

BORDER CONTROL IN COMBATING COUNTERFEITS: THE NIGERIAN POSITION

Nigeria is a leading market for all types of goods and services. This is not unconnected with the fact that it is the most populous African nation and has the 8th largest population in the world¹. Nigerians have a strong appetite for popular brands and the country has been noted to be the most lucrative market in Africa. Unfortunately, this has also made products with well known global brands susceptible to the menace of fake and infringing products.

Given the concerns raised by this menace, the importance of the role of the Nigeria Customs Service (the “Customs Service”) has never been more evident. The foregoing has necessitated a look at the current realities and the role of the Customs Service and exercise of its powers in combating counterfeits.

APPLICABLE LAWS FOR SEARCH AND SEIZURE OF COUNTERFEITS BY THE NIGERIA CUSTOM SERVICE

From our experience, there are three (3) main ways by which the Customs Service perform search and seizure of counterfeits. They are:

(a) Direct Customs Seizure

The applicable law in this regard is the Customs and Excise Management Act (“CEMA”)². It is important to note that until recently the officials of the Customs Service have generally understood their main function to be that of collection of duties on imports and exports for the Federal Government, as provided in CEMA³. The only other function they recognise is the prevention of importation or exportation of contrabands⁴, even though the Nigerian President is empowered to prohibit importation of counterfeits⁵. The Customs Service, therefore, does not see combating counterfeiting as one of their functions; at least not one of the core functions.

There has however been a significant shift in this regard, as the Senate on May 31, 2017 passed the Nigerian Customs Service Act (Repeal and Re-enactment) Bill, 2017 (the “Bill”). The Bill which is currently awaiting presidential assent, specifically provides that the Customs Service can subject imports and exports to prohibitions and restrictions relating to ‘the protection of industrial or commercial property, including controls on drug precursors, and goods infringing intellectual

¹ See CIA World Factbook at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>

² Cap C45, Laws of the Federation of Nigeria, 2004 (On May 31, 2017 the ‘Nigerian Customs Service Act (Repeal and Re-enactment) Bill, 2017’, which is to repeal the existing law, was passed by the upper chamber of the Nigerian National Assembly and is presently awaiting presidential assent).

³ Section 4 CEMA

⁴ Section 46(b) CEMA

⁵ Section 24 CEMA generally empowers the President to, by order, prohibit the importation of any specified goods. The exercise of this power is demonstrated in the Fiscal Policy of the Federation as typified in the Common External Tariff – Act No. 4 (CET). The CET, apart from stipulating import/export for various products, also provides a list of Absolute Prohibited products from importation into Nigeria. Item 3 of Schedule 4 of CET states that “all counterfeit/pirated materials or articles including base or counterfeit coin of any country” are absolutely prohibited. It is on this basis that we have always engaged the officers of the Customs that combating counterfeiting falls within the purview of the functions vested on them under Section 46 (b) of CEMA.

property rights⁶. It also provides in detail the procedure for intellectual property rights holders to apply to the Customs Service for suspension of the import/export clearance of an importer/exporter, or even where the goods are in transit, subject to the establishment of reasonable grounds that the goods infringe on the intellectual property rights of the applicant.⁷

(b) Judicial Intervention/Court Order

An interested party can in a civil action for trademark infringement/passing-off, pursuant to the Trademarks Act⁸, apply to the Federal High Court⁹, for an ex parte order of search and seizure mandating the Customs Service to set aside and impound a shipping container if the same is suspected to be carrying counterfeits.

(c) Regulatory Interventions

Regulators such as the Consumer Protection Council (CPC)¹⁰ or the Standards Organization of Nigeria (SON)¹¹ can request the Customs Service to set aside and impound shipping containers suspected to be violating their respective enabling laws.

PRACTICAL REALITY OF ENGAGING THE CUSTOMS SERVICE IN COMBATING COUNTERFEITING

As mentioned, the Customs Service does not take counterfeiting as one of its main responsibilities. This observation is based off the interpretation of the responsibilities of the Customs Service under the CEMA and our interactions with various officials of the Customs Service. Some officials have indicated that it was not the duty of the Customs Service to determine whether any product was counterfeit or not, in so far as the requisite duties have been paid on such products, revealing that the focus was more on the generation of revenue through collection of duties.

Against this backdrop, it has been difficult to engage the Customs Service directly in carrying out search and seizure of counterfeits. We often have to provide extensive explanation on their purview with combating counterfeiting and eventually arrive at some kind of collaborative effort. It is hoped that with the recent passage of the Bill, there will be a renewed drive by the Customs Service in combating counterfeiting and making it a primary focus.

We should mention that the Management of the Customs Service have made efforts to establish an Intellectual Property Section/Unit within the organization but same has not become functional till date.

⁶ Section 55 (1) (f) Nigerian Customs Service Act (Repeal and Re-enactment) Bill, 2017

⁷ Section 169 Nigerian Customs Service Act (Repeal and Re-enactment) Bill, 2017.

⁸ Trademarks Act Cap. T13 LFN, 2004.

⁹ Section 251 (1) (f) of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) as amended, Section 7 (1) (f) of the Federal High Court Act Cap F12 Laws of the Federation of Nigeria (LFN), 2004 and Section 3 of the Trade Marks Act Cap. T13 LFN, 2004.

