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GOOD VIBRATIONS: THE PUSH FOR NEW LAWS AND INDUSTRY PRACTICES IN AMERICAN INSTRUMENT MAKING

PATRICK GENOVA*

INTRODUCTION

In recent years the market for illegal wood has ballooned into a fifteen billion dollar industry.¹ Rainforests in places like Peru are being plundered, with over one-third of rare wood exports leaving the country illegally.² An estimated forty to sixty-three percent of the wood trade in Indonesia comes from illegal harvesting.³ Increased demand and scarcity, along with tightening regulations, have led to a growing illegal market that endangers the sustainability of legitimate wood sourcing.⁴

A number of industries rely on rare wood, including the energy, building, furniture, and instrument making industries.⁵ Many of these markets, including musical instruments, have not found suitable replacements to make a large impact on dwindling wood supplies.⁶ The intricate balance between environmental conservation and economic marketability is particularly hard for American manufacturers.⁷ The Lacey Act places tough restrictions on supply chains to ensure that wood imports are legal.⁸ The Lacey Act places the burden on American manufacturers while allowing export nations to continue relaxed administration that encourages illegal

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¹ Francis G. Tanczos, *A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L.J. 549–50 (2011).

² Jeremy Hance, *U.S. Gobbling Illegal Wood from Peru's Amazon Rainforest*, MONGABAY, Apr. 10, 2012, http://news.mongabay.com/2012/0410-hance_illegallogging_peru_eia.html.

³ *Illegal Logging*, WORLD WILDLIFE FOUND., available at http://wwf.panda.org/about_our_earth/about_forests/deforestation/forest_illegal_logging/.

⁴ *Id.*

⁵ *Making Music the Sustainable Way*, GREEN BUILD (July 2, 2013), <http://www.greenbuild.org>.

⁶ See generally Teresa Welch, *Conservation, the Luthier, and the Archetier: Making Musical Instruments in an Environmentally Sustainable World*, 21 J. LAND RESOURCES & ENVTL. L. 489 (2001).

⁷ *Id.* at 499.

⁸ Meredith Pryce, *Reason to Fret: How the Lacey Act Left the Music Industry Singing the Blues*, 65 RUTGERS L. REV. 295 (2012).

wood sourcing.⁹ In many countries illegal logging is caused by weak governance, corruption, and organized crime that is sometimes hard to trace as the product changes hands in the supply chain.¹⁰ This type of harvesting continues to rapidly diminish primary forest systems.¹¹

In light of these struggles, American laws and international agreements need to be revisited to balance the twin goals of free trade and conservation in American musical instrument manufacturing. Part of this solution requires instrument manufacturers to focus on greener instruments through sustainable building techniques and brand management.¹² Given the failings of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") and the Lacey Act,¹³ both need to be revisited to promote their initial goal of environmental sustainability while limiting burdens on trade. This Note will focus on these issues through the lens of American instrument manufacturers who have been struggling with regulation and sustainability in sourcing wood. Manufacturers of lumber, furniture, and flooring have also faced problems with wood sourcing, but instrument manufacturing presents special problems in this area.¹⁴ Further, consumers place a high value on the type of wood used, not just for aesthetics, but also for durability, playability, and tone.¹⁵ The American instrument making industry serves as the perfect case study because of recent troubles with existing law and a continued consumer resistance to the use of alternative tonewood methods.

While recent amendments to the Lacey Act were aimed at the fifteen billion dollar black market in illegal wood harvesting,¹⁶ the burden of combating illegal trade has been placed mainly on American importing manufacturers and not on loggers or foreign supply chains.¹⁷ Despite

⁹ See, e.g., Jed Borod & Bruce Zagaris, *U.S. Case Shows Gaps in International Environmental Law and Mahogany Trade Regulation*, 12 INT'L ENFORCEMENT L. REP. 497 (Dec. 2005).

¹⁰ Mikaela Nilsson Rosander, *Illegal Logging: Current Issues and Opportunities for Sida/SENSA Engagement in Southeast Asia*, SWEDISH ENVTL. SECRETARIAT FOR ASIA i (2008), available at http://www.recoftc.org/site/uploads/content/pdf/Illegal_Logging_03_-_web-no-bleed_52.pdf.

¹¹ *Id.*

¹² See, e.g., 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.

¹³ See *infra* Parts II and VII.

¹⁴ Welch, *supra* note 6, at 489.

¹⁵ *Id.*

¹⁶ See Tanczos, *supra* note 1.

¹⁷ See, e.g., Borod & Zagaris, *supra* note 9.

political efforts, the illegal timber industry still threatens many of the world's most precious forests.¹⁸ At the same time, the Lacey Act places undue restraints on American manufacturers.¹⁹ There are two main ways to address this problem. The first is to amend CITES to place stricter burdens, such as sanctions and reduced environmental ratings, on exporters and impose fines for those who break the rules. The second is to amend the Lacey Act as necessary to provide clarity to manufacturers and to weed out enforcement of arbitrary violations that do not conform with CITES' goals. Currently, the Lacey Act permits the Department of Justice to enforce foreign laws restricting the trade of wood without first evaluating if the law is actually aimed at source-wood protection or other secondary economic effects.²⁰ This means that American companies have to keep up with the ever-changing laws that are sometimes passed for insidious economic purposes.²¹ The price of breaking the law is confiscation of wood shipments and hefty fines.²²

The second way to address the deforestation problem is for manufacturers to push for more sustainable wood sources and new technology that would make the demand for rare wood drop, and subsequently make the illegal wood trade less lucrative. This can be done by taking advantage of the growing green movement, eco-labeling, and incentive programs for companies who invest in sustainability.²³ This may be a particularly challenging goal, but it is necessary for the continued marketability and sustainability of American instruments.

This Note will first look at the numbers behind the big business of instrument making, and then examine the history and problems with CITES and the Lacey Act focusing on the Gibson Guitar case. It will then go on to discuss some ways in which the Lacey Act and CITES can be revised to fix current problems. The last part of this Note will examine brand management, eco-labeling, and incentives that would help instrument manufacturers push for sustainability.

¹⁸ Press Release, Union of Concerned Scientists, *Illegal Logging Threatens Economies and the Environment* (Apr. 16, 2012), *available at* http://www.ucsusa.org/news/press_release/illegal-logging-threatens-economy-and-environment-1383.html.

¹⁹ *See generally* Tanczos, *supra* note 1.

²⁰ *See* Pryce, *supra* note 8, at 312–14.

²¹ *Id.* at 315.

²² *See, e.g.*, Press Release, U.S. Dep't. of Justice: Envtl. and Natural Res. Div., *Gibson Guitar Corp. Agrees to Resolve Investigation into Lacey Act Violations* (AUG. 6, 2012), *available at* <http://www.justice.gov/opa/pr/2012/August/12-enrd-976.html>.

²³ *See infra* Part XIII.

I. AMERICAN MUSIC: NUMBERS

America is home to some of the top grossing wooden musical instrument companies in the world, including Steinway Musical, Fender Musical instruments, and C.F. Martin & Co.²⁴ The industry accounted for \$1.3 billion in sales, with 1,800 establishments employing 17,500 workers in 2009.²⁵ Of the \$1.3 billion, \$700 million was in exports.²⁶ There is no doubt that the instrument industry is big business, and high-end instruments are sought after by collectors and players alike. In 2006 a Stradivari violin sold for a record-breaking \$3.54 million dollars.²⁷ An American-made 1949 prototype of the Fender Telecaster recently sold for over \$300,000.²⁸ Many of these companies built their brand before deforestation became a large international issue. Companies, like Gibson, had the ability to upstart with the best wood. Now many companies must change practices without sacrificing quality or quantity.

II. THE LACEY ACT: A ROCKY PAST AND A BUMPY FUTURE

The Lacey Act was first introduced in 1900 as a way of enforcing poaching laws.²⁹ The original act strengthened state poaching laws by making it a federal crime, through the Commerce Clause, to sell illegally poached animals in interstate channels.³⁰ The law dealt with the problem of poachers hunting animals illegally in one state and then selling them in another.³¹ Until 2008, the Lacey Act largely did not regulate the international wood trade.³² The 2008 Farm Bill amended the Lacey Act to

²⁴ See Musical Instruments: Industry Snapshot, HIGHBEAM BUS. (Nov. 17, 2012, 11:56 PM), <http://business.highbeam.com/industry-reports/food/musical-instruments> for an overview of the business numbers for American musical instrument makers. While not all of these corporations rely on threatened wood sources, some of the biggest are dependent on wood sources for continued market success. *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Review of 2006*, THE STRAD (Dec. 2006).

