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Raymond R. Mandra

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***K Mart Corp. v. Cartier, Inc.*: Is Continued Gray Market Importation a Result of Gray Statutory Language or Judicial Legislation?**

I. Introduction

Gray market goods are those goods manufactured in a foreign country, bearing a legitimate United States trademark, which are imported into the United States without the permission of the United States trademark owner.¹ Section 526 of the Tariff Act of 1930 prohibits the importation of "merchandise of foreign manufacture" bearing "a trademark owned by a citizen of, or by a corporation . . . organized within, the United States" without the permission of the U.S. trademark owner.² Nevertheless, the current Customs Service regulations, 19 C.F.R. § 133.21(c),³ allow importation of gray market goods that meet the "common-control"⁴ or "authorized-use"⁵ exceptions to the exclusionary protection provided by Section 526. The issue before the Court in *K Mart Corp. v. Cartier, Inc.*⁶ was whether the Customs Service's interpretation of Section 526 of the Tariff Act of

1. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1555 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). Gray market goods are products "bear[ing] a 'genuine' trademark" and should not be confused with goods bearing counterfeit trademarks. Gray market goods are also classified as "parallel importations" when both the U.S. trademark owner and a third party are importing the foreign-manufactured goods. *Id.*

2. 19 U.S.C. § 1526 (1982); *see infra* note 25.

3. 19 C.F.R. § 133.21(c)(1)-(3) (1987); *see infra* note 43.

4. 3A R. CALLMAN, *UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES*, § 26.27, at 119-20 (4th ed. 1983 & Supp. 1988). The "common-control" exception, 19 C.F.R. § 133.21(c)(1)-(2) (1987), allows importation of gray market goods if the foreign manufacturer and the domestic trademark holder "are owned by the same person or business entity or the foreign and domestic trademark owners are parent and subsidiary companies or are subject to common ownership or control." *Id.*

5. *Id.* at 120. The "authorized-use" exception, 19 C.F.R. § 133.21(c)(3) (1987), allows importation of gray market goods when the domestic trademark holder has authorized the use of its mark by a foreign manufacturer on foreign-produced goods. *Id.*

6. 108 S. Ct. 1811 (1988).

1930,⁷ as promulgated in 19 C.F.R. § 133.21(c)(1)-(3) (1987),⁸ was a permissible interpretation of Section 526.⁹

In a 5-4 decision, the Court concluded that the common-control exception, 19 C.F.R. § 133.21(c)(1)-(2), which allows the importation of foreign-produced goods bearing a valid U.S. trademark when the foreign manufacturer is affiliated with or owned by the U.S. trademark holder, was a permissible interpretation of Section 526.¹⁰ However, a different 5-4 majority held that the authorized-use exception, 19 C.F.R. § 133.21(c)(3), which allowed importation of foreign-manufactured goods bearing a valid U.S. trademark if the U.S. trademark owner had licensed or assigned the use of the trademark to an independent foreign manufacturer, was an impermissible interpretation of Section 526.¹¹

The Court's decision, upholding the common-control exception despite an apparently contrary statutory mandate, not only underscored the vast deference that a reviewing court will give to an agency's interpretation of a statute,¹² but also was a blow to U.S. trademark owners seeking a monopoly within the U.S. market, which they previously thought to be conveyed by Section 526, for their foreign-produced goods bearing U.S. trademarks. Additionally, the Court's decision was an apparent victory for discount retailers, who depend on gray market imports as a source of relatively inexpensive brand name merchandise.¹³ A decision invalidating the regulations in full would have allowed U.S. trademark holders to sell their foreign-produced goods in foreign markets without fear of importation of those goods by a third party into the U.S. to compete directly with the

7. 19 U.S.C. § 1526 (1982); *see infra* note 25.

8. *See infra* note 43.

9. *K Mart*, 108 S. Ct. at 1814.

10. *Id.* at 1817. A 5-4 majority consisting of Justices Kennedy, White, Brennan, Marshall, and Stevens voted to uphold the common-control exception.

11. *Id.* A different 5-4 majority, however, consisting of Justices Kennedy, Blackmun, Scalia, and O'Connor, and Chief Justice Rehnquist voted to strike down the authorized-use exception. *Id.*

12. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 839, 844 (1984). "[C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" *Id.*

13. *High Court Refuses To Bar Import of Gray-Market Goods: Billions at Stake*, 11 L.A. Daily J., June 1, 1988, at 1, col. 2.

trademark owners own imported goods.¹⁴

The background and legislative history of Section 526 of the Tariff Act of 1930 and Customs Service regulations, 19 C.F.R. § 133.21(c), will be examined in Part II of this Note. In addition, Part II will set forth the various scenarios under which gray market importation occurs, the Court's standard of deferential review given to agency interpretations of congressional statutes, and the previous decisions of the courts on the validity of 19 C.F.R. § 133.21(c).

The procedural history of *K Mart* will be described in Part III of this Note. The Court's decision in *K Mart* will be presented in Part IV by separately examining each of three Justices' opinions on the common-control and authorized-use exceptions. Part V analyzes with particularity the statutory analysis employed by the Court in reaching its conclusion that the common-control exception of the Customs Service regulations is a reasonable agency interpretation of Section 526. Furthermore, Part V intimates that the Court misconstrued the intent of Congress as expressed by Section 526 through the application of flawed methods of statutory construction. Part VI concludes that the Court was practicing judicial legislation in upholding an agency regulation which is contrary to the plain meaning of Section 526 of the Tariff Act of 1930, and whose legislative history and purpose are at best ambiguous, in order to preserve a major industry which provides low-cost quality goods to American consumers. Additionally, Part VI suggests a method of statutory analysis, the application of which will give greater consistency to the courts' determination of the actual intent of a legislative body as expressed through a statute and which will thereby reduce the practice of judicial legislation.

14. See *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 917-18 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

II. Background

A. Origin of Section 526 of the Tariff Act of 1930

1. A. Bourjois & Co. v. Katzel

Section 526 of the Tariff Act of 1922 was a direct result of the Second Circuit Court of Appeals decision in *A. Bourjois & Co. v. Katzel*,¹⁵ which held that an American corporation which had purchased the United States trademark of a foreign corporation's product had no recourse against importation into the United States of that same genuine product by a third party.¹⁶ In *Katzel*, a U.S. corporation purchased from a French corporation the U.S. trademark for "Java" face powder manufactured by the French corporation.¹⁷ The Second Circuit in that case subscribed to the "universality" theory of trademark protection,¹⁸ which protects trademarks to ensure consumers that the article of purchase is the genuine article as represented by the trademark.¹⁹ Thus, in *Katzel*, the Second Circuit refused to grant relief to the U.S. trademark holder when a domestic competitor imported the genuine "Java" face powder purchased abroad from the French manufacturer and competed on the domestic market with the U.S. trademark holder.²⁰

In response to the Second Circuit's decision in *Katzel*, Congress enacted Section 526 of the Tariff Act of 1922.²¹ Subsequently, the United States Supreme Court reversed the decision of the Second Circuit²² when Justice Holmes embraced the trademark law theory of "territoriality," which espouses a prop-

15. 275 F. 539 (2d Cir. 1921), *rev'd*, 260 U.S. 689 (1923).

16. *Id.* at 543.

17. *Id.* at 539.

18. Under the "universality" theory of trademark law, merchandise bearing a valid trademark according to the law of one country would not be found to infringe if imported "[in]to another country where the exclusive right to the mark was held by someone other than the owner of the merchandise." *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1171 (S.D.N.Y. 1984).

