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THE COMPETITIVE PROCESS AND GRAY MARKET GOODS

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The spiralling growth rate of international trade has been accompanied by the importation and sale of gray market goods, a recurring problem and subject of considerable concern and controversy.[1] The label "gray market" is applied to those goods which are manufactured abroad and then sold in the United States, outside authorized channels of distribution.[2] The consumer who pays $100 for a famous name brand imported watch that usually sells for $200 has probably purchased a gray market item.

Gray market goods are not counterfeit. They are genuine goods which usually bear a trademark, but which are generally sold at prices considerably less than those charged by the United States distributor. While the consumer is typically pleased with the financial savings involved in the purchase of a gray market item, the United States distributor is not because, in effect, a sale has been lost. If enough sales are lost, the distibutor may eventually go out of business.

Since a major focus of United States competition policy is to benefit the consumer,[3] it is unclear whether the importation and sale of gray market goods violates United States law. The presence of gray market goods can be viewed as either an assault on the competitive process or as an enhancement of it. This article considers the tension between the equities for the distributor and the efficiencies for the consumer when gray market goods are sold. It then examines the status of gray market goods within the framework of United States competition policy.

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1. *See, e.g.*, Crandle, *Closing the Door on Pirates and Bad Apples*, CUSTOMS TODAY, Spring 1983, at 9, 11; Lewin, *Gray Area for Imports*, N.Y. Times, Nov. 1, 1983, at D2, col. 1. For a historical account of the problem see Vandenburgh, *The Problem of Importation of Trademarked Goods is not a Trademark Problem*, 49 TRADE-MARK REP. 707 (1959).

2. For a discussion of how other legal systems deal with this problem, see Takamatsu, *Parallel Importation of Trademarked Goods: A Comparative Analysis*, 57 WASH. L. REV. 433 (1982).

3. *See Antitrust Symposium: Purposes and Goals of Antitrust*, 27 ST. LOUIS U.L.J. 287 (1983); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981).

I. THE NATURE AND EXTENT OF THE PROBLEM

There is nothing novel about the importation of genuine goods in contravention of an existing exclusive distributorship.[4] What is new is the quantity and frequency of their importation. What was once a cottage industry has become big business with the growth of international trade. In the past, these goods were referred to as "parallel imports," and included items such as watches, cameras and perfumes. Today, the list has expanded to include a wide range of consumer items such as electronic equipment, televisions, microwave ovens, stereo equipment, tires, glassware, dinnerware and crystal.[5] Although there may be stylistic differences between the overseas articles and those intended for the American market, they are essentially the same goods.

One of the major factors which has contributed to the growth of the gray market is the strength of the dollar against fluctuating currencies.[6] In the camera industry, probably the most vulnerable target of gray market goods, the gray market business has been compared to the commodity exchange since dealers watch foreign exchange rates and then traffic the cameras accordingly.[7]

The two most common situations in which the problem arises are: (1) when United States subsidiaries are exclusive distributors for foreign corporations and (2) when United States companies authorize foreign producers to manufacture and sell goods in foreign markets with the understanding that the goods will not be sold in the United States.[8] In both situations gray market dealers purchase the goods from middlemen abroad, import them into the United States and then sell them at prices which are usually lower than those charged by an American distributor.[9]

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4. *See* Vandenburgh, *supra* note 1.

5. Blumstein, *Seiko Wins Order to Get Alexander's to Change Its Ads,* N.Y. Times, Aug. 6, 1982, at D1, col. 3.

6. *Why Camera Prices are Falling,* BUS. WEEK, Sept. 6, 1982, at 61, 64.

7. *Id.*

8. *See* Brief of Amici Curiae (Trademark Group of the American Association of Exporters and Importers, American Watch Association, Bojorquez Mexican Food Coalition and Jewelers of America, Inc.), attachment B (Letter from Steven Kersner to Darrel Kast (May 14, 1982)), Bell & Howell: Mamiya Co. v. Masel Co., 548 F. Supp. 1063 (E.D.N.Y. 1982), *vacated and remanded,* 719 F.2d 42 (2d Cir. 1983).

9. *See, e.g.,* Brief for Appellant at 9, Bell & Howell: Mamiya Co. v. Masel Co., 548 F. Supp. 1063 (E.D.N.Y. 1982), *vacated and remanded,* 719 F.2d 42 (2d Cir. 1983) (cameras sold by gray market dealers cost $150 to $200 less than the prices charged by the United States distributor).

II. Competition Issues

A. Benefits and Burdens of Gray Market Goods

By stimulating price competition, gray market goods enhance intrabrand competition.[10] The consumer receives low-priced goods, a result which ostensibly benefits consumer welfare. If gray market goods were excluded from the United States, the American market would be insulated from price competition. This could cause the domestic consumer to be the victim of price discrimination due to the payment of artificially high prices instead of world market prices checked by competition.[11] The fact that gray market goods cost less in foreign markets, however, may not be indicative of anti-competitive price discrimination. Instead, it might simply reflect the economic realities of a given foreign market. Cost as well as price may be less in the foreign market; a seller may not need expensive advertising, warranty service or product liability insurance in order to compete with other sellers.[12]

On the burden side of the equation, consumers are deceived when expected warranties or services are not provided by gray market dealers. Consumers also experience a sense of diminished expectation when they purchase high quality goods at a high price in prestige stores, only to find the same goods sold in discount outlets one year later.[13] Finally, consumers' long run interests may be affected if the penetration of gray market goods causes unemployment in a domestic industry.[14]

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10. Interbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors—wholesale or retail—of the product of a particular manufacturer.

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977).

11. The Robinson-Patman Amendment to section 2 of the Clayton Act, 15 U.S.C. § 13(a)-(f) (1982) proscribes the practice of price discrimination. When sellers receive a different margin of price over cost from different purchasers, anti-competitive price discrimination has occurred. *See* F. Scherer, Industrial Market Structure and Economic Performance 253-54 (1980).

12. *See* 1978 A.B.A. Sec. of Pat., Trademark & Copyright L., Committee Reports at 76.

