

PARALLEL IMPORT SUBJECT TO CUSTOMS SEIZURE

After the "Silhouette"-Decision of the European Court of Justice, it has been established that genuine products being imported into the European Economic Area (EEA) without the consent of the trademark owner constitute a trademark infringement in Germany. Nonetheless, the Ministry of Finance instructed its customs authorities (OFD) not to seize such parallel imports. It was argued that a customs seizure of parallel imports could anyway only be based on German National Trademark Law since the EC-Regulation on Customs Seizure explicitly excludes parallel imports from its application. Under National German Trademark Law, however, it was contended that the different wording of the provisions on infringement and customs seizure made it not possible to extend customs seizures to parallel imports.

In a suit initiated by an American textile company the Federal Supreme Court for Financial Matters in October 1999 held that, under a general motion for customs seizure of trademark counterfeits, parallel imports have to be seized by the border controls provided they are imported from other countries than those of the EEA. This decision based on National German Trademark Law and not on the EC Regulation has been rendered without a hearing. Thus, theoretically it could still have been overturned in a hearing summoned upon request of the OFD. Since the facts have always been undisputed between the parties, no such request was filed and the decision became final.

The new situation allows trademark owners to better maintain different quality and price levels inside and outside the EEA since they now enjoy the possibility of stopping parallel imports at least at the German border instead of having to proceed against parallel imports after they have appeared on the market.

Although the OFD lost the case, the decision will strengthen its position among the other national customs authorities in EEA-countries being in charge of customs seizures. While under the EC Regulation as of July 1, 1999, any national European customs authority can grant motions for customs seizures in all Member States (provided they are based on a Community Trademark), only the German OFD will be in the position to grant motions for border seizures with respect to parallel imports in Germany.

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