19. *Katzel*, 275 F. at 543. "If the goods sold are the genuine goods covered by the trade-mark, the rights of the owner of the trade-mark are not infringed." *Id.*

20. *Id.* at 540.

21. See *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 909 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

22. *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923).

erty right in the owner of the mark regardless of the origin of the goods.²³ Congress later reenacted Section 526 of the Tariff Act of 1922 in identical form²⁴ as Section 526 of the Tariff Act of 1930.²⁵

2. Legislative History of Section 526

The legislative history which accompanied the enactment of Section 526 is limited.²⁶ It includes the transcript of a short Senate floor debate on the amendment of Section 526 to the Tariff Act of 1922²⁷ and a brief mention in the House Conference Report to the Tariff Act of 1922.²⁸ The House Conference Report tends to show that Congress intended to accept the trademark

23. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1564 (Fed. Cir. 1985). "Emphasizing the territoriality of trademark rights, the Court [in *A. Bourjois & Co. v. Katzel*, 260 U.S. 689 (1923)] reversed the Second Circuit's holding of non-infringement." *Id.* Under the territoriality theory of trademark law, "a trademark has a separate legal existence under each country's laws, and . . . its proper lawful function is [to protect] the domestic goodwill of the domestic markholder" built up in the consumer through the domestic markholder's business practices. *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1171-72 (S.D.N.Y. 1984).

24. *Coalition to Preserve the Integrity of American Trademarks*, 790 F.2d at 912.

25. 19 U.S.C. § 1526 (1982). Section 526(a) of the Tariff Act of 1930, codified at 19 U.S.C. § 1526(a) provides:

Except as provided in subsection (d) of this section, it shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of Title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said Title 15, unless written consent of the owner of such trademark is produced at the time of making entry.

Id.

26. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1562 (Fed. Cir. 1985).

27. 62 CONG. REC. 11,602-05 (1922).

28. *Vivitar*, 761 F.2d at 1562 (quoting H.R. REP. No. 1223, 67th Cong., 2d Sess. 158 (1922)). The Conference Report, H.R. REP. No. 1223, 67th Cong., 2d Sess. 158 (1922), reads as follows:

A recent decision of the circuit court of appeals holds that existing law does not prevent the importation of merchandise bearing the same trade-mark as merchandise of the United States, if the imported merchandise is genuine and if there is no fraud on the public. The Senate amendment makes such importation unlawful without the consent of the owner of the American trade-mark.

Id.

theory of "territoriality."²⁹ In addition, the Conference Report, without explanation, added to Section 526 the requirement that the trademark be "owned by an American citizen or corporation."³⁰

During the Senate floor debate, Section 526 was amended by adding the phrase "of foreign manufacture" after the word "merchandise" in response to a concern by Senator Irvine Lenroot of Wisconsin.³¹ Senator Lenroot feared that without this amendment Section 526 would preclude an American citizen from importing a good manufactured in the U.S. by a domestic corporation bearing a U.S. trademark which had been exported to a foreign country.³² Unfortunately, the last question posed by Senator Lenroot, which probed whether Section 526 was meant to exclude a foreign-manufactured good bearing a valid U.S. trademark when the manufacturer and the U.S. trademark owner were in a position of common control,³³ was never answered due to expiration of the debate's allotted time.³⁴ In *Coalition to Preserve the Integrity of American Trademarks v. United States (COPIAT)*, the D.C. Circuit concluded that the Senate's lack of response to Senator Lenroot's last question implied that the Senate intended Section 526 to exclude importation in situations of common control.³⁵ But in *Vivitar*, the Federal Circuit stated "that the debate is too unfocused and misinformed to serve as a definitive basis for interpretation of [Section 526]."³⁶ In sum, the small amount of legislative history that accompanied the enactment of Section 526 has resulted in differing interpretations.³⁷

29. See *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 910 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988) (quoting H.R. REP. NO. 1223, 67th Cong., 2d Sess. 158 (1922)).

30. *Id.* at 911 (citing H.R. REP. NO. 1223, 67th Cong., 2d Sess. 158 (1922)).

31. 62 CONG. REC. 11,603 (1922).

32. *Id.*

33. *Id.* at 11,605.

34. See *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 912 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

35. *Id.*

36. *Vivitar Corp. v. United States*, 761 F.2d at 1552, 1563 (Fed. Cir. 1985).

37. See *Olympus Corp. v. United States*, 792 F.2d 315, 319 (2d Cir. 1986) (enactment of Section 526 to overrule *Katzel* does not necessarily constrain the "broad lan-

B. *History of the Customs Service's Administration of Section 526*

Initially, the Customs Service adopted the language of Section 526 in its regulations without reference to any exceptions to the exclusionary protection afforded by Section 526.³⁸ The Customs Service created a "same person" exception fourteen years after the enactment of Section 526.³⁹ Further changes took place in 1953 when the Customs Service adopted regulations including a "related company" exception based on Section 45 of the Trade-Mark Act of 1946 and deleted reference to Section 526 as authority.⁴⁰ In 1959, however, the agency adopted regulations reverting to a "same person" exception, while reinserting Section 526 as authority and deleting reference to the Trade-Mark Act of 1946.⁴¹ The current form of the regulations was promulgated by the agency in 1972 with the inclusion of the common-control and authorized-use exceptions.⁴²

The current Customs Service regulations, 19 C.F.R. § 133.21(c), provides for two basic exceptions to the exclusionary protection of Section 526 of the Tariff Act of 1930.⁴³ Importation is not prohibited by Section 526 under the common-control ex-

guage" of the statute), *cert. denied*, 108 S. Ct. 2033 (1988); *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1822 (1988) (reasonable inference" from the legislative history is that Congress intended Section 526 to apply to all types of domestic firms); *Vivitar*, 761 F.2d at 1563 ("floor debate . . . is too unfocused and misinformed to serve as a definitive basis for interpretation . . ."); *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163, 1175 (S.D.N.Y. 1984) (legislative history does not support a narrow interpretation of Section 526).

38. See Joint Appendix Brief at 17-18, 21-23, *K Mart* (Nos. 86-495, 86-624, and 86-625) (containing Cust. Reg. 1923, art. 476; Cust. Reg. 1931, arts. 517(a), 518).

39. See *id.* at 27-28 (containing T.D. 48537, 70 Treas. Dec. Int. Rev. 336-37 (1936)). The "same person" exception allowed the importation of foreign merchandise bearing a valid U.S. trademark when the foreign manufacturer and the U.S. trademark holder were "the same person, partnership, association or corporation" despite the prohibition of Section 526 against such importation. *Id.*

40. See *id.* at 55-59 (containing T.D. 53399, 88 Treas. Dec. Int. Rev. 384 (1953)). The "related company" exception expanded upon the same person exception by requiring that the foreign manufacturer and the U.S. trademark holder need only be related, and not necessarily the same entity, to avoid the proscription of Section 526. *Id.*

41. See *id.* at 66-67 (containing 19 C.F.R. § 11.14 (1959)).

42. See *infra* notes 43-45 and accompanying text.

43. The Customs Service regulations, 19 C.F.R. § 133.21(c)(1)-(3) (1987), provide in pertinent part that:

ception when the foreign manufacturer and the U.S. trademark owner are the "same person or business entity" or "are parent and subsidiary companies or are otherwise subject to common ownership or control."⁴⁴ In addition, the authorized-use exception allows importation when the mark is "applied under authorization of the U.S. owner."⁴⁵

C. *Gray Market Importation Scenarios*

1. *Prototypical Gray Market Situation*

Gray market importation occurs in three general situations. In the first situation, known as a prototypical gray market case, a domestic firm has purchased from an independent foreign firm the U.S. trademark for the foreign-manufactured goods.⁴⁶ In the prototypical gray market situation, which is analogous to the facts in *Katzel*,⁴⁷ gray market importation occurs when a third party purchases in a foreign market the foreign-manufactured goods bearing the U.S. trademark and imports them into the U.S. to compete directly with the U.S. trademark owner.⁴⁸

2. *Common-Control Situation*

The second situation under which gray market importation occurs involves three types of domestic-foreign affiliation scenarios.⁴⁹ These are encompassed by the common-control exception

(c) *Restrictions not applicable.* The restrictions set forth . . . [in] this section do not apply to imported articles when:

(1) Both the foreign and the U.S. trademark or trade name are owned by the same person or business entity;

(2) The foreign and domestic trademark or trade name owners are parent and subsidiary companies or otherwise subject to common ownership or control . . . ;

(3) The articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner. . . .

