Determining Origin in a Predetermined World:

The Impact of *Energizer Battery*

By

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Whether evolutionarily through Darwin,[1] cosmologically through Hawking[2] or musically through The Who,[3] the quest for one's "origin" has long-transfixed the world. So too is it the case in the world of international trade as what constitutes "origin" can prove as elusive as a Cubs World Series Title.

While, fortunately, the Cubs found a way to overcome their bane,[4] the determination of origin from a product qualification and marking perspective remains in a state of flux. Recent efforts to establish a more-definitive basis for establishing origin have only further muddied the water and threaten to complicate not only future practices but also what was believed to be settled law.

A complete dissertation on the history of origin could prove never-ending as each case truly turns on its own facts. This consideration is further compounded by the fact that the determination of origin can serve multiple purposes, whether that be establishment of country of origin for, *inter alia*, marking/labeling purposes, preferential tariff treatment, "Made in USA" claims, corporate average fuel economy ("CAFE") calculations or qualification for government procurement. It is this subjectivity that has always made a definitive finding of origin challenging and one

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[1] Darwin, Charles. On The Origin of Species by Means of Natural Selection, or Preservation of Favoured Races in the Struggle for Life. London, John Murray, 1859.
[2] Hawking, Stephen. A Brief History of Time. New York, Bantam Books, 1998.
[3] The Who. Who Are You? Polydor Records, 1978.
[4] Sullivan, Paul. "Magical Season Ends Only Way It Could Have." *Chicago Tribune*, 3 November 2016.

which promises to continue despite what might be expressed in either this paper, published rulings or decisions of the governing courts of law.

I. Origin – The Evolution

For our purposes, the seminal case establishing a protocol for the determination of origin is *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940).[5] In that decision, the U.S. Court of Customs and Patent Appeals ("CCPA") was asked to review the decision of the U.S. Customs Court concerning the proper country of origin for marking purposes for certain wood brush blocks and toothbrush handles that were subject to further processing operations into finished hairbrushes and toothbrushes, respectively, in the United States. Upon importation, both the blocks and the handles properly bore country of origin markings identifying their origin as Japan; however, as a result of the post-importation process of the embedding of bristles to those items, that country of origin was obliterated.

At the trial level, the Court concluded that the processes involved in the conversion of the handles and blocks into toothbrushes and hairbrushes reflected a manufacturing operation through which those items lost their identity and became products of the United States. Based on that conclusion, the Customs Court went on to hold that the "ultimate purchaser" of the handles and blocks was the manufacturer

[5] Although we are commencing our review with the *Gibson-Thomsen* decision, it should be noted that the principle of "substantial transformation" discussed in this paper actually has its roots in the decision of the U.S. Supreme Court in *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908).

of the finished toothbrushes and hairbrushes and the Government's position that the origin of the handles and blocks needed to be preserved until such time as the goods reached the consumer (who the Government viewed as the "ultimate purchaser") was without support.

On appeal by the Government, the CCPA noted that:

> Counsel for the Government argue that the words "ultimate purchaser" were not in section 304 of the Tariff Act of 1930, and that their inclusion in section 304 (a), *supra,* was for the express purpose of requiring that all imported articles, capable of being marked, be marked so as to indicate to the retail purchaser of such articles the country of their origin, and that it was also the purpose of the Congress to require that imported material, which is to be used in the United States in the manufacture of a new article, having a new name, character, and use, be marked so as to indicate to the retail purchaser of the new article produced in the United States the name of the country of origin of such imported material.