²⁸ *The 10 Most Expensive Guitars Ever Sold: In Pictures*, THE TELEGRAPH (Nov. 18, 2012, 3:07 PM), <http://www.telegraph.co.uk/finance/newsbysector/retailandconsumer/9131748/The-10-most-expensive-guitars-ever-sold-in-pictures.html?frame=2162741>.

²⁹ Timothy M. Sullivan, *Inadequate Analysis Leading to an Accurate Conclusion: The Ninth Circuit's Cursory Treatment of the Constitutionality of the Lacey Act in United States v. Senchenko*, 29 ENVTL. L. 743 (Fall 1999).

³⁰ Laura T. Gorjanc, *Combating Harmful Invasive Species Under the Lacey Act: Removing the Dormant Commerce Clause Barrier to State and Federal Cooperation*, 16 FORDHAM ENVTL. L. REV. 111, 115 (Fall 2004).

³¹ *Id.*

³² See Clarke & Grant, *infra* note 49.

target illegally harvested wood and wood products that are imported into America.³³ The stated purpose of this amendment was to cut down on the illegal trade of timber and items made from illegal timber.³⁴

While restrictions sound great, many American manufacturers (as well as consumers)³⁵ have run into problems with the rules, while export countries have found ways around them. While big American companies cannot afford to risk violating CITES and the Lacey Act, many small logging operations in countries like Madagascar have been able to bypass laws through corruption, laundering, and forging documentation.³⁶ When this illegal wood makes its way to the United States, the Department of Justice can seize the shipment and charge the manufacturers.³⁷ In the current climate, importers have been burdened by the “due care” standard when proving that wood sources are legal.³⁸ This is determined by the supply chain as well as licenses, documents, and certifications.³⁹ The Lacey Act makes corporations accountable for violations of foreign environmental laws.⁴⁰ The problem is that not all laws are solely based on environmental protection and others are only tangentially related. For example, the Gibson raid over Indian Rosewood enforced a law protecting Indian workers and not wood sourcing.⁴¹ While the law contains some link to environmental policy, the

³³ See Tanczos, *supra* note 1, at 553–54.

³⁴ *Lacey Act Primer*, U.S. DEP’T OF AGRIC.: ANIMAL AND PLANT HEALTH INSPECTION SERV. (Aug. 2013), http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf (providing basic information about the 2008 Farm Bill Amendment, its effects on manufacturers, and punishments for violations).

³⁵ While it is not the intent of the Lacey Act to regulate the movement of aftermarket guitars, many traveling players have worried about confiscation when traveling abroad. Musicians who have rare wood instruments must get a permit, which takes sixty to one hundred and twenty days, to prove that the instrument is made from legal wood sources. Without a permit musicians may have their guitars confiscated. See Michael John Simmons, *A Guitar Lover’s Guide to the CITES Conservation Treaty*, FRETBOARD JOURNAL (Fall 2008), available at <http://www.fretboardjournal.com/features/magazine/guitar-lover%E2%80%99s-guide-cites-conservation-treaty>; John Roberts, *Law Could be Used to Seize Musicians’ Guitars, May Need ‘Fix,’ Senator says*, FOXNEWS (May 18, 2012), <http://www.foxnews.com/politics/2012/05/18/law-could-be-used-to-seize-musicians-guitars-may-need-fix-senator-says/>.

³⁶ Craig Segall, *The Forestry Crisis as a Crisis of the Rule of Law*, 58 STAN. L. REV. 1539, 1541 (2006); Barry Bearak, *Scarce Madagascar Rosewood Plundered*, S.F. GATE (June 13, 2010), <http://www.sfgate.com/green/article/Scarce-Madagascar-rosewood-plundered-3261570.php>.

³⁷ See Pryce, *supra* note 8, at 304–05.

³⁸ *Id.* at 315.

³⁹ See U.S. Dep’t of Agric., *supra* note 34, at 14.

⁴⁰ Christine Fisher, *Conspiring to Violate the Lacey Act*, 32 ENVTL. L. 475, 488 (2002).

⁴¹ Henry Juskiewicz, *Repeal the Lacey Act? Hell No, Make It Stronger*, HUFFINGTON POST, Nov. 2, 2012, http://www.huffingtonpost.com/henry-juskiewicz/gibson-guitars-lacey-act_b_1071770.html.

economic windfall for Indian workers is apparent.⁴² Many of these laws are also nebulous, and ever-changing. Furthermore, the Department of Justice is the ultimate judge of whether a law is broken, making manufacturers guess about what types of violations will be enforced.⁴³ The Lacey Act has often been criticized as the American government doing its best to enforce foreign laws.⁴⁴

III. THE DUE CARE STANDARD AND ITS ANTI-AMERICAN EFFECTS

The Lacey Act requires companies to use “due care” when determining if wood is legally sourced.⁴⁵ The question then becomes what exactly is due care. The Department of Agriculture does not give good answers to these complex problems, listing some of the “red flags” as goods that are underpriced, that have no paperwork, or are sold under unusual sales methods.⁴⁶ The market of illegal timber is more sophisticated than those suggestions let on.⁴⁷ It is hard to imagine big music companies like Fender or Martin going to the back alleys for their wood supplies. The vague due care standard might cover a back alley transfer, but it becomes more complex when one looks at cases like the recent Gibson debacle.⁴⁸ The relatively new nature of enforcement means that importers just have to wait and see what exactly the right level of care is. If the Gibson case is any indication, the standard seems to be that importers must take all reasonable steps to ensure the wood was procured legally under U.S. and foreign law.⁴⁹

⁴² *Id.*

⁴³ See, e.g., Alexander Gaffney, *In Notable Shift, DOJ to Treat Manufacturing Regulations as 'Top Area of Focus' in 2013*, REGULATORY FOCUS (Feb. 1, 2013), <http://www.raps.org/focus-online/news/news-article-view/article/2803/in-notable-shift-doj-to-treat-manufacturing-regulations-as-top-area-of-focus-in.aspx>; David Jonas, *Air Industry Faces Uncertain Future After Surprise DOJ Move On AA-US Airways*, BUS. TRAVEL NEWS (Aug. 14, 2013, 12:25 PM), <http://www.businesstravelnews.com/More-News/Air-Industry-Faces-Uncertain-Future-After-Surprise-DOJ-Move-On-AA-US-Airways/?ida=Airlines&a=proc>.

⁴⁴ Juszkievicz, *supra* note 41.

⁴⁵ See Tanczos, *supra* note 1, at 567.

⁴⁶ See U.S. DEPT. OF AGRIC., *supra* note 34, at 14.

⁴⁷ See Nalin Kishor, *Controlling Illegal Logging in Domestic and International Markets by Harnessing Multi-Level Governance Opportunities*, (6)(2) INT'L J. OF THE COMMONS 255, 260–62 (2012).

⁴⁸ See Asner et al., *Interpreting the Lacey Act's "Due Care" Standard After the Settlement of the Gibson Guitar Environmental Enforcement Case*, Arnold & Porter Advisory (Aug. 2012), available at http://www.arnoldporter.com/resources/documents/Advisory%20Interpreting_The_Lacey_Acts_Due_Care_Standard_after_Settlement_Gibson_Guitar_Environmental_Enforcement_Case.pdf.

⁴⁹ Caitlin Clarke & Adam Grant, *Gibson Guitar Logging Bust Demonstrates Lacey Act's Effectiveness*, WORLD RES. INST. (Aug. 10, 2012), <http://insights.wri.org/news/2012/08/gibson-guitar-logging-bust-demonstrates-lacey-acts-effectiveness>.

Furthermore, reasonable care may not be enough when there is any indication that the importer had known or should have known of illegal activity.⁵⁰ Since the Department of Justice has discretion over what instances it decides to prosecute, it may take another case to really understand the standard. While the due care standard arguably leaves room for flexibility in enforcement, such little guidance makes adherence difficult.

