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An Explanation of the Term “Ornamented” as Used in the Tariff Schedules of the United States

I. INTRODUCTION*

Merchandise imported into the customs territory of the United States is classified for duty purposes by officers of the United States Customs Service.¹ To classify the merchandise, officers locate the paragraph or item number in the Tariff Schedules of the United States which best names or describes that merchandise.² Duty is then collected at the rate set forth in that paragraph or item number.³

Disputes frequently arise between importers and the United States Customs Service over which one of the several competing tariff provisions applies to a particular type or style of merchandise.⁴ Often these disputes involve the definition of tariff terms. However, even when a tariff term is defined in the TSUSA, disputes arise over the application of the definition to specific merchandise. The definition of

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1. 19 C.F.R. § 15211 (1985) provides: “[m]erchandise shall be classified in accordance with the Tariff Schedules of the United States (19 U.S.C. Section 1202) as interpreted by administrative and judicial rulings.” Classification by the Customs Service bears a presumption of correctness “having evidentiary weight in and of itself.” *United States v. New York Merchandise Co.*, 435 F.2d 1315, 1318 (1970). The plaintiff has the burden of establishing by a preponderance of the evidence that the merchandise in issue does not fall within such a classification. *Id.*

2. R. STURM, *A MANUAL OF CUSTOM LAW* 145 (1976). Titles I and II of the Tariff Act of 1930, which comprised the dutiable and free lists for articles imported into the United States, were amended by the Tariff Classification Act of 1962, Pub. L. 87-456 § 101, 76 Stat. 72, 72-73, and a new Title I was created. 19 U.S.C. § 1202 (1965). Title I is published as the Tariff Schedules of the United States Annotated. (“TSUSA”). The annotated tariff is issued annually and is updated by periodic supplements by the United States International Trade Commission. (“USITC”). USITC Pub. 1760 (1985) at 1.

3. R. STURM, *supra* note 2, at 145.

4. *Id.* “When two or more tariff provisions seem to cover the merchandise, the prevailing provision is determined in accordance with the rules of construction contained in the head-notes at the beginning of and elsewhere in the tariff schedules.” Dep’t of the Treasury, U.S. Customs Serv., *IMPORTING INTO THE UNITED STATES* at 33 (Aug. 1985). Customs’ officials are also guided by the tariff classification principles contained in administrative rulings and the case law of the U.S. Court of International Trade (formerly the U.S. Customs Court) or the U.S. Court of Appeals for the Federal Circuit (formerly the U.S. Court of Customs and Patent Appeals). *Id.*

"ornamented" is such a term; although it is defined in the TSUSA, disputes repeatedly arise when applying it to specific merchandise.

Clothing and other textile products which are considered ornamented usually are classified at a higher duty rate than similar non-ornamented merchandise.⁵ The definition of ornamentation applies to almost all types of textile wearing apparel including outerwear, underwear, and accessories such as handkerchiefs, scarves, neckties, and hosiery. In the vast majority of cases, ornamentation increases the already high duty rate.⁶

Since clothing is being constantly restyled, ornamentation is a continuing concern for both the Customs Service and textile importers. Yet ornamentation remains a mystery because its definition is difficult to understand and the application of the definition is constantly being modified by judicial and administrative rulings. Therefore, the purpose of this article is to assist Customs personnel, Customs brokers, importers, and attorneys not specializing in this aspect of Customs law, to understand the definition of the term "ornamented" as used in the TSUSA in light of the numerous judicial and administrative rulings on the subject.

II. ORNAMENTATION ISSUES

The fundamental problem in classifying textile merchandise subject to the definition of ornamentation is that the decision is inherently subjective. The U.S. Customs Service takes the position that what constitutes ornamentation is a subjective determination not readily amenable to definition by strict criteria⁷ and that the decision

5. The importance of the definition of ornamentation can be illustrated by an example: Importer X and importer Y both import women's cotton, woven jackets, identical except that importer X's jacket has a one-quarter inch fringe below the knot on the jacket's drawstring belt while importer Y's jacket has a similar three-sixteenth inch fringe. Because importer X's jacket is ornamented with the one-quarter inch-long fringe, U.S. Cust. Priv. Ltr. Rul. 031127 (Nov. 29, 1973) at 1 mandates that importer X will pay 19.6% ad valorem duty (that is fixed at a percentage of the value of the jacket) while importer Y will only pay 8% ad valorem duty since, under the TSUSA definition, importer Y's jacket is not ornamented. Based on the application of the definition of ornamentation, a difference of one-sixteenth of an inch of a small number of threads can cause a difference in duty rate of 11.6% (based on 1986 duty rates).

6. Wearing apparel and textile products are the most protected of all domestic commodities. The U.S. has the highest textile duties of any major country. J. COM. IMPORT BULL. at 9 (Nov. 13, 1985). [hereinafter IMPORT BULL.] For example, U.S. duties on imported wearing apparel and textile products averaged about 22% compared to 5% for most other products. *Id.* at 11 (April 23, 1986).

7. T.D. 85-166, 19 CUST. B. & DEC. NO. 42 at 4 (1985).

must be made on a case by case basis.⁸ The Customs Court has held that a feature's ornamental effect is a question of fact to be determined by the Customs Court on a case by case basis.⁹

Approximately fifteen billion dollars worth of textile products were imported into the United States in 1985.¹⁰ The majority of the countless types or styles of imported textile products are subject to classification as ornamented or not ornamented. The U.S. Customs Service has the responsibility to determine the proper tariff classification for this vast quantity of imported merchandise.¹¹ However, importers are required to supply to the U.S. Customs Service invoices that give a detailed description of the imported merchandise including a description of possibly ornamenting features.¹² If an importer receives a Customs ornamentation ruling or otherwise has knowledge that Customs will classify specific merchandise as ornamented, but nonetheless describes the merchandise as not ornamented, the importer may be subject to a penalty.¹³

Therefore, an importer dealing with the importation of textile products must be familiar with the ornamenting features enumerated in Headnote 3, Schedule 3, TSUSA. In addition, everyone working in this area must be able to evaluate a particular feature in terms of its decorative¹⁴ and functional¹⁵ qualities pursuant to the test for orna-

8. U.S. Cust. Internal Adv. Rul. 041260, at 3 (Jan. 27, 1976).

9. *United States v. Endicott Johnson Corp.*, 617 F.2d 278, 281 (1980).

10. *Washington Post*, May 4, 1986, at F1, col. 1.

11. U.S. Cust. Enforcement Rul. 653737, at 2 (Apr. 1, 1985). Merchandise is classified primarily by review of invoices describing the merchandise. Whenever a question exists, however, samples of merchandise are reviewed before, during, or after Customs entry procedures.

12. *See* 19 U.S.C. § 1481(a) (1980).

13. *See* 19 U.S.C. § 1592(c) (1980). Section 1592(a) of Title 19 prohibits the importation of merchandise by means of false or fraudulent documents, statements or practices without reasonable cause to believe in their veracity. If a violation is established, the merchandise becomes subject to seizure or penalty equal to the wholesale value of the merchandise in the United States.

14. A decorative feature tends to adorn, embellish, decorate, or beautify the article of clothing or textile product on which it appears. *See Britannia Sportswear v. United States*, No. 83-46, slip op. at 89 (Ct. Int'l Trade, May 11, 1983). For example, in *Britannia*, the U.S. Court of International Trade held that jeans which have a single fabric loop on their sides, at the hip, were not ornamented because the loops were small, they were made of the same material, and they were stitched in the same manner as the garment. The court said that the loops on the jeans "do not visibly adorn, embellish, decorate or beautify the jeans." *Id.* Once a feature is considered no more than incidentally decorative, the question of functionality need not be considered. *Id.* at 90.

15. The United States Court of Customs and Patent Appeals discussed functionality in terms of a feature serving a significant purpose in the character, construction or manufacturer of an article. Features that strengthen the material, enable the manufacturer to produce the

mentation set forth in section V of this article.¹⁶

III. A BRIEF HISTORY OF ORNAMENTATION

Although not a new concept,¹⁷ the broad concept of ornamentation in use today was created under the Tariff Classification Act of 1962.¹⁸ The definition of ornamentation was placed in the TSUSA by the 1962 Act in order to retain the higher duty rates for textile articles¹⁹ which are embroidered or ornamented in certain ways enumerated by paragraph 1529(a) of the Tariff Act of 1930.²⁰

Originally, the language of paragraph 1529(a) was intended to impose a higher duty rate on textile articles.²¹ However, numerous trade-agreement concessions resulted in lower rates of duty of if para-

product more efficiently or cheaper, or produce a better product are functional and not merely ornamental. *Endicott Johnson*, 617 F.2d at 282.

16. See *infra* text accompanying notes 29-30.

17. Embroidery was introduced as a tariff term as early as the Tariff Act of 1846 which provided for a thirty per centum ad valorem duty on "[m]anufactures of cotton, linen, silk, wool, or worsted, if embroidered or tamboured, in the loom or otherwise, by machinery or with the needle, or other process." 9 Stat. 74 at 44-45 (1846).

18. See *supra* note 2. The Tariff Classification Act of 1962 was approved on May 24, 1962 and went into effect on August 21, 1963. For the legislative history and purpose of the Act, see generally 1962 U.S. CODE CONG. & ADMIN. NEWS, at 1641.

