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Relief From Unfair Import Practices Under Section 337 of the Tariff Act of 1930: An Overview

*David Scott Nance**

The trade laws of the United States provide a number of different forms of relief from unfair import competition. Some laws, such as those allowing the imposition of antidumping[1] and countervailing duties,[2] are based upon an international consensus that certain forms of behavior in international trade are unfair.[3] Other types of relief, such as the escape clause under section 201 of the Trade Act of 1974[4] and the retaliatory measures available under section 301 of the same act,[5] are a matter of governmental discretion and, as such, are subject to political as well as legal factors. Section 337 of the Trade Act of 1930[6] is unique among the trade laws of the United States because it addresses certain activities, such as patent infringement and price fixing, and because of the broad nature of the remedies available under it, especially total exclusion of foreign imports under order. The relatively nonpolitical character of proceedings under section 337, and the sweeping scope of the relief that may be obtained under it, make that section a useful instrument for domestic industries that have been subjected to the forms of unfair import competition covered by the section.

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[1] 19 U.S.C. § 1673 (1982). The concept of dumping is statutorily defined as "a class or kind of foreign merchandise [that] is being, or is likely to be, sold in the United States at less than its fair value . . . ." *Id.* at (1). This provision imposes customs duties "equal to the amount by which the foreign market value exceeds the United States price for the merchandise." *Id.* at (2).

[2] 19 U.S.C. § 1671 (1982). A countervailing duty arises when subsidies are provided, either "directly or indirectly, . . . with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States . . . ." *Id.* at (a)(1). This provision imposes customs duties "equal to the amount of the net subsidy." *Id.* at (a)(2).

[3] S. REP. No. 247, 96th Cong., 1st Sess. 37-43, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 423-29.

[4] 19 U.S.C. § 2251 (Supp. IV 1986).

[5] *Id.* § 2411 (Supp. IV 1986).

[6] Tariff Act of 1930, ch. 497, § 337, 46 Stat. 590, 703 (codified as amended at 19 U.S.C. § 1337 (1982)).

This article provides a broad overview of the criteria for relief under section 337, and of the relief that may be gained from its use. It first discusses the types of acts that may constitute unfair import practices under the section, the facts the domestic industry must provide to prove it is eligible for relief under the Act, and the types of relief that are available. It then describes in some detail the procedures followed in a section 337 proceeding. Because of the significant changes made to section 337 by the Omnibus Trade and Competitiveness Act of 1988,[7] this article emphasizes the relevant differences between the old and new laws.

I. Introduction

Section 337 of the Tariff Act of 1930, as amended, makes unlawful "[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee . . . ."[8] Before 1988, exactly what comprised such unfair methods of competition was left undescribed. Now, however, the section specifically makes unlawful the importation of articles infringing valid United States patents (including process patents), copyrights and trademarks, and mask works for semiconductors.[9] The section does not otherwise define what is meant by unfair methods of competition, but generally the scope of the section has been interpreted broadly. A number of different acts that are already impermissible for U.S. businesses to engage in are denied to foreign businesses, such as infringement of intellectual property rights (patents, copyrights, trademarks, and trade dress) and activities in restraint of trade (price fixing and predatory pricing). The section cannot be invoked, however, in cases involving dumping or subsidization. Section 337 provides an unusually flexible instrument for combating unfair practices by foreign competitors precisely because it addresses the general problem of unfair methods of competition.

Nevertheless, before relief can be provided under section 337, the domestic industry must prove that it has been injured. The statutory standard is whether the alleged unfair acts complained of threaten "to destroy or substantially injure an industry in the United States," or "to prevent the establishment of such an industry," or "to

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[7] Pub. L. No. 100-418, 102 Stat. 1107 (1988).

[8] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(a)(1), 102 Stat. 1107, 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(1)(A)).

[9] Prior to 1988, prohibition of imports of products infringing process patents (those detailing how a product is made) was provided for under a different section. *See* 19 U.S.C. § 1337a (1982). The Omnibus Trade and Competitiveness Act of 1988 repealed this provision and the protection of process patents is now incorporated within section 337 of the Tariff Act itself. *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342(c), 102 Stat. 1107, 1215-16 [hereinafter Trade Act of 1988].

restrain or monopolize trade and commerce in the United States."[10] Although the statute speaks in terms of destruction or substantial injury, the standard actually used to prove injury is relatively easy to satisfy.

If the domestic industry can show the use of unfair methods of competition with respect to imports, and that injury to the domestic industry exists, several different types of relief may be provided under section 337. The most drastic of these is the total exclusion of the imported product from the United States. Alternative remedies include a more limited exclusion, and the issuance of a cease and desist order requiring the cessation of the illegal conduct. Under some circumstances, the domestic industry can also obtain the exclusion of imports except under bond while the investigation under section 337 continues. Additionally, the law provides for the forfeiture of infringing merchandise under some circumstances.