IV. THE GIBSON RAIDS

In early August of 2012, Gibson agreed to pay a penalty of \$300,000 for its Lacey Act violation for the importation of Rosewood from India.⁵¹ In 2009, Gibson had similar troubles when their warehouses were raided over Rosewood shipments from Madagascar.⁵² Rosewood is often used in fret boards and guitar bodies, and comes at the high price of \$4,500 per cubic meter.⁵³

Gibson had imported Rosewood and Ebony fret board blanks from Madagascar that were ultimately seized by the federal government because of suspicious supply chains.⁵⁴ Gibson's problems started when they did not follow, what Gibson CEO Henry Juzkiewicz calls, U.S. interpretation of foreign law.⁵⁵ A Malagasy law implemented in 2006 limited the export of "unfinished ebony;" the fretboards fell under this category.⁵⁶ This law came after a coup in the Malagasy government.⁵⁷ The uncertainty in the laws after the coup made prominent guitar maker C.F. Martin Guitar Co. stop its relationships with Madagascar for fear of violations.⁵⁸ It is very possible that Gibson was playing in a gray area, but it does not seem like they willfully violated the law.⁵⁹ The Department of Justice claims that Gibson

⁵⁰ See Tanczos, *supra* note 1, at 568–69.

⁵¹ Press Release, U.S. Dep't of Justice, *supra* note 22.

⁵² Sean Michaels, *Gibson Guitars Raided for Alleged Use of Smuggled Wood*, THE GUARDIAN (Nov. 20, 2009), <http://www.theguardian.com/music/2009/nov/20/gibson-guitars-raided>.

⁵³ *Id.*

⁵⁴ Craig Havighurst, *Why Gibson Guitar Was Raided by the Justice Department*, NAT'L PUB. RADIO (Sep. 6, 2011), <http://www.npr.org/blogs/therecord/2011/08/31/140090116/why-gibson-guitar-was-raided-by-the-justice-department>.

⁵⁵ Juzkiewicz, *supra* note 41. In this article Gibson CEO cries foul on the raid, arguing that the laws, as they stand, allow too much flexibility for foreign law to arbitrarily effect the import of timber into America. *Id.*

⁵⁶ See Press Release, U.S. Dep't of Justice, *supra* note 22.

⁵⁷ Havighurst, *supra* note 54.

⁵⁸ *Id.*

⁵⁹ See James C. McKinley, Jr., *Gibson Guitar Settles Claim Over Imported Ebony*, N.Y. TIMES (Aug. 6, 2012, 7:25 PM), http://artsbeat.blogs.nytimes.com/2012/08/06/gibson-guitar-settles-claim-over-imported-ebony/?_r=0.

employees learned of the illegal trade in 2008 and did not use due care in assessing the problem.⁶⁰ Gibson refutes any knowledge of illegal sourcing.⁶¹ Gibson had trusted, without inspecting further, that the German exporting company that procured the lumber did so legally.⁶²

Of the many varieties of Rosewood, forty-seven are only found in Madagascar, making the Madagascar timber industry very lucrative.⁶³ Unfortunately, poaching is also a big problem.⁶⁴ Loggers illegally cut trees and then send the logs down river to legal harvesting areas.⁶⁵ The government of Madagascar has spoken out against the illegal logging, but has allowed the export of hundreds of crates of illegally harvested wood to pass out of the country at large profits.⁶⁶ The problem may be an economic one: in 2010 alone profits from wood exports out of Madagascar totaled 167 million dollars.⁶⁷ Regulations put in place by the government of Madagascar have been called “one big loophole” by the American ambassador to Madagascar, R. Niels Marquardt.⁶⁸ Madagascar may simply be protecting one of their biggest manufacturing assets.

The case in India was very similar to the Madagascar situation. Indian law barred unfinished timber from being exported.⁶⁹ Items that just need to be fastened and do not need further woodworking to the guitar would be considered finished. Fretboards, which need to be shaped and have frets installed, are considered unfinished by the Indian government.⁷⁰

⁶⁰ See Press Release, U.S. Dep't of Justice, *supra* note 22.

⁶¹ See Havighurst, *supra* note 54.

⁶² Andrew Revkin, *A Closer Look at Gibson Guitar's Legal Troubles*, N.Y. TIMES (Aug. 13, 2012, 12:15 PM), <http://dotearth.blogs.nytimes.com/2012/08/10/a-closer-look-at-gibson-guitars-legal-troubles/>. John Thomas, Professor of Law at Quinnipiac University, explains the overall settlement agreement from the two raids, and some of the implications. *Id.*

⁶³ Karl Lief Bates, *Rosewood Trees Face Extinction Amid Madagascar's Chaos*, DUKE TODAY (May 27, 2010), <https://today.duke.edu/2010/05/rosewood.html>.

⁶⁴ Bearak, *supra* note 36.

⁶⁵ Stuart Pimm, *The Call to Boycott Madagascar's Rosewood and Ebony Explained*, NAT'L GEOGRAPHIC (Oct. 6, 2009), http://newswatch.nationalgeographic.com/2009/10/06/madagascar_forest_crisis/.

⁶⁶ David Braun, *Madagascar's Logging Crisis: Separating Myth From Fact*, NAT'L GEOGRAPHIC (May 20, 2010), http://newswatch.nationalgeographic.com/2010/05/20/madagascar_logging_crisis.

⁶⁷ Bearak, *supra* note 36.

⁶⁸ *Id.*

⁶⁹ James R. Hagerty & Kris Maher, *Gibson Guitar Wails on Federal Raid Over Wood*, WALL ST. J. (Sept. 1, 2011), <http://online.wsj.com/article/SB10001424053111903895904576542942027859286.html>.

⁷⁰ John Thomas, *Knock on Wood: Importers Fret After Feds Raid Guitar Maker Under Lacey Act*, A.B.A. J. MAG. (Dec. 1, 2011), available at http://www.abajournal.com/magazine/article/knock_on_wood_importers_fret_after_feds_raid_guitar_maker_under_lacey_act/.

Gibson has its own interests in making sure most of the building is done in America. If Gibson allowed the guitars to be fretted in India, that guitar would legally need to be labeled as “Made in India.”⁷¹ A guitar that is made in India fetches a lower price than its American counterpart.⁷² So the competing interests of Indian woodworkers and American guitar manufacturers went toe to toe. The Lacey Act incorporates the Indian law regardless of underlying motivations. It is hard to imagine how a law that mandates finishing the fretboards in India is furthering environmental goals and not economic benefit.

While Gibson may have been navigating in rough waters, there is no doubt that this kind of interaction is not what most people imagine when they think of black market sales. The Gibson cases were the first real attempts by the Department of Justice to enforce the Lacey amendments of 2008.⁷³ With the actions against Gibson, the Department of Justice told all manufacturers that they were serious about enforcement.⁷⁴ The settlement for the India case cost Gibson roughly \$600,000, including fines and the cost of seized wood.⁷⁵ While some argue that the Lacey Act is doing exactly what it was meant to do,⁷⁶ there are some obvious problems with the system as it stands. Did the actions of the government in the Gibson case really help the stated environmental goals of the Lacey Act? Maybe to a minimal extent, but the results seem to do more harm than good. The incentive for foreign companies and governments to exploit laws is simple: wood is big business.⁷⁷ It is unrealistic for the Department of Justice to evaluate all foreign laws for consistency, effectiveness, and secondary effects. Even the Department of Justice seems to acknowledge the ambiguity that American manufacturers face. As part of the settlement, the Department of Justice agreed not to undertake any more enforcement surrounding

⁷¹ See Matthew Bales, Jr., *Implications and Effects of the FTC’s Decision to Retain the “All or Virtually All” Standard*, 30 U. MIAMI INTER-AM. L. REV. 727, 731 (1999). Explains the high standard it takes to be considered “Made in America” and the constraints it puts on American manufacturers in an increasingly global society. *Id.*

⁷² See Oliver St. John, *Made in USA Makes Comeback as a Marketing Tool*, USA TODAY (Jan. 21, 2013, 10:11 PM), available at <http://www.usatoday.com/story/money/personal-finance/2013/01/21/made-in-usa-trend/1785539/>.

⁷³ Adam Grant, *Is Your Company Prepared for the Lacey Act?*, WORLD RES. INS. (Dec. 22, 2009), <http://www.wri.org/stories/2009/12/your-company-prepared-lacey-act>.

⁷⁴ See Press Release, U.S. Dep’t of Justice, *supra* note 22.

⁷⁵ Clarke & Grant, *supra* note 49.

⁷⁶ *Id.*

⁷⁷ See Patricia Elias, *Logging and the Law: How the U.S. Lacey Act Helps Reduce Illegal Logging in the Tropics*, UNION OF CONCERNED SCIENTISTS 3–4 (Apr. 2012), available at http://www.ucsusa.org/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf.

