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making such marks, and records documenting the manufacture, sale, or receipt of things involved in such violation.

- (B) As used in this subsection the term "counterfeit mark" means--
 - (i) a counterfeit of a mark that is registered on the principal register in the United States Patent and Trademark Office for such goods or services sold, offered for sale, or distributed and that is in use, whether or not the person against whom relief is sought knew such mark was so registered; or
 - (ii) a spurious designation that is identical with, or substantially indistinguishable from, a designation as to which the remedies of this Act are made available by reason of §110 of the Act entitled "An Act to incorporate the United States Olympic Association", approved September 21, 1950 (36 U.S.C. 380); but such term does not include any mark or designation used on or in connection with goods or services of which the manufacturer or producer was, at the time of the manufacture or production in question authorized to use the mark or designation for the type of goods or services so manufactured or produced, by the holder of the right to use such mark or designation.
- (2) The court shall not receive an application under this subsection unless the applicant has given such notice of the application as is reasonable under the circumstances to the United States attorney for the judicial district in which such order is sought. Such attorney may participate in the proceedings arising under such application if such proceedings may affect evidence of an offense against the United States. The court may deny such application if the court determines that the public interest in a potential prosecution so requires.
- (3) The application for an order under this subsection shall--
 - (A) be based on an affidavit or the verified complaint establishing facts sufficient to support the findings of fact and conclusions of law required for such order; and
 - (B) contain the additional information required by paragraph (5) of this subsection to be set forth in such order.
- (4) The court shall not grant such an application unless--
 - (A) the person obtaining an order under this subsection provides the security determined adequate by the court for the payment of such damages as any person may be entitled to recover as a result of a wrongful seizure or wrongful attempted seizure under this subsection; and
 - (B) the court finds that it clearly appears from specific facts that--
 - (i) an order other than an ex parte seizure order is not adequate to achieve the purposes of §32 of this Act;
 - (ii) the applicant has not publicized the requested seizure;
 - (iii) the applicant is likely to succeed in showing that the person against whom seizure would be ordered used a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services;
 - (iv) an immediate and irreparable injury will occur if such seizure is not ordered;
 - (v) the matter to be seized will be located at the place identified in the application;
 - (vi) the harm to the applicant of denying the application outweighs the harm to the legitimate interests of the person against whom seizure would be ordered of granting the application; and

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- (vii) the person against whom seizure would be ordered, or persons acting in concert with such person, would destroy, move, hide, or otherwise make such matter inaccessible to the court, if the applicant were to proceed on notice to such person.
- (5) An order under this subsection shall set forth--
 - (A) the findings of fact and conclusions of law required for the order;
 - (B) a particular description of the matter to be seized, and a description of each place at which such matter is to be seized;
 - (C) the time period, which shall end not later than seven days after the date on which such order is issued, during which the seizure is to be made;
 - (D) the amount of security required to be provided under this subsection; and
 - (E) a date for the hearing required under paragraph (10) of this subsection.
- (6) The court shall take appropriate action to protect the person against whom an order under this subsection is directed from publicity, by or at the behest of the plaintiff, about such order and any seizure under such order.
- (7) Any materials seized under this subsection shall be taken into the custody of the court. The court shall enter an appropriate protective order with respect to discovery by the applicant of any records that have been seized. The protective order shall provide for appropriate procedures to assure that confidential information contained in such records is not improperly disclosed to the applicant.
- (8) An order under this subsection, together with the supporting documents, shall be sealed until the person against whom the order is directed has an opportunity to contest such order, except that any person against whom such order is issued shall have access to such order and supporting documents after the seizure has been carried out.
- (9) The court shall order that a United States marshal or other law enforcement officer is to serve a copy of the order under this subsection and then is to carry out the seizure under such order. The court shall issue orders, when appropriate, to protect the defendant from undue damage from the disclosure of trade secrets or other confidential information during the course of the seizure, including, when appropriate, orders restricting the access of the applicant (or any agent or employee of the applicant) to such secrets or information.
- (10)(A) The court shall hold a hearing, unless waived by all the parties, on the date set by the court in the order of seizure. That date shall be not sooner than ten days after the order is issued and not later than fifteen days after the order is issued, unless the applicant for the order shows good cause for another date or unless the party against whom such order is directed consents to another date for such hearing. At such hearing the party obtaining the order shall have the burden to prove that the facts supporting findings of fact and conclusions of law necessary to support such order are still in effect. If that party fails to meet that burden, the seizure order shall be dissolved or modified appropriately.
 - (B) In connection with a hearing under this paragraph, the court may make such orders modifying the time limits for discovery under the Rules of Civil Procedure as may be necessary to prevent the frustration of the purposes of such hearing.
- (11) A person who suffers damage by reason of wrongful seizure under this subsection has a cause of action against the applicant for the order under which such seizure was made, and shall be entitled to recover such relief as may be appropriate, including damages for lost profits, cost of materials, loss of goodwill, and punitive damages in instances where the seizure was sought in bad faith, and, unless the court finds extenuating circumstances, to recover a reasonable attorney's fee. The

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court in its discretion may award prejudgment interest on relief recovered under this paragraph, at an annual interest rate established under §6621 of the Internal Revenue Code of 1954, commencing on the date of service of the claimant's pleading setting forth the claim under this paragraph and ending on the date such recovery is granted, or for such shorter time as the court deems appropriate.

