graph below for an example of this analysis.

The obvious ongoing theme of the above examples is that continuous monitoring is an important part of using trade data in your practice or business. While there are examples of using trade data intermittently to ensure that your brands and products have not been abused, it increases the risk of missing a shipment and delays the response that can be delivered.

When parties constantly track every shipment entering the country that relates to their interests, there is the ability to notify U.S. Customs and have them take action before a shipment reaches the consignee. Every day that legal professionals can keep counterfeit and

unauthorized product off store shelves can mean millions for their clients and companies.

Companies may use trade data for several purposes outside of IP, allowing them to spread the cost of access across multiple departments and ensure that the maximum benefit of the data is achieved. For example, a marketing department uses trade data to analyze the market in order to derive better forecasts. They take the specific information to understand both what their competitors are importing and what trends exist in the products that they manufacturer or sell.

Sourcing and supply chain departments reduce costs by easily finding new sources for commodities and manufactured goods and also by tracking their own suppliers. Finally, sales teams use the specific dataset to target potential clients, selling services like logistics, trade financing and insurance.

### **Conclusion**

Trade data allows members of the intellectual property and legal communities to deliver results that cannot be obtained anywhere else. Not only is the information actionable, it is timely and affordable enough for nearly every situation.

By ensuring that brands are not infringed upon and international laws are followed, users proactively protect their property rights and save their companies and clients millions in lost revenue and fines. Trade data is a tool that should be used in any legal situation that involves international trade to the United States because it is the most detailed information available to prove how companies and individuals have imported products.

### Hypothetical Antidumping Evidence for a Product from a Country