13. For example, in many cases if a consumer invests a substantial sum of money in the purchase of a prestige line of dinnerware, the value of the dinnerware decreases if it is sold in non-prestige stores, whether or not discounting is involved.

14. *See, e.g.*, Brief for Appellee at 33 n.8, Bell & Howell: Mamiya Co. v. Masel Co., 548 F. Supp. 1063 (E.D.N.Y. 1982), *vacated and remanded*, 719 F.2d 42 (2d Cir. 1983). In the *Mamiya* case, as a result of the importation of gray market cameras, employment was reduced by 60%. *Id.*

Unauthorized sales deprive the United States distributor of the ability to control the nature and quality of the goods.[15] Gray market goods may not conform to all of the United States safety and technical requirements, and many of the goods are not regulated by the inspection, transit and quality controls of the authorized United States distributor. Goods which are not transported properly, particularly cameras, watches and electronic equipment, may not perform according to the specifications set by the manufacturer and expected by the buyer. Consumers are also often unaware when purchasing gray market goods that they are buying something other than goods marketed by legitimate distributors.[16] Thus, it is usually the good will of the United States distributor which is injured when consumers are dissatisfied with an item purchased from a gray market dealer. Finally, if major sales are lost to gray market importers, there may be a serious residual effect in the service industries associated with authorized United States distributors.

B. *Elements of Unfair Competition*

The phenomenon of gray market goods raises the question of whether dealers in these goods exceed the desirable bounds of competitive behavior. While the presence of gray market goods may provide intrabrand competition, it does so at the cost of undermining distribution programs constructed to increase interbrand competition.[17] With little or no financial spending, the gray market dealer is able to reap the benefits of the substantial investment of the United States distributor to establish consumer awareness and maintain product quality. In short, the gray market dealer capitalizes on the good will resulting from the distribution, marketing, warranties and servicing provided by the United States distributors. Because of this, the distributor's desire to design an efficient and effective distribution system may be impaired.

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15. For example, customs regulations require that imported watches be marked on the inside of their cases. When watches are transported internationally they must be marked with the name of the importer and country of origin. 19 U.S.C. § 1202 (1982) (sched. 7, Tariff Schedules of the United States). Watches, a common gray market item, are delicate precision instruments produced in highly sterile environments to avoid contamination. Thus, they are marked during the course of manufacture in a sensitive environment. When gray market dealers open the watches and mark them outside of this environment, performance is impaired. *See* Seiko Time Corp. v. Alexander's, Inc., 218 U.S.P.Q. 560 (S.D.N.Y. July 30, 1982).

16. *See id.* (finding of fact number 37).

17. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52 n.19 (1977).

The United States distributor usually spends considerable sums of money on advertising to develop a product market.[18] If a high quality image is desired for a product, the long-range marketing strategy may involve selling only to exclusive stores at the risk of losing revenues from sales to less prestigious stores. Typically, the United States distributor is responsible for dealer training, promoting the brand name in the United States and providing quality inspection, warranties and repair services. The distributor must also control shipping, handling, importation and storage of goods.

In addition to being unfair, the "free rider" problem described above may remove many of the incentives for aggressive interbrand competition. To the extent that it does so, it may be considered anticompetitive.

Thus, the presence of gray market goods raises the uneasy specter of ostensible benefit to the consumer but unfairness to the United States distributor. The resulting task is to find an equilibrium between these tensions by satisfying long-term consumer interests while at the same time protecting the competitive process.

III. Legal Response to Gray Market Goods

A. *The Nature of the Threatened Interest*

The concern of United States trade laws is to foster open competition, but commercial relationships should not be devoid of legal restraints. United States law provides redress against industrial espionage, misappropriation of trade secrets, patent infringement, copyright infringement, trademark infringement and other tortious acts amounting to unfair competition. These acts interfere with protectable interests.[19] In considering the appropriate legal response to the phenomenon of gray market goods, it is necessary to consider what rights are being affected and whether any protectable interest is involved.

The importation of gray market goods affects the contractual relationship between the United States importer/distributor and the foreign seller. In most cases the affected agreement is an exclusive distribution agreement. There are numerous legitimate business reasons why

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18. For example, in 1981, eight watch companies involved in importing watches through authorized distribution spent about 50 million dollars on advertising in the United States. The companies are Seiko Time Corporation, Bulova Watch Co., Citizen Watch Co. of America, Inc., Longines-Wittnauer Watch Co., North American Watch Corp., Omega Watch Corp., Pulsar Time, Inc. and Rolex Watch U.S.A. *See* Brief of Amici Curiae, *supra* note 8, at 8 n.3.

19. *See generally Developments in the Law, Competitive Torts*, 77 HARV. L. REV. 888 (1964).

a United States distributor and foreign seller would choose to do business through an exclusive distribution arrangement.[20] The exclusive United States distributor controls pricing, distribution, advertising and supply. Where consumer goods are involved, great emphasis is put on brand image, and control over the marketing strategy is extremely important. If dealer servicing is an integral part of the product's promotion, a distributor would be reluctant to guarantee proper service unless he were assured of exclusive distribution rights.

In most cases the foreign seller desires full penetration of the United States market. Thus, there is good reason for him to increase incentives for the United States importer/distributor to commit all necessary promotional and support services towards this end. Since many consumer goods ranging from televisions to automobiles are sold in the United States through authorized distributors of foreign manufacturers, consumers often are aware of distribution systems. This awareness increases consumer identification of certain products with the United States distributor. It may be important for the foreign seller to have a healthy business relationship with the United States distributor since domestic buyers might be reluctant to purchase foreign goods which are not supported by a local company.

Exclusive distribution agreements may be protected by the common law of torts, contracts and unfair competition[21] to the extent that they involve competitive practices, but they must also be viewed within the framework of antitrust law.