Id.

44. 19 C.F.R. § 133.21(c)(1)-(2) (1987).

45. 19 C.F.R. § 133.21(c)(3) (1987).

46. See *Trademark Law, Economics and Grey-Market Policy*, 62 IND. L.J. 753 (1987). In *K Mart*, the Court labeled the prototypical gray market situation "case 1." *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1814 (1988).

47. See *supra* notes 15-20 and accompanying text.

48. See *Trademark Law, Economics and Grey-Market Policy*, 62 IND. L.J. 753 (1987).

49. See *Coalition to Preserve the Integrity of American Trademarks v. United*

of the Customs Service regulations, 19 C.F.R. § 133.21(c)(1)-(2). The first scenario occurs when a foreign corporation's domestic subsidiary owns the U.S. trademark for the foreign-produced goods bearing that trademark.⁵⁰ The second scenario occurs when a U.S. based firm owns a foreign subsidiary which produces the goods bearing a U.S. trademark owned by the U.S. firm.⁵¹ The final type of domestic-foreign affiliation scenario occurs when a U.S. based firm maintains a division located in a foreign country which produces goods bearing a U.S. trademark owned by the U.S. firm.⁵² Gray market importation occurs under these scenarios if the foreign-manufactured goods bearing valid U.S. trademarks are purchased abroad and imported by a third party in direct competition with the U.S. trademark holder.⁵³

3. Authorized-Use Situation

The third situation involving gray market importation occurs when a domestic corporation licenses or assigns the use of its U.S. trademark to a foreign firm, typically with an agreement that the foreign firm will only sell the foreign-manufactured goods in the foreign market.⁵⁴ This situation is encompassed by the authorized-use exception of the Customs Service regulation, 19 C.F.R. § 133.21(c)(3).⁵⁵ As in the other two situations, gray market importation occurs when the foreign-manufactured goods bearing valid U.S. trademarks are purchased abroad and

States, 790 F.2d 903, 904 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom.* K Mart Corp. v. Cartier, Inc., 108 S. Ct. 1811 (1988). In *K Mart*, the Court labeled the domestic-foreign affiliate scenario "case 2." *K Mart*, 108 S. Ct. at 1815.

50. *K Mart*, 108 S.Ct. at 1815. In *K Mart Corp.*, the Court further subdivided the domestic-foreign affiliate scenario by creating three sub-classifications: (1) a foreign firm and domestic subsidiary situation was labeled "case 2a"; (2) a domestic firm and a foreign subsidiary situation was labeled "case 2b"; and a domestic firm and foreign division situation was labeled "case 2c." *Id.*

51. See *Coalition to Preserve the Integrity of American Trademarks*, 790 F.2d at 904.

52. 3A R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 21.17 at 81 (4th ed. 1983 & Supp. 1988).

53. *Coalition to Preserve the Integrity of American Trademarks*, 790 F.2d at 904.

54. 3A R. CALLMAN, UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES, § 21.17 at 81 (4th ed. 1983 & Supp. 1988). In *K Mart*, the Court labeled a domestic firm's authorization of use by an "independent foreign" firm "case 3." *K Mart*, 108 S. Ct. at 1815.

55. See *Coalition to Preserve the Integrity of American Trademarks*, 790 F.2d at 904 (giving all three exceptions).

imported into the U.S. by a third party to compete directly with the U.S. trademark holder.⁵⁶

D. *Judicial Scrutiny of Administrative Interpretations of Statutes*

The determination of the validity of the Customs Service regulations depends on the level of deference that a court is willing to give to an agency's interpretation of a congressional statute.⁵⁷ Traditionally, the courts have accorded great deference to the administrative interpretation of statutes.⁵⁸ In doing so, the courts acknowledge the agency's specialized expertise and express a pragmatic concern to afford an agency the necessary flexibility to function in an efficient manner.⁵⁹

In *Chevron U.S.A., Inc. v. NRDC, Inc.*,⁶⁰ the seminal decision on agency interpretation of statutes,⁶¹ the Court upheld the Environmental Protection Agency's construction of the Clean Air Act, but noted that if the intent of Congress was clearly expressed by unambiguous statutory language, then the agency was bound to follow that intent as expressed in the statute. The *Chevron* Court stated that when the statute is ambiguous on the issue at hand, then a court's quest is to determine whether the agency's interpretation of the statute is reasonable.⁶² If the statutory mandate is ambiguous and the agency's interpretation is reasonable, then the courts will uphold the validity of the regulation despite questions surrounding "the wisdom of the

56. *Id.*

57. See *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979). The Court refused to defer to the SEC interpretation that noncontributory pension plans were covered by the Securities Acts because the agency interpretation was new and contrary to past SEC positions. *Id.* at 566.

58. *Id.* at 566 n.20.

59. *Id.*

60. 467 U.S. 837 (1984).

61. Prior to *Chevron*, the Court's standard of review of agency interpretations of statutes vacillated between a "reasonableness standard," which required an agency interpretation to have a rational basis, and a "rightness standard," under which the Court determined whether the agency interpretation matched the Court's independent construction of the statute. Note, *A Framework for Judicial Review of an Agency's Statutory Interpretation: Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469 (1985). The decision in *Chevron* provided a consistent method of review with a "coherent framework for structuring judicial review in this area." *Id.* at 477.

62. *Chevron*, 467 U.S. at 843.

agency's policy"⁶³

To determine the intent of Congress as expressed in the statute, a court will look to "its language, purpose, and history."⁶⁴ Despite the plain meaning rule,⁶⁵ courts will commonly look outside the language of the statute to ascertain the true meaning of a statutory mandate.⁶⁶ If the intent of Congress on the specific issue is ambiguous, then the court must determine if the agency regulation is reasonable by "examination of the legislation and its history"⁶⁷

Furthermore, an agency interpretation which represents a "longstanding and consistent" agency position is accorded heightened deference.⁶⁸ An agency interpretation which is shown to be inconsistent with past agency positions, however, is given less deference by the reviewing court.⁶⁹

E. *Precedent: Validity of the Customs Service Regulations*

In the early 1980's, the strong dollar in overseas markets allowed for the economically favorable purchase of goods of foreign manufacture for import into the United States.⁷⁰ This resulted in a rash of litigation invoking the exclusionary protection mandated by Section 526 and challenging the validity of the Customs Service regulation, 19 C.F.R. § 133.21(c), when genuine goods of foreign manufacture, bearing valid U.S. trademarks,

63. *Id.* at 866.

