ARTICLE

E-Commerce Transactions and Country of Origin Marking for Imported Products: A Gap Between Statutory Purpose and Legal Requirements

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With some exceptions, items imported into the United States from abroad have been required to bear a marking indicating their country of origin since the passage of the Tariff Act of 1890. Identification of a product's country of origin serves several purposes, including identifying the duty rate and applicability of certain tariffs. Most importantly for the purposes of this Article, a country of origin marking provides information to a consumer about an item's geographic origin at the time of sale so that a consumer can choose to base a purchasing decision on that information. The rise in the volume of e-commerce transactions within the United States, however, has created a gap between this intended purpose and the relevant statute and associated regulations. While the statute and regulations require only that a physical item be marked with its country of origin, the physical item in an e-commerce transaction is not available to the consumer until after the sale has been completed. Therefore, a consumer who cannot physically inspect an item at the point of sale cannot incorporate a product's country of origin into his or her purchasing decision.

This Article examines whether the country of origin marking regulations administered by U.S. Customs and Border Protection should be amended to include a new requirement that a product's country of origin be disclosed at the online point of sale. This Article also identifies further areas of research that could be explored, including those which may be useful in determining the potential effectiveness of country of origin disclosures made at online points of sale, and considers available alternatives to the implementation of additional country of origin marking rules in the context of remote sales.

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I. INTRODUCTION

This Article addresses certain issues raised in the context of e-commerce transactions by the current rules governing country of origin marking for imported products, including the relevant statute (19 U.S.C. § 1304), and the associated regulations administered by U.S. Customs and Border Protection (CBP).[1] In particular, this Article examines the gap between the statute's original intent and the legal requirements for transactions in which a customer is unable to physically inspect a product's country of origin marking at the time of purchase, as is the case in online sales. This Article argues that revision of the existing statute and regulations is necessary for the country of origin marking requirements to provide information to consumers in a substantially equivalent manner whether they are shopping online or in brick-and-mortar stores. Only then will certain key purposes of the statute be served in the modern context of e-commerce.

This Article examines these issues as follows. Part II describes the background and history of the country of origin marking requirements for imported articles, as well as the framework of the current statute and regulations that mandate country of origin markings. Part III reviews the purposes of the country of origin marking requirements. This Part focuses specifically on the intent of the law to provide consumers with adequate information at the time of sale to be able to base their purchasing decisions on an item's identified country of origin, whether these consumers prefer domestic goods to foreign ones or have preferences for items of certain foreign countries over others. Part III also examines similar U.S. laws and regulations intended to provide consumers with accurate information concerning product origin or composition, thus allowing them to make informed purchasing decisions. Part IV addresses the ongoing relevance of country of origin marking requirements in physical sales, including the effect of country of origin information on consumer preferences and an analysis of compliance costs related to the current country of origin marking regime. Part V reviews the current landscape of online retail sales, and discusses challenges posed by e-commerce transactions to other statutory and regulatory frameworks, both in the United States and abroad, as well as the parallel gap between legislative purpose and implementation that arises in the context of catalog

1. Prior to March 2003, CBP was named the Customs Service and was under the jurisdiction of the U.S. Department of the Treasury. CBP is currently part of the Department of Homeland Security. *See 1789: First Congress Provides for Customs Administration*, U.S. CUSTOMS & BORDER PROT. (last modified Apr. 25, 2014), https://www.cbp.gov/about/history/1789-first-congress-provides-customs-administration; *see also March 1, 2003: CBP is Born,* U.S. CUSTOMS & BORDER PROT. (last modified Aug. 1, 2016), https://www.cbp.gov/about/history/march-1-2003-cbp-born.

sales. Part VI considers how additional country of origin marking regulations could be implemented in order to address the gap between statutory intent and current legal text, and considers whether such additional requirements would place an undue regulatory burden on e-commerce merchants. In addition, Part VI explores some potential arguments against the implementation of such new requirements, including the consideration of certain alternatives to new regulations and whether consumers can adequately express their purchasing preferences through product returns.

II. BACKGROUND AND APPLICABLE LEGAL PROVISIONS

A. History of Country of Origin Marking Requirements

The U.S. began mandating country of origin marking through the Tariff Act of 1890.[2] The original country of origin marking provision set forth in the Tariff Act of 1890 provided as follows:

> That on and after [March 1, 1891], all articles of foreign manufacture, such as are usually or ordinarily marked, stamped, branded, or labeled, and all packages containing such or other imported articles, shall, respectively, be plainly marked, stamped, branded, or labeled in legible English words, so as to indicate the country of their origin; and unless so marked, stamped, branded or labeled they shall not be admitted to entry.[3]

Similar country of origin marking requirements were included with the Tariff Acts of 1894, 1897, 1909, and 1913.[4] Specifically, the Tariff Acts of 1894 and 1897 introduced non-delivery provisions, stating that until imported articles were "so marked, stamped, branded, or labeled they shall not be delivered to the importer."[5] The Tariff Act of 1897 was amended from previous versions in that it provided that country of origin markings should "not be covered or obscured by any subsequent attachments or

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2. Donna L. Bade, *Beyond Marking: Country of Origin Rules and the Decision in CPC International*, 31 J. MARSHALL L. REV. 179, 183 (1997) (citing Tariff Act of 1890, ch. 1244, § 2504, 26 Stat. 567, 613 (1891) (codified at 19 U.S.C. § 1304 (1994))). Within this Article, the agency is referred to as "Customs" when describing the agency prior to March 2003, and "CBP" at all times after the name change of the agency. The laws and regulations regarding U.S. import regulations are referred to generally within this Article as "customs laws" or "customs regulations."

3. Tariff Act of 1890, ch. 1244, § 2504, 26 Stat. 567, 613 (1891).

4. Peter Chang, *Country of Origin Labeling: History and Public Choice Theory*, 64 FOOD & DRUG L.J. 693, 695 (2009) (citing McKinley Act of 1890, ch. 1244, § 6, 26 Stat. 567, 613; Tariff Act of 1894, ch. 349, § 5, 28 Stat. 509, 547; Tariff Act of 1897, ch. 11, § 8, 30 Stat. 151, 206)*; see also* S. Comm. Fin., Comparison of Customs Tariff Laws, 1789 to 1909, Inclusive, at 368-69 (Comm. Print 1911).

5. Chang, *supra* note 4, at 695.

arrangements."[6] It also replaced the requirement for articles "usually or ordinarily marked" to apply to those instead "capable" of being marked "without injury."[7] In 1922, the statute was amended to provide for the levy of an additional duty of 10% on products being held by Customs as marked and provided that unmarked articles were not to be delivered until marking was completed.[8] The Tariff Act of 1922 also introduced a prohibition on removing the country of origin marking with the intent to conceal origin information.[9]

Historically, country of origin marking requirements were not unique to the United States. Before the Tariff Act of 1890, Britain had introduced the Merchandise Marks Act of 1887, which prohibited false trade descriptions including "any description, statement, or other indication, direct or indirect . . . as to the place and country in which any goods were made or produced."[10] Similar legislation was also introduced in 1892 in France, 1894 in Germany, and 1902 in Spain.[11]

B. Current Country of Origin Marking Requirements

i. General requirement

19 U.S.C. § 1304 states that except as otherwise provided, "every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." 19 C.F.R. Part 134 implements the country of origin marking requirements and exceptions contained within 19 U.S.C. § 1304.[12] 19 C.F.R. § 134.11 states essentially the same marking requirements as does 19 U.S.C. § 1304, including that such imported articles shall be marked at the time of importation into the Customs territory of the United

6. *Remarkable Treasury Ruling: Act of Congress Nullified*, 63 Am. Economist 45 (Jan. 17, 1919).

7. *Id.*

8. Chang, *supra* note 4, at 697; *see also* Globemaster, Inc. v. United States, 340 F. Supp. 974, 976 (Cust. Ct. 1972).

9. U.S. v. Ury, 106 F.2d 28, 29 (2d Cir. 1939). Regulations regarding removal, defacement, or alteration of marking are currently found within 19 C.F.R. § 134.4 (2018).

10. DAVID M. HIGGINS, BRANDS, GEOGRAPHICAL ORIGIN, AND THE GLOBAL ECONOMY: A HISTORY FROM THE NINETEENTH CENTURY TO THE PRESENT 19 (2018).

11. *Id.*

12. While CBP is responsible for enforcing country of origin marking regulations, the Customs Modernization Act (Title VI of P.L. 103-182) shifted much of the responsibility for complying with the customs laws and regulations from CBP to the importer of record, requiring the importer to apply "reasonable care" to enter merchandise and act in accordance with all applicable legal requirements to enter merchandise. *See* VIVIAN C. JONES & MICHAEL F. MARTIN, INTERNATIONAL TRADE: RULES OF ORIGIN 2, Congressional Research Service (Jan. 11, 2011).

States. Certain types of items are excepted from this marking requirement (discussed further within this Part).

ii. Ultimate purchaser

As described above, an imported article must physically indicate to the "ultimate purchaser" the identity of that article's country of origin. The CBP regulations provide that the "'ultimate purchaser' is generally the last person in the United States who will receive the article in the form in which it was imported."[13] As an example, the regulations state that "[i]f an article is to be sold at retail in its imported form, the purchaser at retail is the 'ultimate purchaser.'"[14] If the imported article is distributed as a gift, the recipient is the "ultimate purchaser."[15]

Among the general exceptions to marking requirements are certain situations in which the ultimate purchaser is different from a general consumer. These exceptions include:

- articles imported for use by the importer and not intended for sale in their imported or any other form;
- articles to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such articles and in such manner that any mark contemplated by the country of origin regulations would necessarily be obliterated, destroyed, or permanently concealed; and
- articles for which the ultimate purchaser must necessarily know (or in the case of a good of a NAFTA country, must reasonably know) the country of origin by reason of the circumstances of their importation or by reason of the character of the articles, even though they are not marked to indicate their origin.[16]

iii. Content of marking

The CBP regulations also require that the content of the country of origin marking be such that the consumer is adequately informed of the appropriate country of origin without confusion. To that end, 19 C.F.R. § 134.46 requires that, in instances where the name of any city or locality in

13. 19 C.F.R. § 134.1(d) (2018). ("[H]owever, for a good of a NAFTA country, the 'ultimate purchaser' is the last person in the United States who purchases the good in the form in which it was imported.").

14. 19 C.F.R. § 134.1(d)(3) (2018).

15. 19 C.F.R. § 134.1(d)(4) (2018). ("[U]nless the good is a good of a NAFTA country. In that case, the purchaser of the gift is the ultimate purchaser.").

16. 19 C.F.R. § 134.32(f), (g), and (h) (2018).

the U.S., or the name of any foreign country or locality other than the name of the country or locality in which the article was manufactured or produced, appears on the imported article or its container, and those words or name may mislead or deceive the ultimate purchaser as to the country of origin of the article, there shall appear, legibly and permanently, in close proximity to such words, letter or name, and in at least a comparable size, the name of the country of origin preceded by "Made in," "Product of," or other words of similar meaning.[17] Customs has ruled that in order to satisfy the close proximity requirement, the country of origin marking must appear on the same side(s) or surface(s) in which the name of the locality other than the country of origin appears.[18] The close proximity requirements are "designed to alleviate the possibility of any misleading of an ultimate purchaser with regarding to the country of origin of an imported article."[19] Likewise, when a potentially misleading or deceptive reference to the U.S. appears on a hangtag attached to and providing information about a particular item, the hangtag must be marked with the actual country on the same side as the reference to the U.S. appears, even when the item is otherwise marked with the correct country of origin.[20]

iv. Method of marking

Beyond the content of the marking itself, CBP regulations also address the method of country of origin markings, such that the marking will be sufficiently long-lasting in order to reach the ultimate purchaser. 19 C.F.R. § 134.41(b) provides:

> The degree of permanence should be at least sufficient to insure that in any reasonably foreseeable circumstance, the marking shall remain on the article (or its container) until it reaches the ultimate purchaser unless it is deliberately removed. The marking must survive normal distribution and store handling. The ultimate purchaser in the United States must be able to find the marking easily and read it without strain.