27 C.C.P.A. at 271-272.

In rejecting that position, however, and after reviewing the legislative history of section 304 of the Customs Statutes (19 U.S.C. §1304), the CCPA concluded that – "relative to the meaning intended by the Congress to be ascribed to the language 'ultimate purchaser' in the United States" – there was "nothing therein to indicate that the Congress intended other than to require that imported articles, capable of being marked, except such articles as the Treasury Department is authorized to exempt, be marked so as to indicate to the ultimate purchaser of *such imported articles* the country of their origin." (Emphasis in original). Instead, the CCPA went on to conclude that:

> We find nothing in the statute nor in its legislative history to warrant a holding that the Congress intended to require that an imported article, which is to be used in the United States as material in the manufacture of a new article

> having a new name, character, and use, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country. On the contrary, we are of opinion that the Congress intended, by the provisions of section 304 (a) (2), *supra,* to cover only such imported articles as do not lose their identity as such when *combined* with other articles.

Id. at 273. Accordingly, as the processing performed in transforming the imported brush blocks and handles into hair brushes and toothbrushes was more than a "combining" operation, the work undertaken was found by the CCPA to result in the establishment of new products with country of origin the United States.

Since that time, the principle that a change in the country of origin in imported materials – whether imported into the United States or a third country – results whenever those materials are used in the manufacture of a new article "having a new name, character or use" has been embraced across a wide range of determinations. Indeed, the decision of the CCPA has even been codified in the regulations of U.S. Customs & Border Protection ("CBP"). As set forth in Subsection 134.35(a) to Title 19 of the U.S. Code of Federal Regulations (19 C.F.R. §134.35(a)):

> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking. The outermost containers of the imported articles shall be marked in accord with this part.

This language runs parallel to the broader, definitional statement of "country of origin" set forth in 19 C.F.R. §134.1(b) wherein it is noted that "[f]urther work or

material added to an article in another country must effect a *substantial transformation* in order to render such other country the 'country of origin' within the meaning of [the marking regulations]." (Emphasis added).

At the same time, while the notion of a "substantial transformation" as decided in *Gibson-Thomsen* generally remains the law of the land, what constitutes a qualifying transformation has been subject to much scrutiny. To some extent, that is a reflection of the reality that the test as established in *Gibson-Thomsen* is not a "bright line" standard; rather, each case turns on its own factual merits as to whether or not the manufacturing or processing performed on imported materials is adequate so as to result in a change in those materials' country of origin. Beyond that consideration, however, there has also been a concerted effort to create a more-objective, more-transparent test that might otherwise apply.

One means by which the "change in name, character or use" standard has been impacted is through a narrowing of scope so as to exclude materials that merely undergo a "simple assembly" operation. In C.S.D. 85-25 (September 25, 1984), a case involving determining eligibility for preferential tariff treatment under the Generalized System of Preferences, the then-U.S. Customs Service[6] ruled that processing based on assembly will not constitute a substantial transformation unless the operation involved in producing the finished product is "complex and meaningful."

[6] The United States Customs Service was renamed the Bureau of Customs and Border Protection of the Department of Homeland Security, effective March 1, 2003. *See* H.R. Doc. No. 108-32 (2003). For ease of identification, "CBP" shall be used throughout this paper to reference both agencies.

What qualified an operation as "complex and meaningful" was – to no surprise – to be determined on a case by case basis and included the consideration of such factors as the number of components assembled; the number of different operations involved; and the time, skill, detail and quality control required as part of the assembly operation.

This refinement of the "substantial transformation" standard has found its way in many rulings including, notably, HQ 734256 (July 1, 1992). In that decision, CBP was asked to confirm the appropriate country of origin marking to be applied to golf clubs produced in the United States from foreign heads of either Japanese or Taiwanese origin, shafts of Japanese origin and U.S.-origin grips. Although the importer argued that the heads and shafts underwent a substantial transformation into a new article of commerce through their further assembly with the domestic grips, CBP disagreed, finding instead that "despite claims to the contrary, we believe that the making of the golf club is a simple assembly process of basically finished parts." Although the importer sought to rely on *Gibson-Thomsen* to support its arguments, CBP dismissed that assertion, holding that:

> This case is clearly distinguishable from the Gibson-Thomsen case because in that case, which concerned the manufacturing of brushes in the U.S., the imported items in question, the brush handles were not finished and required further manufacturing. The processing of the foreign brush handles involved drilling holes and embedding them with wire to hold the bristles which changed their character. No such work is done in this case. Rather, both major components, the heads and shafts are imported in a finished condition. They are completed articles which do not lose their separate identity when they are combined. The manufacture of the golf clubs results from a simple assembly of already finished components which does not result in a substantial transformation.