64. *International Brotherhood of Teamsters v. Daniel*, 438 U.S. 551, 566 n.20 (1979).

65. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Id.*

66. *United Steelworkers v. Weber*, 443 U.S. 193, 201 (1979). *See also* Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301 (1975). "[T]he plain meaning rule was never as widely practiced as preached." *Id.*

67. *Chevron*, 467 U.S. at 845.

68. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978) (the consistent 80 year application of an agency interpretation deserves considerable deference).

69. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (an agency interpretation which changed at least three times between 1965 and 1985 is not given the considerable deference of a consistent agency position).

70. S. OPPENHEIM, G. WESTON, P. MAGGS & R. SCHECTER, *UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION* 12 (4th ed. Supp. 1986).

were imported by a third party without the consent of the U.S. trademark owner.⁷¹ The decisions of three United States Courts of Appeals highlighted the split among the circuits on the validity of the Customs Service regulations and the exclusionary protection provided by Section 526.⁷²

First, in *Vivitar Corp. v. United States*, the United States Court of Appeals for the Federal Circuit rejected a challenge to Section 133.21(c) of the Customs Service regulations as being inconsistent with Section 526 of the Tariff Act of 1930 by holding that the regulations were a "reasonable exercise of administratively initiated enforcement."⁷³ After an extensive review of the available legislative history, the Federal Circuit concluded that Congress did not intend to limit the exclusionary protection mandated by Section 526.⁷⁴ Moreover, the Federal Circuit rejected the assertion that the regulation deserved especially vast deference because it represented a longstanding administrative position.⁷⁵ The Federal Circuit found, however, that the regulations were valid as an exercise of the Customs Service's administrative enforcement, but did not reflect the potential protection afforded by Section 526.⁷⁶ Furthermore, the court held that the

71. *Id.* See, e.g., *Selchow & Righter Co. v. Goldex Corp.*, 612 F. Supp. 19 (S.D. Fla. 1985) (granted injunction against the importation by a third party of "Trivial Pursuit" games made in Canada by the licensor of the mark to the U.S. plaintiff where the licensor itself was precluded from importing into the U.S. by the terms of the license); *Osawa & Co. v. B & H Photo*, 589 F. Supp. 1163 (S.D.N.Y. 1984) (granted preliminary injunction against gray market imports); *Parfums Stern, Inc. v. United States Customs Service*, 575 F. Supp. 416 (S.D. Fla. 1983) (denied preliminary injunction against gray market importation of "Oscar de la Renta" fragrances where a single international enterprise was evidence of common control).

72. See *Olympus Corp. v. United States*, 792 F.2d 315, 320 (2d Cir. 1986) ("congressional acquiescence in the longstanding administrative interpretation of the statute legitimizes that interpretation as an exercise of Customs' enforcement discretion."); *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 918 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988) ("the Customs regulations in question . . . are contrary to Section 526 . . . and hence unlawful."); *Vivitar Corp. v. United States*, 761 F.2d 1552, 1571 (Fed. Cir. 1985) ("the regulations . . . are upheld as a reasonable exercise of administratively initiated enforcement"), *cert. denied*, 474 U.S. 1055 (1986).

73. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1571 (Fed. Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986).

74. *Id.* at 1565.

75. *Id.* at 1568 ("Customs has had continuing questions concerning the reading of the statute.").

76. *Id.* at 1570-71.

trademark owner could assert its rights under Section 526 in a private action in district court to enjoin a third party from importing the trademark owner's goods.⁷⁷

In *Olympus Corp. v. United States*,⁷⁸ the United States Court of Appeals for the Second Circuit upheld the validity of the Customs Service regulations, 19 C.F.R. § 133.21(c). The court relied on the lack of congressional action against gray market importation when Section 526 was amended in 1978, notwithstanding Congress' knowledge of the practice.⁷⁹ Thus, the Second Circuit held that congressional acquiescence to the Customs Service's longstanding interpretation of Section 526 validated the agency's interpretation of Section 526 as an exercise of its enforcement discretion.⁸⁰

Just prior to the *Olympus* decision, however, the D.C. Circuit in *COPIAT* invalidated the Customs Service regulations, 19 C.F.R. § 133.21(c), due to their inconsistency with the exclusionary protection mandated by Section 526.⁸¹ The D.C. Circuit rejected the enforcement discretion argument relied upon by the *Vivitar* and *Olympus* courts.⁸² The split among the circuits set the stage for review of the validity of the regulations by the United States Supreme Court.⁸³

III. Procedure of *K Mart Corp. v. Cartier, Inc.*

The Coalition to Preserve the Integrity of American Trademarks (COPIAT) is an organization of United States trademark owners, which includes among its members, Cartier, Inc. and

77. *Id.* at 1570.

78. 792 F.2d 315, 320 (2d Cir. 1986).

79. *Id.* The amendment created an exception to the bar against importation when the goods were imported by an individual for personal use. 19 U.S.C. § 1526(d) (1988).

80. *Olympus Corp. v. United States*, 792 F.2d 315, 320 (2d Cir. 1986).

81. *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 913 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart v. Cartier, Inc.*, 108 S. Ct. 1811 (1988). "In light of the language of the statute, its legislative history and purpose, and the contemporaneous constructions placed upon it, [the court concluded] that Section 526 simply cannot be limited in the manner that the Customs Service has attempted." *Id.*

82. *Id.* at 918. "From the start, the Customs Service has regarded the regulations as its interpretation of what the law requires rather than as a decision not to prosecute to the letter of the law." *Id.*

83. The Supreme Court granted certiorari in *K Mart Corp. v. Cartier, Inc.*, 479 U.S. 1005 (1986).

Charles of the Ritz Group Ltd.⁸⁴ COPIAT and its two aforementioned members brought an action in the United States District Court for the District of Columbia seeking declaratory relief against the validity of the Customs Service regulations, 19 C.F.R. § 133.21(c), and an order directing the agency to enforce the express exclusionary mandate of Section 526.⁸⁵ COPIAT's members, distributors and manufacturers of goods bearing valid U.S. trademarks, alleged that third parties were importing these goods bearing U.S. trademarks owned by the individual members of COPIAT in contradiction to the proscription of Section 526.⁸⁶ The defendants to the action included the United States, the Secretary of the Treasury, and the Commissioner of the Customs Service.⁸⁷ Thereafter, K Mart Corporation, a large nationwide retailer, and 47th Street Photo, a New York City camera retailer, both of whom participate heavily in gray market importation as major discounters, joined the action as intervenor-defendants.⁸⁸ After determining that it had subject-matter jurisdiction,⁸⁹ the district court upheld the validity of the regulation finding that "the legislative history, judicial decisions, legislative acquiescence, and longstanding consistent policy of the Customs Service" justified the agency's interpretation of Section 526 as reasonable.⁹⁰ Thus, the district court granted the defendants' motion for summary judgment.⁹¹

On appeal, the United States Court of Appeals for the District of Columbia affirmed the jurisdictional finding,⁹² but reversed the lower court's decision, holding that the Customs Service regulations, 19 C.F.R. § 133.21(c), were an unreasonable

84. *Coalition to Preserve the Integrity of American Trademarks*, 790 F.2d at 904.

85. *Coalition to Preserve the Integrity of American Trademarks v. United States*, 598 F. Supp. 844, 846 (D.D.C. 1984), *aff'd in part and rev'd in part*, 790 F.2d 903 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 847.

90. *Id.* at 852.

91. *Id.* at 853.