Paper sticker labels or pressure sensitive labels "must be affixed in a conspicuous place and so securely that unless deliberately removed they will remain on the article while it is in storage or on display and until it is

17. Headquarters Ruling Letter H290682 (June 11, 2018).

18. *Id.* (citing Headquarters Ruling Letter 708994 (April 24, 1978)).

19. *Id.*

20. Dunn-Heiser v. U.S., 374 F. Supp. 2d 1276, 1281 (Ct. Int'l Trade 2005) (citing Headquarters Ruling Letter 734874 (May 10, 1993)).

delivered to the ultimate purchaser."[21] Likewise, tags "must be attached in a conspicuous place and in a manner which assures that—unless deliberately removed—they will remain on the article until it reaches the ultimate purchaser."[22]

The Commissioner of Customs and Border Protection may require a particular method of marking, such as die stamping, cast-in-the-mold lettering, etching, engraving, or cloth labels, by way of applicable rulings.[23]

v. Exceptions from marking requirements

Certain articles are excepted from the country of origin marking requirements. The J-List[24] describes types of articles excepted from the marking requirements.[25] Some of the products on this list include works of art; eggs; cut flowers; bamboo poles; ribbon; sponges; Christmas trees; and wire, except barbed wire.[26] General exceptions to the marking requirements are found in 19 C.F.R. § 134.32, and include among other provisions articles that are incapable of being marked or being marked without injury; articles which are crude substances; articles which were produced more than 20 years prior to their importation into the United States; products imported for use by the importer and not intended for sale; and products of possessions of the United States.

When an article is excepted from the marking requirements, the outermost container or holder in which the article ordinarily reaches the ultimate purchaser must be marked to indicate the country of origin of the article (whether or not the article is marked to indicate its country of origin).[27] Certain exceptions and provisions to this requirement are contained within 19 C.F.R. § 134.22.

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21. 19 C.F.R. § 134.44(b) (2018).

22. 19 C.F.R. § 134.44(c) (2018).

23. 19 C.F.R. § 134.42 (2018).

24. So named due to the statutory provision, 19 U.S.C. § 1304(a)(3)(J), allowing for the creation of the list. *See* MICHAEL D. SHERMAN, STEVEN J. JARREAU, & JOHN B. BREW, U.S. CUSTOMS: A PRACTITIONER'S GUIDE TO PRINCIPLES, PROCESSES AND PROCEDURES 93 (2009).

25. While certain country of origin labeling requirements (administered by the U.S. Department of Agriculture) were introduced in 2008 for certain foods including fresh beef, pork, and lamb, as well as fresh fruits, nuts, and vegetables, some of these provisions were repealed in December 2015, due to a World Trade Organization decision which granted authorization for retaliatory tariffs. *See United States – Certain Country of Origin Labelling (COOL) Requirements*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm#bkmk384abrw (last visited July 29, 2018). Other provisions still remain in place (*see* 7 C.F.R. pt. 60 (2018)).

26. 19 C.F.R. § 134.33.

27. 19 C.F.R. § 134.22(a) (2018). *See* Chang, *supra* note 4, at 697 (explaining the container marking requirements were created by Section 304 of the Tariff Act of 1930 in order to address the previously-existing legislative gap that containers bore no marking where articles were not required to be marked) (citing H.R. REP. NO. 7, at 329-30 (May 9, 1929), and Tariff Act of 1930, ch. 497, § 304, 46 Stat. 590, 687).

vi. Determining country of origin

The determination of the applicable country of origin can be a complicated analysis, especially where goods are manufactured multi-nationally or through a global supply chain. Within the United States, non-preferential and preferential rules of origin apply—respectively, the general rules of origin and those applicable to particular trade agreements entered into by the United States.[28] Separate statutory rules of origin exist for textile and apparel items.[29]

Generally, when preferential treatment is not sought, 19 C.F.R. § 134.1(b) provides that an item's "country of origin" means "the country of manufacture, production, or growth of any article of foreign origin entering the United States."[30] In addition, "[f]urther work or material added to an article in another country must effect a substantial transformation in order to render such other country" as the country of origin.[31] A substantial transformation occurs when an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing.[32] A substantial transformation will not result from a minor manufacturing that leaves the identity of the article intact.[33]

With respect to merchandise for which the benefits of a preferential tariff regime are sought, a different analysis of origin may occur. For the good of a NAFTA country, the NAFTA marking rules contained at 19 C.F.R. Part 102 are used to determine an item's country of origin. Other preferential tariff regimes also have their own tests regarding origin, as contained within the General Notes to the Harmonized Tariff Schedule of the United States (HTSUS).[34] NAFTA and subsequent free trade agreements also generally employ tests of a tariff shift and/or a regional value content threshold instead of the substantial transformation test in order to determine country of origin.[35]

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28. CUSTOMS AND BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: RULES OF ORIGIN (May 2004), https://www.cbp.gov/sites/default/files/assets/documents/2016-Apr/icp026_3.pdf.

29. 19 U.S.C. § 3592 (2016).

30. 19 C.F.R. § 134.1(b).

31. *Id.*

32. HQ H273304 (Aug. 11, 2016) (citing United States v. Gibson-Thomsen Co., 27 CCPA 267 (1940) and Nat'l Juice Prods. Ass'n v. United States, 628 F. Supp. 978 (Ct. Int'l Trade 1986)).

33. *Id. See, e.g.*, Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 562 (1908) ("There must be a transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'") *See also* C. Edward Galfand, Comment, *Heeding the Call for a Predictable Rule of Origin*, 11 U. PA. J. INT'L BUS. L. 469, 471 (1989).

34. *See generally* General Notes, Harmonized Tariff Schedule of the United States (2018).

35. Philip MacFarlane, *Shift to the Tariff-Shift: The Development of Import Country of Origin Tests for U.S. Customs from Gibson-Thomsen to NAFTA* (Dec. 1, 2012). Available at SSRN: https://ssrn.com/abstract=2518865 or http://dx.doi.org/10.2139/ssrn.2518865.

C. Penalties for Failure to Meet Country of Origin Marking Requirements

i. Provisions of law

When articles or containers have been found to lack country of origin markings as required by law, CBP notifies the importer to arrange with CBP to properly mark the article or containers, or to return all released articles to CBP custody for marking, exportation, or destruction.[36] Marking must be completed under CBP supervision unless CBP accepts a certificate of marking instead.[37]

Articles not marked as required are subject to additional duties of 10% of the final appraised value, unless exported or destroyed under Customs supervision prior to the liquidation of the entry.[38] The 10% additional duty can be assessed for failure either to mark the article or container to indicate the English name of the country of origin, or to include words or symbols required to prevent deception or mistake.[39] This 10% duty is "not a duty owed to the Government upon the importation of foreign merchandise" but instead is an "additional dut[y] imposed after the fact on noncompliant merchandise that has been erroneously released into the stream of commerce."[40]

Moreover, any intentional removal, defacement, destruction, or alteration of a marking of the country of origin to conceal this information can result in criminal penalties of up to $5,000 and/or imprisonment for one year.[41] Further, even where failing to correctly mark the country of origin does not result in a loss of duties to Customs directly, such violations can be considered "material" within the meaning of 19 U.S.C. § 1592 and can form the basis for penalties assessed pursuant to that statute.[42] For example, for a negligent violation that does not result in a loss of revenue to the United States, a maximum penalty of 20% of dutiable value of the merchandise at issue can be assessed.[43]

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36. 19 C.F.R. § 134.51(a) (2018).

37. 19 C.F.R. § 134.51(c) (2018).

38. 19 C.F.R. § 134.2 (2018); 19 U.S.C. § 1304(i) (2012).

39. 19 C.F.R. § 134.2 (2018).

40. United States *ex rel.* Customs Fraud Investigations, LLC v. Victaulic Co., Civ. A. No. 13-2938, 2015 WL 1608455 (E.D. Pa. Apr. 10, 2015); *see also* Globemaster, Inc. v. United States, 340 F. Supp. 974, 976 (Cust. Ct. 1972).

41. 19 C.F.R. § 134.4 (2018); 19 U.S.C. 1304(l) (2012).

42. United States v. Pentax Corp., No. 96-01-00067, slip op. at 669 (Ct. Int'l Trade Sept. 20, 1999).

43. 19 U.S.C. § 1592(c)(3)(B) (2012); United States v. Active Frontier Int'l, Inc. 867 F. Supp. 2d 1312, 1315–16 (Ct. Int'l Trade 2012). (explaining further, however, that all false statements regarding country of origin are not necessarily material within the meaning of 19 U.S.C. § 1592.)

ii. Enforcement actions

Failing to comply with the country of origin marking requirements is taken seriously by CBP and may result in the imposition of significant penalties. CBP may also impose 10% marking duties and any additional duties (such as antidumping duties or countervailing duties) that were not originally assessed due to a mis-marked or mis-declared country of origin.[44] CBP regularly undertakes enforcement actions to ensure that the country of origin marking regulations are followed. As described below, the agency also uses enforcement of country of origin marking requirements to pursue the goal of achieving full payment of applicable duties (including antidumping and countervailing duties) relevant to goods imported into the United States.

For example, Pentax Corporation and its parent companies, Asahi Optical Corporation and Asahi Optical International, were alleged by the U.S. government to have intentionally marked cameras as products of Hong Kong when they in fact originated in China.[45] The matter settled for $20 million in November 1999.[46] In *United States v. Inner Beauty Int'l (USA) Ltd.*, the government alleged that Inner Beauty, a New York corporation, falsely stated the country of origin of merchandise as Hong Kong rather than China when it made eight entries in 2004 of women's undergarments subject to an import quota.[47] In 2017, CBP made a seizure of 950 microphones and cables with a value over $25,000, when it was discovered that item's packaging read "Made & Manufactured in the U.S.A.," while the carton the items were shipped in bore the statement "Made in China."[48]

The comments of a CBP official also confirm that enforcement of accurate country of origin markings is one of the agency's priorities. In May 2011, Allen Gina, then Assistant Commissioner for CBP's Office of International Trade, spoke to the Senate Finance Committee's International Trade, Customs and Global Competitiveness Subcommittee.[49] He noted that one challenge faced by CBP was illegal

44. 19 U.S.C. § 1304(i) (2016).

45. SHERMAN ET AL., *supra* note 24, at 94 (2009).

46. Jack Lucentini, *Pentax to Pay $20 Million for its Import Error*, JOURNAL OF COMMERCE (Nov. 12, 1999), https://www.joc.com/maritime-news/pentax-pay-20-million-its-import-error_19991111.html).

47. United States v. Inner Beauty Int'l (USA) Ltd., No. 10-00256, slip op. at 1-2, (Ct. Int'l Trade 2011).

48. Media Release, U.S. Customs and Border Prot., CBP Officers in Tacoma Seize Shipments in Violation of Trade Laws, (Mar. 13, 2017), https://www.cbp.gov/newsroom/local-media-release/cbp-officers-tacoma-seize-shipments-violation-trade-laws.

49. *U.S. Customs and Border Protection's (CBP) Role in Detecting and Preventing the Circumvention of Antidumping and Countervailing Duties on Imported Goods Before the Subcomm. on Int'l Trade, Customs, and Global Competitiveness of the S. Fin. Comm.*, 112th Cong. (2011) (statement of Allen Gina, Assistant Commissioner, Customs and Border Prot., Office of Int'l Trade) https://www.finance.senate.gov/imo/media/doc/050511agtest.pdf (last visited July 29, 2018).

transshipment intended to disguise the true country of origin of a product. He stated that "[t]ransshipment is often built into production by design, with false markings and packaging devised to purposefully mimic legitimate production in other countries."[50] He further commented on CBP enforcement measures to uncover illegal transshipment and antidumping/countervailing duty circumvention.[51]

As shown by these comments and CBP's past enforcement actions, accurate country of origin markings are considered both important in their own right and also as related to other goals of CBP, including the full collection of duties and the accurate enforcement of quotas where necessary (since certain tariffs, including antidumping and countervailing duties, as well as quotas, may only apply to items originating from certain countries). Laws and regulations concerning country of origin markings are actively enforced by CBP and are an important part of the regulatory scheme governing the importation of merchandise into the United States.

