

**REASON TO FRET: HOW THE LACEY ACT LEFT THE MUSIC
INDUSTRY SINGING THE BLUES**

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I. STRANGE BEDFELLOWS: THE LACEY ACT AND THE MUSIC INDUSTRY

On June 18, 2008, Congress passed the Food, Conservation, and Energy Act, also known as the 2008 U.S. Farm Bill (“Farm Bill”), into law.¹ It was an agricultural bill primarily geared toward the continuation of the United States policy of agricultural subsidy, but it also included other policies intended to affect nutrition,

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1. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923.

conservation, and energy.² One of these policies included in the Farm Bill was an amendment to the Lacey Act of 1900 (“Lacey Act”),³ a law aimed at protecting endangered animal species.⁴ The amendment included in the Farm Bill expanded the Lacey Act’s environmental protections, beyond its already established protection of animal species, to include biological plant species.⁵

As of April 1, 2010, the Department of Agriculture specifically extended enforcement of the Lacey Act to include musical instruments made from biological plant species.⁶ Among those concerned about this inclusion are instrument manufacturers and professional musical artists, who stand to be greatly affected by the amendment’s strict rules on the import of exotic hardwoods known in the music industry as tonewoods. While this amendment has gone into effect, the government’s methods for enforcement are somewhat unclear and have resulted in confusion amongst members of the music community: individual musicians are afraid to carry their instruments overseas,⁷ and the only enforcement of the new amendment against a manufacturer—two individual cases against the Gibson Guitar Corporation (“Gibson Guitar”) concerning the import of ebony wood stocks from India and Madagascar—settled without fully addressing the issues posed by the current overbroad

2. The passage of the 2008 Farm Bill was not without its share of drama. It was panned for being overly inclusive or, popularly, full of “pork.” See Robert Novak, Editorial, *Pork-laden Farm Bill Sums Up GOP Disarray*, CHI. SUN TIMES, May 19, 2008 at 27.

Originally passed on May 15, 2008, President Bush vetoed it on May 21. The following morning the Senate overrode the veto by more than a two-thirds majority, but Congress mistakenly sent the bill to the White House missing an entire section, rendering it invalid. Alan Bjerga, *Senate Overrides Bush Veto of \$289 Billion Farm Bill (Update 1)*, BLOOMBERG, May 22, 2008, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=amLpoRc81U8Y&refer=home>. Both houses overrode a second veto by President Bush on June 18, 2008, effectively passing the Act into law without the approval of the White House. 154 CONG. REC. 12797, 12800 (2008).

3. Lacey Act of 1900, 16 U.S.C. §§ 3371-3378 (2006 & Supp. V 2011).

4. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204, 122 Stat. 923, 1291.

5. The Act now specifically makes it illegal to “import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any plant” taken in violation of a domestic or foreign law aimed at protection or regulation of export of certain plants. § 3372(a)(2)(B)(1).

6. Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,516 (Sept. 2, 2009).

7. Tim Ghianni, *Gibson Guitars Wood Import Case Raises Concerns*, REUTERS (Sept. 30, 2011, 6:23 PM), <http://www.reuters.com/article/2011/09/30/us-usa-trade-guitars-idUSTRE78T5MA20110930> (“Acclaimed bass guitar player Dave Pomeroy, who is president of the Nashville musicians union, said members remained unclear as to whether it was safe to travel with their instruments . . . ‘All musicians want to do is do what every other business person does and that is take their tools to work with them.’”).

interpretation of the Act.⁸

This Note will look at the 2008 amendment and the resulting issues affecting both individual musicians and manufacturers of musical instruments who rely on the import of unfinished stocks of exotic tonewoods and finished instruments made from those stocks in their businesses and careers.⁹ In Part II, this Note will briefly cover the evolution of the Lacey Act and the importance of exotic tonewoods to the music industry by examining the features that make the use of these exotic species vital to the manufacture and trade of quality musical instruments. It will discuss this issue from both a scientific and esthetic point of view.¹⁰

In Part III, this Note will explore issues that are likely to arise pertaining to two separate groups as a result of the import declaration requirement, a requirement that is *only* applicable to plant species. Subpart A will address issues arising under the Lacey Act as they pertain to individual musicians, focusing on recent announcements concerning the enforcement of the Lacey Act by the Department of Justice and the U.S. Fish and Wildlife Service. Subpart B will discuss the concerns that have arisen with importers or manufacturers of musical instruments under the 2008 amendment

8. Verified Complaint *in rem*, United States v. 25 Bundles of Indian Ebony Wood, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011); Verified Complaint *in rem*, United States v. Ebony Wood in Various Forms, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010); see Aaron Smith, *Gibson Guitar in Settlement on Illegal Wood Imports*, CNNMONEY (Aug. 7, 2012, 7:04 AM), <http://money.cnn.com/2012/08/06/news/companies/gibson-imports-wood/index.htm> (explaining how, rather than fighting the case against it, Gibson Guitars agreed to “pay a \$300,000 penalty to avoid criminal charges for importing ebony and rosewood in violation of the Lacey Act”).

9. It should be noted that the Lacey Act also can result in convictions for the trade and transport of animal products such as ivory and tortoise shell, materials which have also traditionally been used in musical instruments. 16 U.S.C. § 3372. As the Lacey Act’s protection of animal species has had over a hundred years to be analyzed, this Note will focus only on the recent 2008 amendment and its effects on the importation and use of tonewoods.

10. This Note will primarily focus on the manufacture of stringed instruments: guitars, violins, and the like. Stringed instruments were chosen because they are easily transportable across state lines and international borders and have a long history of using exotic tonewoods in their construction. Further, as of this writing, the only Lacey Act enforcement of the new amendment involved Gibson Guitar over import shipments of exotic woods. See Verified Complaint *in rem*, United States v. 25 Bundles of Indian Ebony Wood, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011); Verified Complaint *in rem*, United States v. Ebony Wood in Various Forms, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010).

This focus on small stringed instruments should not be construed as meaning that the Lacey Act only affects such instruments. For example, the Department of Agriculture specifically includes pianos as a separate section under the heading of “musical instruments” in its announced implementation of the revised Lacey Act. Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,416 (Sept. 2, 2009).

of the Lacey Act, looking specifically at the import declaration requirement for plant species now imported into the United States as well as the two recent prosecutions that have arisen.

Part IV will discuss the issues concerning the “any foreign law” requirement and its effect on the mens rea required for a conviction under the Lacey Act. Subpart A will discuss the purpose of the requirement, focusing on what qualifies as “any foreign law.” Subpart B will focus on the civil and criminal mens rea required for conviction of both individuals and corporate entities under the Lacey Act and briefly discuss how recent announcements by the Department of Justice have complicated this standard for individual musicians.

Part V will change focus and address one potential area of penalty under the Lacey Act, civil forfeiture, and the “innocent owner” defense as it now applies following the recent amendments. It will focus on a recent announcement of amnesty for those unable to discover the origins of their instruments with due care, and it will also discuss whether this new amendment will clash with the established precedent that an innocent owner defense does not exist under the Lacey Act.

Finally, Part VI will conclude by discussing where individual musicians and manufacturers of instruments currently stand under the Lacey Act. It will also discuss several recent moves by members of Congress to alleviate the problems currently faced by musicians and manufacturers as well as other ways that the government can help importers guarantee that tonewood stocks have been legally harvested overseas and help individual musicians guarantee the safety of their individual instruments and livelihoods by avoiding prosecution for violating the Lacey Act in the first place.

II. HOW COULD AN ENVIRONMENTAL STATUTE CAUSE SUCH A MUSICAL HEADACHE? THE EVOLUTION OF THE LACEY ACT AND THE IMPORTANCE OF EXOTIC TONEWOODS

Over the years, the Lacey Act has grown from a weak environmental law to one of the federal government’s most powerful tools for protecting endangered species. With the amendment of the Lacey Act in 2008, it has run into direct conflict with an industry that depends on the use of the exotic species that the Lacey Act seeks to protect.

A. *A Brief History of the Lacey Act: From Weakling Legislation to Environmental Powerhouse*

The Lacey Act, the first conservation act passed by the United States, has deep roots in the preservation of exotic species. Proposed by Representative John Lacey of Iowa and signed into law in 1900 by President McKinley, the Lacey Act reflected the growing concern over trade in illegally taken game, as well as the visible extinction or

impending extinction of several well-known and documented species.¹¹ The Lacey Act, in its original state, afforded the federal government, specifically the Department of Agriculture (“DOA”), very little power. In addition to giving the DOA the power to reintroduce endangered local populations of birds and banning the import of certain species considered to be “injurious to the interest of agriculture,”¹² the Act made it

unlawful for any person or persons to deliver to any common carrier, or for any common carrier to transport from one State or Territory to another State or Territory . . . any foreign animals or birds the importation of which is prohibited, or the dead bodies or parts thereof . . . where such animals or birds have been killed in violation of the laws of the State, Territory, or District in which the same were killed.¹³

This Act made no mention of foreign laws, only allowing for federal sanctions when animals were killed in violation of state law—a purely domestic prohibition.¹⁴

Throughout the twentieth century, Congress amended the Lacey Act multiple times, expanding its reach and the DOA’s powers. For example, in 1935 Congress expanded the Act to make illegal the interstate trade of animals killed in violation of any federal *or foreign* law in addition to any state law.¹⁵ In 1969, the Act expanded to

11. Press Release, U.S. Fish & Wildlife Serv., Nation Marks Lacey Act Centennial, 100 Years of Federal Wildlife Law Enforcement (May 30, 2000), *available at* <http://www.fws.gov/pacific/news/2000/2000-98.htm>; *see also* 33 Cong. Rec. 4871 (1900) (statement of Rep. John Lacey) (arguing that this is not a “purely sentimental measure and intended merely to strike at bird millinery” but a legitimate concern for the impending loss of a number of bird species).

While the public was aware that a number of species had been affected by human encroachment and hunting by the turn of the twentieth century, it was, arguably, the passenger pigeon that brought the issue of endangered species to the forefront of U.S. consciousness. Prized for its quality meat and abundance, the passenger pigeon’s population declined rapidly in the nineteenth century. While the largest flock ever recorded was spotted in Wisconsin in 1871, roughly 136 million birds over eighty square miles, by 1899 the state recorded its last known pigeon shot. The last living passenger pigeon, a female named Martha, died in captivity in the Cincinnati Zoo in 1914. Jeff Reiter, *Historic Markers Lament the Extinction of the Passenger Pigeon*, CHI. DAILY HERALD, Sept. 28, 2010, at N1.

12. Act of May 25, 1900, ch. 553, 31 Stat. 187, § 1-2 (codified as amended at 16 U.S.C. §§ 3371-3378 (2006)) (expanding the DOA’s powers and prohibiting interstate transportation of illegally killed game).

13. *Id.* at § 3.

14. *Id.*

15. Migratory Bird Hunting Stamp Act, ch. 261, 49 Stat. 378 (1935) (codified as amended at 16 U.S.C. 718-718j (2006)) (prohibiting animals killed in violation of federal or foreign laws to be traded in interstate commerce).

It should be noted that when the Lacey Act was first passed in 1900, the state ownership doctrine—i.e., that a state owned the wildlife found within its borders—had been explicitly spelled out just four years earlier by the Supreme Court in *Geer v.*

include “any wild mammal, fish, wild bird, amphibian, reptile, mollusk, or crustacean” as well as the eggs or offspring of those species and increased the mens rea requirement for liability to “knowing[] and willful[]” violations of the Act.¹⁶

In 1981, Congress again modified the Lacey Act to further expand its protection of endangered species.¹⁷ While this amendment first included the violation of Indian Tribal Law as one of the sources of liability,¹⁸ as well as adding a felony punishment for those convicted under it,¹⁹ the amendment is especially notable for the inclusion of protection of *native* plant species.²⁰ This protection, however, only extended to *indigenous* plants taken in violation of *state* law and did not provide the same international protections that the Lacey Act now afforded to animal life.²¹ This inconsistency resulted in a severely limited application of the plant protections provided under the Lacey Act and prompted calls to broaden this particular provision of the Act.²²

While state and federal governments have passed other protections over the years,²³ the Lacey Act continues to be an important part of the United States’ conservation efforts.²⁴ Having

Connecticut, 161 U.S. 519 (1896). This prevented the federal government from putting the DOA in control of the United States’ wildlife. However, while this doctrine would not be reversed until eighty-one years later in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), it was not particularly popular, and by the time it was reversed had been experiencing “steady erosion.” Robert S. Anderson, *The Lacey Act: America’s Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 39 (1995). The passage of the 1935 amendment is an example of such erosion. *Id.* at 38-40.