The International Trade Commission (ITC)[11] is responsible for conducting investigations under section 337, for deciding whether an unfair trade practice and injury exists, and for determining the appropriate remedy. In cases of affirmative findings, the agency's decision is transmitted to the President, who has sixty days in which to decide whether to veto the agency's determination as to remedy. If the President does not do so, the ITC's determination goes into effect automatically. Appeals of the ITC's decision, whether affirmative or negative, go directly to the Court of Appeals for the Federal Circuit.

Although the general provisions of section 337 are relatively straightforward, like any statute, its actual application gives rise to a near-infinite number of variations. The remainder of this article examines in detail the manner in which section 337 operates.

II. Unfair Methods of Competition Subject to Section 337

Section 337 provides broadly that unfair methods of competi-

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[10] Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337).

[11] The International Trade Commission (ITC) is an independent U.S. agency composed of six commissioners. 19 U.S.C. § 1330(a) (1982). Each commissioner serves one five-year term. *Id.* The President, with the consent of the Senate, appoints each member. *Id.*

The ITC has several functions. It possesses broad investigatory powers in the area of foreign trade. Besides deciding whether violations have occurred under section 337, the ITC also determines whether violations have occurred under section 201 of the Trade Act of 1974 and antidumping and countervailing provisions. 19 U.S.C. §§ 1337(a)(1), 2251(b)(1), 1673(2), and 1671(a)(2) (1982). Additionally, it performs fact-finding and advisory functions with respect to particular aspects of international trade as requested by the President or Congress. S. REP. No. 1298, 93d Cong., 2d Sess. 25, 115 (1974); *see also* 19 U.S.C. §§ 1981(a)(1), 2112(f) (1982); *see generally* Comment, *Complainant Fraud on the International Trade Commission: Is There a Standard?*, 35 CATH. U.L. REV. 545 (1986) (comprehensively examining the ITC and its various duties in the area of foreign trade).

tion that cause injury to a domestic industry are unlawful. Until 1988, the section did not even attempt to define what was meant by "unfair methods of competition," and it was left largely to the ITC and the courts to provide meaning to this term. As was noted previously, the 1988 amendments made certain specific acts unlawful. Nevertheless, these amendments did not provide a comprehensive definition of unlawful methods of competition, so the statute continues to leave a great deal of discretion to the ITC and the courts to decide whether various types of behavior are remediable under section 337.

The ITC has stated that "[t]he terms 'unfair methods of competition' and 'unfair acts' have been held to have a broad and inclusive meaning."[12] Acts that have been held unlawful and subject to action under section 337 may be divided into two general categories. The most commonly alleged acts under section 337 involve the infringement of intellectual property rights. A second, but less popular, use of section 337 has been to counteract activities in restraint of trade, such as price fixing. For each type of activity, the ITC and the courts have required that the domestic industry prove a number of facts, such as the existence of a valid patent. Similarly, various defenses are available to the foreign producer or the importer.

A. Infringement of Intellectual Property Rights

Acts infringing upon the intellectual property rights of a domestic industry are by far the most common types of unfair methods of competition addressed by section 337. Of these, the most common cases have involved infringement of patents (including process patents), although recently an increasing number of cases have involved infringement of copyrights and trademarks. In addition, misappropriation of trade dress and of trade secrets constitute unfair methods of competition.

1. Patent infringement

Patent infringement and unauthorized importation of a product manufactured abroad by means of a patented process have long con-

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[12] Certain Novelty Glasses, USITC Pub. 991, Inv. No. 337-TA-55, 6 (July 1979). The following statement in *Certain Welded Stainless Steel Pipe and Tube*, USITC Pub. 863, Inv. No. 337-TA-29 (Feb. 1978) perhaps best depicts the ITC's interpretation of unfair competition:

> Clearly legislative history reveals that Section 337 was intended to be . . . directed at reaching a broad variety of unfair acts. Unless some convincing authority can be found for the proposition that Congress has since limited [its] scope . . . , it is our opinion that Section 337 embraces dumping and all other unfair methods of competition and unfair acts in the importation of articles or in their sale.

