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Combating Gray Market Goods in an Economic Downturn with the Lanham Act

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What Is the Gray Market?

Gray market goods include products with legitimate, authorized trademarks that are intended for sale and use outside the United States but that are imported and sold in the United States without the consent of the US trademark owner and/or authorized distributor of like domestic goods.[1] For example, in *United States v. Braunstein*, the Ninth Circuit found that Apple computers purchased by the defendant, who was not an authorized Apple distributor, from Apple's Latin American authorized

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distributor and that were intended for sale in Latin America but sold in the United States were gray market Apple computers.[2] Unlike counterfeit (black market) goods, which are unauthorized copies of marks,[3] gray goods may be lawfully sold in the United States if they are "identical" to their US cousins.[4] Gray goods that are "materially different," however, violate §§ 32, 42, or 43 of the Lanham Act and thus cannot be sold in the United States.

The IT industry has adopted a broad definition of gray market goods. The Alliance for Gray Market and Counterfeit Abatement (AGMA), a trade association of major technology companies, including CISCO, IBM, and Microsoft, defines gray market goods to include "the unauthorized sale of new, branded products diverted from authorized distribution channels" without the permission or knowledge of the trademark owner.[5] This broad definition has been adopted by several federal courts in dealing with defendants that obtained IT products through improper means and/or without the knowledge or consent of the US trademark holder and then sold these IT products outside the trademark holder's authorized distribution network. In *Hewlett-Packard Co. v. Capital City Micro, Inc.*, the defendant, an authorized Hewlett-Packard (HP) distributor, submitted false volume discount requests to acquire thousands of laptop computers from HP for sale to a large customer in the United States.[6] The defendant, however, actually sold the laptops to an unauthorized retailer that sold them to end users in the gray market. Denying the defendant gray marketer's motion for summary judgment, the district court adopted the trademark owner's contention that goods procured by fraud and sold outside the trademark owner's authorized channel constitute gray goods.

In a down economy, the volume of gray goods increases because they are sold at a substantial discount. Gray marketers are able to purchase gray goods abroad well below the wholesale cost of their US counterparts. Manufacturers, particularly of expensive goods (such as high-end watches or construction equipment), often sell like products cheaper overseas because the gray goods: (1) do not come with the standard US warranty; (2) contain cheaper components; and/or (3) do not meet US safety and/or environmental standards. The domestic price also includes marketing/advertising and service costs that the gray marketer does not incur but benefits from. Price differentials can also occur as the result of currency fluctuations (*i.e.*, the value of the dollar to the Japanese yen).[7]

A gray market typically arises under three ownership arrangements:

1. A domestic company, not related to the foreign trademark owner, purchases the exclusive rights to the foreign trademark in the United States;

2. A domestic company, which is controlled by the foreign trademark owner (*i.e.*, a subsidiary), has the exclusive right to the foreign trademark in the United States; or

3. A domestic owner of a US trademark gives a foreign company the right to use the mark outside the United States.[8]

Ignore Gray Goods at Your Own Peril

"The gray market is a fact of life."[9] Trademark owners that ignore the gray market risk serious damage to their goodwill and their distribution and service networks. Because gray marketers sell their wares for less than the genuine US goods, they are able to undercut and take sales from the trademark owner's authorized distribution network.[10] While estimates of gray goods vary by industry, the value is substantial. A 2003 KPMG report estimated the gray market for IT products alone to be $40 billion a year in sales, with $5 billion in lost profits annually for US distributors.[11] Likewise, IT warranty abuse, which includes improper service on and returns of gray goods that do not come with warranty and should not be returned, costs manufacturers more than $10 billion annually.[12]

Gray goods also erode the trademark holder's goodwill. A trademark is a "bundle of special characteristics" that consumers of a specific branded product "expect[] to receive . . . on every occasion."[13] A well-established trademark thus reduces consumer search costs because purchasers know what they are getting based on prior experience and/or knowledge of the brand from the owner's marketing efforts.[14] In exchange for "lower search costs and the assurance of consistent quality," consumers will pay a premium and/or choose a specific brand over competing products.[15] To get consumers to pay this higher price and/or develop brand preferences, however, requires companies to spend millions and sometimes billions of dollars on advertising, quality control, and developing a service and distribution network.[16] The return on such investments is significant. In 2009, at least five IT companies had brands valued at more than $20 billion: IBM ($68,734,000,000); Microsoft ($56,647,000,000); Nokia ($34,864,000,000); HP ($24,096,000,000); and Cisco ($22,030,000).[17]

