

ITC Section 337 Practice: Beyond Patent Infringement

By Lindsey E. Martínez

Reprinted and/or posted with permission of Daily Journal Corp. (2011).

Section 337 of the Tariff Act of 1930 protects against unfair methods of competition and unfair acts regarding the importation and sale of articles in the United States. Over the past several years, the International Trade Commission (ITC) has become an increasingly popular venue to protect U.S. intellectual property rights under Section 337, including patents, trademarks and copyrights, as evidenced by more than 700 investigations instituted since 1974. Section 337 litigation is often preferred, due in part, to the relatively quick decisions made by the ITC, where a trial is often concluded in less than a year.

In addition, Section 337 provides for in rem jurisdiction, so that all known companies can be named in a single investigation at the ITC. This is in sharp contrast to a U.S. district court case where it may be necessary to bring multiple cases in various states in order to satisfy jurisdictional requirements. Further, in these cases the ITC itself serves the complaint to all proposed respondents by certified mail without the need for translation. This is often preferable to district court, where it may take months to serve respondents abroad and translation of the complaint may be necessary. If a respondent does not respond to the complaint within 10 days, a default can issue and their products can be automatically excluded from the United States.

Other special considerations for Section 337 actions include the requirement that the ITC consider public interest factors when deciding an investigation, and the ability of the president of the United States to review the ITC's decision where a violation is found. The president has 60 days to review the decision, and approve or disapprove the remedy for policy reasons.

While no monetary damages are available under Section 337, a prevailing plaintiff may obtain two remedies: an exclusion order to prevent importation of violating goods, to be enforced by U.S. Customs at the borders,

and a cease and desist order, requiring the importer to stop importing the violating goods or face substantial penalties. Section 337 specifically declares the infringement of a U.S. patent or a U.S. copyright registered under Title 17, a registered trademark, a mask work registered under Chapter 9 of Title 17, or a boat hull design protected under Chapter 13 of Title 17. There is no injury requirement in cases involving infringement of these intellectual property rights.

In addition to unfair practices based upon infringement of intellectual property rights, Section 337 also prohibits unfair methods of competition and unfair acts in the importation and sale of products in the United States, the threat or effect of which is to destroy or substantially injure a domestic industry, prevent the establishment of such an industry, or restrain or monopolize trade and commerce in the United States. Thus, in these types of investigations, threat or actual injury must be shown.

This broad language appears to implicate several other areas of law in addition to intellectual property, especially since Section 337 does not define the terms "unfair methods of competition" and "unfair acts." This language suggests that, in addition to patent and intellectual property protection, Section 337 may also apply to unfair competition, trade secrets, antitrust, products liability, child labor, human rights and sustainable environmental practices. While some of the non-traditional Section 337 causes of action such as antitrust have been put into practice, others such as child labor and unsustainable environmental practices have not been implemented.

In relation to antitrust, this statute may prove favorable for some cases because of the speed at which a decision is rendered, as well as the fact that Section 337 may have a much broader reach than other antitrust laws because the section does not require a showing of injury to the competition. For antitrust violations, a cease and desist

order may be issued by the ITC as an exclusion order may restrict competition. While Section 337 allows for an antitrust cause of action, such claims are rarely brought. Due to the sparse antitrust practice under Section 337, precedent awarding antitrust relief is equally thin. The ITC has, however, found a violation of Section 337 based on an antitrust cause of action in *Certain Welded Steel Pipe & Tube*, Inv. No. 337-TA-29. The decision, handed down in 1978, issued a cease and desist order. In this instance, the president exercised his veto power and overturned the ITC's finding of a violation on public policy grounds. All other antitrust-based investigations have found no violation of antitrust laws. Therefore, while an antitrust cause of action may be brought before the ITC, the full implications of antitrust practice under Section 337 remain to be seen.

The goal of enacting Section 337 was to protect domestic labor and industry, and a number of areas of law are implicated by the "unfair acts" portion of the statute, such as unfair competition based on unfair labor practices, including child labor and human rights issues. Similarly, another area of uncharted waters tied to the "unfair acts" piece of Section 337 involves the use of unsustainable practices such as manufacturing, agriculture and fishing. While these types of cases have never before been brought under Section 337, potential hypothetical cases regarding unfair acts could involve the following:

Labor Law or Human Rights: A suit by a company whose competitor manufactures goods abroad and imports them into the United States utilizing unfair labor prac-

tices, such as child labor or labor that violates human rights norms. A cause of action could be brought under Section 337 where the competitor's conduct violates the foreign country's domestic laws or international law and the complainant company can show actual injury.

Environmental Law: A suit by a company who suffers injury at the hands of a competitor that manufactures a product outside of the United States, for import into the United States, but the product fails to meet U.S. environmental laws.

Unsustainable Practices: A suit by a company whose suffers injury where a competitor violates a foreign nation's own laws or international treaties, such as commercial fishing that is done in violation of international law, thereby giving the competitor an unfair advantage.

While primarily used as a tool for patent enforcement and protection, Section 337's broad language and mandate to protect domestic labor and industry may offer a unique, fast-paced forum for settling potential claims ranging from child labor to commercial fishing.



Lindsey Martínez
714.427.7058
lmartinez@swlaw.com

Lindsey Martínez's practice is concentrated in commercial litigation and international matters.

Snell & Wilmer
— L.L.P. —
LAW OFFICES

www.swlaw.com

DENVER | LAS VEGAS | LOS ANGELES | LOS CABOS | ORANGE COUNTY | PHOENIX | SALT LAKE CITY | TUCSON