COMMENTS

“MADE IN AMERICA”: A COMPARATIVE PERSPECTIVE ON COUNTRY OF ORIGIN LABELS FOR MANUFACTURED PRODUCTS IN THE UNITED STATES AND CANADA

I. INTRODUCTION

In the past twenty years the world has seen one of the largest economic changes in modern history: a drastic increase in commodity exports.¹ This change signifies the growth of global trade and demand for goods and merchandise.² Today, economies in developing countries compose more than half of the world’s gross domestic product.³ These countries’ sudden market and economic growth is partially due to the business practice of outsourcing.⁴ Outsourcing moves all or some of a business’s production operations to other parts

2. Id.
3. Id.
4. Throughout the past couple decades, the rise in emerging markets has caused global economic growth to span across the globe, encompassing developed and developing countries. G.A. Res. 65/168, ¶ 17, U.N. Doc A/RES/65/168 (Aug. 1, 2011).
6. Outsourcing is “[t]he contracting or subcontracting of noncore activities to free up cash, personnel, time, and facilities for activities in which a company holds a competitive advantage.” Outsourcing, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/out sourcing.html (last visited Nov. 22, 2014).
of the world.\textsuperscript{7} Outsourcing supports the basic economic theory that lower production costs may result in lower purchasing prices for consumers.\textsuperscript{8} The global nature of today’s economy generates a complex legal issue for businesses in determining the origin of a good or commodity.\textsuperscript{9} This issue is further complicated by differing legal jurisdictions.\textsuperscript{10}

A country of origin is “the country in which a product is wholly obtained or produced, or the country where an article is substantially transformed into another product.”\textsuperscript{11} Outsourcing different stages of production, like manufacturing and assembly, makes it difficult to determine where the final product is actually produced according to law.\textsuperscript{12} Many final products contain intermediate goods\textsuperscript{13} that were made or assembled in different countries.\textsuperscript{14} Consequently, businesses must look to their jurisdiction’s labeling laws, standards, and requirements to determine the product’s appropriate country of origin.\textsuperscript{15} For example, a business may sell a television that incorporates a screen from one country, contains wiring from another, and uses audio components assembled in yet another. In order for the

\textsuperscript{7} Dixon, \textit{supra} note 5.

\textsuperscript{8} See Todd E. Clark, \textit{Do Producer Prices Lead Consumer Prices?}, KAN. CITY FED. RES. 25, 25 (1995), \url{http://testing.kansascityfed.org/PUBLICAT/ECONREV/pdf/3q95clar.pdf} (suggesting that higher production costs leads to an increases consumer prices).


\textsuperscript{11} Wong, \textit{supra} note 9, at 62.

\textsuperscript{12} See \textit{id}.

\textsuperscript{13} Intermediate goods are the materials and inputs that are imported by manufacturers that go into their final products for consumption. Shimelse Ali & Uri Dadush, \textit{Trade in Intermediates and Economies}, VOX (Feb. 9, 2011), \url{http://www.voxeu.org/article/rise-trade-intermediates-policy-implications}. The lowering of trade barriers, the accelerated increase in communication technology, and new organizational innovations have all contributed to the ease of splitting up the production process to the cheapest and most efficiently possible country. \textit{Id}.

\textsuperscript{14} \textit{Id}.

\textsuperscript{15} See Wong, \textit{supra} note 9, at 71.
business to attach a country of origin label, it would have to comply with their jurisdictions specific product origin regulations.  

Country of origin laws and regulations are widespread and vary greatly depending on where a product is sold. Jurisdictions throughout the United States have contrasting laws that business must follow to avoid liability. Harships and additional costs arise and persist when national manufacturers and distributors are required to adhere to varying laws within the same country. Further, forfeiting the full opportunity to acquire the most accurate knowledge of a product’s origin ultimately harms consumers. This article examines the faults and shortcomings in United States’ country of origin labeling laws and argues for the adoption of a model similar to Canada’s. Part II of this article provides general background information on the different types of country of origin labels and discusses the importance of these labels as it relates to the effect they have on a consumer perception of a product. Part III analyzes California’s country of origin statute and examines how one particular court interpreted it. Part IV examines how the Federal Trade Commission regulates origin labels with an “all or virtually all” standard. Part V offers information about the two different criteria Canada uses to control its origin claims. Part VI highlights the flaws of the U.S. system that arise from its lack of uniformity and

16. Id.

17. See infra Parts III-V (discussing the different standards in California, Canada, and the standards the Federal Trade Commission set). Different governmental agencies, states, and countries throughout the world set various country of origin labeling standards. See id. In turn, businesses that attach origin labels to their products must be conscious about where their products are sold, as the location will dictate the applicable legal standard. See infra Parts III-IV (discussing the various origin laws in the United States).

18. See Wong, supra note 9, at 71.


20. Randal Shaheen, Amy Ralph Mudge, & George Langendorf, Made in the U.S.A., Except in California, 28 Advertising Compliance Service 4 (July 7, 2008) [hereinafter Made in the U.S.A., Except in California].

21. See infra Part VII.
disconnect from consumer perception and the federal standards specific downfall. Finally, Part VII proposes the United States adopt a country of origin model similar to Canada’s. It further offers analysis to particular problems that arise when determining whether or not a product conforms to country of origin laws.

This article does not address United States Customs Service’s mandatory origin labeling requirements, which primarily oversee foreign origin markings. The U.S. Customs Service requires country of origin markings on all imports into the United States to assist in statistical categorization. This article discusses the requirements and laws that seek to prevent consumer deception due to misleading labels.

II. COUNTRY OF ORIGIN LABELS

A country of origin label specifies where a product is made and gives consumers information about the product, such as its quality.

22. 19 C.F.R. § 134 (West 2014). The United States Customs Services is traditionally charged with the duty of overseeing and controlling import and export activities in the United States. Trang Nguyen, Changes to the Role of US Customs and Border Protection and the Impact of the 100% Container Scanning Law, 6 WORLD CUSTOMS J. 109, 109 (2012). With the drastic increase in international trade, U.S. Customs is charged with the important task of facilitating this trade. Id. However, the scope of their duties is expanding as they now act in the capacity of securing national security through imports in the United States. Id. at 110-11.

23. Publisher’s Editorial Staff, Corporate Counsel’s International Advisor, Labeling Requirements-Imports, 278 CORP. COUNS. INT’L ADVISOR ARTICLE I (July 1, 2008).


26. The legal standards discussed within this article focus on the laws in the United States and Canada that are enforced to protect consumers from deceptive business practices in marketing and advertising. See infra Parts III-V.


28. Jayson L. Lusk, Jason Brown, Tyler Mark, Idlir Proseku, Rachel Thompson, & Jody Welsh, Consumer Behavior, Public Policy, and Country-of-
Although other factors such as warranty, brand reputation, and value are often considered significant in consumers’ purchasing decisions, country of origin indications may be the most decisive aspect of the product’s characteristics.  

Country of origin labels induce “consumer ethnocentrism,” which promotes the purchase of domestic-made goods and gives individuals “a sense of identity . . . [and] feelings of belongingness.” Consumers within the United States, in particular, place an added value on products that are domestically manufactured.

Origin Labeling, 28 REV. OF AGRIC. ECON. 284, 285 (2006) [hereinafter Lusk et al.]. Furthermore, researchers have concluded that perceptions of quality signified by country of origin labels are due in part to consumers’ prior conceptions of that country’s image, and in certain cases, the level of economic development. See Martin S. Roth & Jean B. Romeo, Matching Product Category and Country Image Perceptions: A Framework for Managing Country-Of-Origin Effects, 23 J. INT’L BUS. STUD. 477 (1992). Additionally, perceptions such as manufacturing experience through decades of production, “quality of raw material[s]” within a country, and “the level of internal competition” significantly influence the perception of quality a consumer will attach to a product made in a particular country. See Harrychand D. Kalicharan, The Effect and Influence of Country-Of-Origin on Consumers’ Perception of Product Quality and Purchasing Intentions, 13 INT’L BUS. & ECON. RES. J. 897, 898 (2014) (citing M.V. Thakor & Lea Prevel Katsanis, A Model of Brand and Country Effects on Quality Dimensions: Issues and Implications, 9 J. INT’L CONSUMER MARKETING 79 (1997)). Thus, it is vital that manufacturers understand the parameters that consumers use when evaluating the quality of goods if they are to include a country of origin label on their product. Kalicharan, supra, at 900.