The gray market poses a very serious threat to the investment in these brands. Gray marketers seek to profit from companies' investments in their trademarks without incurring the associated costs, while diluting and damaging the value of the brand.[18] When consumers of gray goods fail to receive the expected bundle of characteristics from the product, they blame the trademark owner, resulting in erosion of the owner's goodwill.[19] This threat is particularly acute in the IT industry because gray goods are not subject to the trademark holder's internal distribution channel or strict quality control measures, and thus, there is likelihood that the goods will be mishandled or damaged before reaching the customer.[20]

Gray market goods also harm the trademark owner's relations with its distributors,[21] sales force morale, customer service efforts,[22] and can create a shadow inventory that will result in the trademark holder's being unable to anticipate demand and being left with excess, unwanted, and outdated inventory,[23] which very well might end up in the gray market.[24]

Tips for Monitoring the Gray Market

US trademark holders have several routes to monitor the gray market. Most gray market sellers market their goods on the Internet. US distributors should thus closely monitor the Internet. While some Internet sites blatantly advertise materially different gray goods, most gray marketers are careful to hide this fact. A couple of signs, however, can identify a broker selling gray goods. To hide the fact that they are selling gray goods at well below retail prices, gray marketers often do not list prices but request potential purchasers to telephone or email for the price. When asked about product serial numbers, gray market sellers often claim that they do not know this information because the good is "on a boat" or "on the water." Such answers are a sure sign of gray goods that are most likely materially different.

Using the Lanham Act to Combat Gray Goods

Once an owner discovers that it has a gray market problem, the Lanham Act provides several options to combat gray goods. A trademark owner, including a foreign owner of a US mark, can seek an order of exclusion under § 42 of the Lanham Act. Domestic distributors may obtain monetary relief, including disgorgement of profits, under § 32 or § 43 of the Lanham Act. Section 32 is available to both foreign and domestic owners of registered trademarks. Section 43, which does not require a registered mark, may be used by a US distributor, even if it is not an exclusive distributor, as long as it has "some cognizable interest" in the mark.[25] In addition to moving in federal court under the Lanham Act, a trademark holder may simultaneously file suit with the International Trade Commission (ITC) under § 337 of the Tariff Act (19 U.S.C. § 1337). Section 337 does not provide for monetary damages or attorneys' fees, only an order prohibiting importation on materially different gray goods. The advantage of § 337, however, is that it does not require personal jurisdiction and therefore is an effective way to pursue multiple parties spread over the country in one suit.[26]

The Material Difference Test

Regardless of which route the US distributor or trademark owner chooses (Lanham Act or ITC), it must prove the gray goods are "materially different" from their domestic counterparts. In the most often cited gray market case, *Societe Des Produits Nestle, S.A. v. Casa Helvetia*, the federal court of appeals held that a single material difference creates a ***presumption*** that the gray goods have a "potential to mislead or confuse consumers about the nature or quality of the product." Actual confusion is not required.[27] "[A]ny difference . . . that-consumers would likely consider to be relevant when purchasing a product" constitutes a material difference. Material differences include "subtle differences" that are "not blatant enough to make it obvious to the average consumer that the origin of the product differs from his or her expectations," and thus, are likely to confuse and/or disappoint the average consumer.

Counsel advising US distributors facing a gray market threat should look to differences that could affect the distributor's ability to control the quality of the goods, impugn its goodwill, negatively affect its relationship with authorized US dealers, and/or potentially lead to consumer confusion. Courts have found the following differences material: (1) altered or obliterated serial numbers; (2) non-English language instructions, manuals, or labels; (3) a significantly reduced price from that of the US exclusive distributor and/or sold without the standard, comprehensive US warranty; and (4) physical differences, including packaging and/or product composition.