III. PURPOSE OF COUNTRY OF ORIGIN MARKING REQUIREMENTS

A. Overview of General Purposes of the Statute

Case law and legislative history concerning the country of origin marking requirements demonstrate that the marking requirements have several purposes:

> (1) To allow a consumer[52] to know whether goods were **imported or domestic**, and thereby purchase U.S.-made goods if he or she had such a preference;
>
> (2) To allow a consumer **to identify the specific country of origin**, such that the consumer could exercise a preference for goods of one foreign country over those of another foreign country; and
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> (3) To provide the consumer with the country of origin information **at the time of purchase**, so that this information

50. *Id.*

51. *Id.*

52. Within this Article, the term "consumer" is used generally to refer to the individual who is purchasing a particular item and to whom country of origin information is being disclosed. However, the statutory and regulatory texts do mandate that country of origin marking information be provided to enable the "ultimate purchaser" to learn of a product's country of origin. Although these terms are colloquially used interchangeably throughout the rest of this Article, given the focus of the Article on online retail sales, the "ultimate purchaser" remains the legally operative individual whom country of origin information must reach.

> would enable the consumer to modify his or her purchasing decisions based on the information concerning country of origin.[53]

These three purposes are explored in greater detail in the remainder of this Part, as it is these three purposes that are currently left unmet with respect to e-commerce transactions. However, country of origin identification, marking, and declarations also serve numerous other purposes. Determining the country of origin and marking a product therewith can serve to establish whether an item: (1) may enter the United States or is subject to an embargo; (2) is eligible for a particular rate of duty or tariff preferences; (3) is subject to additional duties, including antidumping duties, countervailing duties, Section 232 duties, or Section 301 duties; (4) is subject to a quota or other quantitative limitations, or (5) qualifies for a government procurement program.[54] Further, as the Court of International Trade has noted, mismarking and false country of origin declarations "certainly also affect Customs' record-keeping, which in turn has the potential to affect decisions as to whether to bring unfair trade action, which in turn has the potential to affect duties."[55]

B. Allowing Consumers to Express a Preference for U.S.-Made Goods

i. Congressional intent with respect to the Tariff Act of 1890

A major purpose of CBP's country of origin marking requirements is to equip American consumers with information to allow them to exercise a preference for U.S.-made, rather than foreign, goods.[56] Such was the clear legislative intent of the first version of the American country of origin marking statute at the time of its passage. The country of origin marking requirements were only one piece of comprehensive legislation that sought to protect American manufacturers. The Tariff Act of 1890 was the first in

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53. Left unaddressed by this Article is a determination of whether allowing consumers to exercise national preferences in purchasing decisions actually results in economic inefficiencies or is otherwise sub-optimal, either for the world economic system as a whole or for the United States in particular. This Article instead examines the stated purposes of the country of origin marking legislation and highlights a significant gap within that statutory and regulatory scheme. It cannot be assumed, however, that disclosure of country of origin to a consumer necessarily optimizes consumer welfare or economic efficiencies, as at least one paper has suggested that consumer preferences such as ethnocentrism, or labeling policies enacted with protectionist intent, may harm societal welfare. *See* Lusk et al., *Consumer Behavior Public Policy, and Country-of-Origin Labeling*, 28 REV. OF AG. ECON., 290 (2006).

54. INT'L TRADE CENTRE, ANN. REP. 2-1 (1996).

55. *United States v. Pentax Corp.*, No. 96-01-00067, slip op. at 669 (Ct. Int'l Trade Sept. 20, 1999).

56. Related to this was a possible legislative intent of preventing foreign manufacturers from falsely marking items as American-made when they were in fact not. The House Committee noted that a purpose of country of origin marking was to protect "both our own people from the imposition of inferior goods and the revenue from possible loss through undervaluation." Chang, *supra* note 4, at 696 (citing 21 CONG. REC. 4247 (1890), and H.R. REP. NO. 1466, at 6-7 (1889)).

a series of tariff acts that imposed higher duties on foreign products while lowering tariffs on raw agricultural products in order to assist domestic manufacturers.[57] As a whole, the Tariff Act of 1890 and subsequent tariff acts were intended to reduce competition and encourage American consumers to purchase American-made products.[58]

Then-Chairman of the Ways and Means Committee[59] (and later President) William McKinley made the following remarks to the U.S. House of Representatives on May 7, 1890:

> We have also introduced a new provision in the bill which requires that foreign merchandise imported into the United States shall be plainly stamped with the name of the country in which such articles are manufactured. There has been a custom too general in some foreign countries to adopt American brands, to the injury of our own manufacturers. Well known articles of American production with high reputation have been copied by the foreigner, and then, by the addition of American brand or American marks, have fraudulently displaced American manufacture, not in fair competition, but under false pretenses. The counterfeit has taken the place of the genuine article, and this we propose to stop.[60]

The legislative intent of the country of origin marking provisions to protect American manufacturers and producers has been noted numerous times by various courts. As the United States Court of Customs Appeals noted in 1928, "[t]he law was not intended so much to derive revenue as it was to protect the American manufacturer and purchaser of the merchandise."[61] Similarly, the U.S. Customs Court stated in 1972 that "Congress was also aware of the fact that many consumers prefer merchandise produced in this country, and sought 'to confer an advantage on domestic producers of competing goods.'"[62] As the Second Circuit further noted in *United States v. Ury*, when Congress enacted the country of origin marking requirement, "[t]he purpose was to apprise the public of the foreign origin and thus to confer an advantage on domestic producers of competing goods."[63] Likewise, the U.S. Court of International Trade

57. Chang, *supra* note 4, at 696.

58. *Id.* at 695.

59. *The McKinley Tariff of 1890*, U.S. HOUSE OF REPRESENTATIVES, (July 29, 2018), http://history.house.gov/Historical-Highlights/1851-1900/The-McKinley-Tariff-of-1890/.

60. Wilbur F. Wakeman, *Marking Goods of Foreign Origin: Requirements Imposed by the McKinley Law of 1890 and in Force Up to Date*, AM. ECONOMIST 242 (1914).

61. United States v Am. Sponge & Chamois Co., 16 Cust. 61 (Ct. Cust. App. 1928).

62. Globemaster, Inc. v. United States, 340 F. Supp. at 976 (quoting United States v. Ury, 106 F.2d 28, 29 (2d Cir. 1930)).

63. United States v. Ury, 106 F.2d at 29.

commented in *National Juice Producers Ass'n v. United States*, "Congress, of course, had in mind a consumer preference for American made goods."[64]

This same original legislative intent was also noted in the Treasury Decision which implemented 19 C.F.R. § 134.26.[65]

> By knowing the country of origin, it allows the purchaser to make an informed choice on whether to buy the foreign article or its domestic counterpart. This choice was provided in large part because Congress recognized that if given a choice, consumers prefer domestic goods. To conceal or obscure country of origin marking information prevents consumers from exercising this preference; denies domestic producers the benefit flowing from such consumer preference; and frustrates the Congressional will.[66]

C. Allowing Consumers to Express a Preference for Goods of One Foreign Country over those of Another Foreign Country

Beyond allowing consumers to exercise a preference for U.S.-made goods in their purchasing decisions, the country of origin requirements also allow a consumer to make purchasing decisions based on a foreign country of origin. Namely, consumers can exercise preferences they might have for goods of one foreign country over those of another.

This alternative purpose of the country of origin marking rules was discussed in detail by the Court of Customs and Patent Appeals in the case of *United States v. Friedlaender & Co.*[67] In that matter, the Collector of Customs of the Port of New York refused to release from customs custody imported chinaware unless it was marked to show Germany as the country of origin; it had been imported with a marking indicating its country of origin as Czechoslovakia.[68] The chinaware had been manufactured in Czechoslovakia before the German occupation of Sudetenland, but before it could be shipped, Germany had taken over that territory.[69]

The court concluded that the chinaware should have been marked with an appropriate country of origin of Germany, since its political country of origin was Germany at the time it started its journey to the United States.[70] In reaching this conclusion, the court noted that "[a]s we

64. Nat'l Juice Prods. Ass'n v. United States, 628 F. Supp. 978 (Ct. Int'l Trade 1986).

65. Requirements relating to imported articles repacked or manipulated.

66. Headquarters Ruling Letter 734230 (Nov. 20, 1991) (citing T.D. 84-127); 18 Cust. B. & Dec. 324, 325 (1984).

67. United States. v. Friedlaender & Co., 27 C.C.P.A. 297 (1940).

68. *Id.* at 300-01.

69. *Id.* at 300.

70. *Id.* at 302-03.

see it, Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will."[71]

The *Friedlaender* opinion noted that consumers could have different opinions regarding goods from different foreign countries: a "purchaser might refuse to buy German goods but might be perfectly willing to purchase Czechoslovakian goods . . . by reason of the mark [a purchaser] would be deceived in buying as the product of one country the product of another which he did not want."[72] Thus, the purpose of the country of origin marking statute was not only to allow the consumer to know at the time of purchase whether the goods were imported, but also the precise country from which those goods originated.[73]

Therefore, the country of origin marking requirement is not merely to distinguish between U.S.-made and imported goods, but also to allow consumers to exercise preferences for goods made in certain foreign countries over those made in other foreign countries. This has implications for whether, in the context of online sales, a specific country of origin should be disclosed or whether a designation of "domestic" or "imported" is sufficient.[74] Given this purpose of the country of origin marking requirements as separate and distinct from the purpose allowing consumers to exercise preferences for domestic products, a specific country of origin should be required in connection with any new CBP regulations, rather than a simple disclosure of whether or not a product was made in the U.S.

D. Allowing Consumers to Make these Choices at the Time of Purchase

Whatever particular preference consumers exercise with respect to country of origin, case law and statutory history demonstrate that a key purpose of country of origin marking is to equip the ultimate purchaser with knowledge of a product's country of origin *at the time of purchase*. This

71. *Id.* at 302.

72. *Id.* at 303.

73. However, it should be noted that the court in *Gibson-Thomsen* differentiated this purpose from the identification of a component used within an item with a distinct identity. "Upon review of the legislative history of section 304(a), Tariff Act of 1930, the court found nothing to indicate that Congress intended to require that an imported article used [as a material] in the manufacture of a new article with a new name, character and use be marked so as to indicate the foreign origin of the material to the retail purchaser." Instead, the court considered the U.S. processor to be the "ultimate purchaser . . . and held that the articles were properly marked upon importation." Country of Origin Marking, 65 Fed. Reg. 4195 (Jan. 26, 2000).

74. *See infra* Part VI.

ensures that consumers may factor this information into their purchasing decisions before completing a purchase.