30. See Terence A. Shimp & Subhash Sharma, Consumer Ethnocentrism: Construction and Validation of the CETSCALE, 24 J. MARKETING RES. 280 (1987). [hereinafter Shimp & Sharma]. The term “consumer ethnocentrism” was coined over one hundred years ago and refers to the “beliefs held by . . . [ethnocentric] consumers about the appropriateness, indeed morality, of purchasing foreign-made products.” Id. Conversely, nonethnocentric consumers assess foreign-made goods based on their tangible characteristics. Id.


32. Shimp & Sharma, supra note 30.
Based on a study conducted by The Boston Consulting Group, U.S. consumers are willing to purchase American-made products even with cheaper alternatives readily available. This is due in part to perceptions pertaining to the high quality of American-made products, patriotism, and the aspiration to save domestic jobs. Further, older Americans tend to value a product’s origin even more than younger Americans. Consequently, based on consumer preference, there is an incentive for some domestic manufacturers to maintain their operations within the United States.

Consumer expectations and opinions about the appropriate amount of domestic content sufficient to label a product American-made vary in the United States. These opinions differ even further when applied to particular products or industries. Consumer surveys suggest U.S. consumers scrutinize country of origin labels when they are attached to vehicles, apparel products, and electronic


35. See BOSTON CONSULTING GROUP, supra note 33; see also Kate Manfred, Harold Sirkin, & Michael Zinser, That “Made in USA” Label May Be Worth More Than You Think, LUXURY DAILY (Jan. 30, 2013), http://www.luxurydaily.com/that-made-in-usa-label-may-be-worth-more-than-you-think/; Jones, supra note 34.

36. USITC, supra note 29. Younger Americans may be habituated in buying products that are produced around the world and the increasing enactment of free trade agreements may decrease the pressure to buy domestically. Jones, supra note 34.


39. USITC, supra note 29, at 5-14.
commodities. Conversely, consumers neglect the labels for commodities such as footwear, toys, and furniture. Additionally, the various types of origin labels that carry indications relating to the exact content contained within products likely also affect consumers’ expectations of what the product contains.

A. Qualified and Unqualified Origin Claims

Products can have two types of origin labels attached to them: qualified and unqualified. A qualified origin claim is used for products manufactured using parts from multiple countries. Qualified claims cover a wide range of language on product labels that express in more detail the country of origin for specific parts within the final product. For example, manufacturers may include the foreign content percentage or the assembly process’s location, such as: “Assembled in America with 20% Foreign Content.” In some instances, qualified claims are attractive to consumers because the claims provide that a part was made in a particular country known for manufacturing high-quality products or subcomponents. This signifies a comparative advantage for a country with a reputable industry, such as French wine or Japanese cars. Qualified claims are appealing to manufacturers as they further promote the quality of their final

40. Id.
41. Id.
43. Id.
44. Id.
45. Id.
46. “A country’s comparative advantage is the compilation of the inherent qualities that make it better will increase[,] its competitiveness in the global marketplace.” Kimberly Amadeo, Comparative Advantage, ABOUT NEWS, http://useconomy.about.com/od/glossary/g/comp_adv.htm (last visited Nov. 20, 2014). The “large land mass, accessible oil, and diverse population” gave the U.S. its comparative advantage, and thus, “the United States became a global leader in financial services, aerospace, defense equipment and technology.” Id.
47. Lusk et al., supra note 28, at 285.
product and gives them a competitive advantage over rivals in that industry. However, when the manufacturer recognizes the value consumers place on goods produced exclusively in one country, such as the United States, a qualified claim may not yield as much benefit as an unqualified claim.

Unqualified origin claims convey representations that a product was wholly or entirely produced within one country. Examples of this are “Made in America” or “Produced in America.” Different legal jurisdictions use more stringent criteria to determine if an unqualified claim is accurate. The added value that consumers attach to unqualified claims incentivizes manufacturers to adhere to the criteria required under the prohibition of false and deceptive business practices, making a product more marketable.

B. The Manufacturer's Dissemination of Information

Manufacturers must provide product information to consumers to facilitate the aim of consumer markets. There exists a direct incentive to supply information about the characteristics of a product, like the country of origin, because it dwindles consumers’ “cost of

49. See id.; see also USITC, supra note 29.
52. See Laurenza, supra note 42.
53. See id.; see also infra Part III.-IV.
54. BOSTON CONSULTING GROUP, supra note 33.
55. See Shimp & Sharma, supra note 30.
making the product more desirable. However, the drive of manufacturers to disseminate this information stems from the desire to sell their goods and may encourage them to convey untruthful information. Therefore, there must be suitable legal means to discourage the disclosure of untruthful material. The potential for false information calls for scrutiny on the reliance of such statements and puts consumer welfare into the hands of the law and the law’s aim of “filling the equality gap between suppliers and consumers.” Consequently, the federal and state laws that regulate false representations, like country of origin, will help regulate consumers’ prosperity.

III. CALIFORNIA’S APPROACH TO COUNTRY OF ORIGIN LABELING AND ADVERTISING AND THE KWIKSET DECISION

California’s unfair competition law, codified in the Business and Professional Code section 17200, seeks to protect the general public as well as competitors from unfair competition and business practices by “promoting fair competition in markets for goods and services.”


58. POSNER, supra note 56, at 4.

59. Id. at 4-5.

60. Id.

61. Id. at 4.

62. TÀNG THÀNH TRAI LÊ, PROTECTING CONSUMER RIGHTS 3 (1987) [hereinafter LÊ].

63. See id.

64. CAL. BUS. & PROF. CODE § 17200 (West 1992).

65. Daniel J. Mogen, California Unfair Competition Law Business and Professions Code Section 17200 in 2 CALIFORNIA ANTI-TRUST & UNFAIR COMPETITION LAW § 13.01 (3d. ed. 2003); In re Morpheus Lights, Inc., 228 B.R. 449, 456 (Bankr. N.D. Cal. 1998). On the other hand, the common law tort of unfair competition deals exclusively with injury by a competitor or business adversary and
The law encompasses “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising,” 66 and is “broadly interpreted to bar all ongoing wrongful business activity in any context in which it appears.” 67

California has enacted a distinct statute covering deceptive advertising 68 and U.S. country of origin labels. 69 Specifically, California Business and Profession Code section 17533.5 (“California’s Origin Law”) makes it unlawful to attach a U.S. country of origin label to a product “when the merchandise or any article, unit, or part thereof, has been entirely or substantially made, manufactured, or produced outside of the United States.” 70 California sets forth extremely strict requirements that manufacturers must follow if they include a representation that their products were made within the United States. 71 Effectively, to abide by California law, a product with a U.S. country of origin label cannot include any subcomponent in the final product that was produced or assembled outside of the United States. 72 California’s requirements are far stricter than the Federal Trade Commission’s policy. 73 The California Court in Benson v. Kwikset 74 upheld California’s strict standard and declined requires the injured party to show competitive injury. Nationwide Mutual Insurance Company v. Dynasty Solar, Inc., 753 F. Supp. 853, 855 (N.D. Cal. 1990).

66. § 17200.