Altered or Obliterated Serial Numbers

A good example of altered serial numbers constituting a material difference is found in *Davidoff & CIESA v. PLD Int'l Corp.*, in which the gray marketer sold gray goods with the batch codes removed and replaced with numbers that did not correspond to any actual products, gray or domestic.[28] Holding that this was a material difference, the district court found that "obliterated" "manufacturer's codes": (1) "degrade[] the appearance of the product" creating an appearance that "the product had in some way been tampered with," resulting in "a likelihood of confusion"; and (2) "deprive Plaintiffs of their exclusive right to control the quality of their products." "[B]atch codes are vital to plaintiff's quality control effort in that those codes are the only means for the plaintiff to identify and recall defective products." It did not matter that the manufacturer "never recalled any of its products . . . it is the right to control the quality—as well as the actual quality—that is afforded . . . protection."

Likewise, *John Paul Mitchell Sys. v. Pete-N-Larry's, Inc.*, involved the sale of gray goods with "obliterated batch codes," which were the "only effective way [for plaintiff] to identify specific products for quality control purposes in the event that recall of products is necessary."[29] The court held that the obliterated batch codes constituted a material difference because they were "vital" to the plaintiff's quality control efforts. The fact that plaintiff never had a product recall was irrelevant because "it is the right to control quality—as well as the actual quality—that is afforded one of the most important protections under the Lanham Act." The court also noted that the "crudity" of the "obliteration of the batch codes" left "noticeable scars" that made the gray goods "physically inferior" to the domestic product and could tarnish the domestic distributor's goodwill because consumers "will likely attribute [the obliteration] to the plaintiff."

In *Montblanc-Simplo GMBH v. Staples, Inc.*, the US distributor of "high quality and highly priced" pens sought to enjoin importation of pens with "altered" serial numbers without the standard manufacturer's warranty.[30] Finding material difference, the court held that "serial numbers are a vital part of [plaintiff's] quality control efforts" and that their removal prevented the manufacturer from being able to recall, track, or identify lost or stolen pens. It did not matter that plaintiff did not identify any actual quality control problems because it is the ability of plaintiff to maintain quality control, not actual quality, that is protected.

Foreign Language Decals and Manuals

Gray goods with foreign language decals and manuals also violate the Lanham Act. In *Bourdeau Bros., Inc. v. Int'l Trade Commission*, John Deere sought to prevent the sale in the United States of "harvesters" that Deere "manufactured solely for sale in Europe."[31] The Federal Circuit held that each of the following constituted a "material difference":

- The "North American harvesters" have "warning labels and safety decals" with "pictures and English writing," while the "European forage harvesters carry only pictures";
- "[t]he operator's manuals of the European version forage harvesters are in the language of the target country, while the American forage harvesters are in English"; and
- "the warranty services provided by Deere differ for the North American and European version[s]."

Similarly, in *Gamut Trading Co. v. Int'l Trade Commission*, the gray marketer sold "Kubota" tractors in the United States that were manufactured in and intended for sale and use in Japan.[32] Kubota-US, a subsidiary of Kubota-Japan, the Japanese manufacturers of the tractors, was the exclusive distributor of Kubota tractors in the United States. The court found that Kubota-Japan manufactured tractors for specific use in the United States and that:

- The United States machines "bear English-language controls and warnings, and have English-language dealers and users manuals";
- Kubota-US "imported" the United States machines "and sold [them] through a nationwide dealership network which provides full maintenance and repair service and maintains an inventory of parts"; and
- "Kubota-US conducts training classes for its dealership employees, instructing them on service and maintenance procedures."

The gray market importer contended that the above did not constitute material differences because its customers knew that they were purchasing "Japanese" tractors and the "Japanese labels" were "readily apparent." Rejecting this contention, the court held that the lack of English "instructional and warning labels, operator manuals, and service manuals" were material, particularly because they "were necessary to the safe and effective operation of the machine."

Lack of Standard Domestic Warranty at a Substantially Reduced Price

Likewise, the sale of gray goods as "new" without the manufacturer's standard warranty and/or at a significant discount to the price offered by the US distributor constitutes a material difference. In *Perkins School for the Blind v. Maxi-Aids, Inc.*, the gray marketer purchased gray goods overseas at a substantial discount to US prices and resold them in the United States at a substantial discount to retail prices and without the manufacturer's standard warranty.[33] The court held that, even if physically identical to the domestic goods, the gray Braillers were materially different because the discounted sale without the standard US warranty or with an "inferior" warranty would likely "cause confusion as to both the quality and source."