A foreign seller's decision to use an exclusive United States distributor to market its goods should be treated no differently than a similar decision by a domestic seller. Exclusive distributorships establish vertical territorial restrictions which are subject to antitrust scru-

20. Vertical controls over distribution channels can enhance interbrand competition by facilitating distribution efficiencies and non-price forms of interbrand competition. In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 54 (1977), the Court identified several beneficial characteristics of vertical restraints. For a discussion of why vertical restraints might be desirable in the field of international trade, see J. ATWOOD & K. BREWSTER, ANTITRUST AND AMERICAN BUSINESS ABROAD 352-57 (2d ed. 1981). *See also* Note, *Restricted Channels of Distribution Under the Sherman Act,* 75 HARV. L. REV. 795 (1962).

21. *See, e.g.,* Perry v. American Hecolite Denture Corp., 78 F.2d 556 (8th Cir. 1935); Overhamm v. Westall, 66 N.Y.S.2d 371 (1st Dep't 1946). One commentator has argued that the problem of gray market goods is unquestionably one of unfair competition. "The disturbance created by the importation of 'genuine' goods in knowing contravention of an existing lawful distributorship is clearly a tort, and because it is motivated by competitive activity, it is unfair competition in its unvarnished variety." Callman, *Another Look at the Unlawful Importation of Trademarked Articles,* 52 TRADE-MARK REP. 556, 561 (1962).

tiny and the application of a rule of reason.[22] The primary focus of this standard is an evaluation of both the intrabrand and interbrand competitive impact of the challenged restriction. Whether of foreign or domestic origin, vertical territorial restraints reduce intrabrand competition. As noted by the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[23] however, vertical restrictions promote interbrand competition, which is the primary concern of antitrust law.

An exclusive distribution arrangement of foreign origin is most vulnerable when the United States distributor has strong market power. This is true insofar as an essential element of unlawful conduct under the rule of reason is proof of market power or the power to raise prices profitably over the competitive level.[24] Without market power, any attempt to exploit the reduced intrabrand competition resulting from vertical territorial restraints would be constrained by interbrand competition from other goods.

On the other hand, the anti-competitive effect of the restriction decreases if there is a strong competitive United States market. This is true whether the market is penetrated with domestic or foreign products.

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22. In Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), the Supreme Court recognized the positive competitive purposes served by vertical restrictions in that they "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his product." *Id.* at 54. The Court observed that with respect to goods which are trademarked, there is a need to ensure guarantees of service and repair.

> Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services then [sic] if none did.

Id. at 55. *See generally* Pitofsky, *The Sylvania Case: Antitrust Analysis of Nonprice Vertical Restraints*, 78 COLUM. L. REV. 11 (1978); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); ABA ANTITRUST SEC., VERTICAL RESTRICTIONS LIMITING INTRABRAND COMPETITION (Monograph No. 2, 1977). Vertical territorial restraints are permissible absent monopolistic purpose or anti-competitive effect. *See* United States v. Colgate & Co., 250 U.S. 300 (1919); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir. 1977) (en banc), *cert. denied*, 439 U.S. 946 (1978).

23. 433 U.S. 36, 51, 52 n.19 (1977).

24. Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 130 n.5 (2d Cir. 1978) (en banc), *cert. denied*, 439 U.S. 946 (1978). *See* Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); 2 P. AREEDA & D. TURNER, ANTITRUST LAW § 322 (1978).

B. Interference With the Contractual Relationship

To the extent that an exclusive distribution agreement is legal under the rule of reason analysis, it should be considered a protectable interest. A property right is created in contract, and wrongful interference with this right may be an actionable tort.[25] The doctrine of interference with contractual relations is a tort theory used to protect parties to commercial contracts from actions which reduce the value of the contract or damage its subject matter.[26] The theoretical basis for this doctrine lies in the property aspect of a contract.[27] A *prima facie* case of intentional interference with a contractual relationship is established by proof that (1) the defendant had actual knowledge of the contract's existence; (2) there is a direct causal connection between the defendant's act and the damage to the value of the contractual relationship and (3) there is actual damage or loss.[28]

Certainly, not all interferences with a competitor's business relationships are tortious. Competitive pricing is one obvious consequence of competition and thus is not an actionable interference. Predatory pricing, disparagement of goods, false advertising and misleading the consumer with respect to warranties, however, should be considered tortious interference with a contractual relationship.

It has been suggested that where a competitor has full knowledge of an exclusive distribution agreement and knows that a foreign manufacturer would not sell goods to him under any circumstances, and

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25. "Contract rights are property, and as such are entitled to the protection of the law . . . ." Second Nat'l Bank v. M. Samuel & Sons, 12 F.2d 963, 967 (1926).

26. Acknowledgment of this tort is found in an article published in 1928 by Professor Charles E. Carpenter. This may well be the first theoretical exposition of the tort of interference with contractual relations. Professor Carpenter wrote:

> [T]oday there is no question but that there may be *prima facie* liability for interference with contract relations without inducing breach of contract by, for example, injuring persons under contract so that they are disabled from performing, or by destroying or damaging property which is the subject matter of a contract, or by doing other acts which make performance more burdensome, difficult or impossible or of less or no value to the one entitled to performance . . . .

Carpenter, *Interference with Contractual Relations*, 41 HARV. L. REV. 728, 731 (1928). Two courts have referred to this passage in upholding causes of action for interference with contractual relations. Cable Vision, Inc. v. KUTV, Inc., 211 F. Supp. 47, 61 (S.D. Idaho 1962), *rev'd*, 335 F.2d 348 (9th Cir. 1964), *cert. denied sub nom.* KLIX Corp. v. Cable Vision, Inc., 379 U.S. 989 (1965); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd per curiam*, 279 A.D. 632, 107 N.Y.S.2d 795 (1951).

27. *See, e.g.*, Revlon, Inc. v. Crest Distrib., 19 Misc. 2d 426, 428, 190 N.Y.S.2d 748 (1959).