Id. at 7; *see also In re* von Clemm, 229 F.2d 441, 443-44 (C.C.P.A. 1955).

stituted unlawful acts under section 337,[13] and section 337 now makes this condition explicit. The invalidity of the patent is the chief defense to a charge of patent infringement.[14] By statute, the validity of a patent is presumed, so that the person arguing the invalidity bears the burden of persuasion.[15] Unless the invalidity of a patent is raised as a defense to an action under section 337, the domestic industry is not required to prove the validity of the patent.[16] Nonetheless, to establish patent infringement under section 337, the domestic party must establish: (1) the prima facie validity of the patent; (2) the imported product infringes the patent; and (3) the infringing product was actually imported into and sold in the United States.[17]

The first requirement is largely self-explanatory. The domestic industry must show that a U.S. patent for a particular product exists and is valid. To prove the second requirement, infringement, the domestic industry must demonstrate that the imported product is covered by the literal language of the patent, or if there is no literal infringement, that there is an infringement under the doctrine of equivalents.[18]

The domestic industry normally proves infringement by introducing physical samples of the patented product and the imported merchandise, but infringement may also be shown through the submission of drawings of the patented product or process, accompanied by affidavits by the employees of the foreign producer or importer, stating that a product like that shown in the drawing was imported into the United States.[19] In arguing infringement before the ITC, the patent owner is restricted by the construction it advanced for its claims before the Patent Office. Thus if a narrow construction was claimed there, the patentee cannot argue a broad

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[13] *See, e.g.*, Massachusetts Inst. of Technology v. AB Fortia, 774 F.2d 1104, 1108 (Fed. Cir. 1985).

[14] *Id.*

[15] *See* 35 U.S.C. § 282 (1982); *see also, e.g.*, Solder Removal Co. v. United States Int'l Trade Comm'n, 582 F.2d 628, 632 (C.C.P.A. 1978).

[16] *E.g.*, Lannom Mfg. Co. v. United States Int'l Trade Comm'n, 799 F.2d 1572, 1579-80 (Fed. Cir. 1986).

[17] *See* Certain Centrifugal Trash Pumps, USITC Pub. 943, Inv. No. 337-TA-43, 9 (Feb. 1979); *see also* 2 J. MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION § 30:38, at 543 (2d ed. 1984) (illustrating the same general factors).

[18] *Centrifugal Trash Pumps*, USITC Pub. 943 at 43. The doctrine of equivalents provides that minor modifications to a product will not bar an action for patent infringement if the product or process in question "performs substantially the same function in substantially the same way to obtain the same result" as the product or process covered by the patent. Graver Tank and Mfg. Co. v. Linde Air Products Co., 339 U.S. 605, 608 (1950); *see also* Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 26-27 (Nov. 1987) (discussing the application of the doctrine of equivalents).

[19] *See, e.g.*, Certain Roller Units, USITC Pub. 944, Inv. No. 337-TA-44, 30 (Sept. 1978).

construction to prove infringement before the ITC.[20] The standard employed by the ITC in determining whether infringement has occurred is that set down by the Supreme Court in *Gorham Co. v. White*.[21] If, in the eye of the ordinary observer, two designs are substantially the same, and if the resemblance is sufficient to deceive a purchaser into buying the infringing product, supposing it to be the other, an infringement occurs.[22]

The domestic industry can also prove patent infringement by inference. In *Certain Apparatus for Installing Electrical Lines and Components Thereof*,[23] the ITC considered whether a patent for an apparatus for installing electrical lines was infringed. The apparatus combined a flexible drill shaft and a coupling means.[24] The Administrative Law Judge (ALJ) who heard the case determined that the seller of a drill had induced infringement of the patent by selling the drill with directions for its use with a coupling device. The ITC, by not reviewing this issue, allowed the ALJ's determination to stand. Thus, although the seller itself did not infringe the patent directly, it was held to have utilized an unfair method of competition under section 337.[25]

The domestic industry must also show that the infringing product has been imported into the United States, but the level of importation need not be great. In *Certain Trolley Wheel Assemblies*[26] the ITC held that the infringing product had been imported when a single assembly was brought into the United States for use as a sample. The ITC held that the statute is stated in the disjunctive, so that the importation or sale of a product in the United States brings the product under section 337. The ITC also held that it is irrelevant that the imported product had no commercial value.[27]

The respondent in a section 337 case alleging patent infringement has a number of possible defenses. The first is to argue that the patent itself is not valid. The various ways in which this can be done fall within the province of patent law. Generally, a patent is not valid or is unenforceable if the claims made in it are included in prior art (publicly available papers or other articles existing before the patent was issued), or if the extension of prior art to the claims is obvi-

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[20] *See* Coleco Indus., Inc. v. United States Int'l Trade Comm'n, 573 F.2d 1247, 1257 (C.C.P.A. 1978).

[21] 81 U.S. 511 (1878).

[22] *See, e.g.*, Certain Luggage Products, USITC Pub. 932, Inv. No. 337-TA-39, 9 (Nov. 1978) (exemplifying the ITC's application of the *Gorham* standard).

[23] USITC Pub. 1858, Inv. No. 337-TA-196, 4 (May 1986).

[24] *Id.*

[25] *Id.* at 7.