In *Osawa & Co. v. B&H Photo*, the gray marketer sold cameras "at prices far below the prices of authorized [US] dealers" and without the manufacturer's standard warranty.[34] Finding these material differences, the court noted that the US distributor "had devoted extensive expenditures, activities and energies to the successful development of goodwill for the [brand]," including: (1) "advertising and . . . other public relations expenses"; and (2) selling the product only through authorized dealers, which are required to receive continuing training from the distributor and keep a full inventory of product and parts on hand to meet customer needs. The court also found that "[c]ustomer confusion" can result from "wide price disparities between legitimate and grey imports" because "consumers will wonder why the same equipment can be purchased so much more cheaply" overseas and "will no doubt assume the explanation is that the plaintiff is gouging, which will engender hostility to the mark." Such price disparity can result in "disaffection among authorized dealers," which in turn "creates a substantial risk of loss of enthusiasm or bad-mouthing (where it matters most since buyers are likely to look to dealers for advice on brands and equipment)."

Product Composition and/or Physical Differences

In addition, even minor differences in the composition of the product and/or physical appearances can constitute material differences. In *Societe Des Produits Nestle, S.A*, the US distributor of Italian chocolates sought to enjoin the sale of chocolates, which, although sold under the same name, were intended to be sold in South America. The First Circuit found it material that: (1) the "composition" of the two chocolates differed and (2) the domestic and gray chocolates were sold using different packaging.[35] Likewise, in *Lever Bros. Co. v. United States*, the court found that minor differences in ingredients and packaging between US and UK versions of bath soap constituted a material difference,[36] while in *Ferrero U.S.A., Inc. v. Ozark Trading, Inc.*, the district court held that a UK version of TIC TAC breath mints were materially different because each mint had an extra one-half calorie and came in slightly different packaging.[37]

In *American Circuit Breakers Corp. v. Oregon Breakers, Inc.*, however, the Ninth Circuit held that the fact that gray market circuit breakers, which were, in "an ironic twist," "gray" in color, compared to the "black" domestic circuit breakers, was not a "material difference" under the Lanham Act.[38] The defendant, a US company, purchased the gray market circuit breakers, which were manufactured in Canada by the authorized Canadian trademark holder that produced black circuit breakers for the exclusive US trademark holder and gray circuit breakers for the Canadian market. After the US defendant purchased the gray circuit breakers from a third party and began selling them in the United States, the US trademark owner sued. Affirming the district court's dismissal, the Ninth Circuit held that the gray circuit breakers were not "materially different" from the black (domestic) circuit breakers because, other than the color, which did not affect performance, they were identical. Because the US consumers that purchased the gray circuit breakers got "exactly the same circuit breaker, both in specification and quality, as they would purchase from [the plaintiff/US trademark owners]," there is not, as a matter of law, "legal confusion." The court also noted that there was no allegation that gray circuit breakers "undermine[d] the [plaintiff's] goodwill."

Example Involving Multitude of Factors

An example of gray goods litigation that involved several of the material differences comes from the US District Court in Illinois: *Hyundai Construction Equipment U.S.A., Inc. v. Chris Johnson Equipment, Inc.* The defendant/gray marketer purchased at least 29 Hyundai heavy construction machines in Korea from Korean dealers that purchased the 29 machines directly from the manufacturer (Hyundai-Korea), the parent company of the plaintiff/US distributor (Hyundai-U.S.A.).[39] The gray marketer was able to purchase all 29 units at well below the cost for which Hyundai-U.S.A. sold like domestic machines to its dealers. As a result, the gray seller sold the gray machines at well below the cost of authorized Hyundai-U.S.A. dealers.

Hyundai-Korea, however, intended for these 29 machines to be sold and used in Korea and/or China, not the US. These 29 units thus did not have the standard bumper-to-bumper warranty that all US machines came with and that was a cornerstone of Hyundai-U.S.A.'s quality control and marketing strategy. Furthermore, in an attempt to hide the source of the 29 machines, the serial numbers for all the machines had been crudely altered. In addition, many of the 29 gray market units: (1) had non-English language safety, operational, and maintenance labels and manuals, unlike domestic Hyundai-U.S.A. machines; (2) contained non-EPA compliant engines; and (3) included model numbers not sold in the United States.