This notion of "simply assembly" has also found root in the language of Free Trade Agreements. The marking rules established under the North American Free Trade Agreement ("NAFTA") as set forth in Part 102 of the CBP Regulations (19 C.F.R. Part 102) specifically establish that the "simple assembly" of components of foreign origin will not result in a change in origin to the country of assembly. For NAFTA purposes, "simple assembly" is objectively defined as "the fitting together of five or fewer parts all of which are foreign (excluding fasteners such as screws, bolts, etc.) by bolting, gluing, soldering, sewing or by other means without more than minor processing." 19 C.F.R. §102.1(o). "Minor processing," in turn, is comprised of a laundry list of lesser operations including such activities as cleaning (including removal of rust, grease, paint, or other coatings); application of preservative or decorative coatings; the removal of small amounts of excess materials; and testing, marking, sorting or grading. *See* 19 C.F.R. §102.1(m).

The reference to NAFTA presents another circumstance by which the "substantial transformation" standard has been modified. Under the predecessor to NAFTA, the U.S.-Canada Free Trade Agreement, the ostensibly more-transparent "Rules of Origin" scheme was first implemented as a means of conferring origin on further-processed goods. As reflected in Section 2 to Annex 301.2 of the Agreement:

> Whenever processing or assembly of goods in the territory of either Party or both Parties results in one of the changes in tariff classification described by the rules set forth in this Annex, such goods shall be considered to have been *transformed* in the territory of that Party and shall be treated as goods originating in the territory of that Party….

(Emphasis added). This principle was carried over with the implementation of NAFTA, with the Agreement's Statement of Administrative Action specifically noting that the "Purpose of Rules of Origin" was "to ensure that any goods that are not wholly produced or obtained in one or more of the Parties undergo *substantial* processing and *substantial* change in one or more of the Parties in order to be eligible for NAFTA benefits." *The North American Free Trade Agreement Act Statement of Administrative Action*, H.R. Doc. No. 103-159, vol. 1, at 50 (103d Cong., 1st Sess. 1993). (Emphasis added).

The impact of the transition to NAFTA's Rules of Origin manifested itself in the decision of the U.S. Court of Appeals for the Federal Circuit ("CAFC") in *Bestfoods, Inc. v. United States*, 165 F.3d 1371 (Fed. Cir. 1999). Besides addressing whether the conversion of peanut slurry into peanut butter in the United States qualified as a "substantial transformation" (according to the CIT and as affirmed by the CAFC, it did not), the decision also addressed the more-significant question as to whether the implementation of NAFTA's Rules of Origin constituted an illegal abrogation of the *Gibson-Thomsen* "change in name, character or use" test. In rejecting that argument, the CAFC opined that:

> The effect of the adoption of NAFTA is that the term "article of foreign origin" in the federal marking statute must be construed to exclude NAFTA goods that undergo a tariff shift after importation, regardless of whether they would be considered "articles of foreign origin" under the Gibson-Thomsen test. In the case of NAFTA goods, Congress has thus authorized the Secretary of the Treasury to promulgate regulations that define the term "article of foreign origin" for NAFTA goods according to the tariff-shift methodology. Of course, the consequence of altering the definition of "article of foreign origin" is not only to change the scope of the goods that are exempted from marking under

> the marking statute, but also to change the scope of the goods that are subject to the statutory marking requirements. Thus, the effect of Congress's authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, *see* 19 U.S.C. §3314(b), was to empower the Secretary to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach instead of the Gibson-Thomsen approach.