19. See IMPORT BULL., *supra* note 6 and accompanying text.

20. Paragraph 1529 provided as follows:

(a) laces, lace fabrics, and lace articles, made by hand or on a lace, net, knitting, or braiding machine, and all fabrics and articles, made on a lace or net machine, all the foregoing, plain or figured: lace window curtains, veils, veilings, flouncings, all-overs, neck ruffings, flutings, quiltings, ruchings, tuckings, insertings, galloons, edgings, trimmings, fringes, gimps, and ornaments: braids, loom woven and ornamented in the process of weaving, or made by hand, or on a lace, knitting, or braiding machine: and fabrics and articles embroidered (whether or not the embroidery is on a scalloped edge), tamboured, appliqued, ornamented with beads, bugles, or spangles, or from which threads have been omitted, drawn, punched, or cut, and with threads introduced after weaving to finish or ornament the openwork, not including one row of straight hemstitching adjoining the hem: all the foregoing, and fabrics and articles wholly or in part thereof, finished or unfinished . . . by whatever name known, and to whatever use applied, and whether or not named, described, or provided for elsewhere in the Act, when composed wholly or in chief value of filaments, yarns, threads, tinsel, wire, lame, bullions, metal threads, beads, bugles, spangles, or rayon or other synthetic textile, 90 per centum ad valorem. Hose and half-hose wholly or in chief value of cotton or of wool shall not be dutiable at the above rate by reason of being embroidered, if the embroidery is such as is commonly known as clocking and does not exceed one inch in width or six inches in length, exclusive of the fork, but shall be subject to a duty of 75 per centum ad valorem.

46 Stat. 497 (1930) at 665. An ad valorem duty such as 90% ad valorem means that ninety cents in duty will be assessed for each dollar of appraised value.

21. See TARIFF CLASSIFICATION STUDY, Explanatory Notes at 7 (1960). The TARIFF CLASSIFICATION STUDY constitutes legislative history for the provisions of the TSUSA. *Certified Blood Donor Services, Inc. v. United States*, 511 F.2d 572, 575 (1975).

graph 1529(a) applied,²² since the "in part" language of paragraph 1529(a) was interpreted to mean any part however small, importers achieved a lower duty rate by concealing meaningless pieces of braid or netting into their merchandise.²³ This problem is eliminated under the current definition of ornamentation because an article is now considered ornamented only if the braid, netting, etc. is used primarily for ornamentation.²⁴

IV. THE DEFINITION OF ORNAMENTATION

Ornamentation is defined in Headnote 3, Schedule 3, TSUSA, as follows:

3. For the purposes of the tariff schedules —

(a) the term "ornamented," as used with reference to textile fabrics and other articles of textile materials, means fabrics and other articles of textile materials, which are ornamented with —

(i) fibers, filaments (including tinsel wire and lamé, yarns, or cordage, any of the foregoing introduced as needlework or otherwise, including —

(A) embroidery, and pile or tufting, whether wholly cut, partly cut, or not cut, and

(B) other types of ornamentation, but not including functional stitching or one row of straight hemstitching adjoining a hem;

(ii) burnt-out lace;

(iii) lace, netting, braid, fringe, edging, tucking, or trimming, or textile fabric;

(iv) appliqué and repique work, beads, bugles, spangles, bullions, or ornaments; or

(v) any combination of the foregoing types or methods of ornamentation;

(b) ornamentation of the types or methods covered hereby consists of ornamenting work done to a pre-existing textile fabric, whether the ornamentation was applied to such fabric —

(i) when it was in the piece,

(ii) after it had been made or cut to a size for particular furnishings, wearing apparel, or other article, or,

(iii) after it had actually been incorporated into another article, and if such textile fabric remains visible, at least in

22. TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7.

23. *Id.* at 6-7.

24. *Id.* at 7.

significant part, after ornamentation: *Provided*, that lace, netting, braid, fringe, edging, tucking, trimming or ornament shall not be required to have had a separate existence from the fabric or other article on which it appears in order to constitute ornamentation for the purposes of this headnote; and (c) appliqué work, beads, bugles, spangles, bullions, and other forms of nontextile ornamentation applied to a textile fabric or other article of textile materials shall be disregarded in determining the component material or chief value of such fabric or other article.²⁵

V. THE TEST FOR ORNAMENTATION

Headnote 3, Schedule 3, TSUSA, sets forth the features which may constitute ornamentation.²⁶ However, the mere listing of a feature (e.g., tucking or textile fabric, etc.) in Headnote three, does not automatically determine that a garment containing such a feature is ornamented for tariff purposes.²⁷

Traditionally, the various features of a garment were compared with the list of possible ornamenting features enumerated in Headnote 3, Schedule 3, TSUSA. If found on the list, the feature was subjected to a balancing test.²⁸ Under this test, a feature considered primarily functional would not be considered ornamental; but a feature not demonstrably functional, would usually be considered ornamental.²⁹

25. TSUSA, USITC, Pub. 1775, at 3-3 (1986). Once any feature is considered ornamental, the merchandise is assigned the duty rate on ornamented merchandise regardless of the number of ornamenting features.

26. This headnote does not define the ornamenting features listed. Terms in the tariff act presumably carry the meaning given to them by the trade and commerce of the United States. U.S. Cust. Classification Rul. 068739, at 2 (Oct. 23, 1981). Usually the common or dictionary meaning is used. See *United States v. C.J. Tower and Sons*, 48 C.C.P.A. 87, 89, C.A.D. 770 (1961).

27. See *infra* notes 28-29 and accompanying text.

28. This test, known as the *Blairmoor* balancing test, was established in *Blairmoor Knitwear Corp. v. United States*, 284 F. Supp. 315, 318 (1968). The test consisted of balancing the functional nature of a feature against its decorative effect. *Id.* at 393. If a feature was primarily decorative, it was considered ornamental. The rationale for using this test came from the explanatory notes of Schedule 3 in the TARIFF CLASSIFICATION STUDY compiled for Congress by the U.S. Tariff Commission. The explanatory notes state the following: "under the proposed definition of 'ornamented,' . . . rates derived from paragraph 1529(a) would apply only if such materials were used primarily for ornamentation." See TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7.

29. Under the *Blairmoor* Balancing Test, features with very little, if any, decorative effect were often considered ornamental simply because they were nonfunctional. See TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7. This result appears contrary to the congressional intent to find ornamentation only when features were used primarily for decoration.

The classification of merchandise subject to the definition of ornamentation was significantly modified by the decision in *United States v. Endicott Johnson Corp.*³⁰ This case involved the classification of cotton canvas shoe uppers with two parallel rows of stitches referred to as "arch stitching."³¹ Instead of asking whether the rows of stitching were primarily decorative or primarily functional, the U.S. Customs Court noted that the white "arch stitching" was not noticeably visible on white sneakers, and certainly no more noticeable than other functional white stitching nearby.³²

The court created a new test for ornamentation by asking the following:

- (1) Does the feature "impart no more than an incidental, decorative effect?" and
- (2) Does the feature "have a functionality which is primary to any ornamental nature?"³³

"An affirmative answer to either results in a nonornamental classification."³⁴ The *Endicott Johnson* test retains the balancing portion of the *Blairmoor* test, but modifies it with the addition of step one. The new test is more compatible with congressional intent.³⁵ However, the addition of step one creates more uncertainty because the new ornamentation test requires two subjective decisions instead of one.

The U.S. Customs Service has applied the principles of *Endicott Johnson* to all merchandise where ornamentation is in question, including the few cases where a finding of ornamentation results in a lower rate of duty.³⁶ For example, ornamented textile gloves are assessed a lower duty rate than nonornamented textile gloves. Therefore, glove importers often placed nonfunctional, nondecorative "X" stitching³⁷ on the gloves to be assessed the lower duty rate applicable

30. *United States v. Endicott Johnson Corp.*, 617 F.2d at 278.

31. *Id.* at 281.

32. *Id.*

33. *Id.* at 282. Whether a particular feature constitutes ornamentation depends on its resulting effect upon the merchandise rather than the intention of the manufacturer. *Colonial Corp. of Am. v. United States*, 62 Cust. Ct. 502, 504, C.D. 3815 (1969).

34. *Endicott Johnson*, 617 F.2d at 281.

35. See TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7.

36. 19 CUST. B. & DEC., *supra* note 7, at 4. This is done on a case by case basis. See Internal Adv. Rul. 041260, *supra* note 8, at 3.

37. An "X" stitch, also called a cross stitch, is a basic embroidery stitch with one thread crossed over the other to form an "X". C. CALASIBETTA, FAIRCHILD'S DICTIONARY OF FASHION at 486 (1975).

to ornamented gloves. However, the Customs Service applied the new test set forth in *Endicott Johnson* to reclassify this type of feature as nonornamental.³⁸

The Customs Service held that step one of the new test required a feature to increase the eye appeal of the article by making it more attractive and that step two of the new test required a feature to serve a primarily decorative rather than useful function. Since the "X" stitching was not readily visible on the gloves, it did not increase the eye appeal of the gloves or serve a primarily decorative function; therefore, under *Endicott Johnson*, the "X" stitching was ruled nonornamental.³⁹

The new test can be applied to any enumerated feature on any textile article.⁴⁰ In restating the new test, the Customs Service held that a feature enumerated in Headnote 3, Schedule 3, TSUSA, is ornamented only if: (1) the enumerated feature is decorative in appearance; (2) the primary purpose of the enumerated feature is the ornamental effect it imparts; and (3) the decorative appearance of the feature is more than merely incidental when viewing the article as a whole.⁴¹

38. See T.D. 85-166, *supra* note 7, at 1.

39. 19 Cust. B. & Dec., *supra* note 7, at 2. This example points out the defect in the *Blairmoor* balancing test. Under *Blairmoor*, even though the cross stitching was nondecorative, it was considered ornamental because it was not primarily functional. This result was contrary to congressional intent which requires ornamentation to be primarily for decoration. See TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7.