The gray marketer did not take issue with these differences, which the court held were all material. Instead, the defendant contended that there was no "actual consumer confusion" because its buyers were "sophisticated" and "knew" that the 29 gray machines "were intended for sale in foreign markets," "differed from" domestic machines sold by Hyundai-U.S.A., did not come with the standard Hyundai-U.S.A. warranty, and that the gray marketer was not "an authorized Hyundai dealer." The purchasers, according to the gray marketer, only cared about the low price. The court held that this did not matter because "actual confusion" is not a requirement under the Lanham Act and because this knowledge "would not protect subsequent customers."

The defendant also contended that Hyundai-U.S.A. did not have standing because it did not own the trademark and its agreement with Hyundai-Korea was not exclusive. Rejecting this contention, the court held that "the primary purpose of the Lanham Act is to protect consumers" and the goodwill of US distributors. Therefore, Hyundai-U.S.A. had standing because: (1) it "spends large amounts of money in advertising and promoting Hyundai products from which [the gray marketer] benefited" and (2) lost sales to lower priced and materially different gray machines "could lead to . . . the loss of goodwill." The court went on to permanently enjoin the gray marketer from importing or selling any Hyundai heavy construction equipment with less than 100 hours of operational time and awarded Hyundai-U.S.A., which was represented by the authors of this article, almost $1 million (the gray marketer's profits on the 29 gray market machines) in damages and its costs.

How to Prevent Gray Market Goods

The experiences of Hyundai-USA and the other US trademark owners discussed in this article show that gray goods can easily enter the United States without the knowledge or consent of the owner. To stem the flow of gray goods into the United States (and thus avoid the cost of litigation), trademark owners should develop internal controls, including the following:

- Designate a point person to monitor gray market issues and respond to questions and reports from customers and distribution partners.

- Develop required procedures for sales persons to follow to verify the legitimacy of purchasers to avoid situations like *Hewlett-Packard Co. v. Capital City Micro, Inc.*, in which an authorized distributor falsified a volume discount order so that it could then sell the fraudulently obtained goods on the gray market.

- Instruct the sales force how to identify gray market activity and require salespersons to check for certain red flags that can signal a fraudulent order, including out-of-the-ordinary orders, requests for unusual volume discounts, or changes in delivery.[40]

- Educate distribution partners on the harm caused by gray goods, including that long-term problems outweigh any short-term financial gains.[41]

- Prior to executing distribution agreements, screen prospective channel partners.

- Ensure that distribution and licensing agreements have necessary safeguards to ensure compliance with the above procedures, including: (a) requiring partners to maintain sales documents; (b) allowing for the right to audit books and records; (c) mandatory reporting of suspected gray goods; and (d) providing for penalties, including termination, and incentives with respect to gray market procedures.

- Implement an automated system that monitors sales data for potential gray market activity.

- Perform post-sale audits to ensure that volume discount sales go to the stated customers.

Gray marketers must also take action to prevent foreign distributors from dumping goods into the gray market. The gray marketer in *United States v. Braunstein* purchased "excess or obsolete Apple computers at greatly reduced prices" from the Apple Latin America Company, a subdivision of Apple. The purchaser, which was not an authorized Apple distributor, then sold these computers in the United States, in direct competition with Apple's authorized distributors, "at prices substantially below Apple's listed wholesale prices for such products." An internal report by Apple determined that Apple Latin America's sales to the gray marketer were the result of Apple's:

1. Putting Apple Latin America "under tremendous pressure to sell large numbers of product" and to increase "sales volume rather than profit margins";

2. Paying Apple Latin America's employees solely on commission;

3. Failing to monitor Apple Latin America's operations and not making it accountable for dumping; and

4. Not implementing any processes or procedures to monitor sales to ensure that sales by Apple Latin America were not being resold in the United States in "direct competition with Apple's United States distributors."[42]

An internal report also showed that Apple ignored the following evidence that should have alerted it to a serious gray market problem:

> (1) registration and warranty cards for the computers sold by Braunstein to United States distributors that were returned to Apple; (2) tracking records documenting the return of those registration and warranty cards; (3) serial number lists for all computer sales to Braunstein; (4) damage claims submitted by United States dealers who bought from Braunstein; and (5) warranty claims and requests for technical services from Braunstein's United States buyers.[43]

By following these controls, manufacturers are more likely to identify and stop potential gray market issues before they occur and avoid the problems faced by Apple in *Braunstein*.