Bestfoods, 165 F.3d at 1375-1376.

II. Energizer Battery

These historical developments bring us to the latest "twist" in establishing origin, and the ultimate reason for this paper: the U.S. Court of International Trade's ("CIT") decision in *Energizer Battery v. United States*, 190 F. Supp. 3d 1308 (Ct. Int'l Tr. 2016). Although there are any number of interim rulings and other guidance that have been issued between *Bestfoods* and now, none have led to the potential sea change in the determination of country of origin that *Energizer Battery* foretells. Interestingly, at the time of its issuance, a great deal of attention was not drawn to the Court's holding. Instead, it is only with the advent of the tariffs imposed by the Trump Administration under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. §1862) and Section 301 of the Trade Act of 1974 (19 U.S.C. § 2411) that the potential impact of this decision has become more-recognized.

In *Energizer Battery*, the Court was asked to determine the country of origin of a military flashlight for purposes of government procurement under the Trade Agreements Act of 1979. The flashlight was comprised principally of components of Chinese origin, including an LED which was found to convey the "essential character"

of the finished product. At the administrative level,[7] CBP had held that the flashlight was of Chinese origin based on the fact that:

> [v]irtually all of the components of the military Generation II flashlight, including the most important component, the LED, are of Chinese origin. All of the components arrive in the United States ready for assembly into the Generation II flashlight. Only the assembly process is done in the United States. Although the assembly process involves putting together a number of different parts to produce the flashlight, most of this work consists of rather simple insertions, relatively simple attaching and fastening of the components and parts together. This work seems to involve following a fairly straightforward routine and does not seem to be exceptionally complex, and it only takes several minutes to complete. You point out that the operators must solder some of the components together, but we do not believe that the soldering involved in this case is a particularly complex operation that is indicative of a substantial transformation, when compared to the operation performed in China in creating the various parts including the LED of the flashlight.

78 Fed. Reg. at 26060. Moreover, although the flashlight was subject to programming in China with U.S.-developed software, the Court went on to conclude that:

> [t]he programming is not essential to the basic operation of the flashlight. The programming constitutes only an enhancement how the flashlight operates, but it does not change its fundamental nature.

Id. Given these findings, CBP then went on to conclude that:

> [b]ased upon the specific facts of this case, we find that the imported components of the flashlight and replacement lens head subassembly are not substantially transformed as a result of the described assembly operations and programing operations performed in the United States. The country of origin for government procurement purposes of the Generation II military flashlight is China.

On appeal to the CIT, Energizer challenged CBP's reliance on an "essential character" test to support its finding that the flashlight was of Chinese origin, instead

[7] HQ H215657, issued on April 29, 2013. The notice of Final Determination was published in the Federal Register on May 3, 2013. 78 Fed. Reg. 26,058.

arguing that the work performed in finally assembling the flashlight in the United States results in a substantial transformation based on the appropriate change in name, character or use standard. Alternatively, if "essential character" applied, then CBP's focus on a specific LED's production in China overstated its significance as the LED had broader application in a "multitude of light emitting devices," the LED required post-importation processing before it could function, additional LEDs were also incorporated as part of the flashlight and the production of the LED's wafer initially occurred in the United States. *Energizer Battery* at 1321 (fn. 18).

After agreeing that reliance on an "essential character" test for purposes of origin determination was inappropriate, the Court turned its attention to whether or not the processing conducted in the United States resulted in a "substantial transformation" of all components into a product of the United States eligible for government procurement purposes. In applying the "substantial transformation" test, the CIT first reviewed the historical use of that standard and noted that the "substantial transformation analysis is fact-specific and cases that are analogous in terms of the nature of post-importation processing are particularly useful to the court's analysis." 190 F. Supp. 3d at 1317. Of the three means by which a substantial transformation can occur, "[t]he name criterion is generally considered the least compelling of the factors which will support a finding of substantial transformation." *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 478, 664 F. Supp. 535, 541 (1987). Instead, "[c]ourts have primarily focused on changes in use or character." 190 F. Supp. 3d at 1318. "For courts to find a change in character, there often needs

