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Technical Assistance Symposium for Judges
**Establishment of the Caribbean Court of Justice:
The Effect on Intellectual Property and International Trade**

Organized by

The International Intellectual Property Institute

in conjunction with

The United States Patent and Trademark Office

U.S. Section 337 Overview

for panel addressing

***“The Legal Impact of the CCJ on Fostering International Trade
and Harnessing Regional Intellectual Property Rights”***

by

Alexander Koff

Attorney – Paul, Hastings, Janofsky & Walker, LLP

alexanderkoff@paulhastings.com (email)

www.paulhastings.com (web)

Barbados

20 April 2004

OVERVIEW OF SECTION 337 TRADE REMEDY

Section 337 of the Tariff Act of 1930 (“Section 337”) makes it unlawful to engage in unfair acts or methods of competition in connection with imported goods. Goods that are found to be imported through such unfair acts are subject to being excluded from the U.S. by an exclusion order issued by the U.S International Trade Commission (“ITC”), located in Washington, D.C.¹

Although the statutory language could be interpreted to cover a wide variety of “unfair acts” with respect to imports, in practice Section 337 has proven effective primarily with respect to infringement of U.S. intellectual property rights. In the large majority of successful Section 337 cases, the claim is that a U.S. patent is infringed by the imported merchandise.

The following provides a brief overview of the Section 337 process. Often a goal of a Section 337 investigation is to obtain an effective and enforceable remedy to stop the importation and sale of infringing goods, or alternatively, to create sufficient bargaining leverage to force infringing competitors to obtain a license or some other satisfactory arrangement that will adequately compensate the complainant for the value of its intellectual property rights.

In brief, Section 337 empowers the ITC to issue orders to preclude:²

- the importation and sale in the United States of articles that infringe a valid and enforceable U.S. patent, copyright or trademark (what we call herein an “Intellectual Property Violation”); or
- “[u]nfair methods of competition and unfair acts” in the importation or sale of such articles in the U.S. which injure or threaten U.S. commerce (hereinafter the “Unfair Competition Violation”).

Due to numerous amendments and ITC interpretations, the elements that a complainant must establish in order to prove the two types of 337 violations differ substantially.

¹ For more information on the ITC, see << www.usitc.gov >>.

² 19 U.S.C. § 1337.

- *Intellectual Property Violation.*

The elements of an Intellectual Property Violation are generally easier to establish than are those of an Unfair Competition Violation. To prove an Intellectual Property Violation, the complainant must show that:

- he or she is the owner or exclusive licensee of a valid, enforceable and federally-registered patent, copyright or trademark;
- articles which are the subject of the 337 action infringe that intellectual property right;
- those articles are imported for sale into the United States; and
- an “industry in the United States” with respect to articles protected by the intellectual property right at issue exists or is in the process of being established.

- *Unfair Competition Violation.*

The requirements for an Unfair Competition Violation case are somewhat stricter. Thus, a complainant which cannot base its 337 claim on the infringement of a valid, enforceable patent, copyright or trademark registered under federal law must establish that:

- there exists an unfair method of competition or an unfair act in the importation of certain merchandise;
- the effect or tendency of this unfair method or act is to destroy, to substantially injure or to prevent the establishment of, an industry in the United States (or to restrain or monopolize U.S. commerce); and
- the complaining party qualifies as an “industry in the United States.”

- *Time Frame.*

A significantly attractive reason for complainants to pursue a Section 337 proceeding is that the issues are decided quickly.

- Statute. The statute requires that proceedings must be completed within twelve to eighteen months. (There is no statutory deadline for completion of litigation in U.S. federal court or in state court proceedings.) Within this period, the parties have the opportunity to

conduct full discovery, including interrogatories, document requests and depositions.

- Specific Case. Several factors out of our control influence the length of the proceeding, such as the complexity of the claims and the workload of the Judges at the time of the case. Although without reviewing the complaint it is not possible to advise regarding the complexity of the case, the number of Section 337 cases now being decided at the ITC is at an all-time high. As a result, we are unable to predict with certainty when a particular case will be resolved, but a reasonable assumption would be 12-15 fifteen months.
- Timetable. A more detailed timetable identifying the administrative stages of a Section 337 proceeding are appended as Attachment A.