69. CAL. BUS. & PROF. CODE § 17533.7 (West 1961).

70. Id.


interpreting California’s statute in a way that would parallel other origin regulations in the United States.\(^7^5\)

The Kwikset Company produces locksets including, but not limited to, deadlocks, doorknob sets, and door lever sets.\(^7^6\) Between 1996 and 2000, Kwikset attached country of origin labels to these products to represent where the products were made.\(^7^7\) The labels read “Made in America,” or made parallel indications that their products were produced in the United States.\(^7^8\) However, some of these products contained screws and pins that were manufactured in Taiwan and a latch assembly that was sub-assembled in Mexico.\(^7^9\)

On Defendant’s appeal of the constitutionality and applicability of California’s Origin Law,\(^8^0\) the majority of the appellate court looked to the legislative intent and plain meaning to interpret California’s Origin Law and found that the statute refers directly to distinct units or components used in the final product “that is necessary for its proper use or operation.”\(^8^1\) The court found that because the screws and pins were distinct components, integral to the final product, necessary to the proper use and operation of the lockset, and made abroad, the “Made in America” label attached to the product violated California’s Origin Law.\(^8^2\)

Justice Stills, in his dissenting opinion, argued that the statute should be interpreted in light of “reason and common sense” and the statute’s literal meaning should be ignored to avoid absurd results.\(^8^3\) In doing so, he proclaimed that if the merchandise as a whole were substantially made in the United States, the product could carry the “Made in America” label.\(^8^4\) He reasoned that the legislature did not attempt to prohibit a domestic origin claim for products with

\(^7^5\). \textit{Id.} at 298.
\(^7^6\). \textit{Id.} at 291.
\(^7^7\). \textit{Id.}
\(^7^8\). \textit{Id.}
\(^7^9\). \textit{Id.}
\(^8^0\). Benson v. Kwikset, 62 Cal. Rptr. 3d 284, 289 (2007).
\(^8^1\). \textit{Id.} at 297.
\(^8^2\). \textit{Id.} at 298.
\(^8^3\). \textit{Id.} at 307 (Stills, P. J., dissenting).
\(^8^4\). \textit{Id.}
insignificant foreign input, but rather meant to prohibit a product’s substance.\(^85\)

Still, the majority recognized the adverse effects California’s Origin Law would have on business, in light of the trend towards industries outsourcing operations to stay competitive, but noted it is not the court’s duty to rewrite statutes, only to “interpret the laws in accordance with the expressed intention of the Legislature.”\(^86\) Furthermore, the majority noted two unsuccessful attempts to amend the statute, showing that the legislature knew the effects of California’s Origin Law, yet declined to narrow its scope.\(^87\)

On February 17, 2011, California Assemblyman Brian Jones introduced a bill that would harmonize California’s Origin Law with the Federal Trade Commission’s policy.\(^88\) Groups such as the Made in USA Foundation and Made in USA Brand Certification Program endorsed the bill, but in June of 2011, the bill failed 3-2 and California’s Origin Law stayed unchanged.\(^89\)

Flashlight manufacturer Mag. Instruments (“Maglight”) was also an immense supporter of the bill.\(^90\) Maglight designs, manufactures, and assembles flashlights in California in an attempt to support American business.\(^91\) But, the company’s founder indicated that a single non-domestic O-ring contained within the flashlights they produce prohibits the company from attaching any domestic origin label on the flashlights sold in California.\(^92\) Maglight is therefore

\(^85\). Id.
\(^87\). Kwikset, 62 Cal. Rptr. 3d at 298.
\(^91\). Id.
\(^92\). Id.
disadvantaged in the market because their competitors, who outsource the majority or all of operations, can sell their products at a cheaper price. Maglight highlights one problem California’s Origin Law creates: it could force producers located in the United States to further outsource subcomponents and operations since the California standard is impractical to follow for some manufacturers. More will be discussed in the following sections regarding the issues and downfalls that arise as a result of the California standard.

IV. THE FEDERAL TRADE COMMISSION AND THE “ALL OR VIRTUALLY ALL” STANDARD

At yet another level of protection, the Federal Trade Commission (“FTC”) protects consumers against “unfair or deceptive acts or practices” that businesses may undertake while advertising their goods. Pursuant to authority under the Federal Trade Commission Act of 1914 (FTC Act), specifically section 5, the FTC has

93. Id.
94. See infra Part VI.A.
95. President Wilson recommended that Congress institute a trade commission in 1914, and the FTC was then formed to “aid . . . the enforcement of the Sherman law and to aid the business public as well.” JERROLD G. VAN CISE, WILLIAM T. LIFLAND & LAURENCE T. SORKIN, UNDERSTANDING THE ANTITRUST LAWS 22-23 (Practicing L. Inst. 9th ed. 1986) (citing S REP. NO. 597, 63d Cong., 2d Sess. 7 (1914)).
97. Id. The FTC regulates the enactment of legislation that encompasses interstate and foreign commerce. JOHN MAYNARD HARLAN & LEWIS W. MCCANDLESS, FEDERAL TRADE COMMISSION 3 (Callaghan & Co. 1916). Furthermore, the FTC “[is] empowered to prevent those forms of false advertising that had an impact on competition.” GEORGE J. ALEXANDER, HONESTY AND COMPETITION 2 (Syracuse University Press 1st ed. 1967). Prior to 1938 the purpose of the FTC Act was to give the FTC an expansive power to regulate anticompetitive behavior among competitors within industries. Lé, supra note 62, at 13. Congress then amended the Act in 1938 to offer more protection to consumers themselves and gave the FTC the authority to regulate business actions that are unfair or deceptive toward the general public. Id. at 14.
99. § 45.
regulated country of origin claims for over seven decades.\footnote{100} Generally, to establish a cause of action under the FTC Act, it must be shown that: “(1) there was a representation; (2) the representation was likely to mislead customers acting reasonably under the circumstances; and (3) the representation was material.”\footnote{101} In 1994, Congress amended section 5 of the FTC Act to specifically address manufacturers who attach “Made in the U.S.A.” or “Made in America” labels to products “to represent that such product was in whole or substantial part of domestic origin.”\footnote{102} The FTC issued guidelines\footnote{104} that provide manufacturers with information on how the FTC will enforce and implement origin standards through their authority under section 5.\footnote{105} Furthermore, the guidelines expound the principles laid out in previous origin cases and clarify how the law will be enforced.\footnote{106}

In the mid 1990’s two complaints alleging violations of the FTC Act were issued against New Balance\footnote{107} and Hyde Athletic\footnote{108} for attaching deceptive origin labels to their products.\footnote{109} Following these complaints, the FTC undertook an exhaustive review of its country of origin policy to determine if the standard paralleled consumer perceptions within the context of growing state global interdependence.\footnote{110} After assessing comments from the public,\footnote{111} the

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100. See Vulcan Lamp Works, Inc., 32 F.T.C. 7 (1940).
103. Id.
104. The guidelines are “administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements.” 16 C.F.R. § 1.5 (West 1967).
105. FTC Enforcement Policy, supra note 51.
106. Compare supra note 101, with supra note 105 (discussing how the FTC will evaluate an origin claim and how the FTC establishes a claim under the Federal Trade Commission Act).
110. Shaheen et al., supra note 19, at 5.
\end{flushright}
FTC proposed new guidelines that required products containing unqualified U.S. origin claims to be “substantially all made in the United States.”\(^1\)\(^2\) The proposal contained two “safe harbors”\(^3\) that, if followed, would allow a product to have an unqualified origin claim without risk that the FTC would challenge the claim’s falsity.\(^4\) The first safe harbor provided that if seventy-five percent of the manufacturing costs and the last “substantial transformation”\(^5\) of a product occurred domestically, the claim would not be considered misleading.\(^6\) The second provides that if the product’s last “substantial transformation took place in the United States, and the last substantial transformation of each of its significant inputs took place in the United States,” the label would also not be considered misleading.\(^7\) The proposal, through these two safe harbors, sought to provide certainty to manufacturers who attach country of origin labels to their products.\(^8\)

After its exhaustive review, the FTC decided to keep the old standard, which limited unqualified country of origin claims to products “all or virtually all”\(^9\) produced domestically.\(^10\) The retention of the “all or virtually all” standard was partly due to a wide-range of comments submitted to the FTC by consumer groups, industries, and government agencies regarding their concerns and

\(^{112}\). Request, supra note 38, at 25020.
\(^{113}\). A safe harbor is a “[p]rovision in an agreement, law, or regulation that affords protection from liability or penalty under specified circumstances or if certain conditions are met.” Safe Harbor, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/safe-harbor.html (last visited Nov. 12, 2014).
\(^{114}\). Request, supra note 38, at 25020.
\(^{115}\). The Federal Trade Commission defines a “substantial transformation” as the “manufacturing or other process that results in a new and different article of commerce, having a new name, character and use that is different from that which existed prior to the processing.” FTC Enforcement Policy, supra note 51.
\(^{116}\). Request, supra note 38, at 25020.
\(^{117}\). Id.
\(^{118}\). Request, supra note 38, at 25040. The FTC would not challenge origin claims if one of the two proposed safe harbors were met. Id. at 25041.
\(^{119}\). See infra Part IV, for a discussion of the “all or virtually all” standard.
\(^{120}\). See Made in USA Claims, supra note 111, at 63758.
opposition to the proposed changes. However, a Congressional Resolution that sought to abandon the proposed guidelines had the most influence on the FTC’s decision.