40. See 19 Cust. B. & Dec., *supra* note 7, at 2.

41. *Id.* The *Endicott Johnson* court significantly improved the *Blairmoor* balancing test by requiring an ornamental feature to be more than incidentally decorative. This new requirement is consistent with Congress' intent that ornamented rates apply only where a feature was used primarily for ornamentation. See TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7. However, the *Endicott Johnson* court made the same mistake made by the *Blairmoor* court by assuming that this congressional intent could be achieved by balancing a feature's functionality versus its ornamental or decorative nature. While this assumption almost always leads to a result compatible with congressional intent, this is not always the case.

For example, if a feature was more than incidentally decorative, and if its decorative effect exactly matched its functional purpose, it would be held ornamental under the language of the *Endicott Johnson* test. This result would be contrary to congressional intent. See TARIFF CLASSIFICATION STUDY, *supra* note 21, at 7. In addition, the implicit assumption at step two of the *Endicott Johnson* test that features are incorporated into garments for decorative or functional purposes only is incorrect. For example, the "X" stitching discussed in the text accompanying notes 37-39 was placed on the glove, not for functional or decorative purposes, but only to qualify for a lower rate of duty. The Customs' interpretation and restatement of the *Endicott Johnson* test avoids these problems by requiring that the primary purpose of the enumerated feature must be the ornamental effect it imparts. See T.D. 85-166, *supra* note 7, at 2.

Even though the Customs three-part interpretive restatement is actually a clearer and

The remainder of this article will review particular features in light of current judicial and administrative rulings. Most of the rulings cited in this article refer to decisions made under the *Blairmoor* test. However, they are still helpful in defining the possibly ornamenting features and in deciding how those features would be construed today under step two of the new *Endicott Johnson* test.

VI. ORNAMENTAL FEATURES

A. *Stitching*

Headnote 3, of Schedule 3, TSUSA, excludes from the term "ornamented" functional stitching or one row of straight hemstitching⁴² adjoining a hem.⁴³ Functional stitching serves a significant purpose with respect to the character, construction, or manufacture of an article.⁴⁴ For example, stitching that provides structural support for a garment is functional because it contributes to the construction of the garment.⁴⁵ However, many types of stitching are both functional and decorative. Whether specific stitching is considered functional or ornamental will depend on the test established in *Endicott Johnson*.⁴⁶

Since both steps of this test are inherently subjective, every textile article or garment subject to the definition of ornamentation must be scrutinized on an individual basis.⁴⁷ With this consideration in mind, several types of stitching will be discussed to determine when a particular type is ornamental.

1. Embroidery

For an article to be embroidered for tariff purposes, there must be ornamental, superimposed stitching which is the result of needlework.⁴⁸ Normally embroidery consists of designs stitched into fabric

better test, the two-part test used by the *Endicott Johnson* court has the stamp of judicial approval and will give results compatible with congressional intent in almost all cases. Therefore, the *Endicott Johnson* court's version of the test for ornamentation will be cited throughout the remainder of this article.

42. Hemstitching is made by drawing out several parallel threads, then tying together groups of vertical threads at regular intervals, making hourglass shapes, used as border on blouses, handkerchiefs, etc. C. CALASIBETTA, *supra* note 37, at 487.

43. TSUSA, *supra* note 25, at 3-3.

44. *Endicott Johnson*, 617 F.2d at 282.

45. *See id.*

46. *See id.* at 284.

47. Internal Adv. Rul. 041260, *supra* note 8, at 3.

48. Baylis Brothers Inc. v. United States, 60 Cust. Ct. 336, 339, C.D. 3383, affirmed in 56 C.C.P.A. 115, 117 C.A.D. 964 (1969).

with thread.⁴⁹

Typically, embroidery is decorative and nonfunctional although this is not always the case. For example, a pair of jeans with a single row of stitching forming a loop in a non-contrasting color was found not to be ornamented for tariff purposes under the *Endicott Johnson* test because the stitching was not readily visible.⁵⁰ In contrast, functional embroidery in the form of a lightning bolt (about two inches long) sewn at the bottom of the front opening placket⁵¹ of a shirt, was held to be ornamental. This stitching was sewn through both layers of fabric forming the placket and served to reinforce that area of the shirt. Although this stitching was functional, it was held to be ornamental because it was primarily decorative in nature.⁵² The effect of the design sewn with contrasting thread was highly visible and the Customs Service decided that its decorative effect outweighed its functional purpose.⁵³ Thus it cannot be assumed that any article, even when embroidered, is ornamented without individually applying the two-step *Endicott Johnson* test.⁵⁴

2. Double Needle Stitching

The Customs Service has held that double needle stitching is nonornamental for tariff purposes.⁵⁵ Double needle stitching⁵⁶ includes stitching along a folded edge, stitching which joins two pieces of material together, or stitching which flattens and secures loose material.⁵⁷ Two rationales support this position. According to the Customs Service, either the double needle stitching is primarily functional and therefore, nonornamental, or the second row of stitching does not

49. L. CARBONE, *DICTIONARY OF SEWING TERMINOLOGY* 49 (1977).

50. U.S. Cust. New York Priv. Ltr. Rul. 803287, at 1 (Jun. 18, 1982). This is an example of the difference between the *Blairmoor* and *Endicott Johnson* tests. Since the stitching was not more than incidentally decorative, it was found nonornamental under step one of the *Endicott Johnson* test. In contrast, since the stitching was nonfunctional, it would have been considered primarily decorative and therefore, ornamental under *Blairmoor*.

51. A placket is a slit at neck, side, front, back, or wrist of a garment. It is used to facilitate putting garments on and taking them off. C. CALASIBETTA, *supra* note 37, at 401.

52. U.S. Cust. Priv. Ltr. Rul. 059283, at 1 (Sep. 13, 1978).

53. *Id.* Although decided under the *Blairmoor* test, the result would be the same under the *Endicott Johnson* test because the embroidery was more than incidentally decorative.

54. See *Endicott Johnson*, 617 F.2d at 281.

55. U.S. Cust. Protest Dec., 061993, at 1 (May 22, 1980).

56. As used here, double stitching means two straight lines of stitching. Cf. U.S. Cust. Priv. Ltr. Rul. 046735, at 1 (Oct. 13, 1967).

57. Protest Dec. Mem. 061993, *supra* note 55, at 4. Thus defined, double needle stitching is almost always functional.

constitute ornamentation in "an accepted trade sense."⁵⁸

3. Triple Needle and Multiple Row Stitching

Triple needle stitching⁵⁹ is generally considered ornamental except when it holds the stress seams⁶⁰ of denim⁶¹ jeans and bib overalls.⁶² For example, a pair of denim jeans with triple needle stitching located on each of the outer leg seams, the back yoke seam, and the back center seam was considered nonornamental because the stitching was primarily functional.⁶³

Similarly, triple needle stitching on the stress seams of bib-type denim overalls is usually considered nonornamental when the overall is designed to be used as a work garment and the triple needle stitching provides extra durability and strength.⁶⁴ However, cotton corduroy⁶⁵ pants with triple needle stitching identical to stitching found on nonornamented denim pants were considered ornamented because the pants appeared to be designed for leisure wear and not for work or sports.⁶⁶

Multiple rows⁶⁷ of stitching beyond three will generally be considered ornamental under the *Endicott Johnson* test because they are

58. *Excelsior Import Assoc.*, 444 F. Supp. 780, 782 (1977), *aff'd*, 583 F.2d 513 (1978). What constitutes "an accepted trade sense" has not been explicitly defined by the courts. Therefore, the Customs Service follows the guidance of the language in the *Excelsior* case. In that case, the court held that evidence that consumers regard a certain feature as enhancing a garment's appearance was determinative of whether the garment was ornamented in "an accepted trade sense." Legal Determin. 80-0178 (Dec. 22, 1980) at 3. The phrase, "an accepted trade sense" may have been a forerunner to step one of the *Endicott Johnson* test.

59. As used here, triple needle stitching means three straight lines of stitching. Priv. Ltr. Rul. 046735, *supra* note 56, at 1.

60. Usually, stress seams are considered to be the outer leg seams, the back yoke seam, and the back center seam. See U.S. Cust. Priv. Ltr. Rul. 74-034054, at 1 (Dec. 31, 1974).

61. Denim is a sturdy cotton yarn-dyed fabric with warp-face twill. Classic denim has indigo-blue face, gray or unbleached fill. C. CALASIBETTA, *supra* note 37, at 189.

62. A bib overall consists of pants with bib top and suspender straps crossing in back and fastened to the bib with metal loops over metal buttons. *Id.* at 385.

63. Priv. Ltr. Rul. 74-034054, *supra* note 60, at 1.

64. Priv. Ltr. Rul. 031127, *supra* note 5, at 2. Triple needle stitching on other garments may be considered nonornamental if the particular garment requires the stitching for extra durability and strength.

65. Corduroy is a medium to heavy-weight cotton fabric with vertical cut-pile stripes, differentiated by size of cords as pin-wale, regular or wide-wale corduroys. C. CALASIBETTA, *supra* note 37, at 187.