28. W. PROSSER, LAW OF TORTS § 129, 927-49 (4th ed. 1971).

then acts in a manner to refute the existence of the exclusive agreement, the interference cannot be considered incidental. Rather, it would be motivated by an unlawful intent to interfere with a contractual relationship.[29] This property right concept was the basis for relief in *DeJur-Amsco v. Janrus Cameras, Inc.*[30] In this case, the plaintiff, an electronics wholesaler, had obtained a contract with a German electronics manufacturer to be the exclusive United States distributor of Grundig dictating and transcribing machines. The defendant, another United States distributor, began selling similar Grundig machines which it obtained through European purchasers who obtained them from Grundig. The defendant's gray market activities were enjoined on the theory of interference with a contractual relationship.[31]

C. *Section 526 of the Tariff Act of 1930*

Section 526 of the Tariff Act of 1930[32] may provide some protection against the importation of gray market goods[33] with respect to goods which bear trademarks. This statute prohibits the importation of merchandise that bears a trademark owned by a United States citizen, corporation or association if the trademark has been registered in the

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29. 2 R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 9.01 (4th ed. 1982).

30. 16 Misc. 2d 772, 155 N.Y.S.2d 123 (1956).

31. *Id.* at 774. The court's holding has been criticized since there was no indication or allegation that the Europeans knew of the exclusive contract between Grundig and the plaintiff. Note, *Interference With Contractual Relations: A Property Limitation*, 18 STAN. L. REV. 1406, 1409 (1966).

32. 19 U.S.C. § 1526 (1982).

33. 19 U.S.C. § 1526(a) (1982) provides:

> § 1526. Merchandise bearing American trade-mark—Importation prohibited
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> (a) Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trade-mark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent Office by a person domiciled in the United States, under the provisions of sections 81-109 of Title 15, and if a copy of the certificate of registration of such trade-mark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trade-mark is produced at the time of making entry.

Foreigners who own United States trademarks are not entitled to the protection of section 526. It has been suggested that this violates the principle of national treatment under the Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 1629, T.I.A.S. No. 6923, of which the United States is a member. The Convention provides that the protection of industrial property is to be applied without regard to nationality among nations. *See* Takamatsu, *Parallel Importation of Trademarked Goods: A Comparative Analysis*, 57 WASH. L. REV. 433 (1981).

Patent and Trademark Office and if the Certificate of Registration is filed with the Secretary of Treasury.[34] Only trademarks which are registered under the Trademark Act of 1905,[35] or the Principal Register of the Lanham Act[36] can be used to prevent importation.

The Tariff Act has been used to exclude spurious goods and cheap imitations,[37] as well as genuine goods.[38] The Act, however, has been the subject of much controversy regarding the extent of its protection and the beneficiaries thereof.[39] The Customs Service, which is charged with enforcing the statute, refuses to exclude goods in those instances where the United States registrant/distributor is related to the foreign manufacturer.[40] The Customs Service regulations are based upon a 1969 Treasury Department decision which specifies three situations where exclusionary protection is not granted: (1) where the foreign producer is the parent or subsidiary of the United States owner; (2) where the foreign and United States firms are under common control and (3) where the foreign producer has been authorized by the United States owner to produce and sell goods abroad.[41] Customs' rationale for its position is that this is essentially a private contractual situation and the resources of the Customs Service ought not be involved in policing such contracts.[42]

Some support for Customs' position is found in the legislative history of section 526, and in a series of antitrust cases brought by the Justice Department in the 1950's against companies who used section 526 to exclude genuine goods.[43]

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34. *See, e.g.*, 19 C.F.R. § 130.1 (1981) and related sections.

35. Act of Feb. 20, 1905, ch. 592, 33 Stat. 724, *amended by* Act of July 5, 1946, ch. 540, 60 Stat. 427 (Lanham Act) (current version at 15 U.S.C. §§ 1051-1127 (1982)).

36. The Principal Register of the Lanham Act is its subchapter I, *id.* §§ 1051-1072.

37. *See* Fred Gretsch Mfg. Co. v. Schoening, 238 F. 780, 782 (2d Cir. 1916); Coty, Inc. v. Le Blume Import Co., 292 F. 264, 268-69 (S.D.N.Y. 1923).

38. Sturges v. Clark D. Pease Inc., 48 F.2d 1035, 1037 (2d Cir. 1931).

39. *See* Bicks, *Antitrust and Trademark Protection Concepts in the Import Field,* 49 TRADE-MARK REP. 1255 (1959); Dam, *Trademarks, Price Discrimination and the Bureau of Customs,* 57 TRADE-MARK REP. 14 (1967); Atwood, *Import Restrictions on Trademarked Merchandise—The Role of the Bureau of Customs,* 59 TRADE-MARK REP. 301 (1969).

40. It should be noted that the Customs Service is considering changing its regulations which enforce section 526. Brief of Amici Curiae, *supra* note 8, attachment C (Letter from the Acting Commissioner of Customs to United States Trade Representative William Brock (November 3, 1982)).

41. 19 C.F.R. § 133.21 (1981).

42. Letter from William E. Brock, United States Trade Representative to the Commissioner of Customs, dated Oct. 5, 1980. Brief of Amici Curiae, *supra* note 8, attachment B.

43. *See, e.g.*, United States v. Guerlain, Inc., 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded,* 358 U.S. 915 (1958).

Legal commentators in the pre-*GTE Sylvania* era have offered additional support for Customs' position, and at least one author has argued that to allow a United States company related to a foreign distributor to exclude competing imports from that distributor is to sanction price discrimination.[44] This is hardly a convincing argument to support Customs' position considering the fact that the independent, domestic distributor who is protected by Customs also excludes competing products.

The legislative history of section 526 is implicated in the Supreme Court's decision in *Bourjois v. Katzel*,[45] wherein the Supreme Court held that trademarks could be infringed by the importation and sale of genuine goods.[46] In *Bourjois,* a French manufacturer of face powder had sold its business and trademarks to the plaintiff, a United States company, for $400,000. The United States company continued to import the French powder and sold it in the United States in boxes similar to the French boxes. The defendant imported the identical powder and sold it in original French boxes in the United States. The court of appeals held that because the imported goods were genuine, there could be no infringement.[47] The Supreme Court, however, reversed, placing great emphasis on the good will value of the trademark which the plaintiff purchased from the foreign manufacturer. The Court held that since the French manufacturer could not use its trademark in the United States, other importers similarly could not be allowed to use it. The Court also found that the defendant's use of the trademark could harm the plaintiff's reputation because the public associated the face powder with the plaintiff.[48]

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44. *See* Bicks and Dam, *supra* note 39, and Vandenburgh, *supra* note 1.

