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The Insufficiency of the Musical Instrument Passport Program Under CITES and the Lacey Act: The Need for a Centralized Wood Title Certification System for Manufactured Wood Products and Wooden Musical Instruments, 48 J. Marshall L. Rev. 495 (2015)

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THE INSUFFICIENCY OF THE MUSICAL
INSTRUMENT PASSPORT PROGRAM
UNDER CITES AND THE LACEY ACT: THE
NEED FOR A CENTRALIZED WOOD TITLE
AND CERTIFICATION SYSTEM FOR
MANUFACTURED WOOD PRODUCTS AND
WOODEN MUSICAL INSTRUMENTS

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I. INTRODUCTION

Imagine walking into an international airport carrying a mint condition 1959 Stratocaster guitar with a beautiful rosewood fretboard.² You are walking through security, guitar in hand, when you are stopped. Customs and Border Protection officers confiscate your prized guitar and harshly remove it from your life forever. The officers arrest you and charge you with violating federal law. Stunned, you ask how this could have happened. You are told that this all occurred because of the Lacey Act, which seals the fate of countless other musical instruments and turns their former owners into felons.

This comment begins with overviews of the Lacey Act, the Convention on International Trade of Endangered Species of Wild Fauna and Flora (CITES), and the Endangered Species Act of 1973 (ESA). The purpose of this background information is to provide context for the recent creation of a “passport” system for musical instruments to protect them from confiscation based on violations of CITES and the Lacey Act. This comment will then analyze the inherent flaws in the current passport system and describe the difficulties facing corporations and individual consumers as they try to navigate current laws that affect musical instruments. This comment concludes with a series of proposals addressing many of the problems with the current law. Most important, this comment introduces a new system of title for wood products that will document wood at the point of harvest. The goals of this new titling system include: simplifying border crossing with musical instruments, preventing criminal liability from attaching to unsuspecting musicians, and protecting the environment by preventing illegally sourced wood products from entering the marketplace.

II. BACKGROUND

To understand how musical instruments have been impacted by changes in the law, it is essential to understand the interaction of three bodies of law: the Lacey Act, a domestic statute enforcing

2. First appearing in 1959, Fender’s 1959–1960 Stratocaster with a rosewood fingerboard represented a “design [that] had reached its evolutionary peak.” *50 Guitars to Play Before You Die*, GUITARIST (Aug. 8, 2011), <http://www.musicradar.com/news/guitars/50-guitars-to-play-before-you-die-198927/25>. The rosewood fingerboard “offered more playing comfort and warmer lower-mid frequencies than previous all-maple necks” and “[i]n recent decades Indian Rosewood has been the most widely used wood around the world for fingerboards on production electric and acoustic guitars” valued for its “stability, lower cost and . . . colorful grain.” *Indian Rosewood Fingerboards*, LUTHIERS MERCANTILE INT’L, INC., <http://www.lmii.com/products/mostly-wood/fingerboards/indian-rosewood-fingerboards> (last visited Mar. 19, 2015).

foreign law; CITES, an international treaty listing endangered species from around the world; and the ESA, a domestic statute regulating state-to-state movement of endangered species.

The United States Fish & Wildlife Service (USFWS) is the entity responsible for implementing the ESA in the United States by identifying endangered and threatened species. In addition, the USFWS is also “designated to carry out the provisions of CITES.”³ This duty originates from the ESA.⁴ In contrast to the ESA, which imposes restrictions only within the United States, CITES “imposes no controls on shipments between States or U.S. territories.”⁵ The sections that follow detail the functions of and relationships among these three bodies of law.

A. *The Lacey Act*

The purpose behind the Lacey Act of 1900 was to protect game and wild birds from poachers by criminalizing interstate sales of poached birds.⁶ Before the Act’s enactment, states had their own laws prohibiting illegal bird poaching but had no way to combat the interstate market for these illegally hunted animals.⁷ The Lacey Act helped states to protect their wild birds from illegal sales across state lines.⁸

In 2008, Congress expanded the coverage of the Lacey Act to include all types of plant and animal materials.⁹ Congress looked to CITES¹⁰ and the ESA¹¹ to form a list of restricted species.¹² This

3. CITES, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/cites/index.html> (last visited Feb. 10, 2015).

4. *Id.*

5. U.S. FISH & WILDLIFE SERV., CITES PERMITS AND CERTIFICATES 2 (2003), available at <http://www.fws.gov/international/pdf/factsheet-cites-permits-and-certificates-2003.pdf>.

6. Rebecca Wisch, *Overview of the Lacey Act*, ANIMAL LEGAL & HISTORICAL CTR. (2003), <https://www.animallaw.info/article/overview-lacey-act-16-usc-ss-3371-78>.

7. Joe Luppino-Esposito, *The Lacey Act: From Conservation to Criminalization*, THE HERITAGE FOUND. (May 7, 2012), <http://www.heritage.org/research/reports/2012/05/the-lacey-act-from-conservation-to-criminalization>. In 1900, many poachers were illegally killing and selling birds to hat-makers, who needed the birds’ feathers for decorative use in hats. *Id.*

8. *Id.*

9. *U.S. Lacey Act*, FOREST LEGALITY ALLIANCE, <http://www.forestlegality.org/policy/us-lacey-act> (last visited Mar. 19, 2013).

10. CITES, <http://www.cites.org/> (last visited Oct. 24, 2013).

11. 16 U.S.C.A. § 1531 (1988).

12. The 2008 Amendment’s drew from the Endangered Species Act, CITES, and similar state laws to craft the list of restricted species. U.S. DEP’T OF AGRIC., LACEY ACT: FREQUENTLY ASKED QUESTIONS 1–2 (2013), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf. But the Amendment also prohibits plants from being imported, exported, transported, sold, received, acquired, or purchased in violation of federal, state, Indian tribe, or foreign law. *Id.* The Amendment imposes an affirmative duty on importers “to be aware of any foreign laws that may pertain to their merchandise prior to its importation into the United States.” *Id.* But there is

Amendment was the first ban on wood products that sought to target illegal conduct outside the United States.¹³ In fact, the Lacey Act imposes criminal and civil sanctions whenever there has been any illegal conduct at any point along the supply chain of wood product imports to the United States.¹⁴ Liability starts from the point that an illegal action takes place and then follows the consumer down the supply chain.¹⁵

To trigger the Lacey Act, two events must occur. First, a plant must be taken, harvested, possessed, transported, sold, or exported in violation of any law.¹⁶ This could be a violation of state, federal, foreign, or tribal law.¹⁷ Second, a person must trade the illegally sourced plant between states within the United State or between a foreign state and the United States.¹⁸

Some people “find the Lacey Act puzzling” because, although “people charged with violating the act are charged with violating a U.S. law, that prosecution is premised on a violation of another law, sometimes the law of another country.”¹⁹ This uncommon structure “has led some to claim that the United States is enforcing the laws of another country.”²⁰ But that is not the case; rather, “the 2008 Amendments to the Lacey Act allow enforcement of foreign laws that are not directly related to conservation or U.S.

no centralized compendium of international laws, and “[c]urrently, the U.S. Government has no plans to create such a database.” *Id.*

13. *U.S. Lacey Act*, *supra* note 9.

14. ENERGY INFO. ADMIN., THE U.S. LACEY ACT: FREQUENTLY ASKED QUESTIONS ABOUT THE WORLD’S FIRST BAN ON TRADE IN ILLEGAL WOOD 3 (2014), available at http://eia-global.org/images/uploads/140606.1_LaceyAct_FAQ_P03.pdf (last visited Feb. 9, 2015).

15. ENVTL. INVESTIGATION AGENCY, SETTING THE STORY STRAIGHT: THE U.S. LACEY ACT: SEPARATING MYTH FROM REALITY 2 (2010), available at <http://www.forestlegality.org/sites/default/files/EIA%20Lacey%20Mythbusters%20-%20English.pdf>.

16. U.S. DEP’T OF AGRIC., *supra* note 12, at 1. A plant is illegally sourced where the plant is illegally taken, harvested, possessed, transported, sold or exported in violation of an underlying law. *Id.* Relevant underlying laws include laws governing: (1) stealing plant; (2) taking plants from officially protected areas such as nature reserves; (3) taking plants without required authorization; (4) failing to pay fees, taxes, or royalties associated with harvesting, selling, or transporting the plant; and (5) violating exportation laws of the plant. *Id.*

17. KRISTINA ALEXANDER, CONG. RESEARCH SERV., THE LACEY ACT: PROTECTING THE ENVIRONMENT BY RESTRICTING TRADE 1 (2013), available at <http://www.fas.org/sgp/crs/misc/R42067.pdf>.

18. U.S. DEP’T OF AGRIC., *supra* note 12, at 1. For a Lacey Act violation to occur, the illegally sourced plant must be imported, exported, transported, sold, received, acquired, or purchased in violation of one of the applicable laws. *Id.* These actions cause the illegally sourced plant to move through U.S. or foreign commerce, thereby triggering the Lacey Act violation. *Id.*

19. See ALEXANDER, *supra* note 17.

20. *Id.*

jobs, such as failure to pay foreign stumpage fees, or shipping wood in violation of a country's export restrictions."²¹

B. The Endangered Species Act

"The purpose of the ESA is to conserve endangered and threatened species and the ecosystems on which they depend as key components of America's heritage."²² Indeed, the ESA, passed in 1973, was intended "to provide a framework to conserve and protect endangered and threatened species and their habitats."²³ The ESA functions by "providing States with financial assistance and incentives to develop and maintain conservation programs."²⁴ In this way, the ESA helps the United States meet the demands of international treaties and conventions, including CITES.²⁵

The USFWS is "the principal federal partner responsible for administering the [ESA]."²⁶ Under the ESA, the USFWS is required to create a list of any endangered or threatened species in the United States.²⁷ The Branch of Foreign Species (BFS) fills a similar role for foreign plant and animal species, determining which are threatened or endangered and therefore qualified for protection under the ESA.²⁸ The USFWS has a two-step process to determine whether to list a species: petition and candidate assessment.²⁹ Through the assessment process, an individual "may petition the Secretary of the Interior to add a species to, or to remove a species from, the list of endangered and threatened species."³⁰ Through the candidate assessment process, "[s]ervice biologists identify species as listing candidates."³¹

Once a species is identified through petition or candidate assessment, the USFWS then determines whether the proposed species should be deemed threatened or endangered under the ESA.³² Specifically, the USFWS considers whether several factors:

21. *Id.*

22. U.S. FISH & WILDLIFE SERV., LISTING A SPECIES AS THREATENED OR ENDANGERED 1 (2015), available at <http://www.fws.gov/endangered/esa-library/pdf/listing.pdf>.

23. *Endangered Species Act*, U.S. FISH & WILDLIFE SERVICES <http://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/endangered-species-act.html> (last visited Feb. 10, 2015).

24. *Id.*

25. *Id.*

26. *Endangered Species*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/about/index.html> (last visited Feb. 10, 2015).

27. *Foreign Species*, U.S. FISH & WILDLIFE SERV. <http://www.fws.gov/endangered/what-we-do/international-activities.html> (last visited Feb. 10, 2015) [hereinafter *Foreign Species*].

28. *Id.*

29. *Listing and Critical Habitat*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/endangered/what-we-do/listing-overview.html> (last visited Feb. 10, 2015).

30. *Id.*

31. *Id.*

32. *Id.*

threats to the species' habitat; overutilization of the species; disease and predation; inadequacy of existing regulations; and any other factors, natural or manmade, affecting the species' survival.³³

C. CITES

CITES is an international treaty that protects species³⁴ of plants and animals from endangerment or extinction due to international trade.³⁵ Currently, over 30,000 different plant and animal species are protected under CITES, and each receives a level of protection tailored to its level of endangerment.³⁶ Species protection is broken down into three Appendices: Appendix I offers the highest level of species protection, Appendix II offers mid-level protection, and Appendix III offers the least.³⁷

One hundred seventy-eight nations participate in CITES.³⁸ The participating nations are referred to as "Parties."³⁹ The

33. *Id.*

34. See generally DAVID S. FAVRE, INTERNATIONAL TRADE IN ENDANGERED SPECIES: A GUIDE TO CITES 3 (1989) (discussing that under CITES, the word "species" is not strictly used in its scientific sense because CITES may also place restrictions on groups of plants or animals that form only part of a species, even placing specific restrictions on plants or animals from a specific geographic location that does not encompass all plants or animals from an entire species).

35. *What is CITES?*, CITES, <http://www.cites.org/eng/disc/what.php> (last visited Oct. 25, 2013).

36. *What is CITES?*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/CITES/what-is-cites.html> (last visited Mar. 19, 2015); see, e.g., U.S. FISH & WILDLIFE SERV., FISH & WILDLIFE NEWS 22–23 (2013), available at <http://www.fws.gov/international/cites/cop16/fws-news-40-years-of-cites-at-a-glance.pdf> (noting that at the CoP216 in 2013, the U.S. submitted a proposal to place the polar bear onto Appendix I, thereby giving polar bears the highest level of protection).

37. *How CITES Works*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/cites/how-cites-works.html> (last visited Mar. 19, 2015). Appendix I is designed to protect species that are threatened with extinction. *Id.* Examples of these species include giant pandas and sea turtles. *Id.* Appendix II captures species that may become extinct without trade control, but which are not currently in danger of extinction. *Id.* Appendix II includes lions and American alligators as well as species of mahogany wood. *Id.* Appendix III contains species that a Party has requested to be included in CITES to help regulate international trade of that species. *Id.* To implement CITES in the United States, eight different agencies work in cooperation. *Top Priorities for the United States at CoP16*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/cites/cop16/top-priorities.html> (last visited Mar. 19, 2015). The agencies that work to implement CITES in the United States are: the UUSFWS; The United States Forest Service; The National Oceanic and Atmospheric Administration; The United States Department of Agriculture Animal and Plant Health Inspection Service; The United States Department of State; The Association of Fish & Wildlife Agencies; United States Agency for International Development; and The U.S. Department of Justice. *Id.*

38. *About CoP16*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/inter>

Parties meet once every two to three years at the Conference of Parties (CoP) to discuss CITES implementation and any proposed changes to the plant and animal species that will fall under CITES.⁴⁰ The most recent CoP meeting was held from March 3-14, 2013.⁴¹ This was the sixteenth meeting of the CoP (CoP16).⁴²

D. The Musical Instrument Passport System

At the CoP16, CITES laid out the ground rules for a new system of musical instrument passports that allows safe passage for musical instruments that would otherwise be confiscated under the Lacey Act.⁴³ CITES created the system to help “[m]usicians and institutions such as orchestras and museums that own musical instruments that contain CITES-listed species [who] have encountered a number of challenges when travelling internationally with those instruments.”⁴⁴

The passport system was created to allow musical instruments owners to apply for certificates that would allow for easy cross border transit of musical instruments.⁴⁵ Nations participating in CITES would treat “each certificate of ownership...as a type of passport that allows the movement of the identified musical instrument accompanied by its owner across their borders upon presentation of the original certificate to the appropriate border control officer.”⁴⁶ In reality, however, the

national/cites/cop16/index.html (last visited Feb. 9, 2015).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* This was significant for musical instrument owners because CoP16 was the first time a Party introduced the idea of a passport system for musical instruments to provide some relief for instrument owners traveling with instruments in hand. CONVENTION OF INT’L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, CITES, CROSS-BORDER MOVEMENT OF MUSICAL INSTRUMENTS, 1–7 (2013), available at <http://www.fws.gov/international/cites/cop16/cop16-resolution-cross-border-movement-of-musical-instruments.pdf> [hereinafter CROSS-BORDER MOVEMENT OF MUSICAL INSTRUMENTS].