66. Priv. Ltr. Rul. 046735, *supra* note 56, at 1.

67. Sometimes what appears to be four rows of multiple stitching is actually two sets of double needle stitching. See *supra* text accompanying notes 55-58.

generally unnecessary for support or construction of the garment.⁶⁸ However, some garments require more than the usual one or two rows of straight stitching. For example, the Customs Service considered five rows of stitches primarily functional on a mandarin collar⁶⁹ since the stitching held together the two pieces of fabric forming the collar and provided a degree of stiffness required by that type of collar.⁷⁰

4. Zig Zag and Overlock Stitching

The best way to determine if a garment with zig zag⁷¹ or overlock⁷² stitching is ornamented is to remove the stitching and see how the structural integrity of the garment is effected.⁷³ If the stitching is primarily functional in respect to the character, construction or manufacture of the article, it will be considered functional.⁷⁴ For example, if zig zag or overlock stitching is the only means of attaching two pieces of material together, it will be considered primarily functional and therefore, nonornamental.⁷⁵

In another example, after examining a garment with seams stitched with double stitching and overlock stitching, the Customs Service held that the overlock stitching was ornamental because the removal of the overlock stitching did not cause the seams to fall apart or reveal any open spaces along the seams.⁷⁶ Since the underlying stitching was sufficient to hold the seams together, even when subjected to stress during normal wear of the garment, the overlocking stitching was not considered primarily functional.⁷⁷

68. See *Endicott Johnson*, 617 F.2d at 281.

69. A mandarin collar is a standing-band collar that extends up on the neck, not quite meeting at center front. C. CALASIBETTA, *supra* note 37, at 33.

70. U.S. Cust. Internal Adv. Rul. 051208, at 2 (Apr. 1, 1977).

71. Zig zag stitching is a serrated line of machine stitching used as decoration or to prevent raveling of raw edges. *SHORTCUTS TO ELEGANCE* at 184 (Time-Life 1973).

72. Overlock stitching is overcast machine stitching. *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY* 1608 (1968). Overcast stitching is a diagonal edging stitch that always enters the fabric from the same side and goes around raw edges to keep them from fraying. C. CALASIBETTA, *supra* note 37, at 488.

73. See U.S. Cust. Internal Adv. Rul. 049413, at 1-2 (Feb. 10, 1977). The merchandise itself must be examined. Verbal descriptions, sketches, pictures, etc. are inadequate.

74. See *Endicott Johnson*, 617 F.2d at 282.

75. U.S. Cust. Priv. Ltr. Rul. 028875, at 1 (Jan. 7, 1974).

76. Internal Adv. Rul. 049413, *supra* note 68, at 2. Under step two of the *Endicott Johnson* test, necessity is not required but only that the functional aspect of the stitching outweighs its decorative effect.

77. *Id.*

In contrast, the Customs Service held a pair of jeans with zig zag stitching not to be ornamented when the zig zag stitching was found to be primarily functional.⁷⁸ In that case, the zig zag stitching added a substantial and noticeable degree of reinforcement to a loosely machine-stitched seam.⁷⁹

5. Quilting

In 1969, the Customs Service ruled that quilting⁸⁰ stitching should not be considered ornamental.⁸¹ The article in question was a quilted robe. The stitching which formed the quilting was applied in a leaf-like pattern on the collar, sleeves, and body of the robe and in a ribbon-bow design on the lower portion of the robe.⁸² Double lines of vertical and horizontal stitching, seven-eighths of an inch apart, imprinted a lattice-work effect on the lower part of the robe.⁸³ Although it could have been argued that some of the stitching was unnecessary to achieve a quilted effect, the Customs Service decided that the nature of quilted fabrics makes it impossible to tell when stitching ceases to be functional and becomes ornamental.⁸⁴

The Customs Service decided that there was no authority in the law to set up an objective test governing the classification of quilted stitching, reasoning that the subjective decision as to what is functional and what is ornamental would provide a continual source of dispute and possibly result in inconsistent decisions. Therefore, the Customs Service decided that quilting stitching should not be considered ornamental.⁸⁵

In 1979, the Customs Service reaffirmed its position that quilting stitching is not ornamental.⁸⁶ It defined functional quilting as "stitching which actually holds two or three layers of material together, one layer of which is a batting or is similar to a batting. . . ."⁸⁷ The Customs Service ruled that "any functional quilting stitching on a gar-

78. Priv. Ltr. Rul. 028875, *supra* note 70, at 1.

79. *Id.*

80. Generally, quilting is formed by layers of fabric sewn together with stitching that forms patterns or designs. See L. CARBONE, *supra* note 49, at 109.

81. T.D. 69-209(21), 3 Cust. B. & Dec. 531 (1969).

82. U.S. Cust. Priv. Ltr. Rul. 059060, at 2 (June 29, 1979).

83. *Id.*

84. *Id.* at 3.

85. *Id.* at 2. The same reasoning could be applied to many other areas of ornamentation but the U.S. Customs Service generally has not taken this approach.

86. Priv. Ltr. Rul. 059060, *supra* note 82, at 3.

87. *Id.*

ment" will not constitute ornamentation for tariff purposes.⁸⁸

This definition, however, allows quilting stitching to be used as a justification for decorative designs on otherwise nonquilted garments. The Customs Service faced this problem when it ruled on the classification of highly decorated jean pockets which were constructed to fit the Customs' definition of quilting.⁸⁹ This particular construction was designed to avoid the higher tariff. The Customs Service resolved this problem by limiting its previous definition of functional quilting;⁹⁰ consequently, a garment with decorative quilting stitching, but possessing little or no utilitarian value, will be considered ornamented for tariff purposes.⁹¹ This position is consistent with the classification principle that quilting or any other feature which is considered functional on one garment may be considered ornamentation on another garment.⁹² For example, triple needle stitching on women's raincoats may constitute ornamentation while similar stitching on work garments may be considered primarily functional and therefore, nonornamental.⁹³

B. Tucking

The definition of tucking is unclear⁹⁴ but essentially, a tuck is folded fabric stitched in place to prevent expansion.⁹⁵ Tucking is a

88. *Id.*

89. U.S. Cust. Legal Determination 062972, at 1-2 (Aug. 19, 1980).

90. "The wording in Headquarter ruling 059060 should be read in conjunction with the merchandise being ruled upon." *Id.* at 4.

91. *Id.* This reinstates the problem of deciding when quilting becomes primarily decorative.

92. *Id.*

93. *Id.*

94. The difference between pleats, tucks and darts are often confused. A pleat is a fold of fabric in a garment which may be stitched down, pressed, partially stitched, or left loose. It may be used for decoration or for controlling the fullness of a garment. L. CARBONE, *supra* note 49, at 105. A tuck is a stitched down pleat used for fit or decoration. It may be stitched down on the outside or inside of the garment. *Id.* at 138. A dart is a kind of tuck formed by a stitched fold of fabric tapering to a point at one or both ends, sewed for fit. The fabric is usually folded on the inside of the garment. U.S. Cust. Internal Adv. Rul. 053839, at 3 (Apr. 27, 1978). Only those pleats that are sewn down on the outside of the garment for primarily decorative purposes are considered ornamental tucks for tariff purposes. Stitching that forms a pleat would be considered independently as a potentially ornamenting feature. The stitching would not be considered ornamental if the pleat formed was primarily functional (e.g., necessary for fit, etc.). See U.S. Cust. Priv. Ltr. Rul. 059567, at 2 (Apr. 13, 1979). If the pleat formed an ornamental tuck, then "both the tucking and any visible stitching added to the garment to create the tucking will cause the garment to be ornamented for tariff purposes." U.S. Cust. Internal Adv. Rul. 052549, at 3 (July 20, 1977).

95. U.S. Cust. Internal Adv. Rul. 053839, at 3 (Apr. 27, 1978).

feature enumerated in the Headnote 3, Schedule 3, TSUSA, definition of ornamentation.⁹⁶ However, many features that fit this definition of tucking are functional to the garment and are therefore nonornamental.⁹⁷

For example, tucks that form the top of the pleats on a pleated skirt are considered primarily functional because the pleats are required to control the fullness of the garment.⁹⁸ Additionally, pleats on each side of the fly of a pair of man's pants were considered functional tucking. The pleats in question extended downward about two and one-quarter inches from the waistband. The tucks which formed the top of the pleats, were held in place with stitching in the shape of a triangle.⁹⁹ The stitching was determined to be functional because it prevented the pleats from opening and was necessary for the fit of the garment.¹⁰⁰

Generally, a tuck which helps to hold in place the fold of an expandable pleat is considered primarily functional for tariff purposes. However, stitching used to prevent expansion, as in the case of nonexpandable box pleats,¹⁰¹ constitutes ornamentation.¹⁰² No size requirement exists for the fold of fabric stitched in place. For example, pin tucks¹⁰³ with less than one-sixteenth of an inch from the edge of the fold have been found ornamental.¹⁰⁴ However, the Customs Service has consistently held that the manner of construction is critical in determining the existence of tucking.¹⁰⁵ The fact that a feature looks like a tuck is not dispositive of it being classified as such.¹⁰⁶ For example, the Customs Service held that a free-hanging edge formed by two sections of a garment being stitched together did not constitute a

96. TSUSA, *supra* note 25, at 3-3.

97. See, U.S. Cust. Priv. Ltr. Rul. 070269, at 1, 2 (May 20, 1983).

98. U.S. Cust. Priv. Ltr. Rul. 054396, at 2 (Feb. 2, 1978).

99. Priv. Ltr. Rul. 059567, *supra* note 94, at 1.

100. *Id.* at 2.

101. A box pleat is a "[d]ouble pleat formed by two facing folds meeting in the center underneath the pleat." C. CALASIBETTA, *supra* note 37, at 403. The box pleat may be made nonexpandable by stitching the folds in place. Such nonexpandable pleats constitute ornamental tucking. Priv. Ltr. Rul. 070269, *supra* note 97, at 1.

102. U.S. Cust. Priv. Ltr. Rul. 036967, at 1 (Dec. 19, 1974). Box pleats are often placed on shirt pockets to allow for expansion. When left expandable, they are nonornamental. When sewn down to prevent expansion, they form ornamental tucks. See Priv. Ltr. Rul. 070269, *supra* note 97, at 1.