92. *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 907 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

interpretation of Section 526.⁹³ The circuit court remanded the case to the district court with "instructions to issue a declaratory judgment that the Customs regulations in question, 19 C.F.R. § 133.21(c)(1)-(3), are contrary to Section 526 . . . and hence unlawful."⁹⁴

Thereafter, COPIAT and its members appealed to the United States Supreme Court, which first granted certiorari on the question of jurisdiction, and subsequently affirmed the court of appeals decision holding that the district court had jurisdiction.⁹⁵ Subsequently, the Court heard arguments on the merits, and thereafter affirmed the court of appeals in part and reversed in part.⁹⁶

IV. Supreme Court's Decision: *K Mart Corp. v. Cartier*

In *K Mart Corp. v. Cartier, Inc.*,⁹⁷ the Court upheld the validity of the common-control exception of the Customs Service regulations as a reasonable agency interpretation of Section 526, but struck down the authorized-use exception of the Customs Service regulations as an impermissible interpretation of Section 526 in light of the plain meaning of the statute.⁹⁸

A. *The Common-Control Exception*

1. *Justice Kennedy's Controlling Opinion*⁹⁹

Justice Kennedy, joined by Justice White, held that the common-control exception of the Customs Service regulations, 19 C.F.R. § 133.21(c)(1)-(2), was a valid agency interpretation of

93. *Id.* at 918.

94. *Id.*

95. *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 950 (1988). The Court rejected the argument of COPIAT and its members that the Court of International Trade had exclusive jurisdiction, and found that the district court properly exercised jurisdiction. *Id.* at 955-56.

96. *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1817 (1988).

97. *Id.* at 1811.

98. *Id.* at 1817.

99. Technically, there was neither a majority nor a plurality opinion of the Court upholding the common-control exception. See BLACK'S LAW DICTIONARY 1039 (5th ed. 1979)(defining plurality). Justice Kennedy's opinion, joined by Justice White, in combination with Justice Brennan's opinion, joined by Justices Marshall and Stevens, provided the necessary votes to uphold the common-control exception.

Section 526.¹⁰⁰ In applying the rationale of *Chevron*,¹⁰¹ he determined that Section 526 was sufficiently ambiguous in the context of the common-control situation to make the Customs Service's interpretation a reasonable one.¹⁰² Justice Kennedy found ambiguity in two separate phrases of Section 526.¹⁰³ First, he concluded that the phrase "owned by" in Section 526 is ambiguous in a common-control situation involving a foreign parent because of the inability to conclude whether the foreign parent or its U.S. subsidiary is the actual owner of the United States trademark.¹⁰⁴ Second, he determined that the phrase "merchandise of foreign manufacture" in Section 526 is ambiguous when applied to a common-control situation involving a foreign subsidiary or division because the phrase could be interpreted "to mean (1) goods manufactured in a foreign country, (2) goods manufactured by a foreign company, or (3) goods manufactured in a foreign country by a foreign company."¹⁰⁵ Thus, Justice Kennedy concluded that the common-control exception of the Customs Service regulations was a reasonable interpretation of Section 526 in light of "the imprecision in the statute"¹⁰⁶

2. Justice Brennan's Concurring Opinion

In a concurring opinion, Justice Brennan, joined by Justices Marshall and Stevens, upheld the common-control exception as a valid agency interpretation of Section 526.¹⁰⁷ Justice Brennan, while relying on the same statutory ambiguities perceived by

100. *K Mart*, 108 S. Ct. at 1817-18.

101. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 839, 844 (1984) (If the statute is ambiguous on the issue at hand, then the agency interpretation is valid if it is reasonable.).

102. *K Mart*, 108 S. Ct. at 1817-18.

103. *Id.* at 1818.

104. *Id.* The entire Court agreed that the phrase "owned by" was ambiguous in a situation involving a foreign parent and domestic subsidiary "case 2a," but this ambiguity did not extend to the other two categories, namely the domestic parent and foreign subsidiary or division situations "cases 2b & 2c," encompassed under the "common-control" exception. *Id.* Therefore, the intent of Congress as expressed in the phrase "merchandise of foreign manufacture" was crucial in determining the validity of the common-control exception.

105. *Id.*

106. *Id.*

107. *K Mart*, 108 S. Ct. at 1819-20 (Brennan, J., concurring).

Justice Kennedy,¹⁰⁸ also looked to the “purpose and the legislative history of Section 526” to ascertain the intent of Congress in enacting Section 526.¹⁰⁹ He argued that the congressional purpose was to protect domestic interests, and therefore, Congress did not intend to extend the exclusionary protection of Section 526 to foreign corporations affiliated with U.S. trademark holders.¹¹⁰ Moreover, Justice Brennan contended that “[t]he sparse legislative history confirms that Congress’ sole goal was to over-rule *Katzel*,” and thus, Section 526 prohibited prototypical gray market importation only.¹¹¹ Consequently, Justice Brennan concluded that the Customs Service’s interpretation precluding foreign affiliates from taking advantage of the exclusionary protection of Section 526 is reasonable.¹¹² Furthermore, Justice Brennan argued that the validity of the common-control exception, as promulgated by the Customs Service in 19 C.F.R. § 133.21(c)(1)-(2), “is further buttressed by the deference owed to an agency interpretation that represents a longstanding agency position.”¹¹³

3. Justice Scalia’s Dissenting Opinion

In a dissenting opinion, Justice Scalia, joined by Justices Blackmun and O’Connor and Chief Justice Rehnquist, concluded that the common-control exception is contrary to the express mandate of Section 526, and therefore is an impermissible agency interpretation.¹¹⁴ Justice Scalia argued that the phrase “merchandise of foreign manufacture” in Section 526 is unambiguous and that the majority only makes it ambiguous by taking it out of the context of the statute as a whole.¹¹⁵ He con-

108. See *id.* at 1821. “[I]t is unclear whether merchandise manufactured abroad by a division or a subsidiary of a domestic firm is ‘merchandise of foreign manufacture.’ That phrase could readily be interpreted to mean either ‘merchandise manufactured in a foreign country’ or ‘merchandise manufactured by a foreigner.’” *Id.*

109. *Id.* at 1822.

110. *Id.* at 1820-21.

111. *Id.* at 1824.

112. *Id.* at 1826-27.

113. *Id.* at 1827. “Treasury has for 50 years adhered to the basic premise of the common-control exception — that Section 526 does not require exclusion of all gray-market goods.” *Id.*

114. *K Mart*, 108 S. Ct. at 1831 (Scalia, J., dissenting).

115. *Id.* at 1831-32. Justice Scalia contended that the majority’s “approach would

tended that the phrase "merchandise of foreign manufacture" clearly means goods manufactured abroad based on its common usage.¹¹⁶ Furthermore, Justice Scalia argued that the majority's interpretation defeats the statute's prohibition against prototypical gray market importation when a foreign firm has licensed its trademark to a domestic firm for use in the U.S. and to another U.S. firm for use in a foreign market.¹¹⁷ Moreover, he contended that the Customs Service's own interpretation of the regulations shows that "foreign manufacture" means produced abroad.¹¹⁸ Lastly, Justice Scalia noted that the majority's interpretation of the regulations requires the Customs Service to perform the impractical differentiation of goods manufactured abroad from those manufactured by foreigners.¹¹⁹ Consequently, Justice Scalia found that the Customs Service common-control exception is invalid because it burdens the "agency with an interpretation that it not only has never suggested, but that is contrary to ordinary usage [and] to the purposes of the statute"¹²⁰

B. *The Authorized-Use Exception*

1. *Justice Kennedy's Majority Opinion*

Justice Kennedy, joined by Justices Blackmun, Scalia, O'Connor, and Chief Justice Rehnquist, held that the authorized-use exception, 19 C.F.R. § 133.21(c)(3), is an impermissible interpretation of Section 526.¹²¹ Unlike the common-control situation, he found that when the foreign manufacturer is an independent foreign corporation, the phrases "owned by" and "merchandise of foreign manufacture" in Section 526 are not in any

also interpret the phrase 'I have a foreign object in my eye' as referring, perhaps, to something from Italy." *Id.*

116. *Id.* at 1832.