[26] USITC Pub. 1605, Inv. No. 337-TA-161 (Nov. 1984).

[27] *Id.* at 7-8.

ous,[28] or if the patentee provided the Patent Office with incomplete or misleading information in obtaining the patent.[29]

The standard of review for determining whether a patent is valid is the "substantial evidence" test. If the patent is held invalid in an independent action, the patent cannot provide a basis for action under section 337.[30] The dismissal of a patent infringement suit does not necessarily shield a foreign producer or importer from an action under section 337 based on the importation of products other than those involved in the prior litigation.[31]

Note that while the ITC may conclude that a patent is invalid, such a determination is applicable only to the section 337 proceeding in which it is made. The ITC does not have the power to declare a patent invalid for all purposes. Rather, the agency's determination is restricted to a decision that importation of the product does not constitute an unfair method of competition, so that no violation of section 337 has occurred.[32] In reviewing determinations by the ITC regarding the validity of a patent, the Court of Appeals for the Federal Circuit conducts *de novo* review, and does not accord the ITC's determination any presumptive correctness.[33]

In contesting an action under section 337, the foreign producer or importer may also seek to show that the product or the process used to produce the product does not in fact infringe the patent. An example of this defense is a claim that the foreign producer operated under license from the U.S. patentee.[34] Again, the normal standards of patent law apply. Finally, the respondent may show that no such products were imported into or sold in the United States.

2. *Copyright infringement*

The importation of a product that infringes a valid U.S. copyright also constitutes an unfair act or method of competition under section 337.[35] To prove copyright infringement, the domestic peti-

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[28] *See, e.g.*, Massachusetts Inst. of Technology v. AB Fortia, 744 F.2d 1104, 1109 (Fed. Cir. 1985).

[29] *See, e.g.*, Certain Double-Sided Floppy Disk Drives and Components Thereof, USITC Pub. 1860, Inv. No. 337-TA-215 (May 1986).

[30] *See* SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 368 (Fed. Cir. 1983).

[31] *See* Young Engineers, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1316 (Fed. Cir. 1983).

[32] Monolithic Catalytic Converters, USITC Pub. —, Inv. No. 337-TA-18, 7-8 (Sept. 1976).

[33] *See* Stevenson v. Int'l Trade Comm'n, 612 F.2d 546, 549 (C.C.P.A. 1979).

[34] *See* Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 51 (Nov. 1987).

[35] Trade Act of 1988, *supra* note 9, § 1942(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(1)(B)). Before the 1988 amendments, copyright infringement was already considered actionable under section 337. *See, e.g.*, Certain Coin-Operated Audiovisual Games and Components Thereof (Viz., Rally-X and Pac Man), USITC Pub. 1267, Inv. No. 337-TA-105, 1-2 (July 1982).

tioner must prove ownership of the copyright and that the respondents copied material contained in the copyright.[36] Determination of ownership of a copyright depends upon a number of factors which include originality in the authors, the copyrightability of the subject matter, the citizenship of the author, compliance with the specified formalities for obtaining a copyright, and, if the petitioner is not the author, the existence of a valid transfer of copyright rights.[37] Possession of a certificate of registration issued by the Copyright Office is prima facie evidence of ownership, so that the burden of proof shifts to the respondent in the investigation.[38]

Besides ownership, the petitioner must also show that the copyrighted matter was copied. To establish this requirement the complainant must prove access by the respondent and substantial similarity of the foreign product to the matter subject to the copyright.[39] Even if access cannot be proven directly, it is inferred if the similarity of products is overwhelming.[40]

The defenses to an action under section 337 based on copyright infringement are similar to those for patent infringement, such as lack of ownership of a copyright. The most likely defenses are that the copyrighted matter is not original (and therefore not properly copyrightable)[41] and that the respondent did not, in fact, copy the copyrighted work. With respect to the former, the ITC has noted that the quantum of originality necessary to sustain a copyright is minimal.[42] The fundamental test for the latter is whether the accused work is so similar to a copyrighted work that an ordinary reasonable person would conclude that the second work embodies material of substance and value from the copyrighted work.[43] Thus, infringement may be found and a remedy supplied under section 337, even if the imported article contains some minor differences with the copyrighted U.S. article.[44]

3. Trademark infringement

Trademark infringement by foreign imports has become an increasing source of concern to U.S. producers. The sale of counter-

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[36] *Certain Coin-Operated Audiovisual Games*, USITC Pub. 1267 at 4-5.

[37] *E.g.*, Certain Coin-Operated Visual Games and Components Thereof, USITC Pub. 1160, Inv. No. 337-TA-87, 13 (June 1981).

[38] *Id.* at 5; *see also* Certain Cloisonne Jewelry, USITC Pub. 1822, Inv. No. 337-TA-195 (Mar. 1986).