43. CITES, FREQUENT CROSS-BORDER NON-COMMERCIAL MOVEMENTS OF MUSICAL INSTRUMENTS, available at <http://www.cites.org/eng/res/16/16-08.php> [hereinafter FREQUENT CROSS-BORDER NON-COMMERCIAL MOVEMENTS OF MUSICAL INSTRUMENTS].

44. CROSS-BORDER MOVEMENT OF MUSICAL INSTRUMENTS, *supra* note 42, at 1.

45. These passports are valid for three years. FREQUENT CROSS-BORDER NON-COMMERCIAL MOVEMENTS OF MUSICAL INSTRUMENTS, *supra* note 43.

46. CROSS-BORDER MOVEMENT OF MUSICAL INSTRUMENTS, *supra* note 42, at 3–4. See also Karen Koenig, *Music Instrument Travel Eased with Endangered Species Passport*, WOODWORKING NETWORK (Mar. 13, 2013), <http://www.woodworkingnetwork.com/wood-market-trends/woodworking-industry-news/production-woodworking-news/Music-Instrument-Travel-Eased-with-Endangered-Species-Passport-197873221.html> (explaining that “[v]alid for three years, the multi-entry passports are for personal-use musical instruments and cannot be transferred”).

system is far more complicated than merely presenting a certificate at the border.⁴⁷

The USFWS administers the passport system. To apply for a passport, applicants must fill out a “Pre-Convention, Pre-Act, or Antique Musical Instruments Certificate” in compliance with CITES and the ESA.⁴⁸ For each instrument, the form instructs the applicant to include: the scientific and common name of each plant or animal component of the instrument; a description, including metric weight, of the instrument; date of manufacture; date of acquisition with appropriate documentation, for example, a bill of sale, United States Customs import declaration, or transfer documents; the current location of the instrument; the purpose of the export, whether for personal, display, competition, performance, or other use.⁴⁹

Certificate applicants must also provide special information if their instruments contain materials covered by CITES or ESA.⁵⁰ For CITES-listed materials, applicants must supply documentation that the instrument was obtained or manufactured before the date that the material was CITES-listed.⁵¹ For ESA-protected species, applicants with an antique instrument—one whose materials were manufactured or removed from the wild more than 100 years ago⁵² – must provide either documentation or expert appraisals of the instrument’s age.⁵³ In addition, for an

47. See, e.g., John Thomas, *A Guitar Lover’s Guide to the CITES Conservation Treaty*, 11 FRETBOARD JOURNAL (2008), available at <http://www.fretboardjournal.com/features/magazine/guitar-lover%E2%80%99s-guide-cites-conservation-treaty> (describing an encounter that an individual consumer had with a representative of the U.S. Fish & Wildlife Service regarding a guitar containing Brazilian rosewood). Already, one consumer has reported that he was told that he would lose his guitar forever. *Id.* Below is the conversation the individual consumer had with a representative of the U.S. Fish and Wildlife Service:

I had planned on taking one of my old Gibsons on the trip; they have Brazilian rosewood fingerboards and bridges. I called the U.S. Fish and Wildlife Service (USFWS), our CITES enforcement authority. ‘You’ll need a permit, and a permit takes at least 60 days to obtain, and more likely at least 90 days,’ an employee told me. ‘Uh,’ I replied, ‘what happens if I don’t get a permit?’ ‘Your guitar will probably be seized, sir, and you won’t be able to get it back.’

Id.

48. U.S. FISH & WILDLIFE SERV., DEP’T OF THE INTERIOR, FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM: PRE-CONVENTION, PRE-ACT, OR ANTIQUE MUSICAL INSTRUMENTS CERTIFICATE (2014), available at <http://www.fws.gov/international/pdf/permit-application-form-3-200-88.pdf> [hereinafter FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM] (listing the requirements for a musical instrument passport system in the form used to apply for a musical instrument passport).

49. *Id.* at 2–3.

50. *Id.*

51. *Id.*

52. *Id.* at 2.

53. *Id.* at 3.

antique instrument, applicants must provide a “signed statement that the item has not been repaired or modified on or after December 28, 1973 with any part of any species protected by ESA.”⁵⁴ For instruments less than 100 years old, applicants must disclose whether the instrument has been bought, sold, or offered for sale since December 28, 1973.⁵⁵ If the instrument was imported into the United States after 1975, applicants must provide additional documentation of this importation.⁵⁶ Some instrument owners may also need to worry about providing separate documentation⁵⁷ for any marine animal components on their instruments if the components fall under the Marine Mammal Protection Act.⁵⁸

E. How the Lacey Act, CITES, and the ESA Impact Musical Instruments

The Lacey Act has important implications for owners of musical instruments. Soon after the passage of the 2008 Amendment to the Lacey Act, border agents began checking musical instruments to determine whether any prohibited woods were crossing the border.⁵⁹ In the wake of this development, the National Association of Music Merchants (NAMM) issued numerous press releases about the threat that this new legislation poses to musicians.⁶⁰

The 2008 Amendment affects most of the components of musical instruments because the Amendment affects all wood products.⁶¹ For instance, music aficionados have long been aware

54. *Id.*

55. *Id.*

56. *Id.* at 4.

57. *Id.* at 3.

58. Interestingly, under the Marine Mammal Protection Act, enacted in 1972, “[a]ll marine animals are protected under the MMPA.” *Marine Mammal Protection Act (MMPA)*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., <http://www.nmfs.noaa.gov/pr/laws/mmpa/> (last visited Feb. 10, 2015).

59. See *Traveling Across International Borders with Your Musical Instrument*, U.S. FISH & WILDLIFE SERV., <http://www.fws.gov/international/permits/by-activity/musical-instruments.html> (last visited Mar. 19, 2015) (noting that the restricted materials most commonly found in musical instruments are Brazilian rosewood, tortoiseshell, and elephant ivory).

60. See, e.g., *Musical Instruments Included on New Lacey Act Implementation Schedule*, NAT’L ASS’N OF MUSIC MERCHANTS, <http://www.namm.org/public-affairs/articles/musical-instruments-included-new-lacey-act-impleme> (last visited Mar. 19, 2015) (notifying musical instrument owners that as of April 1, 2010 shipments of imported pianos, guitars, violins, and other instruments that include wooden parts will require proper documentation, including stating the scientific name and origin of the wooden components).

61. CITES, REVIEW OF SIGNIFICANT TRADE: *AQUILARIA MALACCENSIS* 45-76 (2003), available at <http://www.cites.org/eng/com/pc/14/E-PC14-09-02-02-A2.pdf> (discussing the CITES listing of agarwood, *aquilaria malaccensis*, and its popularity for use in manufacturing perfume). In addition to musical instrument production, rare woods are also harvested for other uses, such as

that Brazilian rosewood is one of the finest tone woods⁶² for the construction of bridges and fretboards.⁶³ In fact, some fine guitars are constructed almost entirely of Brazilian rosewood.⁶⁴ The 2008 Amendment restricts trade of this sought-after wood.⁶⁵ Fortunately, CITES does provide exemptions for musical instrument owners. A musical instrument can qualify for a CITES exemption even if it is made with banned materials. To qualify, the instrument owner must demonstrate that the materials were incorporated into the instrument before they were banned under CITES.⁶⁶

perfume production. *Id.*

62. See *Breedlove Acquires the World's Largest Collection of Legal Brazilian Rosewood*, BREEDLOVE (Nov. 25 2013), <http://breedlovemusic.com/breedlove/breedlove-news/breedlove-acquires-the-worlds-largest-collection-of-legal-brazilian-rosewood> (describing the coveted tonal qualities of Brazilian rosewood).

Those fortunate enough to own a guitar made with Brazilian rosewood—and those who have had the opportunity to play one—know this tonewood is something unique and incredible. Brazilian rosewood is hard, stiff, and highly resonant with a chime-like ring that sustains. When cut, it has a delicious floral scent, similar to roses, thus the name. *Id.*

63. *Which Guitar Fretboard Wood is Right for You?*, LEFTYFRETZ, <http://leftyfretz.com/guitar-fretboard-wood-choices/> (last visited Mar. 19, 2015) (discussing that the reason rosewood is so popular for fretboards is because of rosewood's naturally oily quality which means that it does not need a finish and results in a slicker fretboard than ebony or maple).

64. See, e.g., *Classical Brazilian Rosewood Guitars*, CANDELAS GUITARS, <http://www.candelas.com/classical-brazilian-rosewood.php> (last visited Mar. 19, 2015) (displaying a lovely, handmade guitar made of Brazilian rosewood).

65. U.S. FISH & WILDLIFE SERV., INTERNATIONAL TRADE IN PLANTS AND WILDLIFE: INFORMATION FOR MUSICIANS AND MANUFACTURERS OF MUSICAL INSTRUMENTS 1–3 (2010), available at <http://www.fws.gov/international/pdf/factsheet-musical-instruments.pdf> (describing Brazilian rosewood, *Dalbergia nigra*, as a dark, dense wood used in musical instrument construction, as well as for furniture and flooring that has been listed in CITES Appendix I since 1992).

66. Although an instrument can qualify for a CITES exemption, the exemption only applies if the materials were crafted into their finished product before the material was added to CITES. Dwight Worden, *You Can't Take My Guitar! What Every Traveling Musician Should Know About CITES*, INT'L BLUEGRASS MUSIC ASS'N, <https://ibma.org/node/52> (last visited Mar. 19, 2015). This means that if an instrument owner can prove that an instrument containing ivory or another banned material was built before the material was added to CITES, then the instrument can qualify for a CITES exemption. *Id.* If, however, the material was harvested decades before being listed in CITES but added to the instrument following the date of CITES incorporation, the exemption no longer applies. *Id.*

This rule is problematic because it does not accurately meld with the everyday practice amongst instrument makers of seeking out, collecting, and storing unique selections of wood for years before using the wood to make instruments. See also *Brazilian Rosewood Guitar Sets & Premium Birdseye Maple*, HANOVER BRAZIL MARKETING AND TRADE, <http://www.hanoverbrazil.com/rosewood-guitars.shtml> (last visited Feb. 9, 2015) (advertising that one of the company's partners is the sole licensee “authorized and certified to harvest” pre-convention Brazilian Rosewood from the stumps of trees that

A significant problem with this CITES exemption is that it does not account for a standard practice among instrument makers. Many instrument makers craft instruments from woods that were harvested years or even decades before the materials were added to CITES.⁶⁷ For example, some instrument makers prefer to use wood from the Little Ice Age⁶⁸ because of its special tonal qualities.⁶⁹ Some luthiers⁷⁰ even make instruments from wood they have repurposed from old buildings.⁷¹ The problem is that as soon as a luthier uses the wood to make an instrument, the exception no longer applies because the exception is only for woods made into finished products before they were CITES listed.

were already harvested before Brazilian Rosewood became CITES listed in 1991).

67. See, e.g., *Curly Redwood Flat Top Soundboards*, TONEWOOD, <http://tonewood.com/guitar-wood/acoustic-guitar-soundboard-sets/flat-top-soundboard-sets/curly-redwood-flat-top-soundboards.html> (last visited Feb. 9, 2015) (advertising wood for building guitars that was salvaged from 100-year-old Redwood stumps).

68. The Little Ice Age existed in Europe from approximately 1400 to 1800. John Pickrell, *Did "Little Ice Age" Create Stradivarius Violins' Famous Tone?*, NAT'L GEOGRAPHIC NEWS (Oct. 28, 2010), http://news.nationalgeographic.com/news/2004/01/0107_040107_violin_2.html. During the Little Ice Age, Europe experienced a period of unusually cold weather that resulted in long winters and slow tree growth. *Id.* Slow tree growth causes trees to grow narrower tree rings that give instruments made with this wood a more brilliant, resonant tone. *Id.*

A tree ring scientist at the University of Tennessee in Knoxville and a climatologist at Columbia University in New York hypothesize that the unique and sought-after tones of the Stradivarius violins may be the result of the Little Ice Age wood used to construct them. *Id.* Stradivarius violins were made by Stradivari in the seventeenth and early eighteenth century, from 1666 to 1737. *Id.* Studies have shown that Stradivari used wood to build his violins that originated during the time he was alive during the Little Ice Age. *Id.*

69. *Woods and Varnish*, SCOTT SLEIDER FINE VIOLINS, INC., <http://www.sleider.com/woodVarnishes.html> (last visited Mar. 19, 2015). Scott Sleider, of Scott Sleider Fine Violins, Inc., uses only mature, seasoned woods of spruce and flamed maple for his violin construction. *Id.* He is one of only one hundred master violin makers in the United States. *Scott Sleider*, SCOTT SLEIDER FINE VIOLINS, INC., <http://www.sleider.com/whoweare.html> (last visited Oct. 2, 2013).

Sleider acquired some of the best wood in his collection in the early 1970s and 1980s from repairmen that had collected the wood early in their careers. *Woods and Varnish*, *supra*. Much of this inherited wood was between twenty-five and seventy-five years old. *Id.* Sleider has been collecting aged woods for use in his violin construction over his entire thirty-year career. *Id.*

70. Luthiers are those who engage in the art of lutherie, which is "the art, craft, and science of stringed musical instrument construction and repair." THE GUILD OF AMERICAN LUTHIERS, <http://luth.org/index.html/> (last visited Mar. 19, 2015).

71. See *Old Growth Wood: A Little History*, SULLIVAN BANJO CO., <http://www.sullivanbanjo.com/about/old-growth-wood/> (last visited Mar. 19, 2015) [hereinafter *Old Growth Wood*] (discussing how wood used in flooring for a factory in New England built in 1875 has been saved and repurposed for use in banjo construction). Repurposed wood from factories has unique sound qualities because of the treatment it received from the vibrations of heavy factory machinery over many years. *Id.*

In addition, the CITES exception has one other key flaw. When an instrument containing CITES-listed wood that was harvested pre-convention is repaired or modified, it loses its CITES-exempt status. This will be discussed in Part D of the Analysis.

1. General Difficulties in Navigating the Lacey Act

Although the Lacey Act was well-intentioned and has some definite benefits, it leaves individuals and corporations with a complex and confusing landscape that is difficult to navigate.⁷²

Because there are a plethora of different forms to sort through, the passport system itself is far from streamlined. To import a single guitar, an individual must fill out the USFWS's Import Declaration form,⁷³ which requires the individual to list every species contained in the guitar by its scientific name.⁷⁴ Most individuals likely do not know exactly which woods are contained in a guitar and probably do not know the scientific names for common wood species, much less exotic ones.⁷⁵

In addition, the form requires the individual to list the exact quantity, by weight, of each plant species contained in the guitar.⁷⁶ This can be problematic because identifying protected woods from related unprotected wood species can be difficult.⁷⁷ Brazilian

72. See generally Thomas, *supra* note 47 (discussing difficulties with the musical instrument passport system that was created to try to help musicians who are affected by the Lacey Act).

73. FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM, *supra* note 48.

74. *Id.*

75. NAT'L 4-H WOOD SCIENCE COMM., NATIONAL 4-H WOOD SCIENCE SERIES: BUILDING BIGGER THINGS 7 (2006), available at <http://extension.oregonstate.edu/catalog/4h/4-h4423b.pdf> (stating that while technical people may be familiar with the scientific names for different species of wood, even people who have worked extensively with wood, such as lumber yard clerks, may not know the scientific names of the lumber they sell).

76. FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM, *supra* note 48.

77. See Andy Rogers, *Who Knew That A Guitar Could Be An Illegal Immigrant!*, ANDY ROGERS MUSIC (Mar. 5, 2011), <http://www.andyrogersmusic.com/who-knew-that-a-guitar-was-an-illegal-immigrant/> (describing the difficulty in classifying protected woods because of the sheer number of different woods and the close similarities in their appearances). Grit Laskin, an internationally renowned luthier, described the difficulties in trying to protect Brazilian rosewood and recounted a personal anecdote to illustrate this difficulty. *Id.* At one time, Laskin sent a sample of what he thought was Brazilian rosewood to the best wood identification lab in the U.S. *Id.* When he received the results, the lab told him that the wood sample was the rosewood *Dalbergia nigra*. However, when Laskin cut into the wood to begin instrument construction, he developed an allergic reaction to the wood. He knew at this point that the wood was actually the Brazilian rosewood *Dalbergia retusa* because Laskin is allergic to this type of rosewood. *Id.* As Laskin put it, "[i]f the finest U.S. lab cannot assess with certainty you know a customs agent couldn't do so either, except by blind luck." *Id.* *Contra* Eric Meier, *Distinguishing Brazilian Rosewood, East Indian and Other Rosewoods*, THE

rosewood is a good illustration of this problem.⁷⁸ There are over two hundred different species of rosewood, seven of which are Brazilian.⁷⁹ However, the only type of rosewood grown in Brazil that is listed in Appendix I of CITES is *Dalbergia nigra*.⁸⁰

Further confusion can occur due to taxonomically incorrect trade names.⁸¹ The common name “Brazilian rosewood” is used to describe two species listed in CITES.⁸² However, only the rosewood *Dalbergia nigra* is listed in Appendix I.⁸³ Strangely, the common name for *Dalbergia nigra*⁸⁴ rosewood listed in CITES is “jacaranda,” which is actually the scientific name for another tree,

WOOD DATABASE, <http://www.wood-database.com/wood-articles/distinguishing-brazilian-rosewood-from-east-indian-and-other-rosewoods/> (last visited Mar. 19, 2015) (providing useful tips for visually distinguishing between different types of rosewood). The Wood Database, which provides useful information on different types of wood, offers some simple visual methods to determine species of a particular sample of rosewood. *Id.* For example, the Wood Database provides photos of Brazilian rosewood (*Dalbergia nigra*) and East Indian rosewood (*Dalbergia latifolia*) and describes the Brazilian rosewood as “more variegated, and more on the reddish side,” while the East Indian rosewood “[t]ends to be a dark chocolate or purplish brown.” *Id.* Although the weights of the Brazilian rosewood and the East Indian rosewood are listed at 52 lbs/ft³ and 57 lbs/ft³, respectively, the author warns that “[t]he two weights are so close, and easily within overlapping range of one another from tree to tree, that weight is not a reliable means to distinguish these two species.” *Id.*

78. Rogers, *supra* note 77 (describing the problems associated with Brazilian rosewood and attempts to regulate it).

79. *Id.*

80. See CITES, CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, APPENDICES I, II AND III (2013), available at <http://www.cites.org/eng/app/appendices.php> [hereinafter APPENDICES I, II AND III] (showing that in the *Leguminosae* family of plants – which includes *Dalbergia cochinchinensis*, *Dalbergia granadillo*, *Dalbergia retusa* and *Dalbergia stevensonii*, among other species – only *Dalbergia nigra* is listed in Appendix I). See also JOHN ARCHERY, U.S. DEP’T OF AGRIC., CITES I-II-III TIMBER SPECIES MANUAL 2-9, 2-10 (2006), available at http://www.aphis.usda.gov/import_export/plants/manuals/domestic/downloads/cites.pdf (stating that there are only six species in CITES Appendix I that are “used for lumber or other wood products”).

81. See, e.g., *Jacaranda mimosifolia*, AGRO FORESTRY TREE DATABASE, <http://www.worldagroforestrycentre.org/sea/Products/AFDbases/af/asp/SpeciesInfo.asp?SpID=1011> (last visited Feb. 5, 2014) (equivocating *Dalbergia nigra* with *jacaranda* by stating that *jacaranda* is commonly known as Brazilian rosewood, when in fact they are two different species).

82. See ARCHERY, *supra* note 80, at 2–9 (listing “Brazilian rosewood” as the common name for two different species of wood, *Aniba rosaeodora* and *Dalbergia nigra*).

83. See Peter Gasson et al., *Wood Identification of Dalbergia nigra (CITES Appendix I) Using Quantitative Wood Anatomy, Principal Components Analysis and Naïve Bayes Classification*, 105 *Annals of Botany* 45 (2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/19884155> (stating that “wood anatomy alone cannot distinguish *D. nigra* from all other commercially important *Dalbergia* species likely to be encountered by customs”).

84. See APPENDICES I, II AND III, *supra* note 80, at 2–9 (listing a variety of common names that are used for *Dalbergia nigra*, including: *jacaranda*, *jacarada cabiuna*, *jacaranda de Brasil*, *jacaranda wood*, *jacaranda-da-bahia*, *jacaranda-preto*, *jacaranda-rajado*, *jacaranda-roxo*, *jacarandaholz*, *jacaradanda de Brasil* and *legno di jacaranda*, among others).

Jacaranda mimosifolia.⁸⁵ “Jacaranda” is a completely different type of wood only remotely related to Brazilian rosewood.⁸⁶ Despite the widespread confusion regarding the difference between *jacaranda* and *Dalbergia nigra*, *Dalbergia nigra* is actually more closely related to broccoli than it is to the species of tree that is correctly known as *jacaranda*.⁸⁷ As the following section will show,

85. See STEPHEN H. BROWN, UNIV. OF FLA., BOTANICAL NAME: JACARANDA MIMOSIFOLIA 2 (2012), available at http://lee.ifas.ufl.edu/Hort/GardenPubsAZ/Jacaranda_Mimosifolia.pdf (describing the growth habits and appearance of Jacaranda in a detailed fact sheet).

86. See Mqbernardo, Comment to *Re: Jacaranda*, CLASSICAL GUITAR (Sept. 26, 2011, 11:03 AM), <http://www.classicalguitaridelcamp.com/viewtopic.php?f=11&t=62570> (describing the confusion that many people have as a result of all the different woods that are referred to as “*jacaranda*”).

Jacaranda is an [I]ndian term that refers to properties of some trees, or its wood. From there it served as basis for the name of, at least, 3 different tree families:

The genus *Jacaranda* (scientific name), a genus of tropical flowering tre[e]s in the *Bignoniaceae* family; its tiny and beautiful flowers are often in clusters (e.g.: *Jacaranda mimosifolia*)

Some trees of the *Dalbergia* (Rosewood) genus, namely Brazilian Rosewood (*D. nigra*), which is called in Brazil “*Jacaranda da Bahia*” (S. Salvador da Bahia being one of the ports from where the wood was shipped to Europe), but also *D. Spruceana* (*Jacaranda do Para*), and others

Some trees of the *Machaerium* genus, namely *M. Villosum* (*Jacaranda do Cerrado* or *Jacaranda Paulista*)[.]

The two later uses are popular uses in Brazil, while the first represents the “official” name of a genus. All of them are trees which y[i]eld dark timber.

Id. The author of the preceding source, Mqbernardo, is Miguel Bernardo, an apprentice luthier from Portugal. Mqbernardo, Comment to *Re: Hello from Portugal!*, CLASSICAL GUITAR (June 30, 2011, 11:52 AM), <http://www.classicalguitaridelcamp.com/viewtopic.php?t=60458&p=660006>.

Confusions arise when names for wood are “coined for marketing purposes.” Arnoldgtr, Comment to *Re: Jacaranda Rosewood*, UNOFFICIAL MARTIN GUITAR FORUM (Dec. 7, 2010, 6:17 PM), http://theunofficialmartinguitarforum.yuku.com/topic/111553#.Uu2Rw_ldXaF. In the Far East, the word “*Jacaranda*” is used to describe “any highly figured wood that resembles rosewood,” which could include species like *cocobolo*, Honduran rosewood, *morado*, or Brazilian kingwood. *Id.* The author of the preceding source, Arnoldgtr, is the the luthier John Arnold, who built a guitar for Zane Fairchild, “one of the finest flatpickers I have ever heard.” Arnoldgtr, Comment to *Re: Nick Lucas question for John Arnold*, THE UNOFFICIAL MARTIN GUITAR FORUM (Jan. 27, 2006, 6:18 PM), <http://theunofficialmartinguitarforum.yuku.com/topic/54236/Nick-Lucas-question-for-John-Arnold#.UvNkJvldXaF>.

87. Jeff M, Comment to *Re: Is Jacaranda and Brazilian Rosewood the Same Thing?*, THE ACOUSTIC GUITAR FORUM (Feb. 21, 2010, 1:16 PM), <http://www.acousticguitarforum.com/forums/archive/index.php/t-177471.html>. In his post, Jeff M states the *Jacaranda* and Brazilian rosewood are definitely not the same species, and that “Broccoli is more closely related to *D. N[i]gra* than *Jacaranda*” and that *jacaranda* is merely “a colloquial name given to several different types of trees.” *Id.*

See *Taxonomy Browser*, NCBI, <http://www.ncbi.nlm.nih.gov/Taxonomy/>

even large companies that take pains to conform to the Lacey Act requirements can still fall prey to the inherent flaws in the implementation of the 2008 Amendment.

2. *The Gibson Bust*

In 2009, the federal government raided Gibson Guitar Corporation,⁸⁸ a giant in the world of guitar manufacturing. Gibson was in possession⁸⁹ of wood protected by the 2008 Amendment.⁹⁰ The raid of such a well-known company caught the music world's attention and highlighted the difficulties musical instrument makers, musicians, and wood export companies now face following the implementation of this law.⁹¹ In response to the raid, the National Association of Music Merchants (NAMM) published a letter expressing the organization's concerns about the consequences of the new Amendment, stating that the Gibson raid together with the "slow response on needed guidance for compliance... has created fear and uncertainty for all those involved in the manufacturing, distribution and retailing of instruments and increasingly, artists and owners of musical instruments."⁹² It was not until March of 2013 that the USFWS

taxonomyhome.html/ (last visited Mar. 19, 2015) (Type "*Jacaranda mimosifolia*" into box labeled "Enter name or id"; click "Add"; type "*Brassica oleracea*" into box; click "Add"; type "*Dalbergia nigra*" into box; click "Add"; click "Expand All") (showing that whereas *Jacaranda mimosifolia* derives from asterids, broccoli (*Brassica oleracea*) and *Dalbergia nigra* derives from rosids). See generally A. R. Gray, *Taxonomy and Evolution of Broccoli (Brassica oleracea var. italica)*, 4 ECON. BOTANY 397 (1982) (discussing at length the natural origins of broccoli and the distinctions between broccoli and cauliflower).

88. *Gibson USA*, GIBSON.COM, <http://www2.gibson.com/Support/About-Us.aspx> (last visited Mar. 19, 2015). Gibson was founded in Nashville, Tennessee in 1974 and produces both electric and acoustic guitars. *Id.*

89. *Gibson Comments on Department of Justice Settlement*, GIBSON.COM (Aug. 6, 2012), <http://www2.gibson.com/News-Lifestyle/Features/en-us/Gibson-Comments-on-Department-of-Justice-Settlement.aspx> [hereinafter *Gibson Comments*] (detailing how Gibson was raided because of allegations that it was in possession of ebony from Madagascar, and ebony and rosewood from India, in violation of the Lacey Act).

90. Aaron Smith, *Gibson Guitar in Settlement on Illegal Wood Imports*, CNN MONEY (Aug. 7, 2012), <http://money.cnn.com/2012/08/06/news/companies/gibson-imports-wood/index.htm>. Gibson CEO Henry Juszkiewicz said that government agents confiscated \$1 million in Indian ebony from Gibson's factories in Tennessee and Nashville, and that the raid cost Gibson between \$2 and \$3 million in products and productivity. *Id.*

91. See, e.g., James R. Hagerty, *Gibson Guitar Wails on Federal Raid over Wood*, WALL ST. J. (Sept. 1, 2011), <http://www.wsj.com/articles/SB10001424053111903895904576542942027859286> (discussing the Gibson raids as illustrative of the core difficulties people face in trying to comply with U.S. law "while dealing with middlemen in faraway countries whose legal systems can be murky").

92. See Kevin Cranley, Letter from the National Association of Music Merchants (NAMM) to President Obama and Members of the United States Congress, available at <http://www.namm.org/public-affairs/articles/letter-national-association-music-merchants-namm-p> (expressing the Chairman of

implemented the musical instrument passport system.⁹³

Ultimately, the Gibson bust led to a deal between Gibson and the government⁹⁴ that set up guidelines for due diligence in supply chains.⁹⁵ However, this was the only major case to test the new Lacey Act compliance issues.⁹⁶ As a result, those affected by the Lacey Act have had very little guidance on the correct methods and procedures for importing protected wood species.⁹⁷

3. *Criminal Liability and the Risks for Individual Musicians and Importers*

The current standards for criminal liability under the Lacey Act present definite risks to the individual consumer. The Lacey Act can impose misdemeanor criminal liability on individuals even when they do not know that they are engaging in wrongful conduct.⁹⁸ The Lacey Act only requires that individuals

NAMM's concerns about the implications of the 2008 Amendment to the Lacey Act after witnessing what happened to Gibson during the government raids of its facilities).

93. See CROSS-BORDER MOVEMENT OF MUSICAL INSTRUMENTS, *supra* note 42 (setting out the United States' proposal for the musical instrument passport system).

94. See *Gibson Comments*, *supra* note 89 (describing how Gibson had to pay a \$300,000 penalty to the United States, as well as a \$50,000 community service payment to the National Fish and Wildlife Foundation (NFWF) to fund projects aimed at "conservation, identification, and/or propagation of protected tree species used in the musical instruments industry as well as the forests in which those species occur").

95. See generally Rachel Saltzman, *Establishing a "Due Care" Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 2–5 (2010), available at <http://www.michiganlawreview.org/assets/fi/109/saltzman.pdf> (discussing the issues relating to "due care" and the 2008 Amendment to the Lacey Act).

96. *But see Chinese Baby Furniture Company Pleads Guilty to Smuggling Internationally Protected Wood*, THE U.S. DEP'T OF JUSTICE (May 1, 2009), <http://www.justice.gov/opa/pr/2009/May/09-enrd-424.html> (detailing the story of Style Craft Furniture, who plead guilty to importing baby cribs from China made from a protected wood called "ramin").