45. 260 U.S. 689 (1923), *rev'g* 275 F. 539 (2d Cir. 1921), *aff'g* 274 F. 856 (S.D.N.Y. 1920). Detailed discussions of the nexus between section 526 and the Court's decision in *Bourjois* are found in Bicks and Atwood, *supra* note 39; Callman, *Unfair Competition with Imported Trademarked Goods,* 43 VA. L. REV. 323 (1957); Derenberg, *Current Trademark Problems in Foreign Travel and the Import Trade: A Critical Analysis of the Purpose, Scope and Effect of H.R. 7234,* 49 TRADE-MARK REP. 674 (1959); Kuhn, *Remedies Available at Customs for Infringement of a Registered Trademark,* 70 TRADE-MARK REP. 387 (1980).

46. Commentators differ as to whether *Bourjois* was intended to overrule pre-*Bourjois* decisions, which held that no trademark infringement occurred where genuine goods were involved, or whether the case was limited to its facts. *Compare* Vandenburgh, *supra* note 1, and Bicks, Atwood and Kuhn, *supra* note 44, *with* Callman and Derenberg, *supra* note 44.

47. 275 F. at 543.

48. In Prestonettes, Inc. v. Coty, 264 U.S. 359, 368 (1924), Justice Holmes offered this explanation as the basis for the *Bourjois* decision.

In effect, *Bourjois* overruled the universality principle of trademarks. This principle stated that goods manufactured abroad under a trademark and then imported and sold in the United States did not infringe the trademark rights of the American owner since the goods came from the same foreign source and the public was not deceived.[49] This principle complemented the original concept of trademarks as representing only the physical source or origin of a product.[50] The *Bourjois* decision established the principle of territoriality of trademarks which holds that the legitimacy of trademark rights depends upon where the goods are sold.[51]

At the same time the appeal of *Bourjois* was pending before the Supreme Court, section 526 of the Tariff Act of 1930 first appeared as an amendment to the Tariff Act of 1922.[52] Floor debate in the Senate was limited to ten minutes, following which section 526 was included as a midnight amendment.[53] Although the legislative history of this section is meager, it does show that section 526 was enacted in large part to overrule the court of appeals' decision in *Bourjois* and to protect United States purchasers of trademarks from fraud or breach of contract by foreign sellers against whom contract remedies might be ineffective.[54]

During the mid-1950's, there were extensive efforts to limit section 526 protection to United States trademark owners who were independent of foreign manufacturers. The Customs Service changed its regulations to eliminate protection for United States trademark owners who were related to foreign manufacturers,[55] and several bills were introduced in Congress to prevent affiliated companies from invoking section 526.[56] None of these bills, however, were successful.

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49. *See* Appollinaris Co. v. Scherer, 27 F. 18, 20 (C.C.S.D.N.Y. 1886).

50. Derenberg, *Territorial Scope and Situs of Trademarks and Good Will,* 47 VA. L. REV. 733 (1961).

51. *See* Syntax Laboratories, Inc. v. The Norwich Pharmacal Co., 437 F.2d 566 (2d Cir. 1971) (in amending the Trademark Act in 1962 Congress intended to prevent the use of trademarks which are likely to cause confusion, mistake or deception of any kind, not just as related to source).

52. Act of Sept. 21, 1922, ch. 356, § 526, 42 Stat. 975. Section 526 of the Tariff Act of 1922 was superceded by § 526 of the Tariff Act of 1930, and was repealed by § 651(a)(1) of the 1930 Act.

53. 62 CONG. REC. 11585, 11602 (Aug. 19, 1922).

54. *See* Sturges v. Clark D. Pease, Inc., 48 F.2d at 1037; Coty v. Le Blume Import Co., 292 F. 264, 269 (S.D.N.Y. 1923). *See also* Note, *Importation Control Under Tariff Act, Section 526: Trademark Privileges and Antitrust Policy,* 67 YALE L.J. 1110, 1111 n.2 (1958).

55. For a discussion of these changes, see Atwood, *supra* note 39.

56. H.R. 9476, 83d Cong., 2d Sess. (1954); S. 2540, 83d Cong., 2d Sess. (1954); Celler Bill (H.R. 7234), 86th Cong., 1st Sess. (1959).

In 1954 the Justice Department filed complaints against four United States toiletry companies in *United States v. Guerlain, Inc.*,[57] charging them with the use of section 526 to eliminate intrabrand competition. This was effected by their monopolization and attempted monopolization of the importation and sale of perfumes bearing the trademark of United States companies.

The defendants in *Guerlain* were closely associated with a French manufacturer and had been assigned certain trademark rights in the merchandise involved in the case. The theoretical basis for the Government's case was that the defendant's use of section 526 of the Tariff Act of 1930 and section 42 of the Lanham Act[58] to exclude genuine goods violated the Sherman Act since the defendant/importers were related to the foreign manufacturer. This relationship was characterized as a "single international enterprise."[59]

The district court agreed with the Government's theory and found the defendants in violation of the Sherman Act. In considering whether the defendants had monopoly power, the court determined that the most valuable aspect of a perfume's appeal is a "highly exploited trademark."[60] It then defined the relevant market to be the separate lines of trademarked perfumes imported by the defendant.[61] After defining such a limited market, the court ruled that the defendants exercised monopoly power since they intentionally excluded all competition under section 526.[62] The court interpreted section 526 to be limited to the facts of *Bourjois*, namely protection of an independent distributor against unfair competition from its assignor's continued sale of the trademarked goods to other importers.[63]

This decision was appealed directly to the Supreme Court pursuant to 15 U.S.C. section 29.[64] The case, while pending decision by the Supreme Court, was returned to the district court and dismissed with prejudice on the Government's own motion.[65]