[39] Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157, 1162 (9th Cir. 1977).

[40] Heim v. Universal Pictures Co., 154 F.2d 480, 487 (2d Cir. 1946).

[41] Certain Cloisonne Jewelry, USITC Pub. 1822 at 49.

[42] *Id.* at 50.

[43] Atari, Inc. v. N. Am. Phillips Consumer Elecs. Corp., 672 F.2d 607, 614 (7th Cir. 1982).

[44] Certain Coin-Operated Audiovisual Games and Components Thereof (Viz., Rally-X and Pac Man), USITC Pub. 1267, Inv. No. 337-TA-105, 16 (July 1982).

feit and pirated goods in the United States annually costs domestic producers huge sums of money from lost sales. Section 337 provides one of the most effective methods of ending this source of unfair competition. Because of the emergence of counterfeiting, the ITC and the courts have addressed this issue in a large number of recent cases.

Infringement of a registered trademark[45] is specifically enumerated as an unfair act or method of competition under section 337,[46] although infringement of a common law trademark continues to be actionable as well.[47] To prove infringement of a registered trademark, the domestic industry must show: (1) a registered trademark was copied; (2) the copy was used in connection with the sale of goods; and (3) the copy was used in a way likely to cause confusion.[48] In considering cases of infringement of common law trademarks, the ITC has adopted the common law definition of a trademark as any word, name, symbol, or device adopted and used by a manufacturer or merchant to identify its wares.[49] A trademark may be a specific symbol or word, or the overall appearance of the product.[50] The party asserting the trademark, either as a basis for action under section 337 or as a defense to such an action, must show that it has the right to use the mark, and that the mark is either inherently distinctive or has acquired a secondary meaning identifying it with the party's wares.[51]

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[45] A registered trademark is one that has been formally registered with the Patent Office. A trademark may also be established under common law if it is shown to have been used consistently.

[46] Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(1)(C)). Trademark infringement had been recognized as actionable under section 337 prior to 1988 as well. *See, e.g.*, Certain Heavy-Duty Staple Gun Tackers, USITC Pub. 1506, Inv. No. 337-TA-137, 16 (Mar. 1984).

[47] *See, e.g.*, Certain Cube Puzzles, USITC Pub. 1334, Inv. No. 337-TA-112, 7 (Jan. 1983).

[48] *E.g.*, Certain Alkaline Batteries, USITC Pub. 1616, Inv. No. 337-TA-165, 23-24 (Nov. 1984). The issue of trademark infringement often arises in connection with imports of goods produced abroad using a registered trademark, where importation of the goods into the United States is not authorized, i.e., gray market imports. The ITC has held that such imports do provide a cause of action under section 337. Thus, in *Certain Alkaline Batteries*, the ITC held that when batteries produced in Belgium using the "Duracell" trademark were imported into the United States without the permission of the United States holder of the mark, copying occurred, even though the trademark was licensed to the Belgian company, so that the batteries could be sold in Belgium using the trademark. *Id.* at 24. Even though the Belgian batteries were "genuine Duracells," their importation into the United States constituted trademark infringement. *Id.* at 25.

[49] Certain Vertical Milling Machines and Parts, Attachments, and Accessories Thereto, USITC Pub. 1512, Inv. No. 337-TA-133, 8 (Mar. 1984).

[50] "Xerox," for example, is a trademark, as is the distinctive shape of the Coca-Cola bottle.

[51] *Certain Vertical Milling Machines*, USITC Pub. 1512 at 8-9. The right to use a trademark is established by evidence that the party has registered the trademark with the Patent Office, enjoys the right to use the trademark under license, or has established the trademark under common law. A trademark is inherently distinctive if it is immediately identifi-

Once the domestic industry shows that a trademark exists, it must prove that the imported product infringes that trademark.[52] The basic test for infringement is whether the imported article is so like the domestically produced article as to produce confusion among buyers.[53] The test for whether confusion is likely is essentially subjective; if the overall impression is that the marks are similar, the ITC will find that confusion, and thus infringement, is likely.[54] Actual evidence of confusion is not required, but if available, is highly persuasive.[55]

4. Misappropriation of trade dress and passing off

Closely related to copyright infringement as a cause of action under section 337, although not explicitly mentioned as such, are misappropriation of trade dress and passing off. Trade dress refers to the packaging and design features of a product.[56] It is an unfair act or method of competition to copy the trade dress of a competitor's product when the competitor has already used the trade dress successfully, and when the copying is likely to cause confusion among purchasers.[57]

To prove misappropriation of trade dress, the domestic industry must show: (1) the trade dress includes nonfunctional design features; (2) the features are either distinctive as a designation of origin or have otherwise obtained a secondary meaning; and (3) there is a resulting likelihood of confusion between the imported and the domestic product.[58] Nonfunctional design features are the features of

able with the party asserting the right to the trademark, because it is unique or arbitrary in form. *Id.* at 11 n.30.