97. See Thomas, *supra* note 47 (discussing difficulties with the musical instrument passport system that was created to try to help musicians who are affected by the Lacey Act).

98. See ALEXANDER, *supra* note 17, at 10 (describing how personal criminal liability under the current standards of the Lacey Act can present problems for individuals in terms of criminal misdemeanors).

[T]he Lacey Act makes it a criminal misdemeanor for someone "who knowingly engages in conduct prohibited by any provision of this chapter," and "in the exercise of due care should know that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation." The criminal misdemeanor provision explicitly requires that the action that triggers the Lacey Act violation be knowingly done. This means that the person must know he (or she) is doing the action, such as transporting the item or buying a wildlife or plant product, not that he

intentionally engage in the activity that later proves to be a Lacey Act violation.⁹⁹ This means that individuals can be liable for a criminal misdemeanor just by knowing that they are importing wood even when they are not aware that the wood is not Lacey Act compliant.¹⁰⁰

In contrast, for a felony conviction, the Lacey Act requires some knowledge that the action may be in violation of a law or regulation.¹⁰¹ Even under this standard, individuals may commit a felony by knowingly importing wood from an area they know *may* have had restrictions on some types of wood in the past, even if they believe there are no current restrictions.¹⁰² In addition, individual consumers should be aware that the statutorily required “due diligence” has not yet been defined.¹⁰³

4. Congressional Deadlock

Twice, Congress has attempted to correct the problems caused by the 2008 Amendment to the Lacey Act. Both times, the legislation failed to pass. First, Congress considered the Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act (the “RELIEF Act”).¹⁰⁴ Then, Congress tried again with the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (the “FOCUS Act”).¹⁰⁵

knows he is doing something wrong.

Id.

99. *Id.*

100. *Id.*

101. *See id.* at 11 (detailing how individual criminal liability for felonies under the Lacey Act creates the possibility for over-criminalization).

The felony provision has a higher standard of culpability. Like the misdemeanor provision, it also requires the actor to know he or she was committing the action that triggers the Lacey Act violation—importing, exporting, engaging in the conduct to sell or purchase or attempt to sell or purchase an item taken in violation of another law—but it also requires that the actor know “that the fish or wildlife or plants were taken, possessed, transported, or sold in violation of, or in a manner unlawful under, any underlying law, treaty or regulation.” *Id.*

102. *Id.*

103. *See* Saltzman, *supra* note 95, at 2–4 (describing the current lack of clarity in the use of the “due care” under the Lacey Act Amendment of 2008 and exploring the problems caused by this ambiguity).

104. H.R. 4171, 112th Cong. (2012); *See* Press Release, Committee on Natural Resources, Witnesses: Bills to Amend Lacey Act Would Correct Unintended Consequences of Law, Protect from Over-Criminalization, Committee on Natural Resources (May 8, 2012), <http://naturalresources.house.gov/news/documentsingle.aspx?DocumentID=294486> [hereinafter Witnesses: Bills to Amend Lacey Act] (describing the benefits the RELIEF Act would have had for consumers and businesses following the 2008 Lacey Act Amendment).

105. H.R. 3210, 112th Cong. (2012); *see* Witnesses: Bills to Amend Lacey Act, *supra* note 104 (describing the benefits of implementing the FOCUS Act to improve the unintended mishaps that have befallen individuals and businesses following the implementation of the 2008 Amendment to the Lacey Act).

The RELIEF Act would have done several things to help individuals and businesses safely navigate the Lacey Act without suffering the effects of over-criminalization.¹⁰⁶ The RELIEF Act would have re-established the “innocent owner” defense for individuals and corporations facing criminal sanctions for possession of illegally sourced plants.¹⁰⁷ The RELIEF Act would also have included a “grandfather” provision that would have exempted any plants or plant products that were *imported* into the United States before the enactment of the 2008 Amendment to the Lacey Act.¹⁰⁸ In addition, the RELIEF Act would have established a “grandfather” clause for finished plant products that were already *assembled and processed* before the enactment of the 2008 Amendment.¹⁰⁹ Not only that, but the RELIEF Act would also have modified the plant declaration requirement so that it would apply only to solid wood items and items imported for commercial use.¹¹⁰ The RELIEF Act’s final improvement to the 2008 Amendment to the Lacey Act would have reduced Lacey Act penalties for first time violators when the offense was not committed knowingly.¹¹¹

Another legislative attempt by Congress to ameliorate Lacey Act complications was the FOCUS Act. The FOCUS Act’s goal was to repeal provisions of the Lacey Act that dealt with violations of foreign laws and the attributed criminal penalties.¹¹² Specifically, the FOCUS Act would protect United States citizens from the requirement that individuals comply with foreign laws,¹¹³ thus limiting criminal penalties to violations of federal, state, and tribal laws.¹¹⁴ The FOCUS Act would also significantly reduce the risk of personal liability by purging criminal liability and reducing monetary penalties for Lacey Act violations.¹¹⁵ Furthermore, the FOCUS Act would remove language from the 2008 Amendment that allows Lacey Act enforcement officers to carry firearms, conduct searches and seizures, and make warrantless arrests.¹¹⁶

Both bills were designed to protect “individuals, businesses and industries that were unintentionally affected” by the 2008 Amendment.¹¹⁷ Unfortunately, the RELIEF Act did not gain enough supporters,¹¹⁸ and the FOCUS Act was tied to

106. Witnesses: Bills to Amend Lacey Act, *supra* note 104, at 1.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. H.R. 3210 (112th): RELIEF Act, GOVTRAK.US, <http://www.govtrack>.

controversial and partisan legislation that prevented any chance of passing through either the House or the Senate of Congress.¹¹⁹ Overall, many problems have arisen due to the 2008 Amendment, including partisan struggles and problems with the musical instrument passport system. This comment will further analyze these and other problems in the Section that follows.

III. ANALYSIS

The following pages discuss and analyze the problems flowing from the 2008 Amendment to the Lacey Act. These issues include the onset of partisan struggles, the ineffectiveness of the current passport system, the uncertainty behind the concept of “due care,” the rules surrounding musical instrument repair and modification, and the problematic implications of the Lacey Act for individual consumers.

A. *Partisan Struggles*

The politicization of the 2008 Amendment is unnecessarily transforming a national issue that affects every citizen into a matter of partisan politics. Now, these strong partisan views are interfering with the ability to cooperatively effectuate a solution to the problems caused by the 2008 Amendment.

In addition, some concerned members of the music world have made troubling statements about how politics have become intertwined with Lacey Act enforcement.¹²⁰ One editorial claimed that the Obama Administration singled out and targeted Gibson

us/congress/bills/112/hr3210 (last visited Mar. 20, 2015).

119. Press Release, United States Senator Rand Paul, Sen. Paul Introduces FOCUS Act (Feb. 2, 2012), http://www.paul.senate.gov/?p=press_release&id=443; see also *FLEOA Member NOAA & FWS Agents & Officers Meet with Congress Over FOCUS Act*, NORTH AM. WILDLIFE ENFORCEMENT OFFICERS ASS'N (Mar. 11, 2012), http://naweo.org/j3/index.php?option=com_k2&view=item&id=257:fleoa-member-noaa-fws-agents-officers-meet-with-congress-over-focus-act.

120. See *Now the Gibson Guitar Raids Make Sense*, INVESTORS.COM (May 23, 2013), <http://news.investors.com/ibd-editorials/052313-657569-gibson-guitar-raid-like-tea-party-intimidation.htm?p=full> (discussing the suspicion that the reasoning behind the government investigation of Gibson Guitars for its importation of East Indian rosewood was based on a dislike of the Gibson CEO's Republican political persuasions). The editorial also states that Gibson's CEO, Henry Juszkiewicz, has made contributions to various Republican politicians over the years. *Id.* These donations include \$2,000 to Republican Representative Marsha Blackburn from Tennessee, and a \$1,500 donation to Republican Representative Lamar Alexander, also from Tennessee. *Id.* See also Caroline May, *Paper: Gibson Guitar Raids May Be Another Case of Obama Administration Targeting*, THE DAILY CALLER (May 26, 2013), <http://dailycaller.com/2013/05/26/paper-gibson-guitar-raids-may-be-another-case-of-obama-administration-targeting/> (discussing the Gibson Guitar raids and the possible political overtones of the raid, as evidenced by the government's lack of interest in similar players of the guitar industry with different political persuasions).

because Gibson's CEO is a Republican donor.¹²¹ The editorial also asserted that Martin & Company, a top competitor of Gibson, whose CEO is a Democratic donor, illegally imports woods without criminal consequences.¹²²

The FOCUS Act has had its share of partisan struggles. The Act aimed to minimize over-criminalization created by ambiguities in the Lacey Act.¹²³ However, the Act became a partisan issue because of its association with Rand Paul¹²⁴ and the Tea Party movement.¹²⁵ Essentially, the only sponsors of the Act were

121. *See id.* (wondering why Gibson was targeted in the government raid while its competitor, Martin & Co., was not, and stating that many people have ignored the factor of the two guitar companies' CEOs' political views). *See also* Joe Newby, *Op-ed Says Raid on Gibson Guitars Another Case of Obama Targeting Conservatives*, EXAMINER.COM (May 28, 2013), <http://www.examiner.com/article/op-ed-says-raid-on-gibson-guitars-another-case-of-obama-targeting-conservatives> (quoting Gibson's CEO on the Hugh Hewitt Show). On the Hugh Hewitt Show, following the government's raid on Gibson's factories, Gibson's CEO said that

[w]e don't [know] what is motivating it It is . . . clear to me that there is some terrific motivation because we are not the only company that uses this type of wood. Virtually every other guitar company uses this wood and this wood is used prominently by furniture and architectural industries, and to my knowledge none of them have been shut down or treated in this fashion.

Id.

122. *See Now the Gibson Guitar Raids Make Sense*, *supra* note 120 (discussing the dollar amount of the contributions Gibson and Martin & Co. made to political figures). This editorial states that Martin & Co. contributed \$35,400 to Democratic candidates and to the Democratic National Committee "over the past couple of election cycles." *Id.* The editorial also states that Martin & Co. lists in its catalog several types of guitars that the company produces which contain "East Indian rosewood," the same wood that provoked the government's raid of the Gibson factories. *Id.*

123. H.R. 3210, 112th Cong. (2012); *see also* Witnesses: Bills to Amend Lacey Act, *supra* note 104 (describing the benefits of the FOCUS Act and how it would serve to correct the problems caused by the 2008 Amendment to the Lacey Act).

124. Although a member of the Republican Party, Rand Paul holds views that do not fit neatly into traditional Republican viewpoints. For example, he favors legalizing gay marriage and has tolerant views on marijuana consumption. *See* Chris Cillizza & Aaron Blake, *Rand Paul and the Rise of the Libertarian Republican*, WASH. POST (June 10, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/06/10/rand-paul-and-the-rise-of-the-libertarian-republican/> (describing Rand Paul as "the most visible defender of civil liberties not only in the Senate, but in elected office right now").

125. Rand Paul is a member of the Tea Party. Howard Fineman, *Rand Paul Torn Between Tea Party Fire, White House Dreams*, POLITICAL READ (July 12, 2013), http://www.huffingtonpost.com/2013/07/12/rand-paul-president_n_3582315.html. The Tea Party is a grassroots movement that began in 2004. *See* The Tea Party movement, which began in 2004 as a grassroots effort, believes in strong military forces, reducing taxes, decreasing the size of the government, and eliminating deficit spending. TEAPARTY.ORG, <http://www.teaparty.org/about-us/> (last visited Mar. 20, 2015). In addition, the movement has strong Judeo-Christian values. *Id.* Interestingly, despite his Tea Party affiliation, Rand Paul received a great deal of support from students

Republicans.¹²⁶ Proponents of the FOCUS Act pointed to an opinion by Justice Antonin Scalia in which he criticizes today's criminal laws for its imprecision and copiousness.¹²⁷ Even though Justice Scalia's points may be valid, associating the FOCUS Act with his views has likely worsened the partisan gap.¹²⁸

at UC Berkeley, "one of the most activist-progressive campuses in California or the nation." Ed Morrissey, *Rand Paul Goes "Behind Enemy Lines" at Berkeley?*, HOT AIR (Mar. 20, 2014), <http://hotair.com/archives/2014/03/20/video-rand-paul-goes-behind-enemy-lines-at-berkeley/> (describing how Rand Paul's speech to the students of UC Berkeley was greeted with a standing ovation, and speculating that Rand Paul "may find himself right at home in the nexus between libertarianism and college-campus activism"). Mr. Morrissey also noted that "Paul's focus on individual liberty and constraining federal intrusion into private lives offered a rare bridge between a major national GOP figure and Berkeley students." *Id.* See also Josh Richman, *Rand Paul, Republican Presidential Hopeful, Finds Support in Berkeley, Of All Places*, SAN JOSE MERCURY NEWS (Mar. 19, 2014), http://www.mercurynews.com/news/ci_25378185/repulican-presidential-hopeful-rand-paul-finds-plenty-support (discussing how Rand Paul's politics of "criticizing government surveillance programs, avoiding military actions that aren't vital to national security, and rethinking the war on drugs" has managed to "draw voters from across the spectrum, including some of Berkeley's famed lefties").

126. Witnesses: Bills to Amend Lacey Act, *supra* note 104.

Republican Rand Paul is a strong proponent for remedying the Lacey Act by preventing individual criminalization through passage of the FOCUS Act. *Id.* He states: "I believe that the Lacey Act is unconstitutional both because of its foreign law component, and because it is so vague that it fails to satisfy basic due process requirements of fair notice. The FOCUS Act fixes what is but one example of the ever-growing problem of overcriminalization that we face in this country: the Lacey Act." *Id.*

127. *Sykes v. United States*, 131 S. Ct. 2267, 2288 (2011) (Scalia, J., dissenting). In his dissent, Justice Scalia states that

[w]e face a Congress that puts forth an ever-increasing volume of laws in general, and of criminal laws in particular. It should be no surprise that as the volume increases, so do the number of imprecise laws In the field of criminal law, at least, it is time to call a halt.

Id.

See also Sen. Paul Introduces FOCUS Act, *supra* note 119 (drawing attention to Justice Scalia's dissent to support the contention that the FOCUS Act is necessary to remedy the problems caused by the 2008 Amendment to the Lacey Act which, the article states, "as currently codified is overly broad, imprecise, vague, and subject to abuse by overzealous prosecutors and activist judges").

128. Justice Antonin Scalia is an unpopular figure in some circles. For example, one of the premiere constitutional scholars has openly derided Justice Scalia for both his judicial style and viewpoints. See generally Erwin Chemerinsky, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. HAW. L. REV. 385 (2000). Chemerinsky writes:

I am not a fan of Justice Antonin Scalia's work on the United States Supreme Court. When the Justice Scalia fan club is formed, I'm not joining. Since I'm liberal and he's conservative, this is hardly a surprise. But my dislike for Justice Scalia's jurisprudence is much greater than an ideological disagreement. To be blunt, there is a disingenuousness to Justice Scalia's decision-making and a meanness to his judicial rhetoric that I believe are undesirable and inappropriate.