117. *Id.* The domestic firm would not be able to exclude "gray-market imports manufactured abroad by the other American firms" because the merchandise "would not be 'of foreign manufacture.'" *Id.*

118. *Id.*

119. *Id.* at 1833. Customs must differentiate, under the sustained regulation, between items merely produced abroad and those produced by foreigners, when only the country of origin is presently required on imports. *Id.*

120. *Id.*

121. *K Mart*, 108 S. Ct. at 1819.

way ambiguous.¹²² Justice Kennedy concluded, therefore, that the authorized-use exception is in direct contradiction to the mandate of Section 526, and thereby is an impermissible interpretation of Section 526.¹²³

Justice Kennedy went on to find, however, that the authorized-use exception was severable from the Customs Service regulations as a whole, so that the common-control exception would survive.¹²⁴ According to Justice Kennedy, the authorized-use exception could be severed from the regulations without impairing "the function of the statute as a whole" and that this would not frustrate the intent of the regulations.¹²⁵

2. Justice Scalia's Concurring Opinion

In a concurring opinion, Justice Scalia, joined by Justices Blackmun, O'Connor, and Chief Justice Rehnquist, supported the majority's decision to invalidate the authorized-use exception due to its inconsistency with the express mandate of Section 526.¹²⁶ Justice Scalia reasserted the majority's position by finding no ambiguity in Section 526 when "a domestic trademark owner and registrant authorizes a foreign firm to use its U.S. trademark abroad."¹²⁷ Contrary to Justice Brennan's dissenting opinion, Justice Scalia argued that the phrase "owned by" is not ambiguous because, at the time of enactment of Section 526, there was licensing of trademarks to unrelated businesses located in separate geographic regions.¹²⁸ Thus, Justice Scalia concluded that the legislature was well aware of the effect of using the statement "owned by" for licensees and assignees of

122. *Id.* at 1818.

123. *Id.* at 1818-19.

124. *Id.* at 1819. Justice Kennedy deemed that severance of the authorized-use exception would not impair the function of the statute as a whole and that there was no indication that the entire regulation would not have been passed but for its conclusion. *Id.*

125. *Id.*

126. *K Mart*, 108 S. Ct. at 1831 (Scalia, J., concurring).

127. *Id.* at 1833. "There, the U.S. trademark is unambiguously 'owned by' a U.S. firm, and registered by a firm 'domiciled in the United States,' and the goods sought to be imported are 'of foreign manufacture.'" *Id.*

128. *Id.* at 1835. "By 1920, it was firmly established that unrelated businesses could own and use an identical trademark so long as the uses were confined to different and distinct regions." *Id.*

trademarks at the time of enactment.¹²⁹ Furthermore, in reply to Justice Brennan's dissent, Justice Scalia contended that it is far from clear that changed circumstances have given rise to a situation so drastic from the original purpose of the statute that the Court should disregard the plain meaning of the statute.¹³⁰ Consequently, Justice Scalia found that Congress intended the exclusionary scope of Section 526 to extend to importation allowed under the Customs Service's authorized-use exception, and thus the regulations were an impermissible agency interpretation of Section 526.¹³¹

3. *Justice Brennan's Dissenting Opinion*

Justice Brennan, joined by Justices White, Marshall, and Stevens, dissented from the majority opinion that struck down the authorized-use exception.¹³² He argued that the phrase "owned by" in Section 526 is ambiguous because trademarks could not be licensed or assigned at the time of enactment of the original statute.¹³³ Consequently, Justice Brennan found that the legislature did not intend to extend the exclusionary protection of Section 526 to U.S. trademark holders who licensed or assigned their trademarks to be used in a foreign market.¹³⁴ He also argued that the legislative history shows that Congress' sole purpose in enacting Section 526 was to overrule *Katzel*.¹³⁵ In addition, Justice Brennan contended that since 1951, the Customs Service's position has been to deny protection to "trademark holders who authorize the use of their trademarks abroad."¹³⁶

129. *Id.* at 1836.

130. *Id.* at 1835. The clear intent of Congress as expressed in a statute may be disregarded by the court in light of changed circumstances "only when (1) it is clear that the alleged changed circumstances were unknown to, and unenvisioned by, the enacting legislature, and (2) it is clear that they cause the challenged application of the statute to exceed its original purpose." *Id.*

131. *Id.* at 1836.

132. *K Mart*, 108 S. Ct. at 1819, 1828 (Brennan, J., dissenting).

133. *Id.* at 1828-29. Justice Brennan argued that since assignment of a trademark was not possible under the prevailing trademark theory at the time of enactment of Section 526, Congress did not comprehend the meaning of ownership of a mark in the same manner as would be understood under current trademark theory; thus, the intent of Congress expressed by the phrase "owned by" is unclear. *Id.*

134. *Id.* at 1829.

135. *Id.* at 1830.

136. *Id.* Thus, Justice Brennan argued that the authorized-use exception was a long-

Therefore, Justice Brennan found the authorized-use exception to be a reasonable agency interpretation of Section 526.¹³⁷

V. Analysis: *K Mart Corp. v. Cartier*

The Court engaged in judicial legislation in upholding the validity of the common-control exception through faulty application of the rules of statutory construction. The determination of the validity of an agency interpretation of a statute is wholly dependent upon the reviewing court's finding of legislative intent based on statutory interpretation.¹³⁸ Therefore, the manner in which the court applies the rules of statutory construction is of primary importance in affecting the outcome of the court's decision. While the courts give great deference to agency interpretations, this deference is limited by "the clear meaning of the statute, as revealed by its language, purpose, and history."¹³⁹

The *K Mart* Court, in upholding the common-control exception, extended great deference to an agency interpretation which is clearly contrary to the plain meaning of Section 526. Through a contorted application of statutory construction, the Court concluded that the phrase "merchandise of foreign manufacture" is ambiguous because it might not encompass goods manufactured abroad by United States citizens or corporate entities. Thus, the Court reasoned that the agency interpretation expressed in the common-control exception was reasonable due to the ambiguity of Section 526.

A. *The Plain Meaning of Section 526*

The majority, upholding the validity of the common-control exception, ignored the plain meaning of the phrase "merchandise of foreign manufacture" in Section 526. In construing the meaning of a statute, a court starts first with the language.¹⁴⁰ In its strictest form, the plain meaning rule requires a court to en-

standing agency position requiring appreciable deference by the reviewing court. *Id.*

137. *Id.* at 1831.

138. See *supra* notes 57-69 and accompanying text.

139. *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 566 n.20 (1979). See also *supra* notes 57-64 and accompanying text.

140. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 110 (1983) (stating that "in determining the scope of a statute, one is to look first at its language.").

force the clear mandate of statutory language without reference to extrinsic evidence of legislative intent.¹⁴¹ In determining the meaning of statutory language a court should "assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.'"¹⁴² On its face, the meaning of Section 526 of the Tariff Act of 1930 is quite explicit.¹⁴³ Therefore, as argued by Justice Scalia in his dissent, the phrase "merchandise of foreign manufacture" clearly means manufactured abroad.¹⁴⁴ In contending that "merchandise of foreign manufacture" could mean "merchandise manufactured by a foreigner" as opposed to merchandise manufactured by a U.S. citizen or corporation in a foreign country,¹⁴⁵ the majority strays far from any ordinary meaning.