Secondary meaning pertains to "a source of the product." *Id.* at 13. The existence of a secondary meaning may be proven through testimony, affidavits, or surveys (direct evidence) or through circumstantial evidence, such as advertising of the mark and exclusivity of use. *Id.* at 13-14.

[52] *E.g.*, Certain Braiding Machines, USITC Pub. 1435, Inv. No. 337-TA-130, 42 (Oct. 1983).

[53] Certain Plastic Food Storage Containers, USITC Pub. 1563, Inv. No. 337-TA-152, 53-54 (Aug. 1984). Among the factors that the ITC considers are: (1) the degree of similarity in appearance between the imported and the domestic mark; (2) the intent of the complainant in adopting the mark; (3) the relation in marketing use and manner between the goods and services of the importer and those of the domestic producer; and, (4) the degree of care in distinguishing the products that will likely be exercised by purchasers. Certain Braiding Machines, USITC Pub. 1435 at 66.

[54] *E.g.*, Certain Braiding Machines, USITC Pub. 1435 at 66-67.

[55] *E.g.*, Certain Plastic Food Storage Containers, USITC Pub. 1563 at 55. Such evidence may consist of testimony of purchasers as to actual instances of confusion. *Id.* Alternatively, evidence in the form of consumer surveys may establish the likelihood of confusion. *Id.* at 57; *see also* Certain Alkaline Batteries, USITC Pub. 1616, Inv. No. 337-TA-165, 31-33 (Nov. 1984).

[56] *E.g.*, Certain Novelty Glasses, USITC Pub. 991, Inv. No. 337-TA-55, 18 (July 1979).

[57] *Id.* at 6-7.

[58] Certain Miniature Plug-In Blade Fuses, USITC Pub. 1337, Inv. No. 337-TA-114, 18 (Jan. 1983).

a product or its packaging which are basically arbitrary and do not serve any particular purpose except to distinguish the product from others.[59] If the design features are inherently distinctive, there is no need to prove that they have acquired a secondary meaning.[60] Secondary meaning is proven much as it is in trademark cases, either through testimony[61] or indirect evidence, such as advertising.[62] In addition, the very act of copying trade dress gives rise to a presumption that the dress has acquired a secondary meaning.[63] This presumption arises because trade dress is generally more complex and detailed than a trademark, so that the possibility of inadvertent simulation is considered to be less likely than is the case with trademarks.[64] As with trademark infringement, the test for likelihood of confusion in trade dress cases is "whether a reasonable consumer under ordinary circumstances would be likely to be confused as to the sources of the products."[65]

Passing off is a similar type of unfair act or method of competition in which the foreign producer or importer intentionally acts in a manner that leads the customer to believe that he is buying the goods of another. Proof of passing off differs from trademark infringement or misappropriation of trade dress in that it requires objective proof that the defendant subjectively and knowingly intended to confuse the buyer.[66]

False advertising and false representation of origin are also closely related to trademark infringement and misappropriation of trade dress. Proof of false representation of origin requires evidence showing that the respondents mislabeled either the product or the

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[59] *Id.* at 19. For example, the packaging of "Duracell" batteries is copper and black, as well as the color scheme of the batteries themselves. *Id.* at 33. Hence, the distinctive color scheme constitutes nonfunctional design features.

[60] *E.g.*, Certain Compound Action Metal Cutting Snips and Components Thereof, USITC Pub. 1831, Inv. No. 337-TA-197, 89 (Mar. 1986).

[61] *See* Certain Novelty Glasses, USITC Pub. 991, Inv. No. 337-TA-55, 11 (July 1979).

[62] *See* Certain Miniature Plug-In Blade Fuses, USITC Pub. 1337 at 21.

[63] *E.g.*, Certain Novelty Glasses, USITC Pub. 991 at 10-11.

[64] *Certain Compound Action Metal Cutting Snips*, USITC Pub. 1831 at 89.

[65] Certain Novelty Glasses, USITC Pub. 991 at 10-11.