16. Endangered Species Conservation Act, Pub. L. No. 91-135, 83 Stat. 275 (codified as amended at 16 U.S.C. §§ 1531-1544 (2006)) (prohibiting importation of endangered wildlife and interstate transportation of illegally taken wildlife); *see also* Anderson, *supra* note 15, at 47-48 (discussing the 1969 amendment to the Lacey Act).

17. Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified at 16 U.S.C. §§ 3371-78 (2006)) (regulating illegally taken fish and wildlife).

18. *Id.* at § 3; *see also* Press Release, U.S. Fish & Wildlife Serv., *supra* note 11 (highlighting the major changes to the Lacey Act made by the 1981 amendment).

19. Pub. L. No. 97-79, § 4, 95 Stat. 1074. The criminal penalties provided for in the 1981 amendment are in addition to the previously existing civil penalties.

20. Pub. L. No. 97-79, §§ 2(f), 3(a)(2)(B), 95 Stat. 1073-74.

21. *Id.*

22. *See* Anderson, *supra* note 15, at 54-55 (arguing that the restricted application of the Lacey Act to plant species is a major deficiency in the law).

23. *E.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (2006 & Supp. V 2011).

24. Christine Fisher, Comment, *Conspiring to Violate the Lacey Act*, 32 ENVTL. L. 475, 476 (2002) (“Despite being this nation’s oldest wildlife protection statute, the Lacey Act exists in relative anonymity to the general public. Yet this Act is a valuable federal weapon against illegal wildlife trafficking. Over twelve hundred Lacey Act cases were investigated in fiscal year 2000, more than most other wildlife laws.”) (citations omitted); *see also* Anderson, *supra* note 15, at 36 (“The Lacey Act occupies a

started as a relatively weak environmental policy,²⁵ today it provides both civil and criminal sanctions for conduct including trafficking in endangered species, false labeling, and marking offenses.²⁶ However, with the enactment of the 2008 amendment, its restrictions on the import of exotic hardwood species, known in the music business as tonewoods, has caused much distress in the music industry, an industry that depends upon the use of tonewoods to create quality musical instruments.

B. The Importance of Tonewoods Today

While many instrument manufacturers have recently announced initiatives aimed at using sustainable materials in the manufacture of their products,²⁷ it is important to understand that exotic tonewoods still have a place in the manufacture of select, high-quality musical instruments today. This is primarily due to the durability, strength, and resonance of the various tonewoods.

Stringed instruments have traditionally been made from various types of woods, chosen for acoustical qualities. It is particularly of note that, because no two woods are created equal, certain exotic tonewoods provide acoustical properties that cannot be recreated by using domestic or more readily available resources. Any number of factors can determine how a piece of wood will resonate but especially vital are the stiffness, internal friction, and mass of the wood.²⁸ Ultimately it is a combination of these factors that allows the vibrations from the instrument's strings to be transformed into an audible sound. "Only a small fraction of the strings' energy leaves the [instrument] as sound. The [instrument]'s structure *transforms* that

central position within this legal framework for three reasons. First, it applies to a wider array of wildlife, fish, and plants than does any other single wildlife protection law. Second, it provides for a longer potential term of incarceration than do most other wildlife laws containing felony provisions. Third, the scope of the acts it prohibits is broader than most other wildlife laws.").

25. See Anderson, *supra* note 15, at 49 (discussing how government was not able to effectively enforce the Lacey Act in its early years but that the powers impeding such enforcement eroded over the following eighty years).

26. 16 U.S.C. § 3372 (2006 & Supp. V 2011) (listing the prohibited acts under the Lacey Act). It should be noted that, unlike trafficking and false labeling, marking offenses—offenses stemming from the incorrect packaging and tagging of the species—only carry civil penalties. Fisher, *supra* note 24, at 485.

27. See Kurt Blumenau, *Ah, the Sweet Sound of Metal and Laminate: C.F. Martin Tries Man-Made Materials in Its Guitars, with Some Commercial Success*, MORNING CALL, June 12, 2005, http://articles.mcall.com/2005-06-12/business/3601814_1_acoustic-guitar-wood-guitar-bodies/2 (discussing the C.F. Martin Guitar Company's research into nontraditional materials as well as the success of other companies such as Ovation and Rain Song Guitars in the manufacture and marketing of instruments made from synthetic materials).

28. Erik Jansson, *Vibration Properties of the Wood and Tuning of Violin Plates*, in ACOUSTICS FOR VIOLIN AND GUITAR MAKERS 5.1 (4th ed. 2002).

fraction by the energy storing and discharging process called resonance.”²⁹ Thus, the sound is created by the “complex acoustic energy field radiating from the exterior surfaces of the [instrument].”³⁰ Essentially, the wooden body of the instrument is the difference between a solo metal string being plucked and the sound that one hears in Carnegie Hall.

But no two woods are created alike. In fact, the density, stiffness, and internal friction of wood can vary greatly from species to species. For example, a common spruce species will have roughly a density of 460 kg/m³, shear stiffness of 0.84 GPa,³¹ and longitudinal stiffness of 15 GPa, while that of Indian Rosewood, a desired wood in the construction of stringed instruments, will have a density of 730 kg/m³, shear stiffness of 2.2 GPa, and longitudinal stiffness of 13 GPa.³²

However, these numbers alone do not fully explain the desirability of different woods. In a hollow-bodied instrument like a violin, the ultimate structure of the sound created by the instrument is a product of three separate frequencies put out by the back plate, which provides the lowest frequency, and the top plate and sides, which provide the higher frequencies: “Therefore, it makes sense that the back plate is made from the relatively denser [woods] and the top plate from the lighter [woods].”³³ While the common spruce with its lower density and high stiffness may be well suited for the top and sides of an instrument, rosewood, an exotic tonewood, is far more desirable for the back plate, as it will provide the rich lower frequencies that the musician—and audience—desires.³⁴

In addition, the various materials provide different tone and sound qualities that cannot be measured by numbers but, more aesthetically, by ear. These qualities are exhibited throughout the

29. WILLIAM R. CUMPIANO & JONATHAN D. NATELSON, GUITARMAKING: TRADITION AND TECHNOLOGY 15 (1987).

30. *Id.*

31. GPa is an abbreviation for gigapascals, a unit of elasticity. David Kyoj et al., *Novel Magnesium-Manganese Hydrides Prepared by the Gigapascal High Pressure Technique*, 43 MATERIALS TRANSACTIONS 1124, 1124 (2002).

32. Jansson, *supra* note 28, at 5.3, Tables 5.1-5.2. Particularly interesting are the numbers for Brazilian rosewood, which is currently listed as an endangered species and no longer available for use in instrument manufacture—it is more dense and elastic than its Indian cousin.

However, these numbers should not be taken to imply that softer or less dense woods are not desirable. To the contrary, spruce is arguably the most popular wood for use in making soundboards for guitars while the various rosewood species, as well as Cocobolo, Kingwood, and American Mahogany, are preferred for the back and side materials of the instrument. CUMPIANO, *supra* note 29, at 93-97.

33. KAMESHWAR C. WALI, CREMONA VIOLINS: A PHYSICIST'S QUEST FOR THE SECRETS OF STRADIVARI 33 (2010).

34. *Id.*; CUMPIANO, *supra* note 29, at 96.

instrument, not only in the body. For example, the neck and fretboards³⁵ of a solid body guitar can also play a vital role in the final, tonal output of the instrument:

Maple necks can impart a bright, poppy tone that can do much to reinforce the top end of a large-bodied guitar, while mahogany necks help push the overall palette into a warmer, more woody tonal range.

... Brazilian rosewood fretboards and their denser rainforest counterparts add sparkle and ring, and Indian rosewood fretboards can help fatten up the midrange.³⁶

While certainly not the only defining factor in what makes a quality musical instrument,³⁷ a particular species can be “a determining factor in the creation of a very special guitar or a guitar designed for a specific purpose.”³⁸ The ultimate decision to use certain combinations of woods lies with the luthier,³⁹ or manufacturer who creates the instrument, and exotic tonewoods such as rosewood, ebony, and koa⁴⁰ are materials that have come to be accepted among those in the music community as desirable not only because of their exotic and historical origins, but also because they contribute certain unique acoustical qualities to the instrument that cannot be matched by other species of wood or synthetic materials.

35. Fretboards are the small wood pieces that sit across the fingerboards of a stringed instrument. It is these small pieces of wood that are the center of the controversy in the two recently settled Gibson Guitar cases. *See Verified Complaint in rem*, United States v. 25 Bundles of Indian Ebony Wood, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011); *Verified Complaint in rem*, United States v. Ebony Wood in Various Forms, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010).

36. Dana Bourgeois, *Tapping Tonewoods: How the Selection of Species Helps Define the Sound of Your Guitar*, ACOUSTIC GUITAR MAG., Mar./Apr. 1994, at 42.

37. Any number of factors can create (or ruin) an instrument ranging from the design of the instrument, to the luthier who created it, to the varnish that has been applied to it. *Id.* at 42; WALL, *supra* note 33, at 45. In fact, one of the great mysteries to this day is what precisely is the secret combination of factors that contribute to the greatness of the instruments made in seventeenth and eighteenth century Cremona. *See generally* WALL, *supra* note 33 (exploring the mysteries of Cremona violins).

38. Bourgeois, *supra* note 36, at 42.

39. “Luthier: one who makes stringed musical instruments (as violins or guitars).” MERRIAM-WEBSTER DICTIONARY 409 (2012).

40. Koa is a hardwood native to Hawaii. Its natural marbled appearance (known as the “curl” or “flame”) and tonal characteristics make it particularly popular in the manufacture of guitars and ukuleles. “A guitar made of koa can range from a warm sounding Mahogany to a brighter sounding Rosewood.” Norman L. Beberman, *Koa: Beautiful Looking, Beautiful Sounding Tonewood*, GUITAR NATION, <http://www.guitar-nation.com/articles/koa.htm> (last visited Jan. 20, 2013). Even though koa is from Hawaii and, thus, is technically a domestic product, it is still subject to the Lacey Act importation requirements. *See* 16 U.S.C. § 3372(a)(1) (2006).

III. THE LACEY ACT AS IT PERTAINS TO IMPORTERS AND
MANUFACTURERS OF MUSICAL INSTRUMENTS AND INDIVIDUAL
MUSICIANS

One of the main methods that the international community has employed to combat environmental issues is civil forfeiture.⁴¹ Civil forfeiture allows government agents “full discretion to confiscate any and all cash and property based upon mere police or informant suspicion of wrongdoing.”⁴² The Supreme Court has explained that the deterrent nature of civil forfeiture, preventing further illegal use of a product, outweighs the property rights in the product.⁴³ For example, in *Bennis v. Michigan*, the Court upheld the confiscation of a car used in the solicitation of prostitution against the ownership rights of the defendant’s wife, even though she owned an equal share in the car.⁴⁴ The Court stated that this is akin to a car owner being liable for the actions of a negligent person driving the car and that, in denying the innocent owner defense, it “precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner.”⁴⁵

The Lacey Act provides that any animal or plant that has been transported or traded in violation of the Act is “subject to forfeiture to the United States notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution.”⁴⁶ This implies that a civil forfeiture can occur as early as the investigative stage of a case, regardless of whether or not criminal charges are ever filed against the alleged violator. For example, in *United States v. One Afghan Urial Ovis Orientalis Blanfordi Fully Mounted Sheep*,⁴⁷ the government confiscated a mounted sheep from a shop in Texas on the suspicion that it was illegally exported from Pakistan. Even though the United States Fish and Wildlife Service (“USFWS”) declined to bring criminal charges against the alleged poacher, it ordered that the sheep be arrested and initiated forfeiture proceedings against it.⁴⁸ On appeal, the Fifth Circuit found that probable cause was sufficient to support forfeiture under the Lacey Act and upheld the confiscation of the sheep.⁴⁹

41. Amanda Doty, Note, *Reshaping Environmental Criminal Law: How Forfeiture Statutes Can Deter Crime*, 18 GEO. INT’L ENVTL. L. REV. 521, 521-22 (2006).

42. Nkechi Taifa, *Civil Forfeiture vs. Civil Liberties*, 39 N.Y.L. SCH. L. REV. 95, 95 (1994).

43. *Bennis v. Michigan*, 516 U.S. 442, 452 (1996).

44. *Id.* at 442.

45. *Id.* at 452 (quoting *Van Oster v. Kansas*, 272 U.S. 465, 467-68 (1926)).

46. 16 U.S.C. § 3374(a)(1) (2006).

47. 964 F.2d 474 (5th Cir. 1992).

48. *Id.* at 475-76.

49. *Id.* at 477-78.