Furthermore, legislatures will "generally use a particular word with a consistent meaning in a given context."¹⁴⁶ The phrase "foreign manufacture" is typically used in statutes to denote a product which is manufactured abroad.¹⁴⁷ Therefore, the majority's finding of textual ambiguity in the phrase "merchandise of foreign manufacture" in a situation of common control was erroneous. Consequently, if a strict plain meaning rule of statutory interpretation was applied to Section 526, the unambiguous exclusionary protection afforded by the statute would require the court to invalidate the common-control exception.

Typically, however, courts which apply the plain meaning rule in statutory construction will look beyond the unambiguous

141. See *supra* note 65.

142. *Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (quoting *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985)). See also *Park 'N Fly*, 469 U.S. at 194 ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.").

143. 19 U.S.C. § 1526(a) (1980). Section 526 prohibits the importation of "merchandise of foreign manufacture" bearing "a trademark owned by" a U.S. citizen or corporation, without the permission of the U.S. trademark holder. *Id.* See *supra* note 25.

144. *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811, 1832 (1988) (Scalia, J., dissenting).

145. *Id.* at 1831.

146. *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972).

147. See, e.g., 19 C.F.R. § 133.21(a) (1988). The regulation denotes "[a]rticles of foreign or domestic manufacture," and thus implies that foreign manufacture pertains to goods manufactured abroad and not to goods made in the U.S. *Id.*

language of the statute to determine legislative intent.¹⁴⁸ This is indeed the better rule, for it avoids enforcing the mandate of unambiguous statutory language when there is clear evidence of contrary legislative intent.¹⁴⁹ However, if the language of the statute is clear, a court requires "a clearly expressed legislative intention to the contrary" in order to disregard the seemingly unambiguous language.¹⁵⁰ Thus, since the language of Section 526 unambiguously precludes the importation of gray market goods in several types of common-control situations and in the authorized-use situation, the legislative history must be examined for any clear congressional intent to the contrary.

B. Congressional Intent

The intent of Congress as expressed by the available legislative history is far from clear. There is no question that the Second Circuit's decision in *Katzel* precipitated the enactment of Section 526.¹⁵¹ However, the intended scope of the exclusionary protection afforded by Section 526 cannot be unambiguously defined from the existing legislative history.

Justice Brennan, realizing the tenuous nature of the Court's finding of ambiguity in the statutory language,¹⁵² properly explored the legislative history and purpose of Section 526 in order to determine congressional intent.¹⁵³ Justice Kennedy, relying on his finding of ambiguous language,¹⁵⁴ and Justice Scalia, apparently adopting the strict "plain meaning rule" of statutory construction,¹⁵⁵ erroneously neglected to fully consider the legisla-

148. See Murphy, *Old Maxims Never Die: The "Plain-Meaning Rule" and Statutory Interpretation in the "Modern" Federal Courts*, 75 COLUM. L. REV. 1299, 1301 (1975).

149. See W. STATSKY, *LEGISLATIVE ANALYSIS AND DRAFTING* 75-76 (2d ed. 1984).

150. *North Dakota v. United States*, 460 U.S. 300, 312 (1982). See also *Jefferon County Pharmaceutical Ass'n, Inc. v. Abbott Laboratories*, 460 U.S. 150, 157 (1983) (stating that "[t]he plain language of the Act is controlling unless a different legislative intent is apparent from the purpose and history of the Act.").

151. See *supra* notes 15-25 and accompanying text.

152. *K Mart*, 108 S. Ct. at 1821 (Brennan, J., concurring) ("Even if the language of § 526 clearly covered all affiliates of foreign manufacturers" the purpose and intention of the legislature must be considered.).

153. *Id.* at 1822.

154. See *K Mart*, 108 S. Ct. at 1818.

155. See *id.* at 1831 (Scalia, J., dissenting).

tive history behind Section 526.

The truly ambiguous nature of the existing legislative history is evidenced by the previous findings of several courts. In *Vivitar*, after an in-depth review of the existing legislative history, the court concluded "that no limitations, based on indications of congressional intent at the time of enactment, can be read into [Section 526]."¹⁵⁶ Moreover, in *Coalition to Preserve the Integrity of American Trademarks v. United States*, the D.C. Circuit Court of Appeals found that the legislative history demonstrated that Congress intended Section 526 to include within its prohibitory scope those goods encompassed by the common-control and authorized-use exceptions.¹⁵⁷ Although Justice Brennan determined that the legislative history revealed "that Congress had a contrary intent," he did admit that evidence existed "suggesting that some legislators might have understood § 526 otherwise."¹⁵⁸ While Justice Brennan was able to draw different inferences from the existing legislative history than the *COPIAT* and *Vivitar* courts,¹⁵⁹ this is far from the clear showing of contrary intent necessary to disturb the plain meaning of Section 526.¹⁶⁰

Therefore, since the legislative history of Section 526 does not reveal a clearly contrary intent on the part of Congress to the unambiguous charge of the statutory language, that clear statutory mandate must be adhered to by the interpreting agency.¹⁶¹ The Customs Service common-control exception allows the importation of foreign-manufactured goods bearing a valid U.S. trademark owned by a domestic firm affiliated with the foreign manufacturer.¹⁶² The authorized-use exception allows the importation of foreign-manufactured goods bearing a legitimate U.S. trademark owned by a domestic firm which has

156. *Vivitar Corp. v. United States*, 761 F.2d 1552, 1565 (Fed. Cir. 1985).

157. *Coalition to Preserve the Integrity of American Trademarks v. United States*, 790 F.2d 903, 912-13 (D.C. Cir. 1986), *aff'd in part and rev'd in part sub nom. K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988).

158. *K Mart*, 108 S. Ct. at 1822 (Brennan, J., concurring). See *supra* notes 26-37.

159. See *K Mart*, 108 S. Ct. at 1824-25 (Brennan, J., concurring).

160. See *North Dakota v. United States*, 460 U.S. 300, 312 (1982).

161. *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 839, 842-43 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

162. See 19 C.F.R. § 133.21(c)(1)-(2) (1987). See *supra* note 43.

licensed or assigned to the foreign manufacturer the use of that trademark in the foreign market.¹⁶³ On its face, Section 526 prohibits the importation of "merchandise of foreign manufacture" bearing "a trademark owned by" a U.S. citizen or corporation without the permission of the U.S. trademark owner.¹⁶⁴ Clearly, the common-control and authorized-use exceptions are contrary to the express mandate of Section 526. Thus, the majority of the *K Mart* Court, striking down the authorized-use exception,¹⁶⁵ properly recognized the clear inconsistency between the regulations and Section 526. However, the majority, upholding the common-control exception,¹⁶⁶ failed to recognize the blatant inconsistency between the regulations and the statute. The validation of the common-control exception was a consequence of the Court's failure to properly construe Section 526 and thus resulted in a decision smacking of judicial legislation.

C. *Longstanding Administrative Practices*

Courts extend vast deferential consideration to "longstanding and consistent" agency positions.¹⁶⁷ However, this deference is limited when the agency position is clearly contrary to the intent of Congress as unambiguously expressed by the governing statute.¹⁶⁸ Therefore, based on plain statutory meaning and the lack of any clear congressional intent to the contrary, the Customs Service interpretation of Section 526 did not deserve the considerable deference normally attributed to an agency interpretation.

