BPE Global
139 Pierce Street
San Francisco, CA 94117

T 1-415-845-8967
E info@bpeglobal.com
bpeglobal.com

The Dynamic Nature of Country of Origin

Andrea Appell
Director

In July 2014 I was honored to co-chair the 3rd Annual TechAmerica / CBP Bidirectional Educational Forum with U.S. Customs and Border Protection. The event brings together Senior Leaders from both the High Tech industry as well as CBP in an effort to communicate and partner on current trade concerns. The two day event successfully addressed several topics important to the High Tech industry, including Country of Origin for the purposes of Government Procurement – a panel on which I participated.

In my presentation I likened the history of U.S. origin administrative rulings to the card game Uno. Unlike a traditional card game where turns progress in an orderly fashion around the table, the game of Uno is dynamic. Players must be attentive to sudden, unpredictable changes in the game and adjust their strategy accordingly. The spirited game of Uno is analogous to the reaction required of the high-tech industry in determining whether their goods are eligible for government procurement. Just when country of origin determination criteria seemed reliable and predictable, like turns in a traditional card game, a game-changing card is played and importers must quickly adjust their strategy to adapt to the new rules.

By way of background, U.S. CBP has the authority to make country of origin determinations under the principle of substantial transformation for goods put up for sale for government procurement purposes. Eligible goods must either be of U.S. origin or the product of a "Designated Country." "Designated Countries" may be signatories to the World Trade Organization Government Procurement Agreement, countries with which the U.S. has signed a free trade agreement, as well as certain developing and Caribbean Basin countries. Important to note for the high-tech sector is that countries such as China and India are currently not considered "Designated Countries." Accordingly, importers usually seek an administrative ruling to clarify where goods are substantially transformed when manufacturing occurs in both a non-designated country such as China and a designated country. Administrative rulings are binding and the logic of these rulings may be leveraged by any U.S. importer to defend its country of origin determination. It is worthwhile to note that historically there has been no requirement or precedent for conferring the country of origin of intangible goods such as software delivered electronically (rather than software delivered on physical media such as on a CD).

Data General vs. the United States 4 CIT 182 (1982) was a landmark case for country of origin before the Court of International Trade ("CIT"). The CIT ruled that programming imported Programmable Read-Only Memory chips ("PROMs"), caused various distinct electronic interconnections to be formed within each integrated circuit. The U.S. origin programming bestowed upon each circuit its electronic function. That is, its "memory" which could be retrieved. A distinct physical change was effected in the PROM by the opening or closing of the fuses, depending on the method of programming. In sum, the chips were substantially transformed from a "dumb" non-functional unit to a more intelligent unit complete with the logic needed to function as intended.

BPE Global
139 Pierce Street
San Francisco, CA 94117

T 1-415-845-8967
E info@bpeglobal.com
bpeglobal.com

The logic employed in the *Data General* case has been cited and applied in many U.S. administrative rulings where a permanent change such as programming of a device or a software / firmware load is performed which imparts a specific character or functional intelligence on an otherwise blank or "dumb" unit (e.g. HQ 732087, HQ 558868, and HQ H052325). In the years since *Data General,* importers formalized this logic into business practice and structured their manufacturing strategies accordingly.

Over the last several years the reliability and predictability of the country of origin logic established by *Data General* has eroded. In more recent cases where importers requested guidance on situations where assembly is performed in one country, software is developed in a second country but downloaded to the finished good in a third country, CBP played their "reverse direction" Uno card and held that the country of origin is the location where the product was assembled to completion rather than where the where the software / firmware load was performed (e.g. HQ H219519, HQ H241177).

Further keeping the high-tech industry on its toes was CBP's December 2013 ruling related to electronically delivered software. As stated earlier, there has been no historical requirement nor precedent for conferring the country of origin of intangible goods. While it is acknowledged that the decision in *Data General* was weighted by the U.S. origin software, CBP leveraged this analysis and applied it to its decision regarding software delivered electronically to U.S. Government entities. In the December 2013 ruling (HQ H243606) CBP held that the software build performed in the U.S. substantially transformed the software modules developed in China and the U.S. into a new article with a new name, character and use. This ruling cemented the same logic from a non-binding advisory ruling from roughly one year prior. In both these cases U.S. CBP cited *Data General* as the basis for its logic even though *Data General* focused exclusively on the substantial transformation of an item of hardware through the programming process rather than a pure software product.

Through TechAmerica, BPE Global and members of the high-tech industry are continuing the partnership with CBP to clarify the criteria related to country of origin determinations in order to achieve predictability in requirements. A request has been made for CBP to reconcile *Data General* with recent administrative rulings and provide importers reliable criteria to assist in determining country of origin of commodities that are manufactured in one location but programmed with software or firmware that imparts an appliance's "intelligence" in the same or other locations. Additionally, CBP has been asked to comment on several questions, including practical questions such as why the country of origin for an intangible good is required, how to report the country of origin of an electronic delivery to CBP, and if origin marking of software delivered on media must include both the location of the software build as well as the location where the content was burned onto the media.

Navigating the dynamic nature of country of origin requirements is critical to any company selling both tangible and intangible goods to the U.S. Government. CBP has begun its valuable analysis of historical rulings as well as research into the questions provided via TechAmerica. BPE Global continues its leadership in these discussions as well as in the development of cutting-edge strategies and best practices in country of origin compliance.