15 U.S.C. 1117 Recovery of profits, damages, and costs [Section 35]

(a) When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under §43(a), shall have been established in any civil action arising under this Act, the plaintiff shall be entitled, subject to the provisions of §§29 and 32 and subject to the principles of equity, to recover

- (1) defendant's profits,
- (2) any damages sustained by the plaintiff, and
- (3) the costs of the action.

The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sale only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional cases may award reasonable attorney fees to the prevailing party.

(b) In assessing damages under subsection (a), the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee, in the case of any violation of §32(1)(a) of this Act (15 U.S.C. 1114(1)(a)) or §110 of the Act entitled "An Act to incorporate the United States Olympic Association", approved September 21, 1950 (36 U.S.C. 380) that consists of intentionally using a mark or designation, knowing such mark or designation is a counterfeit mark (as defined in §34(d) of this Act (15 U.S.C. 1116(d))), in connection with the sale, offering for sale, or distribution of goods or services. In such cases, the court may in its discretion award prejudgment interest on such amount at an annual interest rate established under §6621 of the Internal Revenue Code of 1954, commencing on the date of the service of the claimant's pleadings setting forth the claim for such entry and ending on the date such entry is made, or for such shorter time as the court deems appropriate.

15 U.S.C. 1118 Destruction of infringing articles [Section 36]

In any action arising under this Act, in which a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under §43(a), shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of a violation of §43(a), the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed. The party seeking an order under this section for destruction of articles seized under §34(d) (15 U.S.C. 1116(d)) shall give ten days' notice to the United States attorney for the judicial district in which such order is sought (unless good cause is shown for lesser notice) and such United States attorney may, if such destruction may affect evidence of an offense against the United States, seek a hearing on such destruction or participate in any hearing otherwise to be held with respect to such destruction.

15 U.S.C. 1119 Power of court over registration; certification of decrees and orders [Section 37]

In any action involving a registered mark the court may determine the right to registration, order the cancellation of registrations, in whole or in part, restore cancelled registrations, and

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otherwise rectify the register with respect to the registrations of any party to the action. Decrees and orders shall be certified by the court to the Commissioner, who shall make appropriate entry upon the records of the Patent and Trademark Office, and shall be controlled thereby.

15 U.S.C. 1120 Fraud; civil liability [Section 38]

Any person who shall procure registration in the Patent and Trademark Office of a mark by a false or fraudulent declaration or representation, oral or in writing, or by any false means, shall be liable in a civil action by any person injured thereby for any damages sustained in consequence thereof.

15 U.S.C. 1121 Jurisdiction of Federal courts; State, local, and other agency requirements [Section 39]

(a) The district and territorial courts of the United States shall have original jurisdiction, the circuit courts of appeal of the United States (other than the United States Court of Appeals for the Federal Circuit) and the United States Court of Appeals for the District of Columbia shall have appellate jurisdiction, of all actions arising under this Act, without regard to the amount in controversy or to diversity or lack of diversity of the citizenship of the parties.

(b) No State or other jurisdiction of the United States or any political subdivision or any agency thereof may require alteration of a registered mark, or require that additional trademarks, service marks, trade names, or corporate names that may be associated with or incorporated into the registered mark be displayed in the mark in a manner differing from the display of such additional trademarks, service marks, trade names, or corporate names contemplated by the registered mark as exhibited in the certificate of registration issued by the United States Patent and Trademark Office.

15 U.S.C. 1122 Liability of States, instrumentalities of States and State officials [Section 40]

(a) Any State, instrumentality of a State or any officer or employee of a State or instrumentality of a State acting in his or her official capacity, shall not be immune, under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person, including any governmental or nongovernmental entity for any violation under this Act.

(b) In a suit described in subsection (a) for a violation described in that subsection, remedies (including remedies both at law and in equity) are available for the violation to the same extent as such remedies are available for such a violation in a suit against any person other than a State, instrumentality of a State, or officer or employee of a State or instrumentality of a State acting in his or her official capacity. Such remedies include injunctive relief under §34, actual damages, profits, costs and attorney's fees under §35, destruction of infringing articles under §36, the remedies provided for under §§32, 37, 38, 42, and 43, and for any other remedies provided under this Act.

15 U.S.C. 1123 Rules and regulations [Section 41]

The Commissioner shall make rules and regulations, not inconsistent with law, for the conduct of proceedings in the Patent and Trademark Office under this Act.

**TITLE VII—IMPORTATION FORBIDDEN OF GOODS BEARING
INFRINGEMENT MARKS OR NAMES**

15 U.S.C. 1124 Importation of goods bearing infringing marks or names forbidden [Section 42]

Except as provided in subsection (d) of §526 of the Tariff Act of 1930, no article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trademark registered in accordance with the provisions of this Act or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in