

# 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

BY

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*This Comment aims to provide an investigative view of the Lacey Act's impact on international plant and animal trade in the context of musical instrument dealing and manufacturing. The Comment first discusses the history of the Lacey Act, followed by a more in-depth discussion of the Act's 2008 amendment to extend protection to the harvest of plants and wood products. It then examines several instances where musical instrument manufacturers and dealers have been accused of and sometimes prosecuted for violating the Lacey Act, as well as an inspection of a few non-musical cases involving the Lacey Act and similar legislation. The Comment next addresses the issues and problems facing the Lacey Act in relation to the musical instrument trade. Finally, the Comment gives a set of recommended solutions for fixing the Lacey Act that would remedy its shortcomings without sacrificing the environmental aims and effectiveness of the law.*

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## I. INTRODUCTION

The Lacey Act of 1900<sup>1</sup> was passed into law at the turn of the twentieth century with the original intent of enforcing animal poaching laws in the United States. Since then the law has been expanded to include foreign laws, as well as protection of plants, animals, and products. An industry that has been particularly concerned with the Lacey Act because of its restrictions on the use of raw woods and animal products, and which has recently become the target of numerous prosecutions for violating the Act, is that of musical instrument manufacturers and dealers. While the Lacey Act has received a great deal of praise for its impact on curtailing animal poaching and deforestation, it is not without many faults.

This Comment first discusses the history of the Lacey Act, followed by a more in-depth discussion of the Act's 2008 amendment to extend protection to the harvest of plants and wood products. It then examines several instances where musical instrument manufacturers and dealers have been accused of and sometimes prosecuted for violating the Lacey Act and inspects a few nonmusical cases involving the Lacey Act and similar legislation. The Comment next addresses the issues and problems facing the Lacey Act in relation to the musical instrument trade. Finally, the Comment gives a set of recommendations for fixing the Lacey Act to remedy its shortcomings without sacrificing the environmental aims and effectiveness of the law.

## II. HISTORY OF THE LACEY ACT

The Lacey Act was passed into law in 1900 with the primary goal of preserving endangered animals and wild birds by making it a federal crime to illegally hunt game in one state and profit from its sale in another state.<sup>2</sup>

<sup>1</sup> Act of May 25, 1900, ch. 553, 31 Stat. 187 (codified as amended at 16 U.S.C. §§ 3371–3378 (2006 & Supp. II 2008)).

<sup>2</sup> REBECCA F. WISCH, ANIMAL LEGAL & HISTORICAL CTR., OVERVIEW OF THE LACEY ACT (Mich. State Univ. Coll. of Law, 2003), <http://www.animallaw.info/articles/ovuslaceyact.htm> (last visited Apr. 7, 2012).

Further concerns regarded the introduction of nonnative species into new ecosystems.<sup>3</sup> In 1935, the statute's provisions were expanded to cover international trade.<sup>4</sup>

In 1969, the Lacey Act was amended to include protection to amphibians, reptiles, mollusks, and crustaceans.<sup>5</sup> The mens rea requirement was changed to "knowingly and willfully" for criminal violations and civil remedies for negligent conduct were provided.<sup>6</sup> The 1969 amendment also increased the maximum penalty to \$10,000 and a one-year imprisonment.<sup>7</sup>

In 1981, the "willful" element of the Lacey Act was removed so that only knowing conduct was necessary to be found in violation of the law.<sup>8</sup> The law also expanded the species it protected to include indigenous plants.<sup>9</sup> A cap was put on civil penalties at \$10,000, and a system to separate felony and misdemeanor offenses was put in place based on the conduct of the offender and market value of the species. This made the penalty for misdemeanor offenses \$10,000 and up to a one-year imprisonment, but increased the penalty for felony offenses to \$20,000 and up to a five-year imprisonment.<sup>10</sup> Wildlife agents were given a greater role in the prosecution of felony offenses in 1981, including the ability to arrest without a warrant.<sup>11</sup> In 1988, the law changed to bring culpability to those who served as guides or assisted in providing illegal hunts for protected species.<sup>12</sup> The law was also amended to implicate anyone who falsified documents for the import, export, or transport of protected species, as well as making those found to have knowledge of the import or export of species valued over \$350 guilty of a felony.<sup>13</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> Press Release, U.S. Fish & Wildlife Serv., Nation Marks Lacey Act Centennial (May 26, 2000), available at <http://www.fws.gov/news/NewsReleases/showNews.cfm?newsId=A11C3D49-AC20-11D4-A179009027B6B5D3>; see Act of June 15, 1935, Pub. L. No. 77-148, ch. 261, 49 Stat. 378 (codified as amended at 16 U.S.C. § 3372(a)–(d) (2006 & Supp. II 2008)).

<sup>5</sup> WISCH, *supra* note 2; Act of Dec. 5, 1969, Pub. L. No. 91-135, § 1, 83 Stat. 275 (codified at 16 U.S.C. § 3371(a) (2006)).

<sup>6</sup> WISCH, *supra* note 2; § 7, 83 Stat. at 280 (codified as amended at 16 U.S.C. § 3373(d) (2006)).

<sup>7</sup> WISCH, *supra* note 2; § 7, 83 Stat. at 280 (codified as amended at 16 U.S.C. § 3373(d) (2006)).

<sup>8</sup> WISCH, *supra* note 2; Act of Nov. 16, 1981, Pub. L. No. 97-79, § 4, 95 Stat. 1073, 1076 (codified as amended at 16 U.S.C. § 3373(d) (2006)).

<sup>9</sup> WISCH, *supra* note 2; § 2, 95 Stat. at 1073 (codified as amended at 16 U.S.C. § 3371(f) (2006)).

<sup>10</sup> WISCH, *supra* note 2; § 4, 95 Stat. at 1074–75 (codified as amended at 16 U.S.C. § 3373(a)–(d) (2006)).

<sup>11</sup> WISCH, *supra* note 2; § 6, 95 Stat. at 1077 (codified as amended at 16 U.S.C. § 3375(b) (2006)).

<sup>12</sup> WISCH, *supra* note 2; Act of Nov. 14, 1988, Pub. L. No. 100-654, § 101, 102 Stat. 3825, 3825 (codified as amended at 16 U.S.C. § 3372(c) (2006)).

<sup>13</sup> WISCH, *supra* note 2; §§ 102, 103, 102 Stat. at 3825–26 (codified as amended at 16 U.S.C. §§ 3372(d), 3373(d) (2006)); 18 U.S.C. § 3559(a)(5) (2006).

In 2008, the Farm Bill<sup>14</sup> amended the Lacey Act and extended its definition of “plants” to include trees, and added protection to products made from any illegally harvested plants and trees and the products made from them, including timber, furniture, paper, and musical instruments.<sup>15</sup> The 2008 amendment further created an import declaration requirement that importers must state specific sourcing information of all plants and wood, including the genus and species, the country from which it was taken, and the quantity and value of the plant or wood.<sup>16</sup> If the information is unknown, the importer is required to declare what the species of plant *likely* is, as well as all possible countries of origin.<sup>17</sup> For recycled materials, the importer must list the percent of protected material in the recycled content, as well as the species and origin information for each of the nonrecycled plant materials contained in the product.<sup>18</sup>

The Lacey Act today makes it “unlawful for any person to import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken, possessed, transported, or sold in violation of any law, treaty, or regulation of the United States or in violation of any Indian tribal law.”<sup>19</sup> Penalties are capped at \$250,000 for individuals and \$500,000 for organizations.<sup>20</sup> Additionally, those convicted under the Lacey Act can be forced to forfeit vehicles, aircraft, or other equipment used in the commission of the crime.<sup>21</sup>

### III. WHAT IS ILLEGAL UNDER THE 2008 AMENDMENTS TO THE LACEY ACT?

A violation of the Lacey Act’s 2008 amendment concerning plants requires two components: 1) a plant being taken, harvested, possessed, transported, sold, or exported in violation of United States law or the law of a foreign country, and 2) a person or company importing, exporting,

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<sup>14</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204, 122 Stat. 923, 1291–94 (codified as amended at 16 U.S.C. §§ 3371(f), 3373(a), (d) (Supp. II 2008)); see *Envtl. Law & Policy Ctr., Legislation*, <http://farmenergy.org/farm-bill-policy/farm-energy-legislation> (last visited Apr. 7, 2012) (stating that the Food, Conservation, and Energy Act is also known as the Farm Bill).

<sup>15</sup> § 8204, 122 Stat. at 1291–93 (codified as amended at 16 U.S.C. §§ 3371(f), 3373(a), (d) (Supp. II 2008)); see Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc., *2008 GAC Position Papers*, [http://www.ncbfaa.org/Scripts/4Disapi.dll/4DCGI/cms/review.html?Action=CMS\\_Document&DocID=11480&MenuKey=pubs](http://www.ncbfaa.org/Scripts/4Disapi.dll/4DCGI/cms/review.html?Action=CMS_Document&DocID=11480&MenuKey=pubs) (last visited Apr. 7, 2012); ENVTL. INVESTIGATION AGENCY, THE U.S. LACEY ACT: FREQUENTLY ASKED QUESTIONS ABOUT THE WORLD’S FIRST BAN ON TRADE IN ILLEGAL WOOD 1 (2007), *available at* <http://www.eia-global.org/lacey/P6.EIA.LaceyReport.pdf>.

<sup>16</sup> Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc., *supra* note 15; § 8204, 122 Stat. at 1291–93 (2008).

<sup>17</sup> Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc., *supra* note 15; § 8204, 122 Stat. at 1291–93 (2008).

<sup>18</sup> ENVTL. INVESTIGATION AGENCY, *supra* note 15, at 2; § 8204, 122 Stat. at 1291–93 (2008).

<sup>19</sup> 16 U.S.C. § 3372(a) (2006).

<sup>20</sup> U.S. Fish & Wildlife Serv., *supra* note 4; see also 16 U.S.C. § 3373(d) (2006) (listing penalties for knowing violations of Lacey Act provisions). The classification and maximum penalties for these offenses are established by 18 U.S.C. §§ 3359, 3371 (2006).