Id. at 385.

Erwin Chemerinsky is not Justice Scalia's only critic. See, e.g., Katla McGlynn, *Bill Maher: Antonin Scalia and Michele Bachmann Are 'The Exact*

In contrast, the RELIEF Act sought to fix problems caused by the 2008 Amendment through a bi-partisan¹²⁹ effort.¹³⁰ The Act had both Republican and Democratic sponsors.¹³¹ Interestingly, however, the initial vote in favor of the RELIEF Act in the House of Natural Resources Committee was strongly partisan,¹³² with all but one Republican voting in favor and all Democrats voting in

Same Idiot, HUFF POST COMEDY (Oct. 12, 2013), http://www.huffingtonpost.com/2013/10/12/bill-maher-scalia-bachmann-devil-video_n_4089147.html (stating the author's opinion that Justice Scalia is an "idiot," due to his belief in the devil).

Another important criticism of the FOCUS Act was the impact the Act would have on Federal Wildlife Officers. See Rebecca Merrit, *Support Federal Wildlife Officers and Agents—Oppose the FOCUS Act!*, CHANGE.ORG, <http://www.change.org/petitions/the-president-of-the-united-states-oppose-the-focus-act> (last visited Mar. 20, 2015) (petitioning the President of the United States, among others, to turn down the proposition for the FOCUS Act because of the negative consequences to federal wildlife officers and agents that would come of the FOCUS Act). In the petition, the author lays out the reason that the FOCUS Act would have a detrimental effect on federal wildlife officers and agents. *Id.* One of the primary concerns of the FOCUS Act's implementation is that the FOCUS Act sought to disallow federal wildlife officers and agents from carrying firearms. *Id.* The petition explains that "[G]ame Wardens and Wildlife Agents routinely encounter armed subjects whether they are involved in legal or illegal taking of fish, game, and wildlife" and it would be dangerous for game wardens and wildlife agents to come into contact with possibly-armed poachers of illegal wildlife. *Id.*

129. The RELIEF Act was sponsored by Republic representative Blackburn, Republican representative Bono-Mack, and Democratic representative Cooper. Jake Schmidt, *House Committee Votes to Allow Illegal Loggers to Pillage World's Forests: Undercutting America's Workers & Increasing Global Warming*, JAKE SCHMIDT'S BLOG (June 7, 2012), http://switchboard.nrdc.org/blogs/jschmidt/house_committee_votes_to_allow.html.

130. *Your Action To Revise Lacey Act, Protect Instrument Owners, Manufacturers And Retailers Needed Now!*, NAMM (June 18, 2012), <https://www.namm.org/public-affairs/blog/your-action-revise-lacey-act-protect-instrument>. Another benefit of the RELIEF Act is that it would have had no effect on the National Budget. See *H.R. 3210 RELIEF Act*, CONGRESSIONAL BUDGET OFFICE (July 2012), <http://www.cbo.gov/publication/43396> (reporting on the cost estimates of implementing the RELIEF Act to modify the 2008 Amendment to the Lacey Act). The House Committee on Natural Resources determined that implementing the RELIEF Act would have "no significant impact on the federal budget." *Id.* Although the RELIEF Act would "reduce revenues from civil penalties collected under the Lacey Act," the RELIEF Act would have no significant impact on direct spending because it would not change the way that the Lacey Act is enforced, and therefore would not impact the agency's workload. *Id.*

131. Schmidt, *supra* note 129.

132. Karen Koenig, *Lacey Act Amendment Under Vote by House*, WOODWORKING NETWORK (June 8, 2012), <http://www.woodworkingnetwork.com/wood-market-trends/woodworking-industry-news/production-woodworking-news/Lacey-Act-Amendment-Under-Vote-by-House-158188485.html#sthash.nx4nj9jX.dpbs> (discussing the House Natural Resources Committee's favorable vote for the RELIEF Act, meaning that the RELIEF Act would then have gone to the House of Representatives to be voted upon).

opposition.¹³³ Despite the Act's popularity among members of the music world¹³⁴ and environmentalists,¹³⁵ this bi-partisan solution died.¹³⁶ The death of the potentially bipartisan RELIEF Act is unfortunate because the Act would have helped musicians avoid the problems detailed above.¹³⁷

B. Problems with the Passport System

Problems with the musical instrument passport process occur when musical instrument manufacturers, sellers, and owners do not know and cannot discover when and where woods originated.¹³⁸ This is particularly relevant when woods are already part of an older instrument or have been prepared and stored for later use.¹³⁹ To begin with, applying for a musical instrument passport requires significant documentation.¹⁴⁰ The documentation

133. Schmidt, *supra* note 129. Twenty-five Republicans voted for the RELIEF Act and eighteen Democrats and one Republican voted against it.

134. Notably, NAMM supported the RELIEF Act as a good solution to the problems posed by the 2008 Amendment to the Lacey Act. *NAMM Supports New Lacey RELIEF Act: New Bill Clarifies Lacey Act for Instrument Manufacturers, Retailers and Distributors*, NAMM, <http://www.namm.org/news/press-releases/namm-supports-new-lacey-relief-act> (last visited Mar. 20, 2015) [hereinafter *New Bill Clarifies Lacey Act*]. NAMM's article states that the RELIEF Act would provide a good solution for the music world because of three important components of the act: the grandfathering component, which would exempt foreign wood products owned before the passage of the 2008 Amendment; the component that would eliminate penalties to individuals who unknowingly violate the Lacey Act; and the component which requires the government to "compile a database of forbidden wood sources on the Internet so that everyone is fairly warned." *Id.*

135. Environmentalists strongly supported the RELIEF Act, as evidenced by Switchboard, a blog by the staff of the Natural Resources Defense Council, "the nation's most effective environmental group." SWITCHBOARD, <http://switchboard.nrdc.org/> (last visited Mar. 20, 2015). A blogger for Switchboard reported on the death of the RELIEF Act, angrily writing, "Unfortunately, by a 25–19 vote too many House Members still took the side of illegal loggers that pillage forests around the world, utilize slave and child labor, decimate wildlife, drive deforestation that is causing global warming, and undercut American companies and workers." Schmidt, *supra* note 129.

136. *Id.*

137. *New Bill Clarifies Lacey Act*, *supra* note 134.

138. See Thomas, *supra* note 47 (describing the difficulties the consumer faces when trying to comply with CITES due to lack of knowledge of the components in musical instruments).

139. See generally *Passports Required for Musical Instruments*, TRAVEL (Mar. 13, 2013), <http://www.telegraph.co.uk/travel/travelnews/9926843/Passports-required-for-musical-instruments.html> (last visited Mar. 20, 2015) (describing the difficulties people faced in the past when trying to transport instruments containing CITES-restricted materials, and how "in the past orchestras have had to resort to drastic measures such as removing all the ivory keys from a piano in order to attend a concert in another country").

140. See FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM, *supra* note 48 (setting forth the requirements to export plants or plant products under CITES in this form that owners of musical instruments must fill out to receive a musical instrument passport).

is lengthy, complex, and costs between fifty and two hundred dollars, depending on the type of documentation the individual applies for.¹⁴¹ Required information includes: the scientific name, the common name, the quantity in metric units, the amount or percentage of plant species in each package, the country where the plant was acquired, and the source of the specimen, whether “removed from the wild or artificially propagated.”¹⁴²

This form creates numerous practical hurdles for individual consumers. For example, a consumer has no easy way to weigh the fretboard of a guitar separately from the neck or body of the instrument because the fretboard is glued securely to the rest of the guitar.¹⁴³ In addition, individuals can be charged with a felony if they lie about the species or the weight, and can be punished with a \$250,000 fine, a five-year prison sentence, in prison, and a forced forfeiture of the instrument.¹⁴⁴

Reporting on the wood’s country of origin creates further difficulties because of geographic-specific species restrictions.¹⁴⁵ For example, a type of black rosewood is now restricted for trade in Panama, but the same type of rosewood grows in dry tropical forests throughout Panama and Mexico.¹⁴⁶ This is problematic because the buyer of this wood would have to know specifically which country the wood came from, Panama or Mexico, to know whether the wood purchased is illegal or legal under the Lacey Act.¹⁴⁷

More problematically still, even well-meaning consumers can be punished for errors in their passport applications. The consumer does not need to satisfy any type of knowledge requirement for a CITES violation to result in forfeiture of a musical instrument because the consumer is strictly liable for possession of woods that violate CITES.¹⁴⁸ These troublesome aspects of the musical instrument passport system are ones that the legislature needs to remedy.

141. *Id.* (listing prices for different types of documentation, including \$100 for a single shipment, \$75 for a pre-convention shipment, and \$50 for household plants).

142. *Id.*

143. Thomas, *supra* note 47 (discussing the unrealistic expectations of the musical instrument passport system and the problematic nature that is quickly revealed when a musician tries to properly document a musical instrument).

144. *Id.*

145. See Press Release, CITES Extends Trade Controls to 111 Precious Hardwood Species from Madagascar and Panama, CITES (Sept. 28, 2011), http://www.cites.org/eng/news/pr/2011/20110928_timber_appendixIII.php (announcing various developments in different countries’ treatment of woods under the Lacey Act).

146. *Id.*

147. *Id.*

148. LAWRENCE R. LIEBESMAN & RAFAEL PETERSEN, ENDANGERED SPECIES DESKBOOK 61 (1st ed. 2003).

C. Due Care Difficulties

Another major concern for businesses and consumers alike is the importance of the due care requirement. Even though Gibson had its wood certified by the Forest Stewardship Council (FSC),¹⁴⁹ the FSC certification was not sufficient to overcome liability¹⁵⁰ under the Lacey Act.¹⁵¹ The FSC requires all wood to be legally harvested in compliance with “traditional and civil rights.”¹⁵²

Gibson states that it is a strong supporter of “sustainable and responsible sources of wood” and has worked with the Rainforest Alliance and Greenpeace to assure that Gibson uses only FSC certified woods.¹⁵³ Despite all of its precautions, Gibson was still unable to satisfy the standards of due care required to escape Lacey Act liability.¹⁵⁴ Gibson complained that the Lacey Act “reads that you are guilty if you did not observe a law even though you had no knowledge of that law in a foreign country.”¹⁵⁵ Because of the strange results of the Gibson raid, many people began to question the effectiveness and fairness of the 2008 Amendment.¹⁵⁶

149. *Gov't Says Wood Is Illegal if U.S. Workers Produce It*, GIBSON.COM (Oct. 18, 2013), <http://www.gibson.com/absolutenm/templates/FeatureTemplatePressRelease.aspx?articleid=1340&zoneid=6>.

150. Saltzman, *supra* note 95, at 7 (stating that Lacey compliance in the timber industry poses particularly difficult problems for companies because it is difficult for companies to “recognize a particular product or . . . keep track of its origin”). There are the many different intermediaries that a wood product goes through down the supply chain before arriving at its final destination at the company. *Id.* Saltzman states that even industry leaders, such as Gibson, who are known for “promoting sustainable wood harvesting may wind up using illegally harvested wood.” *Id.* at 7. In addition, companies working in the timber industry face particular challenges meeting Lacey Act due care standards because of the complexity of foreign timber laws. *Id.* For example, Indonesia alone “has over nine hundred laws, regulations, and decrees that govern timber exploitation, transportation, and trade.” *Id.* at 6.

151. Accordingly, Saltzman suggests that when the government prosecutes a company for Lacey Act violations, the government should focus not simply on the fact that the company violated the Lacey Act, but rather on the “whether [the company] was responsive to available information about ‘legality standards’ issued by the government in the country of origin” where the company received the timber. *Id.* A common piece of advice following the 2008 Amendment to the Lacey Act is that companies should simply stop getting woods from countries with a high risk of illegal logging altogether. *Id.* at 3. However, this advice is both impracticable and unfeasible because it would “effect a dramatic and unnecessary change in business practice.” *Id.*

152. *Gov't Says Wood Is Illegal if U.S. Workers Produce It*, *supra* note 149.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Gibson Guitar Settlement Provides Roadmap to Improve Lacey Act*, WOODWORKING NETWORK (Aug. 7, 2012), <http://www.woodworkingnetwork.com/wood-market-trends/woodworking-industry-trends-press-releases/Gibson-Guitar-Settlement-Provides-Roadmap-to-Improve-Lacey-Act-165744576.html> (stating complaints from the American Association of Exporters & Importers and over a dozen other organizations about the 2008 Amendment to the Lacey Act).

An article by the American Association of Exporters & Importers posed the question, “[h]ow can a business be expected to know with absolute certainty that a wood product was harvested, shipped, and imported in compliance with a nearly limitless number of foreign laws when the United States government itself does not know how to classify or treat that product under the Lacey Act?”¹⁵⁷ This question highlights the central problem that plagued Gibson during the raids and pinpoints a key area that the legislature needs to address and improve upon.

Both large and small companies that harvest wood are subject to the Lacey Act’s standard of strict liability¹⁵⁸ for forfeiture.¹⁵⁹ But those who purchase wooden musical instruments and other wooden products from suppliers or instrument makers should be immune from liability. Liability should never extend to the consumer unless the illegal wood product was obtained or sourced due to the consumer’s intentional or knowing actions. The consumer simply does not have access to the same sources of information as large corporations do to ensure that woods are compliant.¹⁶⁰ In the same way, parties that purchase wood from the harvester should not be held to strict liability for forfeiture absent intentional or knowing actions. While companies like Gibson who purchase the wood to craft items are arguably in a better position than consumers to determine whether woods are compliant, liability should begin and end with the harvester.

D. Date of Modification Issues

One tricky aspect of the current regulatory scheme is the issue of instrument modification. Whether an instrument containing banned materials can nonetheless be Lacey Act compliant turns on some very subtle points of law.

157. *Id.*

158. The Director of Government Affairs for the International Wood Products Association stated that currently, the “Justice Department does not recognize the ‘innocent owner’ provision for civil forfeiture—buyers must forfeit goods regardless of what steps they took to comply.” BRIGID SHEA, INT’L WOOD PRODUCTS ASS’N, THE LACEY ACT IMPLICATIONS FOR INDUSTRY 5, available at <http://www.eli.org/sites/default/files/docs/seminars/09.23.09dc/sheaf.pdf?q=pdf/seminars/09.23.09dc/sheaf.pdf>.

159. See Stephen Guertin, Deputy Director, U.S. Fish & Wildlife Serv., Testimony Before the U.S. House of Representatives, Committee on Natural Resources, Subcommittee on Fisheries, Wildlife, Oceans and Insular Affairs, Regarding the 2008 Lacey Act Amendments (May 16, 2013), [http://www.doi.gov/ocl/hearings/113/2008laceyact_051613.cfm?renderforprint=1& \[hereinafter Testimony of Stephen Guertin\]](http://www.doi.gov/ocl/hearings/113/2008laceyact_051613.cfm?renderforprint=1& [hereinafter Testimony of Stephen Guertin]) (describing how the 1981 Amendment to the Lacey Act created strict liability forfeiture provisions).

160. See Thomas, *supra* note 47 (discussing the problems a consumer faces in trying to fill out the current musical instrument passport paperwork due to lack of information).

