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Section 337 of the Tariff Act of 1930 prohibits the “importation into the United States, the sale for importation, or the sale within the United States after importation” of articles that “infringe a valid and enforceable United States patent,” copyright, trademark (registered or common law), trade secret, or mask work. The U.S. International Trade Commission (USITC), an administrative agency, is charged with investigating complaints alleging a violation of Section 337.

A Section 337 investigation begins when an intellectual property rights holder files a complaint alleging a violation of its intellectual property rights by one or more named accused infringers. The complaint must contain a substantial amount of detail and supporting exhibits to establish a basis for committing public resources to the investigation; notice pleading is not sufficient. The USITC’s Office of Unfair Import Investigations (OUII) reviews the complaint and recommends to the USITC whether or not to institute an investigation. Once instituted, an investigation is conducted in substantially the same manner as U.S. district court litigation with full discovery, possible summary determination, a hearing, and an initial determination, followed by a final determination.

There are, however, a number of unique features of a Section 337 investigation:

Jurisdiction: The USITC has jurisdiction over “articles” imported into the U.S. rather than the respondents. Exclusion orders of the USITC, discussed below in Remedies, attach to the articles themselves rather than to the respondents. The USITC’s jurisdiction is not without limit, however. The term “articles” means “material things” it does not extend to electronically-transmitted digital data. Cease and desist orders, also discussed below in Remedies, may also be issued by the USITC and are, by their nature, attached to the respondents, rather than the articles.

Domestic Industry Requirement: The intellectual property rights holder must establish that it has a protectable U.S. domestic industry. In an investigation involving patents, for example, the USITC can find a violation of Section 337 “*only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.*” Proof of a domestic industry requires an “economic” and “technical” showing. To make an “economic” showing, the holder must demonstrate that there is: **(1)** significant investment in plant and equipment; **(2)** significant employment of labor or capital; or **(3)** substantial investment in the patent’s exploitation, which may include engineering, research and development, or licensing activities.

To make a “technical” showing, the holder must demonstrate that its own products practice at least one claim of the asserted patent.

Parties: The plaintiff in a USITC investigation, the intellectual property rights holder, is known as the “complainant.” The defendant in a USITC investigation, the accused infringer of intellectual property rights, is known as the “respondent.” An investigation may also include an additional party: an Investigative Attorney from the OUII. The Investigative Attorney enjoys full party status and participates in discovery, motion practice, and at the hearings. *Id.* The Investigative Attorney’s role is to safeguard the “public interest.” *Id.* It is not uncommon for the Investigative Attorney to side with one or more of the parties to the investigation.

Jury: There are no juries in USITC investigations.

Expedited Proceeding: Forty-five (45) days after an investigation is instituted, the USITC is required to indicate the date it will issue its final determination. On average, the USITC sets a date that affords sixteen months for the investigation to be completed. An initial determination on violation is due no later than four months before the date set out by the USITC. To accommodate for the hearing, which is generally scheduled in the eighth (8th) month, the entire basis and defenses of the investigation usually must be completed in just five (5) months. This is significantly shorter than the average U.S. district court litigation.

Burden of Proof: The USITC allows parties to request summary determination, analogous to summary judgment in U.S. district court. Summary determination is granted if *“there is no genuine issue of any material fact and the moving party is entitled to summary determination as a matter of law.”* The moving party bears the initial burden of establishing the absence of any material fact and that it is entitled to summary determination as a matter of law. The burden then shifts to the opposing party to *“set forth specific facts showing that there is a genuine issue for trial. This evidence must be real and substantial, not merely colorable, and all inferences are drawn in favor of the non-moving party.”* For purposes of the hearing, the burden of proof is on the proponent of the proposition. In the patent context, the complainant bears the burden to demonstrate infringement by a preponderance of the evidence. The respondent(s), in turn, must show invalidity by clear and convincing evidence.

Review: Initial determinations of an administrative law judge of the USITC are reviewable by the entire USITC based on petition by the parties or *sua sponte*. If the USITC declines to review an initial determination, it becomes the final determination of the USITC. Exclusion orders and cease and desist orders of the USITC do not become effective immediately after issuance of the final determination. The President of the United States has sixty (60) days to disapprove any USITC order for policy reasons. If the President does not announce disapproval within the sixty (60) days, the USITC’s order goes into effect. A party that is not satisfied with the USITC’s final determination may thereafter appeal to the U.S. Court of Appeals for the Federal Circuit.

Remedies: The USITC cannot award money damages. Instead, the USITC can issue: (1) limited or general exclusion orders (LEO or GEO) and (2) cease and desist orders. An LEO is an instruction to the U.S. Customs and Border Protection (CBP) to exclude from importation into the U.S. all infringing articles **of the named respondents**. A GEO is an instruction to the CBP to exclude from importation into the U.S. all infringing articles **regardless of the entity** that does the importation. *Id.* A GEO will only be issued if it *“is necessary to prevent circumvention of an exclusion order limited to products of named persons”* or there is *“a pattern of violation of [Section 337] and it is difficult to identify the source of infringing products.”* Complainants generally seek LEOs due to the rigorous criteria and balancing of interests requires to secure a GEO. The USITC can also issue a cease-and-desist order (CDO) that instructs a respondent to cease its domestic unfair acts, particularly selling previously imported inventory that consists of infringing articles.

If the USITC issues an exclusion order, LEO or GEO, CBP enforces it. CBP has its own power to search, seize, and arrest, and the legal authority to make substantive determinations regarding infringement of trademarks and copyrights, pursuant to the Tariff Act of 1930. In the context of USITC exclusion orders, importation of the articles subject to the order will be forfeit. A complainant is encouraged to meet with CBP after the USITC issues a final exclusion order to discuss the scope of the order and to assist CBP in identifying the infringing products.

The decision to exclude a particular inbound shipment, pursuant to an exclusion order, is made by the Customs Director of the district where importation is being attempted. The decision to

exclude is subject to an administrative “protest” proceeding. A protest must be filed by the importer within ninety (90) days of the exclusion decision by the Customs Director. A decision denying a protest can be appealed in a civil action to the U.S. Court of International Trade.