For example, in the *Friedlaender* decision, the identity of the specific country of origin *at the time the consumer made the purchase* was operative to the outcome of the case. For the majority, it was irrelevant that the merchandise was accurately marked with its country of origin at the time of its manufacture. Instead, the majority found that the marking should inform the ultimate purchaser of the item's origin in an accurate manner as of the time of importation and sale.[75] Based on the facts of the *Friedlander* case, the majority found that "[i]t cannot be contended that the involved merchandise when it left its place of manufacture was a Czechoslovakian product. Still at the time of importation it was marked with the name of a country that was in being and it did not originate within the boundaries of that country."[76] The majority therefore found that Czechoslovakian marking did not properly indicate to the consumer, at the time of importation and sale, the accurate origin of the product.[77]

Judge Bland, in a separate dissenting opinion, also highlighted the importance of the country of origin requirements in allowing consumers to distinguish between goods of two foreign countries. Judge Bland reached a different conclusion than did the majority, arguing that the goods at issue were appropriately marked because the goods were manufactured and marked in Czechoslovakia prior to the German military occupation and takeover; he nevertheless agreed with the majority that the purpose of the marking statute itself that consumers should have access to relevant information in order to make purchasing decisions.[78] In this case, he argued that "[i]f purchasers prefer Czechoslovakia products to German products they ought to know who produced them. On the contrary, if they prefer German production to production elsewhere the public ought to know it."[79] Further, he commented, "[s]ome countries stand out among their competitors as being able to produce certain kinds of goods better than any other country. People have a prejudice in favor of goods so produced and they have a right to know where they are produced in order that they may exercise their will. Moreover, American purchasers have the right, regardless of the excellence of quality, to choose between producers irrespective of the motives that prompt the attitude."[80]

Judge Garrett's dissent also reached the same conclusion as did Judge Bland, but without challenging the purpose of the country of origin

75. *Friedlaender,* 27 C.C.P.A. at 303.
76. *Id.*
77. *Id.*
78. *Id.* at 305-06.
79. *Id.* at 305.
80. *Id.*

marking requirement itself. He stated that he had "no quarrel" with what the majority characterized the "evident purpose" of the marking statute (mandating the country of origin marking to allow for a consumer to exercise a preference in that regard).[81] He disagreed that Germany was the country of production or origin in this instance, and noted that "[s]ome purchasers may wish to buy German chinaware by which I mean chinaware of actual German origin, that is made by Germans in Germany."[82] As such, "[o]bviously, the required marking on the merchandise here involved would deceive such purchasers," and that therefore "the argument that the action complained of carries out the intent of Congress with respect to enabling ultimate purchasers to know the country of origin falls."[83] Thus, all the judges in *Friedlaender*, whether in the majority or dissenting, agreed that a key purpose of the country of origin marking statute was to allow the customers to make purchasing decisions based on a preference for one foreign country over another.

This same purpose of the marking statute was again emphasized in *Globemaster, Inc. v. United States*.[84] In that case, Globemaster had imported plastic covers for plier handles that were not marked as required with the country of origin.[85] At issue was whether the importer could tender the additional 10% duty for failure to mark and receive the merchandise after such payment.[86] The court reviewed the purpose of the marking provisions and noted, "[t]here can be no doubt that the pertinent legislation reflects the Congressional intent that the public be apprised of the country of origin of merchandise. It was the legislative purpose to enable the 'ultimate purchaser' of the goods to decide for himself whether he would 'buy or refuse to buy them.'"[87] The court, therefore, found that it would "defeat the very purpose" of the marking statute to accept the plaintiff's contention that the statute allowed delivery of the unmarked goods of the country of origin after payment of the additional 10% duty.[88]

The key purpose of the marking statute—to allow consumers to view the country of origin at the time of purchase to inform their purchasing decisions—has been reiterated in recent court cases and CBP rulings. For instance, in 2000 the U.S. Court of International Trade held that:

> [w]hile the identity of the 'ultimate purchaser' of a good may be a matter of dispute, there can be no dispute that the purpose of a

81. *Id.* at 304.
82. *Id.* at 304-05.
83. *Id.* at 305.
84. 340 F. Supp. 974 (Cust. Ct. 1972).
85. *Id.* at 974.
86. *Id.*
87. *Id.* at 976.
88. *Id.*

> good is limited to informing an 'ultimate purchaser' of an article in the United States of the foreign articles' country of origin lest that knowledge influence his or her decision to purchase the article."[89]

Likewise, CBP rulings often state the importance of country of origin markings to providing origin information to the ultimate purchaser.[90]

E. Other U.S. Laws and Regulations Requiring Marking for Consumer Information

i. Information disclosed to consumers

Import marking requirements meant to protect consumers and provide product information to an item's purchaser are well-established in American law. These include both the marking requirements administered by CBP as well as measures enacted in other areas such as product safety. U.S. law allows consumers to make purchasing decisions, whether based on the particular origin of a product, its composition, or other factors, by requiring certain products to be physically marked or labeled in some instances.

For example, with respect to the origin of a product, the U.S. Food and Drug Administration (FDA) requires that food labeling statements regarding geographical origin not be false or misleading, both for imported and domestic products.[91] It is the FDA's policy, however, to defer to CBP regarding false or misleading country of origin labeling.[92] Likewise, as discussed further in the next section of this Article, the Federal Trade Commission administers regulations governing claims that a product is "Made in the U.S.A."[93]

Other rules mandate the disclosure of more specific details along with origin data to consumers in order to allow them to make informed purchasing decisions. The U.S. International Trade Commission, in a 1996 report describing its review of country of origin marking requirements, noted that other laws requiring the marking of items "for the benefit of the ultimate purchaser" included the Wool Products Labeling Act of 1939;

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89. Bestfoods v. United States, 110 F. Supp. 2d 965 (Ct. Int'l Trade 2000) (citing *Friedlaender*, 27 C.C.P.A); Koru North America v. United States, 701 F. Supp. 229 (Ct. Int'l Trade 1988); and Globemaster, Inc. v. United States, 340 F. Supp. 974 (Cust. Ct. 1972). *See also* Country of Origin Marking, 65 Fed. Reg. 4193 (Jan. 26, 2000) (citing *Friedlaender*, 27 C.C.P.A. at 302 (remarking Congressional intent in enacting the statute)).

90. *See*, *e.g.*, U.S. Customs and Border Prot., N301371: The Country of Origin Marking of Lipstick (Nov. 2, 2018), https://rulings.cbp.gov/search?term=N301371&collection=ALL&sortBy=RELEVANCE&pageSize=30&page=1.

91. 21 U.S.C. § 343(a) (2012); 21 C.F.R. § 101.18 (2017).

92. Food and Drug Administration, CPG Sec. 560.200 Country of Origin Labeling (Oct 1, 1980), https://www.fda.gov/ucm/groups/fdagov-public/@fdagov-afda-ice/documents/webcontent/ucm074567.pdf.

93. *See infra* Section III.E.ii.

the Textile Fiber Products Identification Act; the Fur Products Labeling Act; and the American Automobile Labeling Act.[94] The Wool Products Labeling Act requires labeling to show the percentage of total fiber weight of wool and other fibers within wool products, as well as the name of the country where the wool product was processed and manufactured, in addition to other information.[95] The Textile Fiber Products Identification Act similarly requires the labeling of textile fiber products by fiber content, the name of the country where processed or manufactured (or whether the item was processed or manufactured in the United States), along with additional information.[96] The Fur Products Labeling Act requires that fur products be labeled with information including, in part, the name of the animal(s) that produced the fur and the name of the country of origin of any imported furs used in the fur product.[97] The American Automobile Labeling Act requires the labeling of passenger motor vehicles with information including the percentage of U.S./Canadian equipment (parts) content; the names of any countries other than the U.S. and Canada which individually contribute 15% or more of the equipment content, and the percentage content for each such country (maximum two countries); the final assembly point by city and state and/or country; the country of origin of the engine; and the country of origin of the transmission.[98]

Each of these statutes protects consumers by providing them with information, including information as to geographic origin, that they may use within their purchasing decisions. As such, the country of origin marking requirements administered by CBP are not a legal outlier, but instead are consistent with a pattern of American laws that protect consumers by mandating the disclosure of relevant product information to them. As such, there is a valid interest in updating the customs country of origin marking requirements to meet the realities of e-commerce, instead of abandoning those requirements altogether or leaving the gap between legal purpose and requirements in its current state.

ii. Allowing consumers to express a preference for domestic goods is also enabled by the FTC regulations.

Moreover, the importance of the legislative intent of the country of origin marking statute is reinforced by particular regulations of the FTC

94. Country-of-Origin Marking: Review of Laws, Regulations, and Practices, Inv. No. 332-366, USITC Pub. 2975, 3-23–3-25, 3-31 (July 1996) (Final). https://www.usitc.gov/publications/332/pub2975.pdf.

95. 15 U.S.C. § 68b (2016).

96. 15 U.S.C. § 70b (2016).

97. 15 U.S.C. § 69b (2016).

98. 49 U.S.C. § 32304 (2012); *Part 583 American Automobile Labeling Act Reports*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., https://www.nhtsa.gov/part-583-american-automobile-labeling-act-reports.

governing claims that a product has been made in the United States. Namely, claims that a product is "Made in the USA" are subject to regulation by the FTC Made in the USA policy, which covers manufacturers and marketers who choose to make claims about the amount of U.S. content in their products.[99] Pursuant to FTC rules, claims that a product is "Made in the USA" can only be legally made where "all or virtually all" of the product has been made in the United States.[100] Made in America claims can also be made where all significant parts and processing that go into the product are of U.S. origin.[101]

Courts discussing the "Made in the USA" rules have recognized that these regulations are essential to allowing consumers to support domestic manufacturers. As the California Supreme Court has stated, "[a] range of motivations may fuel this preference, from the desire to support domestic jobs, to beliefs about quality, to concerns about overseas environmental or labor conditions, to simple patriotism."[102]

The presence of the FTC regulations reinforces the notion that allowing U.S. consumers to exercise a preference for domestic goods over foreign goods is a genuine policy interest (although the FTC and CBP regulations have different standards for when a product is considered American-made and of American origin, respectively). The FTC regulations also reach online sales in certain instances and affect whether a product can be claimed as an American-made product at online points of sale and in online advertising, discussed in greater detail in Part V of this Article. These aspects of the FTC rules present a potential starting point for the regulatory changes to the CBP regulations and to 19 U.S.C. § 1304.

IV. RELEVANCE AND EFFECTIVENESS OF COUNTRY OF ORIGIN MARKING REQUIREMENTS

This Part IV examines country of origin markings, as required in their current form, and explores the aspects in which they currently fail to fulfill the statutory purposes described above in the context of online sales. This Part also considers the costs of compliance with these requirements and how firms view their marking obligations. By addressing the current country of origin marking requirements and their current shortcomings, the costs and benefits of any proposed changes (as discussed within Part VI of this Article) can be more cogently evaluated.

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99. *Complying with the Made in the USA Standard*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/business-center/guidance/complying-made-usa-standard (last visited July 25, 2018).

100. *Id.*

101. *Id.*

102. Kwikset Corp. v. Super Ct., 246 P.3d 877, 890 (Cal. 2011).

A. Historical Support for Country of Origin Marking Requirements

In many instances, domestic firms have supported the country of origin marking requirements without reservation, suggesting that the requirements do further their interests as intended by the Tariff Act. In the ITC's 1996 review of the country of origin marking requirements, many domestic organizations and some American companies supported maintaining the country of origin marking requirements as they existed, in addition to strong enforcement.[103] A few of these entities included the International Brotherhood of Teamsters; the AFL-CIO; the American Pipe Fittings Association; Eastman Kodak Co.; and the American Apparel Manufacturers Association.[104]

The same ITC report, however, also reported concerns about the marking requirements. The report included proposals for alternative rules for certain domestic companies (or multinational companies based in the United States), suggesting that in some cases, the benefits of country of origin marking for certain domestic commercial interests were outweighed by the costs. For example, Xerox Corporation indicated that it would prefer that spare parts for repairs be exempted from marking.[105] The American Frozen Food Institute recommended the elimination of marking for products with comingled ingredients, or the development of a workable rule for marking commingled goods.[106] The Pillsbury Company recommended that food products be exempted from country of origin marking requirements.[107]

Thus, support for or opposition to the country of origin marking requirements among American commercial interests has historically been mixed, depending on the position of a given company within the economy and its particular interests at stake. Evaluating industry support for country of origin marking requirements, however, misses a key purpose of the marking legislation, which is to empower the *consumer* to make purchasing decisions informed by a product's country of origin.

B. Country of Origin is a Genuine Factor in Consumer Purchasing Decisions

Does information about a product's country of origin actually have the potential to affect individual purchasing decisions? Do consumers in fact have preferences for domestic products over imported ones, or for goods

103. Country-of-Origin Marking, *supra* note 94, at xviii.
104. *Id.*
105. *Id.* at xix.
106. *Id.*
107. *Id.*

of one foreign country over another? Do these preferences in fact affect their purchasing decisions?