For a specimen listed under ESA, the threshold question is whether the item was manufactured or removed from the wild over 100 years ago.¹⁶¹ If it was, then the item qualifies as “antique.”¹⁶² However, to be compliant, the item must have “not been repaired or modified on or after December 28, 1973 with any part of any species protected by ESA.”¹⁶³ This includes, of course, repairing the item with a patch of the same material.¹⁶⁴ Since the item itself is ESA protected, then repairing it using the same material would violate this rule.¹⁶⁵

A specimen listed under ESA that is less than 100 years old must meet the requirements that it “was acquired or held in a controlled environment on or before (a) December 28, 1973 or the date when the species was listed, and (b) has not entered into commerce (e.g., been bought, sold, or offered for sale...) since December 28, 1973, or the date when listed.”¹⁶⁶ This means that if an instrument passed from one owner to another in the last 100 years, it cannot qualify to be exported or imported. The result is the same if the item entered into commerce, even if it did so during the acquisition or retention in a controlled environment.¹⁶⁷

No such modification issues exist if the material is listed solely under CITES. An instrument with CITES-listed wood may be imported and exported as long as the material was obtained or manufactured before the material was CITES listed.¹⁶⁸

E. The Problematic Implications of the Lacey Act for the Individual Consumer

In the United States’ fact sheet about the Lacey Act, *Lacey Act Amendment: Complete List of Questions and Answers*,¹⁶⁹ the government explains, “we will be enforcing the declaration

161. 19 C.F.R. § 10.53(e)(3) (2012).

162. FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM, *supra* note 48, at 2.

163. *Id.* at 3.

164. Chuck Erikson, *Section Two: Exemptions for Personal Property; Pre-Ban, Pre-Convention, and “Legacy” Materials; and Antique Items*, GUILD OF AMERICAN LUTHIERS, http://www.luth.org/web_extras/CITES_LaceyAct/section_02.html (last visited Mar. 20, 2015).

165. *Id.*

166. FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM, *supra* note 48, at 2.

167. *Id.* at 3.

168. *Id.* For example, Brazilian rosewood harvested before June 11, 1992, when it was CITES-listed as compliant. See U.S. FISH & WILDLIFE SERV., DEPT OF THE INTERIOR, FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM: EXPORT/RE-EXPORT OF PLANTS (CITES) 6 (2011), available at <http://www.fws.gov/forms/3-200-32.pdf> (stating that if Brazilian rosewood has been harvested after June 11, 1992, then an instrument containing this wood does not violate CITES).

169. See LACEY ACT: FREQUENTLY ASKED QUESTIONS, *supra* note 12, at 3 (setting out a list of questions and answers to inform people of the facts of the 2008 Amendment to the Lacey Act).

requirement for formal [customs] entries” but not for informal entries “[a]t this time.”¹⁷⁰ The fact sheet also recognizes that “most personal shipments” are *informal* entries while “most commercial shipments” are *formal* entries.¹⁷¹ However, these are not complete definitions, and could be wildly misleading to a musical instrument owner. According to United States Customs and Border Protection, an *informal* entry is “the importation of merchandise that does not exceed \$2,500 in value.”¹⁷² A *formal* entry, on the other hand, is the importation of goods that are valued at \$2,500 or more.¹⁷³

The fact sheet further states that the Lacey Act will only be enforced against individuals for “informal entries.”¹⁷⁴ This provides little comfort. Many treasured musical instruments are worth well over \$2,500.¹⁷⁵ For example, Eric Clapton’s Cherry Gibson ES335 guitar sold for £540,000, or about \$876,000.¹⁷⁶ This means that even though the fact sheet assures that individuals make “informal entries,” musicians traveling with high-value musical instruments may actually make “formal entries.”¹⁷⁷

The fact sheet also describes how individuals carrying personal instruments, such as guitars, do not have to declare these items.¹⁷⁸ The fact sheet explains that “[i]tems in passenger baggage or personal items travelling with a person do not require a declaration. For example, if you are traveling with your personal guitar, you are not required to declare the plant material in the guitar.”¹⁷⁹ However, the 2008 Amendment to the Lacey Act is not meant to exclude such individuals. It is very likely that the government will begin to enforce the Lacey Act against individuals for two reasons.¹⁸⁰

170. *Id.*

171. *Id.*

172. *Filing an Informal Entry (for Goods Valued at Less than \$2500)*, U.S. CUSTOMS AND BORDER PROTECTION, https://help.cbp.gov/app/answers/detail/a_id/215/ (last visited Mar. 20, 2015).

173. *Filing a Formal Entry (for Goods Valued at \$2500 or more)*, U.S. CUSTOMS AND BORDER PROTECTION, https://help.cbp.gov/app/answers/detail/a_id/214/related/1 (last visited Mar. 20, 2015).

174. *Id.*

175. *Id.*

176. Eric Clapton, *I Choked Up as My Guitars Were Sold: Eric Clapton on Raising £10m for Charity but Having His Heart Broken in the Process*, MAIL ONLINE (June 15, 2013), <http://www.dailymail.co.uk/home/event/article-2340474/Eric-Clapton-I-choked-guitars-sold-The-musician-raising-10m-charity-having-heart-broken-process.html>.

177. *Id.*

178. LACEY ACT: FREQUENTLY ASKED QUESTIONS, *supra* note 12, at 6.

179. *Id.* at 6.

180. *But see* Randy Lewis, *USDA OKs Musical Instruments for Travel under Lacey Act*, L.A. TIMES (June 1, 2013), <http://articles.latimes.com/2013/jun/01/entertainment/la-et-ms-lacey-act-musical-instruments-usda-report-amendment-20130531> (reporting that the Department of Justice and the U.S. Fish and Wildlife Service have said that “citizens traveling with their

First, most instruments that musicians would choose to travel with are worth more than \$2,500.¹⁸¹ Even brand new instruments can be worth well over \$2,500: for example, Anne Cole's hand-made cellos begin at \$32,000.¹⁸² Because musical instruments are valuable, most would likely qualify as "formal entries" that require declaration.

Second, the passport system was specifically created to help "[m]usicians and institutions such as orchestras and museums that own musical instruments that contain CITES-listed species [who] have encountered a number of challenges when traveling internationally with those instruments."¹⁸³ The implementation of this passport system *to benefit* individuals suggests that the Lacey Act will be enforced against individuals. If the government never planned to enforce the Lacey Act against individuals, then the passport system would be entirely unnecessary.

As a result of these complications, the Lacey Act's peculiar rules create a multitude of problems that are difficult for the individual consumer to understand and prevent.¹⁸⁴ The following Proposal presents a solution to these problems by introducing a new system of title that attaches at the moment of wood harvest. This new system will eliminate the need for musical instrument passports and the requirement of due care.

IV. PROPOSAL

While the Lacey Act largely does what it is supposed to do, the 2008 Amendment needs significant modification. This proposal suggests several major changes: (1) eliminating individual criminal liability; (2) simplifying the geographic components of the Lacey Act; (3) amending the current rules on instrument modification; and (4) implementing a new system of title for wood products that will eliminate the need for the musical instrument passport system and allow musicians to travel safely and easily with their musical instruments without fear of unwarranted penalties.

musical instruments are not an enforcement priority").

181. For example, Yo-Yo Ma's cello was built in Venice in 1733 and is worth between \$2 and \$2.5 million. Beth Gardiner, *Yo-Yo Ma Loses His Cello For Short Time*, THE SEATTLE TIMES (Oct. 17, 1999), <http://community.seattletimes.nwsourc.com/archive/?date=19991017&slug=2989399>.

182. See Anne Cole, *Cellos*, ANNE COLE VIOLINMAKER, <http://www.annecoleviolinmaker.com/cellos.php> (last visited Mar. 20, 2015) (listing different models of Anne Cole's cellos).

183. *Cross-Border Movement of Musical Instruments*, *supra* note 42, at 1.

184. See Jack Baruth, *Cross The Border, Lose Your Bentley; The Lacey Act Applies To Automobiles, Too*, THE TRUTH ABOUT CARS (Aug. 26, 2011), <http://www.thetruthaboutcars.com/2011/08/cross-the-border-lose-your-bentley-the-lacey-act-applies-to-automobiles-too/> (setting forth the proposition that a consumer could even face the confiscation of a Bentley automobile if the interior is made of a type of wood that is in violation of the Lacey Act).

A. *Eliminating Individual Criminal Liability*

Currently, the 2008 Amendment to the Lacey Act suffers from over-criminalization.¹⁸⁵ The burden the Act places on the individual consumer is too great, and the impact of criminal liability on the individual consumer is too high. Accordingly, the individual consumer should not be criminally liable unless the individual has knowingly participated in the illegal harvesting. The law should place the burden of legal harvest solely on the initial harvester.¹⁸⁶ The titling system this Proposal suggests provides a mechanism to do this.

B. *Simplifying the Geographic Components of the Lacey Act*

The geographic components of the Lacey Act are too complex for the individual consumer. The laws require an individual to be aware of minor regional differences in the legality of harvested wood products.¹⁸⁷ The geographic focus of the Lacey Act may be beneficial in certain circumstances involving international trade and large corporations. Conceivably, a flat, species-wide ban may be too restrictive for a species that is only endangered in certain countries. In these instances, only banning wood that was harvested from the endangered areas may be more appropriate. However, it is illogical to require individual consumers to check

185. See generally Witnesses: Bills to Amend Lacey Act, *supra* note 104 (describing the benefits of the FOCUS Act and how it would serve to correct the problems with over-criminalization).

186. In this Comment, the term “harvester” includes, but is not limited to, the person actually cutting the tree. This is because individuals or corporations who subcontract for wood harvesting should not be permitted to hide behind the people they employ to cut the wood. In this comment, the term “harvester” uses a substance over form approach. *But see* Saltzman, *supra* note 95, at 4–5 (stating that small businesses involved in the timber industry should be held to a lower presumption of knowledge about industry standards). In contrast to Saltzman’s suggestions, small businesses and large businesses who act as harvesters should be equally expected to know and follow industry standards in terms of the Lacey Act. Otherwise, smaller businesses could claim lack of industry knowledge to avoid liability for Lacey Act violations and the environmental goals of the Lacey Act would be undermined. Large or small, business that act as harvesters should be held liable for improper practices, and liability should never pass to the consumer.

187. See generally Wesley Ryan Shelley, Comment, *Setting the Tone: The Lacey Act’s Attempt to Combat the International Trade of Illegally Obtained Plant and Wildlife and its Effect on Musical Instrument Manufacturing*, 42 ENVTL. L. 549, 564 (2012) (illustrating the difficulty of the requirement under the 2008 Amendment that mandates consumer compliance with all foreign law by stating that “the Asian islands of Indonesia alone have almost 9000 laws . . . that could fall under the Lacey Act”). The article also states that the requirement to follow foreign law includes following “resolutions and regulations of each nation.” *Id.*

the laws of every relevant country¹⁸⁸ and the origin of every piece of wood used in a particular instrument. This is too large a burden. Banning particular species based on where the tree grew and holding consumers responsible for violations is highly impracticable.¹⁸⁹ The new titling system that this Proposal suggests will eliminate this problem by limiting accountability to the harvester and eliminating liability down the supply chain.

C. Amending the Issues Surrounding Date of Modification

Currently, major flaws in the passport system and in the CITES exception create issues surrounding the date of harvest.¹⁹⁰ The application form for the export/re-export of plants under CITES has a specific provision for Brazilian rosewood (*Dalbergia nigra*).¹⁹¹ However, the form specifies that the instrument owner must “certify that all the guitars to be exported are made from pre-convention Brazilian rosewood (*Dalbergia nigra*), harvested prior to June 11, 1992, as documented by the guitars’ serial numbers.”¹⁹² Requiring the instrument owner to certify that a guitar is made from rosewood that was harvested and imported prior to 1992 presents challenges for antique instruments without serial numbers.

The individual consumer needs evidence to verify that a guitar contains pre-convention Brazilian rosewood. However, the individual musical instrument owner is likely not in a good position to offer this proof.¹⁹³ Consider, for example, the difference in available documentation between Martin guitars, Gibson guitars, and Larson guitars. The Martin guitar company has a reliable serial number base, but Gibson has not maintained a reliable system, and Larson guitars usually do not have serial

188. In addition, following the Gibson raids of woods from India, Gibson CEO Henry Juskiewicz stated that “although the Indian government certified that the wood was properly and legally exported under this law, the U.S. Fish and Wildlife Service substituted its own opinion and reinterpreted the Indian law.” Henry Juskiewicz, *Repeal the Lacey Act? Hell No, Make It Stronger*, THE BLOG (Nov. 2, 2011), http://www.huffingtonpost.com/henryjuskiewicz/gibson-guitars-lacey-act_b_1071770.html.

189. See CITES Extends Trade Controls to 111 Precious Hardwood Species from Madagascar and Panama, *supra* note 145 (explaining that *Dalbergia retusa* is restricted specifically when it comes from Panama, although it grows in dry tropical forests from Panama to Mexico).

190. FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM, *supra* note 48.

191. FEDERAL FISH AND WILDLIFE PERMIT APPLICATION FORM: EXPORT /RE-EXPORT OF PLANTS (CITES), *supra* note 168 (listing the requirements to obtain a single use permit for a vintage guitar containing Brazilian rosewood).

192. *Id.*

193. John Thomas, *Musical Instrument Passports: A New CITES Provision*, FRETBOARD JOURNAL, <http://www.fretboardjournal.com/blog/musical-instrument-passports-new-cites-provision> (last visited Feb. 10, 2015).

numbers at all.¹⁹⁴ For older guitars made by companies like Gibson and Larson that do not have reliable documentation of age, the consumer may have no way to prove that Brazilian rosewood fretboards or other guitar parts came from trees that were harvested and crafted into instrument parts before Brazilian rosewood became CITES-listed.¹⁹⁵

To create a solution to help owners of older instruments, this comment suggests combining two ideas: a grandfather clause and expert affidavits. Combining these two ideas is crucial to solving the problem that owners of older musical instruments face in proving that the Rosewood in their instruments predates 1992.

First, this comment suggests implementing a grandfather clause to exempt older instruments¹⁹⁶ from Lacey Act enforcement. The grandfather clause would function as long as an instrument was imported before the implementation of this comment's new wood titling system. Second, to prove that an instrument is old enough to be exempt under the grandfather clause, instrument owners should be permitted to submit expert affidavits. Owners of older instruments without serial numbers or identifying features could submit affidavits from antique guitar specialists stating their expert opinions on the guitar's age.¹⁹⁷ In addition, once the owner proves through expert affidavits that the instrument qualifies for the grandfather clause, the instrument could receive a unique identifier number. This could then serve as the instrument's title number and be entered into the registry of the new titling system.

D. A New System of Title for Musical Instruments

This comment's new titling system¹⁹⁸ would affect not only the Lacey Act and its enforcement but also timber industry

194. *Id.*

195. See Thomas, *supra* note 194 (speculating that, although the Department of Fish and Wildlife has not commented on this, it seems reasonable that an affidavit from a "recognized vintage guitar expert might suffice for proof of age").

