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CRS Report for Congress

Intellectual Property Rights Protection and Enforcement: Section 337 of the Tariff Act of 1930

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Summary

Section 337 of the Tariff Act of 1930 allows U.S. companies to protect themselves from imports that infringe intellectual property rights. The U.S. International Trade Commission (ITC) adjudicates complaints filed by U.S. companies alleging Section 337 violations. Primary remedies under Section 337 include exclusion orders and cease and desist orders. In recent years, there has been an increase in the number of Section 337 proceedings or actions. Members of Congress have expressed concern about the length of time for completion of Section 337 investigations and the effectiveness of enforcement of exclusion orders. This report will be updated as events warrant.

Section 337 of the Tariff Act of 1930

Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) is the primary option available to U.S. companies to protect themselves from imports into the United States of goods made by foreign companies that infringe U.S. intellectual property rights (IPRs), such as patents, trademarks, and copyrights.[1] The U.S. International Trade Commission (ITC) administers Section 337 investigations. Since 2001, over 90% of unfair competition acts asserted under Section 337 have involved patent infringement. These cases tend to be complex and require adjudication by the ITC.[2] In the case of most copyrights and trademarks, the CBP is empowered to make on-the-spot determinations of IPR infringement.[3]

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[1] For more information on IPR protection and enforcement, see CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias and Ian F. Fergusson,

[2] Telephone conversation with ITC official, March 19, 2008.

[3] 19 U.S.C, § 156; 19 U.S.C. §1595a, and 19 C.F.R. §133.42.

Requirements for Filing a Section 337 Complaint

In general, U.S. companies must fulfill three requirements in order to assert unfair competition under Section 337. First, there must be an importation or a sale for, sale after, or potential future importation of the infringing product into the United States. It is not necessary for the imports to be in commercial, or mass, quantities. Second, an unfair act of competition relating to the imported good must occur, i.e., an infringement of a valid U.S. patent, copyright, or trademark. Third, a domestic company must be engaged in sufficient domestic activity, such as investment in plant and equipment or employment of labor and capital, in the United States related to the imported product in question. U.S. citizenship is not necessary to meet this third requirement.[4]

Standard Section 337 ITC Investigations

Investigation Process. As shown in **Table 1**, Section 337 ITC investigations involve multiple steps that take place over the course of many months. The ITC issues "target dates" for identifying when the ITC proceedings should be finished (i.e., the Final Determination is issued). For cases with target dates of 15 months or less, the Initial Determination must be issued at least three months before the target date.[5] For more complex cases with longer target dates, the Initial Determination must be issued at a minimum of four months before the target date. Investigation periods have increased over time. Prior to 2006, the average length for investigations (in which a final decision was reached) was less than 15 months. In FY2007, the average length increased to 16.6 months; the shortest completion time was eight months and the longest was 23.5 months.[6]

Table 1. Summary of Section 337 Investigation Process

Action	Target date of 15 months or less	Target date greater than 15 months
Complainant files Section 337 case	Start	Start
Decision to institute Section 337 case	With 30 days	Within 30 days
Assignment of case	Maximum 12 months (i.e., must be issued at least three months before target date)	Initial Determination must be issued at least four months before target date
Evidentiary hearing		
Initial Determination		
Final Determination	Issued by target date	Issued by target date
Presidential Review	60 days	60 days
Possible Appeals Process	Varies	Varies

[4] Thus, foreign companies with sufficient U.S. activity are able to file Section 337 complaints.

[5] For instance, in a case with a target date of twelve months, the Initial Determination must be issued nine months before the target date.

[6] Office of Unfair Import Investigations, reported in ITC, "Performance and Accountability Report: FY2007."

Filing a Section 337 Complaint. Any company seeking relief under Section 337 must prepare a detailed complaint with information supporting the claims with the ITC, including background information on the intellectual property asserted in the claim and evidence of infringement.[7]

Institution and Assignment of Case. Upon receiving a complaint, the ITC has thirty days to determine whether or not to initiate a Section 337 investigation. If an investigation is instituted, the ITC assigns the case to an Administrative Law Judge (ALJ), who will oversee and conduct the investigation. The ITC also assigns an investigative attorney from its Office of Unfair Import Investigations (OUII), who provides his or her views to the ALJ regarding whether or not a Section 337 violation has taken place. The attorney also represents the public interest during the investigation. A target date for completion of the investigation also will be set.

Evidentiary Hearing. The ALJ will conduct a formal evidentiary hearing, typically lasting one to two weeks, generally within seven to ten months of the filing.