The FTC currently evaluates domestic origin claims based on an “all or virtually all” produced standard. Unlike the two safe harbors in the proposed guidelines, the FTC’s current standard has no “bright line test” to ascertain if a specific amount of foreign content in a product is ample enough to invalidate a U.S. origin label. Under this “all or virtually all” standard, the final product should only include a de minimis or negligible amount of foreign content.

To determine a product’s country of origin, the FTC will look to a variety of factors and analyze each label on a case-by-case basis. First the FTC will look at the final assembly location, and then it will examine other factors, such as the percentage of foreign and domestic content and the remoteness of the foreign content. The FTC places great importance on a product’s final assembly location because

121. Id. One commentator stated that the “concept of ‘Made in the USA’ has been specific and definite for the last 50 years . . . [and that the FTC should] leave it as it is.” Id. Another stated that they “are opposed to any change that would increase the percentage of foreign labor or materials in those goods or products bearing the ‘Made in the USA’ label.” Id.

122. See H.R. Con. Res. 80, 105th Cong. (1997) (A resolution supported by 226 members of the house for the FTC to retain the “all or virtually all” standard.).

123. Bruce Ingersoll, FTC Reverses Its Plan to Relax Policy Governing Some ‘Made in USA’ Labels, WALL ST. J. A6 (Dec. 2, 1997). A combination of consumer groups, labor unions, and manufactures lobbied congress to oppose the proposed changes, resulting in a resolution signed by two hundred and twenty-six members of the House urging the FTC to retain the “all or virtually all” standard. Id.

124. FTC Enforcement Policy, supra note 51.


126. FTC Enforcement Policy, supra note 51.

127. “De minimis” denotes something that is of small importance and that is so small or trivial that the law will not consider it. De Minimis, USLEGAL.COM, http://definitions.uslegal.com/d/de-minimis/ (last visited Nov. 24, 2014).

128. Made in USA Claims, supra note 111, at 63765.

129. FTC Enforcement Policy, supra note 51.

130. Id.
consumers attach major significance to the last country where a product was formed or changed into a new product. The FTC also considers the percentage of manufacturing costs incurred within the United States. If a high amount of the costs were incurred within the United States, there is less chance that a U.S. origin label will deceive the ultimate consumer. Lastly, the FTC examines a product’s remoteness of foreign content in connection with the other two factors just mentioned. Specifically, the FTC examines “how far removed from the finished product the foreign content is.” Nevertheless, the FTC will always require that the product’s last substantial transformation occurred in the United States for it to have a valid U.S. country of origin label, regardless of whether the foregoing factors tend to indicate that the product was produced in the United States.

V. THE CANADIAN APPROACH

Similar to the FTC’s role in the United States, Canada’s Competition Bureau (“CB”) facilitates consumer knowledge and encourages competitive markets through the regulation of origin

131. Id.
132. Id.
133. Id. The business expenditures to be included into calculating the total percentage of foreign and domestic manufacturing costs are also at issue; this article discusses a possible solution to this question by including within this calculation the direct costs associated with accounting principles. See infra Part VII.B.
134. FTC Enforcement Policy, supra note 51.
135. Id. Consumers will view “foreign materials or components [as] ‘less significant’ . . . when they appear in complex products or are far removed from the finished article.” Lara A. Austrins, A Trap for the Unwary: Use of the “Made in U.S.A.” Mark, CLARK HILL (Nov. 4, 2014), http://www.clarkhill.com/alerts/a-trap-for-the-unwary-use-of-the-made-in-u-s-a-mark. The degree of remoteness of the foreign content poses another area of consideration that must be defined to give marketers the advantage of being able to predetermine, to the best of their ability, if the product will conform to the “all or virtually all” standard. See infra Part VII.C.
136. FTC Enforcement Policy, supra note 51. Requiring that the last substantial transformation occur in the United States stems from consumer perception, gathered by the FTC from the public both before and after the proposed guidelines were release. Id.
137. See generally Canada’s Enforcement Policy, supra note 27, at 1-6.
It is primarily charged with administering and enforcing provisions requiring that products “bear accurate and meaningful label information” under the Competition Act and The Consumer Packaging and Labeling Act. These acts provide enforcement guidelines regarding “Made in Canada” and “Product of Canada” labels and strive to give predictability to businesses and ensure a guarantee that labels are not deceptive or misleading. The CB issues specific criteria companies must meet to attach “Product of Canada” and “Made in Canada” origin labels, which creates a distinction between the two under the guidelines.

Labels that do not use the exact “Made in Canada” or “Product of Canada” language are still evaluated according to the guidelines issued by the CB pursuant to the Acts noted above. A label may invoke a similar meaning that is in line with a “Made in Canada” or “Product of Canada” by using a particular group of words, visual images or illustrations, or a certain layout label. In these situations, the CB will invoke a “general impression test,” where it assesses the literal meaning of the language on the label or the impression the

138. Id.
139. Id. at 1.2.2.
140. The Competition Act, R.S.C, 1985, c. C-34 (Can.).
141. The Packing and Labeling Act, R.S.C, 1985, c. C-38 (Can.).
142. Canada’s Enforcement Policy, supra note 27, at 1-6.
143. Id. at 1.
144. See id.
146. Id.
147. Canada’s Enforcement Policy, supra note 27, at 3.1.1. The Supreme Court of Canada has held that the general impression test “must be applied from a perspective similar to that of ‘ordinary hurried purchasers’... [and that they]... must not conduct their analysis from the perspective of a careful and diligent consumer.” Richard v. Time, [2012] S.C.R. 8, ¶ 67 (Can.). This standard invokes a low threshold in determining whether or not the advertising is considered misleading. Imran Ahmad & Chris Hersh, Supreme Court of Canada’s Impression of Misleading Advertising “General Impression” Test, CASSELS BROCK LAWYERS (Feb. 29, 2012), http://www.casselsbrock.com/CBNewsletter/Supreme_Court_of_Canada’s_Impression_of_Misleading_Advertising__General_Impression__Test.
label’s representation conveys. 148 Initially, the CB will determine if a product’s label leaves the impression that the product is made in Canada or is a product of Canada. 149 If so, the good is subjected to the criteria of the label the representation parallels, and is treated as if it bore that label. 150

Alternatively, products that use a “Product of Canada” label must adhere to two conditions to comply with accurate and truthful labeling standards: 151 (1) the product was last substantially transformed 152 in Canada; and (2) the product’s production cost was “all or virtually all” incurred in Canada. 153 On the other hand, products that use a “Made in Canada” label must adhere to three conditions to comply with the standards: (1) the product’s last substantial transformation occurred in Canada; (2) fifty-one percent of the product’s total manufacturing cost was incurred in Canada; and (3) the product includes a suitable qualifying statement. 154

The creation of a distinction between the two labels is a departure from the previous legal standards the CB enforced. 155 Prior to the adoption of the current guidelines in December 2009, and their implementation in July 2010, 156 products that bore the label “Made in Canada” were merely required to meet a fifty-one percent threshold of Canadian content and no other precise phrase was explicitly

148. Canada’s Enforcement Policy, supra note 27, at 3.1.1. A Canadian flag or the expression “Proudly Canadian” are examples where the CB would likely use the “general impression test.”