196. See *New Bill Clarifies Lacey Act*, *supra* note 134 (discussing the benefits of a grandfather clause).

The grandfather clause should also apply to tone woods already harvested and prepared for musical instrument making many years before passing the Lacey Act Amendment of 2008. See *Old Growth Wood*, *supra* note 71 (describing how wood flooring in a factory built in New England in 1875 was rescued and repurposed for use in banjo construction, and how it proved to be a unique tone wood).

197. See Thomas, *supra* note 195 (suggesting that antique guitar owners should be allowed to produce specialist opinions on the age of their guitars).

198. The titling system fulfills the environmental concerns behind the Lacey Act and the ESA by preventing illegally sourced products from entering into the economy, but does so without placing a substantial burden on manufacturers and harvesters. This system also prevents criminalization of

practices.¹⁹⁹ This new system of wood titling begins when the harvester chops down a batch of trees. At this time, the harvester records the species, location of harvest, wood weight, volume, moisture content, and any other relevant details about the harvest. This information is confirmed by a third-party examiner. The examiner also verifies that the harvester met the Lacey Act standard of “due care” and that the wood was harvested in compliance with all laws at the place of harvest. Each batch of wood certified by the third party is issued a harvest identification number. This number is then added to a centralized wood title registry database. The registry keeps track of all the wood products made from a specific harvest batch by tracking the wood through the manufacturing process all the way to the end consumer.

After wood is harvested, certified, and registered in the database, the wood is milled. At this point, it is again weighed, measured, and tested for moisture content. If at any time the batch is split, a separate number must be assigned to the wood that has left the main group. This approach tracks all of the lumber stemming from the harvest batch through the supply chain. When an instrument manufacturer buys the milled wood, the manufacturer can be assured that the wood is in compliance. When the manufacturer uses the wood, the volume and weight of the wood used to make a musical instrument part or parts must be recorded in the registry database.

When the pieces for a musical instrument are complete, each wooden part is entered into the registry with its own title. Then, these wooden parts can be registered together as a musical instrument and receive musical instrument title. The musical instrument title would then have a title number linked to the registry database that would connect the musical instrument title to the records of all the musical instrument parts used in its assembly and the details about the wood used to make each part.

With this musical instrument title, the end consumer can prove that the components of a musical instrument are in compliance all the way back through the supply chain. Under this system, liability will not pass down the chain of commerce to the

innocent consumers.

199. In addition to setting up the titling system in the United States, it will be important to get international assistance and support for anti-deforestation efforts, for example, establishing titling systems within other countries' borders. Ideally, the titling system should function internationally, not merely within the United States. The United States should both establish the titling system within its country's borders, and also encourage other countries to set up their own titling systems. Then, all the systems could combine and share a mass database of all titles given to harvesters of all participating countries. This cooperative effort would have dramatic effects toward combating illegal harvesting of wood. *See generally Breedlove Acquires the World's Largest Collection of Legal Brazilian Rosewood*, *supra* note 62 (detailing the guitar company Breedlove's system of documenting Brazilian rosewood to ensure Lacey Act compliance).

consumer. The only party to whom liability for illegally harvested wood will attach is the initial harvester.

Implementing this system of title would certainly be possible. In fact, at least one small guitar company has already set up a system of documentation that accompanies each instrument sold so that the buyer can be sure the woods in each guitar are Lacey Act compliant.²⁰⁰ Currently, no effective system exists²⁰¹ to help consumers easily move wood products without arduous paperwork²⁰² meant for agricultural product shipments.²⁰³

200. See *id.* (detailing the guitar company Breedlove's system of documenting Brazilian rosewood to ensure Lacey Act compliance). On its webpage, the guitar company Breedlove states that

[w]e bought our supply from Madinter, a hardwood trading company specializing in Brazilian rosewood. Ma[d]inter imported several Brazilian rosewood logs during the 1950s and 1960s, prior to the 1967 Brazilian restrictions. Our selection of Brazilian tone sets comes exclusively from these trees imported prior to 1967. We purchased Madinter's collection in its entirety in 2013. Every Breedlove guitar crafted from Brazilian rosewood has supporting documentation that ensures that your instrument is legal.

Id.

201. One author has optimistically suggested that CITES should adopt USDA-style labels, similar to those used for organic foods, to proclaim that wood is "eco-friendly," and CITES approved. See Patrick Genova, Note, *Good Vibrations: The Push for New Laws and Industry Practices in American Instrument Making*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 195, 218 (2013) (stating that an "eco-labeling system may have a big impact on what consumers buy," which would promote green policies and could even be adopted by CITES to entice customers with CITES-approved, eco-friendly products). However, this would do nothing to help with CITES verification for cross-border transit of musical instruments and would likely increase the prevalence of difficult-to-trace counterfeit products with fake "eco-friendly" tags. This is because "eco-friendly" labels can easily be faked, allowing illegally harvested products to enter the market. Nate Schweber, *Officials Tell of Fake Labels Hidden Beneath Fake Labels*, N.Y. TIMES, Mar. 3, 2012, at A15, available at http://www.nytimes.com/2012/03/03/nyregion/officials-say-they-smashed-a-ring-smuggling-counterfeit-uggs.html?_r=0 (discussing the burgeoning market for fake luxury products with "dummy tags"); *Anti-Counterfeiting Operations*, UL, http://ul.com/?page_id=72&preview_id=72 (last visited Feb. 10, 2015) (stating that "[c]ounterfeiters will copy and sell anything that turns a profit without regard to quality, safety or the law"); Jenny T. Slocum & Jess M. Collen, *The Evolving Threat and Enforcement of Replica Goods*, 33 W. NEW ENG. L. REV. 789, 796 (2011) (discussing the sophistication of counterfeit and replica goods); Lia Eustachewich & Rich Calder, *"Fake Label" Exposed Counterfeit Wine*, N.Y. POST (Dec. 17, 2013), <http://nypost.com/2013/12/17/fake-label-exposed-counterfeit-wine/> (reporting that a man used a printer from Indonesia to create fake wine labels, and discussing the prevalence of fake wine labels).

202. One means of documenting a wood product's importation is to get a phytosanitary certificate. See FEDERAL FISH & WILDLIFE PERMIT APPLICATION FORM: EXPORT/RE-EXPORT OF PLANTS (CITES), *supra* note 168 (recommending the owner should present a foreign phytosanitary certificate as a means of providing evidence that a plant product was obtained prior to its CITES listing). A phytosanitary certificate "is used to certify that the domestic plants or plant products have been inspected according to appropriate

A useful analogy and model for this system of required harvester documentation is the shipping statements required for shipping milk.²⁰⁴ Under the requirements of the United States Public Health Service and Human Services (USPHS), each time a shipment of milk is transported in a milk tank truck, a shipping statement must be prepared.²⁰⁵ The shipping statement must contain: the shipper's name, address, and permit number; permit identification of the hauler; point of origin of the shipment; milk tank truck identification number; name of product; weight of product; temperature of product when loaded; date of shipment; name of supervising Regulatory Agency at the point of origin shipment; description of treatment stage of the milk product; seal numbers for the inlet, outlet, wash connections and vents; and the grade of product.²⁰⁶

procedures, and they are considered to be free from quarantine pests, practically free from other injurious pests, and conform to the current phytosanitary regulations of the importing country." See *Import Export*, U.S. DEPT OF AGRIC., http://www.aphis.usda.gov/import_export/plants/plant_exports/export_certificates_forms.shtml (last visited Mar. 20, 2015) (describing what is meant by a "phytosanitary certificate"). See also Adelaida Harries & Joseph Cortes, *Procedures Manual for Phytosanitary Accreditation for Seed Export* (2005), <http://www.bigmap.iastate.edu/publications/phytosanitary%20accreditation.pdf> (describing the procedures to ensure that individuals adhere to phytosanitary seed export regulations). The procedures that an individual must follow in order to adhere to phytosanitary seed export regulations include field inspections and visual and laboratory tests for disease. *Id.* at 14. On the form required to apply for a phytosanitary certificate, the exporter of the item must fill out: the exporter's address; the name and quantity of produce; the place of origin; the botanical names of the plants; the declared point of entry; and any distinguishing marks. See U.S. DEPT OF AGRIC., PHYTOSANITARY CERTIFICATE, available at http://www.aphis.usda.gov/import_export/plants/plant_exports/downloads/ppq577.pdf (presenting the form necessary to apply for a phytosanitary certificate). The requirement to record "distinguishing marks" should be particularly useful for documenting antique instruments without serial numbers that may have no other way to be identified. See Thomas, *supra* note 195 (discussing how antique Larson guitars do not have serial numbers).

203. See also *Requirements for Phytosanitary Certificates*, FAO.ORG, <http://www.fao.org/docrep/004/y3241e/y3241e06.htm> (last visited Mar. 20, 2015) (outlining and explaining the requirements to receive a phytosanitary certificate); see generally FOOD AND AGRIC. ORG. OF THE UNITED NATIONS, INTERNATIONAL STANDARDS FOR PHYTOSANITARY MEASURES 41–65 (2012), available at https://www.ippc.int/sites/default/files/documents/20131009/ispm_05_en_2013-08-26cpm-7_2013100911%3A06-559.12%20KB.pdf (defining common terminology used in the implementation of phytosanitary certificates for purposes of international trade).

204. U.S. DEPT OF HEALTH AND HUMAN SERV., GRADE "A" PASTEURIZED MILK ORDINANCE 15–16 (2009), available at <http://www.fda.gov/downloads/Food/FoodSafety/ProductSpecificInformation/MilkSafety/NationalConferenceonInterstateMilkShipmentsNCIMSMModelDocuments/UCM209789.pdf> (stating the requirements of the shipping statement that must be prepared for each shipment of milk per the standards of the U.S. Department of Health and Human Services/Food and Drug Administration).

205. *Id.* at 15.

206. *Id.* at 15–16.

This system this comment suggests involves implementing a similar type of pre-sale certification for wood products at the point of harvest. This would require wood products to be certified before timber industries, luthiers, or any other party can purchase them. Timber without a harvest identification number to prove that the wood has been certified by the third-party examiner could not legally be sold to anyone. This change in industry practice would drastically lessen the burden on the musical instrument luthier and place it on those who are in the best position to gain the necessary information²⁰⁷ about the wood: the harvester. The harvester is physically present at the location where trees are cut, just as the milk shipper is physically present when milk is loaded into a milk tank. If raw wood product is documented, brought in legally, and certified as legal, then the certified legality of the wood should attach to the instrument that is created from that wood.

Another good analogy is the title to a car.²⁰⁸ The musical instrument title this Proposal suggests would act as permanent documentation proving Lacey Act compliance stemming back from the time the wood used to make the instrument was harvested.²⁰⁹ This would decrease uncertainties,²¹⁰ lead to a great deal of

207. See Thomas, *supra* note 47 (explaining the confusion and grave difficulties consumers face trying to supply the information to fill out the form to apply for a musical instrument passport).

208. See also *Title Transfers*, DMV.ORG, <http://www.dmv.org/title-transfers.php> (last visited Mar. 20, 2015) (stating that in order to gain title to a used car, the buyer must submit a title transfer application). Although filling out a title transfer application may be a little too extreme for the sale of a musical instrument, under the new system this comment proposes, the record keeper should be notified if a musical instrument changes owners.

209. This reason that it is important for the individual musical instrument parts to receive title in addition to completed musical instruments is because individual musical instrument parts, such as banjo necks, are readily detachable. People frequently buy and sell musical instrument parts as well as entire instruments. The titling system this Proposal suggests is designed to cater to the practical realities of what already occurs in the music world.

210. Under this new system of musical instrument title, when a musician needs to bring an instrument across the border, the border patrol officer can simply search for the instrument's musical instrument title number in the registry database. The patrol officer will then have access to the entire history of each wooden piece incorporated into the instrument and there should be no question as to whether the instrument is compliant. For ease of use and to prevent fraud, each finished instrument and instrument part will need to be photographically documented and potentially labeled with title numbers.

accountability,²¹¹ and be easy to keep track of digitally in the registry database.²¹²

Musical instrument title would track the wood used in an instrument starting from point of harvest all the way to the finished product. The harvest identification number of the wood would pass down to all instruments constructed of the wood from this particular harvest batch. For example, a single instrument made of ten woods would have ten numbers tracking each component back to each wood's initial sourcing. The unique musical instrument title number would make it simple to track back to these ten sourcing numbers through the registry database by searching the title number. In the event of later instrument modification, additional harvest sourcing numbers could be added to the individual instrument title in the registry database. Most important of all, because the third party examiner will determine compliance with due care at the original point of harvest, this wood titling system does away with the possibility of individual liability for noncompliance with due care.²¹³

211. Just as a public officer must be notified when a car changes hands so that the public officer can "record the transfer [of the title] on his books and records," the same should be true for musical instruments. 27 C.F.R. § 70.186 (2006). Once a musical instrument has a musical instrument "title," a record should be kept of who currently has the title, and the record keeper should be notified when the title changes to another person.

212. See generally Hui-Chuan Chen & Edmund Prater, *Information System Costs of Utilizing Electronic Product Codes in Achieving Global Data Synchronization within the Pharmaceutical Supply Chain Network*, 6 INT'L J. OF INFO. SYS. & SUPPLY CHAIN MGMT. 62 (2013) (describing the use of supply chain information systems using product codes to organize and track pharmaceutical supply chains from source products to the end product using a web-based data network).

213. While some might argue that creating a titling system could lead to legitimizing illegally harvested wood products, the titling system could easily abate fraud by requiring people to record the weight and moisture content of the wood at each step down the chain of title. See WILLIAM SIMPSON & ANTON TENWOLDE, *WOOD HANDBOOK: WOOD AS AN ENGINEERING MATERIAL* 11–14 (1999) (discussing the relationship between wood weight and wood moisture content). After accounting for weight change based on moisture content, an increase in the total weight of all wood products originating from a harvest would indicate fraudulent introduction of wood into the chain of titling that was not part of the original harvest. See also Phil Mitchell, *Methods of Moisture Content Measurement in the Lumber and Furniture Industries*, NORTH CAROLINA STATE UNIVERSITY, http://www.ces.ncsu.edu/nreos/wood/wpn/methods_moisture.htm (last visited Apr. 6, 2015) (describing different methods of measuring the moisture content of wood).

Fraud could also occur if people try to attribute title to a musical instrument or instrument part to which this title does not belong. Obviously, if some sort of fraudulent action occurs, there would still be grounds for criminal and civil penalties to blameworthy parties. In the case of fraudulent documentation by the harvester or instrument manufacturer, a solution that would hold the harvester or manufacturer responsible while not attaching criminal liability onto the innocent consumer would be to create a re-certification process. Through this process, the instrument without proper title could get a new title, independent of the wood that was used to construct it, so that the individual consumer escapes liability. The blameworthy harvester or

In addition to the information it contains about the wood products used to make the instrument, the musical instrument title on the registry database should contain a place to list any compliant non-wood materials. For example, one very common material used for musical instruments is abalone.²¹⁴ Abalone are “single shelled, marine... snails.”²¹⁵ Abalone shells are used for creating decorative inlay patterns on the headstock of guitars and banjos.²¹⁶ The United States put white abalone (*Haliotis sorenseni*) on the ESA list in 2001, making importation and exportation totally illegal.²¹⁷ “Fortunately, nearly all abalone used for guitar inlays is of the pink, red or green variety.”²¹⁸ Although it sounds simple enough to avoid white abalone, it may be more difficult to identify white abalone from a small shard of shell since the official charts for determining the abalone species use characteristics of the living snail to identify the species.²¹⁹ It is common sense that the smaller the piece of abalone in the instrument’s inlay, the harder it will be to determine which type of abalone it is through visual inspection. To avoid any doubt as to which species of abalone is incorporated into an instrument and the age of the specimen, this information should be incorporated into the instrument’s title under this new system.