Indian wood until the Indian Government provides clarification regarding its legality.⁷⁸

The cost of implementing an oversight system that would not only take into account varying local laws, but also oversee wood along every step of the journey is very expensive.⁷⁹ It is hard for any manufacturer to verify legal wood as it passes through every checkpoint from tree to guitar.⁸⁰ When timber is illegally harvested there are even more tracks to follow. Stolen wood is cut, laundered through timber distributors, cut into blanks, passed through country origin inspectors, and delivered by cargo ship before ever making it to manufacturers.⁸¹ Meanwhile, foreign competitors are able to offer cheaper products and elbow American manufacturers out of the market.⁸² Roy Houseman of the United Steelworkers Union said that, “[t]he Lacey Act serves a critical purpose for our environment in helping to prevent illegal logging, but it also serves an important purpose for U.S. workers and businesses that have to compete with imports of products made from legally-sourced trees.”⁸³

V. A BRIEF HISTORY OF CITES

CITES is an international agreement, implemented in 1973, and aimed at protecting wildlife including the illegal transport of timber.⁸⁴ Almost all of the countries from which manufacturers buy wood are CITES members.⁸⁵ CITES covers about 30,000 plant species, including most rare wood that is used in instrument building.⁸⁶ CITES, among other things, places voluntary regulations on importing and exporting wood.⁸⁷

⁷⁸ See Revkin, *supra* note 62.

⁷⁹ See Tanczos, *supra* note 1, at 565.

⁸⁰ *Id.* at 568.

⁸¹ Ajit Joy, *Following the Money Trail: The Challenges in Illegal Logging Investigations*, U.N. OFFICE ON DRUGS AND CRIMES 3, available at <http://www.illegal-logging.info/content/following-money-trail-challenges-illegal-logging-investigations>.

⁸² Jeremy Hance, *Tea Party Rallies in Favor of Gibson Guitar, Ignores Reasons Instrument Maker Is Under Investigation*, MONGABAY (Oct. 10, 2011), http://news.mongabay.com/2011/1010-hance_teparty_madagascar.html.

⁸³ *Cooper-Blackburn Bill Seeks Exemptions for Illegal Wood Imports*, MONGABAY (Nov. 5, 2011), <http://news.mongabay.com/2011/1105-cooper-blackburn.html>.

⁸⁴ *U.S. Lacey Act and CITES*, ENVTL. INVESTIGATION AGENCY, <http://eia-global.org/campaigns/forests-campaign/u.s.-lacey-act/lacey-and-cites/> (last visited Nov. 15, 2013).

⁸⁵ *Member Countries*, CITES, <http://www.cites.org/eng/disc/parties/> (last visited Nov. 15, 2013).

⁸⁶ *What is CITES?*, CITES, <http://www.cites.org/eng/disc/what.php> (last visited Nov. 15, 2013).

⁸⁷ Convention on International Trade in Endangered Species, art. 2, Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249.

If CITES held all countries to the same standards and scrutinized exporters in the same way as American importers, there is no doubt that CITES could make a huge impact on illegal wood trade.⁸⁸ More developed countries are more likely to impose strict regulations because of higher public approval for environmental initiatives and the relatively small effect on trade overall.⁸⁹ Smaller, less developed countries, on the other hand, have large incentives to loosen restrictions.⁹⁰ Loose restrictions allow for the highest profit on wood trade. When raw materials are the top export of a country, over-regulating could be devastating.⁹¹ Similar problems have plagued many environmental treaties. The Kyoto Protocol, for instance, has had problems with member nations arguing about the amount of emissions allowed, with developing countries arguing that over-regulation stifles industrial development.⁹²

VI. WHAT DOES CITES REQUIRE?

CITES breaks down wildlife into three categories: Appendix I includes the most endangered species, Appendix III includes the least, with Appendix II falling in between.⁹³ Appendix I specimens are considered threatened with extinction, and Appendix II are specimens that are not threatened, but have been designated for protection against trade.⁹⁴ Appendix III specimens are protected in at least one member country, but are not in imminent danger.⁹⁵ CITES requires that parties to the treaty

⁸⁸ Charlene D. Daniel, *Evaluating U.S. Endangered Species Legislation—The Endangered Species Act as an International Example: Can this be Pulled Off? The Case of the Rhinoceros and Tiger*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 683, 684 (1999) (examining using the Endangered Species Act as model legislation for CITES members to provide guidance and to level protection).

⁸⁹ See generally Andrew B. Whitford & Karen Wong, *Political and Social Foundations for Environmental Sustainability*, 62 POLITICAL RESEARCH QUARTERLY 190 (Mar. 2009) (arguing that political systems, economic development, and ISO adoption are proximate causes of sustainability in countries); Richard M. Auty, *Pollution Patterns During the Industrial Transition*, 163 THE GEOGRAPHICAL J. 206 (July 1997) (stating that pollution decreased once economies are developed).

⁹⁰ See Rosander, *supra* note 10, at 3.

⁹¹ *Id.* at 11.

⁹² See generally Frederick A. B. Meyerson, *Population, Carbon, Emissions, and Global Warming: The Forgotten Relationship at Kyoto*, 24 POPULATION AND DEVELOPMENT REV. 115 (Mar. 1998) (describing the emission cap limits of the Kyoto Protocol).

⁹³ Convention on International Trade in Endangered Species, *supra* note 87, at art. 2.

⁹⁴ *Id.*

⁹⁵ *Id.*

take appropriate measures through local laws to enforce the provisions by penalizing possession of specimens and confiscating illegal specimens.⁹⁶

VII. WHERE DOES CITES BREAK DOWN?

The fundamental problem with CITES is it depends on its signatories to uphold the values and stated goals.⁹⁷ The Convention does not offer model legislation for countries and does not give much guidance on how to implement protection systems.⁹⁸ The Convention also does not analyze the laws of member states to evaluate if they are furthering goals.⁹⁹ The only international oversight from the Convention is a reporting system where member parties can “propose remedial action” against a nonconforming member.¹⁰⁰ This is not a very strong mandate against member nations who violate the treaty. In comparison, Americans who violate the Lacey Act are subject to \$10,000 in fines under civil penalties for each violation and up to five years in prison, \$20,000 in fines, or both in criminal penalties.¹⁰¹

This is where the system breaks down. For example, America enforces the Lacey Act when dealing with timber imports. If illegal wood is harvested from a member country that is more relaxed in its oversight, the wood will pass out of the country to American manufacturers, injecting cash into the source country's economy.¹⁰² When the timber gets to the United States, it is confiscated and sometimes returned to the country of origin.¹⁰³ This creates an incentive for countries to keep low standards, at least in the short term.¹⁰⁴ This is especially true for countries that have large timber industries that support much of their economy.¹⁰⁵ Relaxed laws allow for the continuation of illegal deforestation for a profit.¹⁰⁶

⁹⁶ *Id.* at art. 8.

⁹⁷ See Daniel, *supra* note 88, at 688.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ See Convention on International Trade in Endangered Species, *supra* note 87, at art. 13.

¹⁰¹ 16 USCS § 3373(a)(1),(d)(1)(B).

¹⁰² See generally Tanczos, *supra* note 1, at 572 (using the case of Bigleaf Mahogany in Peru to explain the complexity of importing rare wood. Entrenched patronage systems and compliance of Peruvian officials makes Peru a popular laundering site for wood. The wood then changes hands several times before arriving in America with all appropriate documentation. Tanczos argues that it is nearly impossible in some cases for importers to swear that wood was not harvested illegally, especially when there is no indication through the documentation).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

VIII. CASTLEWOOD CASE

The Castlewood case from 2002 illustrates some of the problems manufacturers run into when relaxed international laws meet the strict requirements of the Lacey Act. The case arose when the Department of the Interior, Fish and Wildlife Service intercepted Brazilian mahogany at ports in the United States.¹⁰⁷ The importing companies argued that since the permits for shipment were signed and issued by Brazil's Management Authority they should be valid, and that the restrictions placed on them were "arbitrary" and "capricious."¹⁰⁸ The court in Castlewood makes it expressly clear that CITES gives countries the right to enforce rules above and beyond those agreed on in the treaty, in this case the Lacey Act.¹⁰⁹ The Department of the Interior argued that despite the permits from Brazilian officials, the companies could not prove "that the specimen was not obtained in contravention of the law of that State."¹¹⁰

Brazil has been struggling in the last decade with striking a balance between a large farming lobby and conservationist efforts.¹¹¹ The result of these tensions is ever-changing laws.¹¹² Earlier this year the Brazilian Congress passed a new complex set of laws designed to strike that balance.¹¹³ There is still uncertainty over whether new laws will change the landscape in Brazil.¹¹⁴ The new bill seems to take on too many issues and strike too many compromises to be completely effective, leaving wood importers in the dark about the legality of supply lines.¹¹⁵

IX. AMENDING THE LACEY ACT

While some have called for loosening of Lacey restrictions to open up international trade,¹¹⁶ this is a shortsighted goal, and in the long term

¹⁰⁷ Castlewood Products, L.L.C. v. Norton, 365 F.3d 1076, 1078 (D.C. Cir. 2004).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1079.