149. Id.

150. Id.

151. Id. at 3.2.1.

152. “Substantially transformed” is defined by the Bureau as the process in which a good undertakes a significant change in “form, appearance or nature that the good existing after the change are new and different goods from those existing before the change.” Id. at 2.4.

153. Id. at 3.2.1. The CB notes that it will consider no less than ninety-eight percent of costs as “all or virtually all.” Id.

154. Id. at 3.2.2.


The new governing standards are a drastic change, as now this claim requires an accompanying qualification indicating the product’s precise amount of foreign content or the location of specific manufacturing processes. However, manufacturers may find it harder to determine if their products meet the “all or virtually all” standard because of its ambiguity. Additionally, businesses in Canada are required to alter their current labels and packaging to add a qualifying statement. Despite the consequences, the new guidelines raise the standard of a label’s accuracy by requiring qualifying statements, and prevent businesses from conveying false or misleading representations to consumers, furthering the CB’s goal.

VI. A FLAWED AMERICAN SYSTEM

Currently, the United States’ country of origin laws fail to achieve the objectives that they seek to attain—consumers are not provided with the critical information they may desire when faced with the option of buying a product from one manufacturer or another. Three suggestions are presented here to fix this issue. First, the United States must unify origin standards for the benefit of both the consumer and manufacturer. Next, the FTC must conduct a new survey to determine consumer perception of American-made products.

157. See id.
158. See Flavell, supra note 155. “Indeed, forcing Canadian manufacturers to highlight any degree of foreign inputs is a radical change.” Id.
159. See id.
161. See Canada’s Enforcement Policy, supra note 27, at 1.1.
162. See Matthew Bales, Jr., Implications and Effects of the FTC’s Decision to Retain the “All or Virtually All” Standard, 30 U. MIAMI INTER-AM. L. REV. 727, 742-44 (1999) (discussing the downfalls of the FTC’s “all or virtually all” standard); see also Shaheen et al., supra note 19, at 4-5 (discussing how differing standards in the United States negatively impacts consumers’ purchasing decisions).
163. Shaheen et al., supra note 19, at 4-5.
165. Bales, supra note 162, at 742-44.
Finally, the current “all or virtually all” standard must be transformed to avoid unnecessary drawbacks that are created from this standard.\textsuperscript{166}

\textbf{A. The Need for Uniformity Across the United States}

The United States lacks a uniform country of origin law, which results in different jurisdictions having varying levels of enforcement standards.\textsuperscript{167} Compared to the FTC, California’s standard requires a higher domestic content threshold to substantiate a U.S. origin label.\textsuperscript{168} While California law prohibits attaching a label to a product that contains any foreign component,\textsuperscript{169} the FTC allows such a claim if the product contains only a small amount of foreign content integrated into it.\textsuperscript{170} The differing standards within the United States, like California’s, presents problems affecting business costs, consumers’ ability to make informed purchasing decisions, and the domestic unemployment rate.\textsuperscript{171}

First, California’s standard may force a manufacturer to forgo a “Made in America” label entirely.\textsuperscript{172} Manufacturers with products containing minimal foreign input will inevitably have to omit a U.S. origin label when selling their products nationwide, even though their label conforms to FTC standards.\textsuperscript{173} Alternatively, if they decide to keep the origin label because it will increase profits based on consumer preference for American-made products,\textsuperscript{174} the manufacturer must make additional expenditures to print different

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{166} \textit{Id.}
  \item \textsuperscript{167} See Made in the U.S.A., Except in California, supra note 20; see also supra Parts III-IV.
  \item \textsuperscript{169} Shaheen et al., supra note 19, at 4.
  \item \textsuperscript{170} Made in USA Claims, supra note 111, at 63765.
  \item \textsuperscript{171} See Shaheen et al., supra note 19, at 4-5.
  \item \textsuperscript{172} Id.
  \item \textsuperscript{173} Id.
  \item \textsuperscript{174} Jones, supra note 34. Research shows that Americans prefer to purchase domestic-made products over imported ones to support the American job market and economy. \textit{Id.}
\end{itemize}
\end{footnotesize}
labels for the same product to comply with each state’s standard.\footnote{Made in the U.S.A.,\ Except in California, supra note 20, at 10.} This choice creates drawbacks for consumers, as the increased production cost of the product will likely be passed down to the consumer,\footnote{“Economic reasoning suggests that the chain of production should link movements in producer prices to subsequent movements in consumer prices, so that changes in producer prices will lead changes in consumer prices.” Clark, supra note 8, at 25.} reflected in the final purchase price of the product.\footnote{Made in the U.S.A.,\ Except in California, supra note 20, at 10.}

Second, a strict standard, such as California’s, will effectively decrease consumer knowledge and prevent consumers from making educated purchasing decisions.\footnote{Id. at 6-7.} Manufacturers who fabricate products with large amounts of domestic input, but whose products still contain minimal foreign content, cannot use an unqualified origin claim and may be inclined to increase the amount of foreign content due to its cheaper price.\footnote{See id. at 6.} Consequently, manufactures will divest consumers of origin information all together, resulting in the inability to differentiate between products containing varying quantities of U.S. content.\footnote{See id.} A more lenient standard affords consumers, who value U.S. products, the ability to distinguish between products with a high amount of U.S. substance and those without.\footnote{See FTC Enforcement Policy, supra note 51.}

Lastly, California’s standard may be untenable to manufacturers and may act as a disincentive for them to keep their production processes domestic because foreign production is cheaper.\footnote{See Shaheen et al., supra note 19, at 4-5.} Moving business operations overseas directly and negatively impacts the U.S. job market.\footnote{Josh Fredman, Questions about Outsourcing and Unemployment, THE HOUSTON CHRONICLE, http://work.chron.com/questions-outsourcing-unemployment-4514.html (last visited May 3, 2015).} Logically, unifying the California and the FTC standard would allow manufacturers to remain within California and the United States, maintaining and even generating domestic jobs.
Outside California, many states lack statutes specifically addressing origin labels.\textsuperscript{184} Arkansas’s Deceptive Trade Practices Act\textsuperscript{185} omits any standards involving products with origin labels.\textsuperscript{186} Likewise, Maryland’s Unfair or Deceptive Trade Practices statute\textsuperscript{187} provides no language indicating the proper standard for origin claims.\textsuperscript{188} And New York law simply defines a “mark of origin” as “the place or country in which an article of merchandise was manufactured, packed, assembled, grown, or produced.”\textsuperscript{189} National manufacturers face difficulty when confronted with the conflicting and differing standards that varying states set.\textsuperscript{190} The lack of uniformity may result in a label conforming to the FTC’s standard, but violating California’s standard, and having no standard whatsoever in other states.\textsuperscript{191} In this instance, manufacturers are forced to decide whether to include a product origin label and run the risk of violating certain states’ standards or omit the label entirely.\textsuperscript{192}

\textbf{B. The Need for a New Survey Depicting Consumer Perception on a Product’s Origin in Light of Current Global Economic Realities}

In 1997, the FTC considered numerous comments and concerns about amending the origin-labeling standards.\textsuperscript{193} The public comments included remarks from people both opposing and accepting the standards, along with arguments for an even more lenient standard...

\begin{thebibliography}{99}
\bibitem{185} ARK. CODE ANN. § 4-88-107 (West 1971).
\bibitem{186} See id.
\bibitem{188} See id.
\bibitem{189} N.Y. GEN. BUS. § 392-c (Consul. 1967).
\bibitem{190} Robie et al., \textit{supra} note 184, at 29.
\bibitem{191} \textit{Id.}
\bibitem{192} See \textit{supra} Part II (discussing benefit of selling American-made products in the United States).
\bibitem{193} Made in USA Claims, \textit{supra} note 111, at 63756.
\end{thebibliography}
than the proposed amended ones.\textsuperscript{194} However, the FTC was not persuaded and the “all or virtually all” standard was kept in place.\textsuperscript{195}