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57. 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated and remanded*, 358 U.S. 915 (1958).
58. 15 U.S.C. § 1124 (1982).
59. 155 F. Supp. at 79.
60. *Id.* at 85.
61. *Id.* at 87.
62. *Id.* at 85.
63. *Id.* at 80.
64. Under 15 U.S.C. § 529 (1982), when the United States is the complainant for equitable relief, any appeal from a final judgment falls under §§ 1291 and 2107 of Title 28. Appeal from an interlocutory order must follow §§ 1292(a)(1) and 2107 of Title 28. Direct appeals to the Supreme Court are possible if made by the district judge of the case within thirty days of the notice to file an appeal. At the discretion of the Supreme Court, the case may be sent back to the court of appeals.
65. 172 F. Supp. 107 (S.D.N.Y. 1959). For a discussion of the rationale for the Gov-

Despite legislative, judicial and administrative efforts to limit or abolish it, section 526 remains in force. As a practical matter, however, the protection this section offers against gray market imports is largely illusory since the Customs Service limits protection to independent, domestic distributors.[66] This limitation is not consonant with post-*GTE Sylvania* antitrust policy. Section 526 is illogical to the extent that it is based on fears of price discrimination.

D. The Lanham Act

Trademarked goods receive additional protection through provisions of the Lanham Act.[67] Section 42 of the Lanham Act prohibits the

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ernment's position, see Bicks, *supra* note 39.

66. 19 C.F.R. § 133.21 (1982). The regulations provide as follows:

> Restrictions on importation of articles bearing recorded trademarks and trade names.
>
> (a) *Copying or simulating marks or names.* Articles of foreign or domestic manufacture bearing a mark or name copying or simulating a recorded trademark or trade name shall be denied entry and are subject to forfeiture as prohibited importations. A "copying or simulating" mark or name is an actual counterfeit of the recorded mark or name or is one which so resembles it as to be likely to cause the public to associate the copying or simulating mark with the recorded mark or name.
>
> (b) *Identical trademark.* Foreign-made articles bearing a trademark identical with one owned and recorded by a citizen of the United States or a corporation or association created or organized within the United States are subject to seizure and forfeiture as prohibited importations.
>
> (c) *Restrictions not applicable.* The restrictions set forth in paragraphs (a) and (b) of this section do not apply to imported articles when:
>
> (1) Both the foreign and the U.S. trademark or trade name are owned by the same person or business entity;
>
> (2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership or control (see §§ 133.2(d) and 133.12(d));
>
> (3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner;
>
> (4) The objectionable mark is removed or obliterated prior to importation in such a manner as to be illegible and incapable of being reconstituted, for example by:
>
> (i) Grinding off imprinted trademarks wherever they appear;
>
> (ii) Removing and disposing of plates bearing a trademark or trade name;
>
> (5) The merchandise is imported by the recordant of the trademark or trade name or his designate; or
>
> (6) The recordant gives written consent to an importation of articles otherwise subject to the restrictions set forth in paragraphs (a) and (b) of this section, and such consent is furnished to appropriate Customs officials.

Id.

67. *See, e.g.*, 15 U.S.C. § 1051 (1982) and related sections.

unauthorized importation of goods which "copy or simulate" a registered United States trademark.[68] Genuine goods are included within the purview of this section.[69] A trademark owner is permitted to record a copy of the trademark certificate of registration with the Department of Treasury so that Customs officials can exclude infringing goods at the port of entry. The primary difference between section 526 of the Tariff Act of 1930 and section 42 of the Lanham Act is that section 526 is limited to United States citizens, corporations and associations,[70] while section 42 of the Lanham Act gives protection to a broader class of persons.

The history of section 42 is not as tortuous as section 526 of the Tariff Act, yet several judicial and legislative attempts have been made to limit its impact where genuine goods are involved, primarily for the same reasons given by those who propose repealing section 526.[71] But, unlike the controversial section of the Tariff Act, the goals of the Lanham Act are quite clear from its legislative history—to protect the good will and investment of the owner in a mark, as well as to prevent consumer confusion.[72]

One commentator has suggested that the true solution to the problem lies in section 44(h) of the Lanham Act.[73] This section gives protection against unfair competition to any person, whether a citizen, a domestic corporation or a national of a foreign country which is treaty bound with the United States. Protection is in the form of analogous remedies which the Act provides against trademark infringement.[74]

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68. 15 U.S.C. § 1124 (1982). "No article of imported merchandise . . . which shall copy or simulate a trademark registered in accordance with the provisions of this chapter . . . shall be admitted to entry at any customhouse of the United States." *Id.* This section provides a United States trademark owner the alternative infringement remedy of barring importations of all goods which bear an infringing mark. In effect, this section reenacted section 27 of the Trade-Mark Act of 1905, which contained the first statutory restriction of trademarks on imported articles. It was construed to apply to spurious goods. Thus, in a series of decisions it was held that the importation and sale of genuine articles did not constitute trademark infringement. *See* Appollinaris Co. v. Scherer, 27 F. 18, 20 (1886); Fred Gretsch Mfg. v. Schoening, 238 F. 780, 782 (2d Cir. 1916); Hunyadi Janos Corp. v. Stoeger, 285 F. 861 (2d Cir. 1922).

69. *See* Bourjois v. Aldridge, 263 U.S. 675 (1923).

70. For a general discussion of the differences between these two sections, see Callman, *supra* note 45.

71. *See* Note, *Trademark Infringement: The Power of an American Trademark Owner to Prevent the Importation of the Authentic Product Manufactured by a Foreign Company*, 64 YALE L.J. 557 (1955).

72. S. REP. No. 1333, 79th Cong., 2d Sess. 3 (1946).

73. Callman, *Another Look at the Unlawful Importation of Trademarked Articles*, 52 TRADE-MARK REP. 556, 562 (1962).

74. 15 U.S.C. § 1114 (1982). These remedies may include injunctive relief and the

This theory has not yet been tested, but it is arguble that section 42 of the Lanham Act may be invoked to prevent acts of unfair competition in the importation of gray market goods.