In fact, research shows that consumers do formulate product preferences based on country of origin. The effect of country of origin on consumers' product preferences has been studied and documented over the past fifty years.[108] The first empirical study in this area, conducted in 1965, found significant differences in the evaluation of products that were identical in all ways except for the name of the country printed on a "made in" label.[109] Subsequent research has shown that country of origin information also affects consumer preferences for:

- General products[110];
- Specific categories of products[111]; and
- Certain brands,[112]

and affects consumers' perception of:

- Product quality[113];
- Brand image[114]; and
- Purchase decisions.[115]

Consumers have also shown a willingness to pay higher prices for products from locations perceived as desirable.[116] Country of origin may serve as a cue for product quality, including for attributes such as reliability and durability.[117] Country of origin may have symbolic and emotional value to consumers, including feelings associated with social status and national pride.[118] Consumers may hold social and personal norms related to the country of origin, such as supporting the domestic economy, or

108. Keith Dinnie, *Country-of-Origin 1965-2004: A Literature Review*, 3 J. OF CONSUMER BEHAVIOR 165 (2004).

109. Peeter W.J. Verlegh & Jan-Benedict E.M. Steenkamp, *A review and meta-analysis of country-of-origin research*, 20 JOURNAL OF ECONOMIC PSYCHOLOGY 522 (1999) (citing Schooler (1965)).

110. Irvine Clarke III & Margaret Owens, *Integrating country of origin into global marketing strategy: a review of U.S. marking statutes,* 17 INTERNATIONAL MARKETING REVIEW 114, 114 (citing Darling and Wood (1990); and Howard (1989)).

111. *Id.* (citing Cordell (1992); Hong and Wyer (1989), (1990); Roth and Romeo (1992)).

112. *Id.* (citing Chao (1993); Han and Terpstra (1988); Haubl (1996); Tse and Gorn (1993); Witt (1990)).

113. *Id.* at 114-15 (citing Hong and Wyer (1989), (1990); Johansson *et al.* (1985); Johansson and Thorelli (1985); Papadopoulous and Heslop (1993)).

114. *Id.* at 115 (citing Han and Terpstra (1988); McConnell (1967); Yaprak (1987)).

115. *Id.* (citing Heslop and Papadopoulous (1993)).

116. *Id.* (citing Nes and Bilkey (1993); Schooler and Wildt (1968)).

117. Verlegh and Steenkamp, *supra* note 109, at 524 (citing Li & Wyer (1994); Steenkamp (1989)).

118. *Id.* at 523 (citing Asekgaard & Ger 1998; Batra et al. 1998).).

refraining from buying goods from countries with objectionable activities or regimes.[119]

The studies that have found country of origin effects on consumer preferences, however, do not necessarily translate into a direct and similar effect on consumer purchasing decisions. The design of certain studies does not perfectly replicate the setting in which consumer purchasing decisions are made. For example, early studies of country of origin effects often used a single-cue design, where participants were asked to provide a product evaluation based only on information about a product's country of origin; such studies inflate country of origin effect sizes (namely, country of origin affects the product preferences of study participants to a greater degree when country of origin is the only information presented).[120] Multi-cue studies, which present additional information besides country of origin to study participants, have found that a country of origin effect still exists, but to a lesser extent than suggested by single-cue studies. Likewise, consumers' responses to survey questions about product origin and their perceptions about international products do not necessarily reflect their actual purchasing behavior.[121] Since some of the research that has been completed concerning consumer preference with respect to country of origin concerned consumers located in different nations, not all of the conclusions reached within those studies are necessarily applicable to U.S. consumers. Further, the type of product or particular country of origin at issue would certainly affect to what extent a consumer purchasing decision is affected by a product's country of origin.

Precisely *why* a particular country of origin might matter to an individual consumer is a highly personal and idiosyncratic decision, and one which the marking statute is not designed to parse or account for beyond its blanket requirement that such information be disclosed to the consumer. For example, consumer ethnocentrism may be moderated by beliefs consumers have about the extent to which their country or their own job is threatened by foreign competition.[122] Age, gender, and education may also affect consumer ethnocentrism and the degree to which a consumer might be motivated to prefer domestic goods over imported ones.[123] The purpose of the country of origin marking requirements, however, is to allow consumers to make informed purchasing decisions, regardless of what decision the consumer ultimately arrives at. As the Court of International Trade has commented, "[w]hile the Marking Statute requires that the ultimate consumer be informed by

119. *Id.* at 524, (citing Shimp & Sharma, 1987; Smith, 1990; Klein, Ettenson & Morris, 1998).
120. *Id.* at 532.
121. Lusk et al., *supra* note 53, at 288.
122. Verlegh & Steenkamp, *supra* note 109, at 528 (citing Sharma, Shimp & Shin (1995)).
123. Lusk et al., *supra* note 53, at 288.

the required marking of a good's country of origin, the statute does not, and cannot, address the myriad of reasons or motivations for the consumer's country of origin preferences, biases, or prejudices as to particular goods, or the goods generally of a particular country."[124]

While the exact effect on any particular consumer purchasing decision cannot be precisely quantified, the body of research completed over the last fifty years demonstrates that consumers do take country of origin into account. This suggests that country of origin marking requirements continue to serve a real and important purpose. As the California Supreme Court has noted when discussing "Made in the USA" representations governed under FTC authority: "Simply stated: labels matter. The marketing industry is based on the premise that labels matter – that consumers will choose one product over another similar product based on its label and various tangible and intangible qualities they may come to associate with a particular source . . . To some consumers, processes and places of origin matter."[125] Given that consumers have preferences with respect to country of origin, and that the availability of that information affects their purchasing decisions, the gap in the marking requirements between e-commerce and physical transactions is important to address.

C. Costs of Compliance

The aforementioned 1996 ITC review reported percentages of responding survey participants who noted increased costs as a problem or concern in complying with country of origin marking requirements. Each of the following industries reported costs associated with country of origin marking requirements: agriculture (22%); chemicals (17%); metals & metal products (9%); machinery (25%); electronics (21%); textiles (14%); overall (16%).[126] The ITC review also asked U.S. companies to identify the major types of costs incurred in complying with country of origin marking requirements, as well as estimates of how much marking compliance costs added to the retail price of the typical product.[127] The report found that only about a quarter of the total companies responding to the survey were able to provide quantitative or qualitative marking-related cost estimates.[128] Where they were reported, the majority stated that marking-related costs represented less than 1% of company net sales, but in absolute terms, such costs could range up to several million dollars annually in some

124. Bestfoods v. United States, 110 F. Supp. 2d 965 (Ct. Int'l Trade 2000).
125. *Kwikset*, *supra* note 102, at 889.
126. Country-of-Origin Marking, *supra* note 94, at 4-7.
127. *See id.* at 4-8.
128. *See id.* at 4-9.

instances.[129] However, where cost information could not be provided, the ITC report found that one reason for that might be that companies already marked their products with country of origin information in conjunction with other markings or product coding, and that country of origin marking represented no additional costs.[130] Another reason cited was that country of origin costs were low and companies decided to forgo additional accounting and overhead costs to track the costs of compliance with country of origin marking requirements.[131]

This Article discusses how new requirements concerning disclosures of products' country of origin at online points of sale could affect the costs incurred by manufacturers and other firms. However, key to that discussion is a recognition that much (but certainly not all) of these potential compliance costs are fixed by the already-existing requirements for identification of country of origin and physical marking of items.

V. E-COMMERCE TRANSACTIONS AND COUNTRY OF ORIGIN MARKING REQUIREMENTS

A. Background on E-Commerce Imports and Sales of Foreign-Made Goods in the U.S.

i. Volume of e-commerce import transactions and sales of foreign-made goods in the U.S.

E-commerce sales are a growing and important segment of consumer purchases. Thus, it is increasingly important that Customs regulations take into account this new economic reality of doing business. In 2016, total e-commerce sales (from both foreign and domestic sellers) amounted to approximately $7,055 billion within the United States.[132] In the first half of 2018, e-commerce sales exceeded 9% of total retail sales in the U.S.[133] In 2017, online retail sales accounted for 13% of total retail sales when factoring out items not generally purchased online, such as fuel, automobiles, and sales in restaurants.[134] Amazon alone was responsible for approximately 44% of all U.S. e-commerce sales in 2014, or about 4% of

129. *Id.*

130. *Id.*

131. *Id.*

132. Torbjörn Fredriksson, *In Search of Cross-Border E-Commerce Trade Data*, UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT 4 (Sept. 11-13, 2017), https://unstats.un.org/unsd/trade/events/2017/suzhou/presentations/Agenda%20item%2011%20(b)%20-%20UNCTAD.pdf.

133. *Quarterly Retail E-Commerce Sales 1st Quarter 2018*, U.S. CENSUS BUREAU NEWS (May 17, 2018), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

134. *A decade in review: E-commerce sales vs. retail sales 2007-2017*, DIGITAL COMMERCE 360 (July 24, 2018), https://www.digitalcommerce360.com/2018/04/09/decade-us-e-commerce-sales/.

total retail sales in the United States.[135] CBP has noted that almost 80% of Americans shop online.[136]

While statistics regarding the value of e-commerce retail sales as a whole within the U.S. are readily available, information regarding the value of cross-border e-commerce transactions are "virtually nonexistent."[137] Some data are available, however, regarding bilateral e-commerce transactions. In 2015, online business-to-consumer sales to the U.S. from China totaled $3.0 billion, while online business-to-consumer sales to the U.S. from Japan totaled $4.4 billion.[138] Cross-border online purchases in 2015 were estimated to make up 7% of total business-to-consumer transactions within the United States, and to make up 1.7% of business-to-consumer merchandise imports by value.[139] The United Nations Conference on Trade and Development (UNCTAD) estimates that in 2015, cross-border business-to-consumer online purchases totaled $40 billion within the United States.[140] In fiscal year 2013, CBP processed 150 million international mail shipments. By fiscal year 2017, that number had exceeded 500 million shipments.[141]

In their entirety, these statistics show that a majority of Americans purchase items online and that these sales total billions of dollars. Their purchases of foreign-made items, while perhaps not precisely quantifiable, unquestionably constitute a significant portion of retail sales, based on the cross-border data and international mail shipment data available. Closing the gap between the legal text of the country of origin marking requirements and the purpose of 19 U.S.C. § 1304 would address a genuine disparity between brick-and-mortar sales and e-commerce transactions in how consumers receive information relating to a product's country of origin.

ii. CBP E-Commerce Strategy

CBP has recognized the growing importance of e-commerce with respect to imports entering the United States, noting on its website that

135. Lauren Thomas, *Amazon grabbed 4 percent of all US retail sales in 2017, new study says*, CNBC (Jan. 3, 2018), https://www.cnbc.com/2018/01/03/amazon-grabbed-4-percent-of-all-us-retail-sales-in-2017-new-study.html.

136. *Commissioner says E-Commerce Challenges Regulators and Shippers Alike*, U.S. CUSTOMS AND BORDER PROT. (June 1, 2018), https://www.cbp.gov/newsroom/spotlights/commissioner-says-e-commerce-challenges-regulators-and-shippers-alike.

137. Fredriksson, *supra* note 132.

138. *Id.* at 9.

139. *Id.* at 10.

140. These cross-border trade statistics, however, would not capture the additional share of foreign-made goods sold to American purchasers by online sellers based in America (but would also overcount sales of American goods sold by foreign sellers).

141. *Commissioner says E-commerce Challenges Regulators and Shippers Alike*, *supra* note 136.

"[e]-commerce is a growing segment of the U.S. economy and has been increasing significantly for the past several years."[142] As such, this has led to "increasing volumes of imports of small, just-in-time packages, creating inspection challenges for CBP," including the same health, safety and economic security risks posed by containerized shipments, but in a higher volume.[143]

In response, CBP has launched new e-commerce initiatives. On September 12, 2016, CBP officially established the E-Commerce and Small Business Branch within the Office of Trade.[144] CBP also issued an E-Commerce Strategy in February 2018.[145] Among its four stated objectives and various sub-objectives is Objective 1.1: to "[r]eview existing legal and regulatory authorities to develop risk segmentation processes, improve targeting, and realign resources," including a review of statutory and regulatory authorities.[146] This goal aligns with reviewing the gap between the current regulatory structure and the legislative intent behind country of origin marking in the e-commerce context.