to be a substantial alteration in the characteristics of the article or components." *Id.* Similarly, "[i]n analyzing any change in use, the court has previously found that such a change occurred when the end-use of the imported product was no longer interchangeable with the end-use of the product after post-importation processing." 190 F. Supp. 3d at 1319. Finally, "[i]n addition to name, character, and use, courts have also considered subsidiary or additional factors, such as the extent and nature of operations performed, value added during post-importation processing, a change from producer to consumer goods, or a shift in tariff provisions." *Id*.

Finally, where the final production is based on assembly, "courts have considered the nature of the assembly together with the name, character, or use test in making a substantial transformation determination." 190 F. Supp. 3d at 1320. As noted by the Court:

> The Federal Circuit, in *Belcrest Linens,* considered the difference between minor manufacturing and combining operations and substantial transformation when stenciled, marked and embroidered bolts of cloth were cut into individual pieces, scalloped, folded, sewn, pressed and packaged, and found that substantial transformation had occurred based on "the extent of the operations performed and whether the parts lose their identity and become an integral part of a new article." *Belcrest Linens,* 741 F.2d at 1373. However, when assembly operations were manual and required some "skill and dexterity to put components together with a screw driver" but the names of each article and the form and character of each component remained unchanged, and the use of the imported articles was predetermined at the time of importation, the court did not find that substantial transformation had occurred. *Nat'l Hand Tool,* 16 C.I.T. at 310-313.

Id. (Footnotes omitted). Ultimately, however, "[w]hile courts consider the nature of post-importation processing in their substantial transformation analysis, there is no

bright line rule on the number of components required or the minimum amount of time spent on assembly before an assembly process is no longer considered "simple assembly" or "combining operations" and is, instead, considered substantial transformation." 190 F. Supp. 3d at 1321.

Applying that guidance to the facts at hand, the Court then went on to conclude "that the assembly operations at the Vermont facility do not result in a substantial transformation of the imported components." *Id.* After noting that the parties agreed that "the post-importation assembly operations do not result in a change in the shape or material composition of any imported component" and, therefore, "there is no change in character as a result of Energizer's assembly operations," *Id*., the Court turned its attention to the remaining two criteria for establishing a substantial transformation: change in name or change in use.

From a "change in name" perspective, the Court disregarded Plaintiff's argument that the individual components were not identified as a "flashlight" until final assembly occurred and instead noted that the critical question is "whether the Plaintiff's imported components retained their names after they were assembled into the Generation II flashlight." *Id*. at 1322. To the Court, "[t]he constitutive components of the Generation II flashlight do not lose their individual names as a result the post-importation assembly. The court finds, based on the undisputed facts presented, that no such name change occurred." *Id.*

As for a "change in use," the court also dismissed Plantiff's argument that its "assembly process is meaningful and transformative" based on the inability of the

components to "function as a flashlight at the time of importation." As stated by the Court:

> [t]he proper query for this case is not whether the components as imported have the form and function of the final product, but whether the components have a pre-determined end-use at the time of importation. When articles are imported in prefabricated form with a pre-determined use, the assembly of those articles into the final product, without more, may not rise to the level of substantial transformation.

Id.

As for the assembly itself, the Court then went on to conclude that the nature of the components being assembled (principally a "high proportion of connective parts" such as screws, washers and nuts), the absence of a complex assembly process (anywhere from 7 to 13 ½ minutes depending upon the skill of the technician involved), the lack of any further work on the components once imported and the insignificance of cost as a deciding factor required a finding that "Energizer's imported components do not undergo a change in name, character, or use as a result of the post-importation processing in the United States, and that the nature of Energizer's post-importation assembly process is not sufficiently complex to give rise to a substantial transformation." *Id*. at 1326. Accordingly, CBP's ruling finding China as the country of origin of the flashlight was sustained.