Furthermore, an agency interpretation of a statute having a history of inconsistency is given far less deference than a consistent agency position.¹⁶⁹ Justice Brennan, after failing to find the clear intent of Congress from the language of Section 526,¹⁷⁰ argued that the Customs Service position, as promulgated under the regulations, was a longstanding and consistent interpretation

163. See 19 C.F.R. § 133.21(c)(3) (1987). See *supra* note 43.

164. See 19 U.S.C. § 1526(a) (1982). See *supra* note 25.

165. *K Mart*, 108 S. Ct. 1811, 1819 (1988).

166. *Id.*

167. See *supra* note 68 and accompanying text.

168. See *supra* notes 57-67 and accompanying text.

169. See *supra* note 69 and accompanying text.

170. *K Mart*, 108 S. Ct. at 1821 (Brennan, J., concurring).

deserving of considerable deference.¹⁷¹ However, the reality is that the wording and scope of the regulations have changed many times since the original enactment of Section 526.¹⁷² Justice Brennan, relying on a Customs Service official's correspondence¹⁷³ and an abstract of a Bureau decision,¹⁷⁴ found that despite the changing language of the regulations, the agency position had actually remained unchanged.¹⁷⁵ Reliance on a Customs Service official's correspondence to show a longstanding consistent position is, at best, tenuous. This reliance is further eroded by contrary evidence showing an inconsistent agency position.¹⁷⁶ In *Vivitar*, the Court of Appeals for the Federal Circuit concluded that the Customs Service interpretation of Section 526 over the years had shown appreciable inconsistency.¹⁷⁷ Thus, the Customs Service's common-control and authorized-use exceptions were not entitled to the vast deference typically extended to a longstanding consistent agency position because: (1) the clearly expressed intent of Congress was contrary to the agency position; and (2) the agency interpretation of the statute over time had lacked uniformity.

D. *The K Mart Decision Rescues a Major Industry*

The Court's decision in *K Mart* is particularly suspect in light of the thriving multi-billion dollar industry which is dependent upon the questionable Customs Service regulations.¹⁷⁸ The

171. *Id.* at 1827.

172. See Joint Appendix Brief at 17-51, 55-61, 65-67, *K Mart Corp. v. Cartier, Inc.*, 108 S. Ct. 1811 (1988) (Nos. 86-495, 86-624 and 86-625) (containing a history of the Customs Service regulations interpreting Section 526). See *supra* notes 38-42 and accompanying text.

173. See *id.* at 63 (a letter by Deputy Customs Commissioner B. Flinn dated March 15th, 1963, stating that the agency considers a "foreign parent or subsidiary corporation of an American trademark owner" exempt from the import prohibition of Section 526).

174. See *id.* at 65. This Bureau of Customs decisions abstract, T.D. 69-12(2) (1969), recognized the common-control exception. *Id.*

175. *K Mart*, 108 S. Ct. at 1827-28.

176. See *Vivitar Corp. v. United States*, 761 F.2d 1552, 1567 (Fed. Cir. 1985), cert. denied, 474 U.S. 1055 (1986). See also Atwood, *Import Restrictions on Trademarked Merchandise--The Role of the United States Bureau of Customs*, 59 TRADEMARK REP. 301, 309-11 (1969) (Customs Law Specialist recognizing the inconsistent agency position as early as 1969).

177. *Vivitar*, 761 F.2d at 1568.

178. See *High Court Refuses to Bar Import of Grey-Market Goods: Billions at*

economic reach of the threatened industry juxtaposed with the peculiar method of statutory interpretation employed by the Court strongly suggests that the Court engaged in judicial legislation. While a majority of the Court may perceive the prohibition of gray market goods as an unfair result, both for the industry and the consumer, not all commentators are in agreement with such a perception.¹⁷⁹ The consumer may benefit directly from lower cost imports, but at the same time may suffer from the reduced service and warranty backing incident to gray market goods.¹⁸⁰ The pros and cons of gray market importation, however, are to be weighed by the legislature as it formulates policy and not by the courts as they interpret the legislatures' decisions.¹⁸¹ Thus, in *K Mart*, the Court erred by upholding the common-control exception in the face of a clearly contrary congressional statute by contorting the rules of statutory construction to achieve a result of perceived fairness in the eyes of the Court.

VI. Conclusion

The Court, through the misapplication of the rules of statutory construction, practiced judicial legislation in upholding the Customs Service common-control regulations, 19 C.F.R. § 133.21(c)(1)-(2), even though it was clearly contrary to the unambiguous intent of Congress as expressed in Section 526 of the Tariff Act of 1930. The motive behind this decision rests on the existence of a major industry providing discount brand name

Stake, L.A. Daily J., June 1, 1988, at 1, col. 2. Justice Brennan noted that agency interpretations which have resulted in "an immense domestic retail industry" should be given vast deference. *K Mart*, 108 S. Ct. at 1828 (Brennan, J., concurring).

179. See *Trademark Law, Economics and Gray-Market Policy*, 62 *INN. L.J.* 753, 777 (1987) (concluding that Section 526 should be strictly enforced to benefit consumers and foster the goals of the trademark laws).

180. *Id.*

181. Two legislative proposals directed at gray market importation are currently before Congress. Congressman Rod Chandler of Washington introduced a bill (H.R. 771) on February 2, 1989, which would permit importation of gray-market goods meeting either the common-control or authorized-use exceptions, and thus would codify the Customs Service regulations at issue. 37 *BNA'S PAT. TRADEMARK & COPYRIGHT J.* No. 917, at 327 (1989). In contrast, Utah's Senator Orrin G. Hatch's bill (S. 626), introduced on March 16, 1989, would completely exclude importation of gray market goods. 37 *BNA'S PAT. TRADEMARK & COPYRIGHT J.* No. 923, at 543-45 (1989).

merchandise which has evolved as a result of the Customs Service regulations at issue. Despite the perceived inequities of a statute, the courts must enforce the clear and unambiguous intent of Congress to avoid the practice of judicial legislation. In pursuit of this often elusive legislative intent, it is imperative that the courts adhere to a consistent and rational manner of statutory construction to avoid judicial decisions which usurp the legislative function.

The practice of judicial legislation is best avoided through the consistent application of rational rules of statutory construction. Common sense dictates, as do the courts,¹⁸² that determination of legislative intent must start with the language by which the legislature has attempted to express its intent. If the language imparts a clear intent derived from the common usage of such language, then a presumption arises in favor of that clear intent.¹⁸³ Rational and pragmatic reasoning, however, requires that such a presumption be rebuttable by legislative history and purpose evidencing a clear contrary intent on the part of the legislature.¹⁸⁴ The consistent application of the preceding logical path of statutory analysis, while not alleviating fully the inherent difficulties of statutory construction, would lead to a reduction in decisions smarting of judicial legislation.

In *K Mart*, the Court's statutory analysis is extremely suspect, leading to the conclusion that the Court engaged in judicial legislation. This is apparent by the finding of ambiguities in the face of statutory language, the common meaning of which readily portrayed a clear and unambiguous intent, and where the legislative history and purpose were at best ambiguous. While the Court may have wished to preserve a major industry providing low-cost quality goods to the American consumer, that decision was not before the Court and is properly the province of Congress.

Raymond R. Mandra

182. See *supra* note 140 and accompanying text.

183. See *supra* note 142 and accompanying text.

184. See *supra* notes 148-50 and accompanying text.