<sup>21</sup> 16 U.S.C. § 3374(a)(2) (2006).

transporting, selling, receiving, acquiring, or purchasing this illegally sourced plant in United States interstate or foreign commerce.<sup>22</sup> Neither element on its own constitutes a violation of the Lacey Act.<sup>23</sup> While the Act applies the federal and state law of the United States, as well as the laws of the nations which the wood or wood product contacts the stream of commerce, the Lacey Act does not impose state or federal laws of the United States laws on foreign nations.<sup>24</sup> The law does, however, apply United States federal law to domestic products in interstate commerce, allowing the federal government to prosecute illegally harvested plants within the United States.<sup>25</sup> If the plant is illegally harvested from federal or tribal lands, the Lacey Act does not require the plant to have entered into interstate commerce for the law to apply.<sup>26</sup> The declaration requirement does not apply to domestic products or plants harvested from federal or tribal lands—it is only necessary for imported goods.<sup>27</sup>

According to the Lacey Act, a “plant” is any part or derivative of any wild member of the plant kingdom, including products.<sup>28</sup> Plants listed the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),<sup>29</sup> the Endangered Species Act (ESA),<sup>30</sup> or on state endangered species lists are always protected; however, these laws often provide exceptions to their protections for trees and plants used for propagative or scientific purposes.<sup>31</sup> Though endangered species are included under the Lacey Act, “plants” are not limited to endangered species, and the Lacey Act applies to all plants and trees that are illegally harvested.<sup>32</sup>

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<sup>22</sup> ENVTL. INVESTIGATION AGENCY, *supra* note 15 (listing examples of acts related to the first element: “(1) theft of plants; (2) taking plants from an officially protected area, such as a park or reserve; (3) taking plants from other types of ‘officially designated areas’ that are recognized by a country’s laws and regulations; (4) taking plants without, or contrary to, the required authorization; (5) failure to pay appropriate royalties, taxes or fees associated with the plant’s harvest, transport or commerce; or (6) laws governing export or trans-shipment, such as a log-export ban”); *see* § 8204, 122 Stat. 923, 1291–92 (2008).

<sup>23</sup> ENVTL. INVESTIGATION AGENCY, *supra* note 15; *see* § 8204, 122 Stat. at 1291–92.

<sup>24</sup> ENVTL. INVESTIGATION AGENCY, *supra* note 15; *see also* § 8204, 122 Stat. at 1291–92.

<sup>25</sup> U.S. DEP’T OF AGRIC., LACEY ACT AMENDMENT: COMPLETE LIST OF QUESTIONS AND ANSWERS 10–11 (2010), *available at* [http://www.aphis.usda.gov/plant\\_health/lacey\\_act/downloads/faq.pdf](http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf); *see also* § 8204, 122 Stat. at 1292, (imposing the laws of any of the United States, and foreign laws, governing the export and transportation of plants).

<sup>26</sup> U.S. DEP’T OF AGRIC., *supra* note 25, at 11; 16 U.S.C. § 3372(a)(1) (2006).

<sup>27</sup> *See* 16 U.S.C. § 3372(f) (Supp. II 2008).

<sup>28</sup> ENVTL. INVESTIGATION AGENCY, *supra* note 15, at 2; 16 U.S.C. § 3371(f) (2006 & Supp. II 2008).

<sup>29</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243, 257–69 [hereinafter CITES].

<sup>30</sup> Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. IV 2010).

<sup>31</sup> *See, e.g.*, CITES, *supra* note 29, art. VII, ¶ 6 (exempting protections for certain noncommercial scientific exchanges of plants and plant material); 16 U.S.C. § 1539(a)(1)(A) (2006) (authorizing the Secretary to issue permits exempting otherwise prohibited actions if undertaken for scientific or propagation purposes); CAL. FISH & GAME CODE § 650 (authorizing the issuance of scientific collection permits for the use of otherwise protected plant specimens for scientific or propagation purposes).

<sup>32</sup> U.S. DEP’T OF AGRIC., *supra* note 25, at 1–2; 16 U.S.C. § 3371(f) (2006 & Supp. II 2008).

United States agencies in charge of monitoring imports for conformation with the Lacey Act include the Animal Plant Health Inspection Service, Fish and Wildlife Service (FWS), and Department of Homeland Security.<sup>33</sup> If items are seized, the case may be forwarded to the Department of Justice (DOJ) for forfeiture proceedings.<sup>34</sup> According to a spokesperson for FWS, once an item is seized it is placed into a large repository of seized items.<sup>35</sup> While some items in the repository are auctioned off, FWS has not had an auction since 1999, and items that could not have been legally imported for commercial purposes are not eligible for auction.<sup>36</sup> In the alternative, FWS has sometimes kept items seized for Lacey Act violations for educational purposes, such as using an instrument containing an illegal tortoise shell to demonstrate to children the activities which have led to the sea tortoise's endangerment.<sup>37</sup>

The Lacey Act requires a reasonable standard of due care in complying with the law.<sup>38</sup> Because of the flexible, fact-based standard that due care entails, combined with the lack of case law regarding the 2008 amendments thus far, businesses engaging in the trade of wood and wood products are unclear as to what steps must be taken to remain compliant with the law.<sup>39</sup> Musical instrument dealers and manufacturers were particularly concerned with the 2008 amendment because the woods widely thought to have the most desirable sonic characteristics are also typically Lacey Act-protected foreign woods.<sup>40</sup> Though musical instrument makers have great interest in tropical hardwoods, the vast majority of such wood is used in flooring and furniture production; roughly one percent of tropical hardwood is used to manufacture musical instruments.<sup>41</sup> Despite instrument makers' use constituting a small share of wood use in production, a photo of a Brazilian rosewood guitar is prominently displayed on the FWS Timber Import/Export Requirements fact sheet and the first page of the FWS Antiques sheet.<sup>42</sup> The permit form for export of plants also specifically refers to "vintage guitar purchaser and exporter" and "guitar manufacturer/exporter/lumber

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<sup>33</sup> ENVTL. INVESTIGATION AGENCY, *supra* note 15, at 2.

<sup>34</sup> *Id.*

<sup>35</sup> John Thomas, *A Guitar Lover's Guide to the CITES Conservation Treaty*, 11 FRETBOARD J., Fall 2008, available at <http://www.fretboardjournal.com/features/magazine/guitar-lover%E2%80%99s-guide-cites-conservation-treaty>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> 16 U.S.C. § 3373(a)(1), (d)(2) (2006).

<sup>39</sup> See ENVTL. INVESTIGATION AGENCY, *supra* note 15, at 4.

<sup>40</sup> See Statement, Andrea Johnson, Env'tl. Investigation Agency, Regarding 24 August 2011 Gibson Guitars Raid by US Fish & Wildlife Service (Sept. 8, 2011), [http://www.eia-global.org/News/Update\\_GibsonRaid.html](http://www.eia-global.org/News/Update_GibsonRaid.html) (last visited Apr. 7, 2012); see also Gulia Music Studio, Inc., *Guitars*, <http://guliamusic.com/guitars.html> (last visited Apr. 7, 2012) (listing types of woods and their most suitable uses on a guitar).

<sup>41</sup> Andrew C. Revkin, *Drop That Guitar and Put Up Your Hands . . .*, N.Y. TIMES, Oct. 8, 2011, <http://dotearth.blogs.nytimes.com/2011/10/08/drop-that-guitar-and-put-up-your-hands/> (last visited Apr. 7, 2012).

<sup>42</sup> Thomas, *supra* note 35 (discussing the placement of these images).

exporter.”<sup>43</sup> Most makers of guitars, however, recognize and respect the need for environmental protection of those desirable wood species used in guitars and support efforts like the Lacey Act that ensure the availability of tone wood species in the future.<sup>44</sup> Though some musical instrument manufacturers and dealers, who account for a negligible share of the wood used in commercial production and of the industries importing exotic woods into the United States, have been supportive of the Lacey Act,<sup>45</sup> musical instrument dealers and manufacturers were some of the first to be tested under the new requirements of the 2008 amendment to the Lacey Act.

#### IV. A SCALE OF ENFORCEMENT ACTIONS

##### A. A-440 Pianos, Inc.

One of the first instances of Lacey Act enforcement implicating a musical instrument importer came in September 2009, when vintage pianos imported by A-440 Pianos, Inc., of Atlanta, Georgia, were inspected by FWS on suspicion of having illegal elephant ivory on the pianos’ keys.<sup>46</sup> FWS officials inspected a shipment of eleven pianos ordered by A-440, one of which was declared as having keys or keyboards covered with elephant ivory.<sup>47</sup> FWS was alerted of the shipment by CITES when the A-440 CEO requested guidance on how to properly fill out the shipment’s paperwork.<sup>48</sup> Upon opening the packages, however, seven of the pianos had individual keys or the entire keyboard removed for suspicion of ivory use.<sup>49</sup> Those keys were found in a crate under furniture and personal effects, and 855 keys were later identified as coated in elephant ivory—classified as 1710 individual pieces of ivory.<sup>50</sup> Under CITES, both species of African elephants (*Loxodonta africana*) and Asian elephants (*Elephas maximus*) are subject to

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<sup>43</sup> *Id.*

<sup>44</sup> See Glenn Rifkin, *Saving Trees Is Music to Guitar Makers’ Ears*, N.Y. TIMES, June 7, 2007, <http://www.nytimes.com/2007/06/07/business/smallbusiness/07sbiz.html> (last visited Apr. 7, 2012) (discussing a coalition of guitar manufacturers joining with the environmental group, Greenpeace, to promote sustainable forestry “not just to appear politically correct but to ensure their long-term survival”).

<sup>45</sup> See Revkin, *supra* note 41; Craig Havighurst, *Why Gibson Guitar Was Raided by the Justice Department*, NAT’L PUB. RADIO, Aug. 31, 2011, <https://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department> (last visited Apr. 7, 2012) (quoting the Chairman and CEO of C.F. Martin Guitar Co. as calling the Act “a wonderful thing,” but noting that “[o]thers in the guitar world aren’t so upbeat”).