III. Energizer in Practice

While the decision in *Energizer* was issued in December 2016, the case itself was not applied by CBP for any purpose other than other government procurement

cases[8] until September 13, 2018 with the issuance of HQ H300226. That ruling concerned a reconsideration of a previous July 25, 2018 National Commodity Specialist Division ruling, NY 299096, in which CBP had held that the assembly in Mexico of three components of Chinese origin into a finished electric motor was a simple assembly for which the country of origin remained China. In reviewing that decision, CBP determined that it has misapplied NAFTA's marking rules of origin and that it should have instead found that the assembly of the three Chinese components resulted in a qualifying change in tariff classification which enabled the motor to be marked as a product of Mexico, eligible for NAFTA preferential tariff treatment.

At the same time, however, CBP went on to conclude that – as the underlying components were sourced from China – a separate determination under the traditional substantial transformation standard was instead required. As stated in HQ H301619 (November 6, 2018), a further revision to HQ H300226: "[w]hen determining the country of origin for purposes of applying current trade remedies under Section 301, Section 232, and Section 201, the substantial transformation analysis is applicable…. [At the same time], the 102 rules do however continue to be applicable for purposes of country of origin marking of NAFTA goods, as defined in 19 C.F.R. § 134.1."

In applying the substantial transformation test, CBP turned its attention to the reasoning set out in *Energizer Battery*. After first recounting the history of that

[8] And then only in four published instances: HQ H287548 (March 23, 2018); HQ H292849 (April 19, 2018); HQ H287851 (April 24, 2018); and HQ H298148 (June 20, 2018).

decision and the Court's analysis of the "change in name, character or use" standard, CBP applied the notion of "predetermination" as discussed in *Energizer Battery* to render its decision in that ruling. As stated by CBP:

> In this case, the foreign subassemblies are imported into Mexico where they will be assembled into the electric motor. The foreign subassemblies had a pre-determined end-use and did not undergo a change in use due to the assembly process in Mexico. Based on the information provided, the production process performed in Mexico is mere simple assembly and the foreign subassemblies are not substantially transformed.

Based on that finding, CBP concluded that the electric motor – at its time of importation into the United States – would be subject to Section 301 tariffs based on the individual components' retention of their Chinese origin status. Concurrently, however, CBP concluded that the motor remained NAFTA-eligible so that, for purposes of both country of origin Marking and the imposition of regular consumption duties, NAFTA preferential treatment should be accorded. As a result, a product of Mexican origin simultaneously remained a product of Chinese origin for which two different legal analyses and two different tariff regimes applied.

CBP's determination in HQ 301619 was recently affirmed by CBP in a request for reconsideration issued on October 11, 2019. See HQ H305370. In the interim and thereafter, based on rulings published by CBP through the Customs Rulings Online Search System ("CROSS"), more than 30 distinct determinations have been made specifically applying *Energizer Battery* for origin-conferring purposes. Those decisions have not been limited to the applicability of Section 301 tariffs, either, as rulings have been generated discussing the determination of origin where the final

processing/assembly occurs outside of the NAFTA territory as well as for eligibility under the Generalized System of Preferences.

Unfortunately, rather than result in a body of work that both the trade and its practitioners may rely upon to confirm the country of origin to their own presented fact patterns, these decisions have only led to further confusion and inconsistency in the application of *Energizer Battery* to an individual case at hand. In addition, the reliance on the notion of "predetermination" from a change in use perspective has opened a Pandora's Box of uncertainty as what is or is not "predetermined" from a component or material perspective. Although the *Gibson-Thomsen* standard for substantial transformation was itself swallowed in subjectivity, application of *Energizer Battery*'s reasoning only leads to one conclusion at this time: **GET A RULING!**

And the quest continues….