

Yeshiva University, Cardozo School of Law

LARC @ Cardozo Law

AELJ Blog

Journal Blogs

2-8-2021

The Federal Trade Commission's 'Made in America' Policy Has Disincentivized Domestic Production but Supply Chain Issues Associated with Coronavirus May Incentivize Reshoring

Jamie Cutler

Cardozo Arts & Entertainment Law Journal

Follow this and additional works at: <https://larc.cardozo.yu.edu/aelj-blog>



Part of the [Law Commons](#)

Recommended Citation

Cutler, Jamie, "The Federal Trade Commission's 'Made in America' Policy Has Disincentivized Domestic Production but Supply Chain Issues Associated with Coronavirus May Incentivize Reshoring" (2021). *AELJ Blog*. 264.

<https://larc.cardozo.yu.edu/aelj-blog/264>

This Article is brought to you for free and open access by the Journal Blogs at LARC @ Cardozo Law. It has been accepted for inclusion in AELJ Blog by an authorized administrator of LARC @ Cardozo Law. For more information, please contact christine.george@yu.edu, ingrid.mattson@yu.edu.

The Federal Trade Commission's 'Made in America' Policy Has Disincentivized Domestic Production but Supply Chain Issues Associated with Coronavirus May Incentivize Reshoring

BY [MANAGING EDITOR](#) / ON FEBRUARY 8, 2021



Image by Mary Pahlke from Pixabay

Americans are proud of their domestic incorporations, sourcing, and/or production and want to market as such.¹ The Federal Trade Commission ("FTC") is a federal agency charged with the authority to regulate unfair and deceptive advertising in the marketplace.² If a business wants to legally advertise as Made in America ("MIA"), it has to comply with the FTC's *Enforcement Policy Statement on U.S. Origin Claims* ("*Enforcement Policy*").³ For a product to be legally labeled as MIA under the *Enforcement Policy*, it must be "all or virtually all" made in the United States ("all or virtually all standard").⁴ This means "all [or a *de minimis* amount of] significant parts and processing that go into the product are of U.S. origin."⁵ The FTC has also implemented a prerequisite for satisfying the all or virtually all standard, which requires a good's final assembly or processing to occur in America and is rereferred to as the location where the product was last substantially transformed.⁶ Lastly, an advertiser's MIA claim must

be truthful and substantiated.⁷ This means the advertiser must have a reasonable basis for making the claim, such as competent and reliable evidence, showing that all or virtually all processes and materials did in fact happen in and came from the United States.⁸

The Commission's MIA policy has been found infeasible to satisfy for a multitude of reasons.⁹ The first difficulty in satisfaction stems from the ambiguity of the *Enforcement Policy*.¹⁰ The policy requires a product to contain only a negligible amount of foreign parts or processing, but does not provide a numerical mechanism for determining whether a product is all or virtually all from the U.S. as to fulfill the standard's requirement.¹¹ The ambiguity of the policy deters marketers from advertising as MIA' in fear of enforcement action by the FTC, which can result in severe penalties.¹² The policy is also infeasible to satisfy due to the differences between foreign and domestic production costs.¹³ Since U.S. labor laws require higher compensation than other countries, such as China, Vietnam, and Mexico, American goods are inevitably more expensive than goods produced in countries where labor is cheaper.¹⁴ Most U.S. businesses have neither the cash flow to increase production costs nor the trademark strength to increase retail prices and retain customers in order to produce all or virtually all of its goods in America.¹⁵

The 'all or virtually all' standard being infeasible to comply with disincentivizes companies from producing domestically or using U.S. components in its products. If they cannot legally obtain the benefit that comes with informing consumers that they have MIA products, companies will produce overseas and source from foreign markets, as it is less expensive.¹⁶ If a manufacturer cannot meet the all or virtually all threshold to legally claim its goods are MIA, why would it use any domestic parts or processing when it can all be done cheaper abroad?¹⁷ Thus, under the current FTC standards, producers will continue to manufacture internationally absent any American marketing advantages.¹⁸ This is evident by the substantial decrease in domestic production and increase in foreign manufacturing and importation.¹⁹ In 2018, U.S. manufacturing represented 11.3% of gross domestic production ("GDP"), but in 1970, manufacturing made up over double the current percentage of GDP at 24.3%.²⁰ America also lost its spot as the world's largest manufacturer to China in 2010.²¹

There is, however, a new-found incentivization of onshore production. Retailers in the United States are facing unprecedented supply chain problems due to the Coronavirus and are working to find solutions.²² Forty percent of clothing sold in America is imported from China and the first wave of Coronavirus forced Chinese factories to close for weeks, leaving retailers with significantly less inventory to sell.²³ April 2020 survey results, provided by accounting firm EY, found "83% of multinational executives were contemplating 'reshoring' – or in other words, bringing manufacturing back to their home turf . . ." due to supply chain issues caused by Coronavirus.²⁴ In July 2020, ThomasNet, an online platform for American suppliers and product sourcing, conducted a similar survey and found 69% of manufacturing companies were looking to bring production to the U.S.²⁵ Thus, the abroad manufacturing issues caused

by COVID-19 has incentivized suppliers, manufacturers, and retailers to reevaluate foreign production and the benefit of manufacturing in America.

Jamie Cutler is a Second Year Law Student at the Benjamin N. Cardozo School of Law and a Staff Editor at the Cardozo Arts & Entertainment Law Journal. Jamie is interested in IP and Fashion Law. Jamie is also the Alumni Committee Chair of the Fashion Law Society and is presently interning at Tapestry, Inc.