<sup>46</sup> Press Release, U.S. Dep’t of Justice, Metro Atlanta Piano Company and CEO Sentenced for Smuggling Illegal Elephant Ivory into the United States (Mar. 9, 2011), <http://www.justice.gov/usao/gan/press/2011/03-09-11.html> (last visited Apr. 7, 2012).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*; Pascal Vieillard, *A-440 Pianos Inc. Guilty of Illegally Smuggling Elephant Ivory into U.S.*, HUFFINGTON POST, Nov. 18, 2010, [http://www.huffingtonpost.com/2010/11/19/pascal-vieillard-a440-pia\\_n\\_785913.html](http://www.huffingtonpost.com/2010/11/19/pascal-vieillard-a440-pia_n_785913.html) (last visited Apr. 7, 2012).

strict trade regulations and require permits to be imported and exported.<sup>51</sup> A-440 originally contended that it did not violate the law because the ivory used on the keys was more than 100 years old, and thus not subject to Lacey Act provisions.<sup>52</sup> The issue, however, was not whether the old ivory should have been grandfathered and thus exempt from the Lacey Act, but whether the declaration paper work filled out for the pianos accurately described what was being imported to the satisfaction of Lacey's requirements.<sup>53</sup>

In November 2010, A-440 Pianos plead guilty in the District Court for the Northern District of Georgia to one felony count of smuggling elephant ivory into the United States.<sup>54</sup> The same day, A-440's CEO Pascal Vieillard plead guilty to one misdemeanor count of violating the Lacey Act by illegally importing pianos containing elephant ivory.<sup>55</sup> The maximum penalty A-440 Pianos faced was a \$500,000 fine and five years of probation, and the maximum penalty Vieillard faced was a \$100,000 fine and one year in federal prison.<sup>56</sup>

In March 2011, A-440 Pianos was sentenced to three years of probation with the condition that all pianos imported by the company in the future must enter through the Port of Atlanta, was assessed a \$17,500 fine, and was forced to forfeit all of the unlawfully imported ivory.<sup>57</sup> Vieillard received a three-year probation sentence and was also ordered to pay a \$17,500 fine.<sup>58</sup> Sally Quillian Yates, the U.S. attorney who prosecuted the case, felt A-440 Piano "deliberately violated laws that govern the importation of elephant ivory" and hoped the prosecution of A-440 would be a clear message to commercial enterprises that violations of laws designed to protect endangered species would not be tolerated.<sup>59</sup>

### B. Gibson Guitar Corporation

The 2008 amendment to the Lacey Act and its impact on musical instruments were tested when the Nashville, Tennessee headquarters and manufacturing facility for Gibson Guitar Corporation was raided in 2009 and

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<sup>51</sup> CITES, *supra* note 29, at 259 (listing the Asian elephant); CITES, *Common Name: African Elephant*, [http://www.cites.org/gallery/species/mammal/african\\_elephant.html](http://www.cites.org/gallery/species/mammal/african_elephant.html) (last visited Apr. 7, 2012) (stating that the African elephant was listed in 1990); *see also* Jeremy Hance, *CEO Sentenced for Smuggling Elephant Ivory into US*, MONGABAY, Mar. 14, 2011, [http://news.mongabay.com/2011/0314-hance\\_ivory\\_us.html](http://news.mongabay.com/2011/0314-hance_ivory_us.html) (last visited Apr. 7, 2012).

<sup>52</sup> *Pascal Vieillard*, *supra* note 50.

<sup>53</sup> *See* U.S. Dep't of Justice, *supra* note 46 (reporting that the package's invoice declared "no ivory keys," and lacked any Fish and Wildlife declarations or CITES permits).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Pascal Vieillard*, *supra* note 50; 16 U.S.C. § 3373(d) (2006) (establishing maximum fines for violations under the Act); Criminal Fine Improvements Act of 1987, Pub. L. No. 100-185, § 6, 101 Stat. 1279, 1280 (codified as amended at 18 U.S.C. § 3571 (2006)) (setting the maximum fines for misdemeanors committed by individuals at \$100,000, and the maximum fines for felonies committed by an organization at \$500,000).

<sup>57</sup> U.S. Dep't of Justice, *supra* note 46.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* (quoting U.S. attorney Sally Quillian Yates).

again in 2011.<sup>60</sup> Gibson is a privately held company founded in 1890, and is one of the largest instrument manufacturers in the world, making such famous guitar models as the electric Les Paul and SG, hollow body ES-335, acoustic Jumbo and hummingbird, as well as multiple bluegrass instruments such as banjos, mandolins, and dobros.<sup>61</sup> The company has acquired other instrument makers and makes pianos under the Baldwin brand and less expensive stringed instruments under the Epiphone brand.<sup>62</sup> Gibson has long been known as a leader in environmental activism in the music community. Gibson is one of the largest donors to the Rainforest Alliance, giving between \$315,000 and \$390,000 annually since 2006 in cash and guitars for the charity's annual gala dinner, and the Gibson CEO Henry Juskiewicz serves on the Rainforest Alliance's board.<sup>63</sup> Gibson has also consistently received the highest mark issued by the Rainforest Alliance, the Forest Stewardship Council (FSC) stamp of approval, given to companies found to have exceptional forest management standards and environmental practices.<sup>64</sup> The FSC label "ensures that the forest products used are from responsibly harvested and verified sources."<sup>65</sup> The Rainforest Alliance stopped accepting donations from Gibson and advised the company to take "major corrective action" to retain its FSC accreditation after federal investigation commenced against the company.<sup>66</sup>

Gibson Guitar Corporation's Nashville plant was first raided in November 2009, in connection with a shipment of Madagascan ebony to be used on guitar fingerboards.<sup>67</sup> The seized materials had an estimated value of \$70,000.<sup>68</sup> The debate between Gibson and federal officials seemingly

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<sup>60</sup> James R. Hagerty & Kris Maher, *Gibson Guitar Wails on Federal Raid Over Wood*, WALL ST. J., Sept. 1, 2011, <http://online.wsj.com/article/SB10001424053111903895904576542942027859286.html> (last visited Apr. 7, 2012).

<sup>61</sup> James C. McKinley, Jr., *Famed Guitar Maker Raided by Federal Agents*, N.Y. TIMES, Aug. 31, 2011, <http://artsbeat.blogs.nytimes.com/2011/08/31/famed-guitar-maker-raided-by-federal-agents/> (last visited Apr. 7, 2012); Gibson, *Products: Electric Guitars*, <http://www2.gibson.com/Products/Electric-Guitars.aspx> (last visited Apr. 7, 2012); Gibson, *Products: Acoustic Instruments*, <http://www2.gibson.com/Products/Acoustic-Instruments.aspx> (last visited Apr. 7, 2012); Gibson, *Larry Carlton ES-335*, <http://www2.gibson.com/Products/Electric-Guitars/ES/Gibson-Custom/Larry-Carlton-ES-335.aspx> (last visited Apr. 7, 2012); Gibson, *Gibson Hummingbird*, <http://www2.gibson.com/Products/Acoustic-Instruments/Square-Shoulder/Gibson-Acoustic/Hummingbird.aspx> (last visited Apr. 7, 2012).

<sup>62</sup> McKinley, *supra* note 61.

<sup>63</sup> Anita Wadhvani, *For Guitar Makers, Prized Woods Pose Quandary*, TENNESSEAN, Oct. 2, 2011, *reproduced at* <http://www.rainforestportal.org/shared/reader/welcome.aspx?linkid=246138> (last visited Feb. 17, 2012); *see* Rainforest Alliance, *Gibson Guitar Working with Rainforest Alliance on Wood Sourcing Legality*, <http://www.rainforest-alliance.org/forestry/gibson-usfws> (last visited Apr. 7, 2012).

<sup>64</sup> Wadhvani, *supra* note 63.

<sup>65</sup> Forest Stewardship Council, *FSC Certification*, <http://www.fsc.org/certification.html> (last visited Apr. 7, 2012).

<sup>66</sup> Wadhvani, *supra* note 63.

<sup>67</sup> Hagerty & Maher, *supra* note 60.

<sup>68</sup> Anita Wadhvani, *Gibson Guitar Renews Effort for Return of Ebony*, TENNESSEAN, Oct. 2, 2011, *reproduced at* <http://www.ongo.com/v/2031202/-1/B1C2CD6EFD5D2F1F/gibson-guitar-renews-effort-for-return-of-ebony> (last visited Apr. 7, 2012).

revolved around whether the seized wood was an unfinished wood product export, which Madagascar law bans or, as Gibson contends, was a finished good export that local officials approved.<sup>69</sup> United States officials, however, described the wood as “sawn timber” illegal to export under Madagascar law, causing Gibson to accuse the United States government of second guessing the findings of the Madagascar government.<sup>70</sup> Also leading to confusion regarding the laws of Madagascar was the fact that the country’s government was in the middle of a political coup in 2009 when the Gibson raid occurred, leaving some question as to what laws were valid and being enforced at the time of the wood shipment.<sup>71</sup> Chris Martin, CEO of C.F. Martin Guitar Co., explained that the coup had created an illegitimate government, which prompted his company to stop buying wood from Madagascar, though Gibson continued to import it until the 2009 raid.<sup>72</sup> Pete Lowry, ebony and rosewood expert at the Missouri Botanical Garden, described the Madagascar wood trade as the wood “equivalent of Africa’s blood diamonds.”<sup>73</sup> Since the 2009 raid, Gibson has stopped acquiring wood from Madagascar, instead seeking ebony and rosewood supplies from India.<sup>74</sup> The 2009 raid also prompted Juskiewicz to resign from the board of the Rainforest Alliance.<sup>75</sup>

Some reports describing the 2009 raid of Gibson note that more than a dozen agents equipped with automatic weapons “burst” into the company’s Nashville factory.<sup>76</sup> A wood product engineer at Gibson, Gene Nix, was questioned during the 2009 raid and told he could face as many as five years in jail for buying Madagascar rosewood and ebony, on what he referred to in e-mails following a 2008 trip to the country as “the grey market.”<sup>77</sup> Further, he described the Madagascar ebony as “highly threatened . . . due to over exploitation,” and United States officials have pointed to Nix’s similar statements that “[a]ll legal timber and wood exports are PROHIBITED because of widespread corruption and theft of valuable woods like rosewood and ebony” to imply his knowledge of wrongdoing.<sup>78</sup> Juskiewicz described Nix’s job as sorting wood in the factory, and took great offense to the use of multiple armed agents during the raid as well as the possible implication of a relatively low-level worker in the case, claiming that the quotes from his email were taken out of context.<sup>79</sup> In October 2011, Gibson

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<sup>69</sup> Hagerty & Maher, *supra* note 60 (describing Gibson’s process of cutting the raw wood into fingerboard prior to export).