While CBP has not expressly addressed country of origin marking requirements for online sales, its e-commerce initiative shows that the agency is certainly aware of the unique customs enforcement challenges posed by e-commerce transactions. The introduction of new regulations to address the lack of country of origin information provided at online points of sale would therefore certainly be in accordance with the agency's current priorities.

B. E-Commerce Challenges in Other Regions and Other Regulatory Areas

The regulatory challenge of e-commerce transactions is not unique to country of origin marking requirements. Within the U.S., e-commerce transactions also pose challenges with respect to other regulatory areas in which physical product marking cannot provide information to the consumer at the time of an online sale. While some statutes and regulations in other areas have been written or modified to regulate online sales, others have not. For example, the FTC requires that digital advertising adhere to the same "Made in the USA" policy as must print

142. *E-Commerce*, U.S. CUSTOMS AND BORDER PROT. (July 6, 2018), https://www.cbp.gov/trade/basic-import-export/e-commerce (last modified…).

143. *Id.*

144. *CBP Releases E-Commerce Strategy*, U.S. CUSTOMS AND BORDER PROT. (Mar. 6, 2018) https://www.cbp.gov/newsroom/national-media-release/cbp-releases-e-commerce-strategy.

145. *CBP Publication No. 0685-0218*, U.S. CUSTOMS AND BORDER PROT. (Feb. 2018) https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/CBP-E-Commerce-Strategic-Plan_0.pdf.

146. *Id.* at 5.

advertisements.[147] While the U.S. Department of Agriculture (USDA) issued voluntary guidelines instructing that country of origin information be provided to customers on websites when agricultural products are sold, this guideline was not included in the later proposed rule or final regulation. [148] The U.S. Consumer Product Safety Commission, however, does require that Internet and other remote sales methods include any relevant precautionary statement pursuant to the Federal Hazardous Substances Act, informing consumers how to protect themselves, where products are advertised for sale.[149]

Further, certain laws and regulations of other jurisdictions display a similar disparity between information required to be made available to e-commerce and brick-and-mortar consumers, such as for origin disclosures for food products in the U.K. or disclosures of cosmetics ingredients within Japan. As described in further detail within this section, however, some jurisdictions have been able to address the unique challenges relevant to disclosing information to consumers at the time of a sale online (such as toy safety product disclosures within the E.U.).

i. The U.S. Federal Trade Commission

The FTC's regulation of claims that a product has been made in the United States applies to both physical product marking and digital advertising. The FTC's authority to regulate claims of U.S. origin is in certain respects broader than CBP's country-of-origin authority. For instance, the FTC has authority under Section 5 of the Federal Trade Commission Act (FTCA)[150] to regulate claims of U.S. origin in advertising.[151] The FTCA prohibits unfair or deceptive acts or practices, including commercial acts involving a foreign nation that cause, or are likely to cause, reasonably foreseeable injury within the United States.[152] The FTC's "Made in the USA" policy also applies extensively to "all forms of marketing, including marketing through digital or electronic mechanisms, such as Internet or e-mail."[153] In addition to prohibiting

147. *See infra,* Part VI.

148. Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Port, Fish, Perishable Agricultural Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946, 67 Fed. Reg. 63367, 63371 (Oct. 11, 2002); Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg. 61943, 61951 (Oct. 30, 2003).

149. Federal Hazardous Substances Act (FHSA) Requirements, U.S. CONSUMER PRODUCT SAFETY COMMISSION, https://www.cpsc.gov/Business--Manufacturing/Business-Education/Business-Guidance/FHSA-Requirements (last visited June 21, 2019).

150. 15 U.S.C. § 45 (2012).

151. AP Deauville, LLC v. Arion Perfume and Beauty, Inc., No. C14-03343 CRB, 2014 WL 7140041 (N.D. Cal. Dist. Ct., Dec. 12, 2014) (citing generally 62 Fed. Reg. 63756 (Dec. 2, 1997)).

152. 15 U.S.C. § 45 (2012).

153. *Id.*

unfair or deceptive advertising, the FTC also administers other regulations that require advertising for textile and wool products to retail consumers, including advertising through electronic means, to contain a designation that a product is either of domestic origin or is imported.[154]

To help explain its regulations concerning unfair or deceptive advertising to online sellers, the FTC issued a publication entitled "Advertising and Marketing on the Internet."[155] This document sets forth the basic legal framework regarding regulation of misleading claims made online about products or services. The FTC also provides a web page, "Advertising and Marketing on the Internet: Rules of the Road," which provides more information to online businesses about relevant FTC regulations.[156] The page notes that third parties, such as website designers, may be liable for making or disseminating deceptive representations if they participate in preparation or distribution of the advertising or know about deceptive claims.[157]

The FTC regularly brings enforcement actions with respect to "Made in the USA" claims for merchandise sold online.[158] For example, in 2013 the FTC brought a complaint against E.K. Ekcessories, Inc., which sold outdoor equipment through its website and provided third parties with marketing materials for use in the marketing and sale of these products.[159] Within the complaint, the FTC alleged violations of "Made in the USA" claims, including language appearing on the company's homepage, product page, and in the "News" section of the website.[160] The company entered into a consent order with the FTC.[161] Similarly, in 2018 the FTC settled a matter with Bollman Hat Company. The FTC alleged, *inter alia*, that the company had disseminated advertisements and promotional materials on its website, Twitter page, and Facebook page for its hats that claimed

154. *See infra,* Part V.C.

155. *Advertising and Marketing on the Internet*, FED. TRADE COMM'N, (Sept. 2000), https://www.ftc.gov/system/files/documents/plain-language/bus28-advertising-and-marketing-internet-rules-road2018.pdf.

156. *Advertising and Marketing on the Internet: Rules of the Road*, FED. TRADE COMM'N (Dec. 2000), https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road.

157. *Id.*

158. See, however, the recent statement of Federal Trade Commissioner Rohit Chopra, stating his concern that no-money, no-fault settlements entered into by the FTC in three instances were sufficient to enforce the "Made in the USA" standard. FED. TRADE COMM'N, Statement of Federal Trade Commissioner Rohit Chopra (Sept. 12, 2018), at 1, 3 https://www.ftc.gov/system/files/documents/public_statements/1407380/rchopra_musa_statement-sept_12.pdf.

159. E.K. Ekcessories, Inc., F.T.C. File No. 132 3156 (2013).

160. *Id.*

161. *Id.*

misleadingly that the hats were all, or virtually all, made in the United States.[162]

These FTC regulations provide a precedent for updating or adapting other consumer disclosure requirements for online sales. As the enforcement actions brought by the FTC demonstrate, such updated regulations would be a tool that agencies use to ensure that consumers receive accurate information about a product's origin.

ii. U.S. Department of Agriculture country of origin labeling

With respect to country of origin regulations for agricultural products, the USDA initially considered treating physical sales and Internet sales similarly. Ultimately, however, the agency decided not to implement those requirements for online points of sale. The Agricultural Marketing Service within the USDA issued voluntary guidelines in 2002, stating that "[f]or sales of a covered commodity where the customer purchases a covered commodity prior to having an opportunity to observe the final package (*e.g.,* Internet sales, home delivery sales, *etc.*)," the retailer should "provide the country of origin information on the sales vehicle (*i.e.*, Internet Site, home delivery catalog, *etc.*) as part of the information describing the covered commodity being offered for sale."[163] This was due to the USDA's "belief that consumers must be made aware of the country of origin of the covered commodity before the purchase is made."[164]

This same approach, however, was not replicated under a proposed rule requiring retailers to notify their customers of the country of origin of covered commodities beginning September 30, 2004.[165] The USDA chose not to follow the same approach as the earlier voluntary guidelines because "[n]umerous commenters stated that it would be nearly impossible and extremely impractical to have current country of origin information on an

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162. Complaint, Bollman Hat Co. v. Save an American Job, LLC, F.T.C. Matter No. 172 3917, (Jan. 23, 2018), https://www.ftc.gov/system/files/documents/cases/172_3197_bollman_hot-american_made_ matters_complaint.pdf *and* Complaint, Bollman Hat Co. v. Save an American Job, LLC, F.T.C. Matter No. 172 3917, (Apr. 12, 2018), https://www.ftc.gov/system/files/documents/cases/172_3197_bollman_hat_complaint.pdf; *see also* Press Release, Bollman Hat Company Settles with FTC, Agrees to Stop Making Deceptive 'Made in USA' and Certification Claims (Jan. 23, 2018), https://www.ftc.gov/news-events/press-releases/2018/01/bollman-hat-company-settles-ftc-agrees-stop-making-deceptive-made *and* Press Release, FTC Approves Final Consent Settling Charges that Bollman Hat Company Made Deceptive 'Made in the USA' and Certification Claims (Apr. 17, 2018), https://www.ftc.gov/news-events/press-releases/2018/04/ftc-approves-final-consent-settling-charges-bollman-hat-company.

163. Establishment of Guidelines for the Interim Voluntary Country of Origin Labeling of Beef, Lamb, Port, Fish, Perishable Agriculture Commodities, and Peanuts Under the Authority of the Agricultural Marketing Act of 1946, 67 Fed. Reg. 63367, at 63371 (Oct. 11, 2002).

164. *Id.*

165. Mandatory Country of Origin Labeling of Beef, Lamb, Pork, Fish, Perishable Agricultural Commodities, and Peanuts, 68 Fed. Reg 61943, at 61591 (Oct. 30, 2003).

Internet site or catalog as this information changes rapidly depending on the store location or warehouse at which an order is processed and filled."[166] Therefore, the proposed rule instead required retailers to "provide notification of country of origin at the time the product is delivered to the consumer."[167] As such, when the final USDA country of origin labeling requirements took effect, a similar gap existed between disclosure of information in e-commerce transactions and physical sales. The final rule currently provides that "[f]or sales of a covered commodity in which the customer purchases a covered commodity prior to having an opportunity to observe the final package (e.g., Internet sales, home delivery sales, etc.), the retailer may provide the country of origin notification either on the sales vehicle or at the time the product is delivered to the consumer."[168]

The concern raised by commenters in the USDA rulemaking process is also relevant to a consideration of whether CBP regulations should be modified to require country of origin disclosures on the websites of online merchants.

iii. U.S. consumer product safety

The regulations of the U.S. Consumer Product Safety Commission (CPSC), like those of the FTC, take into account the reality of online sales. For example, the 2008 Consumer Product Safety Improvement Act (CPSIA) requires that advertising for a product online must include any relevant warning statement for toys and games relating to choking hazards.[169] This requirement "applies to catalogue and other printed material advertisements which provide a direct means of purchase or order of products requiring cautionary labeling" under relevant portions of the Federal Hazardous Substances Act.[170] The same provision provides that "direct means of purchase or order" means "any method of purchase that allows the purchaser to order the product without being in the physical presence of the product.[171] Advertising that provides a direct means of purchase or order of a product includes, among other venues, web sites that enable consumers to purchase a product online.[172]

These CPSC regulations serve both to treat all remote sales equivalently under the term "direct means of purchase or order" and also

166. *Id.*

167. *Id.*

168. 7 C.F.R. § 65.300(i) (2016).

169. OECD, *Online Product Safety: Trends and* Challenges, OECD DIGITAL ECONOMY PAPERS NO. 261, 12 (2016), https://doi.org/10.1787/5jlnb5q93jlt-en. (citing Labeling Requirement for Toy and Game Advertisements, 73 Fed. Reg. 67730, 67330 (Nov. 17, 2008)).

170. 16 C.F.R. § 1500.20 (2008).

171. *Id.* § 1500.20(c)(6).