Civil forfeiture is an effective method of “both preventing crime and funding law enforcement.”⁵⁰ However, because under the Lacey Act it can be used by the government regardless of proof of culpability or criminal sanctions, it has resulted in fear across the music industry on an individual and corporate level.

In addition to the threat of civil forfeiture, as a result of the 1981 amendment, the Lacey Act includes criminal and civil penalties ranging up to five years in prison and fines up to \$20,000 for knowingly importing a product in violation of a foreign law.⁵¹ It also can result in prison time of up to one year for violations pertaining to the import declaration requirement for plants.⁵² In conjunction with the civil forfeiture penalties, these criminal penalties stand to cripple a party found in violation of the Lacey Act.

A. *Quality Instruments and the Rightful Fears of the Individual Musician*

While it seems that individual musicians are the least likely to be affected by an enforcement of the Lacey Act, in fact, they stand to lose the most by its enforcement. American musicians frequently travel outside of the United States to practice their craft, and many are terrified of the consequences of not knowing the origins of the wood materials in their instrument.⁵³ Recent announcements from the United States Department of Justice (“DOJ”) and the USFWS have indicated that it is safe to travel overseas with individual instruments.⁵⁴ However, this declaration has not been widely tested and could lead to questions concerning a clash between the established case law, which says the Lacey Act does not have an innocent owners defense attached, and the recently added provision

50. Doty, *supra* note 41, at 522.

51. 16 U.S.C. § 3373(d)(1)(A) (Supp. V 2011). In addition to adding criminal sanctions to the Lacey Act’s bag of tricks, the 1981 amendment also expanded the civil penalties available. *See* Anderson, *supra* note 15, at 49 (“The new law discarded this ‘double intent’ requirement, prescribing a criminal penalty for those who knowingly committed an act prohibited by the law and knew, or in the exercise of due care should have known, of the illegal nature of the wildlife at issue.”) (footnote omitted); H.R. REP. NO. 97-276, at 5-6 (1981) (repealing the Black Bass Act, 16 U.S.C. §§ 851-856 (1926), and portions of the Lacey Act and combining the two laws into title 16 of the United States Code).

52. 16 U.S.C. § 3373(d)(3)(B) (2006).

53. *See supra* note 7 and accompanying text (noting the fears of musicians following the 2008 amendment to the Lacey Act).

54. *See* Michael Davidson, *Where We Stand: The Lacey Act and Our Law Enforcement Work*, U.S. FISH & WILD SERVICES (Sept. 22, 2011, 3:41 PM), <http://www.fws.gov/news/blog/index.cfm/2011/9/22/Where-We-Stand-The-Lacey-Act-and-our-Law-Enforcement-Work>; George Gruhn, *Lacey Act Unfairly Burdens Music Instrument Industry*, ASBURY PARK PRESS (Aug. 4, 2012, 1:52 AM), <http://www.app.com/article/DN/20120804/OPINION/308040008>.

that suggests the defense is now available.⁵⁵

The primary issue facing many musicians is that professional musicians—classical and contemporary—tend to prize older stringed instruments.⁵⁶ Classical musicians are especially likely to seek out antique instruments because “[u]nlike many old keyboards and winds, old stringed instruments, especially violins, remain playable . . . [O]ld instruments are regarded as better than new ones because of the way that changes in the wood over time affect their tone.”⁵⁷

In addition, certain antique instruments have grown in notoriety. Instruments created by several families during the seventeenth and eighteenth centuries in Cremona, Italy, are prized today for their “distinct voices, carrying power, and responsiveness.”⁵⁸ These instruments⁵⁹ are exceptionally prized and can sell for millions of dollars, on the rare occasion they are available for purchase.⁶⁰ However, while the likes of Stradavari are out of reach for many of the world’s greatest musicians,⁶¹ countless other quality antique instruments regularly become available at more affordable—albeit not exactly bargain basement—prices.⁶²

The unclear nature of the 2008 Lacey Act amendment has left many musicians feeling uneasy about taking an instrument overseas.⁶³ This uneasiness is compounded by the wording of the

55. For a discussion of the innocent owner defense, see *infra* Part V.

56. For example, B.B. King’s Signature ES-355, also known (some would argue immortalized) as “Lucille,” has been his primary guitar for decades. See THE 100 GREATEST GUITARISTS OF ALL TIME! 35 (Jeff Kitts & Brad Tolinski, eds., 2002).

57. JAYSON KERR DOBNEY, GUITAR HEROES: LEGENDARY CRAFTSMEN FROM ITALY TO NEW YORK 40 (Mark Polizzotti et al. eds., 2011).

58. WALL, *supra* note 33, at 113.

59. The most famous seventeenth century instruments were made by the likes of the Guarneri, Amati, and, most famously, Stradivari families. See *generally id.*

60. *E.g.*, Yoree Koh, *Stradivarius Nets \$16M for Japan Quake Relief*, WALL ST. J. (Jun. 21, 2011, 2:20 PM), <http://blogs.wsj.com/scene/2011/06/21/stradivarius-nets-16m-for-japan-quake-relief>. The article reports on the sale of the “Lady Blunt,” a violin built in 1721 by Antonio Stradivari and named after Lady Ann Blunt, granddaughter of Lord Byron and owner of the violin for thirty years. Considered to be one of the most pristine Cremona violins in existence, it has twice set the world record for the auction price of a violin. *Id.*

61. In fact, today most Cremona violins are out of the hands of individual musicians, instead owned by foundations or banks and loaned out to world-class musicians. *E.g., id.* (explaining that “[t]he [Nippon Music Foundation] owns over a dozen Stradivarius instruments,” loaning them, free of charge, to various musicians who cannot afford such an instrument on their own).

62. The author is hesitant to provide exact numbers due to the ever-changing nature of the auction business; however, one need only look at the website of some of the world’s greatest auction houses to find instruments valued at more modest, though, still expensive prices.

63. See *supra* note 7 and accompanying text.

Lacey Act that requires “any person” to declare the scientific name, quantity, and country of origin of all biological species in an instrument they wish to import into the United States⁶⁴ and provides for immediate civil forfeiture of contraband property with strict liability.⁶⁵ When considered in light of the fact that many antique instruments are of unknown origin and materials⁶⁶ and the average income of a musician in the United States is particularly low,⁶⁷ it is unclear whether the average musician traveling overseas to perform their craft would be able to satisfy the declaration requirements of the Lacey Act or survive the immediate civil forfeiture of a prized instrument upon failure to meet such requirements.

In an attempt to quell the fears of individual musicians, the DOJ and the USFWS announced that the government is only interested in pursuing cases against “those who knowingly transact in larger volumes of illegal products.”⁶⁸ Significantly, the DOJ and USFWS have indicated that those who *unknowingly* possess an instrument containing illegal material will not be prosecuted if they could not have discovered the origin of the material with due care.⁶⁹

However, this raises two related legal questions: first, how does this affect the mens rea of an individual musician facing a civil forfeiture and criminal liability—specifically, what constitutes “due care”; and second, has the 2008 amendment created an opportunity for an innocent owner defense, in contradiction to established Lacey Act precedent, that could be used in the event of a forfeiture?

B. The Breadth of the Lacey Act and Why Manufacturers Should Be Concerned

While the individual musician stands to suffer catastrophic

64. 16 U.S.C. § 3372(f)(1) (Supp. V 2011) (emphasis added); *see also* Implementation of Revised Lacey Act Provisions, 74 Fed. Reg. 45,415, 45,416 (Sept. 2, 2009) (naming musical instruments as one of the categories of products against which the Lacey Act will be enforced).

65. 16 U.S.C. § 3374(a)(1) (2006).

66. *See, e.g.*, DOBNEY *supra* note 57, at 15 (giving an illustration of a guitar circa 1800, owned by the Yale University Collection of Musical Instruments and displayed by the Metropolitan Museum of Art, with origins listed as “[p]robably Naples”).

67. The median hourly income for a musician in the United States was \$22.39 in May 2010, with the lowest 10% earning less than \$8.50. *Bureau of Labor Statistics Occupational Outlook Handbook, Musicians and Singers*, U.S. DEP’T OF LABOR (Mar. 29, 2012), <http://www.bls.gov/ooh/entertainment-and-sports/musicians-and-singers.htm>.

68. Davidson, *supra* note 54 (emphasis omitted) (providing an outline of the USFWS’s stance on the 2008 amendment to the Lacey Act).

69. Letter from Christopher J. Mansour, Dir. of the Office of Cong. and Legislative Affairs, and Ronald Weich, Assistant Att’y Gen., Office of Legislative Affairs, to Fred Upton, Chairman, Comm. on Energy and Commerce (Sept. 19, 2011) [hereinafter Letter to Comm. on Energy and Commerce].

consequences from the loss of an instrument, it is far more likely that manufacturers of quality musical instruments will be affected by the 2008 amendment to the Lacey Act, and the effects on manufacturers should not be seen as any less calamitous. In fact, the only two prosecutions since the 2008 amendment resulted in civil forfeitures of ebony wood imported by Gibson Guitar from India and Madagascar.⁷⁰

The Lacey Act not only provides for the civil forfeiture of the materials in question, which the importer must then sue for return,⁷¹ but it also provides for criminal sanctions, including prison sentences and crippling fines.⁷² While Gibson Guitars is a large company that one may view as able to defend itself against a prosecution, individual luthiers and manufacturers, either solo artisans or boutique businesses, build many of the quality instruments on the market⁷³ and import a great deal of valuable tonewoods.⁷⁴

Instrument manufacturers depend on the use of exotic hardwoods to ply their trade.⁷⁵ Currently, many luthiers and manufacturers are living with a very real problem: they will ultimately be held responsible for the legality of the harvest and import of any wood products that they import into the United States.⁷⁶ Though the Gibson Guitar cases settled in August 2012, they have served one major purpose—to “attract[] attention far beyond the noisy agitations of the right—not because the actions of

70. Verified Complaint *in rem*, United States v. 25 Bundles of Indian Ebony Wood, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011); Verified Complaint *in rem*, United States v. Ebony Wood in Various Forms, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010).

71. See *infra* Part V (discussing the innocent owner defense against civil forfeiture).

72. 16 U.S.C. § 3373(d)(1) (Supp. V 2011) (providing for criminal penalties of up to \$20,000 and five years in prison for knowingly importing plant life in violation of a foreign or domestic law); 16 U.S.C. § 3373(d)(3) (2006 & Supp. V 2011) (providing for criminal penalties of up to one year in prison and fines as defined in title 18 of the United States Code for violating sections of the Lacey Act that pertain to the import declaration requirement).

73. For example, “[t]he maker who best represents the continuing tradition of Italian American lutherie,” John Monteleone, creates guitars from his shop in Islip, New York. DOBNEY, *supra* note 57, at 333. Among other things, Monteleone is famous for creating the “Teardrop” for guitarist Peter Girardi, one of the most famous guitars in the world. *Id.* at 38-39. Like many of his respected predecessors in the lutherie world, he “works primarily on a commission basis and has a long list of customers waiting for guitars.” *Id.* at 38.

74. See Chris Oliver, *Lacey Act, Luthiers and the Relief Act*, INFINITY LUTHIERS SHOP BLOG (Oct. 27, 2011), <http://www.infinityluthiers.com/blog/archives/836> (discussing that many luthiers own “tens of thousands of dollars worth of wood . . . [equating to] retirement accounts . . . in the form of lumber”).

75. See *supra* Part II.B (discussing the importance of exotic tonewoods in the manufacture of musical instruments).

76. See 16 U.S.C. § 3372 (2006 & Supp. V 2011).

the federal government were wrong, but because the future of North American guitar making will be in peril if problematic aspects of environmental law are not resolved.”⁷⁷

With the 2008 amendment, the Lacey Act now includes a declaration requirement specifically geared to plants and plant products.⁷⁸ Those who do import are now required to declare, in detail, the scientific name, country of harvest, and quantity of the plant material upon importation.⁷⁹ While the United States Drug Administration’s Animal and Plant Health Inspection Service (“APHIS”) has indicated that importers are not required to account for the “chain of custody” of the product,⁸⁰ recent actions would suggest otherwise. For example, in the first case brought against Gibson Guitars, the ebony in question was obtained from a supplier who purchased the inventory from another supplier, effectively putting at least two links in the chain between the harvest of the wood and the import by Gibson. The crux of the case against Gibson relied on the illegal import, not by the most direct supplier, but from the first person to export the wood from Madagascar.⁸¹ This shows that, while there is no requirement to account for the chain of custody on the import declaration requirement, the manufacturer-

77. Kathryn Marie Dudley, Op-Ed., *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>. Notably, the Gibson cases have become somewhat of a *cause celebre* for certain members of Congress who not only see the cases as enforcing foreign laws that keep jobs from hard-working Americans, but also have implied that the Obama Administration targeted Gibson Guitar because its CEO is a well-known Republican donor. *See id.* While these arguments certainly make for an interesting discussion, they are outside the scope of this Note.

