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Why the International Trade Commission is such an appealing forum for patent disputes

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Signage is seen outside of the U.S. International Trade Commission in Washington, D.C., U.S., August 31, 2020. REUTERS/Andrew Kelly/File Photo Purchase Licensing Rights

June 11, 2025 - Earlier this year, the U.S. Court of Appeals for the Federal Circuit rendered a decision that opened the doors of the International Trade Commission (ITC) to a new category of complainants alleging patent infringement in the United States, enhancing its established appeal as a premier destination for the resolution of IP disputes.

Litigating in the ITC has always offered advantages for patent litigants due to factors such as speedy timelines and uniquely powerful remedies. In finding that a patentholder's non-technical activities in the U.S., such as sales and marketing, qualify to show a "domestic industry," Lashify v.U.S. International Trade Commission overturns several decades of precedent and now allows more patentholders to seek ITC relief.

Section 337 of the Tariff Act

Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, authorizes the ITC to investigate unfair trade practices involving imported products, including allegations of patent infringement. Among other things, complainants bringing a Section 337 claim must satisfy a jurisdictional and substantive requirement unique to actions under Section 337.

Specifically, a complainant must show that it has a "domestic industry." To prove a "domestic industry" in a patent case, a complainant must show it has made significant investment in activities in the United States (the "economic" prong), and that such activities relate to articles protected by the patent or patents at issue (the "technical" prong). These requirements ensure that the investigation and any resulting remedies benefit a U.S. industry.

The ITC: an expedient and powerful forum for patent litigation

While a patentholder is not limited to enforcing its patent in the ITC, there are several notable advantages to pursuing remedies at the ITC compared to a typical district court litigation.

ITC investigations are expedient: One advantage of litigating at the ITC is speed. A Section 337 proceeding at the ITC is triggered once a complainant files its complaint. The complaint must adhere to certain requirements specified in the ITC's Rules of Practice and Procedure, including the requisite domestic industry allegations.

Within 30 days of the filing of a complaint, the ITC formally institutes an investigation by publishing a Notice of Investigation (NOI) in the Federal Register, which describes the allegations, parties, and assigned Administrative Law Judge (ALJ). Following publication of the NOI, the investigation proceeds through discovery and then culminates in an evidentiary hearing in front of an ALJ within a mere nine to 11 months after institution of the investigation.

Typically, the parties will prepare both pre- and post-hearing briefing on the relevant issues. Afterwards, the ALJ issues its written decision in the form of an Initial Determination (ID). The ID is subject to the Commission's review, and the final decision is issued by the ITC in the form of a Final Determination (FD).

On average, the process from institution of the investigation to the issuance of the Commission's Final Determination and remedies concludes after only 16 to 18 months, whereas a patent infringement litigation can drag on for years in the federal district courts. This disparity can be attributed to a few things. For one, discovery proceeds at a more expedited pace in the ALJ setting, and ITC proceedings are rarely stayed. Further, the ALJ is statutorily required at the outset of the investigation to set a "Target Date," which is the deadline for the investigation's completion.

The ALJ may set a Target Date longer than 16 months, but such a Target Date requires Commission approval. In this way, a successful complainant can benefit from a swift resolution of its claims, which is particularly advantageous to promptly stop infringers from further infringing importations.

ITC investigations result in severe remedies: Another advantage of litigating at the ITC are the unique forms of available relief. Although the ITC does not award monetary damages, a successful complainant may obtain several forms of relief, including an exclusion order or a cease and desist order.

Exclusion orders: An exclusion order instructs the U.S. Customs and Border Patrol to stop infringing products at the border. 19 U.S.C. § 1337(d)(1). Two types of exclusion orders are available to ITC complainants.

•**Limited exclusion order:** A limited exclusion order (LEO) is limited to products made or imported by or on behalf of the named respondents found to be in violation of the statute. An LEO is not limited to specific model numbers, but includes the named respondents' infringing products encompassed by the product type identified in the NOI.

•**General exclusion order:** A general exclusion order (GEO) applies to all infringing products, regardless of who imports or sells the product. Unlike an LEO, a GEO allows a complainant to obtain relief against non-named respondents that import a class of infringing products. Due to the GEO's expansive breadth, the standard for obtaining a GEO is much higher than that of an LEO. Specifically, a complainant must show a widespread pattern of unauthorized imports from many sources that are difficult to identify.

Cease and desist order: Unlike an exclusion order, a cease and desist order (CDO) does not exclude infringing products at the border, but instead targets the conduct of violating respondents that have a commercially significant inventory of infringing products in the U.S. 19 U.S.C. § 1337(f). Recipients of a

CDO are prohibited from (among other things) importing, selling, advertising, marketing, and distributing infringing products already present in the U.S. Violators of ITC CDOs are subject to monetary penalties up to $100,000 per day of violation or twice the value of the goods, whichever is greater.

Given that an exclusion order and a cease and desist order can entirely halt the continued entry and circulation of infringing products, the ITC provides unique remedies for complainants to protect their patents. Further, litigants at the ITC are not precluded from seeking monetary damages in concurrent district court litigation, which means that a litigant does not have to pick one forum over the other to resolve its claims.

The 'Lashify' decision

The Federal Circuit's recent decision in Lashify v. U.S. International Trade Commission makes the ITC process and remedies available to more litigants than before. Previously, a patentholder could not satisfy the "economic" prong without showing that at least some of its technical, manufacturing, or R&D activities occurred in the U.S. Absent this showing, a patentholder could not benefit from the ITC's substantial remedies, and instead could only pursue relief in other forums.

For instance, Schaper Manufacturing Co. v. U.S. International Trade Commission, 717 F.2d 1368 (Fed. Cir. 1983) categorically excluded from consideration a complainant's "very large expenditures for advertising and promotion" in the U.S and declined to find a "domestic industry" where the complainant's manufacturing and R&D processes occurred outside of the U.S. Notably, the Schaper Court relied heavily on certain legislative history suggesting that sales and marketing activities alone could not establish a domestic industry.

In Lashify, the Federal Circuit overturned decades of such precedent, including Schaper itself, relying on the Supreme Court's decision in Loper Bright Enterprises v. Raimondo, 603 U.S. 369 (2024). Exercising its "independent judgment," the Court found the Commission's prior interpretation to be "contrary to the provision's language" and faulted the Commission for putting legislative history ahead of the plain and clear language of the statute.

Indeed, the Federal Circuit found "no carveout of employment of labor or capital for sales, marketing, warehousing, quality control, or distribution" in the provision at issue. The Federal Circuit instead held that a company's sales, marketing, warehousing, quality control, and distribution in the U.S. qualified for a "domestic industry" even if the company's manufacturing took place entirely abroad.

By expanding the activities in the U.S. that are sufficient to establish the domestic industry requirement, the Federal Circuit opened wider the ITC's doors to another category of complainants. Now, under Lashify, patentholders that lack technical activities in the U.S. but perform other kinds of activities in the U.S. (such as sales, marketing, warehousing, quality control, and distribution of products protected by the asserted patents) have a new and potent tool to their toolbox for pursuing relief from patent infringers.

What the future holds for patentholders

Although we are still in the early stages of this new framework, Lashify has created opportunities for a new category of patentholders to seek the advantages unique to litigants in this forum. Notably, in at least one very recent decision, an ALJ found that expenditures relating to "customer-facing technical sales activities" supported a finding of domestic industry, referring specifically to the Lashify decision. See In re Certain Liquid Coolers for Electronic Components in Computers, Components Thereof, Devices for Controlling Same, and Products Containing Same, Inv. No. 337-Ta-1394 (Mar. 21, 2025) (Initial Determination).

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