While the majority of comments submitted depicted consumer perception that aligned with the “all or virtually all” standard, many discussed how the proposed guidelines paralleled current global economic realities.\textsuperscript{196} Although some argued that lowering the standard would lead to a decrease in domestic jobs,\textsuperscript{197} in many instances U.S. jobs would be retained.\textsuperscript{198} Today’s global economic existence makes it impractical and sometimes impossible for some manufacturers to meet the current FTC standard.\textsuperscript{199} Certain subcomponents or materials essential to the production of goods are simply not available through U.S. suppliers, compelling manufacturers to seek resources abroad.\textsuperscript{200} Ultimately, these manufacturers are disadvantaged in the market place because they are prohibited from attaching a U.S. origin label even when they make every effort to use all domestic components.\textsuperscript{201}

A new study of consumer perceptions should address how much foreign content consumers will allow in a product to still consider it “Made in the U.S.” Consumers should be given percentages of foreign and domestic content in products to assist in determining the appropriate amount of foreign content permitted in American-made products. The comments, which the FTC reviewed in the 1990’s and ultimately lead to the proposed two safe harbor rules, depicted foreign content percentages consumers were willing to view as acceptable in

\textsuperscript{194} Id. at 63757-65. One commenter stated, “If a product is only partially made in our Country, I want to know.” Id. at 63758 n.24. Another stated that the proposed guidelines would “afford the opportunity for hundreds of thousands of American workers to see their contributions in factories throughout the United States create products which will appropriately carry the unqualified designation as having been ‘Made in America.’” Id. at 63761 n.56.

\textsuperscript{195} Made in USA Claims, supra note 111, at 63756.

\textsuperscript{196} Id. at 63760.

\textsuperscript{197} Id. at 63758; but see id. at 63760 (“A number of commenters disputed the claim by supporters . . . that lowering the standard would lead to fewer jobs in the United States.”).

\textsuperscript{198} See Made in USA Claims, supra note 111, at 63760; see also supra Part VI.A.

\textsuperscript{199} Bales, supra note 162, at 742-44.

\textsuperscript{200} Id.

\textsuperscript{201} Id.
light of economic realities. The FTC should adopt a specific percentage threshold to give manufacturers the appropriate tools to create a strategy within the advertising and marketing realm and provide consumers with the exact amounts of foreign and domestic content within a product.

Calculating accurate foreign and domestic percentages may pose an added strain on business, but it decreases the potential for consumer deception. Imposing the duty to inquire and define the origin of products’ subcomponents and materials is relatively reasonable because of consumer protection policies and the benefits domestic origin labels receive. Due to the willingness of Americans to buy American products, the effect of a domestic origin label results in business receiving an increase in total sales, customers, and profits. Thus, including unqualified claims should demand the

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202. Request, supra note 38, at 25035-38. For example, in the 1995 “FTC Attitude Survey,” sixty-seven percent of respondents considered a product “Made in America” when the domestic content was set at seventy percent and foreign content at thirty percent. \textit{Id.} at 25037. The FTC Attitude Survey presented participants with scenarios that depicted the amount of domestic and foreign content within a product. \textit{Id.} The participants were then asked whether or not they agreed with a “Made in America” label being attached to the product. \textit{Id.} at 25035.

203. Many commentators who submitted concerns to the FTC in regards to their proposed guidelines noted that calculating content percentages would impose further costs upon manufacturers. \textit{Id.} at 25028. For example, The Joint Industry Group and Polaroid stated that attempting to calculate percentages “would require companies to conduct detailed internal cost analyses in order to accurately determine the exact domestic content for their products.” \textit{Id.} They also recognized that companies would have to monitor “changes in a producer’s sourcing patterns . . . the price for a given material, and variances in depreciation.” \textit{Id.}

204. \textit{See infra} Part VII.B.

205. Consumer protection laws seek to safeguard the rights of consumers and protect against sellers who employ unconscionable or deceptive business tactics. \textit{See KAN. STAT. ANN.} § 50-623 (West 2013) (promoting the policy of “protect[ing] consumers from suppliers who commit deceptive and unconscionable practices”). Under Washington’s Consumer Protection Act, conduct is actionable when it has an impact on the public interest. Sato v. Century 21 Ocean Shores Real Estate, 681 P.2d 242, 244 (1984). There, conduct is deemed to have an impact on the public interest when “the defendant by unfair or deceptive acts or practices in the conduct of trade or commerce has induced the plaintiff to act or refrain from acting.” \textit{Id.} The FTC acts for the purpose of furthering the public interest. \textit{See ALEXANDER, supra} note 97, at 14.

most precise depiction of content and origin because of the privileges that come with it.

The global economic marketplace is currently growing.207 This progression presents an opportunity and a need to reassess consumer perception on origin claims.208 The previous evaluation was undertaken over fifteen years ago.209 Since then, the economy has morphed into a system that requires the inclusion of more global inputs for goods.210 This change is due in part to the comparative advantage of industry abroad.211 To stay competitive in today’s market, manufacturers need to obtain parts and materials at the cheapest price possible, or else face the possibility of having to sell products at a higher cost than their competitors.212 The growth of this economic reality over the past fifteen years illustrates the need to reconsider the consequences of the current FTC standard and conduct a current consumer perception survey regarding origin claims and products’ foreign content.

207. Modest Trade Growth Anticipated for 2013 and 2015 Following Two Year Slump, 2014 Press Releases, WORLD TRADE ORGANIZATION (Apr. 14, 2014), http://www.wto.org/english/news_e/pres14_e/pr721_e.htm#_ftnref2. For the past two decades the global increase in gross domestic product has been has averaged 5.3%. Id. The World Trade Organization expects global exports and imports to modestly rise within the next two years. Id.

208. Globalization, the movement of manufacturing operations overseas, makes it more difficult for consumers to understand the country of origin of particular goods. Vytautas Dikčius & Gintarė Stankevičienė, Perception of Country of Brand Origin and Country of Product Manufacturing among Lithuanians and Emigrants from Lithuania, 1 ORG. & MARKETS IN EMERGING ECON. 108, 109 (2010).

209. Shaheen et al. supra note 19, at 5.

210. Id.


C. The Negative Impact of the “All or Virtually All” FTC Standard

The FTC’s retention of the “all or virtually all” standard failed to solve critical problems surrounding origin claim issues in the United States and echoed negative repercussions already existing. The standard is ambiguous and puts manufacturers in a position where they are uncertain if their product’s composition will conform to the current standard. It seeks to define what products support domestic jobs. However, a negative effect might have occurred: companies may have an incentive to take more of their production abroad.

First, the “all or virtually all” standard does not give an exact basis for manufacturers to decide if attaching a domestic origin label will unlawfully deceive or mislead consumers. The FTC acknowledged there is no clear or precise avenue to determine if a certain product will coincide with the current standard. Although the FTC dictates factors that it considers when challenging the legitimacy of an origin label, manufacturers are still forced to play a guessing game as they market their goods and advertise towards American consumers. As a result, costs will inevitably rise, as more time and money is put toward this determination.