78. 16 U.S.C. at § 3372(f) (Supp. V 2011) (describing the import declaration requirement to go into effect 180 days following the enactment of the 2008 amendment).

79. *Id.*; *see also* ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., OMB NO. 0579-0349, PLANT AND PLANT PRODUCT DECLARATION FORM, PPQ FORM 505 (2011) [hereinafter PLANT PRODUCT DECLARATION FORM], *available at* http://www.aphis.usda.gov/plant_health/lacey_act/downloads/declarationform.pdf (requiring the importer to declare certain information in detail).

80. ANIMAL AND PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., LACEY ACT AMENDMENT: COMPLETE LIST OF QUESTIONS AND ANSWERS 4 (Feb. 16, 2012) [hereinafter APHIS LACEY Q&A], *available at* http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf.

81. *See* Affidavit of Kevin L. Seiler at 4-6, *United States v. Ebony Wood in Various Forms*, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010) (detailing the investigation that led to the confiscation of Gibson’s shipment of Madagascan ebony). For more information on this importer, Roger Thunam, *see* Robert Draper, *The Pierced Heart of Madagascar: The Island’s Geographic Isolation Created a Wonderland of Biological Richness*, NAT’L GEOGRAPHIC, Sept. 2010, at 80 (“‘Thunam isn’t a businessman—he’s a trafficker,’ says one local official. ‘He cuts what isn’t his. He’s taken from the people’s park. And now others think it’s acceptable to take what’s forbidden.’ Unsurprisingly, Thunam asserts otherwise. Born into the vanilla business, he expanded into timber 30 years ago. Since that time, he says, the government has issued him various permits.”).

importer is still ultimately liable for bad links in that chain.⁸²

The bottom line is that the Lacey Act will hold the manufacturer importer responsible for any materials illegally harvested or exported from the country of origin. While it may sound admirable in its intention and sensible in its purpose, the Lacey Act is, in its current state of being, “damned near impossible to enforce, and impossible to comply with.”⁸³ As a result, any manufacturer of quality instruments is currently at a disadvantage as it is they who will be held responsible for the actions of every link in the importation chain.

IV. THE “ANY FOREIGN LAW” REQUIREMENT

The Lacey Act, in addition to banning any flora or fauna sold or transported in violation of any United States or Indian Tribal Law, also specifically makes it illegal “to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce . . . any fish or wildlife taken, possessed, transported, or sold in violation of any law or regulation of any State or in violation of any foreign law.”⁸⁴ Arising out of this provision are two questions: what does “any foreign law” mean; and how does this affect the mens rea of those affected by this provision?

The Lacey Act provides for both civil and criminal sanctions.⁸⁵ Civil sanctions, for example civil forfeiture, can be brought regardless of whether or not criminal prosecution is sought by the government⁸⁶ and have a somewhat dubious “due care” standard of mens rea attached.⁸⁷ However, the Lacey Act sets a high standard for criminal prosecutors. Generally, it is required that the party “knowingly” engaged in the violation.⁸⁸

A. What Does “Any Foreign Law” Mean?

What exactly does “any foreign law” mean is perhaps one of the most confusing questions of the “any foreign law” requirement.⁸⁹ The Lacey Act was intended to protect wildlife. But what happens when a

82. See *infra* Part IV.B-C (discussing in more detail the import declaration requirement and corporate mens rea).

83. Gibson, *the Lacey Act, and Tropical Hardwoods: Some Facts*, DAILY KOS (Sept. 24, 2011, 2:45 PM), <http://www.dailykos.com/story/2011/09/24/1019901/-Gibson-the-Lacey-Act-and-tropical-hardwoods-some-facts>.

84. 16 U.S.C. § 3372 (a)(2)(A) (2006).

85. 16 U.S.C. §§ 3373-3374 (2006 & Supp. V 2011). Section 3373 provides for both civil and criminal penalties while section 3374 deals specifically with forfeiture.

86. See *supra* Part III, for a discussion of civil forfeiture and its effects on individual and corporate parties subject to it.

87. 16 U.S.C. § 3373(a)(1) (Supp. V 2011).

88. *Id.* § 3373(d)(1)(A).

89. *Id.* § 3372(a)(2)(A).

party is prosecuted for violating a law⁹⁰ that was not initially intended to protect flora or fauna, but rather existed for an entirely different purpose?

The intent of Congress in passing the Lacey Act and its subsequent amendments was the concern over the illegal trade of endangered species, and it was further amended in 1935 to include illegal species taken in violation of foreign laws because of concern over the illegal trade of species not native to the United States.⁹¹ As late as the 1981 amendment,⁹² members of Congress implied that the Lacey Act was intended to provide sanctions for foreign laws that protected *wildlife*.⁹³ For example, in *United States v. Molt*, the appellants were charged under the Lacey Act for conspiring to smuggle reptiles into the United States from various South Pacific nations.⁹⁴ Upon review, the Third Circuit upheld the charge stemming from the violation of a Papua New Guinea law aimed at protecting wildlife but disallowed the charge stemming from the violation of a Fiji revenue law.⁹⁵ The court reasoned that “the foreign laws and regulations referred to in the [Lacey Act] are laws and regulations designed and intended for the protection of wildlife in those countries.”⁹⁶

However, the precedent set by the Third Circuit in *Molt* did not stand for long. With the passage of the 1981 amendment, Congress

90. While it seems that the word “law” is a limiting word, it has been well established that “any foreign law” extends beyond legitimate statutes passed by foreign governments to include rules and regulations enacted by foreign government agencies. For example, in *United States v. 594,464 Pounds of Salmon*, the Ninth Circuit upheld a lower court ruling that the term “any foreign law” included regulations on exporting fish that had been enacted not by the national government but by a lower Taiwanese government agency. 871 F.2d 824, 828 (9th Cir. 1989); see also *United States v. 594,464 Pounds of Salmon*, 687 F. Supp. 525, 527-28 (W.D. Wash. 1987) (explaining that, given the broad description of the word “law,” it makes sense that Congress’ intent to protect wildlife could not be carried out without the inclusion of foreign rules and regulations).

91. See *United States v. McNab*, No. 01-15148, 2003 U.S. App. LEXIS 5561, at *22-23 (11th Cir. Mar. 21, 2003) (explaining that the intent of Congress was to protect wildlife from illegal trade in the United States).

92. Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified at 16 U.S.C. §§ 3371-78 (2006)).

93. *E.g.*, S. REP. NO. 97-123, at 4 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1751 (stating that the amendment would “allow the federal government to provide more adequate support for the full range of state, foreign and federal laws that protect wildlife”).

94. 599 F.2d 1217, 1218 (3d Cir. 1979).

95. *Id.* at 1220.

96. *Id.* at 1218-19 (supporting this stance with a direct quote from the congressional record that “[b]y prohibiting the sale in the United States of wildlife protected by a foreign government, the demand for poached wildlife from that country will be sharply reduced” (citing S. REP. NO. 91-526, at 3, 12 (1969), *reprinted in* 1969 U.S.C.C.A.N. 1413, 1415)).

shifted its stance on the subject of what laws should apply. Specifically citing the *Molt* case, the Senate made clear that it was more concerned that the law be aimed at wildlife in general than with actual conservation of wildlife when it stated that “under a narrow reading of the *Molt* decision it might be argued that a state’s hunting license law which is revenue-producing is not covered by the Lacey Act. However, such a law clearly does relate to wildlife and it is the committee’s intent that it be covered by the Act.”⁹⁷

Since the 1981 amendment passed, the courts have tended to expansively interpret this wording to mean that a law, regardless of its intent, will qualify under the Lacey Act so long as it relates to wildlife. For example, in *United States v. Lewis*, the Tenth Circuit upheld a single conviction under the Lacey Act for violating an Oklahoma hunting law.⁹⁸ The appellant argued that because the law only meant to regulate hunting and not wildlife conservation, the Lacey Act should not apply.⁹⁹ However, the court disagreed and held that a state hunting law, because it deals with the regulation of wildlife in some way, was an adequate law under the Lacey Act, and, as such, the conviction was proper.¹⁰⁰

The 2008 amendment continues this standard. Currently, the Lacey Act makes it clear that it is unlawful to import, export, or transport in interstate commerce *any* plant that has been

taken, possessed, transported, or sold in violation of *any law* or regulation of any State, or *any* foreign law, that protects plants or that regulates . . . the theft of plants; . . . the taking of plants from a park, forest reserve, or other officially protected area; . . . the taking of plants from an officially designated area; or . . . the taking of plants without, or contrary to, required authorization; . . . taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or any foreign law; or . . . taken, possessed, transported, or sold in violation of *any limitation under any law or regulation of any State, or under any foreign law, governing the export or transshipment of plants.*¹⁰¹

While it may be argued that the initial intent of Congress was that “any foreign law” would only enforce those laws aimed at wildlife preservation, today the standard has been raised much higher. Presently, the wording of the Lacey Act, the congressional record, and the established case law imply that, so long as a law seeks to regulate the export of a plant species in *any way*, it will be sufficient

97. S. REP. NO. 97-123, at 6 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1753.

98. 240 F.3d 866, 871 (10th Cir. 2001).

99. *Id.* at 869.

100. *Id.*

101. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204(b)(1)(B)(i-iii), 122 Stat. 923, 1291 (emphasis added).

to bring charges under the Act.

Perhaps the most widely known example of how the Lacey Act has been interpreted to include any foreign law in general, as opposed to any foreign law pertaining to wildlife preservation, can be found in *United States v. McNab*.¹⁰² In *McNab* the government used a Honduran regulation¹⁰³ that required lobster tails exported from the country to be packaged in a specific manner as a foundation to bring a Lacey Act prosecution.¹⁰⁴ The regulation did not aim to protect wildlife, but rather regulated the packing material in which any legally exported lobster tail must be packed. The resulting convictions have since served as a battle cry for politicians and members of the press who see this expansive reading of the Lacey Act as being overly broad and hurtful to the average American.¹⁰⁵

This broad application of the term “any foreign law” continues to have far-reaching consequences today. For example, in the recently settled Gibson Guitar cases, the government applied a broad range of foreign laws resulting in the civil forfeiture of two shipments of ebony fingerboards. In the first case, *United States v. Ebony Wood in Various Forms*,¹⁰⁶ the law in question deals with a legitimate environmental concern: the Madagascan government passed it in 2006 to combat the illegal harvesting of ebony and rosewood.¹⁰⁷

102. 331 F.3d 1228 (11th Cir. 2003).

103. Acuerdo No. 0008-93, 13 Jan. 1993, Recursos Naturales [Natural Resources], LA GACETA, DIARIO OFICIAL DE LA REPÚBLICA DE HONDORAS [L.G.], 7 Apr. 1993 (Hond.).

104. The regulation in question states that “[p]rocessing lobster tails involves several steps: thawing, sorting, and grading the lobsters by quality and size; placing the tails in individual plastic sleeves; and packing them in boxes.” *McNab*, 331 F.3d at 1233 n.4. It should also be noted that this was not the only foreign law in question. The defendants were also convicted of Lacey Act charges stemming from the violation of Honduran regulations against exporting undersized lobster tails and female lobsters with the eggs sacs removed. *Id.* at 1232, 1246. While these violations do aim at protecting an animal species and arguably fall well within the initial intent of the Lacey Act, the fact that they were included does not change the fact that Regulation 0008-93 does not protect wildlife and was used as a basis for a Lacey Act conviction. See *infra* note 216 and accompanying text.

105. See, e.g., Interview by Lou Dobbs with Rand Paul, U.S. Senator, in N.Y.C., N.Y. (Feb. 8, 2012), available at <http://www.youtube.com/watch?v=Eb9z0Ch0PV4> (“I was horrified to think that we are enforcing criminal sentences on U.S. citizens for foreign laws, and, in fact, a couple of U.S. citizens . . . were put in jail . . . for violating a Honduran regulation that said your fish needed to be in cardboard boxes and not in plastic wrappers.”); Hank Campbell, *Gibson Guitars and the Lacey Act Misused*, SCI. 2.0 (Sept. 3, 2011, 11:47 AM), http://www.science20.com/science_20/gibson_guitars_and_lacey_act_misused-82210 (discussing *McNab* and the raids of the Gibson Guitar factory as a prime example of how overbroad the current Lacey Act interpretations are).

106. Verified Complaint *in rem*, *United States v. Ebony Wood in Various Forms*, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010).