172. *Id.*

to provide product safety information to consumers before a consumer purchases a product. In this way, consumers receive cautionary information about product safety before a purchase is made, in the same way that they would at a brick-and-mortar store by inspecting a physical product. These CPSC regulations provide a model upon which similar changes to CBP regulations can be based. This would adequately address the informational asymmetries in how consumers receive country of origin information in physical versus remote transactions.

iv. International labeling and country of origin requirements

Other countries also face the same issue as the U.S. does in that consumers at online points of sale receive less information than those at physical points of sale. Some jurisdictions have been able to address this issue, at least in part. In the European Union, in a similar manner as the CPSIA and associated CPSC regulations, the Toy Safety Directive of 2009 requires warnings specifying the appropriate ages for users to appear on consumer packaging or otherwise be made clearly visible to the purchaser before the time of purchase, including in cases where the purchase occurs online.[173] However, in other jurisdictions, information that must appear on a physical label does not have to be disclosed at online points of sale. For example, in Japan, disclosures about ingredients used in cosmetic products do not have to be reported online, but must appear on the products themselves.[174]

The mismatch between the purpose of labeling requirements and the nature of remote sales exists within other countries as well. In Australia, food products are generally subject to labeling and information requirements[175], but "retailers can display an image of a [food] product on their websites without any legal requirement to state its country of origin."[176] Likewise, a similar disparity in information at the time of sale

173. *Id.*

174. Similar to Japan, Australia does not strictly mandate the reporting of cosmetics ingredients online, even though that information is required to be disclosed on cosmetics products themselves. Australia has issued a supplier guide for cosmetics products noting that "[i]f you are an online supplier, the ACCC (Australian Competition and Consumer Commission) considers it good practice to show an ingredients list with the online listing so that consumers can view the product ingredients before the goods are checked out." Such ingredient listing is required on the containers of cosmetics products or on cosmetics products themselves. Australian Competition & Consumer Commission, *Product Safety: Ingredients Labelling on Cosmetics*, SUPPLIER GUIDE 4 (2014), https://www.productsafety.gov.au/system/files/ Ingredients%20labelling%20on%20cosmetics%20-%20Supplier%20guide_0.pdf.

175. Labelling, FOOD STANDARDS, (May 2017), http://www.foodstandards.gov.au/industry/labelling/pages/default.aspx.

176. Peter Hunt, *Country-of-origin labelling: Online loophole*, THE WEEKLY TIMES (Mar. 7, 2017), https://www.weeklytimesnow.com.au/news/national/countryoforigin-labelling-online-loophole/news-story/0ed83cbaa52282b9bac2a178a224178b.

exists in the United Kingdom with respect to certain food products sold online and in stores. In the U.K., country of origin must be shown for beef, veal, lamb, mutton, pork, goat and poultry; fish and shellfish; honey; olive oil; wine; and fruits and vegetables imported from outside the E.U.[177] Yet there is no parallel requirement to disclose country of origin information online for these items. Consumers in the U.K. favor closing this information gap. For example, a YouGov survey completed in the U.K. found that over 80% of consumers thought there should be the same amount of information about a food product's country of origin online as there is on physical food packaging.[178] This survey also found that 64% of U.K. adults said it would be helpful to have a filter in order to identify only British produce when grocery shopping online.[179]

This same issue can also be observed worldwide and across a variety of product types. The Organisation for Economic Co-operation and Development (OECD) conducted a sweep in 2015 in which 15 jurisdictions inspected 880 products in order to detect issues related to product labeling.[180] In that sweep the OEDC found "that 57% of the products inspected did not have relevant labeling information featured on inspected websites; 22% showed only part of the labeling."[181] Full product labeling was shown on websites for 21% of products inspected.[182] However, the sweep was not limited to those products for which product labeling online was required. The OECD sweep also found that among the 77 products that were purchased by sweep participants, 68% had adequate labeling on the physical product itself.[183]

C. Catalog Sales: A Parallel Gap between Statutory Intent and Legal Requirements

E-commerce sales are not the only type of transaction in which consumers do not have the benefit of country of origin information at the time of purchase. The same issue arises in the context of catalog sales completed by mail order, telephone, or by any other remote means.

Thus, as in the examples of the other jurisdictions and types of labeling described above, the failure of the customs country of origin

177. *Food labelling and Packaging*, GOV.UK, https://www.gov.uk/food-labelling-and-packaging/food-labelling-what-you-must-show (last visited July 25, 2018); *see also Food labelling: country of origin*, GOV.UK, https://www.gov.uk/guidance/food-labelling-country-of-origin#beef-and-veal-labelling (last visited July 25, 2018).

178. Matt Atherton, *Product origin labels 'must be made clearer online'*, FOOD MANUFACTURE (Jun. 8, 2017), https://www.foodmanufacture.co.uk/Article/2017/06/09/Country-of-origin-labelling-must-be-same-online-as-on-shelves.

179. *Id.*

180. OECD, *supra* note 169, at 4-5, 12.

181. *Id.* at 12.

182. *Id.* at 12-13.

183. *Id.* at 13.

statute to meet its goals in the context of e-commerce transactions is not new or unique. The Sears Roebuck catalog was first published in 1894, with the first catalog in the United States having been published by Tiffany and Co. in 1845. The gap in the country of origin marking requirements with respect to sales completed remotely is therefore essentially as old as the country of origin marking requirement itself.

Disclosure of origin information in the context of catalog sales, though never addressed by CBP, has in fact been has been required in certain cases by the FTC. While the customs regulations do not mandate that consumers receive country of origin information in remote sales made either online or by mail order or telephone, the FTC regulations applicable to textile and wool products do require that consumers making either an e-commerce purchase or one by mail order or telephone be informed as to whether a product was made in the U.S. or was imported.[184] Within the Federal Register Notice announcing these regulations, the Federal Trade Commission strongly encouraged that mail order advertisers include a legend in their advertising explaining the meaning of their country of origin disclosures in order to assist consumers.[185] Currently, the terms "mail order catalog" and "mail order promotional material" with respect to textile fibers and wool products include materials disseminated to ultimate consumers either in print or by electronic means.[186] Thus, there is precedent in the context of the FTC regulations concerning wool and textile products that a product be at identified at least as of domestic origin or as an imported product when a customer purchases it at a point of sale removed from the physical item itself.

In 1995, mail order sales represented 10.8% of general merchandise sales and 3.7% of retail sales.[187] Catalog sales at that time therefore did not constitute as large a percentage of retail sales as do online sales today; the relatively small percentage of catalog sales as a portion of retail sales might explain why the U.S. customs regulations never addressed the information gap present in remote sales, even though that issue has existed for an

184. *See* 16 C.F.R. § 303.34 (2018) (textile fiber products) and 16 C.F.R. § 300.25a (2018) (wool products).

185. The third-party catalog marketer, in addition to the product seller, has the responsibility to comply with FTC regulations concerning misleading product claims. The FTC also instructs catalog marketers, in order to avoid liability for making deceptive representations about a product, to "ask for material to back up claims rather than repeat what the manufacturer says about the product." FED. TRADE COMM'N, *Advertising and Marketing on the Internet: Rules of the Road* 2-3 (2000), https://www.ftc.gov/tips-advice/business-center/guidance/advertising-marketing-internet-rules-road.

186. 16 C.F.R. § 303.1(u) (2018); 16 C.F.R. § 300.1(h) (2018)*; see also* Rules and Regulations Under the Textile Fiber Products Identification Act, 78 Fed. Reg. 29263, 29269 (May 20, 2013).

187. Mary Edwards, *The Impact of Catalog Shopping on Traditional Retail*, CENTER FOR COMMUNITY ECONOMIC DEVELOPMENT (1997), https://fyi.uwex.edu/downtowneconomics/files/2015/05/JUN97LTB-2.pdf.

extended period of time. It might be the growing importance of online sales that has prompted certain other agencies to address the issue of catalog sales and require that information be provided to consumers remotely also in mail order and telephone transactions, as did the 2008 Consumer Product Safety Act; however, the FTC regulations concerning disclosures for wool and textile products in mail order advertising date from the mid-1980s, well before the advent of online sales in today's volumes.

The disparity in country of origin information available to remote and brick-and-mortar consumers is therefore not a new one. In today's environment, however, where online sales represent a large and growing portion of total sales to consumers, it has become increasingly important to address this information gap.

VI. RECOMMENDATIONS AND ALTERNATIVES

A. Recommendations

i. The current country of origin marking statute and regulations are insufficient to satisfy legislative intent in the context of e-commerce transactions.

When a product sold online is physically marked with its country of origin, but the online point of sale does not indicate that product's country of origin, the letter of the country of origin marking requirement is satisfied, but not its spirit. In the context of e-commerce transactions, an online sale in which the website lacks a disclosure as to the origin of the product (even though a physical good will bear an appropriate country of origin marking informing the consumer at the time the consume receives the product itself) fails to satisfy a main purpose of the statute – namely, that consumers receive sufficient information about the origin of a product in order to influence their purchase *before it is made*, so that consumers can exercise preferences for either domestic goods or goods of particular foreign countries. This situation arises because the requirement that the country of origin be disclosed at the time of the transaction, while often cited as a key purpose of the country of origin statute, is not currently reflected within the text of the country of origin marking statute or the applicable CBP regulations.

The question therefore is whether the statute and regulations governing customs country of origin marking requirements should be updated and modified to require that origin information be disclosed at online points of sale, or whether such a change would be too burdensome to product manufacturers as retailers. As discussed below, this Article suggests that such updated country of origin disclosure requirements

would be unlikely to create a regulatory burden greatly exceeding obligations currently imposed by the country of origin marking requirements, and that modifying the current country of origin requirements would remedy a significant disparity between information currently available to consumers in online transactions and those shopping in physical stores.

ii. Country of origin disclosures for e-commerce transactions should provide information to consumers in a clear and obvious manner.

A legislative amendment to the current country of origin marking statute would be able to mandate new disclosure requirements at online points of sale. 19 U.S.C. § 1304(a) currently mandates, except as otherwise provided, the marking of every article of foreign origin imported into the United States, while 19 U.S.C. § 1304(b) mandates the marking of containers unless exempted. Subsequent paragraphs of 19 U.S.C. § 1304 address the marking of certain products, additional duties for failure to mark, penalties, and other related provisions. Were additional requirements to be adopted to require the disclosure of country of origin information at online points of sale, amendment and supplementation of 19 U.S.C. § 1304 would be an appropriate mechanism to do so. Parallel changes to the CBP regulations could then be made in accordance with such an amendment to the statute.

With respect to how country of origin information should appear on a website, the FTC has issued a guide, ".com Disclosures," that provides a starting point for how to consider effectively disclosing information to online consumers.[188] Among the FTC's suggestions are the following practical guidelines, which are also applicable in the customs context:

- Necessary disclosures should not be relegated to "terms of use" and similar contractual agreements.
- Prominently display disclosures so they are noticeable to consumers, and evaluate the size, color, and graphic treatment of the disclosure in relation to other parts of the webpage.
- Review the entire ad to assess whether the disclosure is effective in light of other elements – text, graphics, hyperlinks, or sound – that might distract consumers' attention from the disclosure . . .

188. FED. TRADE COMM'N, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf.

- Display visual disclosures for a duration sufficient for consumers to notice, read, and understand them.[189]

The FTC also notes that advertisers should assume that a consumer does not read an entire website or online screen, and that having to scroll will increase the risk that a consumer will miss a disclosure.[190] Further, the FTC notes the importance of advertisers drawing attention to a disclosure so consumers do not miss such a statement.[191] Finally, the FTC guide also provides an appendix including visual examples of effective and ineffective online disclosures.[192] Such general principles relating to the effectiveness of the online disclosures are equally applicable to whether a consumer would be likely to notice country of origin customs information provided online.

The sufficiency of a physical country of origin marking for any given product is a highly fact-intensive question, and the sufficiency of an online country of origin disclosure in any particular instance, if such a requirement were enacted, would likely be no different. CBP currently addresses the sufficiency of physical marking requirements through issuing customs rulings in individual cases, and could extend that practice to rule on whether the form and content of particular country of origin disclosures made online appropriately conformed to any requirements that had been enacted.

iii. What is the current practice of online retailers with respect to disclosing country of origin on product webpages?