¹¹⁰ *Id.* at 1083.

¹¹¹ São Paulo, *Compromise or Deadlock?: The President's Effort to Balance the Claims of Forests and Farms has Satisfied Few. An Opportunity to Promote Sustainable Farming May be Missed*, THE ECONOMIST (June 2, 2012), available at <http://www.economist.com/node/21556245>.

¹¹² *Id.* (discussing the recent Farm Bill in Brazil and the conflicting interests and uncertainty in the new laws. The split between farmers and conservationists makes it hard to write any law that will be widely accepted and effective).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ Pete Kasperowicz, *Lawmakers Look to Ease Lacey Act Regulations After Gibson Guitar*

it could be devastating to the ecosystems CITES and the Lacey Act are looking to protect. Many in the instrument making industry, which has been slow to get on board with timber regulation, sense the changing tide and are pro-conservation, but feel that other countries need to be held to similar standards.¹¹⁷

The first step in changing regulation is to start with the Lacey Act. While the intent of the act is laudable, the 2008 amendments have created confusion among importers.¹¹⁸ Congress is already looking into amendments to the 2008 changes.¹¹⁹ Specifically, Bill H.R. 3210 presented in October of 2011 suggested changes to the 2008 Lacey structure.¹²⁰ The biggest, and most relevant, change that the bill would bring is that only foreign laws that are “directed at the protection, conservation, and management of plants” would be enforced on American manufacturers.¹²¹ The new bill would also mandate a government-run database of foreign laws.¹²² The relatively limited amendments in Bill 3210 suggest that, for the most part, the Lacey Act is working the way Congress wants it to. The National Association of Music Merchants (NAMM), which has been an outspoken critic of the Lacey Act,¹²³ applauds the new suggested changes.¹²⁴ NAMM released a statement saying:

NAMM’s goal since the Amendments in 2008 is to inform regulators and help legislators make positive changes to the

Raid, THE HILL (Oct. 20, 2011), <http://thehill.com/blogs/floor-action/house/188831-guitar-heros-lawmakers-look-to-ease-rules-after-gibson-guitar-raid>.

¹¹⁷ Havighurst, *supra* note 54; Juskiewicz, *supra* note 41. The music industry has largely embraced conservation, but as CEO Juskiewicz points out, some of the laws enacted by Lacey have little to do with conservation and should be left out. *Id.*

¹¹⁸ Kristina Alexander, *The Lacey Act: Protecting the Environment by Restricting Trade*, CONG. RESEARCH SERV. (July 16, 2013), available at <http://www.fas.org/sgp/crs/misc/R42067.pdf>.

¹¹⁹ H.R. 3210, 112th Cong. (2011).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Kevin Cranley, *A Letter From the National Association of Music Merchants (NAMM) to President Obama and Members of the U.S. Congress*, NAT'L ASS'N OF MUSIC MERCHS., available at <http://www.namm.org/public-affairs/articles/letter-national-association-music-merchants-namm-p>. Kevin Cranley, President of NAMM, explains that the impact of the Lacey Amendment is “confusion, uncertainty, and threat of criminality” even when manufacturers are intending due care. *Id.*

¹²⁴ Press Release, Nat'l Ass'n of Music Merchs., NAMM Supports New Lacey Relief Act, (Oct. 20, 2011), available at <http://www.namm.org/news/press-releases/namm-supports-new-lacey-relief-act>.

Lacey Act that will preserve not only the world's forests, but the vital work of U.S. manufacturing and commerce in the music products industry—and we believe the new RELIEF Act moves us closer to achieving this goal.¹²⁵

Still, environmental groups argue that the RELIEF Act would effectively gut the Lacey Amendments, claiming it creates large loopholes through its exemption of “non-solid” wood products.¹²⁶ They also claim that the punishment for violators is too low, with first time offenders paying just \$250.¹²⁷ Even some U.S. manufacturers, mostly lumber companies, have opposed the new bill in a letter to the U.S. House of Representatives, saying it sidesteps the effectiveness of the Lacey Act and creates an unfair advantage for manufacturers who do not make sure their wood is harvested legally.¹²⁸ It is important to note that no instrument company signed the letter to the House of Representatives defending the Lacey Act as is.¹²⁹

Even if the proposed bill does not make it into law, it is clear that something needs to be done with the Lacey Act for it to be workable from an environmental and economic standpoint. A simple answer is to make the law clearer so that no manufacturer may claim ignorance when it is broken. This can be done by only promoting laws that follow the intended purpose of the act, as suggested in the RELIEF Act.¹³⁰ This change, along with a database that would provide manufacturers with a list of imports that are currently illegal, manufacturers would have increased clarity.¹³¹ Incentives for environmentally conscious sourcing such as tax incentives and eco-labeling programs (discussed later in the Note) would also encourage compliance. While this would not solve the problems of fraud and timber theft, it would set a clear standard.¹³² Once the laws are clarified, the Lacey Act

¹²⁵ *Id.*

¹²⁶ *Musicians Against Illegal Logging: Protect Forests and the Future of Musical Instruments*, FRIENDS OF THE EARTH (Nov. 18, 2012), <http://www.foe.org/projects/oceans-and-forests/forests-and-climate/protect-the-lacey-act>. The claim about non-solid wood is largely irrelevant to instrument making because pulp and shavings are generally not used in the process, but the exception has a very broad environmental scope since non-solid items account for about 50% of United States imports. *Id.*

¹²⁷ *Id.*

¹²⁸ Letter from American Forest Foundation, to U.S. House of Representatives (Nov. 8, 2011), available at http://libcloud.s3.amazonaws.com/93/28/9/1023/industry_letter_oppose_cooper_3210.pdf.

¹²⁹ *Id.*

¹³⁰ H.R. Rep. No. 112-604, at 3 (2011).

¹³¹ *Id.* at 4.

¹³² *Id.*

needs to be harsh to violators. There should be no excuse for the importation of illegal woods.

X. CHANGES TO CITES TO DISCOURAGE DEFORESTATION

Currently, CITES has very loose guidelines for member countries.¹³³ This leads to wide variation in law, from the strict Lacey Act in America to the ever-changing and nebulous laws of Madagascar.¹³⁴ The only real regulations for Appendix II specimens are that there should be a permitting officer that signs off on the export and that the importing person/corporation must have the appropriate permits upon arrival.¹³⁵ CITES does bind member states to make individual laws that prevent illegal trade,¹³⁶ but the mandate is not strict enough and no guidelines are given to members to assist with lawmaking.¹³⁷ A way of solving this problem is to require a baseline for every member country. While it is clear that laws need to be different from country to country to fit differing needs, if a rock-bottom set of laws was proposed to all member countries, everyone would have the same starting point. If members then wanted to go above and beyond they would, of course, be allowed to.

Charlene Daniel, in her essay evaluating the CITES problem, offers a simple solution: have all member states use the Endangered Species Act as a model state legislation.¹³⁸ This is a novel idea—the act has been highly effective in the United States.¹³⁹ The problem with this argument is that the United States does not depend on endangered resources for capital like many of the CITES member states do. While restrictions under the

¹³³ See Convention on International Trade in Endangered Species, *supra* note 87.

¹³⁴ See Press Release, U.S. Dep't of Justice, *supra* note 22.

¹³⁵ See Convention on International Trade in Endangered Species, *supra* note 87.

¹³⁶ See Daniel, *supra* note 88, at 687.

¹³⁷ *Id.* at 688.