107. Madagascar Inter-Ministerial Order No. 16.030/2006 (banning the harvesting

However, in the second case, *United States v. 25 Bundles of Indian Ebony Wood*,¹⁰⁸ the government seized a bundle of ebony fingerboards because they were imported in violation of the Indian Foreign Trade Development and Regulation Act of 1992, which prohibits the export of *unfinished* wood from India but permits it to be exported, provided the finished work is completed prior to export.¹⁰⁹ This act has virtually nothing to do with the preservation of Indian hardwoods but is intended to affect the preservation of Indian jobs.¹¹⁰ While the second application has served as a battle cry for those who see the Lacey Act as being overly broad,¹¹¹ it is a perfect example of how broad the “any foreign law” requirement reaches into international law and how daunting it can be for an importer to comply with it. Presently, the language and judicial interpretation of the Act implies that the term “any foreign law” means not just environmental laws but any law that pertains to the regulation of the species.¹¹²

of all rosewood and ebony wood species in Madagascar). *See generally* Draper, *supra* note 81 (detailing how population growth and political turmoil have played a key role in the increased harvesting of Madagascar’s natural resources).

108. Verified Complaint *in rem*, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011)

109. *See* Affidavit in Support of Application for Civil Forfeiture at 5-7, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011); Foreign Trade (Development and Regulation) Act, 1992, No. 22, Acts of Parliament, 1992 (India); Foreign Trade Policy, 2010, Gazette of India, section II(3)(ii) (Aug. 23, 2010).

110. *See Trade*, BUS. KNOWLEDGE RESOURCE ONLINE, <http://business.gov.in/trade/index.php> (last visited Jan. 24, 2013) (explaining that the Indian foreign trade policy, enacted under the Indian Foreign Trade Development and Regulation Act of 1992, has “employment generation” as one of its major objectives).

111. *See, e.g.*, Affidavit in Support of Application for Civil Forfeiture at 5-7, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011) (detailing Gibson CEO Henry Juskewicz’s numerous statements to the press about the Indian law in question and equating it to the United States government enforcing laws that take jobs away from Americans); *Gibson, the Lacey Act, and Tropical Hardwoods: Some Facts*, *supra* note 83 (“In this first case in 2009, it seems like Gibson just got caught in blatant violation of the act, with the wood equivalent of banned ivory. In this new case, it’s a different story. . . . [T]he Lacey Act is being used to enforce India’s industrial protectionism, rather than environmental laws.”).

112. In addition to labeling this interpretation as overbroad, some have argued that it is unconstitutional because it enforces foreign laws. *See United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829-30 (9th Cir. 1989). However, the courts have long established that this is not the case. *See id.* at 830 (“[T]he Act does not call for the assimilation of foreign law into federal law. Rather, the Act merely provides that once a violation of a foreign law has occurred, that fact will be taken into account by the government official entrusted with enforcement. That is, the government is not applying the foreign law *per se*, but rather it is looking to the foreign law to determine if the Act’s provisions are triggered; if so, then it will apply the Act, and not the foreign law.”). In addition to any foreign law that seeks to regulate plant species, those seeking to transport biological products must also be sure that they are not doing so in

B. Civil and Criminal Mens Rea

The current language of Lacey Act implies two things concerning mens rea: first, that a party will be subject to civil penalties if they engage in any of the forbidden activities that, had they exercised due care, they would have known to be illegal under any foreign law;¹¹³ and second, a party will be subject to criminal penalties if they knowingly act in violation of the Act.¹¹⁴

Manufacturers who seek to import materials for use in musical instruments are, perhaps, at the greatest disadvantage under the any foreign law requirement. As discussed above, a Lacey Act violation can stem not only from the violation of a foreign law aimed at environmental protection, but can also stem from any foreign law generally affecting the plant species, regardless of its intent.¹¹⁵ Criminal mens rea under the Lacey Act requires the government to prove that the defendants had “actual knowledge that the wildlife was unlawfully taken or possessed.”¹¹⁶

However, while this does put a high burden on the government to prove knowledge, the requirement is not quite as cut-and-dry as it may seem. The purpose of requiring knowledge is to “separate wrongful conduct from ‘otherwise innocent conduct.’”¹¹⁷ As this applies to the Lacey Act, the government need only prove that a defendant knew of the illegality associated with the import, not necessarily the details of the law itself. For example, in *United States v. Santillan*, the defendant appealed a conviction for illegally importing parrots into the United States from Tijuana, Mexico.¹¹⁸ The defendant argued that, while he knew that he could not bring the birds into the country without declaring them, he thought that he would only be required to forfeit them if he was caught; he could not have known about the law he was violating by importing the birds because he had purchased them several hours earlier in a bar while having a few drinks.¹¹⁹ The Ninth Circuit upheld the conviction finding that, even though he did not know about the specific (and rather aggressive) importation restrictions on the birds, the fact that he knew that it was illegal to bring them in was enough to uphold his

violation of any state, federal, or Indian tribal law. 16 U.S.C. § 3372(a)(1) (2006).

113. 16 U.S.C. § 3373(a)(1) (Supp. V 2011).

114. *Id.* § 3373(d) (2006 & Supp. V 2011).

115. *See supra* note 104 (discussing a Lacey Act conviction under a law that is not aimed at protecting wildlife).

116. *United States v. Parker*, 991 F.2d 1493, 1496 (9th Cir. 1993).

117. *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video*, 513 U.S. 64, 72 (1994)).

118. 243 F.3d 1125, 1126 (9th Cir. 2001).

119. *Id.* at 1126-27.

conviction.¹²⁰ Essentially, a party will be in violation of the Lacey Act if he imports a species and knows that the import is in violation of *some* law—the party need not know specifically why the action is illegal to have knowledge within the meaning of the Act.

Further, the government may use any number of ways to prove that a party had knowledge of the illegality. For example, evidence of a party's past crimes may be admissible to prove knowledge in a Lacey Act prosecution.¹²¹ An example of such a situation occurred in *United States v. Miranda*, a Lacey Act prosecution for the importation of undersized lobster tails.¹²² In *Miranda*, the Eleventh Circuit allowed the admission of a citation previously issued to the defendant for the possession of undersized lobster tails to show knowledge of illegality.¹²³ The government may use any number of additional methods to prove knowledge, including “[p]atterns of mislabeling, the hiding of business records, any evidence of previous game violations, and the use of false names.”¹²⁴

The requirement that an individual have knowledge of some illegality should comfort musicians and instrument manufacturers because it sets a high standard of proof for the government to convict under the Lacey Act. While the standard does not require the government to prove actual knowledge of the specific law violated, it does require that the government prove more than mere negligence on the part of the instrument owner or manufacturer.¹²⁵ However, because the Lacey Act has been codified for some time, courts likely will find that notice has been given and will expect compliance.

Nevertheless, criminal sanctions are only half of the Lacey Act equation and, arguably for some, the lesser of two evils. Per the Lacey Act, a party will be subject to civil penalties if he engages in any of the forbidden activities that, had he exercised due care, he would have known to be illegal under any foreign law.¹²⁶ A due care provision essentially “requir[es] the government to show, based on an objective test, that, regardless of knowledge, the defendant failed to

120. *Id.* at 1127, 1129.

121. *See* FED. R. EVID. 404(b)(2) (“[E]vidence [of a past crime] may be admissible for another purpose such as proving . . . knowledge[.]”).

122. 835 F.2d 830 (11th Cir. 1988).

123. *Id.* at 832. This case should not be confused with *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), another case involving the import of lobster tails. While *Miranda* deals primarily with the lobster tails being undersized, *McNab* is arguably the prime example of how the Lacey Act has been stretched. *See supra* note 104 and accompanying text; *infra* note 216 and accompanying text.

124. John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1150 (1999).

125. *See* 16 U.S.C. § 3373(d) (2006 & Supp. V 2011).

126. 16 U.S.C. § 3373(a)(1) (2006).

take proper precautions to avoid violating the Act.”¹²⁷ This is a lower threshold than criminal mens rea: it does not require proof of scienter but does require compliance with “any foreign law.”¹²⁸

For example, in *United States v. 594,464 Pounds of Salmon*, the Ninth Circuit upheld a civil penalty against a California corporation for illegally importing salmon from Taiwan without a permit, a violation of a Taiwanese regulation.¹²⁹ The court reasoned that the statute’s requirement of compliance with “any foreign law” was sufficient notice “as to have provided [the corporation] with ‘fair warning.’”¹³⁰ Because the Lacey Act requires compliance with any foreign law and because the contesting corporation frequently engaged in large-scale international commerce, the corporation had been given fair warning; due care required it to comply with any foreign law pertaining to the import.¹³¹ This holding is especially significant for manufacturers that import tonewoods as due care implies that importers must be within the bounds of all possible laws pertaining to the Lacey Act’s “any foreign law” requirement.¹³²

Recently, with the 2008 amendment and its subsequent enforcement, the government has thrown a new wrench into the mens rea equation. When the DOJ and USFWS announced that they would not seek to punish those individual musicians who exercise due care in attempting to ascertain the origins of their instruments,¹³³ the government essentially added a new question: in such a situation, what “due care” must be exercised by an *individual* instrument owner to avoid *criminal* prosecution? This is unique because it appears to apply the civil mens rea requirement under the Lacey Act to instrument owners facing criminal sanctions.¹³⁴ The DOJ and USFWS did not give any further instruction as to what constitutes due care in such a situation and, as of this time, the

127. David P. Gold, Note, *Wildlife Protection and Public Welfare Doctrine*, 27 COLUM. J. ENVTL. L. 633, 666 (2002) (using § 3373(d)(2) of the Lacey Act to illustrate how the government should include a due care requirement in all environmental statutes).

128. § 3373(a)(1).

129. 871 F.2d 824, 825, 830 (9th Cir. 1989).

130. *Id.* at 829 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)).

131. *Id.*

132. § 3373(a)(1).

133. See Letter to Comm. on Energy and Commerce, *supra* note 69 (“[P]eople who *unknowingly* possess a musical instrument or other object containing wood that was illegally taken . . . and who, in the exercise of due care, would not have known that it was illegal, do not have criminal exposure.”).

134. Compare § 3373(a)(1) (naming due care as the standard to measure liability for civil sanctions under the Lacey Act), with Letter to Comm. on Energy and Commerce, *supra* note 69 (informing Congress that individual instrument owners who exercise due care in ascertaining the origins of their instruments will not be subject to criminal sanctions).

answer is ultimately unclear.

However, some guidance may be inferred by looking at the resources available today. Most quality instruments can be traced to a manufacturer and date of creation.¹³⁵ Further, most tonewoods exhibit particular aesthetic qualities beyond tone that can be easily identified by sight.¹³⁶ Additional resources may be used; for example, in the case of a particularly prized instrument, DNA tracking may be available.¹³⁷ With such accessible resources, it can be inferred that a musician can ascertain, to some degree, whether or not an instrument contains illegal materials. What is known is that this provision is clearly aimed only at individual musicians and instrument owners, not at corporate manufacturers.¹³⁸

The “any foreign law” requirement is a heavy burden on the individual musician or manufacturer. Presently, there is no database or readily available resource for the average person to consult concerning foreign laws that may affect the import of musical instruments or materials, and the APHIS has indicated that the government has no intention of creating such a database in the near future.¹³⁹ While the DOJ, USFWS, and APHIS have indicated that it

135. Most U.S. guitar manufacturers will provide a serial number for each guitar, which allows the instrument to be traced. *See, e.g.*, BLUE BOOK OF ELECTRIC GUITARS, GIBSON SERIALIZATION (S.P. Fjestad ed., 6th ed. 1999), available at <http://www.gibson.com/Files/downloads/bluebook/GibsonSERIALNUMBERS.pdf> (explaining the method of serialization of Gibson Guitars from 1902 to the present); *Serial Numbers*, C.F. MARTIN & Co., <http://www.martinguitar.com/about-martin/the-martin-story/serial-numbers.html> (last visited Jan. 24, 2013) (providing serial number information for guitars manufactured by C.F. Martin).

There are, of course, some exceptions to this rule. For example, some older instruments can only be attributed to a general time and place of origin. *See, e.g.*, DOBNEY *supra* note 57, at 44 fig.80 (attributing a mandolin from the collections of the Metropolitan Museum of Art to “[p]robably northern Italy, ca. 1710”). This dilemma is even more applicable to instruments of “lesser” quality. For example, the author of this Note owns a blue ukulele that she picked up at a roadside souvenir shop in Florida several years ago. Upon closer inspection, she has absolutely no idea where it originally came from.

