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October 17, 2008

Trade and Commercial Regulations Branch
Regulations and Rulings
Office of International Trade
U.S. Customs and Border Protection
1300 Pennsylvania Avenue, NW
(Mint Annex)
Washington, DC 20229Re: Docket USCBP-2007-0100, Uniform Rules of Origin for Imported Merchandise

Dear Sir/Madam:

On behalf of our client, Brocade Communications Systems, Inc., San Jose, CA (“Brocade”), we are submitting these comments regarding the Notice of Proposed Rulemaking (“NPRM”) regarding the establishment of Uniform Rules of Origin for Imported Merchandise (73 Fed. Reg. 43,385, July 25, 2008).

U.S. Customs and Border Protection (“CBP”)¹ proposes to extend application of the country of origin rules codified in 19 C.F.R. Part 102 (the NAFTA Marking Rules) to determinations of origin for admissibility, eligibility for preferential trade programs, marking requirements and textile imports. In addition, for purposes of government procurement determinations and advisory rulings under the Trade Agreements Act, the proposal would amend 19 C.F.R. §177.22(a)(2) to read “a substantial transformation into a ‘new and different article of commerce’ occurs when the country of origin of an article which is produced in a country or instrumentality from foreign materials is determined to be that country or instrumentality under §§102.1 through 102.21 of this chapter.”

Background on Programming High Technology Equipment

Brocade appreciates being given the opportunity to submit comments on this proposal. While in many situations, the use of a set of objective uniform rules will lead to more consistent interpretation and improved compliance, Brocade believes that clarifications are needed with respect to the proposal, specifically with regard to the *programming of*

¹ For convenience, in this letter “CBP” will be used not only to refer to U.S. Customs and Border Protection, but also to the former U.S. Customs Service.

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high technology equipment where CBP has in the past held that software which makes it function defines the character and use of the product. As more fully explained below, we believe these clarifications may take the form of amendments to the existing regulatory language, new examples or interpretive notes added to Part 102.

In 1982, the U.S. Court of International Trade decided the case of *Data General v. United States*, 4 Ct. Int'l Trade 182 (1982), which involved the programming of a PROM. In *Data General*, the Court held that a PROM chip which was manufactured in one country, but programmed in another was substantially transformed and became a product of the country of programming (in that case, the United States). The court noted that it was undisputed that programming alters the character of a PROM, effecting a physical change. The court found that the essence of the article, its interconnections or stored memory, was established by programming and concluded that altering the non-functioning circuitry comprising a PROM through technological expertise in order to produce a functioning read only memory device possessing a desired distinctive circuit pattern constituted "substantial transformation."

CBP has over the years extended *Data General* to other programming operations and has employed similar rationale in several rulings. For example, in Headquarters Ruling Letter ("HQ") #732087 (February 7, 1990), CBP ruled that a blank computer diskette was substantially transformed by having a program written onto it and the party performing the programming was considered the ultimate purchaser of the blank diskette for country of origin marking purposes. CBP noted that the character of the diskette had changed from one of a blank storage medium to one with a predetermined pattern coded onto it. The use of the diskette had changed from that of an unreadable, therefore meaningless, article of software, to that of an encoded instruction guide to enable a computer to perform various commands. *See also* HQ #733085 (July 13, 1990) and HQ #558868 (February 23, 1995) (programming of SecureID Card substantially transforms the card because it gives the card its character and use as part of a security system and the programming is a permanent change that cannot be undone); and HQ #735027 (September 7, 1993) (programming blank media (EEPROM) with instructions on it that allows it to perform certain functions of preventing piracy of software constituted substantial transformation).

In HQ #562964 (March 29, 2004), which involved SCSI (Small Computer System Interface) tape drive rack units for use in networks, CBP stated,

[t]he OEM proprietary firmware is burned into the drives in Country X after the drives have been tested to insure they are able to receive instructions with the universal program. The OEM firmware allows the tape drives to be recognized and controlled by the OEM's network. As such, *this programming defines the character and use of the tape drive as a network storage device for the ultimate purchaser's network*. In addition, the programming greatly increases the value of the tape drive and increases the cost of assembly in Country X. Although the burning in of the firmware is not itself a complex process, *it involves changing*

the tape drive from a blank storage device, capable only of being tested, to a network-controlled storage device. We believe such programming is akin to the programming of the blank media in Data General, as well as the SecureID card and anti-piracy software programmed into the EEPROM in the CBP rulings cited above. *As such, we believe this assembly process may be deemed complex and meaningful.* Accordingly, we would consider the tape drive rack unit in Scenario 2 to have undergone substantial transformation. (Emphasis added.)