¹³⁸ See *id.* The argument presented by Daniel is that the Endangered Species Act of 1973 has been a successful response to CITES, and giving member nations a place to work from is a great start to fixing CITES' problems. Without model legislation many member states are left without a clear way to implement the goals of CITES. Recovery plans under the Endangered Species Act have recovered 15 animals since its start in 1973, and 90 percent of species met delisting deadlines. See generally, Maryann Mott, *U.S. Endangered Species Act Works: Study Finds*, NAT'L GEOGRAPHIC (Apr. 18, 2005), available at http://news.nationalgeographic.com/news/2005/04/0418_050418_endangered.html; Kieran Suckling et al., *On Time: How the Endangered Species Act is Saving America's Wildlife*, CTR. FOR BIOLOGICAL DIVERSITY (May 2012), available at http://www.esasuccess.org/pdfs/110_REPORT.pdf.

¹³⁹ Mott, *supra* note 138.

Endangered Species Act are certainly a large step towards environmental sustainability and do regulate many aspects of commerce in America, an equivalent of the ESA would be too restrictive for countries whose economies are based around the sale of natural resources.¹⁴⁰

A lesser standard could sufficiently take on environmental concerns while keeping international trade steady. Having uniform laws, as well as uniform goals, will make administration of CITES a lot less confusing for companies and permitting bodies. There also needs to be a uniform reprimand system for member states that do not comply. Currently, CITES has a binding arbitrating body, but cases only come in front of it if there is mutual consent between the feuding states.¹⁴¹ A simple solution is to make binding arbitration mandatory for feuds that cannot be resolved in a reasonable time frame. Currently no disputes have been arbitrated by the CITES system.¹⁴² While mandating arbitration takes away sovereignty from member nations, the minimal loss of sovereignty is nothing if a workable system of sustainability can be implemented effectively. New lawmaking opens the door for environmentally sourced products, but work still must be done to get the consumer on board.

XI. SEARCH FOR SUSTAINABLE ALTERNATIVES IN INSTRUMENT MAKING

While regulations will affect the way many businesses make instruments in the future, there is still a market for old hardwood guitars.¹⁴³ Many consumers claim they can tell the difference between their prized tonewood and the eco-friendly counterparts.¹⁴⁴ The industry is starting to realize the importance of alternative methods and sources, but still has to

¹⁴⁰ See Daniel, *supra* note 88, at 688, 692.

¹⁴¹ Convention on International Trade in Endangered Species, *supra* note 87, at art. 28.

¹⁴² See Daniel, *supra* note 88, at 696.

¹⁴³ Sara J. Martinez, *Play Responsibly: Guitar Makers Seek Sustainable Sound*, THE ATLANTIC (Nov. 29, 2011), available at <http://www.theatlantic.com/technology/archive/2011/11/play-responsibly-guitar-makers-seek-sustainable-sound/248970/> (detailing the many steps music manufacturers have been taking to ensure continued viability of wood sources. Gibson CEO Henry Juszkiewicz described the responsibility of manufacturers: "I think we have a responsibility that goes beyond just meeting lawful standards. We have a responsibility to the large community we operate in to make the world better.").

¹⁴⁴ Steven Errede, *Sustainability and Musical Instruments*, UIUC PHYSICS 193, available at http://courses.physics.illinois.edu/phys193/Lecture_Notes/P193_Lect11.pdf (explaining the complexity, from a physics standpoint, that makes "good sound." There are only a limited number of species that create tonal properties that are good enough for use in instruments. Factors in tone quality include dissipative properties, the orientation of the grain, and the grain density).

bring sustainability up to the level of playability expected by consumers. There are three ways of creating more environmentally friendly instruments: sustainable forestry, sustainable wood supplies, and technological advances.¹⁴⁵ The question then becomes: will the instrument buyers accept the changes, and what, if anything, can the government or outside organizations do to promote more sustainable practices?

XII. SUSTAINABLE FORESTING METHODS

The most obvious step in sustainability is protecting the sources of wood already famous for making great instruments. There are a number of ways of doing this, including: tree farming, protection of forests, and reclamation of timber.¹⁴⁶

Unfortunately, there are some issues with this approach—some woods cannot be farmed because of the long growth period necessary before they are suitable for instrument building. Many instruments, especially stringed instruments, are made from woods that are close to one hundred years old.¹⁴⁷

There is also the issue of harvesting for other purposes—the instrument making industry does not have the whole market on these woods. They are used for any number of other projects and a push for conservation by only one interested industry may not totally alleviate the deforestation problem.

XIII. SUSTAINABLE WOOD SOURCES

The next step is for the industry to look towards more sustainable woods that have not historically been used in instrument making. Technology has made many types of wood that were unworkable by hand available to modern woodworkers.¹⁴⁸

There is always the argument that these woods do not sound as good.¹⁴⁹ They also do not have the history and “fame” of more traditional

¹⁴⁵ Mark French & Rod Handy, *Sustainability and Life Cycle Management in Guitar Production*, PURDUE U. (2006), available at http://www.ijme.us/cd_06/PDF/ENT%20105-061.pdf.

¹⁴⁶ Gayla Drake, *Sustainable Tone: The Forest and the Trees*, PREMIER GUITAR (July 2009), available at http://www.premierguitar.com/Magazine/Issue/2009/Jul/Sustainable_Tone_The_Forest_and_the_Trees.aspx?

¹⁴⁷ Martinez, *supra* note 143.

¹⁴⁸ *New Wood-Plastic Composites to Boost Industry, Help Use Waste Products*, PHYS ORG. (Oct. 3, 2006), <http://phys.org/news79094005.html>.

¹⁴⁹ Martinez, *supra* note 143.

woods.¹⁵⁰ But slowly the industry has realized the importance of unconventional wood sources.¹⁵¹

In the woodwind area, companies like Hanson Clarinets, the largest UK producer of clarinets, are experimenting with reinforced African Blackwood by using composite wood made from scraps of Blackwood that would have traditionally been of no use in the instrument making process.¹⁵² For woodwind instruments, which are mostly made from the endangered African Blackwood, wood does not need to be ancient for good tonal qualities, sustainable farming and composite woods are good options.¹⁵³

Martin Guitars is experimenting with environmentally friendly practices through its “sustainable wood series”¹⁵⁴ using sustainable woods such as katalox and recycled spruce.¹⁵⁵ Looking to non-traditional woods could be the answer to cutting back on rare wood usage.¹⁵⁶

XIV. NEW TONEWOOD TECHNIQUES

Technology has also made it easier to produce instruments through sophisticated woodworking techniques.¹⁵⁷ Some of these techniques include high pressure bonded wood, plastics, and particle boards.¹⁵⁸ Martin Guitars has been on the forefront of new technologies in guitar making. Martin has experimented with compressed and fiber wood as well as aluminum topped guitars.¹⁵⁹ The balancing act is trying to find sustainable methods while keeping the integrity of the brands which are built on more traditional wood sources. An inferior product could kill the brand.

This is a relatively new field of instrument making that has come about in the past decade or so. That being said, the techniques are not

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; Maggie Galehouse, *Making Guitars with Sustainable Wood*, THE HOUSTON CHRON. (Jan. 26, 2009), available at <http://www.chron.com/life/article/Making-guitars-with-sustainable-woods-1742703.php>.

¹⁵² Lucy Siegle, *How Green is My Guitar?*, THE GUARDIAN, (May 2, 2009), <http://www.guardian.co.uk/environment/2009/may/03/ethical-dilemma-guitars>.

¹⁵³ *Id.*

¹⁵⁴ *Responsible Guitar Building: Sustainable Wood*, C.F. MARTIN & CO. (Dec. 16, 2010), <http://martinguitar.tumblr.com/post/2338146989/responsible-guitar-building-sustainable-wood>.

¹⁵⁵ Raz Godelnik, *Martin Unveils Recycled Wood Guitar, While Gibson Still Fights Raid Fallout*, TRIPLE PUNDIT (Dec. 1, 2011), <http://www.triplepundit.com/2011/12/martin-wood-dismantled-bridges-new-guitar-gibson-fights-raid/>. Many have criticized the use of katalox, arguing that it is not a sustainable source, just a more sustainable source. *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See Drake, *supra* note 146.

¹⁵⁸ See Godelnik, *supra* note 155.