136. For example, ebony is prized for its deep black color in addition to its hardness and tone quality when used as fingerboards; pernambuco wood is sought after for use in violin bows, not only for its suppleness, but also because it has a natural red hue; and koa is known for its instantly recognizable curly grain. WILLIAM R. CUMPIANO & JONATHAN D. NATELSON, GUITARMAKING: TRADITION AND TECHNOLOGY 270 (1987) (ebony); U.S. FISH AND WILDLIFE SERVICE, INTERNATIONAL TRADE IN PLANTS AND WILDLIFE (2010), available at http://www.fws.gov/international/DMA_DSA/CITES/pdf/musical_instruments.pdf (pernambuco); Beberman, *supra* note 40 (koa).

137. *See generally* DOUBLE HELIX, APPLIED GENETICS FOR FOREST CONSERVATION AND SUSTAINABLE TRADE (2011), available at <http://www.illegal-logging.info/uploads/DoubleHelixAppliedGeneticsForForestsReport072011.pdf> (outlining the current ability of DNA technology to trace the origin of wood species).

138. Letter to Comm. on Energy and Commerce, *supra* note 69.

139. APHIS LACEY Q&A, *supra* note 80, at 2.

is not their intent to prosecute individual and personal imports at this time, it has also been implied that individual musicians should exercise “due care” in determining the origins of their instruments. Further, manufacturers are required to research, at potentially great cost, any law pertaining to the regulation of the species of tonewood that they wish to import. While a manufacturer may not find itself subject to a criminal sanction because it did not knowingly import a tonewood species in violation of any foreign law, it may still find itself subject to the civil forfeiture that accompanies any violation because it did not, subjectively, exercise due care in researching all applicable foreign statutes.

V. THE INNOCENT OWNER DEFENSE

In addition to criminal and civil sanctions brought under § 3373(a) and § 3373(d), the Lacey Act carries a third type of penalty: civil forfeiture.¹⁴⁰ The innocent owner defense is a defense against civil forfeiture that is codified in various statutes.¹⁴¹ It allows a party to avoid the confiscation of property in a civil forfeiture if they can prove, by a preponderance of the evidence, that they did not know that their conduct would give rise to forfeiture, or if they did know, that they did all that they could, within reason, to give up use of the property in question.¹⁴²

The innocent owner defense has been invoked on multiple occasions in Lacey Act prosecutions where the defendant wished to fight the confiscation of property.¹⁴³ However, the innocent owner defense is the exception, not the rule, and only exists where specific statutes provide for it.¹⁴⁴ When looking at decisions made prior to the 2008 amendment, the underlying premise remains the same: across all jurisdictions, the general consensus is that the Lacey Act *does not* include an innocent owner defense.¹⁴⁵ This proposition is backed up

140. 16 U.S.C. § 3374 (2006 & Supp. V 2011); *see also supra* Part III (discussing civil forfeiture); *United States v. Lee*, 937 F.2d 1388, 1391 (9th Cir. 1991) (“The Act provides for civil penalties, criminal penalties, and forfeiture of illegally taken fish and wildlife. . . . All of these penalties are meant to apply to those who engage in conduct in violation of section 3372.”).

141. *E.g.*, 18 U.S.C. § 983(d) (Supp. V 2011) (outlining the innocent owner defense as a portion of the general rules for civil forfeiture proceedings).

142. *Id.*

143. *See, e.g.*, *United States v. Proceeds from the Sale of Approximately 15,538 Panulirus Argus Lobster Tails*, 834 F. Supp. 385, 391-92 (S.D. Fla. 1993) (invoking the innocent owner defense against the proceeds of the sale of contraband lobster tails); *United States v. One Handbag of Crocodilus Species*, 856 F. Supp. 128, 134 (E.D.N.Y. 1994) (invoking the innocent owner defense against the confiscation of a crocodile purse).

144. David Pimentel, *Forfeiture Procedure in Federal Court: An Overview*, 183 F.R.D. 1, 15 (1999).

145. *E.g.*, *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106,

by the clear legislative intent of Congress in allowing for civil forfeitures: “The [Lacey] Act provides for forfeiture of the . . . plants on a *strict liability basis* because the merchandise is, in effect, contraband.”¹⁴⁶

For example, in *United States v. 2,507 Live Canary Winged Parakeets*, the defendant argued that, even though he knew that the *brotogeris vericolorus* species of parakeets could not be legally exported from Peru, he was under the impression that the export could be authorized by the director of the Peruvian Department of Forests and Fauna.¹⁴⁷ Because he had an authorization, he argued that he was entitled to an innocent owner defense.¹⁴⁸ The court rejected this argument because the Lacey Act “unambiguously renders the initial forfeiture of wildlife unlawfully imported under this title a matter of strict liability.”¹⁴⁹

While the innocent owner defense has not yet been attempted under the 2008 amendment to the Lacey Act, courts likely will find it now applies to prosecutions brought under the Act. Section 3374, which governs forfeitures, has not changed with the new amendment.¹⁵⁰ However, the 2008 amendment added a new provision¹⁵¹ indicating that “[c]ivil forfeitures under this section shall be governed by the provisions of chapter 46 of title 18 [of the United States Code].”¹⁵² This is significant because this portion of the United States Code includes the innocent owner defense.¹⁵³

However, the innocent owner defense is just that—a defense. It is a defense to in rem forfeiture proceedings brought against the product itself.¹⁵⁴ This means that the product must already be confiscated by the government in order to qualify as a party to this defense.¹⁵⁵ If, in fact, this defense now applies to the Lacey Act, it is

1117 (S.D. Fla. 1988) (“The Court is of the opinion that the defense of ‘innocent owner’ is not available in actions under the Lacey Act.” (citation omitted)).

146. S. REP. NO. 97-123, at 13 (1981), *reprinted in* 1981 U.S.C.C.A.N. 1748, 1760 (emphasis added).

147. 689 F. Supp. at 1114.

148. *Id.* at 1117.

149. *Id.* at 1118.

150. 16 U.S.C. § 3374(a)(1) (2006) (“All fish or wildlife or plants imported . . . contrary to the provisions of section 3372 . . . shall be subject to forfeiture to the United States notwithstanding any culpability requirements . . .”).

151. Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, § 8204(d), 122 Stat. 923, 1291.

152. § 3374(d).

153. 18 U.S.C. § 983(d) (Supp. V 2011).

154. *United States v. 328 Pounds More or Less, of Wild Ginseng*, 347 F. Supp. 2d 241, 245 (W.D.N.C. 2004) (citing *United States v. Real Prop. Described in Deeds Recorded at Book/Page 639/846, 639/840, 639/834, 639/827, and 610/727, 962 F. Supp. 734, 736-37* (W.D.N.C. 1997)).

155. For example, *2,507 Live Canary Winged Parakeets* was an in rem forfeiture

vital that musicians and manufacturers understand the parameters of the defense and that, despite its name, it is not a “get out of jail free” card. Because the innocent owner defense is a defense and not an argument against confiscation in the first place, it is far more applicable to corporate parties seeking a return of their products than it is to the individual musician who has lost one instrument.¹⁵⁶

Per 18 U.S.C. § 983(d), “[a]n innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute.”¹⁵⁷ The government can confiscate an instrument once it has met the burden of proof that the property is subject to forfeiture.¹⁵⁸ Should a party seeking to challenge the confiscation under this provision wish to pursue an innocent owner defense, it must establish two things: first, it must prove that it has standing to make such a defense; and second, it must prove, by a preponderance of the evidence, that it is, in fact, an innocent owner.¹⁵⁹

“Standing is [the] threshold issue before considering [the] innocent owner defense.”¹⁶⁰ Before a party may even argue the innocent owner defense in a civil forfeiture situation, it must prove that it is the correct party to bring that defense. The statute defines an owner as being a party

with an ownership interest in the specific property sought to be

action. The defendant in the case was not the party accused of importing the parakeets, but the actual parakeets that had already been forfeited to the United States government. *United States v. 2,507 Live Canary Winged Parakeets*, 689 F. Supp. 1106, 1110 (S.D. Fla. 1988) (“[A]fter having confirmed that the parakeets imported were in fact *brotogetis versicolorus*, Agent Medina and other agents from the Fish and Wildlife Service seized the Defendant parakeets.”).

While *2,507 Live Canary Winged Parakeets* denied that an innocent owner defense existed, the process for in rem forfeiture has not changed with the 2008 amendment. See *Verified Complaint in rem*, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011); *Verified Complaint in rem*, *United States v. Ebony Wood in Various Forms*, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010). Both cases are prosecutions of shipments of ebony wood confiscated from the Gibson Guitar factory in Tennessee. See Craig Havighurst, *Why Gibson Guitars Was Raided by the Justice Department*, NAT’L PUB. RADIO (Aug. 31, 2011, 4:00 PM), <http://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department> (quoting the CEO of Gibson Guitars as saying, “We’re in this really incredible situation. We have been implicated in wrongdoing and we haven’t been charged with anything”).

156. See *supra* Part III (discussing the potential consequences that stem from the confiscation of an individual musician’s instrument versus that of a shipment of plant products imported by a manufacturer).

157. 18 U.S.C. § 983(d) (Supp. V. 2011).

158. *Id.* § 983(c) (discussing the burden of proof for the government to confiscate property in a civil forfeiture situation).

159. See, 29 JOHN K. RABIEJ, *MOORE’S FEDERAL PRACTICE* § 711.33 (3d ed. 2011) (discussing 18 U.S.C. § 983 motions for summary judgment based on an innocent owner defense).

160. *Id.* at § 711.33 n.2.

forfeited . . . and . . . does not include . . . a person with only a general unsecured interest in, or claim against, the property or estate of another; . . . a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or . . . a nominee who exercises no dominion or control over the property.¹⁶¹

Essentially, the party seeking to make the claim must first prove that it is actually an owner with a real interest in the property confiscated and not a holder of some other, lesser interest in the property.¹⁶²

For example, in *United States v. \$500,000.00 in U.S. Currency*, the appellant challenged a ruling that he lacked standing to bring an innocent owner defense concerning a sum of cash that the government had confiscated from a company with which the appellant had dealings.¹⁶³ The government argued that the appellant only had standing as a general creditor and not as the actual owner of the property.¹⁶⁴ The Fifth Circuit reversed the ruling and held that the appellant did, in fact, have standing because he was seeking a bailment interest in the money in question and that interest was within the scope of 18 U.S.C. § 983(d)(6)(B)(ii).¹⁶⁵

In contrast, in *United States v. 74.05 Acres of Land*, the claimant argued that he should be afforded an innocent owner defense concerning the civil confiscation of land that he was in contract to purchase.¹⁶⁶ The court rejected the claimant's argument that, as an "equitable owner" of the property, he had standing to bring the defense.¹⁶⁷ Specifically, the court argued that in light of Civil Asset Forfeiture Reform Act,¹⁶⁸ it was clear that Congress had narrowed the term "innocent owner" to exclude those with an equitable interest and only extended the protection to those with an actual interest.¹⁶⁹

In order for a party to argue the innocent owner defense against

161. 18 U.S.C. § 983(d)(6).

162. In order to determine if a person has standing to bring the innocent owner defense, the court "must identify what interest the litigant seeks to assert and then decide if that interest is arguably within the zone of interests to be protected or regulated by the statute." *United States v. \$500,000.00 in U.S. Currency*, 591 F.3d 402, 404 (5th Cir. 2009) (quoting *Bonds v. Tandy*, 457 F.3d 409, 413-14 (5th Cir. 2006)).

163. *Id.* at 403-05.

164. *Id.* at 405.

165. *Id.* at 405-06.

166. 428 F. Supp. 2d 57, 60 (D. Conn. 2006).

167. *Id.* at 66.

168. The Civil Asset Forfeiture Reform Act ("CAFRA") is a law passed by Congress in 2000 that amended and consolidated the procedures for federal civil forfeiture and resulted in the current form of 18 U.S.C. § 983. Civil Asset Forfeiture Reform Act, Pub. L. No. 106-185, 114 Stat. 202 (2000).

169. *74.05 Acres*, 428 F. Supp. 2d at 65.

a civil forfeiture, it must first prove that it has standing to do so. Per 18 U.S.C. § 983(d)(6), it must prove that it has a real interest in the property—for example, a “leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest.”¹⁷⁰

This provision should not be a problem for most musicians and manufacturers affected by such a civil forfeiture. For example, in the recently settled cases brought against Gibson Guitar, the wood products in question were purchased and imported by Gibson for use in the manufacture of instruments at its factory in Tennessee.¹⁷¹ In such a situation, the product is, in fact, owned and there is no question as to it being anything other than an actual interest in the property. With individual musicians, similarly, should they outright own the instrument, there would be little to no question as to their actual interest in the instrument. Further, in situations where the instrument is on loan to the musician, they likely would qualify as a leaseholder, as specifically enumerated in the statute.¹⁷² Because the standing requirement implies an actual interest in the confiscated property, musicians and manufacturers whose instruments and products have been confiscated likely will be able to meet the standing requirement.