[66] Certain Cube Puzzles, USITC Pub. 1334, Inv. No. 337-TA-112, 26 (Jan. 1983). Such proof might include evidence that the respondent in the investigation changed the color or appearance of its product in order to more closely resemble that of another, Certain Plastic Food Storage Containers, USITC Pub. 1563, Inv. No. 337-TA-152, 71 (Aug. 1984); displayed the infringed product's name on the package, Certain Heavy-Duty Staple Gun Tackers, USITC Pub. 1506, Inv. No. 337-TA-137, 58-60 (Mar. 1984); or copied the domestic producer's advertising, sales materials, and operating manuals, Certain Vertical Milling Machines and Parts, Attachments, and Accessories Thereto, USITC Pub. 1512, Inv. No. 337-TA-133, 39 (Mar. 1984). Unlike trademark infringement, however, proof of passing off does not require proof of the existence of either a secondary meaning or a likelihood of confusion. Certain Apparatus for Installing Electrical Lines, USITC Pub. 1858, Inv. No. 337-TA-196, 18 (May 1986).

packaging as to the country of origin of the product.[67] False representation of origin can also include failure to provide country of origin, if such a failure implies that the country of origin was the United States.[68]

False advertising occurs when competitors make false statements comparing their goods to those of another.[69] The basic test for false advertising is the reaction of the ordinary consumer. Accordingly, to prove false advertising the complainant must provide evidence showing how the advertising is perceived by those exposed to it.[70]

5. Misappropriation of trade secrets

A final type of infringement of intellectual property rights held by the ITC to constitute a violation of section 337 is the misappropriation of trade secrets, false advertising, and false markings regarding origin and source. Proof of misappropriation of trade secrets requires that the domestic industry show: (1) the existence of a trade secret not in the public domain; (2) that the complainant is the owner of the secret; (3) that the complainant disclosed the secret to the respondent while in a confidential relationship or that the respondent wrongfully took the secret by unfair means; and (4) that the respondent used or disclosed the secret, causing injury to the rightful owner.[71]

B. Restraint of Trade

Section 337 states explicitly that unfair acts or methods of competition that restrain or monopolize trade in the United States are unlawful.[72] Therefore, actions that restrain trade, such as price-fixing, predatory pricing, and market-sharing agreements, as well as attempts to create a monopoly, are clearly actionable. Nevertheless,

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[67] *See* Certain Compound Action Metal Cutting Snips and Components Thereof, USITC Pub. 1831, Inv. No. 337-TA-197, 26 (Mar. 1986).

[68] *See* Certain Alkaline Batteries, USITC Pub. 1616, Inv. No. 337-TA-165, 23-24 (Nov. 1984).

[69] Certain Plastic Food Storage Containers, USITC Pub. 1563, Inv. No. 337-TA-152, 66 (Aug. 1984). Examples of false advertising include statements that the imported product is interchangeable with the domestic product, when in fact it was not, *id.* at 66-67; use of the photograph of the domestic product to advertise the foreign product, *Certain Vertical Milling Machines*, USITC Pub. 1512 at 41; and use of the promotional materials of a competitor, Certain Apparatus for Installing Electrical Lines, USITC Pub. 1858, Inv. No. 337-TA-196, 19 (May 1986).

[70] Certain Caulking Guns, USITC Pub. 1507, Inv. No. 337-TA-139, 49 (Mar. 1984). Such evidence may include direct evidence, such as consumer surveys, or circumstantial evidence; however, the ITC can decide for itself whether advertising is false or deceptive. *Id.* at 50.

[71] Certain Apparatus for the Continuous Production of Copper Rod, USITC Pub. 1017, Inv. No. 337-TA-52, 38 (Nov. 1979).

[72] Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(1)).

very few cases alleging these types of actions have been brought under section 337.

Although the provisions of section 337 are generally similar to those of the Sherman Act, the standards for restraint of trade under section 337 are less stringent. Unlike the Sherman Act, section 337 does not require proof of the existence of a contract, combination, or conspiracy to restrain trade; the complainant need show only that a restraint of trade exists. Therefore, it is theoretically possible that the actions of one company alone could constitute a restraint of trade, although in practice such a result is more likely when two or more companies are shown to have acted together.[73]

Among the activities forbidden by section 337 is predatory pricing, which the ITC has defined as the sale of a product at below its cost of production with the aim of driving out competitors.[74] The ITC has stated that it uses a flexible test for what constitutes unreasonably low prices which depends upon the particular characteristics of the industry concerned.[75] Generally, the ITC considers prices to be unreasonably low if they fall below the average variable cost of production. This presumption is rebuttable, however. Sales at prices above average variable cost, but below average total cost (average variable cost plus average fixed costs) are evidence of predatory pricing. Nevertheless, predatory pricing is found only if the complainant provides other evidence of intent to drive competitors out of the market as well.[76]

Willful maintenance of monopoly power also constitutes a restraint of trade actionable under section 337. Maintenance of monopoly power may be established if the monopolist engaged in "exclusionary conduct" which impairs competition in an unduly restrictive way.[77] In considering the effects of the monopolist's conduct, the ITC examines whether other factors affected the complainant's ability to compete as well.[78] The complainant has the burden of proof in establishing exclusionary conduct.[79]

Commission of other actions, such as trademark infringement or

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[73] Certain Airtight Cast-Iron Stoves, USITC Pub. 1126, Inv. No. 337-TA-69, 6 (Jan. 1981).