<sup>70</sup> *Id.*

<sup>71</sup> Hank Campbell, *Gibson Guitars and the Lacey Act Misused*, SCIENCE 2.0, Sept. 3, 2011, [http://www.science20.com/science\\_20/gibson\\_guitars\\_and\\_lacey\\_act\\_misused-82210](http://www.science20.com/science_20/gibson_guitars_and_lacey_act_misused-82210) (last visited Apr. 7, 2012).

<sup>72</sup> See Havighurst, *supra* note 45.

<sup>73</sup> Eric Felten, *Guitar Frets: Environmental Enforcement Leaves Musicians in Fear*, WALL ST. J., Aug. 26, 2011, at D8 (quoting Pete Lowry).

<sup>74</sup> Hagerty & Maher, *supra* note 60.

<sup>75</sup> *Id.*

<sup>76</sup> McKinley, *supra* note 61.

<sup>77</sup> Hagerty & Maher, *supra* note 60.

<sup>78</sup> Wadhvani, *supra* note 63 (emphasis in original).

<sup>79</sup> Hagerty & Maher, *supra* note 60.

requested the return of the 2009 seized ebony, but their request was put on hold by a United States District Court judge, citing that a potential criminal investigation was under way, though no criminal charges had as of yet been filed against Gibson.<sup>80</sup>

On August 28, 2011, Gibson's Nashville and Memphis factories were raided a second time by federal officials, culminating in the confiscation of company documents, computer hard drives, pallets of Indian ebony and rosewood, guitars, and tools.<sup>81</sup> Like Madagascar, India has a ban on exports of unfinished wood.<sup>82</sup> Again, the 2011 Gibson raid centered around a disagreement over how to define guitar fingerboards: whether they are finished parts of musical instruments as they were declared by Gibson, or an unfinished raw material as the United States contends.<sup>83</sup> According to the affidavit which secured the search warrant of Gibson, fingerboard blanks more than ten millimeters thick cannot be exported under Indian law, and only finished veneers less than six millimeters thick are eligible to be exported.<sup>84</sup> The shipment seized from Gibson contained veneers ten millimeters in thickness.<sup>85</sup>

The Indian law prohibiting the export of unfinished wood materials is designed to protect woodworking jobs in India.<sup>86</sup> In a letter dated less than a month after the 2011 Gibson raid, however, India's Deputy Director-General of Foreign Trade, Vinod Srivastava, clarified in reference to the 2011 raid that: "Fingerboard is a finished product and not wood in primary form. The foreign trade policy of the government of India allows free export of such finished products of wood."<sup>87</sup> Government officials assert the 2011 raid was due to Gibson "fraudulently" labeling the wood in order to intentionally evade the Indian export ban, while Gibson has downplayed the alleged violation claiming it to be nothing more than "a broker [making a] mistake in filling out a form."<sup>88</sup> Juszkiewicz said that government officials suggested that had the remaining finishing steps to the fingerboards been done in India, rather than shipping the blanks for American workers to finish, that the company could have avoided prosecution for violating the Lacey Act.<sup>89</sup>

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<sup>80</sup> Wadhvani, *supra* note 68; *see also* McKinley, *supra* note 61 (regarding the fact that criminal charges have yet to be filed).

<sup>81</sup> McKinley, *supra* note 61.

<sup>82</sup> Hagerty & Maher, *supra* note 60.

<sup>83</sup> *Id.*

<sup>84</sup> McKinley, *supra* note 61.

<sup>85</sup> *See id.*; Robert V. Green, *Government Regulations: The Gibson Guitar Case*, BRIEFING.COM, Sept. 22, 2001, <http://www.briefing.com/investor/our-view/ahead-of-the-curve/government-regulations-the-gibson-guitar-case.htm> (last visited Apr. 7, 2012).

<sup>86</sup> McKinley, *supra* note 61.

<sup>87</sup> John Roberts, *After Gibson Raid, Other Guitar Makers at Risk of Breaking Law*, FOXNEWS.COM, Oct. 5, 2011, <http://www.foxnews.com/politics/2011/10/05/after-gibson-raid-other-guitar-makers-at-risk-breaking-law/> (last visited Apr. 7, 2012) (citation omitted) (quoting Deputy Director Srivastava).

<sup>88</sup> Hagerty & Maher, *supra* note 60.

<sup>89</sup> *See* David Grubbs, *Gibson Guitar's Montana Plant Not Subject to Raid*, ASSOCIATED PRESS, Sept. 2, 2011, [http://billingsgazette.com/news/state-and-regional/montana/article\\_e618168c-d5a6-11e0-bc6a-001cc4c03286.html](http://billingsgazette.com/news/state-and-regional/montana/article_e618168c-d5a6-11e0-bc6a-001cc4c03286.html) (last visited Apr. 7, 2012).

Gibson's acoustic guitar factory in Bozeman, Montana, continued to use wood from the same shipment as the wood seized in the 2011 raid in the production of their acoustic guitars with no governmental interference.<sup>90</sup>

In both cases, the precut ebony and rosewood blanks seized by federal officials were to be used eventually as fingerboards on Gibson guitars. Once in the possession of Gibson, the blanks would typically be sanded, glued, and shaped to fit a maple or mahogany guitar neck.<sup>91</sup> Next, decorative binding may be added to the outside of the fingerboard, and it may be given a coating of lacquer.<sup>92</sup> Finally, pearloid or clay inlays would be put onto the fingerboard, and slots would be cut for fret installation onto the neck.<sup>93</sup> A significant amount of work went into the ebony and rosewood to take it from harvest to cutting and shaping into fingerboard blanks before shipment to Gibson. However, after Gibson received the blanks, there was a large amount of finishing work remaining before the fingerboard blanks would be part of a playable guitar. This distinction between raw materials and finished products is what has fueled the debate between the United States and Gibson, and the reality of classifying the seized wood contained in the 2009 and 2011 shipments lies somewhere in the middle of the two sides' contentions.

### *C. Long & McQuade*

Another, lower-profile story involving the Lacey Act and import of musical instruments involves Long & McQuade, Canada's largest chain of musical instrument retailers. James Fry, a Long & McQuade employee, claimed that while sending a Taylor guitar containing abalone inlay from Long & McQuade in Canada to Taylor's headquarters in California for warranty repairs, FWS intercepted and seized the instrument and notified Fry that he needed a permit and paperwork to ship it across the border.<sup>94</sup> This was not the only instance of United States officials seizing American-made instruments from Long & McQuade when being returned to the United States for repair. Fry had a similar experience when shipping a Martin guitar back to the Pennsylvania factory for warranty repairs, this time receiving a \$225 fine for "knowingly shipping abalone shell" by mail to an employee in the shipping department.<sup>95</sup> In both cases, officials at Martin and Taylor confirmed that neither guitar was manufactured with any CITES-protected abalone species.<sup>96</sup> Stories like this have led other instrument dealers to stop

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<sup>90</sup> *Id.*

<sup>91</sup> Ted Drozdowski, *The Making of a Gibson USA Guitar*, GIBSON.COM, Mar. 11, 2009, <http://www.gibson.com/en-us/Lifestyle/Features/309-gibson-usa/> (last visited Apr. 7, 2012).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Thomas, *supra* note 35.

<sup>95</sup> *Id.* Long & McQuade paid the fine on behalf of the employee; however, FWS has not yet released the guitar. *Id.*

<sup>96</sup> *Id.*

shipping internationally, sometimes eliminating as much as forty percent of the dealer's business.<sup>97</sup>

#### *D. Non-Musical Instrument Cases*

The Lacey Act has also been criticized in non-instrument instances for its broad language that has given federal officials enormous discretion in prosecuting offenses. One example of federal officials overzealously enforcing legislation with similar wording to the Lacey Act came in June 2011, when eleven-year-old Skylar Capo rescued a baby woodpecker from being eaten by a cat at her father's house.<sup>98</sup> Skylar and her mother agreed to nurse the bird back to health for a day or two before setting it free.<sup>99</sup> On the way home Skylar and her mother, wanting to protect the bird from the summer heat, brought it with them when they entered a store to run an errand.<sup>100</sup> Inside the store, a woman from FWS informed the Capos that they were in violation of the federal Migratory Bird Treaty Act (MBTA),<sup>101</sup> legislation that is similarly worded to the Lacey Act,<sup>102</sup> for transporting a protected species.<sup>103</sup> The bird was released once the Capos got home, and Skylar's mother reported the incident to FWS; however, two weeks later the same FWS agent who originally alerted the Capos of the MBTA came with a state trooper to Ms. Capo's home to issue a \$535 fine and inform her that if

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<sup>97</sup> *Id.*; Havighurst, *supra* note 45. One other company that has recently been affected is Fender Musical Instruments Corp. (Fender), which filed for initial public offering March 8, 2012, with the U.S. Securities and Exchange Commission. Fender Musical Instruments Corp., Registration Statement (Form S-1) (March 8, 2012), <http://www.nasdaq.com/markets/ipo/filing.ashx?filingid=8089224> (last visited Apr. 7, 2012). In its registration statement, under the headline "Risks related to our business and industry," Fender disclosed that it was subject to an ongoing German criminal investigation pertaining to less than 500 Fender guitars containing Brazilian rosewood fingerboards to determine if they were improperly imported into Germany. *Id.* The registration statement mentions the raids at Gibson, and exemplifies the difficulties companies have complying with the law, stating: "Although we believe our sourcing and importation practices are in compliance with the Lacey Act and other applicable regulations, [FWS] or other applicable regulators could take a different view, which could restrict or prevent our use of specific types of woods from specific countries/regions of the world, and/or subject us to fines and other penalties." *Id.*

<sup>98</sup> *Girl Saves Woodpecker, but Her Mom Fined \$535*, CBSNEWS.COM, Aug. 4, 2011, <http://www.cbsnews.com/stories/2011/08/04/earlyshow/main20088063.shtml> (last visited Apr. 7, 2012).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> 16 U.S.C. §§ 703–712 (2006).