- *Proceedings.*

Section 337 proceedings are generally conducted by an Administrative Law Judge (“ALJ”) under rules of evidence that are somewhat less strict than those in U.S. federal courts.

- Institution. A case commences when a complainant files a detailed complaint with the ITC. Within 30 days of the filing, the ITC must formally decide whether to issue an order “instituting” the 337 investigation. It is rare for the Commission to decline to institute on a complaint. In Section 337 proceedings, it is normal practice for a company that is considering filing a complaint to first vet the merits of their claim with the ITC staff. (This process has no bearing on the ultimate result in the case but it does increase the chance that the ITC will vote to institute a formal investigation.)
- Next Steps. Once the ITC launches its investigation, the named respondents will be required to submit a response within 20 days. At the end of the case, the ALJ will issue a formal decision deciding the merits of complainant’s claims.
- Review. The ALJ’s decision is reviewed by the Commissioners of the ITC. The ITC is an independent, nonpartisan, quasi-judicial federal agency not directly controlled by the White House. It normally upholds the ALJ’s factual findings and reviews mainly for issues of law or policy. The ITC’s action is subject to approval or disapproval by the President. Appeals are heard by the U.S. Court of Appeals for the Federal Circuit.

- *ITC Staff.*

In Section 337 proceedings, the ITC assigns a staff attorney who participates fully in the case and represents the “public interest.” Lynn Levine, Director of the ITC Office of Unfair Import Investigations, will assign the staff lawyer. The OUII staff lawyer does not communicate with the ALJ or the Commissioners outside the formal process; he or she is treated like any other party in the case. The ITC staff attorney files briefs and participates in discovery. On some areas of policy, the ALJ may defer to the opinion of the ITC staff attorney during the course of the proceeding. As a result, it can be helpful to have the ITC staff attorney believe in the merits of the respondent’s defense.

- *Remedy.*

The ITC’s jurisdiction extends to all allegedly infringing articles imported for sale in the United States, regardless of whether those articles are imported or sold by a foreign or a domestic entity. This means that the ITC can issue an exclusion order preventing a respondent’s products from being imported into the United States if they are manufactured in manner that violates the complainant’s intellectual property rights (assuming, for instance, that the complainant’s alleged a patent claim in the complaint). Also, the ITC can issue a cease and desist order preventing any respondent from selling its existing U.S. inventory.

- *Parallel District Court Proceeding.*

A Section 337 remedy is not exclusive. A complainant can simultaneously file an infringement action against a respondent in a U.S. district court (*e.g.*, for the purpose of obtaining money damages, which are not available at the ITC). However, a respondent that finds itself simultaneously defending a 337 case at the ITC and an infringement action in federal district court can move in the district court to have the court action stayed pending resolution of the ITC proceeding. (A respondent does not have to litigate the same claim in two places at the same time.)

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Attachment A:
Estimated Timetable for Administrative Portion of Section 337 Investigation

Event	Allotted Time	Total Case
Filing of Complaint	n/a	n/a
Determination by the ITC to Institute a Section 337 Investigation Based on the Complaint	Within 30 days ¹ ¹ The ITC can exceed this period in “exceptional circumstances” or at the request of the complainant.	0 days ² ² Runs from ITC Institution of Investigation
Responses Due	20 days ³ ³ Runs from ITC Institution of Investigation.	20 days
ALJ sets Target Date for Completion of Investigation (perhaps 15 months)	45 days ⁴ ⁴ Runs from ITC Institution of Investigation.	45 days
Initial Determination by ALJ of Violation of Section 337	9-12 months ⁵ ⁵ Assumes 12-15 month Target Date.	275-365 days
Recommended Determination by ALJ Concerning Remedy	14 days ⁶ ⁶ After Violation Determination.	289-379 days
Initial Determination of Violation Becomes Final Automatically if ITC Does Not Review	45 days ⁷ ⁷ Runs from Date of Initial Determination.	320-410 days
ITC Review and Determination Regarding Remedy – Transmits Orders to President, Treasury, and the Parties	45 days ⁸ ⁸ Estimate; ITC sets own deadline on issues regarding remedy.	365-455 days
Total Time		12-15 months