1. See Emili Vesilind, Adorned in the USA: the 'Made in the U.S.' Label Proves Elusive for Jewelry Companies, JCK (Mar. 9, 2020) (Kathy Corey, vice president of Day's Jewelers, stated "We'd love to use that Made in the USA terminology in our stores . . . it certainly is an added benefit to closing the sale."), <https://www.jckonline.com/magazine-article/adorned-in-the-usa-jewelry/> [<https://perma.cc/246Y-J9W4>].
2. Inc. Editorial, Inc. Staff, Federal Trade Commission (FTC), Inc., <https://www.inc.com/encyclopedia/federal-trade-commission-ftc.html> [<https://perma.cc/86MP-TGVP>] (last updated Jan. 5 2021); Fed. Trade Comm'n, What the FTC Does, F.T.C., <https://www.ftc.gov/news-events/media-resources/what-ftc-does> [<https://perma.cc/95VJ-78GG>] (last visited Sept. 20, 2020).
3. Press Release, Fed. Trade Comm'n, FTC Issues Staff Report on Made in USA Workshop, Seeks Comment on Related Proposed Rulemaking for Labeling Rule (June 22, 2020), <https://www.ftc.gov/news-events/press-releases/2020/06/ftc-issues-staff-report-on-made-in-usa-workshop> [<https://perma.cc/HY5V-H33H>].
4. Public Statement, Fed. Trade Comm'n, Enforcement Policy Statement on U.S. Origin Claims (Dec. 1, 1997), <https://www.ftc.gov/public-statements/1997/12/enforcement-policy-statement-us-origin-claims> [<https://perma.cc/V8TF-XJYR>] [hereinafter Fed. Trade Comm'n, Enforcement Policy Statement on U.S. Origin Claims].
5. Id.
6. Id.
7. Id.
8. Barbara Kolsun & Douglas Hand, The Business and Law of Fashion and Retail 740 (2020); Yao Liu, Complying With "Made in USA," "Assembled in USA" and Other US Origin Claims, Cavitch Familo & Durkin (Sept. 28, 2019), <https://cavitch.com/made-in-usa-standards/> [<https://perma.cc/S5WY-QKPN>].
9. Randy Shaheen, Amy Mudge & Annie Lee, Made in U.S.A: Time for a Change?, Antitrust Source 1, 3-4 (2012), https://www.venable.com/-/media/files/publications/2012/04/made-in-usa-time-for-a-change/files/made-in-usa-time-for-a-change/fileattachment/made_in_usaantitrust_source412.pdf [<https://perma.cc/Z3VN-UL3B>].
10. Leonard L. Gordon, FTC Workshop on "Made in USA" Claims, Venable LLP (Oct. 1, 2019), <https://www.allaboutadvertisinglaw.com/2019/10/ftc-workshop-on-made-in-usa-claims.html> [<https://perma.cc/LJ9P-D555>].

11. *Id.*; Fed. Trade Comm'n, Enforcement Policy Statement on U.S. Origin Claims, *supra* note 4.
12. The Fashion L., "Made in" Labels are Marketing Gold but Not Without Potential Legal Consequences, Fashion L. (May 14, 2020), <https://www.thefashionlaw.com/made-in-labels-are-marketing-gold-but-not-without-legal-consequences/> [<https://perma.cc/7F3S-3PWF>].
13. See Shaheen, Mudge, & Lee, *supra* note 9, at 3.
14. Dana Varinsky, Here's what 5 of your favorite products would cost if they were made in the US, Bus. Insider (Nov. 27, 2016, 2:40 PM), <https://www.businessinsider.com/how-much-products-would-cost-if-made-in-us-2016-11> [<https://perma.cc/6WRK-KQZH>]; Scott Shapiro, How Much More Should Americans Pay for 'Made in America'?, Forbes (Aug. 21, 2017, 1:27 PM), <https://www.forbes.com/sites/scottshapiro/2017/08/21/how-much-more-should-americans-pay-for-made-in-america/#eaddf8f1be75> [<https://perma.cc/TJD6-KXNP>].
15. See Klemm Analysis Group, Impact of Litigation on Small Businesses, 2 (2005), <https://www.sba.gov/sites/default/files/files/rs265tot.pdf> [<https://perma.cc/99HZ-CK9C>] (When small businesses pay litigation costs, raising prices to recoup the losses is "not an option, as it would put them at a competitive disadvantage vis-à-vis their competitors.") ("[M]ost small businesses . . . survive on small profit margins . . ." so any additional "costs can prove disastrous, if not fatal.").
16. Matthew Bales, Implications and Effects of the FTC's Decision to Retain the All or Virtually All Standard, 30 U. Miami Inter-Am L. Rev. 727, 745 (1999); Shaheen, Mudge, & Lee, *supra* note 9, at 5.
17. Bales, *supra* note 16, at 744; Shaheen, Mudge, & Lee, *supra* note 9, at 5.
18. Bales, *supra* note 16, at 745; Shaheen, Mudge, & Lee, *supra* note 9, at 5.
19. See The Fashion L., As Fashion Contemplates Reshoring, a Look at What "Made in USA" Means, Fashion L. (Jan. 20, 2021) <https://www.thefashionlaw.com/a-fashion-talks-reshoring-made-in-labeling-rules-come-under-the-microscope/> [<https://perma.cc/J5LT-XLQX>] ("[M]ore than 90 percent of the apparel sold in the U.S. . . . is made internationally.").
20. Kimberly Amadeo, US Manufacturing Statistics and Outlook, Balance (Nov. 19, 2020), <https://www.thebalance.com/u-s-manufacturing-what-it-is-statistics-and-outlook-3305575> [<https://perma.cc/3SLP-MBKQ>] (citing the Bureau of Economic Analysis).
21. *Id.*
22. The Fashion L., *supra* note 19.
23. *Id.*
24. *Id.*
25. *Id.*