<sup>102</sup> *Compare id.* at §§ 703(a), 705, 707 (2006) (describing prohibitions against transport, import, and export of migratory birds, in whole or in part, and setting up a criminal penalty structure for knowing violations of the MBTA), *with* 16 U.S.C. §§ 3372(a), 3373(d) (2006) (prohibiting the export, import, transport, sale, purchase, etc. of fish or wildlife or plants taken in violation of any United States or Indian tribal law, and creating a criminal penalty for knowing violations of the Lacey Act).

<sup>103</sup> 16 U.S.C. § 705 (2006); *Agency Cancels \$535 Fine for Woodpecker Savior's Mom*, MSNBC.COM, Aug. 2, 2011, [http://www.msnbc.msn.com/id/43986826/ns/us\\_news-weird\\_news/t/agency-cancels-fine-woodpecker-saviors-mom/#.TqW2LLpy18](http://www.msnbc.msn.com/id/43986826/ns/us_news-weird_news/t/agency-cancels-fine-woodpecker-saviors-mom/#.TqW2LLpy18) (last visited Apr. 7, 2012).

convicted, Ms. Capo could face up to a year in jail for violating the MBTA.<sup>104</sup> Only after significant media ridicule did officials from FWS drop the fine and all charges related to the incident, as well as issue an apology to Ms. Capo for a “clerical error” which caused her to be “processed unintentionally.”<sup>105</sup> The similar language of the MBTA and the Lacey Act, along with common enforcement by FWS, shows how easily the broad scope of the law can be misinterpreted or overly enforced by individual federal officials, effectively turning harmless activities into federal crimes under the Lacey Act.

Another example of the wide-reaching enforcement of the Lacey Act involved Diane Huang, an employee of Ex-Im seafood distributor.<sup>106</sup> Ex-Im purchased seafood to be distributed to restaurants, in this case Caribbean spiny lobster, from Seamerica Corporation, who imported the lobster for Caribbean Dream Corporation, a large commercial fishing enterprise in Honduras.<sup>107</sup> In March 1999, the government seized 72,000 pounds of spiny lobster, some of which were argued to be either too small to be fished or egg-bearing and harvested in violation of Honduran fishing laws, all of which were packaged in bulk plastic bags instead of cardboard boxes required by Honduran law.<sup>108</sup> Officials from Caribbean Dream Corporation, Seamerica, and Ex-Im were all indicted and charged under the Lacey Act for their involvement in importing the lobster in violation of Honduran environmental law.<sup>109</sup> Whether or not the laws were still valid under Honduran law was a debated topic at trial, with the American court finally holding the laws to be valid and enforceable despite evidence from the defense that the Honduran laws that the Lacey Act violations relied on, specifically the cardboard shipping container requirement, were no longer enforced in Honduras.<sup>110</sup> The court also determined that the Lacey Act language that incorporates violations of “any foreign law” extends not only to statutory law of other nations, but also to foreign resolutions and regulations.<sup>111</sup> Though Diane Huang was merely an employee of Ex-Im, a company separated in the chain of distribution from the lobster harvesters who committed the Honduran violations, she was still found guilty under the Lacey Act and sentenced by the district court to twenty-four months imprisonment, a decision the Eleventh Circuit affirmed.<sup>112</sup> The case helps give some insight to the ranging scope of the Lacey Act as it reaches through the stream of commerce.

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<sup>104</sup> 16 U.S.C. § 707 (2006); *Agency Cancels \$535 Fine for Woodpecker Savior’s Mom*, *supra* note 103.

<sup>105</sup> *See Agency Cancels \$535 Fine for Woodpecker Savior’s Mom*, *supra* note 103.

<sup>106</sup> Brief of Appellant Diane H. Huang at 1, 5, *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003) (Nos. 01-15148, 02-10810, 02-11264).

<sup>107</sup> *Id.* at 5–6.

<sup>108</sup> *McNab*, 331 F.3d at 1233; Brief of Appellant Diane H. Huang, *supra* note 106, at 6.

<sup>109</sup> *See McNab*, 331 F.3d at 1232; Brief of Appellant Diane H. Huang, *supra* note 106, at 5.

<sup>110</sup> *See McNab*, 331 F.3d at 1233–34.

<sup>111</sup> *Id.* at 1239.

<sup>112</sup> *Id.* at 1235; Brief of Appellant Diane H. Huang, *supra* note 106, at 1–2, 5–7.

## V. FLAWS IN THE LACEY ACT

*A. Problems for Corporations*

Difficulties have obviously arisen from enforcement of the Lacey Act, primarily due to the 2008 amendments from the Farm Bill.<sup>113</sup> A duty has been imposed on individuals and corporations to inspect wood or plants and “products thereof.”<sup>114</sup> Though the task would not be unreasonably difficult for raw materials not far removed from the original harvester and supplier, other highly processed or recycled products that combine wood or other wild materials with nonwood materials raise more questions.<sup>115</sup> It is highly unlikely that the importer of such finished products would be able to accurately identify the root source of all its materials beyond the information their supplier provides them. Beyond that, everyone within the chain of distribution of an imported product is obligated to be able to identify the root source of the product’s component materials.<sup>116</sup> The Diane Huang case shows how far removed one can be from an initial environmental violation and still be heavily punished under the Lacey Act.<sup>117</sup> Additionally, the increased frequency of forged import paperwork means that even if a company investigates the sources of its wood and confirms that it is acceptable, the company must also verify whether the permits and documentation of the wood are one of the many forgeries in existence.<sup>118</sup> Vintage guitar guru and dealer George Gruhn described the Lacey Act as “a

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<sup>113</sup> The Animal and Plant Health Inspection Service of the Department of Agriculture issued numerous notices in the Federal Register requesting comments as they attempted to implement the 2008 amendments’ declaration requirement. Several issues were raised, such as the difficulty and expense of determining the origin of the many components of composite products, and the difficulty of declaring the origin of materials in a product made from reused plant materials or manufactured after the 2008 amendments were passed. Implementation of Revised Lacey Act Provisions, 76 Fed. Reg. 38,330, 38,330–31 (June 30, 2011) (advanced notice of proposed rulemaking).

<sup>114</sup> Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923, 1291–93 (codified at 16 U.S.C. §§ 3371(f) (Supp. II 2008)).

<sup>115</sup> Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc., *supra* note 15 (“The sheer magnitude of this list is extraordinary and includes such products as a rayon dress, Country Time lemonade (pineapple pulp, wood rosin), bicycles (rubber tire, recycled rubber pedal, rubber handles), pet shampoo (pine tar), wine with corks, books, chewing gum, maple syrup, lipstick (wood rosin), machinery with a rubber gasket.”).

<sup>116</sup> The Lacey Act includes a “due care” standard; a defendant is assumed to have exercised due care to determine whether materials were sold in violation of any laws. If a defendant “should have known” in his exercise of due care that materials had illegal sources, he “shall be fined not more than \$10,000, or imprisoned for not more than one year, or both.” 16 U.S.C. § 3373(d)(2) (2006). The due care standard even extends to an owner of “vessels, vehicles, aircraft, and other equipment used to aid in the importing, exporting, selling, receiving, acquiring, or purchasing of fish or wildlife or plants . . . for which a felony conviction is obtained”; if the owner should have known he was aiding the felon, his vehicle is subject to forfeiture. 16 U.S.C. § 3374(a)(2) (2006).

<sup>117</sup> See *supra* notes 106–12 and accompanying text.

<sup>118</sup> ENVTL. INVESTIGATION AGENCY & WORLD RES. INST., FACT SHEET: ARE YOU READY FOR THE LACEY ACT? 3 (n.d.), available at [http://www.forestlegality.org/files/fla/factsheet\\_are\\_you\\_ready\\_for\\_the\\_lacey\\_act\\_en.pdf](http://www.forestlegality.org/files/fla/factsheet_are_you_ready_for_the_lacey_act_en.pdf).

nightmare,” and that complying with it is “cumbersome, illogical and nearly unintelligible,” eventually causing him to stop doing business with international customers.<sup>119</sup>

In addition to identifying the source of each product’s materials, the Lacey Act also charges importers to conform to not only United States law and treaties, but to all foreign laws and treaties which regulate animals, plants, or trees.<sup>120</sup> Illustrating the volume and burden of researching all of another nation’s environmental laws, the Asian islands of Indonesia alone have almost 9000 laws, that could fall under the Lacey Act.<sup>121</sup> Included in that definition of “all foreign laws” are all resolutions and regulations of each nation, as found by the court in the Diane Huang case.<sup>122</sup> The Animal and Plant Health Inspection Service (APHIS) has stated, “It 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.”<sup>123</sup> APHIS further stated that the government has no plans to create a single database containing foreign laws that pertain to the Lacey Act.<sup>124</sup>

The lack of clarity in foreign laws further puts a company at risk because it is subject to United States courts’ interpretations of foreign law even where evidence of how the country of origin would have ruled is present. As seen in the 2011 Gibson raid, United States officials’ actions do not necessarily rely on even direct rulings from the exporting country’s government.<sup>125</sup> Not knowing how the United States court would potentially rule on a foreign law means that in almost every case there is a risk that items will be seized and the company will at best have to forfeit their property as well as what they paid for it, if not face additional fines and penalties.

Even for the most able corporate legal departments, having to research the environmental laws of multiple countries in addition to their own business and trade regulations is a tall order that only stands to increase the company’s costs. For smaller businesses such as A-440 Pianos, Ex-Im seafood distribution, and small instrument builders, the legal bills required to certify that imports are not in violation of the Lacey Act could jeopardize a company’s financial viability and bankrupt the company. Juskiewicz claims the cost of legal fees, manufacturing disruptions, and finding new materials have cost the company more than \$3 million from the 2009 and 2011 raids.<sup>126</sup> On top of that, Gibson elected to take on the additional cost of

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<sup>119</sup> Thomas, *supra* note 35.

<sup>120</sup> 16 U.S.C. § 3372(a) (2006); *see* ENVTL. INVESTIGATION AGENCY, *supra* note 15, 1–2.

<sup>121</sup> Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc., *supra* note 15.

<sup>122</sup> *See supra* notes 106–12 and accompanying text.