¹⁰ By virtue of section 3, Consumer Protection Council Act, Cap. C25 LFN 2004.

¹¹ By virtue of section 30, Standards Organization of Nigeria Act, 2015, No. 14.

ENTRY PORTS INTO NIGERIA

SEA PORTS		
Region	Name	Location
SOUTH-WEST	Lagos Port Complex	Apapa, Lagos State
	Tin Can Island Port	Apapa, Lagos State
SOUTH-EAST	Calabar Port	Cross River State
	Delta Port	Delta, State
	Rivers Port Complex / Port Harcourt	Port Harcourt, Rivers State
	Onne Port	Rivers State
AIRPORTS		
Region	Name	Location
FEDERAL CAPITAL TERRITORY, ABUJA	Nnamdi Azikiwe International Airport	Abuja
SOUTH- EAST	Akanu Ibiam International Airport	Enugu
NORTH	Mallam Aminu Kano International Airport	Kano
SOUTH-WEST	Murtala Muhammed International Airport	Lagos
SOUTH-SOUTH	Port Harcourt International Airport	Port Harcourt, Rivers
LAND BORDERS		
Region	Name of Border Town	Route
SOUTH-WEST	Seme	Badagry, Lagos to Cotonou, Benin
	Idi'roko	Ogun State to the Republic of Benin
	Yewa North (formally Egbado North)	Ogun State to the Republic of Benin
NORTH	Bama	Maiduguri, Borno State to Banki in Cameroon

	Ilela	Sokoto to Republic of Niger
	A9 Highway	Kastina to Maradi in Republic of Niger
	A7 Highway	Ilorin, Kwara to Ksubosu, Benin
SOUTH-EAST	Mfun	Ikom in Cross River to Ekok Cameroon

PROCEDURE FOR SEARCH AND SEIZURE OF COUNTERFEIT BY THE CUSTOMS SERVICE

(a) Custom Seizure

Until the passage of the Bill, the Customs Service had not put in place any formal procedure for seizure of counterfeits, nor did it have any formal practice of recording trademarks for brand owners. Even though, at different fora on anti-counterfeiting, attending officers of the Customs Service have advised that brand owners could contact the Customs Service for necessary assistance. The general practice, however, is that companies who engage in the importation of products informally notify the Customs Service of their interest, and to look out for the company's products and advise them accordingly for further action.

The Bill now provides a procedure for search and seizure of counterfeits¹² and this is a step in the right direction for the industry.

(b) Judicial Intervention/Court Order

This operates by filing a civil court action for Trademark Infringement and/or passing-off, seeking an application¹³ for an order mandating the Customs Service to set aside and impound a container for inspection by the Bailiff of the court.

For such an application to be considered and granted by the court, there must be sufficient facts of placed before the court in form of an affidavit outlining the basis of suspicion of the shipping containers. The applicant must also give an undertaking as to damages should it turn out that the court ought not to have made the order.

(c) Regulatory Intervention

This is initiated by writing a petition to the relevant regulatory agency. The petition should be accompanied by evidence of trademark registration. Upon the Agency being satisfied that there

¹² Section 169 Nigerian Customs Service Act (Repeal and Re-enactment) Bill, 2017.

¹³ Section 251 (1) (f) of the Constitution of the Federal Republic of Nigeria 1999 (CFRN) as amended, Section 7 (1) (f) of the Federal High Court Act Cap F12 Laws of the Federation of Nigeria (LFN), 2004 and Section 3 of the Trade Marks Act Cap. T13 LFN, 2004.

is a basis to intervene, it would contact the Area Commander of the Custom Services at the relevant Port to indicate their interest in a specific consignment.

OTHER GENERAL PROCEDURES BY THE CUSTOMS SERVICE

(a) Form for Company/Brand Registration at the Customs Service

At present, there is no form for the registration of companies or their brands with the Customs Service.

(b) Court Order for Destruction

Goods which are seized by the Customs Service are required to go through proceedings for Condemnation by a court of summary jurisdiction before they are destroyed. This appears to be more of a formality, as most times the offenders do not put up a defence. Where the goods are living things or perishables, the Customs Service is empowered to destroy without a court order.

In situations where seizure by the Customs Service was procured through a court order, the implication is that the seizure is actually a court seizure, and it is the court that must order the destruction. It is worthy to note that the Consumer Protection Council (CPC) as a regulator has interpreted its enabling laws as vesting it with the powers to destroy without court orders.

(c) Time Frame within which Destruction is carried out from Notification

It is difficult to determine this from the Customs Service's perspective. For court seizures through the Customs Service, an order for seizure would only be made upon the conclusion of the case which could be between eighteen (18) to thirty-six (36) months. Destruction by regulatory agencies could take about one (1) year from the date of seizure.

(d) Enlightenment Workshop with the Customs Service

It is possible to organise product education workshops with the Customs Service. Stakeholders including the author have participated at such workshops organised by manufacturers.

(e) Documentation

Apart from trademark certificates, other documents that would be required for some of the different options (Court ordered seizure, Judicial and Regulatory Intervention) outlined include:

- Any document indicating the presence of the offending goods in the container – shipping documents;
- Particulars the offending product indicating how it violates the original product;
- Samples of the original and the fake;
- Evidence of sale and promotion of the original products; and
- Any evidence of the sub-standard or injurious nature of the offending products, amongst others.



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