Initial Determination of Case. The ALJ then will issue a preliminary ruling (an "Initial Determination") determining whether or not a Section 337 violation has occurred and proposing remedies (discussed in next section) if violations are found. The ALJ decision will be based on the merits of the case. For instance, in a Section 337 case involving U.S. patents, the ALJ will evaluate the case based on patent infringement issues. For cases in which the target date is 15 months or less, the Initial Determination must be issued at least three months before the target date. For longer target dates, the Initial Determination must be issued at least four months before the target date.

Final Determination of Case. Within 45 days of the Initial Determination, the ITC Commissioners decide whether or not to review the Initial Determination. The Commissioners may decide to adopt the ruling. Alternately, they may elect to change all or some parts of the Initial Determination, or to completely reject or remand it. Generally, within three months of the Initial Determination, the ITC Commissioners issue a "Final Determination," which takes into account public interest considerations, such as the impact on the public's health and safety or on the ability to satisfy U.S. market demands.

Settlement. Some cases before the ITC are settled before a final decision is made. Complainants (typically the patent holder) and respondents (the alleged infringer) may move to terminate an investigation. For instance, they may agree to cross-licensing or to resolve the dispute through arbitration.

Review of Determination. The Final Determination is sent to the President for review based on national security considerations. This decision is enforceable within 60 days if no actions are taken by the President. The President rarely has overturned the Final Determination. During the 60 day review process, respondents who continue activities ruled by the ITC to be in violation of Section 337 do so under bond.

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[7] For more information on filing a Section 337, see ITC, "Section 337 Investigations: Answers to Frequently Asked Questions," Publication No. 3708, July 2004. 19 C.F.R. Part 210 discusses the ITC investigation process, time frame, and parties involved.

If the Final Determination is not disapproved by the President, respondents engaging in such activities stand to lose a significant amount of money. In some cases, the bond is 100% of the total value of the imported products. Thus, while remedies are not enforceable until the conclusion of the 60 day review period, the bond frequently serves as a deterrent from engaging in the Section 337 violating activities. This is especially the case because the President rarely disapproves of ITC Final Determinations.

Appeals. Within the 60 day Presidential review period, the respondent (or anyone adversely affected by the Final Determination) can file an appeal of the decision to the U.S. Court of Appeals for the Federal Circuit. Depending on the circumstances, the final determination may or may not be enforceable while the appeal is being heard.

Amendments to Section 337. In the original enactment of Section 337, Congress stipulated that the ITC complete investigations within 15 months (from institution of a case to Final Determination). Section 337 was later amended to become compliant with the General Agreement on Tariffs and Trade (GATT), whose national treatment provision requires that member states not treat foreign member states' nationals any less favorably than their own nationals. There was concern that Section 337, as initially enacted, may not allow foreign companies to defend themselves adequately because the ITC adjudication process generally takes place at a faster pace than litigation in federal district courts. The ITC is now required by statute to complete investigations "at the earliest practicable time."

Trends in Section 337 Cases. Section 337 cases cover a range of products, with about one-third involving electronics, telecommunications, computers, semiconductors. Other cases involve products such as chemical, biotechnological, pharmaceutical, mechanical, and consumer goods.

Since 2002, there has been a general uptick in the number of Section 337 cases. In FY2007, the number of new cases was nearly 60% more than the number of new cases started in FY2003. There also were close to 80% more active cases in FY2007 than there were four years ago.[8] The overall rise in international IPR infringement has contributed to the increase in Section 337 activity. Additionally, there has been increased publicity of the ITC as an IPR border enforcement entity, partly due to recent high-profile rulings.[9] Moreover, there is greater corporate awareness of the potential benefits of filing a Section 337 case rather than engaging in litigation through U.S. district courts (see next section).

Alternative to Section 337. U.S. companies also may bring lawsuits against foreign entities in the venue of U.S. district courts to challenge the entry of infringing products into the United States. Federal district courts, unlike the ITC, can award monetary damages to the IPR holder and issue injunctions against infringers. If the adjudicated infringer violates the injunction by continuing to import the infringing product, it may face sanctions if the rights holder claims the infringer has acted in contempt of court. However, the federal courts do not possess direct authority to block

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[8] Office of Unfair Import Investigations, reported in ITC, "Performance and Accountability Report: FY2007," p. 71.

[9] For instance, in the 2007 *Certain Baseband Processor Chips* (337-TA-543) case, Broadcom obtained a limited exclusion order prohibiting Qualcomm from importing infringing chips.

imports, as the ability to issue exclusion orders enforced by the CBP rests with the ITC. If the adjudicated infringer lacks assets in the United States, enforcing a U.S. court's orders may prove difficult.[10] In addition, litigation in U.S. district courts tends to be more costly and to take longer to yield decisions than the Section 337 venue.