In recent years, CBP has issued numerous other rulings involving the origin of high technology equipment for both marking and government procurement purposes. There have been numerous situations where the hardware (cases, circuit boards and power supplies) was assembled in a foreign country, but the software and operating systems enabling the hardware to function were loaded in a different country. In the rulings, CBP generally found that the programming of a device that changes or defines its use constituted a substantial transformation. For example, in HQ #968000 and in New York (“NY”) Ruling #R03637 issued to Brocade, CBP determined that that a fabric switch was substantially transformed into a product of the United States where it was partially manufactured in China and assembled to completion with software loading and testing performed in the United States. The assembly of the hardware for the switch occurred in China. Then, the resulting electromechanical assembly was shipped to the United States, where U.S.-origin software was installed, configured, and tested. CBP found that the U.S.-origin software imparted the functional characteristics of the end product.

Most recently in HQ #H025023 (April 1, 2008), CBP found that the loading of an operating system which enabled the fabric switch to function and the testing of the software resulted in a substantial transformation.

Accordingly, CBP has consistently held that the programming of a device that changes or defines its use constitutes substantial transformation.

Problem with Current Proposed Rules

In order for the Part 102 rules to reach the same result, we believe that modifications or clarifications are required. This may be accomplished by revising the definitions currently used, or by adding a specific subsection, or by providing examples and/or interpretative notes in the regulatory text so that they are available in the C.F.R. as was done in the valuation regulations (*see* 19 C.F.R. §152.103(a) or 152.103(e)(2)) or the various free trade agreement regulations (*see, e.g.,* 10.461, 10.536, 10.596 or 181.44).

In most of the cases cited above, the product would not meet the requirements set forth in 19 C.F.R. §102.11(a)(1)-(3) because the goods were not wholly obtained or produced from domestic materials and the programming would not result in the tariff shift required by §102.20. Thus, the rules set forth in §102.11(b)(1), or (d)(3) must be used. The fungibility requirements of (b)(2) do not appear to apply; the good is not a set or mixture so (c) does not apply, and the final good is neither the result of minor processing nor

simple assembly so (d)(1) and (2) do not apply. However, under §102.11(b)(1), where the country of origin cannot be determined under §102.11(a), the country of origin is the country or countries of origin “of the single *material* that imparts the essential character to the good.” (Emphasis added.) Under §102.11(d)(3), where the country of origin cannot be determined under the preceding subsections, the country of origin is determined by the “last country in which the good *underwent production*.”

Although software may provide the essential character of the finished good, it is not clear that under the current definitions in Part 102, that software is a “material.” Similarly, while downloading and testing may constitute completion of the assembly operation, it is not clear that the current definition of “production” is sufficient to cover such operations.

19 C.F.R. §102.1(l) defines “**material**” as “a *good* that is incorporated into another good as a result of production with respect to that other good, and includes parts, ingredients, subassemblies, and components.” §102(n) defines “**production**” as “growing, mining, harvesting, fishing, trapping, hunting, manufacturing, processing or assembling a good.”

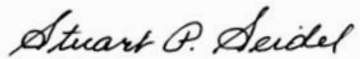
Requested Changes to the Proposed Rules

As indicated above, we believe that CBP should clarify the definitions of “material” and “production” to make it clear that those terms include software and downloading operations that provide the essential character or functionality to the imported good. That is, in situations where the good cannot perform its intended function without the programming, the programming of the good should be considered the equivalent of production and the software or operating system that makes it function should be considered analogous to material. As indicated previously, this may be accomplished by revising the definitions currently used, or by adding a specific subsection, or by providing examples and/or interpretative notes in the regulatory text so that are available in the C.F.R.

In addition, we believe that the existing Part 102 rules must be updated to reflect adoption of the 2007 Harmonized System changes before the rules can be used for the stated purposes. Unfortunately, the current Part 102, which we believe was drafted in the mid-1990’s, does not reflect major revisions to the Harmonized System that were adopted after Part 102 was promulgated. Once these revisions have been taken into account, the updated proposed changes and additions to the rules should be published for public comment. We believe this should be done *prior to* adoption of the Part 102 for uniform rules as many of the rules are outdated, and rules do not even exist for some revised tariff headings or subheadings. For example, the Part 102 rules for headings 8523 (old unrecorded media) and 8524 (recorded media) each require a change from any other heading. Thus, under the old HTS, recording in country B on blank media from country A provided a tariff shift and changed origin. The 2007 HS and current HTS place both recorded and unrecorded media in the same heading, 8523, but different subheadings. Thus under the current Part 102, no required tariff shift would occur and the country of origin would remain the same.

Brocade appreciates the opportunity to be able to comment on the NPRM. Should CBP wish to discuss our suggestions further, please contact either Teresa A. Gleason at (202) 452-7030 or teresa.a.gleason@bakernet.com or Stuart P. Seidel at (202) 452-7088 or stuart.p.seidel@bakernet.com.

Sincerely,

A handwritten signature in cursive script that reads "Stuart P. Seidel". The signature is written in black ink on a light-colored background.

Terrie A. Gleason
Stuart P. Seidel
Counsel for Brocade Communications Systems