The trademark holder must also educate consumers. A good way to do so is by putting a notice on corporate Web sites: (1) defining the gray market; (2) alerting dealers, potential purchasers, and current owners of the existence of gray market products; (3) detailing the differences between the gray and domestic goods; (4) clearly stating that gray goods imported into the United States are done without the US distributor's consent or knowledge; (5) indicating that gray goods do not fall under warranty and will not be serviced by authorized dealers; and (6) providing a toll-free telephone number to report gray market goods. US distributors should also issue special alerts to dealers and/or service providers with respect to any specific gray good threat and provide continuing education.

Joining industry alliances such as AGMA (*www.agma.org*), the Intellectual Property Owners Association (*www.ipo.org*), and other similar groups can help a trademark owner stay informed and lobby for tougher legal safeguards.

Upon discovery of a gray market importer in the United States, the trademark holder should immediately send a cease-and-desist letter and, if necessary, file suit under the Lanham Act, making sure to seek disgorgement of profits, treble damages, and attorneys' fees.

Conclusion

Accordingly, counsel advising US distributors, trademark owners, or manufacturers facing the threat of gray market goods should advise their clients on how to identify gray marketers, prevent gray goods from entering into the United States, and the benefits of fighting gray goods with the Lanham Act.

Notes

1. Bourdeau Bros., Inc. v. Int'l Trade Commission, 444 F.3d 1317, 1322 (Fed. Cir. 2006).
2. United States v. Braunstein, 281 F.3d 982, 985 (9th Cir. 2002).
3. In contrast to gray goods, which have legitimate, authorized marks, counterfeit goods contain unauthorized marks. *See* Yamaha Corp. v. United States, 961 F.2d 245, 248 (D.C. Cir. 1992). *See also http://www.agmaglobal.org/resources/faq.shtml* (counterfeit goods are "unauthorized copy of the product" and/or goods that "are marked with a 'counterfeit mark' made to appear like the genuine trademark of the good").
4. American Circuit Breakers Corp. v. Oregon Breakers, Inc., 406 F.3d 577, 585-586 (9th Cir. 2005) (holding that gray market circuit breaker that was identical to US circuit breaker in all material aspects other than color, which was not material, was a "genuine" good and did not violate the Lanham Act).
5. *http://www.agmaglobal.org/resources/faq.shtml.*
6. Hewlett-Packard Co. v. Capital City Micro, Inc., 2006 WL 149034 at *1-2 (W.D. Tenn. Jan. 19, 2006).
7. *See* Hyundai Construction Equipment U.S.A., Inc. v. Chris Johnson Equipment, Inc., 2008 WL 4210785 at *1 (N.D. Ill. Sept. 10, 2008); Osawa & Co. v. B&H Photo, 589 F. Supp. 1163, 1166-1167 (S.D.N.Y 1984).
8. K-Mart Corp. v. Cartier, Inc., 486 U.S. 281, 286-287 (1988).
9. *Braunstein*, 281 F.3d at 992 (9th Cir. 2002).
10. *Braunstein*, 281 F.3d at 984-985; *Hyundai Construction Equipment U.S.A., Inc.*, 2008 WL 4210785, at *1; *Osawa & Co.*, 589 F. Supp. at 1166-1167.
11. *http://www.agmaglobal.org/resources/faq.shtml.*
12. AGMA, Price WaterhouseCoopers, "Expose Multi-Billion Dollar Threat To Technology Industry: Warranty And Service Abuse New Study Defines Problem and Presents Methods to Effectively Manage Growing Threat," Oct. 20, 2009, *http://www.agmaglobal.org/press_events/press_docs/Service%20Abuse%20Whitepaper%20FINAL%20(REVISED%2010-20-09).pdf.*
13. Societe Des Produits Nestle, S.A. v. Casa Helvetia, 982 F.2d 633, 636 (1st Cir. 1992) ("Every product is composed of a bundle of special characteristics. The consumer who purchases what he believes is the same produce expects to receive those special characteristics on every occasion"); Bourdeau Bros., Inc. v. Int'l Trade Commission, 444 F.3d 1317, 1320 (Fed. Cir. 2006) ("the public associates a trademark with goods having certain characteristics"); 15 U.S.C. § 1127 (the Lanham Act defines a "trademark" as "any word, name of symbol, or device" used "to identify and distinguish" a "unique product" and/or the "source of the goods").