¹⁵⁹ *Id.*

perfect and many consumers will focus on the failures rather than the triumphs. Although high-end, completely sustainable guitars may be years from mass production, continued research can make them a reality.¹⁶⁰

XV. CHANGING THE CULTURE OF INSTRUMENT MAKING

Even if manufacturers could perfect sustainable techniques there is still the hurdle of getting the consumer on board. Is the average consumer ready to put down their exotic wood guitar and pick up something that is made of fancy particle board? It is likely to be a tough sell, no matter how good the alternatives sound. This is where the argument really links up with law change—even if American manufacturers do their best to market and research alternative wood, it is going to be an uphill battle if foreign instrument makers do not have the same restrictions. Still, there are some things that corporations can do to make sustainable products more marketable to the public.

Consumer awareness is key to getting consumers interested in the product. In the past, initiatives like the Forest Certification Program have failed to garner public attention because the public does not know enough about certified wood, and the consumer demand for the products is low.¹⁶¹ Companies need to center a brand image around sustainability and educate the public.¹⁶² A customer has to believe the extra money is worth spending on a sustainable product.¹⁶³

American instrument makers, especially in the guitar world, are far ahead of their competitors in the market.¹⁶⁴ Big companies like Fender, Gibson, and Martin dominate and really set the tone for what the industry standard is worldwide.¹⁶⁵ These guitar makers defined cool—bottled and

¹⁶⁰ French & Handy, *supra* note 145.

¹⁶¹ Misty L. Archambault, *Making the Brand: Using Brand Management to Encourage Market Acceptance of Forestry Certification*, 81 N.Y.U.L. REV. 1400, 1413 (Oct. 2006) (discussing the problems facing certified wood programs, in particular, the case of Home Depot, who made headlines when they vowed to buy only Forestry Certified wood. While Home Depot's step certainly has huge environmental impacts, it went largely unnoticed by the average consumer. The article then focuses on brand management techniques that could make certified wood more marketable).

¹⁶² *Id.* at 1430.

¹⁶³ *Id.*

¹⁶⁴ Emily Lambert, *Fender Bender*, FORBES (June 22, 2004), available at http://www.forbes.com/2004/06/22/cz_el_0622fender.html.

¹⁶⁵ *Id.* Fender alone captures 30% of the electric guitar market. The article goes on to explore the often-imitated styles of Fender and Gibson guitars, and some of the intellectual property problems associated with the models. *Id.*

sold the essence of music for decades. If anyone can make customers come around to sustainable methods, it is these companies. But they have still got a lot to compete against. For hundreds of years mahogany, rosewood, alder, and other tonewoods have dominated the instrument market and have been hailed by collectors and players.¹⁶⁶ The challenge is not only finding a sustainable method for producing wood, but also changing the ideals of generations of luthiers and players.

XVI. INCENTIVES FOR GREEN INITIATIVES

In recent years the government has taken up initiatives to give tax credits in the green building sector.¹⁶⁷ While this may help many instrument manufacturers green up their buildings, it does not incentivize making more sustainable products.¹⁶⁸ Tax credits for meeting designated standards would insulate the higher costs of green instruments.¹⁶⁹ This would help keep the green products attractively priced and easier for the consumer to get used to.

The Leadership in Energy and Environmental Design (“LEED”) is a good example of how the private sector may also be able to incentivize green thinking. The LEED program is run by the U.S. Green Building Council (“USGBC”) and LEED certifications have been increasingly sought after.¹⁷⁰ LEED sets out credits that builders can earn when using green construction. If a building gains enough credit it is given a LEED certification, which tells consumers that the building satisfies green requirements set out by a third party.¹⁷¹ New construction can gain points for green vehicles, indoor water use reduction, and advanced energy metering.¹⁷² The

¹⁶⁶ See, e.g., Drake, *supra* note 146.

¹⁶⁷ Michael Haun et al., *An Overview of Federal Tax Incentives for Green Technology*, BLOOMBERG LAW REPORTS (2010), available at https://www.paulhastings.com/assets/publications/1490.pdf?wt.mc_id=1490.pdf (explaining tax credits for production of electricity from qualified sources, tax credits for investment in renewable energy and energy efficient commercial buildings).

¹⁶⁸ *Id.*

¹⁶⁹ Compare *id.* with Federal Tax Credits for Consumer Energy Efficiency, Energy Star, available at http://www.energystar.gov/index.cfm?c=tax_credits.tx_index.

¹⁷⁰ John Collins Rudolf, *For Sustainable Wood, a New and Unloved Standard*, N.Y. TIMES (Oct. 22, 2010), <http://green.blogs.nytimes.com/2010/10/22/for-sustainable-wood-a-new-and-unloved-standard/>.

¹⁷¹ *What is LEED?*, U.S. GREEN BLDG. COUNCIL (July 25, 2012), <http://www.usgbc.org/articles/about-leed>.

¹⁷² *LEED New Construction Credits*, U.S. GREEN BLDG. COUNCIL (Apr. 1, 2013), http://www.usgbc.org/sites/default/files/LEED%202009%20RS_SCH_04.01.13_current.pdf.

question is whether this same model can be used on eco-friendly products and manufacturers. The downfall to a LEED type program is that it does not necessarily provide monetary support for manufacturers of green products.¹⁷³ While the system works pretty well in the construction area (even if resources are limited) it may not be so simple when talking about a product like a violin or bassoon.

XVII. ECO LABELING

Recent market studies show that the typical American consumer has a strong interest in green products.¹⁷⁴ This means that an eco-labeling system may have a big impact on what consumers buy.¹⁷⁵ An eco-label system could even be worked into CITES. CITES could come up with standards for manufactured products and if a product met the standard a company would get the added bonus of telling customers that their product is “eco-friendly” and CITES approved.

Recently there has been a movement towards eco-labeling in the instrument market, with many manufacturers looking to get independently certified as “eco-friendly.”¹⁷⁶ Maybe most prominent is the Forest Stewardship Council certification system.¹⁷⁷ The Forest Stewardship Council (“FSC”) is an independent non-profit organization whose mission is to “promote environmentally responsible, socially beneficial and economically viable management of the world’s forests.”¹⁷⁸ The FSC gives out Chain of Custody Certifications that give third party certification that the supply chain of wood is legal.¹⁷⁹

While some companies have complied with FSC standards on some wood sources, even progressive companies are far from 100% compliance.¹⁸⁰

¹⁷³ See U.S. GREEN BLDG. COUNCIL, *supra* note 171.

¹⁷⁴ Teresa Hock, *The Role of Eco-Labels in International Trade: Can Timber Certification be Implemented as a Means to Slowing Deforestation?*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 347, 348, 349, 358–59 (Summer 2001).

¹⁷⁵ *Id.*

¹⁷⁶ *Responsible Guitar Building: FSC Certified Wood*, MARTIN GUITARS (Dec. 9, 2010), available at <http://martinguitar.tumblr.com/post/2155127044/responsible-guitar-building-fsc-certified-wood> [hereinafter MARTIN GUITARS]; *Sustainability: Taylor's Environmental Commitment*, TAYLOR GUITARS (2012), available at <https://www.taylorguitars.com/about/sustainability>.

¹⁷⁷ Caitlin Clarke, *Are Your Wood Products Really Certified?*, WORLD RES. INST. (May 4, 2011) available at <http://www.wri.org/stories/2011/05/are-your-wood-products-really-certified>.

¹⁷⁸ See FOREST STEWARDSHIP COUNCIL, *infra* note 195.

¹⁷⁹ *FSC Certification: Chain of Custody*, Forest Stewardship Council, available at http://tcnef.brownrice.com/uploads/file/CoC%20Binder%20Sec%2010_2%20CoC%20User%20Guide%20STD%2040%20004.pdf.

¹⁸⁰ Clarke, *supra* note 177.

For instance, Martin only sells five instruments (four guitars and one ukulele) that meet the supply chain standards.¹⁸¹ Gibson also only holds FSC certification on some of their instrument lines.¹⁸² In fact, Gibson was FSC certified when they were charged with possessing stolen wood from Madagascar.¹⁸³ While companies claim to be FSC certified, in reality most of the products are still not up to certification.¹⁸⁴

The big problem is that certification is intangible to consumers.¹⁸⁵ Environmentalism does not make instruments look better or play better. That is why participation in the FSC program is low across the industry.¹⁸⁶ At first, FSC certification seemed like a promising way to get manufacturers and consumers on board.¹⁸⁷ In 1999, Home Depot announced it would meet FSC certification standards for all the wood it sells.¹⁸⁸ Still, consumer awareness of certification has not been widespread.¹⁸⁹

The problem may be that FSC certification is not aimed at the consumer. Without consumer support companies have less incentive to get certified.¹⁹⁰ A good example of a consumer-based labeling scheme is the U.S.D.A.'s organic labeling. From when the labeling initiative started in 1990 to 2002, sales of organic foods have gone up twenty percent in the United States.¹⁹¹ Any agricultural producer who sells more than \$5,000 worth of organic products a year must submit to the U.S.D.A. labeling program.¹⁹² The labeling program gives a consistent definition of organic and gives high visibility to consumers with the "U.S.D.A. organic" labeling system.¹⁹³ To get the organic seal, a producer must use approved methods

¹⁸¹ See MARTIN GUITARS, *supra* note 176.