103. Pin-tucks are tucks that are pressed and stitched on the very edge of the fold. L. CARBONE, *supra* note 49, at 104.

104. Internal Adv. Rul. 053839, *supra* note 95, at 2.

105. *Id.*

106. *Id.*

tuck, while an identical appearing feature on another garment constructed by stitching two pieces of fabric together prior to the folding and stitching, did constitute a tuck.¹⁰⁷

One way to test the existence of a tuck is to remove the stitching which holds the fold and see how the integrity of the garment is effected. If removal of the stitching causes the garment to fall apart, no tuck exists.¹⁰⁸

C. Appliqué

For tariff purposes, an appliqué is material in the form of a design, which is superimposed on fabric.¹⁰⁹ Many types of textile, leather, plastic and other materials are sewn or otherwise fastened to fabrics to form ornamental appliques. For example, words (such as manufacturer's trademark) which are cut out and sewn to textile merchandise are generally considered to be ornamental appliqué by the U.S. Customs Service.¹¹⁰ However, not all appliques are classified as ornamentation. For example, elbow patches are generally considered functional since they prevent wear at places that are subject to more wear than other areas of the garment.¹¹¹

The Customs Service has held that in order for leather, a nontextile¹¹² material, to be considered ornamentation it must be an appliqué.¹¹³ In 1914, the Customs Court of Appeals held that strips which

107. *Id.* at 3.

108. This is an example of the application of the second step of the *Endicott Johnson* test. See *Endicott Johnson*, 617 F.2d at 281 and text accompanying notes 33-34.

109. U.S. Cust. Internal Adv. Rul. 061708, at 2 (Jan. 30, 1980).

110. *Id.* at 2-3. See also, *United States v. Bernard, Judae & Co.*, 4 Cust. Appls. 403, T.D. 33660 (1913).

111. U.S. Cust. Internal Adv. Rul. 040374, at 1 (Aug. 28, 1975). However, if a patch is decoratively shaped, excessively large, etc., it may be considered ornamental.

112. A "nontextile material," such as leather, metal, plastic, etc., is not within the meaning of "textile material" which is defined in Headnote 2 Schedule 3 TSUSA, as follows:

2. For the purposes of the tariff schedules—

(a) the term "textile materials" means—

(i) the fibers (cotton, other vegetable fibers, wool and hair, silk, and man-made fibers) provided for in part 1 of this schedule;

(ii) the yarn intermediates and the yarns provided for in part 1 and part 4 (elastic yarns) of this schedule;

(iii) the cordage provided for in part 2 and part 4 (elastic cordage) of this schedule;

(iv) the fabrics provided for in part 3 and part 4 of this schedule;

(v) braids, as defined in headnote 2(f), *infra*; and

(vi) except as provided by headnote 5, articles produced from any of the foregoing products;

TSUSA, *supra* note 25, at 3-2.

113. T.D. 73-71, 7 Treas. Dec. 180, 181 (1973).

were not in the form of designs did not constitute appliques.¹¹⁴ Therefore, under this decision, a leather strip is not an ornamenting feature. However, if the leather is in the form of a figure or design, then it constitutes an applique and will cause the garment on which it is attached to be classified as ornamented for tariff purposes.¹¹⁵

A garment constructed in such a manner that a large or substantial opening is filled in or covered by a separate piece of fabric which does not extend beyond the opening more than is reasonably necessary for attachment is not generally considered ornamented with applique.¹¹⁶ Since these fabric inserts are necessary to complete the garment, they do not constitute ornamentation.¹¹⁷ However, the Customs Service has consistently held that when a piece of fabric is cut out from beneath an overlay to give the overlay the appearance of a fabric insert, the overlay will constitute ornamentation for tariff purposes because the overlay is not necessary to complete the construction of the garment.¹¹⁸

D. Edging

Edging represents one feature enumerated in Headnote 3, Schedule 3, TSUSA, which may or may not constitute ornamentation for tariff purposes.¹¹⁹ Ornamental edging includes a variety of stitching, and additions or finishes to a garment's edge. Those edgings that are only incidentally decorative, or primarily function to finish a garment's raw edge, are not ornamental.¹²⁰ Those edgings that do not finish a garment usually constitute ornamentation.¹²¹

The TSUSA definition of ornamentation states that an "edging shall not be required to have had a separate existence from the fabric

114. *United States v. Hamburger Levine Co.*, T.D. 34382, 26 Treas. Dec. 637, 641-42 (1914). This anomalous ruling has caused confusion because "strip" is left undefined.

115. T.D. 76-175 (2), 10 Cust. B. & Dec., 4-5 (1976). *See also* U.S. Cust. Internal Adv. Rul. 078019, at 2 (May 9, 1986). It is interesting to note that embroidery on leather strips does not constitute ornamentation since Headnote 3, Schedule 3, TSUSA, requires non-functional stitching be placed on a pre-existing textile fabric in order for it to be considered ornamentation. Because leather is not considered a textile material, stitching on it cannot be ornamentation. U.S. Cust. Priv. Ltr. Rul. 044817, at 2 (May 28, 1976).

116. U.S. Cust. Priv. Ltr. Rul. 72-0019, at 1 (Dec. 30, 1971).

117. *Id.* This "cut and sew" method of manufacturing garments is widely used to create decorative but nonornamental features on garments.

118. U.S. Cust. Protest Dec. 543008, at 2 (Jan. 21, 1983).

119. TSUSA, *supra* note 25, at 3-3. Of course, any enumerated feature may or may not constitute ornamentation for tariff purposes.

120. *See* U.S. Cust. Internal Adv. Rul. 070587, at 4 (May 5, 1983).

121. *Id.*

or other article on which it appears in order to constitute ornamentation. . . ."¹²² This language allows edgings that form an integral part of the garment to be regarded as ornamentation under the *Endicott Johnson* test.¹²³ For example, garments with picot or scallop edging are usually classified as ornamented even though the picot or scallop edging may not separately exist apart from the garment.¹²⁴

Under the *Endicott Johnson* test, functional edging may constitute ornamentation if the decorative effect outweighs the edgings' functionality.¹²⁵ For example, according to the Customs Service, the decorative effect of scalloped edging over a raw edge outweighs the utilitarian purpose of the edging because the garment's eye appeal is increased.¹²⁶ However, the Customs Service did not believe that the decorative effect of a contrasting color chain stitch outweighed the utilitarian function of the edging which added stability to the edge of a garment.¹²⁷ Although under some circumstances, a picot or a shell stitch creates an ornamental edging, not every edging of these types is deemed ornamental.¹²⁸ In addition to the additional qualities of the edging, the Customs Service also considers similarity of stitch, sameness of color in the edging and the article, and the decorative nature of the article itself when evaluating an article under the *Endicott Johnson* test.¹²⁹

E. Fringe

Although a court and the Customs Service will "start with a presumption that visible fringe is to some extent ornamental"¹³⁰, the

122. TSUSA, *supra* note 25, at 3-3.

123. *See id.* It is a common misconception that ornamentation consists solely of something added to a completed garment. This is especially untrue as it applies to edgings. Edging which is considered ornamental does not need to be added to an already completed garment. For example, ornamental edging in the form of fringe can be formed by fraying the edge of a fabric. *See infra* note 130 and text accompanying notes 133 and 134.

124. *See* Internal Adv. Rul. 070587, *supra* note 114, at 5, 7. Picot edging is formed by a series of small decorative loops along the edge of fabric. *See* THE RANDOM HOUSE COLLEGE DICTIONARY 1004 (rev. ed. 1980).

125. *See* U.S. Cust. Internal Adv. Reconsideration Rul. 064624, at 3 (June 18, 1981). However, if an edging is necessary to complete an unfinished edge, it will usually be considered nonornamental.

126. U.S. Cust. Priv. Ltr. Rul. 066553, at 1 (Sept. 17, 1981).

127. *Id.*

128. Reconsideration Rul. 064624, *supra* note 125, at 3.

129. *See id.* Ornamentation decisions involving decorative edges often result in conflicting opinions because of the highly subjective nature of the *Endicott Johnson* test.

130. *The Ferriswheel v. United States*, 644 F.2d 865, 868 (1981). Generally, fringe is an edge finish formed by unraveling a cut edge of fabric. However, it may consist of loose strands

presence of fringe does not *per se* render an imported garment ornamented.¹³¹ When considering the fringe on a kilt, the Court of Customs and Patent Appeals held "that fraying the edge of a fabric to create a self-fringe can be a functional alternative to hemming a cut edge, thereby eliminating the inherent bulkiness of a hem."¹³² In that case the fringe was less than one-quarter inch in length. Therefore, the court's decision was compatible with the Customs Service position that fringe of less than one-quarter inch in length is nonornamental.¹³³ In contrast, the Customs Service has determined that fringe one-quarter inch or longer is ornamental because it "increases the eye appeal of an article and clearly indicates that the fringe was intentionally left on [the] article for that purpose."¹³⁴

In addition to border fringe, fringe may also be formed by loose hanging threads placed at regular intervals throughout the fabric.¹³⁵ Whether groupings of yarns extending from a fabric is "fringe" depends on the length and arrangement of the protruding yarns.¹³⁶

F. Piping

The headnote three definition of ornamentation also lists trimming and textile fabric as two features which may constitute ornamentation.¹³⁷ Piping¹³⁸ falls into both categories. It is usually narrow textile fabric and also can be considered trimming.¹³⁹ The Customs Service has developed an established and uniform practice¹⁴⁰ of classi-

of thread or yarn on any portion of a garment. L. CARBONE, *supra* note 49, at 60. See also C. CALASIBETTA, *supra* note 37, at 226.