14. Auvil, Steven, "Gray Market Goods Produced By Foreign Affiliates of the US Trademark Owner: Should the Lanham Act Provide a Remedy?" *Akron Law Review* 447 (Spring 1995).
15. *Id.* at 448; *http://pages.stern.nyu.edu/~adamodar/New_Home_Page/lectures/brand.html* ("One of the benefits of having a well-known and respected brand name is that firms can charge higher prices for the same products, leading to higher profit margins and hence to higher price-sales ratios and firm value.").
16. Dan-Foam A/S v. Brand Names Beds, 500 F. Supp. 2d 296, 299 (S.D.N.Y. 2007) (the trademark "spent in excess of $250 million in connection with their advertisement and promotion of products bearing the TEM-PUR PEDIC® trademark in order to establish this trademark in the minds of consumers as a source of high-quality bedding products").
17. *http://bwnt.businessweek.com/interactive_reports/top_brands/.*
18. Auvil, *supra* n.14, at 438.
19. *Bourdeau Bros., Inc.*, 444 F.3d at 1321 (when the public fails to receive the expected bundle of characteristics from the branded product, the goodwill of the of the trademark holder is eroded); Fuller, Scott, "Brand Value: Who determines it and how?" *www.allaboutbranding.com/index.lasso?article=263* ("If someone expects to receive more value than they actually do, the chances are good that they will be disappointed in the purchase, and be left with a negative brand experience.").
20. *http://www.agmaglobal.org/resources/faq.shtml.*
21. *Braunstein*, 281 F.3d at 985 (gray goods sold "at much cheaper prices . . . hurt sales of [authorized] distributors . . . and caused resentment"); Cavusgil, S.T., & Sikora, E., "How multinationals can counter gray market imports," *Columbia Journal of World Business* (Winter 1988) at 75-85.
22. Meyers, M. B., "Incidents of gray market activity among US importers: Occurrences, characteristics, and consequences," *Journal of International Business Studies*, (1999) 30 (1), 105-126.
23. *http://www.agmaglobal.org/resources/faq.shtml.*
24. *See Braunstein*, 281 F.3d at 984.
25. Hyundai Construction Equipment U.S.A., Inc., 2008 WL 4210785, at *2.
26. *See generally* 19 U.S.C. § 1332.
27. Societe Des Produits Nestle, S.A. v. Casa Helvetia, 982 F.2d 633 (1st Cir. 1992).
28. Davidoff & CIESA v. PLD Int'l Corp., No. 00-2635-CIV, 2000 WL 1901542 (S.D. Fla. Sept. 25, 2000).
29. John Paul Mitchell Sys. v. Pete-N-Larry's, Inc., 862 F. Supp. 1020 (W.D.N.Y. 1994).
30. Montblanc-Simplo GMBH v. Staples, Inc., 172 F. Supp. 2d 231 (D. Mass. 2001).
31. Bourdeau Bros., Inc. v. Int'l Trade Commission, 444 F.3d 1317 (Fed. Cir. 2006).
32. Gamut Trading Co. v. Int'l Trade Commission, 200 F.3d 775 (Fed. Cir. 1999).
33. Perkins School for the Blind v. Maxi-Aids, Inc., 274 F. Supp. 2d 319 (E.D.N.Y. 2003).
34. Osawa & Co. v. B&H Photo, 589 F. Supp. 1163 (S.D.N.Y 1984).
35. Societe Des Produits Nestle, S.A, 982 F.2d 633 (1st Cir. 1992).
36. Lever Bros. Co. v. United States, 877 F.2d 101 (D.C. Cir. 1989).
37. Ferrero U.S.A., Inc. v. Ozark Trading, Inc., 753 F. Supp. 1240 (D.N.J. 1991).
38. American Circuit Breakers Corp. v. Oregon Breakers, Inc., 406 F.3d 577, 585-586 (9th Cir. 2005).
39. Hyundai Construction Equipment U.S.A., Inc. v. Chris Johnson Equipment, Inc., 2008 WL 4210785 (N.D. Ill. Sept. 10, 2008).
40. *http://www.agmaglobal.org/resources/faq.shtml.*
41. *Id.*; *Braunstein*, 281 F.3d at 985 (short-term financial gains outweighed by long-term harm to the mark and profits).
42. *Braunstein*, 281 F.3d at 985-986.
43. *Braunstein*, 281 F.3d at 987-988.