When determining whether the legal requirements for country of origin disclosures in e-commerce transactions must be amended, is it relevant to examine how country of origin information is currently transmitted to consumers? Research could certainly be conducted as to the current practices of online retailers to determine if they are, in fact, voluntarily disclosing the country of origin to consumers on product web pages. For example, the outdoor apparel company Patagonia has voluntarily committed to providing the country of origin for each product it sells through its printed and online catalogs.[193] While the company previously identified which articles were made in the United States and which were imported, in 2008 the company announced that these designations were updated to reflect each item's country of origin.[194]

189. *Id.* at iii.

190. *Id.* at 6.

191. *Id.*

192. *Id.* at A-2–A-26.

193. Patagonia, *Country of Origin Information Available Online*, THE FOOTPRINT CHRONICLES (Sept. 3, 2008), https://www.patagonia.com/blog/2008/09/country-of-orig/.

194. *Id.*

However, even if research concludes that this practice is currently occurring on a widespread basis, that would not change the fact that the current legal requirements for country of origin marking do not adequately meet the intended purposes of the law in the context of e-commerce transactions. Voluntary action does not rise to the level of a mandatory statutory and regulatory regime, and companies that choose to fully disclose product origin have no assurances their competitors will do the same if there is no risk of an enforcement action. Finally, as a practical matter, until Amazon either voluntarily discloses country of origin information for all products sold on its platform, or is required to do so, a sizeable portion of e-commerce within the U.S. will fail to disclose products' country of origin to consumers at the time of purchase.

iv. Additional regulatory burden

A proposal for any new country of origin regulations must consider whether they would pose an undue regulatory burden for product sellers. A review of the difficulties associated with the current marking requirements, compared with the additional actions that would be taken in the context of e-commerce transactions, suggests that it would not.

In its 1996 report, the ITC listed obstacles and difficulties cited by companies with respect to the country of origin marking requirements. The most applicable costs included:

- Technical or commercial difficulty of marking a product
- Administrative burdens and overhead costs associated with tracking imported goods that are commingled when producing finished products
- Uncertainty about the marking requirements
- Conflict between the various marking laws and regulations issued by Customs, NHTSA, FTC, the Food and Drug Administration, and other Government agencies
- Changing interpretations of what constitutes substantial transformation and where it occurs
- Lack of harmonization between U.S. and foreign regulations, and among various foreign regulations, especially differences in the applied definitions of substantial transformation
- Multiple foreign origin markings on products that may misinform and perhaps mislead consumers, and do not clarify that the processing and manufacture of the final product is performed in the United States
- A product with foreign content that can be sold in foreign markets (Mexico and Canada, for example) as "Made in the

> USA" but either cannot be sold domestically as "Made in the USA" or must be marked with a foreign origin
> - A disincentive to use North American content and an incentive to procure inputs on the basis of non-economic factors, in order to limit the marking burden and to avoid labeling that would mislead the consumer.[195]

The first of these—technical or commercial difficulty of marking a product—relates to the physical act of marking itself, and so cannot be considered as a cost of compliance for online origin disclosures. However, an analogous cost to be considered would be the cost associated with maintaining a website to include current and accurate country of origin information – likely a lesser cost than that for physical marking, but an additional cost to firms nonetheless.

Other obstacles listed above relate to the often-complex determination itself of the origin country; those obstacles would not vary were additional requirements to be placed on disclosing an item's country of origin at the online point of sale. For example, among the above-listed costs, some of these include changing interpretations of what constitutes substantial transformation; lack of harmonization between U.S. and foreign regulations as to how substantial transformation is defined; and the issue of products that can be sold in the foreign market as "Made in the USA" but cannot be sold within the U.S. as such. Determining the accurate country of origin and navigating conflicts between country of origin determination according to U.S. and foreign laws, as well as those between the regulations of CBP and other agencies, would remain largely unchanged by additional requirements for the disclosure of country of origin for products sold online. Updated requirements would merely require posting the country of origin online, after the appropriate country of origin had already been determined.

However, the concerns regarding costs of compliance that were noted in comments made during the aforementioned USDA rulemaking process are relevant here. Specifically, the administrative burden and overhead costs associated with tracking imported goods apply equally in the CBP regulatory context. Namely, costs could arise where a single online point of sale is offering a single type of good, but where different units of that good are being sourced from multiple locations. This issue could also arise where the e-commerce merchant is merely the seller of a particular product and is not the product manufacturer or currently responsible for marking the product itself. In that case, the e-commerce merchant would have to become familiar with any new regulations governing disclosures of country of origin information online and create a system to reflect online

195. Country-of-Origin Marking, *supra* note 94, at xiii–xiv.

the countries of origin of the products it sources, which could increase the costs to the e-commerce merchant. New regulations should not impose liability on an online seller who is not the product manufacturer for reporting product origin information that has been incorrectly determined by the manufacturer.

Other costs could increase in the short term but lessen over time as online merchants become more familiar with new online product origin disclosure requirements. These include, for example, uncertainty about the marking requirements, as well as administrative costs associated with updating websites to include new required online disclosure information.

The additional costs of complying with new regulations requiring online disclosure of country of origin information would therefore create some additional costs for e-commerce merchants. Those costs, however, would be incremental over the current costs of determining a product's country of origin and performing physical item marking. Further, it also seems likely that requiring the disclosure of a product's country of origin at an online point of sale would allow consumers to effectively exercise product origin preferences (a key purpose of country of origin requirements) without creating an unduly burdensome set of additional regulations for e-commerce merchants. However, additional information would be needed in order to precisely quantify the increased costs that would be associated with new regulatory requirements.

B. Alternatives and Areas for Further Research

i. Can consumers express their country of origin preferences through returns of items purchased in e-commerce transactions?

The argument that additional country of origin regulations are necessary in order to allow consumers to make informed purchasing decisions online presumes that such information must be provided before the time of purchase in order to affect purchasing decisions. However, an important question is whether consumers can exercise these preferences through an alternative mechanism. Could consumers adequately exercise such preferences by returning merchandise after they receive it and are able to inspect the physical country of origin marking? Is the third purpose of the marking statute as described above, namely, that information be provided to the consumer *at the time of purchase*, superfluous when product returns are possible?

Generally, there is a lack of data regarding whether and to what extent country of origin information has an impact on returns for products sold online. The median rate of merchandise returns in 2018 were estimated at

10% of total retail sales.[196] Return rates for online sales, however, are significantly higher, in some cases reaching 30%.[197] Reasons for returns most often cite factors quite different than insufficient information about the origin of the item (such as defective/poor item quality; bought wrong item; buyer's remorse; better price elsewhere).[198] The category of defective/poor item quantity alone represented 25% of all returns worldwide.[199]

This information may suggest that while country of origin information might affect a consumer's purchasing decision, it might not affect a consumer's decision in returning merchandise to the same degree. However, more research is needed to determine whether consumers are in fact more likely to base a purchasing decision on a product's country of origin than they are to make a decision to return an item for the same reason. Further research could also compare the behavior of online consumers to that of brick-and-mortar customers to see how often country of origin is a basis for a return.

ii. Potential alternative of distinguishing between domestic and imported goods and limiting new requirements to retail goods

An alternative requirement that online sellers indicate whether goods are of domestic origin or are imported, such as those currently required for wool and textile products under the FTC regulations, would fail to meet all the purposes of the country of origin marking statute. The customs marking requirements, while certainly designed in part to allow U.S. consumers to exercise a choice to purchase U.S.-made goods, also have the previously-discussed purpose of allowing consumers to exercise preferences for goods of *specific* foreign countries as opposed to other foreign countries. While a requirement that online sellers designate items as domestic or imported would address some of the issues created by the current gap between legal requirements and statutory purpose, it would not fully close that gap. It could, however, ease the burden of compliance discussed above in the case of sellers sourcing a single item from multiple foreign countries, by allowing sellers to merely identify a product as being imported rather than complying with any new requirement to identify the particular country of origin for a product.

196. Appriss Retail, *2018 Consumer Returns in the Retail Industry* 3 (2018), https://appriss.com/retail/wpcontent/uploads/sites/4/2018/12/AR3018_2018-Customer-Returns-in-the-Retail-Industry_Digital.pdf.

197. Courtney Reagan, *A $260 billion 'ticking time bomb': The costly business of retail returns*, CNBC (Dec. 16, 2016), https://www.cnbc.com/2016/12/16/a-260-billion-ticking-time-bomb-the-costly-business-of-retail-returns.html.

198. IHL Group, *Retailers and the Ghost Economy: The Haunting of Returns* 11 (2015), http://engage.dynamicaction.com/ws-2015-06-ihl-ghost-economy-haunting-of-returns-ar_lp.html.

199. *Id.*

Some manufacturers suggested in their responses to the 1996 ITC review that country of origin markings should only be required for goods put up for retail sale (i.e., consumer goods).[200] Such a rule in the context of e-commerce would provide information regarding country of origin to a large number of consumers. The policy decision with respect to country of origin marking requirements has already been made, however—country of origin information is pertinent to all ultimate purchasers, not just retail consumers, since the definition of an "ultimate purchaser" to whom a country of origin marking must be made available is not limited to a retail consumer only.[201] However, like an alternative domestic/imported designation, such a rule might alleviate some of the costs of an online seller identifying the origin of a single type of good sourced from multiple locations. Further research would be needed to determine how often this concern would arise, and to estimate the additional costs of compliance of any proposed e-commerce country of origin marking requirement.

iii. Would country of origin marking requirements for e-commerce transactions be effective?

While the research cited above has found that indication of country of origin does in fact affect consumer preferences when making purchasing decisions, additional research would be needed to determine specifically whether country of origin information disclosed at an online point of sale would have the same effect, and to what extent.

Given the greater amount of information about a product available on a product web page, as opposed to available upon inspection of a physical item, would an indication of country of origin on an online web page affect consumer preferences in the same way? Or would the country of origin information be lost in a page of text? The effect of a country of origin on consumer purchasing decisions could be examined by comparing the following: (1) items sold within containers bearing a greater amount of text; (2) items sold in containers bearing relatively less text, and (3) items sold marked with no other text besides the country of origin marking. Such an examination would require examining items that are as similar as possible in order to arrive at a meaningful comparison. Does less text overall lead to a greater effect on consumer preferences for country of origin? The results might be indicative of the usefulness of new country of origin disclosure requirements at an online point of sale.

The OECD has noted that consumers generally have more limited access to safety information and warnings online than in traditional retail

200. Country-of-Origin Marking, *supra* note 94, at xviii.
201. 19 C.F.R. § 134.1(d) (2018).

settings, "including in particular when consumers use mobile devices with small screens."[202] Would a country of origin disclosure be even less effective when consumers buy products using mobile devices? Again, more research on this point would be helpful in determining how effective country of origin disclosure requirements at online points of sale might be.

Further, requirements about disclosing a country of origin at the online point of sale could allow CBP greater visibility into a company's compliance with country of origin marking requirements without undue intrusion on the operations of that company, since the agency could review at least some aspects of compliance remotely (such as whether any country of origin information was being provided to consumers, and in what manner it was being provided). Other aspects of country of origin marking, such as whether goods were being marked with the correct country of origin, would still likely remain as difficult to monitor and enforce under an additional set of regulations mandating country of origin marking at online points of sale. It is therefore possible that such a new set of requirements concerning online points of sale would be effective in providing consumers with information due to the capability of CBP to more easily detect and enforce certain types of country of origin marking violations.

VII. CONCLUSION

Within the context of e-commerce transactions, a significant gap exists between the statutory purpose behind country of origin marking requirements for imported items and the current regulatory language of those requirements. When online consumers are unable to receive origin information about a product at the time of purchase, they are unable to incorporate such information into their purchasing decisions – and this is one of the key purposes of the country of origin marking requirements. There is substantial evidence that consumer preferences are in fact based in part on country of origin information, as these legal requirements contemplated. Further, e-commerce makes up a significant portion of American retail sales and a majority of Americans shop online, making this gap between intent and legal requirements an important one to address. This Article therefore recommends considering an amendment to 19 U.S.C. § 1304 and the associated CBP regulations to require disclosure of country of origin information at online points of sale, in addition to the physical marking of items currently required.

202. OECD, *supra* note 169, at 8.

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