<sup>123</sup> U.S. DEP’T OF AGRIC., *supra* note 25, at 2.

<sup>124</sup> *Id.*

<sup>125</sup> *See* Barbara Taylor & Peter Morris, *No Strings Attached: The Latest Expansion of the Lacey Act*, WHITE COLLAR DEF. BLOG, Jan. 19, 2012, <http://www.illegal-logging.info/uploads/SheppardMullinLaceyActArticle.pdf> (last visited Apr. 7, 2012); *supra* notes 69–71.

<sup>126</sup> Elizabeth Bewley, Gannet Wash. Bureau, *Gibson Adds Lobbying Fees to Mounting Bills*, WBIR.COM, Oct. 12, 2011, <http://www.wbir.com/news/article/187569/2/Gibson-adds-lobbying-fees-to-mounting-bills> (last visited Apr. 7, 2012).

hiring the Washington, D.C., law firm Crowley & Morley LLP to lobby for the company's interests in changing the Lacey Act.<sup>127</sup>

Others recognize the critical importance of the Lacey Act. Bob Taylor, President of Taylor Guitars, claimed the new standards established under the 2008 Lacey Act amendments to not be an “unbearable added burden” and said his company was “happy to do the extra administrative work.”<sup>128</sup> A common problem, however, is that the parts of the world which are home to tone woods are also typically remote and rampantly corrupt, creating a high probability that traders in that area are not compliant with the law.<sup>129</sup> After traveling to Madagascar in 2008 to observe forestry and logging conditions, Taylor claimed that the country was a “ravaged land and a tangle of national laws that made it impossible to figure out what was legal and illegal to export,” and, as a result, that Taylor would follow the action of C.F. Martin Guitars and continue its practice of not purchasing any Madagascan wood.<sup>130</sup> Bob Taylor cited part of the problem in obtaining highly sought after tonewoods is that the most valuable species for guitars often grow in some of the world's most politically unstable countries, such as parts of Africa and South America.<sup>131</sup> Taylor claimed not to be an environmentalist, lawmaker, or forestry expert, but said that as a guitar maker he has had to take on those roles to be more involved in his wood sources and remain compliant with the Lacey Act.<sup>132</sup>

Despite its hesitancy regarding the Lacey Act, Taylor Guitars continues to be one of the most popular acoustic guitar brands in the world. A lesser known custom builder, Dave Berkowitz, claimed to be in fear of using the same types of wood seized from Gibson in 2011, saying: “One fine from Fish and Wildlife would shut me down and bankrupt me.”<sup>133</sup> And Berkowitz is not the only one who is afraid. The National Association of Music Merchants (NAMM), which represents roughly 9000 instrument merchants, wrote to President Obama and every member of Congress describing the unintended negative impacts of the Lacey Act in the wake of the Gibson Raid.<sup>134</sup> By requiring companies to research and comply with all foreign laws, and to accurately declare imports that contain plant and animal products no matter how far removed from harvest, the Lacey Act has unreasonably burdened instrument dealers and manufacturers—a state of affairs that must be remedied.

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<sup>127</sup> *Id.*

<sup>128</sup> Bob Taylor, *How Has the Lacey Act Influenced the Way You Do Business? A Conversation with Bob Taylor of Taylor Guitars*, FOREST LEGALITY ALLIANCE, Sept. 19, 2011, <http://www.forestlegality.org/media-resources/blogs/bob-taylor/how-has-lacey-act-influenced-way-you-do-business-conversation-bob-t> (last visited Apr. 7, 2012).

<sup>129</sup> Scott A. Paul, *The Lacey Act, Politics and Premium Guitars*, HUFFINGTON POST, Oct. 14, 2011, [http://www.huffingtonpost.com/scott-a-paul/forests-lacey-act\\_b\\_1011757.html](http://www.huffingtonpost.com/scott-a-paul/forests-lacey-act_b_1011757.html) (last visited Apr. 7, 2012).

<sup>130</sup> Wadhvani, *supra* note 63.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> Roberts, *supra* note 87.

<sup>134</sup> *Id.*

*B. Problems for Individuals*

Another question that remains unanswered is the scope of the Lacey Act for individuals. The A-440 Pianos case clearly demonstrated that the Act goes beyond raw materials to include finished instruments, and that mere instrument distributors could be targeted and not just instrument manufacturers. But the question still stands whether or not singular musicians who import instruments can be implicated under the Lacey Act. In a letter to United States Representative Marsha Blackburn, who serves as the Vice Chairman of the House Subcommittee on Commerce, Manufacturing, and Trade, the DOJ and the Department of the Interior attempted to clarify that question:

[P]eople who *unknowingly* possess a musical instrument or other object containing wood that was illegally taken, possessed, transported or sold in violation of law and who, in the exercise of due care, would not have known that it was illegal, do not have criminal exposure. The Federal Government focuses its enforcement efforts on those who are removing protected species from the wild and making a profit by trafficking in them.<sup>135</sup>

While the details of the A-440 Pianos case are unknown (regarding the degree to which the company exercised due care), it seems certain that the act of importing vintage pianos did not constitute “removing protected species from the wild.” Though it is unlikely that the agencies in charge of enforcing the Lacey Act would be justified in coming after individuals and their instruments, the broad language of the Act certainly does not preclude them from doing so. Even if an individual is able to avoid criminal exposure by exercising due care and unknowingly possessing a musical instrument containing wood in violation of the Lacey Act, they still risk seizure of the instrument.<sup>136</sup> Therefore, the owner of a 1920s Martin acoustic guitar which may contain Brazilian rosewood, a wood protected by CITES, cannot bring the guitar into the United States without a permit because of the chance that it may be seized.<sup>137</sup> Even if the owner is able to escape criminal fines and prison time for unknowingly possessing the wood, seizure of a such a classic instrument—worth upwards of \$10,000, and often invaluable to the player whose family has passed it down for generations—simply because the owner is unable to identify where the wood was harvested remains a strict penalty.<sup>138</sup>

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<sup>135</sup> Letter from Christopher J. Mansour, Dir., Office of Cong. & Legislative Affairs, Dep’t of the Interior, and Ronald Weich, Assistant Att’y Gen., Office of Legislative Affairs, Dep’t of Justice, to Marsha Blackburn, U.S. Rep., Tenn. (Sept. 19, 2011), *available at* [https://motherjones.com/files/doj\\_-\\_doi\\_response\\_re\\_gibson\\_guitar.pdf](https://motherjones.com/files/doj_-_doi_response_re_gibson_guitar.pdf).

<sup>136</sup> See 16 U.S.C. § 3374(a) (2006) (declaring subject to forfeiture “[a]ll fish or wildlife or plants imported, exported, transported, sold, received, acquired, or purchased contrary to the [Lacey Act] . . . or any regulation issued pursuant thereto”—other than the labeling requirements of section 3372(b)) (emphasis added); see Thomas, *supra* note 35.

<sup>137</sup> Felten, *supra* note 73.

<sup>138</sup> 16 U.S.C. § 3374(a) (2006).

One guitarist, John Thomas, who is also a professor at the Quinnipiac University School of Law, was told by an FWS employee that if he were to take his vintage Gibson acoustic guitar with a Brazilian rosewood fingerboard and bridge on an overseas vacation with him that he would need to have an export–import permit or else the guitar would “probably be seized,” and that he would not be able to get it back.<sup>139</sup> Thomas was also told by a spokesperson for the CITES secretariat in Geneva that travelers should be most concerned when traveling in or out of the United States, the European Union, Australia, or Japan, because those countries have the strictest enforcement efforts and domestic laws that are even stricter than CITES.<sup>140</sup> Under this strict application of the Lacey Act, an owner who knows that the body and neck of a guitar are made of legal maple or spruce would still risk seizure if small components of the guitar such as the nut and saddle are made of ivory instead of bone, or the bridge made of ebony and not properly declared on import.<sup>141</sup> Additionally, the declaration requirement of the Lacey Act demands that importers of wood be able to give sourcing information about their products,<sup>142</sup> shifting the burden of proof to the importer (rather than the government) to prove that a certain material in an instrument is legal—a nearly impossible showing in the case of valuable vintage guitars. The U.S. Department of Agriculture clearly states that the Lacey Act does not provide for any de minimis exception to the substantive prohibitions or declaration requirements of the Act.<sup>143</sup> While FWS officials claim not to have an interest in prosecuting individuals,<sup>144</sup> and common sense says doing so would be a misuse of limited federal resources, the statutory language of the Lacey Act does not preclude them from engaging in such prosecution.

Some CITES-protected plant and animal products are commonly used in the production of guitars. An owner may look for elephant ivory saddles, nuts, bridge pins, and binding; tortoise shell picks, pickguard, and binding; and Brazilian rosewood and Big-leaf (or Honduran) mahogany for the guitar

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<sup>139</sup> Thomas, *supra* note 35; Quinnipiac Univ. Sch. of Law, *Faculty Detail: W. John Thomas*, <http://law.quinnipiac.edu/x241.xml?School=&Dept=&Person=564> (last visited Apr. 7, 2012).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> See 16 U.S.C. § 3372(f) (Supp. II 2008) (requiring a declaration of the genus and species names of the plant to be imported, a description of its value and the quantity sought to be imported, and, if known, the plant’s country of origin; where the country of origin is unknown, and a species is commonly taken from more than one country, the importer must declare the name of each country from which the plant may have been taken).