A less obvious but very necessary inclusion on the musical instrument title is to leave a place to record fake materials used in the instrument. Today, many instruments are made with

instrument manufacturer who made the fake title document would then be punished civilly or criminally without involving the consumer.

214. This paper is only concerned with ESA and CITES insofar as they relate to wood product transport. This paper is not intended to delve into the policy considerations of the use and harvest of animal products under the ESA or under the Marine Mammal Protection Act.

215. Abalone, NOAA FISHERIES, http://www.westcoast.fisheries.noaa.gov/protected_species/abalone/abalone.html (last visited Feb. 10, 2015) (describing the appearance and life cycle of abalone as well as threats to the species).

216. See generally Sean J. Barry, *Pearl Inlay Part II: Inlay Patterns, Layout, and Pearl Cutting*, INLAY.COM, <http://inlay.com/inlay/pearl/pearl-2.html> (last visited Feb. 11, 2015) (describing the process of guitar inlay installation).

217. See Thomas, *supra* note 47 (discussing ESA regulation of abalone).

218. *Id.*

219. *Abalone Identification Guide*, CAL. DEP’T OF FISH AND WILDLIFE, http://www.dfg.ca.gov/marine/invertebrate/ab_id.asp (last visited Feb. 11, 2015). On the identification chart, white abalone is easily recognized from other types of abalone by several distinctive features including yellowish green tentacles, and a yellowish tan body color with traces of orange. *Id.* However, these features are found only in the whole, living snail, not in the tiny sliver of shell shaped into a decorative inlay for a guitar. The interior of the shell’s iridescence for white abalone is described as “pearly white & pink.” In contrast, pink abalone has pink iridescence, flat abalone has “purplish pink” iridescence, and black, pinto, and threaded abalone all have “pearly white” iridescence. *Id.* Trying to tell the difference between black, pinto and threaded abalone when the snails are nothing more than a sliver of shell could prove very difficult.

imitation versions of materials that have become restricted. For example, ivoroid (which is essentially plastic) is used for a variety of musical instrument parts in place of ivory.²²⁰ “A single ply of white or ivoroid plastic is the most common choice in binding around the body” of a guitar.²²¹ Instead of restricted tortoise shell for guitar pickguards, musicians commonly use an imitation tortoise shell material made of acrylic.²²² The use of imitation materials is not merely a modern phenomenon. The guitar company Martin made a guitar with ivoroid binding as early as 1918.²²³ For the wood titling system to function as a cohesive, inclusive document for a musical instrument it is crucial for the database to include a place to record imitation materials on the musical instrument title so that there is no risk that an instrument without restricted materials is suspected of having any.

By preserving as much information as possible about every aspect of the materials that make up an instrument and putting this information into the instrument’s title, the title can remove any doubt about an instrument’s ability to cross a border because all of its components can easily be double checked for Lacey Act, CITES and ESA compliance.

This system would also ensure that consumers do not face the wrath of the infamous due care standard. This is because the shipment numbers of legally harvested and imported woods made into musical instruments would be recorded in title. As long as an instrument has title stemming from the third party examiner certifying that the harvester followed the standards of due care at the point of harvest, there can be no reason to hold the consumer liable for any type of harvest violation.

For this reason, musical instrument title can act as a passport for the instrument, a document that confirms the instrument does not violate any laws. The holder of the musical instrument’s title can therefore pass freely across borders because the issuance of the title to the consumer would act as an assurance that the instrument is compliant with all laws. Naturally, each instrument should have some sort of label or tag physically

220. *Ivoroid Bridge Pins*, STEWART-MACDONALD, http://www.stewmac.com/Hardware_and_Parts/Endpins_and_Bridge_Pins/Ivoroid_Bridge_Pins.html (last visited Feb. 10, 2015) (showing an online catalogue listing for Ivoroid bridge pins).

221. *How to Install Bindings*, STEWART-MACDONALD, http://www.stewmac.com/How-To/Online_Resources/Binding/How_to_Install_Bindings.html (last visited Feb. 11, 2015) (explaining how to install bindings on guitars and describing the common binding materials).

222. *Tortoise Pickguard Material for Archtop Instruments*, STEWART-MACDONALD, http://www.stewmac.com/Materials_and_Supplies/Pickguard_Materials/Tortoise_Pickguard_Material_for_Archtop_Instruments.html (last visited Feb. 10, 2015) (showing an online catalogue listing for acrylic tortoise material).

223. GEORGE GRUHN, *GRUHN’S GUIDE TO VINTAGE GUITARS: AN IDENTIFICATION GUIDE FOR AMERICAN FRETTEED INSTRUMENTS* 494 (2010).

attached to it. A labeling requirement will serve two purposes: to discourage people from attempting to claim untitled instruments are titled, and to make border crossing faster and easier by making the title number easily accessible to border patrol officers.

Much like a standard passport used for humans that includes a picture of the person who is to go across a border, these musical instrument titles the registry database should include several different pictures of the musical instrument. These photos could prove very useful for identification purposes because of the inherent uniqueness found in wood grains and would reduce the chance of fraud.²²⁴

Another important step in issuing musical instrument title would be to require the luthier to document the musical instrument's components before assembly so that the individual musical instrument parts can receive title.²²⁵ The new title system would require instrument manufacturers to weigh the parts of an instrument before assembly and record these weights in the documentation for the title. This requirement would be an easy step for the manufacturer.²²⁶

224. See Nick Engler, *Wood Grain*, WORKSHOP COMPANION (2009), http://workshopcompanion.com/KnowHow/Design/Nature_of_Wood/1_Wood_Grain/1_Wood_Grain.htm (describing how wood grains are unique due to each tree's individual growing patterns). The individual nature of each instrument's wood grain pattern will also make person-to-person sales of used instruments very simple. After the title system is implemented, people will inevitably want to buy and sell used instruments (through eBay, for example). If someone wants to buy a used instrument but wants to make sure that it has proper title, this individual can simply search for the instrument's title number on the registry and compare the picture of the instrument for sale with the picture of the instrument in the registry. This system would be similar to looking up a car's title before buying a used car. The National Motor Vehicle Title Information System (NMVTIS) "is designed to protect consumers from fraud and unsafe vehicles and to keep stolen vehicles from being resold." NATIONAL MOTOR VEHICLE TITLE INFORMATION SYSTEM, <http://www.vehiclehistory.gov/index.html> (last visited Mar. 20, 2015). The NMVTIS website has tools to allow consumers to access a used car's history and offer tips on buying a used car. *Id.* The musical instrument title system could operate similarly.

225. In cases where an instrument without title is purchased from a third party or when the luthier, due to illness or death, is unable to provide information about the instrument, there should be an opportunity to consult with local botanists, other luthiers, or wood experts to seek information about the wood's origins and receive title.

226. Requiring musical instrument manufacturing companies to provide consumers with information about the contents of purchased instruments is particularly important for instruments made with veneers. Veneers make it much harder to decipher which woods are contained in an instrument. Once the layers of wood have been glued together it is difficult to list the amounts of each material used. See Elizabeth Baldwin & Leonard Krause, *Complying with the Lacey Act: A Real-World Guide*, COMPLIANCE SPECIALISTS, LLC, (2010), <http://laceyactresources.com/> (giving an example of how a veneer complicates Lacey Act documentation). An example of how a veneer can complicate Lacey Act documentation is "an engineered floor . . . made in China

This new system of wood titling would solve another critique of the current musical instrument passport system: the three-year validity period.²²⁷ If a musical instrument has qualified for a musical instrument passport, why should the passport last only three years? A better arrangement would be to use the car title analogy of the system of documentation proposed above to allow each instrument a lifelong document certifying that the woods used in its making were legally harvested and imported. In addition, this Proposal's titling system would also serve to eliminate the strict liability²²⁸ forfeiture penalties that currently exist under the Lacey Act.²²⁹

Some guitar lovers have speculated about the drastic solution of using only woods that are grown, harvested, and manufactured within the United States.²³⁰ For example, a luthier could use cherry wood for guitar necks instead of more traditional woods that are restricted under the Lacey Act.²³¹ However, others note that a change to using local woods for guitars to avoid Lacey Act

[that] contain[s] a Meranti plywood core made in Malaysia and a top veneer of Red Oak originally from the United States." *Id.* All of these woods, including the Red Oak from the United States, must be documented. *Id.*

In contrast, particle board and fiberboard are not necessarily problematic under the Lacey Act in the same way as veneer woods because APHIS specifically addressed this concern in creating a list of recommended genus and species codes for particle board, fiberboard products, and similar products. *See generally* U.S. DEP'T OF AGRIC., LACEY ACT PLANT AND PLANT PRODUCT DECLARATION SPECIAL USE CODES (2011), available at http://www.aphis.usda.gov/plant_health/lacey_act/downloads/lacey-act-special-use-codes.pdf (compiling a chart of Special Use Codes to help in documenting composite, recycled, reused, or reclaimed materials). *See also* Adam Grant & Sofie Beckham, *IKEA's Response to the Lacey Act: Due Care Systems for Composite Materials in China*, FOREST LEGALITY ALLIANCE, <http://www.forestlegality.org/document/ikea%E2%80%99s-response-lacey-act-due-care-systems-composite-materials-china> (last visited Mar. 20, 2015) (describing IKEA's methods of exercising due care with regards to producing composite products such as particleboard and fiberboard).

227. *See* FREQUENT CROSS-BORDER NON-COMMERCIAL MOVEMENTS OF MUSICAL INSTRUMENTS, *supra* note 43 (stating that the musical instrument passports are valid for three years maximum).

228. *See* Testimony of Stephen Guertin, *supra* note 159 (stating that the 1981 Amendment to the Lacey Act created strict liability forfeiture provisions).

229. *See also* LIEBESMAN & PETERSEN, *supra* note 148, at 61 (discussing the court's view that strict liability forfeiture is necessary to "fulfil[] congressional intent and minimiz[e] the ability of individuals from capitalizing on misdeeds").

230. *See* Doug Ingram, Comment to *Re: The Lacey Act, Your Experiences*, CLASSICAL GUITAR (July 19, 2010, 3:26 PM), <http://www.classicalguitar.delcamp.com/viewtopic.php?f=11&t=51415&start=15> (heartily endorsing using local woods for instrument making, and describing crafting a guitar out of wood cut from his family's backyard).

231. Michael N., Comment to *Re: The Lacey Act, your experiences*, CLASSICAL GUITAR (July 19, 2010, 11:20 PM), <http://www.classicalguitar.delcamp.com/viewtopic.php?f=11&t=51415&start=15> (suggesting that cherry wood may be a viable option for guitar necks because both Mahogany and Cedrela woods are restricted under CITES).

ramifications will likely take some time for the music world to embrace because of the traditional role foreign woods have played in guitar construction.²³² Further, because many local woods²³³ have not traditionally been used in instrument construction, they are not in high demand, and therefore supplies are limited.²³⁴ For example, although apple trees are certainly a local source of wood in the United States, lumberyards do not ordinarily carry apple wood.²³⁵ Such radical consequences could be avoided by implementing the titling system outlined above.

After creating the titling system, the United States should construct a database of the foreign laws they intend to enforce against individuals under the Lacey Act. As yet, no registry of foreign laws has been created,²³⁶ and musicians have highlighted this as a key problem.²³⁷ It would be wise for the United States to

232. Guitar-ded, Comment to *Re: The Lacey Act, your experiences*, CLASSICAL GUITAR (July 18, 2010, 5:09 PM), <http://www.classicalguitar.com/viewtopic.php?t=51415&start=15> (quoting Jim Frieson, who states that although he “look[s] forward to the day when it will become more accepted that a decent guitar can be made from woods other than those currently desired,” using local woods is “nowhere near happening in Japan for high end classical guitars”).

233. See Lewis Santer, *The Continuing Search for Good Sounding, Structurally Stable, Un-Endangered, Beautiful Local Woods that Instrument Buyers Will Accept*, LSANTER (Nov. 30, 2011), <http://lsanter.com/the-continuing-search-for-good-sounding-structurally-stable-un-endangered-beautiful-local-woods-that-instrument-buyers-will-accept-part-1/> (describing the author’s experiment in building a musical instrument with all local materials). In light of the Gibson raids, the author discusses his goal of building wooden musical instruments with all California materials. *Id.* He then discusses his “newest find,” persimmon wood, which he states is from the ebony family. *Id.* He speculates that the persimmon wood will be useful for fingerboards. *Id.*

234. Alan Carruth, *Re: The Lacey Act, Your Experiences*, CLASSICAL GUITAR (July 22, 2010), <http://www.classicalguitar.com/viewtopic.php?t=51415&start=15> (stating that the wood Osage Orange has only been used for fence posts and archery bows in the past and has not been harvested for “any sort of high-end use”; he voices the hope that these woods will become more available on the market for these sorts of uses).

235. *Id.*

236. See U.S. DEP’T OF AGRIC., *supra* note 12, at 2 (stating that “[i]t is the responsibility of the importer to be aware of any foreign laws that may pertain to their merchandise prior to its importation into the United States” and that “[c]urrently, the U.S. Government has no plans to create such a database”).

237. Speaking for the League of American Orchestras, one author discussed the current difficulties in transporting instruments between countries. Robert Sandla, *Something to Declare*, Summer 2013 SYMPHONY 27 (2013), available at http://americanorchestras.org/images/stories/adv_gov_pdf/Something%20to%20Declare.pdf.

One reason the permitting process remains complicated is that the CITES passport only covers one aspect of permit requirements. CITES is the minimum permitting threshold set by all 178 of the participating countries. Each country could have its own domestic requirements, as we do here. The CITES passport will help musicians satisfy one layer of permitting with a single document. Musicians will still need to check with each country to which

compile a list of the foreign laws it intends to enforce against individuals.

The proposals outlined in this Section are ones that will hopefully be both instructive of the flaws in the current system of musical instrument passports, and serve as viable recommendations for changes to the system in the future.

V. CONCLUSION

In conclusion, the 2008 Amendment to the Lacey Act, although well-meaning, does not apply gracefully to the context of wooden musical instruments. A variety of changes must be made to help corporations and consumers avoid criminal liability without undue burden. With a stronger focus on the realities of musical instrument tone woods, the Act could be modified and improved to achieve its goal of preventing deforestation and illegal logging while allowing musical instrument makers and consumers to safely transport and enjoy wooden musical instruments.

they travel to see if additional permits are required. We hope that there will eventually be some central resource that musicians could access so they can understand the requirements of each country. As yet that kind of resource doesn't exist. *Id.*