¹⁸² See Clarke & Grant, *supra* note 49.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See Archambault, *supra* note 161.

¹⁸⁶ *But see id.*

¹⁸⁷ J.R. Geraghty, *Land and Resource Management: From Trees to Tables—How Big Timber Got Green*, 2000 COLO. J. INT'L ENVTL. L. & POL'Y 97, 105 (2000). The stark difference between the optimism about FSC labeling in the Geraghty article (2000) versus the proclamation by Archambault (*supra* note 161) that FSC has largely been unsuccessful shows the continued demand for a consumer-based labeling system.

¹⁸⁸ *Id.*

¹⁸⁹ See Archambault, *supra* note 161.

¹⁹⁰ *Id.*

¹⁹¹ Philip H. Howard & Patricia Allen, *Beyond Organic: Consumer Interest in New Labeling Schemes in the Central Coast of California*, CTR. FOR AGROECOLOGY AND SUSTAINABLE FOOD SYS., UNIV. OF CAL., SANTA CRUZ (2006) at 439.

¹⁹² *Do I Need to Be Certified Organic?*, U.S.D.A. (June 2012).

¹⁹³ *National Organic Standards Board (NOSB)*, U.S.D.A., <http://www.ams.usda.gov/AMSV1.0/NOSB> (last visited Nov.18, 2013).

that “integrate cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.”¹⁹⁴

What the wood market needs is an equivalent to the U.S.D.A. labeling system. This could be done by an independent body, like the FSC, or by the government like with U.S.D.A. ratings. A product that complies would get a seal of approval, letting the consumers, even the gnat-brained ones, know that the product meets the standards of the program.

The next question is what standards should be used. Setting the standard too low would undermine the process, but a high standard would make compliance unattainable. The FSC model may be a good place to start. The FSC sets out ten purposes including compliance, respect for the rights of indigenous people, and maintenance of high conservation value forests.¹⁹⁵ While the values of FSC match the direction manufacturers need to go, they are not readily accessible to the consumers. The actual rating system is very complex, and while the goals are clear, the methodology is not.¹⁹⁶ This is not necessarily a deal-killer; most consumers do not know every step of the U.S.D.A. certification. But the U.S.D.A. system¹⁹⁷ sends a simple message. Apples get a certified “Extra Fancy,”¹⁹⁸ top quality eggs get a grade “AA,”¹⁹⁹ and organic food gets a “U.S.D.A. Organic” label.²⁰⁰ A grading system or just a standard label for environmentally conscious supply chains could appeal to consumers. This idea could be expanded across all wood markets.

The obvious argument against the success of a labeling system like the U.S.D.A.’s is that the U.S.D.A. labeling system has been largely

¹⁹⁴ *Id.*

¹⁹⁵ *FSC International Standard: FSC Principles and Criteria for Forest Stewardship*, FOREST STEWARDSHIP COUNCIL (2002), available at <https://ic.fsc.org/download.fsc-std-01-001-v4-0-en-fsc-principles-and-criteria-for-forest-stewardship.a-315.pdf>.

¹⁹⁶ *Id.*

¹⁹⁷ The U.S.D.A. standards are often criticized for being too relaxed and sometimes misleading. This undermines the primary functions of the labeling system: identification, warnings, and health education. While the U.S.D.A. system does have its flaws it succeeds in uniformly labeling products in a way that is consumer oriented, and thus, is a good starting place for a wood-based labeling system. *See generally*, Donna M. Byrne, *Cloned Meat, Voluntary Food Labeling, and Organic Oreos*, 8 PIERCE L. REV. 31, 42, 56, 60 (2009); Michelle T. Friedland, *You Call that Organic?—The USDA’s Misleading Food Regulations*, 13 N.Y.U. ENVTL. L.J. 379, 383, 397, 403 (2005).

¹⁹⁸ *United States Standards for Grades of Apples*, U.S.D.A. (2002), available at <http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5050339>.

¹⁹⁹ *What Are Egg Grades*, U.S.D.A., available at http://www.fsis.usda.gov/wps/wcm/connect/5235aa20-fee1-4e5b-86f5-8d6e09f351b6/Shell_Eggs_from_Farm_to_Table.pdf?MOD=AJPERES (last visited Nov. 18, 2013).

²⁰⁰ 6 C.F.R. Sec. 205.300 (2001). “Use of the term ‘Organic.’”

successful because it regulates the “health” of food.²⁰¹ An argument could be made that consumers will not be as interested in wood grading because it does not directly affect the health of the consumer. While consumers may have health concerns about their food, they also care about its environmental, social, and ethical impact.²⁰² It stands to reason that consumers would have similar concerns about the sourcing of their wood products. While it would be ambitious to assume that wood labeling would be as successful as food labeling, there has recently been some success in this kind of labeling. Systems of labeling pioneered by groups like the Rainforest Alliance and FairTrade USA have been successful in helping consumers make informed buying decisions.²⁰³ For instance, in 2000 four million pounds of Fair Trade coffee were sold in the United States.²⁰⁴

CONCLUSION

Forests continue to be a principle ecological resource.²⁰⁵ 3.4 billion cubic meters of wood is cut yearly.²⁰⁶ Timber remains a fifteen billion dollar a year black market industry.²⁰⁷ Given the wide use of timber products, a balance needs to be struck between sustainability and market consumption.

The American instrument industry continues to struggle with the balance between continuing to offer the same quality and quantity while remaining environmentally conscious. Still, manufacturers are aware that “going green” is a necessity. Thirteen million hectares²⁰⁸ of forest were lost each year from 2000 to 2010.²⁰⁹ Meanwhile, restrictions placed on manufacturers by the Lacey Act not only do not stop the multibillion dollar illegal

²⁰¹ See Friedland, *supra* note 197, at 403–11.

²⁰² Arielle Lessing, *A Supplemental Labeling Regime for Organic Products: How the Food, Drug, and Cosmetic Act Hampers a Market Solution to an Organic Transparency Problem*, 18 MO. ENVTL. L. & POL'Y REV. 415, 441–42, 418 (2011).

²⁰³ See generally, *Label Use Guide*, FAIRTRADE USA, available at http://fairtradeusa.org/sites/all/files/wysiwyg/filemanager/FTUSA_Label-Use-Guide_vers13.pdf; *Using the Rainforest Alliance Certified Seal*, SUSTAINABLE FARM CERTIFICATION INT'L, available at <http://sustainablefarmcert.com/use-of-seal>.

²⁰⁴ Jill Draeger, *Perking Up the Coffee Industry Through Fair Trade*, 11 MINN. J. GLOBAL TRADE 337, 349 (2002).

²⁰⁵ *Forest Products*, POPULATION AND NATURAL RES., available at <http://atlas.aas.org/pdf/63-66.pdf>.

²⁰⁶ *Id.*

²⁰⁷ See Tanczos, *supra* note 1.

²⁰⁸ 13 million hectares is roughly equivalent to 32 million acres.

²⁰⁹ *World Deforestation Decreases, but Remains Alarming in Many Countries*, FOOD AND AGRIC. ORG. OF THE U.N. (2010), available at <http://www.fao.org/news/story/en/item/40893/icode/>.

wood trade, but also hurt American manufacturers. CITES has also been largely ineffective in this area because of its loose regulation and the lack of punishment for violating members.

The three-pronged approach to the problem suggested here could be a manageable solution. When used together, amendments to the Lacey Act and CITES, along with a consumer focused sustainability initiative, could create the balance needed to push American builders into more sustainable practices.

The recent raids on Gibson warehouses prove that the Lacey Act needs to be revisited and refocused. A more stringent duty of care requirement would make manufacturers liable, while a limited scope would exclude arbitrary violations. Coupled with a new CITES agreement that gives baseline legislation, the international market will be set to supply a more sustainable product.