<sup>143</sup> U.S. DEP’T OF AGRIC., *supra* note 25, at 2. The USDA mentions that the relative amount of an item may be used in considering the knowledge or due care requirements of the law, and makes note of enforcement agencies’ ability to exercise discretion in prosecuting potential penalties depending on the severity of the incident. The Government makes it clear, however, that no exception for negligible amounts exists under the Lacey Act. *Id.*

<sup>144</sup> See, e.g., *United States v. Monsoor*, 77 F.3d 1031, 1034 (7th Cir. 1996) (rejecting a Lacey Act defendant’s claim for vindictive and selective prosecution, while also noting that similar violations of the Act by other individuals were not often prosecuted by officials).

body.<sup>145</sup> For a layman, distinguishing between Brazilian, Indian, or Madagascan rosewood may be a difficult task, as would be distinguishing between Honduran mahogany (*Swietenia marcophylla*) and West Indian mahogany (*Swietenia mahagoni*).<sup>146</sup> The inability to discern the guitar wood's country of origin is not a defense to seizure of the instrument under the Lacey Act. If a guitar includes any CITES-protected plant or animal products, the general rule for importing the instrument is whether the material predates CITES protection of the material, measured by the date when the protected article was fashioned into its current form.<sup>147</sup> Further, there are only fourteen airports in the United States authorized for importing and exporting CITES species.<sup>148</sup> A FWS official was asked about the procedure when someone leaves through an authorized port in the United States—with proper permits—goes over seas, and returns to the United States through an unauthorized port (assuming the person could neither import the item into the United States through the unauthorized port, nor export the item from the unauthorized port).<sup>149</sup> The official said, "I've never thought about this or heard about this. I just don't know."<sup>150</sup> It is certainly difficult for the importing public to know how to abide by Lacey Act import laws regarding CITES-protected materials when the FWS law enforcement spokesperson cannot provide a reliable interpretation. Of course, in addition to the CITES-protected species, an importer must be aware of, and the owner must fear, the import of nonprotected species that are illegally harvested.<sup>151</sup>

An example of the difficulty tracing materials and the gravity of seizure of high value instruments at stake is the case of original Antonio Stradivari violins, many of which have historically sold at auction for upwards of eight

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<sup>145</sup> See generally Thomas, *supra* note 35 (discussing parts of the guitar that might contain illegal products).

<sup>146</sup> See U.S. Dep't of Agric., *Classification for Kingdom Plantae Down to Genus Swietenia Jacq.*, <http://plants.usda.gov/java/ClassificationServlet?source=display&classid=SWIET> (last visited Apr. 7, 2012) (click on the plant profiles—marked by a 'P'—to see the differences between the two species).

<sup>147</sup> Thomas, *supra* note 35 ("For ivory, the application date is June 1, 1947. Hawksbill turtle was included when CITES first came into effect on July 1, 1975. Brazilian rosewood was added on June 11, 1992. Guitars built before these dates are eligible for exemption. Yet, the crucial date isn't the manufacture date of the guitar or the harvest date of the CITES-protected stuff on the guitar. The controlling date is actually the date when the protected stuff was fashioned into its current form. If that fossilized ivory nut fell off a mastodon, say, 6 million years ago, was dug up 200 years ago and used for a piano key in 1820, but your luthier fashioned that old piano key into a nut and placed it on you[r] guitar last month, that ivory is a month old for CITES purposes—and subject to Appendix 1 restrictions.").

<sup>148</sup> *Id.* The airports are Anchorage, Atlanta, Baltimore, Boston, Chicago, Dallas-Fort Worth, Honolulu, Los Angeles, Miami, Newark/New York, New Orleans, Portland, San Francisco, and Seattle. *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> 16 U.S.C. §§ 3371(b), 3372(a) (2006).

figures.<sup>152</sup> Part of the mystique and value of Stradivarius violins is the fact that they were made only from 1644 to 1737, and only around 600 Stradivarius stringed instruments are still in existence.<sup>153</sup> In fact, the Smithsonian Museum of American History houses a family of five Stradivarius stringed instruments, which are occasionally loaned out to professional musicians for concerts and recordings.<sup>154</sup> More important to the Lacey Act, however, is the reality that after 300 years of scientific testing from biophysicists on the violins, no one is certain of what materials went into the construction that give the instruments their unmatched tone, thereby increasing their rarity because no one has been able to replicate their construction.<sup>155</sup> While spruce and maple woods are said to make up the violin body, much of the mystery lies in the nature of the mineral preservatives and finishing agents used to produce the violins.<sup>156</sup> Because so many questions remain regarding the construction of one of the most prized instruments in the world, it would be impossible to accurately declare the mystery materials used in its creation for purposes of importing a Stradivarius violin into the United States under the Lacey Act. The Lacey Act, in essence, stops the interstate trade of one of the most highly regarded instruments ever created; even if the government chooses not to target individual instrument owners, the most remote and unlikely risks—such as seizure of a \$16 million piece of property must—be taken seriously.

If federal agents are not pursuing an individual's single instruments, it is possible that they could go after an individual who travels with a great number of instruments that may contain materials falling under the Lacey Act's reach. ZZ Top guitarist, Billy Gibbons, for example, takes a number of guitars from his gargantuan collection with him when the band goes on tour.<sup>157</sup> Almost always included in that group of touring guitars is an authentic 1959 Gibson Les Paul, for which Gibbons has already turned down an offer of \$5 million.<sup>158</sup> Even with the access and financial capabilities available to Gibbons to discover the source of the guitar's wood, such a feat

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<sup>152</sup> Yoree Koh, *Stradivarius Nets \$16M for Japan Quake Relief*, WALL ST. J., June 21, 2011, <http://blogs.wsj.com/scene/2011/06/21/stradivarius-nets-16m-for-japan-quake-relief/> (last visited Apr. 7, 2012).

<sup>153</sup> *Id.*

<sup>154</sup> See Smithsonian Inst., *Stradivarius Violins*, [http://www.si.edu/Encyclopedia\\_SI/nmah/stradv.htm](http://www.si.edu/Encyclopedia_SI/nmah/stradv.htm) (last visited Apr. 7, 2012).

<sup>155</sup> Joseph Nagyvary et al., *Mineral Preservatives in the Wood of Stradivari and Guarneri*, PLOS ONE, Jan. 2009, at 1, 1, <http://www.plosone.org/article/info:doi%2F10.1371%2Fjournal.pone.0004245> (last visited Apr. 7, 2012).

<sup>156</sup> *Id.*

<sup>157</sup> D.X. Ferris, *Slash, Richie Sambora and Billy Gibbons Talk First Guitars, Famous Riffs*, ROLLING STONE MAG., Dec. 12, 2008, <http://www.rollingstone.com/music/news/slash-richie-sambora-and-billy-gibbons-talk-first-guitars-famous-riffs-20081212> (last visited Apr. 7, 2012). When asked to give a ballpark figure of how large his guitar collection was, Gibbons replied "Oh, it'd fill a ballpark." *Id.*

<sup>158</sup> 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/> (last visited Apr. 7, 2012).

is almost impossible due to its age.<sup>159</sup> Less able musicians are put at even more of a disadvantage. Though the idea of the government seizing instruments from famous musicians may seem farfetched, it is not far removed from the idea of seizing instruments from a small north Georgia piano salesman, and would likely net as many violations of the Lacey Act.<sup>160</sup>

## VI. SOLUTIONS

Leonard Krause, a Lacey Act consultant in Eugene, Oregon, recommends that importers hire attorneys in the countries they are exporting from, though he admits to the raised cost of business such attempts at compliance create.<sup>161</sup> For large corporations, hiring a foreign attorney is affordable and can be considered a cost of doing business. For small custom instrument builders, however, the risk of forfeiture of imported materials is greater not because the activity they engage in is any more illegal than that of a large corporation, but because they cannot afford the resources necessary to properly investigate the laws of foreign nations. In addition, if implicated under the Lacey Act, a small instrument manufacturer would typically be unable to pay the costs of mounting a proper defense in court, leaving their options at pleading guilty to a lesser offense or risking bankruptcy by taking the matter to trial with whatever counsel they can afford. For this reason, a *de minimis* exception should be created that exempts importers who are either too small to bear the legal costs of researching foreign laws or do not import enough to have an effect on the activities which the Lacey Act seeks to curtail.

As seen with Gibson and Diane Huang, those charged under the Lacey Act may face penalties for violations of foreign laws that the foreign nations themselves do not even enforce.<sup>162</sup> Considering the multitude of outdated and sometimes ludicrous laws still on the books in the United States,<sup>163</sup> American courts should be familiar with the idea of valid but rarely enforced laws.<sup>164</sup> It would be advisable for courts in Lacey Act cases to give great deference to evidence of how foreign countries enforce their own laws, rather than simply interpreting the statutory language.

An alternative to forcing companies to investigate the environmental laws of each country they export from is to expand the Lacey Act to include the pertinent language of the laws of those countries. Opponents to amending the Lacey Act point to more than a century of generally positive results in curtailing plant and animal poaching, and urge against sweeping

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<sup>159</sup> *See id.*

<sup>160</sup> *See supra* Part IV.A.

<sup>161</sup> Hagerty & Maher, *supra* note 60.

<sup>162</sup> Campbell, *supra* note 71; *see supra* Part IV.D.

<sup>163</sup> *See, e.g.*, TENN. CONST. art. IX, § 3 (disallowing any person who fights a duel or challenges someone to a duel from holding office in state government).

<sup>164</sup> *Id.*; *see also* C. A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 VAND. L. REV. 1805, 1841 (2001) (noting that dueling no longer exists as a legal issue, but statutes prohibiting it exist as a recognized anachronism).

changes to an overall successful law.<sup>165</sup> Instead, changes to the law should be carefully calculated to remedy the problems that have recently come to light as a result of the 2008 amendment, as well as address technological developments which have made it easier for individuals and small merchants to engage in international instrument trade. Rather than have a blanket statement that enforces all foreign statutes and regulations against American importers, the United States could organize a codebook categorized by exporting country and material imported, and explicitly incorporate all of the relevant law for each exporting country into American law. Lacey Act violators could be charged for direct violation of United States law if the Act expressly adopted the language of the foreign laws, instead of charging for violations of any foreign law under the blanket provision that enforces foreign laws as the Lacey Act currently provides. While there would be an initial cost to the government to research and draft the new legislation, the initial cost plus the maintenance to update the Act as foreign countries' laws change would pale in comparison to the costs saved to prosecutors who would no longer have to research foreign environmental laws themselves. The United States could then selectively include only those foreign laws which further the goals of the Lacey Act, are still enforced by their host country, and can easily be interpreted and enforced by American courts. By creating a codebook of foreign laws that the Lacey Act specifically incorporates, instead of generally requiring individuals and companies to take on the costly job of investigating foreign laws themselves, relevant law regarding what the Lacey Act prohibits would be provided in a clear and accessible manner.

