

## FOXING/OVERLAP OUTLINE

July 2012

### A. Foxing and Foxing-Like Bands

1. The statutory provision is: "Foxing or foxing-like band applied or molded at the sole and overlapping the upper."
2. This provision is of concern only for footwear with textile or rubber/plastic uppers and rubber/plastic outsoles described in Headings 6401, 6402, and 6404. It is not an issue with respect to leather uppers or textile uppers which are 50 percent leather when leather accessories and reinforcements are included, or for footwear with textile uppers valued at over \$6.50.
3. A foxing:
  - a) is a strip of material separate from the sole and upper;
  - b) secures and covers the joint between sole and upper;
  - c) overlaps the upper (the overlap must be readily discernible);
  - d) is a band or strip;
  - e) encircles or substantially encircles the shoe;
  - f) is attached by cementing, stitching or vulcanizing; and,
  - g) does not include toe bumpers, wedge wraps, platform wraps or mock welts (but a mud guard could be a foxing).
4. A foxing-like band:
  - a) describes that which has the same qualities, characteristics or appearance as the traditional foxing on a sneaker or tennis shoe;

- b) need not be a separate component;
- c) need not secure the joint between sole and upper;
- d) must be applied or molded at the sole and must overlap the upper;
- e) must encircle or substantially encircle the shoe; and,
- f) may be attached by any means;
- g) a unit molded sole (whether simultaneous or separate) is considered to have a foxing-like band when there is a 1/4" vertical overlap. When the overlap is less than 1/4", it is presumed not to constitute a foxing-like band.

5. "Substantial encirclement" exists where at least 40 percent of the shoe's perimeter has a foxing or a foxing-like band. Encirclement under 40 percent is not considered substantial; over 60 percent is always considered substantial. Encirclement between 40 percent and 60 percent will depend on other factors, but principally appearance - does it look like the foxing on a traditional sneaker or tennis shoe. This rule is honored more in the breach than in the observance.<sup>1</sup>

Keep in mind that Customs will combine separate components in determining whether there is substantial encirclement.

6. The various overlap standards are:
- a) the 1/4" standard applies only to unit molded soles in adult sizes - children's unit molded soles and other types of soles do not require that degree of overlap;
  - b) injection molded soles - 1/4" standard applies;
  - c) the degree of overlap for children's footwear is 3/16" and 1/8" for infants;
  - d) rolled sole - almost any discernible overlap will be considered a foxing like band, although some rulings speak of a 1/8" standard;
  - e) where the overlap is sufficiently high at any point on the shoe's perimeter, all areas of overlap, regardless of height, will be considered in determining whether there is substantial encirclement (This is the so-called "High-Point" rule which applies unless the importer provides a separate bottom, in which case only those areas of sufficient height will be included in determining substantial encirclement.)

<sup>1</sup> There are a few instances where an overlap covering more than 40 percent of the perimeter was found not to constitute a foxing-like band. These rulings include HQ 956697 (November 8, 1994) (overlap of 43% - 48% confined to the front of the shoe not considered a foxing-like band) and NY N070616 (August 5, 2009) (involving a sandal).

7. The sidewall on a shell bottom is part of the upper and is not considered a foxing because the sidewall is the upper and the upper cannot overlap itself. There must be a gap between the insole line and the point where the shaft is attached to the sidewall. This gap need not be substantial. Note that in a two color mold if the second color covers the insole line it will be considered a foxing-like band.

8. Slip-lasted footwear (so-called California construction only) is not considered to have a foxing or foxing-like band. This exclusion is limited to the precise footwear described in T.D. 83-116. The exclusion is not applied to athletic footwear.

9. Foxing under, *i.e.* a mud guard or two piece upper, is not considered a foxing-like band when the mud guard is pieced in. *See*, HQ 964647 (June 22, 2001).

10. A mock welt is not a foxing-like band as long as it is a separate piece and not part of a unit-molded bottom.

#### **B. Nissho Iwai Decision**

The decision of the United States Court of International Trade in *Nissho Iwai American Corporation, Nike, Inc. v. United States* concerns the proper classification of the "Air Jordan". The issue was whether the footwear exhibited a foxing-like band. The trial court held that the combination of foot frame (midsole) and the outsole constituted a foxing-like band. Unfortunately, the decision, which is the first judicial interpretation of the "foxing-like" statutory language, is not very illuminating. The trial court's decision was affirmed by the Federal Circuit.

The importer argued that the combination of the foot frame and the outer sole did not constitute a foxing-like band for a variety of reasons, the majority of which were ignored by the trial court. The trial court agreed that the foot frame was not similar to a foxing. However, in the court's opinion, an examination of the visible effect of the foot frame-outsole combination is what is important in determining whether the subject footwear exhibits a foxing-like band.

The trial court noted that the legislative history specifically stated that the foxing language was "designed to ensure classification... of a style of imported shoe with plastic coated uppers that had the general outward appearance of the traditional sneaker or tennis shoe. The trial court held that the subject footwear was not different, in a tariff sense, from the so-called "traditional" athletic footwear or "sneakers" of the past.

The appeals court modified this position only slightly, holding that the appropriate question is whether the band is similar to the foxing on the traditional sneaker. The appeals court referred to T.D. 83-116 with approval.

**C. Soles Which Overlap the Upper except at the Toe or Heel**

1. This is an issue for textile uppers only and appears in heading 6404. It does not apply to plastic uppers or to textile uppers which are 50 percent leather, accessories and reinforcements included.
2. The sole overlaps the upper beyond the toe or heel when each of the following conditions are met:
  - a) it must be the sole which overlaps the upper, not a separate component such as a toe bumper;
  - b) any discernible overlap will suffice; (1/16" has been mentioned in rulings);
  - c) when the area of overlap in the toe or heel area is greater than 2 1/2" it is not considered to be at the toe or at the heel. A 2 1/2" overlap at toe and/or heel is still at the toe or heel but an overlap of 3" at either toe or heel will lead to increased duties.

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