However, once the party has established standing under 18 U.S.C. § 983(d)(6), it must then prove, by a preponderance of the evidence, that it is an *innocent* owner. Section 983(d)(2) defines an innocent owner as “an owner who . . . did not know of the conduct giving rise to forfeiture; or . . . upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.”¹⁷³ This implies that a party must either prove ignorance of the status of the forfeited item or that once he did learn of its contested status, he tried to stop its use.

This burden is especially hard to meet when one has already been convicted of the underlying crime that gave rise to the civil forfeiture.¹⁷⁴ For example, in *United States v. \$21,510 in United States Currency*, the claimant attempted an innocent owner defense in seeking the return of a sum of money and a Rolex watch that was seized as narcotics proceeds.¹⁷⁵ Because the claimant had already

170. 18 U.S.C. § 983(d)(6)(A) (Supp. V 2011).

171. See Verified Complaint *in rem* at 3, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

172. 18 U.S.C. § 983(d)(6)(A).

173. *Id.* § 983(d)(2)(A).

174. See *United States v. \$21,510 in U.S. Currency*, 292 F. Supp. 2d 318, 323 (D.P.R. 2003), *aff'd*, 144 F. App'x 888 (1st Cir. 2005) (“To be sure, this defense is a difficult one for a claimant whom has been convicted of the very crime that gave rise to the forfeiture action.”).

175. *Id.* at 319-20.

pled guilty to the underlying charge of conspiracy to distribute narcotics, the court reasoned that he could not have been an innocent owner.¹⁷⁶ Thus, it can be implied that a party convicted of violating the Lacey Act pursuant to § 3373(a) or § 3373(d) will have a difficult time proving by a preponderance of the evidence that he is an innocent owner of the confiscated property in question.

However, when a claimant has not been convicted of the underlying crime, the claimant must produce proof beyond that which the government offers to show either it was truly innocent as to knowledge of the underlying offense or, once it discovered the underlying offense, it attempted with good faith to end the criminal use.¹⁷⁷ For example, in *United States v. 2001 Honda Accord EX*, the government met its burden for confiscation because the owner had a real interest in and dominion over a car that was used to sell ecstasy tablets.¹⁷⁸ However, the government was not able to prove that the claimant had any knowledge that her friend, who was eventually convicted of selling the drugs while using the car, was going to do anything with the car beyond drive a friend to Pennsylvania from Tennessee when she loaned the car to him.¹⁷⁹ Because the government could not prove that she knew of the plot to sell the drugs, the claimant was able to show by a preponderance of the evidence that she was an innocent owner.¹⁸⁰

Unfortunately, Lacey Act claimants may find this standard much harder to meet than the claimant in *2001 Honda Accord EX*. Despite the wording of the Act, which sets the civil mens rea at “due care,” the current mens rea requirement for civil penalties under the Lacey Act is quite high.¹⁸¹ If due care implies that a manufacturer has been given notice of “any foreign law” that applies to the tonewoods it imports, then it will be a very high threshold to meet to show that the importer is truly innocent of knowledge of a foreign law affecting the import. For example, in *594,464 Pounds of Salmon*, the court rejected the notion that the importer was innocent of knowing about the Taiwanese export restriction at the heart of the Lacey Act violation because the Lacey Act had effectively put the importer on notice of any restrictions that could apply.¹⁸² If notice

176. *Id.* at 323.

177. § 983(d)(2)(A).

178. 245 F. Supp. 2d 602, 607-11 (M.D. Pa. 2003).

179. *Id.* at 611-12.

180. *Id.*

181. See *supra* Part IV.B (discussing civil mens rea and the due care threshold).

182. *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989). Notably, this case did not argue an innocent owner defense because prior to the 2008 amendment, the defense was not available in Lacey Act cases. However, as the innocent owner defense applies to civil forfeitures, the civil mens rea requirement can be applied as an illustration.

has been give that any foreign law will apply to an import under the Lacey Act, an instrument manufacturer in a civil forfeiture case will need to prove much more than innocence as to knowledge of the law in question. The manufacturer will have to prove that it attempted, in good faith, to ascertain all restrictions on the imported tonewood and that, if it did find out about any illegality, it attempted to stop the use of it.

Despite precedent that the Lacey Act has no innocent owner defense, Congress included this defense in the 2008 amendment to the Act.¹⁸³ However, this is a defense to a civil forfeiture that has already occurred and comes with a high burden of proof for the moving party to meet.¹⁸⁴ Individual musicians and instrument manufacturers should take note of what is required as it may serve as a defense in the case of a civil forfeiture. Especially important is the fact that one must prove either ignorance or an attempt to stop the use of the product.¹⁸⁵ But, because it is a difficult burden to meet, musicians and manufacturers should not depend upon it as a sure defense in a Lacey Act proceeding.

VI. CONCLUSION: WHERE THE LACEY ACT STANDS, RECENT MOVES BY CONGRESS, AND WHAT REMAINS TO BE DONE

The 2008 amendment to the Lacey Act has resulted in a maelstrom of confusion in the music industry. Since it was amended in 1981,¹⁸⁶ the general tendency of the judiciary has been to interpret the Lacey Act expansively.¹⁸⁷ However, this expansive interpretation of the “any foreign law” requirement had stretched the Lacey Act beyond the original intention of its sponsor: to protect wildlife from the harmful effects of poaching and industrialization.¹⁸⁸ Today, the arms of the Lacey Act reach far beyond protecting endangered plant and animal species and place such a heavy burden on importers and average Americans that it is virtually impossible to bear. While this expansive interpretation is not exactly a new issue, Congress has repeatedly refused to address the problem it has created.¹⁸⁹

The only two Lacey Act confiscations that, as of this point in time, have resulted from the 2008 amendment are perhaps the best examples of how the Lacey Act can be both properly used and abused.

183. *See supra* notes 151-53 and accompanying text.

184. *See supra* notes 151-55 and accompanying text.

185. *See supra* notes 171-73 and accompanying text.

186. Lacey Act Amendments of 1981, Pub. L. No. 97-79, 95 Stat. 1073 (codified at 16 U.S.C. §§ 3371-78).

187. *See supra* Part IV.

188. *See* 33 CONG. REC. 4871 (1900) (statement of Rep. John Lacey) (outlining the intent of the act as aimed at environmental protection).

189. *See* Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (amending the Lacey Act but continuing to include the term “any foreign law”).

In the first case, *United States v. Ebony Wood in Various Forms*, a 2010 shipment of ebony fingerboards and several completed guitars partially made of ebony were seized; the wood in question was imported from Madagascar.¹⁹⁰ Madagascar is an island nation with natural hardwood resources, “an exceptional biodiversity hotspot with desperately little original forest remaining.”¹⁹¹ The foreign law that Gibson allegedly violated was passed by the Madagascan government in 2006 and bans the export of ebony and rosewood with the hope of stemming the illegal logging practices that have decimated the native hardwood populations of Madagascar¹⁹²—a true environmental issue within the original intent of the Lacey Act.

However, the second case, *United States v. 25 Bundles of Indian Ebony Wood*, is different.¹⁹³ The government alleges that the ebony wood confiscated from Gibson in September 2011 was exported from India in contravention of a law that requires wood to be finished in India prior to export. However, Indian ebony, unlike its Madagascan cousin, is legal to export provided it is either a veneer or, if not a veneer, finished in an Indian mill.¹⁹⁴ The trouble with this law is that it does not aim to protect Indian hardwoods, but rather is a derivative of the Indian Foreign Trade Development and Regulation Act of 1992—an act intended to create Indian jobs.¹⁹⁵ The law in question has virtually nothing to do with environmental policy, and its use drives home exactly how far the Lacey Act has been stretched beyond its original parameters. The government has seized over a million dollars worth of hardwoods from an American company under the Act because someone labeled the blanks as unfinished wood, which is an illegal export under a foreign *labor* law.¹⁹⁶

190. See Verified Complaint *in Rem* at 1, *United States v. Ebony Wood in Various Forms*, No. 10-cv-00747 (M.D. Tenn. Aug. 9, 2010); Affidavit of Kevin L. Seiler, *supra* note 81, at 6.

191. Erik R. Patel, *Madagascar's Logging Crisis: Separating Myth from Fact*, NAT'L GEOGRAPHIC NEWS WATCH (May 20, 2010), http://newswatch.nationalgeographic.com/2010/05/20/madagascar_logging_crisis/.

192. See Madagascar Inter-Ministerial Order No. 16.030/2006.

193. Verified Complaint *in rem*, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011).

194. See Foreign Trade Policy, 2010, Gazette of India, section II(3)(ii) (Aug. 23, 2010) (prohibiting the export of wood classified on the Harmonized System as 4407, or unfinished, but allowing the export of wood classified as 4408, or unfinished veneers, to be exported); Affidavit in Support of Appeal for Civil Forfeiture at 5-7, *United States v. 25 Bundles of Indian Ebony Wood*, No. 11-cv-00913 (M.D. Tenn. Sept. 27, 2011) (explaining the Indian Foreign Trade policy).

195. See Les Christie, *Gibson Guitar CEO Fights Back*, CNN MONEY (Sept. 2, 2011, 3:55 PM), http://money.cnn.com/2011/09/02/smallbusiness/gibson_guitar/index.htm (“The latest raid revolves around a trade issue. The wood was allegedly exported illegally because it was unfinished and too thick to be a veneer, the only unfinished wood India allows to be shipped, according to a Justice Department affidavit.”).

196. See *Gibson, the Lacey Act, and Tropical Hardwoods: Some Facts*, *supra* note 83

The Lacey Act is no longer just an environmental law but something much larger and much scarier than what it was originally intended to be. It now requires that *any* party importing *any* plant or animal species be aware of *any* foreign law that may pertain to the species, and should that party find itself in violation of the Lacey Act, it will be at the great expense of both time and money. While the Madagascar case shows that it is still capable of affecting its intended purpose, the Indian case proves how easily that purpose can be abused.

Further, while Congress did not seek to reign in the breadth of the “any foreign law” requirement in the 2008 amendment, its addition of the “innocent owner” defense in that amendment¹⁹⁷ is of little consolation to the importers that may find themselves on the opposite side of a Lacey Act civil forfeiture. The “innocent owner” defense sets the bar low for the government to confiscate an imported product and, thanks to the “any foreign law” requirement putting importers on notice, sets the due care bar exceptionally high for a party wishing to claim his property back once it is the subject of forfeiture.

But perhaps some hope is on the horizon. With the second raid on the Gibson Guitar factory in September 2011, the Lacey Act came to national attention.¹⁹⁸ This widespread media attention prompted Congress to act, proposing two bills aimed at revising the Lacey Act.¹⁹⁹ The first aims to directly alleviate the pressures put on musicians as a result of the 2008 amendment. The second seeks to reign in the Lacey Act as a whole, addressing the over-breadness of the act as it currently stands. Neither fully addresses the issue of

(discussing the mistake in the customs filing that resulted in the forfeiture); Christie, *supra* note 195 (“The wood was allegedly exported illegally because it was unfinished and too thick to be a veneer . . .”).

197. 18 U.S.C. § 983(d) (Supp. V 2011).

198. See, e.g., Elana Schor, *Logging Law Rocked Hard as Tea Party, Enviros Battle over Gibson Guitar*, N.Y. TIMES (Sept. 27, 2011), <http://www.nytimes.com/gwire/2011/09/27/27greenwire-logging-law-rocked-hard-as-tea-party-enviros-b-64213.html?pagewanted=all> (detailing how the second Gibson raid “[u]nintentionally turned up . . . a political hornet’s nest”); Julie Eilperin, *Gibson Guitar Ignites Debate over Environmental Protections*, WASH. POST (Nov. 13, 2011), http://articles.washingtonpost.com/2011-11-13/national/35281751_1_illegal-wood-henry-juszkiewicz-country-music (discussing the political and publicity firestorm following the September 2011 Gibson raid); Steve Bryant, *Keep Your Hands Off Our Wood – For Gibson Guitars*, YOUTUBE (Sept. 8, 2011), http://www.youtube.com/watch?v=_XBf7rTtnPM (“Don’t the government have some better things to do? Like getting us out of a war or two. Or fixing the economy, like a good government should. Ebony and rosewood aren’t common good. . . . Keep you hands off our wood. Keep your hands off our wood. Even in the morning if we’re up to no good, Keep your government hands off our wood.”).

199. Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act, H.R. 3210, 112th Cong. (2011); Freedom from Over-Criminalization and Unjust Seizures Act, H.R. 4171, 112th Cong. (2012).

over-broadness in a way that fulfills the original intent of the Lacey Act.

The first act, known as The Retailers and Entertainers Lacey Implementation and Enforcement Fairness (RELIEF) Act²⁰⁰ (the “RELIEF Act”), was proposed in October 2011, barely one month following the second Gibson raid, by Congressman Jim Cooper of Tennessee.²⁰¹ It seeks primarily to accomplish three things: grandfather in wood products owned prior to May 22, 2008, the date the 2008 amendment took effect; forbid the government from confiscating wood products that the owner was unaware were illegal; and require the government to compile a database of forbidden wood products to be available on the Internet as fair warning of what is illegal.²⁰²

While this bill may be of comfort to those associated with the music industry and seeks to remedy many of the issues this Note identifies as problems facing musicians and instrument manufacturers, it falls short of addressing the pervasive broadness issue that reaches far beyond the scope of its application to musical instruments. While it does assert in its findings that “[f]ederal law enforcement officials should not engage in overzealous enforcement action under the 2008 amendments,”²⁰³ in no part of the proposed legislation does it attempt to alleviate the burden of the “any foreign law” requirement.²⁰⁴ Instead, it seeks to alleviate the punishment for importing in violation of the Lacey Act by limiting the innocent owner defense for those importing plant products and reducing civil and criminal penalties for “certain first offenses.”²⁰⁵ While many individual musicians and music organizations openly support the RELIEF Act,²⁰⁶ it has been met with some skepticism from some manufacturers.²⁰⁷ The RELIEF Act addresses many issues voiced in the months following the 2011 Gibson Raid, but it seeks to remedy

200. H.R. 3210, 112th Cong. (2011).

201. *Id.* The Act is co-sponsored by Representatives Mary Bono Mack of California, the widow of Congressman Sonny Bono—a longtime champion of the music industry and the namesake of the Sonny Bono Copyright Term Extension Act—and Marsha Blackburn of Tennessee.

202. *Id.*; see also Cooper, Blackburn Introduce RELIEF Act, CONGRESSMAN JIM COOPER (Oct. 20, 2011), http://cooper.house.gov/index.php?option=com_content&view=article&id=537&Itemid=7 (explaining the rationale behind the Act and what it wishes to accomplish).

203. H.R. 3210, 112th Cong. § 2(9) (2011).

204. See generally H.R. 3210, 112th Cong. (2011).

205. *Id.* at §§ 3(c)-(d), 4.

206. See Cooper, Blackburn Introduce RELIEF Act, *supra* note 202 (listing musicians and organizations that have openly supported the bill, including Vince Gill, Rosanne Cash, the Grand Ole Opry, and the American Federation of Musicians).

207. *E.g.*, Oliver, *supra* note 74 (arguing that, of the three intents of the RELIEF Act, “[t]he first two provisions have some merit. The third is ridiculous.”).

only those issues and, in doing so, does not address the underlying problems that the 2008 amendment failed to fix.

Senator Rand Paul of Kentucky introduced the second act, known as the Freedom from Over-Criminalization and Unjust Seizures Act²⁰⁸ (the “FOCUS Act”) in February 2012. Unlike the RELIEF Act, the FOCUS Act makes no mention of the Lacey Act’s application to musical instruments,²⁰⁹ but it aims to address the “damage this extremely broad and vague law has done to American companies.”²¹⁰ The FOCUS Act would amend the Lacey Act by striking the “any foreign law” requirement from the Lacey Act entirely, in favor of enforcing only international treaties and domestic laws,²¹¹ and eliminating criminal penalties associated with the act, replacing them with civil penalties as low as \$350.²¹²

But, in eliminating the “any foreign law” requirement in favor of international treaties and eliminating the criminal penalties in favor of minimal civil penalties, the Lacey Act loses its bite and becomes merely a minor player in the environmental protection playbook. While this move has been met with some applause from the public,²¹³ it misses the point of enacting the Lacey Act and extending its reach to include foreign laws in the first place.²¹⁴ By eliminating the “any foreign law” requirement, the United States loses a valuable tool to hold liable those who import a plant species deemed by its local government to be an endangered portion of the local ecosystem.²¹⁵

208. S. 2062, 112th Cong. (2012).

209. *Id.*

210. Press Release, Sen. Rand Paul, Sen. Paul Introduces FOCUS Act (Feb. 2, 2012), *available at* http://paul.senate.gov/?p=press_release&id=443.

211. H.R. 4171, 112th Cong. § 2(a) (2012).

212. *Id.* § 2(b). Ultimately, this act seeks to incorporate both the pre-1935 inclusion of only domestic law with the pre-1981 lack of criminal and civil sanctions. *See* Anderson, *supra* note 15, at 36-52 (discussing the historical development of the Lacey Act from its inception in 1901 through the mid-1990s).

213. *See, e.g.*, News Release, Nat’l Ass’n of Criminal Def. Lawyers, Sen. Rand Paul Takes on Lacey Act: Nat’l Defense Bar Applauds Important Step in Reigning in Overcriminalization (Feb. 2, 2012), *available at* <http://www.nacdl.org/NewsReleases.aspx?id=23532> (“NACDL supports measures such as the FOCUS Act to bring common sense back to criminal lawmaking.”).

214. *See* 33 Cong. Rec. 4871 (1900) (statement of Rep. John Lacey) (implying that the Lacey Act is meant to reach beyond the millinery industry, arguably the most visible preservation issue at the time, to the ultimate concern for pervasive environmental protection); *see also* MICHAEL J. BEAN & MELANIE J. ROWLAND, *THE EVOLUTION OF NATIONAL WILDLIFE LAW* 47-50 (3d ed. 1997) (noting that the 1981 amendment’s addition of strict penalties and lower culpability requirement allowed the Lacey Act to become an effective deterrent to crime against wildlife and discussing the general legislative and judicial sentiment that excluding foreign law was too restrictive); *supra* note 90-93 and accompanying text (explaining the intent of the Lacey Act is to protect wildlife).

215. *See* Draper, *supra* note 81 (discussing specifically a ban on exporting rosewood from Madagascar). Some governments have imposed bans on the hunting and

The FOCUS Act would reduce the Lacey Act to a shell of its former self and eliminate any real deterrent power it currently yields toward eliminating the import of illegally taken, endangered flora and fauna.²¹⁶

While neither act hits the nail square on the head in terms of remedying the issues caused by the current wording and expansive interpretation of the Lacey Act, both are signs that the U.S. public is frustrated by the potential penalties associated with the Act, and both are moves in the correct direction to solve the problems associated with the current state of the Act. The Lacey Act is a powerful tool in the United States' pocket to combat the illegal and immoral taking of potentially endangered species. By amending it to only reduce the penalties of those in the entertainment industry, the Act would still be too broadly interpreted. If the entire foreign law application were to be eliminated, it would lose its power as a tool for environmental preservation.

Congress would, perhaps, be better served by finding a middle ground—one that grandfathers in previously owned plant products (solving the problems of those who own antique and newer instruments, as well as any hard or tonewood product, obtained

harvesting of local flora and fauna that are not reached by the international treaties to which the FOCUS Act seeks to limit the Lacey Act's enforcement. For example, Madagascar has deemed the slash-and-burn harvesting of rosewood and ebony to be a risk to its natural rainforests, resulting in a ban on its harvest and export. *Id.*

216. While the *McNab* case has become somewhat of a rallying cry for those seeking to amend the Lacey Act, it is a perfect example of how it can correctly work to protect foreign wildlife species. In that case, the defendants were convicted, not only of importing lobster tails packed in the wrong type of packaging in violation of Honduras Regulation 0008-93, but also of importing undersized lobster tails and female lobsters with the roe removed in violation of Resolutions 003-80 and 030-95. While the regulation pertaining to the packaging can be viewed as purely procedural, the other two resolutions were passed by the Honduran Government to protect its native lobsters, already experiencing a population decline, from overharvesting. *See United States v. McNab*, 331 F.3d 1228, 1234 n.8 (11th Cir. 2003) (“The Fishing Law is a comprehensive statute regulating the Honduran fishing industry.” (citing Decreto No. 154, May 19, 1959, La Gaceta, June 9, 1959)); *see also Spiny Lobster Smuggling from Honduras*, U.S. DEP'T OF JUST., <http://www.justice.gov/enrd/3326.htm> (last visited Jan. 24, 2013) (providing a background of the *McNab* case, including photos of the smuggled lobster tails); Press Release, U.S. Dep't of Justice, Four Involved in Lobster Harvesting & Distribution Found Guilty in Illegal Import Scheme (Nov. 3, 2000), *available at* <http://www.justice.gov/opa/pr/2000/November/647enrd.htm> (“[T]he indictment charged that workers on [McNab's] vessels harvested lobster that were under the legal size limit set by Honduras. They also harvested egg-bearing lobsters in violation of Honduran regulations and harvested lobster and shrimp during the closed seasons set by Honduras. To conceal the catch of egg-bearing lobsters, the parts of the lobster tails to which the eggs were attached were clipped off.”); *The Spiny Lobster Initiative*, GLOBAL FISH ALLIANCE, <http://www.globalfishalliance.org/spiny/about.html> (last visited Jan. 24, 2013) (explaining that “[t]hroughout the Caribbean, high demand has led to over fishing and destructive practices” and “[l]obster stocks are reported to be down by at least 35 percent over the last several years”).

legally before implementation of the May 22, 2008 Lacey Act, as proposed by the RELIEF Act)—and eliminating the “any foreign law” requirement in favor of an application of foreign conservation laws (similar to the FOCUS Act, solving the problems voiced by those opposed to the second Gibson raid, but still protecting species deemed endangered by the local government). Further, the DOJ and USFWS should adopt a method of certification, so that those who import such materials are not left in the dark as to the legality of any plant products imported despite a good faith attempt to ascertain foreign laws that may affect an import.²¹⁷

Ultimately, musicians and manufacturers must be aware of the limits placed upon them by the Lacey Act: individual musicians who wish to carry their instruments overseas (or over state lines) should take precautions and attempt to ascertain, to the best of their abilities, the precise species of tonewoods from which their instruments are made. While the government announced that it does not intend to bring charges against individuals at this time,²¹⁸ it is still highly advisable that if asked upon return to the United States with a valuable instrument, one is able to show he exercised due care in determining a species, source, and legality of the materials used in the manufacture of the instrument.

Manufacturers of musical instruments must be even more vigilant in complying with the Lacey Act because they depend on the import of tonewoods in their businesses. The “any foreign law” requirement has effectively put importers on notice that due care requires both a thorough investigation of *any* law pertaining to the tonewood imported into the United States or across state lines²¹⁹ and also compliance with the import declaration requirements to the best of their ability.²²⁰ Further, importers should be prepared to prove

217. For example, Canada allows third party certification of wood products. *See generally* NATURALLY: WOOD, THIRD PARTY FOREST CERTIFICATION IN BRITISH COLUMBIA (2011), available at <http://www.naturallywood.com/sites/default/files/Third-Party-Certification.pdf> (recognizing how three globally recognized certification programs work together to support sustainable forest management, including chain of custody certification). Further, the Forest Stewardship Council provides accreditation to independent groups that seek to issue certificates of compliance with forest management and chain of custody standards. *Who We Are*, FOREST STEWARDSHIP COUNCIL, <http://www.fsc.org/who-we-are.176.htm> (last visited Jan. 24, 2013).

218. *See supra* text accompanying notes 68-69.

219. 16 U.S.C. § 3372(a)(1)-(2) (2006 & Sup. V 2011).

220. *See* PLANT PRODUCT DECLARATION FORM, *supra* note 79, at 2-3 (outlining specific requested information for importation of plant species); *see also* Chuck Erikson, *CITES, Lacey Act, ESA, USFWS and Customs Regulation of Wood, Shell, Bone, Ivory, Fossil Ivory, and Finished Items (Such as Guitars) Which Contain Any of These or Other Wildlife or Plant Products*, GUILD OF AM. LUTHERIE, http://www.luth.org/web_extras/CITES_Lacey-Act/cites_lacey-act.html (last visited Jan. 24, 2013) (providing guidance on filling out declaration forms complying with the Lacey Act).

such due diligence in the event of a civil forfeiture or risk losing the innocent owner defense.

With the 2008 amendment to the Lacey Act, Congress set the bar quite high for musicians and manufacturers, and the consequences for running afoul of the act are potentially catastrophic. Until Congress amends the Act further, musicians and manufacturers must be vigilant to not run afoul of the Lacey Act in its present state.