In addition to modifying the statutory language, a system could be implemented by one of the agencies responsible for enforcing the Lacey Act that would allow companies and individuals to submit requests for rulings on specific situations similar to private letter rulings provided by the Internal Revenue Service (IRS).<sup>166</sup> In such a system, any importer could request that United States officials make a determination of what items would need to be declared and which laws would need to be followed for any given import. This would give the importer a clear rule of law to rely on when importing goods, and would act as a defense in court if the importer acted consistently with the terms of the ruling. The use of private letter rulings in the Lacey Act would further give importers less ability to claim a lack of knowledge that they were in violation of the law, for if they had requested a private letter ruling, the law would have been clear. While it requires more work from the government, a system of private letter rulings could ease efficiency of imports as well as prosecution of Lacey Act cases.

Another alternative to the current status of Lacey Act enforcement would be for the government to establish a system of certifying foreign

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<sup>165</sup> See Paul, *supra* note 129.

<sup>166</sup> See, e.g., Internal Revenue Serv., *Private Letter Rulings, Technical Advice Memoranda and Field Service Advice Memoranda Involving Tax Exempt Bond Issues*, <http://www.irs.gov/taxexemptbond/article/0,,id=134365,00.html> (last visited Apr. 7, 2012); 26 U.S.C. § 6110 (2006) (describing the procedure for issuing an IRS written determination).

exporters.<sup>167</sup> By creating a list of United States certified companies who have demonstrated a history of exporting items in compliance with the Lacey Act, importers would easily be able to recognize legitimate business dealings. Under the law with certification, all those in the supply chain who have purchased from a certified exporter would be immune from Lacey Act liability.<sup>168</sup> Certification would not only further the goals of the Lacey Act, but would increase the value of exported goods by making importers more secure in their purchases.<sup>169</sup> Certification would also enable prosecutors and United States officials to more easily distinguish and monitor potential violators of the Lacey Act.

Further, clarification needs to be made to the declaration requirement of imported materials. Though the government claims that the purpose of the declaration requirement is “data acquisition and accountability,”<sup>170</sup> the requirement has often times brought wrongly declared or mislabeled imports to the government’s attention, leading to prosecution under the Lacey Act. While raw and recently cultivated materials’ sources may not be overly difficult to identify, manufactured goods are almost impossible to trace back to their source, especially the older they are. A possible remedy to the Lacey Act’s high standard of proof in the declaration requirement would be to only apply the requirement to raw materials and foreign manufactured goods, exempting items made in the United States. This alleviates a portion of imports that the government would otherwise have to monitor by also grandfathering United States goods made before the Lacey Act, while still effectively monitoring the illegal imports coming into the country. It is reasonable to believe that by monitoring the raw materials coming into the country, as well as foreign manufactured goods, domestically produced commodities could not be made from newly harvested illegal resources. This is inevitably the goal of the Lacey Act: to stop future environmental crimes from occurring, not to punish users of previously manufactured possessions that became illegal only after the Lacey Act or its 2008 amendment. As George Gruhn said, “I can’t help it if they used Brazilian rosewood on almost every guitar made prior to 1970. I’m not contributing to cutting down Brazilian rosewood today.”<sup>171</sup> The manner in which the Lacey Act currently jeopardizes goods that should be grandfathered into the law only serves to decrease the availability of highly sought after materials, in turn increasing demand for new cultivation of the species that the Lacey Act seeks to protect.

Another way of fixing the declaration requirement would be to create a passport-like system for imported items that would fall under the Lacey Act.<sup>172</sup> By allowing importers and manufacturers to register their instrument and work with federal officials to obtain proper documentation without risk

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<sup>167</sup> Revkin, *supra* note 41.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> U.S. DEP’T OF AGRIC., *supra* note 25, at 1.

<sup>171</sup> Havighurst, *supra* note 45.

<sup>172</sup> Thomas, *supra* note 35.

of seizure, the government would be able to maintain a database of instruments already in circulation containing materials pertinent to the Lacey Act. A passport system would also allow importers to confidently move instruments across United States borders, while concurrently allowing customs agents to track when the items cross international borders the same way they track people.<sup>173</sup> A CITES spokesperson said, however, that they would not consider implementing such a system and felt “that CITES is working well as it is.”<sup>174</sup>

Another recommendation is to limit the Lacey Act’s effect to the first sale of products, as a way of grandfathering protection to pre-Lacey Act materials.<sup>175</sup> The way the Lacey Act is presently written, instruments made hundreds of years ago are subject to scrutiny every time they enter the United States, forcing the importer, whether individual or business, to take on the impossible task of identifying the genus, species, and country of origin of every material on their instrument.<sup>176</sup> Not only does the law currently label nearly all international buyers of vintage instruments as federal criminals, but it does little or nothing to advance the goals of the Lacey Act.<sup>177</sup> Raw materials proven to have been harvested prior to being outlawed would be included in this grandfathering.<sup>178</sup> By including the raw materials, which many instrument manufacturers have stockpiled, but fear to craft into an instrument, the Lacey Act would be able to continue combating future deforestation while not making waste of older raw materials that were harvested before it became illegal to do so.<sup>179</sup>

In 2011, House of Representatives Democrat Jim Cooper and Republican Marsha Blackburn, both of Tennessee, introduced a bill to amend the Lacey Act to exempt any non-American wood that can be proven to have been in someone’s possession prior to the 2008 amendment.<sup>180</sup> The bill also aims to prohibit penalties against those who are unaware that they are in violation of the Lacey Act, allows reduced fines for first-time offenders, and requires the government to create a database of sources of illegal wood.<sup>181</sup> Republican Senator Rand Paul of Kentucky was joined by

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> See Taylor, *supra* note 128 (advocating for limiting the Lacey Act to the product’s first sale, to avoid placing an impossible burden on importers of guitars sold 50 or 100 years ago).

<sup>176</sup> *Id.*

<sup>177</sup> See *id.*

<sup>178</sup> Kathryn Marie Dudley, *Luthiers: The Latest Endangered Species*, N.Y. TIMES, Oct. 25, 2011, <http://www.nytimes.com/2011/10/26/opinion/are-guitar-makers-an-endangered-species.html> (last visited Apr. 7, 2012).

<sup>179</sup> *Id.*

<sup>180</sup> Pete Kasperowicz, *Lawmakers Look to Ease Lacey Act Regulations After Gibson Raids*, THE HILL: E<sup>2</sup>WIRE, Oct. 20, 2011, <http://thehill.com/blogs/e2-wire/e2-wire/188915-lawmakers-look-to-ease-lacey-act-regulations-after-gibson-guitar-raid> (last visited Apr. 7, 2012); Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act (RELIEF Act), H.R. 3210, 112th Cong. (2011).

<sup>181</sup> Kasperowicz, *supra* note 180; H.R. 3210, 112th Cong. §§ 1(11), 4 (2011).

four other Republican Senators to propose the FOCUS Act,<sup>182</sup> a more drastic amendment to the Lacey Act that would exempt American companies from having to abide by foreign export laws.<sup>183</sup> Additionally, Gibson joined forces in October 2011 with a group of other companies, nonprofits, and associations to create the Lacey Act Defense National Consensus Committee, a group aimed at developing a standard that will enable companies to operate successfully within the guidelines and intent of the Lacey Act.<sup>184</sup>

Though the government has issued statements that it is not interested in prosecuting individual instrument owners under the Lacey Act, the statutory language does not preclude it from doing so. Given the high value of many instruments, any ambiguity that creates risk of forfeiture to individual importers of musical instruments should be removed from the statute. As previously noted, it is likely that ZZ Top guitarist Billy Gibbons carries at least as many if not more materials protected under the Lacey Act when returning from an overseas tour as were confiscated in the A-440 Pianos case.<sup>185</sup> By creating exceptions to the current rule of the Lacey Act that give solace to those with instruments made prior to the enactment of the Lacey Act, or instruments previously declared and approved to enter the United States, the government could alleviate worries regarding the seizure of valuable vintage instruments while furthering the present and future goals of reduced animal poaching and deforestation.

## VII. CONCLUSION

While the Lacey Act has been amended and criticized during its century-long history, very few disagree with the ideals on which the law stands. In its time, the law has been instrumental in enforcing laws that are aimed to combat illegal poaching of animals and fight deforestation. With its benefits, however, many glaring flaws continue to appear in the enforcement of the Act. Nowhere has this been more true than in the musical instrument dealing and manufacturing industries, which have been targeted multiple times by the United States for violations of the Lacey Act. There are numerous steps

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<sup>182</sup> Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act), S. 2062, 112th Cong.; Press Release, Rand Paul 2010: U.S. Senate, Senator Paul Introduces FOCUS Act (Feb. 2, 2012), <http://www.randpaul2010.com/2012/02/senator-paul-introduces-focus-act> (last visited Apr. 7, 2012).

<sup>183</sup> See S. 2062 § 2(a) (removing from the 1981 Lacey Amendment's prohibited acts section any reference to violations of foreign laws in importing or exporting).

<sup>184</sup> *Group Forms to Establish Standard for Lacey Act Compliance*, MONGABAY.COM, Oct. 28, 2011, [http://news.mongabay.com/2011/1028-lacey\\_act\\_standard.html](http://news.mongabay.com/2011/1028-lacey_act_standard.html) (last visited Apr. 7, 2012). The group includes the National Association of Music Merchants, Rainforest Alliance, Forest Stewardship Council, Anderson Berkshire Hathaway, National Wood Flooring Association, Knoll, Williams Sonoma, Sustainable Furnishings Council, National Wildlife Federation, Floor Covering Institute, Wood Flooring International, Gibson Guitar Corporation, Staples, Home Depot, Kimberly-Clark, Columbia Forest Products, C.F. Martin & Company, Danzer Group, and the Capital Markets Partnership. *Id.*

<sup>185</sup> See *supra* notes 157–60 and accompanying text.

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that can be taken to correct the unforeseen problems surrounding the Lacey Act, alleviating the worries of the many companies and individuals who are uncertain about the Act's implementation. In addition, time and the prosecution of more Lacey Act violators will hopefully shed some light on the Act's scope and execution. Though the law has frequently received praise for its effectiveness, the Lacey Act is desperately in need of change so that it will avoid implicating innocent importers, while still being able to further its esteemed goals.