Currently, the most actively sought remedy against gray market interference is injunctive relief.[75] Section 32 of the Lanham Act[76] provides for injunctions against trademark infringement. Additionally, courts have permitted trademark infringement actions by exclusive distributors and sellers of trademarked goods who had contractual rights to exclude even the owners from selling in a particular territory.[77]

In the recent case of *Bell & Howell: Mamiya Co. v. Masel Supply Co.*,[78] the United States Court of Appeals for the Second Circuit vacated a district court order granting a preliminary injunction against the importation of gray market cameras manufactured in Hong Kong. The plaintiff, a Delaware corportion, was the owner of United States trademark registrations for three Mamiya marks under which it imported and sold photographic equipment in the United States. The equipment was manufactured in Japan by the Mamiya Company and sold to a Japanese trading company, who in turn sold it to the plaintiff. Through contractual arrangements with the Mamiya Company, Japan, the plaintiff was given the exclusive right to distribute the Mamiya medium format photographic equipment in the United States.

The defendant imported identical cameras which it purchased in Hong Kong from sources other than the Mamiya Company, Japan, and sold them in the United States without the plaintiff's permission at prices considerably lower than those charged by the plaintiff.[79] In response to the plaintiff's motion for a preliminary injunction, the defen-

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power to exclude infringing imports.

75. *See* Model Rectifier Corp. v. Takachiho Int'l, Inc., 221 U.S.P.Q. 502 (9th Cir. 1983) (upholding a preliminary injunction to prevent gray market imports); N.Y.L.J., Aug. 30, 1983, at 1, col. 1. *Cf.* Parfums Stern, Inc. v. United States Customs Service, 575 F. Supp. 416 (S.D. Fla. 1983) (motion for preliminary injunction denied relying on *Guerlain*).

76. 15 U.S.C. § 1114 (1982).

77. *See, e.g.*, Quabaug Rubber Co. v. Fabiono Shoe Co., 567 F.2d 154, 159 (1st Cir. 1977); G.H. Mumm Champagne v. Eastern Wine Corp., 142 F.2d 499, 500 (2d Cir. 1944); Alfred Dunhill of London, Inc. v. Kasser Distillers Products Corp., 350 F. Supp. 1341, 1345 n.2 (E.D. Pa. 1972); *cf.* DEP Corp. v. Interstate Cigar Co., 622 F.2d 621, 624 (2d Cir. 1980) (plaintiff's action for trademark infringement was dismissed based on a finding that the plaintiff lacked standing since it was not the owner of the trademark in question).

78. 548 F. Supp. 1063 (E.D.N.Y. 1982), *vacated and remanded*, 719 F.2d 42 (2d Cir. 1983).

79. The defendant solicited camera sales largely by word of mouth, in part because the prices which it could offer at any given time varied greatly. 548 F. Supp. at 1069.

dant offered two arguments: first, that no likelihood of confusion, dilution, or unfair competition was involved since genuine goods were imported; and second, that injunctive relief would be improper on antitrust grounds since the control that the Japanese seller exercised over the plaintiff turned the plaintiff's trademark rights into an illegal, vertical, territorial restraint.[80]

The district court observed that the defendant's antitrust claim was similar to that raised in *United States v. Guerlain*, but it criticized *Guerlain*, stating that its precedential value was questionable in view of the subsequent *vacatur* of that case.[81] Noting that "the business of selling Mamiya goods in the United States is the plaintiff's business,"[82] the district court found a substantial likelihood of confusion in the defendant's use of the mark in the United States. The court was also concerned with the plaintiff's ownership of good will associated with the trademark and the impact of the defendant's use of the mark on that good will.[83] The plaintiff defined the warranty and provided the repair service for the cameras it sold. Because the defendant's use of the marks carried none of these assurances, the district court found that this was "likely to cause confusion with the plaintiff's use of the mark"[84] and, as a result, issued a preliminary injunction.

The United States Court of Appeals for the Second Circuit disagreed with the district court's finding of consumer confusion and vacated the injunction order. The court's opinion, however, did not address the substantive issues of the case.[85]

The court emphasized that in order to obtain an injunction in the Second Circuit there must be a showing of irreparable harm coupled with either likelihood of success on the merits or serious questions on the merits, with the balance of hardships tipping in favor of the party requesting the injunction.[86] Bell & Howell failed to make this showing.

Both Bell & Howell's and Masel's goods shared a common origin of manufacture, and there was no proof that Masel's goods were inferior to those of Bell & Howell. Therefore, the court stated that there was little, if any, confusion regarding origin of the goods.[87]

Further, the court did not believe that lack of warranty protection on the goods sold by Masel constituted sufficient irreparable harm to

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80. *Id.* at 1067-68.
81. *Id.* at 1074.
82. *Id.* at 1079.
83. *Id.*
84. *Id.*
85. 719 F.2d 42, 46 (2d Cir. 1983).
86. *Id.* at 45.
87. *Id.* at 46.

support the preliminary injunction. According to the court, consumers could be alerted to this deficiency by less drastic measures such as labeling or advertising.[88]

In another Lanham Act case involving gray market goods, *Seiko Time Corporation v. Alexander's, Inc.*,[89] the United States District Court for the Southern District of New York enjoined Alexander's Department Store from advertising the availability of gray market watches at discount prices.[90] The plaintiff in this case was the exclusive United States distributor of Seiko watches. For several years the defendant purchased its watches from the plaintiff, but in the spring of 1981 it discontinued buying from the United States distributor and began purchasing the watches from other sources. These watches, however, were not intended for the United States market.