131. If a feature is not listed in Headnote 3, Schedule 3, TSUSA, definition of ornamentation, it is *per se* nonornamental, but no feature is *per se* ornamental. All features listed in the definition of ornamentation are subject to the *Endicott Johnson* test. See 19 Cust. B. & Dec., *supra* note 7, at 4.

132. *Ferriswheel*, 644 F.2d at 868.

133. *Id.* The court is not bound by Customs administrative rulings but reached its conclusion by application of the *Endicott Johnson* test. The functional aspects of the short fringe, as an alternative to hemming, outweighed its decorative effect. *Id.* at 24.

134. U.S. Cust. Priv. Ltr. Rul. 031127, at 1 (Nov. 29, 1973). But see *Colonial Corp.*, 602 Cust. Ct. at 504.

135. *Lilli Ann Corp. v. United States*, 51 Cust. Ct. 121, 126, C.D. 2418 (1963).

136. *Id.*

137. U.S. Cust. Priv. Ltr. Rul. 801272, at 1 (Sept. 3, 1981). The use of "textile fabric" is explained in the text accompanying note 149.

138. Usually, piping consists of a narrow piece of bias-cut fabric, stitched into a seam to form decorative trim. C. CALASIBETTA, *supra* note 37, at 400.

139. Priv. Ltr. Rul. 801272, *supra* note 137, at 1.

140. An established and uniform practice can be created by a ruling published in the Customs' Bulletin or on the basis of uniform liquidations of entries throughout the Customs terri-

fying piping as nonornamental when the piping is inserted into a seam and does not extend more than one-quarter of an inch from the seam.¹⁴¹

The Customs Service continues to classify according to this practice because of the difficulties involved in changing an established practice.¹⁴² However, Customs now believes that even though piping may marginally increase the strength of the seam in which it is sewn, this purpose is only incidental to the primary function of increasing the eye appeal of the garment on which it appears.¹⁴³

Therefore, the Customs Service considers all piping that does not fall strictly within the parameters of the established practice to be ornamental.¹⁴⁴ For example, piping that does not extend along the length of an entire seam and piping that is over a seam rather than sewn into a seam are considered ornamental.¹⁴⁵

G. *Lace and Netting*

Lace or net wearing apparel, whether or not ornamented, is classified at the same duty rate as ornamented wearing apparel.¹⁴⁶ However, textile wearing apparel may also be ornamented with lace or net.¹⁴⁷ The Customs Service considers netting or net fabrics as fabrics

tory of the United States over an extended period of time. However, the Customs Service decides whether an established and uniform practice exists on a case by case basis which depends on the particular circumstances of each case. U.S. Cust. Internal Adv. Rul. 038831, at 1 (Aug. 7, 1975).

141. *Id.*

142. U.S. Cust. Service Dec. 060888, at 1 (Jan. 30, 1980). Once a uniform practice has been established, a higher duty rate cannot be assessed until notice is given in the Federal Register and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change. 19 C.F.R. § 177.10(c) (1985).

143. Cust. Service Dec. 06088, *supra* note 136, at 1. This would be true under both the *Blairmoor* and *Endicott Johnson* tests.

144. *Id.*

145. *Id.*

146. *See, e.g.,* TSUSA, *supra* note 25, at 3-121. Headnote 2(h), Schedule 3, TSUSA, defines a "lace" article as "an article which is wholly or almost wholly of lace." The term "wholly of" is defined in General Headnote 9(f)(ii), TSUSA, as meaning that the article is, except for negligible or insignificant quantities of some other materials, composed completely of the named material. The term "almost wholly of" is defined in General Headnote 9(f)(iii), TSUSA, as meaning that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of other material or materials may be present in that article. A determination of what constitutes the essential character of a garment is difficult and, often, subjective. Judicial decisions are made on a case-by-case basis and provide no general rule in this area. U.S. Cust. Internal Adv. Rul. 064528, at 4 (Oct. 10, 1980).

147. TSUSA, *supra* note 25, at 3-3.

formed by the intertwisting or knotting of threads (usually warp and bobbin threads), yarns, cords, or ropes creating fairly stable open meshes uniformly throughout the fabric.¹⁴⁸ The meshes formed should be able to maintain their shape under most conditions. Therefore, for tariff purposes, the terms "netting" and "net" do not include plain loosely woven or knit fabrics.¹⁴⁹ Netting does include fabric consisting of a uniform pattern of fairly stable open meshes.¹⁵⁰

Prior to 1981, Customs defined lace¹⁵¹ as an "openwork fabric with a preconceived inwrought design" and at times, required the fabric to have a certain delicacy.¹⁵² However, the Customs Service modified this position by ruling that machine knit fabric can only be classified as lace if it is produced on a warp knitting machine.¹⁵³ Therefore, the current test for machine knit lace is whether the lace is an "openwork fabric with a preconceived inwrought design" which is produced on a warp knitting machine.¹⁵⁴

148. U.S. Cust. Protest Dec. 075879, at 3 (May 30, 1985).

149. *Id.*

150. *Id.*

151. Basically, lace is a delicate openwork fabric in which the decorative effect and fabric are produced concurrently by the intertwisting or looping of threads. There are primarily two classes of lace—"real" or handmade lace and imitations. Imitations are made by different types of machines. There is no controversy in classifying handmade lace as lace. Handmade lace can be of any width, and is produced by a network of yarns twisted or knotted by hand to form patterns by using bobbins and pins (bobbinet or pillow lace), needles (needlepoint or point lace), hooks (tatting), or hand machines.

The difficult area is machine-made lace. Lace made on traditional lace machines does not pose a classification problem because of the unique construction of the pattern and/or mesh stitches. Traditional machine laces are neither knit nor woven but are created by the inter-twisting of the threads. Examples of machines creating these types of laces include Leavers, Mechlin, and Barmen. Technological advances have resulted in machine-made fabrics which simulate the traditional twist-stitch lace. Originally referred to as "imitation laces," this lace has been accepted into the lace industry with handmade and traditional machine-made laces. The Customs Service has difficulty deciding if fabrics made on knitting machines constitute lace for tariff purposes. U.S. Cust. Classification Rul. 068739, at 3 (Oct. 23, 1981).

152. *Id.* at 1.

153. Technically, the requirement is that machine-made lace must be produced by a machine which utilizes vertical ground or warp threads activated from one or more bars or carriers. If lace must be constructed by use of warp threads activated by bars, then it follows that machine knit fabric can only be classified as lace if it is produced on a warp knitting machine. In contrast, fabrics produced on weft knitting machines such as circular knitting machines (producing single and double jersey, rib, interlock, and purl fabrics) and flat bed machines, cannot be classified as lace because by definition weft machines cannot make lace. *Id.* at 5. See generally I. WINGATE, FAIRCHILD'S DICTIONARY OF TEXTILES (6th ed. 1979) (for definitions of types of fabrics and machines).

154. Classification Rul. 068739, *supra* note 151, at 4. The above discussion and definitions do not apply to "burnt-out lace" which is a separate type of fabric and is specifically defined in Headnote 2(g), Schedule 3, TSUSA, as follows: "the term 'burnt-out lace' means embroidery

Often, the determination that a particular feature on a garment is of lace or net has little consequence in terms of ornamentation because many of the features enumerated in Headnote 3, Schedule 3, TSUSA, overlap. For example, even if a decorative edge is found not to be lace because it was made on a weft knitting machine, it may still constitute ornamentation as a textile fabric, edging, trimming, etc.

H. Textile Fabric

The provision for "textile fabric" enumerated in Headnote 3, Schedule 3, TSUSA, is used as a catchall for any feature composed of textile fabric that is not otherwise enumerated.¹⁵⁵ Features such as loops, tabs, straps, ties, and ruffles, all fall within the scope of "textile fabric" and may or may not be considered ornamental depending on the application of the *Endicott Johnson* test.¹⁵⁶

Ruffles are an example of textile fabric which may constitute an ornamenting feature. For example, a ruffle on a pair of woven cotton dorm (i.e., short) pajamas consisting of a mid-thigh length top and matching panties was held to be ornamental.¹⁵⁷ The sleeveless top had a stand-up ruffle, approximately one inch wide and made from the same pajama material, which had been inserted between the two pieces of fabric which formed the neckline. This ruffle created a decorative effect on the pajamas. The question was whether the ruffle also served a functional purpose which overrode the decorative effect.

The importer advanced three reasons why the ruffle around the neck opening of the garment served a functional purpose.¹⁵⁸ The importer first argued that the ruffle was necessary to finish the edge of the neckline. This rationale was rejected because the neckline was completed by sewing the fabric forming the body of the pajama to a

in which the base or ground (whether fabric, paper, or other material), having been removed chemically or by other means, is not visible" TSUSA, *supra* note 25, at 3-2.

155. The term "catchall" can be misleading because there are many textile and nontextile features that are nonornamental. For example, printing, painting or fur trim on a garment will not constitute ornamentation because they do not fall within the Headnote 3, Schedule 3, TSUSA, definition. Nor will garments be ornamented with features that are not permanently attached (e.g., sewn, buttoned or snapped). For example, ties attached to blouses only by a loop under the collar are nonornamental because they are not permanently attached. In addition, some features such as certain double collars are considered nonornamental based on established and uniform practices of the Customs Service. See T.D. 56272(76), 99 Treas. Dec. 595 (1964). See also Internal Adv. Rul. 038831, *supra* note 140, at 1.

156. *Endicott Johnson*, 617 F.2d at 281.

157. U.S. Cust. Internal Adv. Rul. 069012, at 2-3 (Nov. 19, 1981).

158. *Id.*

separate folded strip of fabric surrounding the neckline.¹⁵⁹ The ruffle was sandwiched between these two pieces of fabric and therefore served no finishing function.

