

October 2018

ORIGIN MARKING REQUIREMENTS

1. General Rule. The requirements for marking and labeling imported merchandise with the country of origin are found in Section 304 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304. The implementing regulations are found at 19 C.F.R. Part 134.

Section 304 of the Tariff Act of 1930 provides generally that, with a few narrow exceptions, articles of foreign origin (or their containers when the articles *per se* are exempt from marking) must be legibly, permanently and conspicuously marked to disclose the country of origin to an ultimate purchaser in the United States.¹ If an article is not marked at the time of importation and it is not marked, destroyed or exported prior to distribution into commerce, an additional duty of 10% *ad-valorem* may be imposed. Concealing, defacing, destroying, removing or altering a country-of-origin mark is a criminal offense.

The country-of-origin mark must survive importation and distribution from the importer to the ultimate purchaser. Generally, the ultimate purchaser is the last person in the United States who will receive the article in its condition as imported. When the importer is considered the ultimate purchaser, the mark need not survive transfer by the importer. The two typical situations where the importer is considered the ultimate purchaser are: 1) when the importer consumes the imported product; and 2) when the importer manufactures the imported product into a new article but only if the manufacturing process results in the substantial transformation of the imported article. Other than articles subject to the Textile Products Identification Act, imported articles that are substantially transformed after importation are not subject to country-of-origin marking requirements.

2. Forms of Marking. To satisfy Section 304, a country-of-origin mark must be legible, conspicuous and permanent.

The requirement of legibility is satisfied by a marking having a size and clarity adequate for easy reading by a person of normal vision.

The degree of permanency necessary is that sufficient to ensure that the mark will remain on the imported article until it reaches the ultimate purchaser. A mark that will not remain in the

¹ In practice, Customs will not accept marking of shoeboxes and requires that the footwear be marked. The box need not be marked unless it contains misleading references as to origin or will not be opened at point of sale. Both shoes must be marked.

article during handling and is likely to fall off for any reason, except deliberate removal, is not acceptable. Stickers are acceptable if they have the appropriate degree of permanency.

The mark must be conspicuous. This means that the mark must be accessible in the course of normal handling. In the absence of a ruling mandating the mark be in a particular place there is no requirement that the mark be in the most conspicuous place. The following sites are acceptable for country-of-origin marking on footwear.

- one inch from inside top of tongue
- near inside topline
- heel seat
- sole
- arch
- side of tongue if near top.

The mark must disclose the English name of the country of origin. Abbreviations that unmistakably indicate the name of a country, such as Gt. Britain, are acceptable. On the other hand, Gt. Brit. and N.Z. have been held not acceptable.

3. Misleading References. Special rules apply to imported articles that refer to a location other than the country of origin, such as a reference to the address of the United States distributor. Section 134.46 of the Customs Regulations requires that the country of origin appear in close proximity and in letters of at least equal size when the reference "may mislead or deceive the ultimate purchaser as to the actual country of origin of the article."²

Section 134.47 of the Customs Regulations sets forth a similar rule for trademarks and trade names that have the same potential. The requirement here is that the country-of-origin mark be in close proximity or some other conspicuous location. As a practical matter, the rule for symbols and other non-textual statements is the same as for trademarks. Until recently, the somewhat relaxed rule for trademarks was limited to registered marks. Under *JBLU, Inc. v. United States*, 813 F.3d 1377 (Fed. Cir. 2016), the rule applies to common law trademarks. It is not necessary that the trademark be registered. It is sufficient that an application is pending. *See*, NY N287545 (July 19, 2017).

These rules are applied rigorously for footwear. Any reference to a place other than the country or origin, no matter how bland, normally will require an origin mark in close proximity.

4. Sanctions. Failure to observe the country-of-origin marking requirements can lead to one or more of the following sanctions.

- a. Denial of Delivery/Seizure
- b. Marking Penalties
- c. Redelivery Notices - Liquidated Damages

² The term - "An American Original" - printed on an insole was found to be misleading and the origin statement on the top of the tongue adjacent to the size found not to be in close proximity. HQ H230147 (April 22, 2015).

5. Made in USA. As noted above, imported materials that undergo a substantial transformation lose their foreign origin. However, that does not mean that the finished article may be marked as "Made in USA".

The Federal Trade Commission ("FTC") has jurisdiction over domestic origin labeling. The FTC's position is that a product may not be labeled "Made in USA" unless all or virtually all of the materials and processing originate in the United States. If the finished article includes or incorporates imported materials such as leather, an unqualified "Made in the USA" statement is unlawful. Statements such as "Made in USA with Imported Leather" or "Made in USA with Imported Parts and Components" is acceptable. In addition, the FTC has stated that an unqualified "Assembled in USA" may be used in those circumstances when there is foreign content.

California law is much more restrictive than are the FTC guides. Essentially, California law prohibits the use of "Made in USA" or similar claims when any article, unit, or part of the article has been entirely or substantially made, manufactured, or produced outside of the United States.

New Balance is the subject of a pending litigation in California challenging its claims of "Made in USA", based on a minimum domestic content of 70 percent. *Dashnaw, et al. v. New Balance Athletics Inc.* New Balance has agreed to settle the case. As part of the settlement, it agrees that it will not make qualified claims of domestic origin unless the 70 percent standard is explicit. Further, it will not make an unqualified domestic origin claim unless the shoe contains at least 95 percent domestic content. The settlement is subject to court approval. I has not been approved as of this writing.

Accordingly, if you intend to claim domestic origin you must be careful that there is little or no foreign content and, if so, that the appropriate qualification is included as part of the claim.