Section 337 Remedies and Enforcement

The ITC grants two primary remedies to U.S. companies: exclusion orders and cease and desist orders. In FY2006, the ITC completed twelve Section 337 investigations,[11] issuing three general exclusion orders, five limited exclusion orders, and two cease and desist orders.[12] The ITC may *not* issue monetary damages to U.S. companies.

Exclusion Orders. Exclusion orders prohibit the importation of the infringing good into the United States. They are effective for as long as the patent is valid. Limited exclusion orders, the most commonly issued type of exclusion order, prohibit the importation of only those infringing goods originating from the parties named in the ITC investigation. In contrast, general exclusion orders prohibit the importation of *all* goods of the kind determined to be infringing, irrespective of the source of the infringing good. Because general exclusion orders are broad in their scope, they may disrupt international trade significantly. In general, they are issued only when circumvention of a limited exclusion order would be likely or it would be difficult to identify all infringing parties. The U.S. Customs and Border Protection (CBP) enforces exclusion orders.

Cease and Desist Orders. Cease and desist orders require the termination of infringing-related activities, such as selling infringing articles previously imported that are currently in domestic inventories. These orders frequently are issued in conjunction with exclusion orders, particularly in situations where the infringing goods are imported in commercial quantities. Cease and desist orders are enforced by the ITC, which is authorized to impose civil penalties on U.S. importers that violate cease and desist orders. Penalties per day may be as high as $100,000 or double the value of the goods involved.[13]

Time Length for Enforcement. The time that it takes for remedies to become enforceable may vary because of differences in target dates and the possibility of appeals by respondents. For example, for a standard investigation with a 15 month target date, from the time that a company files a complaint, the maximum time that it would take for an exclusion order to be enforceable would be about 18 months.

Preliminary Relief

U.S. companies may request that the ITC conduct expedited temporary relief proceedings and issue a temporary exclusion or cease and desist order while the regular

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[10] Telephone conversation with USITC official, March 19, 2008.

[11] ITC, "Performance and Accountability Report: Fiscal Year 2007."

[12] ITC, "Year in Review: Fiscal Year 2006."

[13] Steven D. Hemminger, "Section 337 of the Tariff Act: Global IP Protection in Our Global Economy?", *Intellectual Property & Technology Law Journal*, Vol. 19, No. 4, April 2007.

investigation takes place. For preliminary relief, U.S. companies must provide significantly more evidence prior to the hearing than for a standard case. The ITC's decision to grant preliminary injunctions is based on: the likelihood of success for the complainant's case and the extent to which the domestic industry, respondents, and the public interest would be adversely affected if a preliminary injunction was not issued.

For temporary relief proceedings, a Final Determination (following an Initial Determination by the ALJ) is granted 90 days after institution for standard cases. For more complex cases, a Final Determination is granted 150 days after institution of the case. In cases where the complainant receives a temporary remedy, the complainant is required to put up a bond. Following the preliminary ruling, the full Section 337 standard case will proceed. If the preliminary injunction is not upheld in the regular investigation, the complainant may lose the bond money.

Issues for Congress

Some members of Congress have expressed concern that the Section 337 venue does not provide immediate relief to U.S. companies facing unfair import competition. Proponents of a faster process have argued that the U.S. economy and public health and safety may be adversely affected by the continued importation of IPR-infringing goods while Section 337 investigations take place.[14] ITC proponents maintain that the length of time for investigation has risen because of increased Section 337 activity, which has contributed to heavier dockets for ALJs and investigation backlogs. In addition, they indicate that recent cases tend to involve more technologically complex products and that filings increasingly name multiple respondents, whereas previous cases generally named one respondent.[15] Others point out that ITC investigations are generally faster than litigation in federal district courts, where proceedings may take several years.

Concerns also have been raised about CBP enforcement of exclusion orders. A recent Government Accountability Office (GAO) report notes that U.S. companies spend millions of dollars to file Section 337 complaints before the ITC, but that enforcement of exclusion orders is limited because of a lack of resources. As of July 2007, CBP reported that 66 exclusion orders were in effect. The number of exclusion order exams carried out by CBP has declined since FY2002. While U.S. capacity to carry out IPR enforcement has increased, according to GAO, challenges remain because IPR enforcement frequently may not be a top CBP priority and there may not be adequate resources targeted to this effort.[16]

[14] Ford, Greg P. Brown, Testimony before Senate Finance Committee, March 13, 2008.

[15] Telephone conversation with ITC official, April 24, 2008.

[16] GAO-08-157, "Intellectual Property: Federal Enforcement Has Generally Increased, but Assessing Performance Could Strengthen Law Enforcement Efforts," March 2008.