The second rationale was that the ruffle functioned as a collar. This contention was rejected on the ground that an ordinary collar is designed to lie flat, while the ruffle in question was a stand-up ruffle. Further, dorm pajamas, unlike some textile articles such as shirts, are considered complete in a commercial sense without a collar.¹⁶⁰ Thus, even if the ruffle was considered a collar, it was unnecessary to complete the pajamas, and therefore the Customs Service considered it to be ornamental.

Finally, the importer argued that the ruffle was functional because it provided additional coverage and warmth to the wearer of the garment. This rationale was also rejected because, according to the Customs Service, the decorative effect far outweighed the functional purposes.¹⁶¹

Tabs holding D-rings are another type of "textile fabric" ornamentation that have caused special problems. Usable metal D-rings, whether or not on a garment for a functional purpose, are considered to be functional articles, and not ornaments;¹⁶² since textile fabric is a feature listed in headnote three, the fabric tabs that attach D-rings onto garments may constitute ornamentation if the D-rings are not on a garment for a primarily functional purpose.¹⁶³

The Customs Service has held that the fabric tabs holding functional D-rings were not ornamental on ski jackets, trench coats, and snowmobile outfits. The rationale behind those rulings was that the D-rings were on the garment to perform a primarily functional purpose. Therefore, if the fabric tab is holding a D-ring that is primarily functional on that particular garment, it will not constitute an ornamenting feature.¹⁶⁴

159. *Id.* at 2.

160. *Id.* at 2-3.

161. *Id.* at 3. Ruffles necessary to extend the length of garments at the sleeves or hem are usually considered nonornamental.

162. U.S. Cust. Classification Rul. 048180, at 1 (Mar. 11, 1977). Since D-rings are used to hold key chains, ski gloves, etc., they are not considered ornaments. Therefore, they are nonornamental. *See infra* text accompanying note 213.

163. Classification Rul. 048180, *supra* note 162, at 1.

164. *Id.* at 2. *See also* U.S. Cust. Protest Dec. Rul. 076894, at 2 (Dec. 17, 1985).

I. Traditional Features: Epaulets, Yokes and Hanger Loops

Until 1980, the Customs Service accepted the "traditional features" doctrine which states that traditional features such as decorative overlaid fabric yokes on western-style shirts are not ornamental because those features are necessary to make the garment "authentic."¹⁶⁵ This doctrine was overturned in *The Ferriswheel v. United States*.¹⁶⁶ The *Ferriswheel* court held that Scottish Highland ceremonial jackets with traditional but primarily decorative epaulets, and braid which simulates buttonholes, were ornamented wearing apparel.¹⁶⁷

The U.S. Court of Customs and Patent Appeals held that for a feature to be classified as ornamental for tariff purposes, it must be primarily decorative rather than primarily functional.¹⁶⁸ The court rejected the idea that a clearly ornamental feature would not be considered ornamental because it is traditional to the garment.¹⁶⁹ The court held that functional capability, as well as the appropriateness of that function to the garment, determines whether or not a feature is primarily functional.¹⁷⁰

The Customs Service responded to the court's rejection of the "traditional features" doctrine by changing its classification practices on several types of features: epaulets, decorative overlaid fabric yokes on western-style shirts and hanger loops.¹⁷¹

1. Epaulets

The Customs Service classified certain types of garments with epaulets¹⁷² (raincoats, certain bush/safari jackets, and certain military-style garments) as not ornamented because epaulets were traditional features on those garments.¹⁷³ However, based on *Ferriswheel*, the

165. T.D. 81-214, 46 Fed. Reg. 42,446 (1981).

166. *The Ferriswheel v. United States*, 21 C.A.D. 1260, 68 C.C.P.A. 22 (1981).

167. *Id.* at 25-26.

168. *Id.* at 25.

169. *Id.*

170. For example, epaulets have been held to be appropriate for a lightweight lined jacket because the "epaulets open and close, and have the capability of holding camera straps, binocular case straps, handbag straps, and similar types of straps and articles." U.S. Cust. Protest Dec. Rul. 076362, at 2 (Oct. 25, 1985). Identical epaulets on a man's lightweight short sleeve pullover garment were also held appropriate to that garment and therefore nonornamental. *Id.*

171. 46 Fed. Reg., *supra* note 165, at 42,446.

172. 46 Fed. Reg., *supra* note 165, at 42,447.

173. *Id.*

Customs Service decided that the classification of garments with epaulets would be based on the individual characteristics of each garment.¹⁷⁴ Those characteristics include, but are not limited to, the construction of the fabric comprising the garment (knit or woven), the weight of the fabric, and the styling and intended purpose of the garment.

For example, knit garments or garments made from loosely woven fabrics would not normally have primarily functional epaulets because the epaulet would not support the weight of a camera, a purse, etc. Garments designed for formal or dress wear or for sleeping also would not usually have primarily functional epaulets. Therefore, under the test used by the Customs Service, epaulets on such garments would be considered ornamental.¹⁷⁵ In contrast, functional epaulets (epaulets which may be opened and closed) on coats and non-tailored jackets were found to be nonornamental.¹⁷⁶ In making this determination, the Customs Service will consider traditional features to be primarily functional on a garment if (1) the feature has functional capability which is appropriate to the garment, and (2) there is credible evidence that the feature is actually used and that such use is more than a fugitive (i.e., trivial) use.¹⁷⁷

2. Yokes

The yoke of a shirt is a shaped piece of fabric fitted about or below the neck and shoulders from which the rest of the garment hangs.¹⁷⁸ Prior to *Ferriswheel*, the Customs Service classified western-style shirts with decorative overlaid front and back shoulder yokes as nonornamented, reasoning that the overlaid yokes were necessary to create an "authentic western shirt."¹⁷⁹ Based on *Ferriswheel*, Customs changed this practice and now regards overlaid yokes on western-style shirts the same as any other overlay; if an overlay is more than incidentally decorative and primarily decorative it will be considered ornamental.¹⁸⁰

174. *Id.*

175. *Id.*

176. *Id.* In addition, when epaulets are applied to garments actually used by the military, they are considered non-decorative functional features and would not constitute ornamentation for tariff purposes. U.S. Cust. Priv. Ltr. Rul. 815664, at 1 (Feb. 5, 1986).

177. 46 Fed. Reg., *supra* note 165, at 42,446.

178. See THE RANDOM HOUSE COLLEGE DICTIONARY 1527 (rev. ed. 1975).

179. 46 Fed. Reg., *supra* note 165, at 42,447.

180. *Id.*

3. Hanger Loops

Prior to *Ferriswheel*, hanger loops¹⁸¹ located on the center of the back of shirts were considered primarily decorative. However, the Customs Service now believes that hanger loops are not primarily decorative but are actually used to hang garments on hooks. Therefore, they are no longer considered ornamental.¹⁸²

J. Simulation

The *Ferriswheel* decision also affected the treatment of decorative features which simulate functional features. Prior to *Ferriswheel*, a decorative feature which simulated a functional feature was normally considered nonornamental if the decorative feature was no more decorative than the real feature it simulated and if it was located where the functional feature would normally be found.¹⁸³ For example, a pocket flap without a pocket would be considered nonornamental if the simulated pocket flap was no more decorative than a real pocket flap and if the simulated pocket flap was located where a real pocket and pocket flap would normally be found.

The position of the Customs Service regarding simulated features was contrary to ornamentation principles because simulated features would usually be found primarily decorative under the *Blairmoor* test and step two of the *Endicott Johnson* test. The *Ferriswheel* court rejected the Customs Service's position¹⁸⁴ and held that simulated features would not be treated differently than any other feature. For example, the braid used to simulate buttonholes was considered ornamental.¹⁸⁵

While the Customs Service was considering the impact of this decision, another important case was decided. *Sportswear Int'l Ltd. v. United States*¹⁸⁶ involved the classification of women's denim slacks, which had two belt loops on the front waistband and an elasticized

181. A hanger loop is a small loop of cord, fabric, etc. placed near the collar in the center-back of shirt-type garments. It can be used to hang the garment on a hook. See RANDOM HOUSE COLLEGE DICTIONARY, *supra* note 178, at 790. Although hanger loops are not considered traditional features, the Customs Service used the *Ferriswheel* decision as an opportunity to reverse its position on them.

182. 46 Fed. Reg., *supra* note 165, at 42,447.

183. U.S. Cust. Protest Dec. 052989, at 3 (Oct. 26, 1977).

184. *Ferriswheel*, 68 C.C.P.A. at 24.

185. *Id.* at 25.

186. 4 Ct. Int'l. Trade 260 (Dec. 22, 1982).

rear waistband.¹⁸⁷ The court held that the belt loops were not functional because they were not capable of holding a belt in place, either for holding up the garment or for holding the belt in place when worn as an ornament.¹⁸⁸ Even though there was evidence to support a finding that the purpose of the two belt loops was to simulate the appearance of jeans on which a belt is required or may be worn, the court found the belt loops to be ornamental.¹⁸⁹

In light of these judicial decisions, the Customs Service changed its practice regarding simulation and now rules that if a simulated feature is determined by the Customs Service to be more than incidentally decorative in nature (using the *Endicott Johnson* standard), the garment will be considered ornamented.¹⁹⁰ The question of the functionality of the feature will not ordinarily be raised, "because by definition a 'simulated' feature is one that is 'mock,' 'false' or 'imitative of a genuine feature', i.e., nonfunctional."¹⁹¹ Therefore, simulations on wearing apparel such as false pocket flaps, false belts or belt segments, false pocket openings, false garment openings and false adjustment straps or tabs, may constitute ornamentation for tariff purposes.¹⁹²

K. Trademark Labels

Since the TSUSA's definition of ornamentation provides that a textile article may be ornamented with textile fabric, a woven fabric label may constitute ornamentation if determined to be decorative.¹⁹³ The Customs Service holds that "tradename, trademark, or similar textile labels ordinarily accomplish no functional purpose in relation

187. *Id.* at 262.