The defendant advertised the watches at substantial discounts from what it said were "suggested list" prices and conducted an extensive newspaper "comparative-price advertising" campaign. The watches were also warranted by the defendant.[91]

In granting the injunction, the court found that the plaintiff made a "clear showing" that it would probably succeed in proving the following claims at trial: (a) the defendant's use of comparisons to the manufacturers' suggested list prices in its advertising of plaintiff's foreign-made watches was a "false representation" under the Lanham Act since, in most cases, no such prices existed; (b) the defendant advertised the watches in such a manner that implied that they were warranted and would be serviced by the plaintiff and this constituted false designation of origin under the Lanham Act and (c) the defendant's advertising and sale of the watches was unfair competition under common law principles.[92]

E. Section 337 of the Tariff Act of 1930

The importation and sale of gray market goods may also be considered an unfair act under section 337 of the Tariff Act of 1930,[93] which prohibits unfair methods of competition that injure a United States industry or restrain or monopolize trade and commerce in the United States. An important issue in this area is whether sales and

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88. *Id.*
89. 218 U.S.P.Q. 560 (S.D.N.Y. 1982).
90. *Id.* at 562.
91. 218 U.S.P.Q. at 561.
92. *Id.*
93. 19 U.S.C. § 1337 (1982).

warranty efforts in the United States constitute domestic industry.[94]

Most of the cases brought under section 337 have involved patent infringement.[95] However, the United States International Trade Commission (ITC), which administers the statute, has considered other actions such as trademark infringement,[96] trade secret misappropriation,[97] false labeling,[98] false designation of origin,[99] copyright infringement[100] and unfair methods of competition.[101] A few antitrust cases have been filed, but all have been terminated without relief.[102]

ITC investigations are adjudicative proceedings subject to the Administrative Procedure Act.[103] Cases are resolved quickly, and this may be particularly useful with gray market goods. The statute requires that most cases be decided within one year, or eighteen months if it is deemed a more complicated case.[104] Most cases, however, are concluded within one year.

Preliminary relief is available in the form of temporary exclusion orders or temporary cease and desist orders pending an investigation, if the ITC has reason to believe there has been a violation of the section.[105] A complainant seeking temporary relief is entitled to have the hearing before the administrative law judge completed within three months of the institution of the investigation.[106]

In determining what constitutes an unfair act in the importation

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94. In Schaper Manufacturing Co. v. Int'l Trade Comm., 717 F.2d 1368 (D.C. Cir. 1983), the court held that although the inventor and exclusive licensee to manufacture and market a toy were active within the United States, because the toy was manufactured under contract with the licensee in Hong Kong, there was no domestic industry under section 337.

95. For example, in Fischer and Co. v. Bakelite Corp., 39 F.2d 247 (C.C.P.A. 1930), the court held that the importation of an infringing patent was an unfair act under section 337. Since that time, first the Tariff Commission and now the International Trade Commission (ITC), established in 1976 and superceding the Tariff Commission, 19 U.S.C. § 1330 (1982), has been a forum for patent disputes.

96. *See Reclosable Plastic Bags*, Inv. No. 337-TA-22, ITC Pub. 801 (Jan. 1977).

97. *Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-52, ITC Pub. 1017 (Nov. 1979).

98. *See Solder Removal Wicks*, Inv. No. 337-TA-26, ITC Pub. 823 (July 1977).

99. *Novelty Glasses*, Inv. No. 337-TA-55, ITC Pub. 991 (July 1979).

100. *Coin-Operated Audio-Visual Games & Components Thereof*, Inv. No. 337-TA-87, ITC Pub. 1160 (June 1981).

101. *In re Certain Alkaline Batteries*, Inv. No. 337-TA-165, ITC Pub. 1616 (Sept. 1983).

102. *See generally* Schaumberg, *Section 337 of the Tariff Act of 1930 as an Antitrust Remedy*, 27 ANTITRUST BULL. 51 (1982).

103. 5 U.S.C. §§ 551-706 (1982).

104. 19 U.S.C. § 1337(b)(1) (1982); 19 C.F.R. § 210.15 (1984).

105. 19 U.S.C. § 1337(e) (exclusion order), (f)(1) (cease and desist order) (1982).

106. 19 C.F.R. § 210.41(e)(2) (1980).

of goods, the ITC will consider judicial determinations under other unfair competition acts.[107] There must be a causal connection between the importation of gray market goods and injury to an industry which is efficiently and economically operated. This connection may be demonstrated by showing such evidence as specific lost sales of the domestic article to imports, the effects of the sales of the imported items on the profitability, pricing and costs of employment in the domestic industry and similar market data.[108]

If it can be shown that predatory pricing is involved with the sale of gray market goods, there may be relief under section 337. This is also designed to prevent unfair methods of competition, the effect or tendency of which is to restrain or monopolize trade and commerce in the United States.[109] The ITC has held that predation is established when prices fall below average variable costs or below short-run, profit maximizing prices and barriers to entry are high enough to let the predator reap the benefits of predation before new entry occurs.[110]

IV. CONCLUSION

Although it has the appearance of benefiting the consumer, the phenomenon of gray market goods is, for the most part, a species of unfair competition. Where an exclusive distribution contract between foreign and domestic entities enhances interbrand competition and satisfies a rule of reason analysis, it should be considered a protectable property interest. There is little justification for permitting gray market imports to interfere with that interest by taking advantage of the good will associated with the distribution, marketing, warranties and servicing provided by the United States distributor.

The antitrust goal of promoting long-run consumer interests is not advanced by conduct which misleads consumers as to warranties and servicing, by false advertising and by disrupting distribution systems geared towards increasing interbrand competition. This type of con-

107. *See* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act,* 21 B.C.L. REV. 227 (1980).

108. *See* Kaye & Plaia, *Developments in Unfair Trade Practices in International Trade: A Review of the Third and Fourth Years Under Section 337 as Amended by the Trade Act of 1974,* 61 J. PAT. OFF. SOC'Y 115 (1979).

109. The restraint of trade and commerce language in section 337 is based on section one of the Sherman Act. Unlike the Sherman Act, however, it contains no requirement of concerted action. *Certain Airtight Cast-Iron Stoves,* Inv. No. 337-TA-69, ITC Pub. 1126, at 6 (Jan. 1981).

110. *See Chicory Root—Crude and Prepared,* Inv. No. 337-TA-27, ITC Pub. at 9 (Oct. 1976). *See also* McGee, *Predatory Pricing Revisited,* 23 J. L. & ECON. 289, 289-330 (1980).

duct exceeds the desirable bounds of competitive behavior.

The competitive process suffers unless there is a commercial environment amenable to efficiency and progress. To the extent that gray market goods impede the incentive for vigorous interbrand competition, they imperil this process.