Furthermore, and similar to the adverse effect of the strict requirements in California, the FTC standard also has the potential to pressure manufacturers to move operations outside the United

213. Bales, supra note 162, at 742-44.
214. See FTC Enforcement Policy, supra note 51.
215. Id.
216. The FTC indicated that the agency would not set a bright line rule or standard through specific percentages because “[i]t is likely to be illusory and no single percentage standard will be appropriate for all products in all circumstances.” Made in USA Claims, supra note 111, at 63765. The FTC claims that foreign percentages “may not reflect the true extent of foreign content” in a product because cheaper labor and cheaper parts may not reflect the exact amount of foreign production. Id. at 63765 n.93.
217. FTC Enforcement Policy, supra note 51.
218. See id. (discussing costs that determine content percentage, the remoteness of foreign inputs, and the site of final assembly).
219. Although the FTC provides different factors that they will consider when analyzing origin claims, a marketer must devote time to consider the criteria of an unqualified origin claim and “[should] possess and rely upon a reasonable basis that the product is in fact all or virtually all made in the United States.” Id.
In many cases, manufacturers are not able to meet the FTC standard because they must look to other nations for supplies not available in the United States to construct their products. When these companies know or reasonably conclude that they will not meet the standard, they are presented with the incentive to outsource a larger part of their manufacturing and assembly processes. Although they will not be able to use an origin label, they are able to lower the price of their products, which consumers have indicated is a large determination in their purchasing decisions. The outsourcing of production processes will predictably lead to a decrease in U.S. jobs. Thus, the choice to keep the current standard may lead to the very harm the standard sought to prevent—the decrease of American jobs.

VII. THE CANADIAN APPROACH AS A MODEL FOR THE UNITED STATES

Canada’s origin standards present a model that would improve the objectives of the United States’ origin laws. The FTC must set levels of appropriate foreign content within American-made products, set the formula to determine how to calculate content percentages, establish how far a manufacturer must look back in their inputs, and create specific regulations for industries who are inevitably unable to conform to U.S. origin laws.

A. Staggered Levels of Percentage Content

The United States should create a distinction between the language used in different unqualified claims and issue a specific domestic content percentage with each, similar to Canada’s system, so consumers will have a more detailed depiction of a product’s origin.

220. See Bales, supra note 162, at 744-43.
221. See infra Part VII.D. Specific industries are unable to purchase materials or subcomponents that are essential to the manufacturing of their finals products. See infra Part VI.D. As a result, the use of these foreign materials and inputs prohibits the product from having a valid U.S. origin claim. See infra Part VII.D
222. Shaheen et al., supra note 19, at 5.
223. See id. at 4-5
224. This distinction would allow consumers to perceive the amount of domestic content within the good and will enable them to differentiate products from one another. Currently, the use of the “all or virtually all” standard only offers...
Canada’s enforcement guidelines set forth definitive origin standards that present advantages to both consumers and manufacturers, which would also bring positive outcomes for the United States. A “Product of Canada” label denotes that the total domestic direct costs of the product is ninety-eight percent or greater, while a “Made in Canada” label only requires that fifty-one percent of the costs are incurred in Canada.\textsuperscript{225} Canadian consumers who value products that facilitate domestic jobs through domestic production may look to both labels and easily identify what product has a higher domestic content. A distinction in the United States could similarly convey the amount of domestic content in a product based on certain labels, which would provide more information regarding a product’s origin. For example, if the FTC sets an extremely high level percentage for a “Product of U.S.A.” label, the label would illustrate that the product is almost entirely made in the United States. Conversely, a “Made in U.S.A.” label would illustrate the domestic content is still very high, yet less than a product with a “Product of U.S.A.” label.

Adding percentage based country of origin labels in the United States will allow consumers to make purchasing decisions that reflect the added value each individual associates with the production costs incurred within the United States.\textsuperscript{226} If a consumer wishes to support U.S. industry, the staggered levels represented through percentages will provide more information than the “all or virtually all” standard.\textsuperscript{227} The consumer will ultimately have to balance their desire to support U.S. industry with the temptation of lower purchase prices consumers one level of product information: a U.S. country of origin label only shows consumers that the product has a de minis or negligible amount of foreign content.

\textsuperscript{225} Canada’s Enforcement Policy, \textit{supra} note 27.


\textsuperscript{227} The current FTC standard only provides consumers with information on goods that contain a small or negligible amount of U.S. content. See FTC Enforcement Policy, \textit{supra} note 51; \textit{see also supra} Part IV. If a model were adopted that set forth differing labels, corresponding to different content percentages, consumers would be able to tell, within a certain range, how much domestic content went into manufacturing each good they buy.
of similar products with different origin labels. The percentages must come from current consumer perception and the FTC must declare what each label represents through guidelines, similar to the Enforcement Policy issued in the late 1990’s.\textsuperscript{228}

Although Canada’s country of origin labels require a qualifying statement to be attached to products in certain situations,\textsuperscript{229} the model proposed above would render this requirement irrelevant. If a qualifying statement were not required for a fifty-one percent domestic content threshold, the label would mislead consumers because there would exist an opportunity for similar products to bear the same label when they indeed contain a significant difference in the amount of domestic inputs.\textsuperscript{230} Here, however, precise and varying levels of acceptable foreign and domestic content amounts would limit the variation of these percentages. It would appropriate a small range of suitable content levels for each label and would ensure similar products with the same label contain a similar amount of foreign content. For example, if a “Made in the U.S.A” label required that the good contain between sixty and seventy percent of U.S.-sourced content, products that attached this label would be within a reasonable range of likeness regarding the product’s composure.\textsuperscript{231} Thus, consumers would be able to identify the products’ composition without the need for a qualifying indication if various percentages are associated with different labels.

\textsuperscript{228} See FTC Enforcement Policy, \textit{supra} note 51.

\textsuperscript{229} Canada’s Enforcement Policy, \textit{supra} note 27. Qualified claims indicate the specific amount of domestic content, or will indicate if any specific part of the manufacturing process occurred outside of the country where the product is claimed to be made. \textit{See supra} Part II.A. For example, the marketer may include that the assembly occurred or the materials were purchased from another country.

\textsuperscript{230} For example, without a qualifying statement one product could contain fifty-one percent of domestic content, while another similar product may contain ninety percent. In both cases, the same label could be used without being deemed deceptive or misleading.

\textsuperscript{231} See Request, \textit{supra} note 38, at 25051. By following this model, the FTC should determine the consumer perception of what would be considered reasonably similar as it relates to the amount of foreign and domestic content levels. Consumer perception consists of consumer opinion and what would be deemed appropriate and fitting for a particular product to be labeled American-made.
B. Calculating a Percentage of Content

The FTC must give manufacturers the precise production costs that will constitute the domestic and foreign percentages. Setting particular labels that correspond with specific percentages of content does have a few drawbacks, but it furthers the policy goal of increased consumer knowledge. Matching a specific percentage to a particular label requires guidelines for manufacturers to follow. The guidelines will help manufacturers determine the exact percentage of domestic and foreign content in their products and will give their consumers a more precise picture of where the product was made by conveying this information with the correct label. To accomplish this, a rule must be set to inform manufacturers of what business costs to will go into the determination.

The FTC received various input regarding appropriate domestic and foreign percentage calculations. Some commentators believed content percentage should be based on hours of labor and should exclude overhead, marketing costs, and financing. Others argued that percentages should include the cost of development, engineering, and profits received. The most practical and easily applicable standard, however, should only require manufacturers to factor the direct costs of manufacturing into the percentage determination. This standard would require manufacturers to look into the amount of labor used in various countries to create and assemble the product, materials acquired to produce the product, and direct manufacturing

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232. See Request, supra note 38, at 25028. The FTC noted that domestic and foreign content percentages would not adequately provide an accurate depiction of content if specific percentages were used because domestic content will vary due to changing material costs, varying employment wage rates, and fluctuations in exchange rates. Id.

233. See id. at 25029.

234. Id.

235. Id.

236. The FTC notes in its enforcement policy that in calculating manufacturing costs businesses should use a good’s inventory cost because these terms are used in harmony with account principles. FTC Enforcement Policy, supra note 51, at n.16. Inventory costs include “the cost of manufacturing materials, direct manufacturing labor, and manufacturing overhead.” Id.
overhead incurred during the production process of the product. These three factors directly relate to the process of manufacturing and producing a specific commodity, while factors such as profit, shipping, and accounting services are further removed from the process and should not be considered when determining a product’s foreign content. There was a broad variety of commentators expressing their opinions on what costs are to be included in the late 1990s, and any new study of consumer perception should also include a section on what costs should be examined to calculate the percentage of domestic and foreign content. This will further align the overall standard with what consumers are willing to allow as domestic and foreign inputs.