188. *Id.* at 263.

189. T.D. 83-263, 48 Fed. Reg. 55281, 55282 (1983).

190. *Id.*

191. *Id.*

192. An approach that a Customs official may take in examining a simulated feature on a garment is to ask the following questions:

1. Does the feature decorate in a commercially meaningful way?

2. Will the feature be visible when the garment is worn, even only part of the time?

If the answer is no to either question, the feature is nonornamental.

3. Is the feature integral to the structure of the garment? If the garment includes sufficient components without the feature to be structurally complete, then the feature is ornamental.

4. Does the feature perform a function on the garment? If the feature is primarily functional vis a vis its decorative aspects then the feature is nonornamental.

(Unofficial Customs Service handout during a wearing apparel seminar in Los Angeles, California in September of 1984).

193. U.S. Cust. Priv. Ltr. Rul. 053863, at 1 (Mar. 29, 1978).

to the intended use of the garment to which attached.”¹⁹⁴ Therefore, labels are generally considered ornamental.

Nevertheless, the Customs Service has ruled that in most instances, small, rectangular-shaped, unobtrusive labels which contain only plain block-type lettering or plain script lettering in an orderly arrangement will not constitute ornamentation for tariff purposes.¹⁹⁵ However, this exception to the general rule is narrowly construed. Any attempt to enhance the appearance of the label (i.e., such as the use of other letter forms, stylized letters of any form, logos, trademarks, borders, pictorial representations, etc.) is considered an intention to enhance the appearance of the garment to which the label is affixed and will constitute ornamentation.¹⁹⁶ Since the decision regarding any particular label is necessarily subjective, each label must be evaluated on a case-by-case basis.¹⁹⁷

To constitute an ornamenting feature, the label must be affixed to the garment in a location where, when worn, the label is visible to an observer. For example, labels on the waistband of garments designed to be worn with a belt are not considered ornamental because the label will be substantially obscured when the belt is worn.¹⁹⁸

If a garment has two labels, the labels will not be considered ornamental if they are not individually ornamental.¹⁹⁹ Furthermore, the embroidery of a seller's tradename directly on to the garment itself without the use of a label is nonornamental, if the embroidery is an orderly arrangement with relatively small block printing.²⁰⁰

Nontextile labels may also constitute ornamentation. For example, metal labels may be ornaments within the meaning of headnote three if they are found to enhance the appearance of the garment. Metal labels are held to the same standard (i.e., no stylized letters,

194. *Id.* at 2.

195. U.S. Cust. Internal Adv. Rul. 041260, at 3 (Jan. 27, 1976).

196. U.S. Cust. Priv. Ltr. Rul. 053863, *supra* note 193, at 2. Intent should not be the determining factor. See *Colonial Corp.*, 62 Cust. Ct. at 504.

197. See Internal Adv. Rul. 041260, *supra* note 195 at 1-2. Since one of the factors to be considered is whether the label is located in a conspicuous place on the garment, the same label may be ornamental on one garment and nonornamental on another. See Internal Adv. Rul. 078019, *supra* note 115, at 2.

198. U.S. Cust. Internal Adv. Rul. 054738, at 2 (May 16, 1978). Any feature not visible when the garment is worn will usually be considered nonornamental.

199. U.S. Cust. Internal Adv. Rul. 068925, at 1 (Jun. 24, 1982). How many labels will produce an ornamented result is uncertain.

200. U.S. Cust. Internal Adv. Reconsideration Rul. 061117, at 3 (Jun. 29, 1979). Despite attempts to narrowly construe exceptions to the general rules of ornamentation, once exceptions are made, they are often extended further.

borders, etc.) as the textile labels.²⁰¹ Leather rectangular labels are also considered nontextile labels.²⁰² With or without stylized lettering, etc., leather labels are nonornamental if they are not decoratively shaped.²⁰³

L. Nontextile Ornamentation

The Customs Service has held that for a nontextile²⁰⁴ form of decoration to fall within the scope of headnote three, that decoration must either be an appliqué²⁰⁵ or specifically named in paragraph 3(a)(iv) of headnote three (beads,²⁰⁶ bugles,²⁰⁷ spangles,²⁰⁸ bullions,²⁰⁹ or ornamental).²¹⁰ Beads, bugles, spangles and bullions have not caused classification problems. These items are easy to classify as ornamental because they usually are used only for decoration.²¹¹ Glitter²¹² is another good example of an ornament because it is always decorative, but almost never functional.

The term "ornaments" when applied to sometimes functional articles has caused difficulty. Nontextile articles which normally have a primarily utilitarian function are not ornaments, even if their use on a specific article is entirely ornamental. For example, plastic buttons

201. U.S. Cust. Internal Adv. Rul. 053880, at 2 (Dec. 2, 1977).

202. See *supra* note 112.

203. U.S. Cust. Classification Rul. 060194, at 2 (Apr. 17, 1979). See also 10 Cust. B. & Dec., *supra* note 115, at 4-5 and accompanying text.

204. See *supra* note 115 and accompanying text.

205. See *supra* note 115 and accompanying text.

206. Beads are pieces of gold, glass, wood, crystal, plastic and other materials, usually rounded, but may be cylindrical, square, disk-shaped, pendant-shaped, etc. and bored through the center. C. CALASIBETTA, *supra* note 37, at 27.

207. Bugles are long tubular-shaped glass beads. *Id.* at 28.

208. Spangles are small, thin, usually circular pieces of glittering metal or other material. RANDOM HOUSE COLLEGE DICTIONARY, *supra* note 178, at 1259.

209. Bullions are gold wire or gold or silver threads or cords. C. CALASIBETTA, *supra* note 37, at 170.

210. 7 Treas. Dec., *supra* note 113, at 181.

211. When beads, sequins, etc., are sewn over the entire outer surface of a garment as close together as possible without overlapping, such garments are usually not considered wearing apparel. Such garments are considered articles of beads, bugles, spangles, etc., and as such, they are not subject to the definition of ornamentation. T.D. 56551(6), 100 Treas. Dec. 924 (1965). In addition, features used as component materials in the manufacture of an article without which the article would be incomplete does not ornament the article. U.S. Cust. Prot. Dec. Rul. 073813, at 3 (Jan. 18, 1985). For example, sections of fabric forming Santa's hands, eyes, nose, mustache, lip and a button necessary to complete a mail bag in the shape of a Santa Claus were not considered ornamenting features. *Id.*

212. Glitter is small glittering objects (as sequins or rhinestones) or tiny glittering bits (as tinsel or glass) used for ornamentation. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 965 (1961).

which are normally found on a shirt are not commercially considered to be ornaments and will not be considered by the Customs Service as ornaments irrespective of whether or not the buttons serve a utilitarian purpose.²¹³ Similarly, functional rivets performing a primarily nonfunctional purpose are considered nonornamental for tariff purposes.²¹⁴

In contrast, normally functional nontextile articles which have been designed and manufactured to serve only as ornaments and which could not be reasonably used for a normal utilitarian purpose (i.e., gold grommets, small gold or silver ornamental chains, nonusable bottle tops designed to be used as ornaments, etc.) may constitute ornamentation when attached to a textile fabric or article for decorative purposes.²¹⁵

VII. CONCLUSION

The subjective nature of the ornamentation decision creates uncertainty for the importer who needs to know the duty rate of his merchandise to determine its resale price. Even an experienced importer may not know if a particular feature on a particular garment is more than incidentally decorative or primarily decorative. Customs Service officials face similar problems when classifying merchandise. Making the ornamentation decision for every imported garment, through sampling of shipments or otherwise, is an impossible task. The opportunity for port shopping by importers is also created because of the lack of uniformity between Customs' ports.

The best way to resolve the ornamentation problem is to eliminate ornamentation as a basis of classifying merchandise. An ideal opportunity to do this will occur when the United States implements the Harmonized Commodity Description and Coding System (The Harmonized System).²¹⁶ The Harmonized System was designed to standardize classification between ratifying nations, to simplify international customs tariff negotiations and to facilitate the comparison of trade statistics.²¹⁷ The Harmonized System was established by Article 2 of the International Convention on the Harmonized Commodity

213. U.S. Cust. Classification Rul. 047472, at 1 (Dec. 11, 1969).

214. U.S. Cust. Priv. Ltr. Rul. 028066, at 1 (Jan. 28, 1974).

215. 7 Treas. Dec., *supra* note 210, at 183.

216. Customs Co-operation Council, the Harmonized Commodity Description and Coding System 3 (1983).

217. Customs Co-operation Council, INTRODUCING THE INTERNATIONAL CONVENTION ON THE HARMONIZED COMMODITY DESCRIPTION AND CODING SYSTEM 9-10 (1983). The

Description and Coding System.²¹⁸ The convention does not prevent the use of the definition of ornamentation.²¹⁹ However, the Harmonized System, expected to be implemented in 1988, will require a major revision of the TSUSA and would be an ideal time to eliminate the term "ornamented" as used in the TSUSA.²²⁰

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United States is a member of the Customs Co-operation Council and a member of the Harmonized System Committee. *Id.* at 65.

218. *Id.* at 7.

219. See Customs Co-operation Council, *supra* note 216, at 7.

220. If Congress desires the replacement of the revenue lost by elimination of the definition of ornamentation, duty rates on all or selected textiles can be adjusted upward. See Customs Co-operation Council, *supra* note 216, at 11.

