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A Trap for the Unwary: Use of the “Made in U.S.A.” Mark

Consumers have long associated the mark “Made in U.S.A.” with high quality goods produced right here at home. Marketing executives perceive the mark to be a valuable tool. However, the requirements for making an unqualified “Made in U.S.A.” or equivalent claim are difficult to satisfy and are often misunderstood. More importantly, improper use of the mark can be costly and damaging to a company’s reputation.

The Federal Trade Commission (“FTC”) enforces Section 5 of the Federal Trade Commission Act (“FTCA”) (15 U.S.C. §45), which prohibits “unfair or deceptive acts or practices” with respect to U.S. origin claims. The FTC U.S. origin rules apply to all products advertised or sold in the U.S. except those governed by specific legislation such as the *Buy American Act*, *Textile Fiber Products Labeling Act*, *Wool Products Labeling Act*, *Fur Products Labeling Act*, and the *American Automobile Labeling Act*.

While nothing requires companies to make a “Made in U.S.A.” claim for their products, any such claims must comply with FTC requirements. The FTC standard for unqualified “Made in U.S.A.” claims is set forth in its Enforcement Policy Statement on U.S. Origin Claims (December 1, 1997):

Product that is all or virtually all made in the United States will ordinarily be one in which all significant parts and processing that go into the product are of U.S. origin. In other words, where a product is labeled or otherwise advertised with an unqualified ‘Made in USA’ claim, it should contain only a *de minimis*, or negligible, amount of foreign content.

There is no bright line test to establish when a product is or is not “all or virtually all” made in the U.S., and the FTC considers a number of factors in making this determination. They include: 1) the site of final assembly or processing; 2) the portion of the product’s total manufacturing costs that are attributable to U.S. parts and processing; and 3) how far removed any foreign content is from the finished product.

Site of Final Assembly or Processing. The final assembly or processing of the product must be in the U.S. Thus, where a product is primarily manufactured in the U.S. but sent to Canada or Mexico for final assembly, any U.S. origin claim must be qualified to disclose that the final assembly occurred abroad.

U.S. Parts and Processing. The FTC examines the percentage of the total manufacturing costs of a product that is attributable to U.S. costs and to foreign costs. There is no fixed point at which a product becomes “all or virtually all” made in the U.S. However, logically, where the percentage of foreign content is very low, it is more likely that the FTC will consider the product all or virtually all made in the United States.

Foreign Content. The FTC considers how far removed any foreign content is from the finished product. Generally, foreign materials or components are considered to be “less significant” to consumers when they appear in complex products or are far removed from the finished article. In determining the percentage of U.S. content in its product, a marketer should look far enough back in the manufacturing process to reasonably ensure that it has accounted for any significant foreign content. Thus, a manufacturer purchasing a component produced domestically that is made up of a number of parts or materials may not simply assume that the component is 100% U.S. made, but must inquire as to the percentage of U.S. content in the component. Foreign content incorporated further back in the production process generally is less significant for purposes of determining whether the product satisfies the “all or virtually all” standard than foreign components or materials incorporated directly into the finished product.

For example, imported steel used in making one part of a single component (e.g. the frame of the CD drive) of a computer is an early input in the computer’s manufacture and is likely to constitute a very small portion of the total cost of the computer. By contrast, imported steel in a wrench is a direct and significant input that does not satisfy the “all or virtually all” standard.

While an unqualified “Made in U.S.A.” claim can be used only where a product satisfies the all or virtually all standard, the FTC does permit use of “qualified” U.S. origin claims, such as “Made in U.S.A. of U.S. and imported parts” or “80% Made in U.S.A.,” as well as claims about specific processes or parts and comparative claims, as long as such claims are truthful, can be substantiated by documentary proof, and all such qualifications and disclosures are clear, prominent and understandable. Claims such as “designed in the U.S.” and “painted in the U.S.” are permissible qualified claims while “produced in” and “manufactured in” are not. Claims such as “Assembled in U.S.A.” can be made without further qualification where a product has undergone its final principal assembly in the United States, and the assembly process is “substantial.” So called “screwdriver” assembly operations are not considered to be substantial.

The FTC may bring enforcement actions against companies making false or misleading claims of U.S. origin. Often, these actions involve the use of cease and desist orders, although the FTC may seek injunctive relief, redress, or civil penalties. Generally, monetary penalties are assessed where there are repeat violations.

In addition to the FTC requirements, many states have their own laws covering U.S. origin claims, with California potentially having a stricter standard for use of the “Made in U.S.A.” claim than the FTC. California’s Business & Professions Code Section 17533.7 states:

It is unlawful for any person, firm, corporation or association to sell or offer for sale in this State any merchandise on which merchandise or on its container there appears the words “Made in U.S.A.,” “Made in America,” “U.S.A.,” or similar words when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.

While the FTC examines the foreign content of the product as a whole in determining whether the product meets its “all or virtually all” standard, the California statute examines the foreign content of the product as it applies to every “article, unit or part” of the product. That is, under California law, all components, screws, pins, bolts, etc., must be made in the U.S. These guidelines have resulted in a litany of class action lawsuits against manufacturers, resulting in large legal expenses and monetary penalties. For example, a recent Wall Street Journal article discussed two class action lawsuits filed against Lifetime Products, a Utah company. One case involved basketball hoops made of parts that were almost entirely cut, shaped, painted and assembled in Utah. However, the net and some bolts were imported from China. The second case involved a larger basketball system that included these same items as well as German-made shock absorbers. Lifetime settled the cases by agreeing to pay \$818,000, while incurring \$535,000 in legal expenses.

Private actions under state laws are not the only action available to private litigants. While the FTCA does not confer standing on private litigants, private litigants may file suit under the Lanham Act (15 USC §1125) for false advertising. Specifically, Section 1125(a) of the statute permits the assertion of claims based on false designation of origin. The statute affords the court broad discretion in fashioning equitable remedies that fairly compensate plaintiffs, including injunctive relief, damages, corrective advertising, and attorneys’ fees.

In today’s global environment, it is not unusual for products that are assembled, produced or manufactured in the U.S. to incorporate foreign made parts or materials. Therefore, in many cases, it is difficult if not impossible to comply with the FTC’s “all or virtually all” standard for use of the “Made in U.S.A” mark. Therefore, companies that claim U.S. origin for their goods must carefully review the origin of components used in their products as well as the production processes they employ to ensure that use of an unqualified “Made in U.S.A.” claim is

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permissible under both federal and state laws. If use of such unqualified claims of U.S. origin are not permissible under either context or permissible under FTC's standard or state standards, it should explore use of a qualified U.S. origin claim.

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