C. Remoteness of Foreign Content

The FTC needs to determine how far back a manufacturer must look to discover the origin of a particular product in order to effectively reform country of origin laws in the United States. Looking “one-step-back” would only require a manufacturer to ascertain where the completed input was produced, whereas a “two-step-back” analysis forces a manufacturer to look where the subcomponents of the input were produced. For example, in the context of an automobile, would it be adequate to merely inquire where the engine was made? Or should the automobile

237. Request, supra note 38, at 25044. Direct manufacturing costs are expenditures that are distinguishable from different products, such as the cost of raw materials or the labor that was used to produce a specific product. See Rosemary Peavler, Direct and Indirect Costs and Their Effect on Pricing Your Product, Money, ABOUT.COM, http://bizfinance.about.com/od/pricingyourproduct/a/Direct-And-Indirect-Costs-And-Their-Effect-On-Pricing-Your-Product.htm (last visited Dec. 27, 2014). On the other hand, indirect manufacturing costs include expenditures that affect the entire company, such as advertising and accounting services. Id.

238. See Peavler, supra note 237.

239. Request, supra note 38, at 25029.

240. See id. at 25030.

241. Id. A one-step-back inquiry requires manufacturers to look to where the direct intermediate good was produced. Id.

242. Id.

243. See id. at 25049-50.
manufacturer be required to determine where the subcomponents of the engine were produced, such as the pistons and spark plugs? 244

The FTC received a large number of comments indicating a one-step-back inquiry would suffice.245 Commentators contended that a two-step-back inquiry would be "unduly burdensome and [that it would be] impractical to require manufacturers to make inquiries beyond the suppliers from whom they purchase materials or components."246 Thus, a one-step-back inquiry is reasonable in most cases because it is challenging for manufacturers to obtain origin information from suppliers.247 A manufacturer, however, should inquire past one-step-back when he or she has knowledge that the specific input contains a large amount of foreign content or the amount of foreign content is significant, as it relates to the overall percentages of foreign and domestic content.248 Although possible drawbacks249 to the one-step-back approach exist, anything past this inquiry is likely to be oppressive to sustain.

244. See id.
245. Id. at 25030. One commentator expressed that the anything beyond a one step back analysis is too burdensome since the “net effect on American employment and quality of product would in the vast majority of cases be de minimis.” Id. at 25030 n.109.
246. Id. at 25030. A comment submitted by Footwear Industries of America indicated that at two-step inquiry into inputs origin would be infeasible because “[s]uppliers often buy inputs from a variety of sources, depending on market conditions, and do not keep track of which inputs go into which end product.” Id. at 25030 n.108.
247. Id. at 25030.
248. See FTC Enforcement Policy, supra note 51, at n.16. The FTC’s enforcement policy noted, “they should look far enough back in the manufacturing process that a reasonable marketer would expect that it had accounted for any significant foreign content.” Id.
249. Request, supra note 38, at 25030. Dynacraft Industries noted in a comment that a “one-step-back” inquiry “could lead to circumvention of the standard by, for example, permitting an unscrupulous party to restructure sourcing to purchasing through middlemen in the U.S. and claim the part if of U.S. origin.” Id. at 25030 n.110. Similarly, the American Hand Tool Coalition noted that “such an approach would be subject to manipulation and ‘would conflict with consumers’ understanding” of domestic origin claims. Id. at 25030 n.111.
D. Industry Specific Regulations

Congress should create specific legislative regulations for particular industries that have difficulty conforming to these standards based on the unavailability of U.S. suppliers.\(^{250}\) Specific regulations for automobile and textile labeling in the United States already exist and other regulations may be needed to resolve confusion and difficulties arising within other distinct industries, as it relates to the availability of domestic inputs.\(^{251}\) The state of manufacturing in the electronics industry provides a compelling argument for industry specific regulation.\(^{252}\) There, it is not feasible and nearly impossible for a manufacturer to conform to the FTC standard and create a product that is built with all or nearly all U.S. content.\(^{253}\) Individualized regimens for certain industries should require a lower threshold of domestic content because inputs for certain products are unavailable or impracticable to obtain through U.S. suppliers.\(^{254}\) However, manufacturers should be required to exhaust all plausible avenues to acquire U.S. content before they are allowed to integrate foreign inputs while still conforming to U.S. origin laws.\(^{255}\) Specifically, manufacturers in these industries should incorporate U.S. substitutes when available, even if the final domestic content will be higher than the percentage threshold set by the exemption in place.\(^{256}\) This approach presents an incentive for manufacturers in these industries to keep as much of the production process within the United

\(^{250}\) Bales, supra note 162, at 749.

\(^{251}\) 49 U.S.C. § 32304 (West 1994) (The American Automotive Labeling Act defines terms and provides regulations automotive manufacturers must follow when selling cars, such as requiring the manufacturer to include the country of origin for the engine and transmission.); 15 U.S.C. § 70 (West 1958) (The Textile Fiber Products Identification Act provides definitions for varying types of fibers that are used when labeling textile goods.).

\(^{252}\) See Request, supra note 38, at 25025.

\(^{253}\) Bales, supra note 162, at 745. Packard Bell Electronics echoed this concern in a comment submitted to the FTC: “it is impossible to obtain the volume of U.S.-made components necessary to support large manufacturing operations.” Request, supra note 38, at 25025 n.43.

\(^{254}\) Bales, supra note 162, at 745.

\(^{255}\) Id. at 746.

\(^{256}\) Id.
States because a U.S. origin label gives them a competitive advantage.\textsuperscript{257}

\textbf{VIII. CONCLUSION}

Country of origin label laws in the United States fail to maximize the benefit these labels are meant to provide. To the contrary, they create many drawbacks for businesses and consumers. First, the FTC’s retention of the “all or virtually all” standard forces manufacturers to predict whether or not the volume of domestic content within their products will comply with this ambiguous standard.\textsuperscript{258} Ultimately, businesses are required to analyze the imprecise country of origin factors in order to anticipate whether or not their product will comply with the law. Furthermore, consumer knowledge is depleted in many cases because manufacturers find it impossible or impracticable to conform to the standards.\textsuperscript{259} Specifically, these manufactures have an incentive to move additional operations overseas to use cheaper alternatives, preventing consumers from obtaining any origin information due to the absence of any label.

Second, the lack of a uniform country of origin standard within the United States echoes similar effects that come with the FTC standard’s ambiguousness: manufacturers are forced to spend more capital on printing different labels for different legal jurisdictions and domestic jobs are lost due to the movement of manufacturing operations. California’s Origin Law strictly confines manufacturers who label their products American-made to buy every input from U.S. suppliers, in order to comply. This standard forces business abroad and decreases consumer knowledge.

Canada’s model, set forth by its Competition Bureau, illustrates a possible, plausible, and predicable avenue the United States can follow to increase consumer knowledge and further business and consumer interests. Specifically, creating distinctions in labels for products that contain differing amounts of foreign content will increase consumer knowledge and decrease the likelihood of deceptive origin labels. Associating and enforcing varying foreign

\textsuperscript{257} See Shimp & Sharma, \textit{supra} note 30.
\textsuperscript{258} See \textit{supra} Part VI.A.
\textsuperscript{259} See \textit{supra} Part VI.C.
content percentages that are linked to specific labels will provide consumers with the most accurate product information that would include foreign content, parts, or subcomponents. Ultimately, the United States needs to implement a similar regime to eliminate ambiguities for businesses and give consumers the power to make more informed purchasing decisions. Additionally, the FTC needs to issue another type of consumer survey that will allow it to formulate a plan consistent with consumer perceptions relating to the various aspects that make up country of origin laws.

Stuart Smith*

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* J.D. Candidate 2016, California Western School of Law. I would like to thank my family, girlfriend, and friends for their love and support throughout all my endeavors in life. They are truly my inspiration and my foundation. Also, I would to thank professors Michael Dessent and Roberta Thyfault for their invaluable assistance and direction throughout this writing process and in my education.