[74] Certain Welded Stainless Steel Pipe and Tube, USITC Pub. 863, Inv. No. 337-TA-29, 18-19 (Feb. 1978).

[75] *Id.* at 19.

[76] *Id.* at 23.

[77] *See* Certain Electrically Resistive Noncomponent Toner and "Black Powder" Preparations Therefor, USITC Pub. 863, Inv. No. 337-TA-29, 18-19 (Feb. 1978).

[78] *Id.* at 9-10. In this case, the complainant had alleged a number of exclusionary activities, including disparagement by the monopolist of the complainant's product, use of warranties, and requirements of exclusive dealing. The ITC found that none of these activities, as conducted by the alleged monopolist, constituted impermissible exclusionary conduct, although the ITC indicated that such types of actions could be held unlawful under section 337.

[79] *Id.* at 11-12.

false advertising, does not constitute restraint of trade within the meaning of section 337.[80]

Several aspects of section 337 investigations in connection with restraint of trade cases are worth noting. Unlike many antitrust or other types of restraint of trade cases, section 337 investigations must be completed within a limited period, meaning the section offers quick relief from restraint of trade activities. Nevertheless, the short time limits also curtail the ability of the complainant to undertake complex discovery activities. Furthermore, the complainant cannot obtain the treble damages awarded in civil suits. The ITC has no particular expertise in handling restraint of trade cases and, as shown earlier, such cases have been rare under section 337.[81] Despite these drawbacks, section 337 can provide a rapid and effective means of remedying the damage caused to domestic industries by the restraint of trade activities of their foreign competitors.

III. Injury to the Domestic Industry Under Section 337

To obtain relief under section 337 in cases not involving infringement of a patent, copyright, registered trademark, or mask work, the domestic industry must prove both that some type of unfair act or method of competition has been performed, and that the "threat or effect" of the act is "to destroy or substantially injure an industry in the United States" or to prevent the establishment of an industry.[82] Thus, the domestic industry must prove injury in cases

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[80] Certain Airtight Cast-Iron Stoves, USITC Pub. 1126, Inv. No. 337-TA-69, 6 (Jan. 1981).

[81] *See* Farkas, *Litigating Antitrust Claims and Defenses before the International Trade Commission*, 2 ANTITRUST 26, 30 (1987).

[82] Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(1)(A)). The law with respect to the injury was changed in three ways in 1988. The most significant change was the removal of the requirement of proof of injury for the cases involving patent, trademark, copyright, or mask work infringement. This change is inherent in the new structure of section 337, and in particular, in the separation of trademark, patent, and copyright infringement from the other types of acts made actionable under the statute. The legislative history of the 1988 amendment makes this change explicit. *See, e.g.*, S. REP. No. 71, 100th Cong., 1st Sess. 127 (1987); H.R. REP. No. 576, 100th Cong., 2d Sess. 633 (1988). To receive relief in these cases, although there is no injury requirement, the petitioner must show that a domestic industry exists with respect to the intellectual property right involved. *See* Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(2)); *see also* S. REP. No. 71, *supra*, at 128.

The 1988 amendments also changed the wording of the statute regarding injury. Prior to 1988, the section addressed actions "the tendency or effect" of which was to cause injury to the domestic industry. *See* 19 U.S.C. § 1337(a) (1982). The statute now provides for relief from unfair methods of competition and unfair acts in importation, the threat or effect of which is to cause injury. This change was viewed as simply codifying the ITC's practice, which was to interpret the word "tendency" as "threat." *See* H.R. REP. No. 576, *supra*, at 632.

Finally, the former requirement that the U.S. industry be "efficiently and economically operated" was eliminated. *See* 19 U.S.C. § 1337(a) (1982). However, this change also was considered to be minor since the ITC had very seldom denied relief on grounds that the

involving common law trademarks, trade secrets, false advertising, and antitrust violations, among others.[83] In cases where proof of injury is not required, it must be shown that a domestic industry exists with respect to the intellectual property right involved.[84]

A. Definition of "Industry" for Purposes of Section 337

To determine whether unfair acts have injured a domestic industry, it is necessary to determine what the relevant industry is. The first principle in defining industry is to recognize that the designation "industry in the United States" is geographical, rather than based on citizenship. Therefore, to avail itself of the protection of section 337, an industry must be physically located in the United States.[85] The ITC determines the existence of an industry at the time the section 337 complaint is filed.[86]

In general, the relevant domestic industry is defined in terms of the unfair act or method of competition being complained of. In patent and trademark cases the domestic industry is defined in terms of exploitation of the patents or trademarks in question. In investigations involving other forms of unfair competition, such as false advertising or passing off, the ITC has defined the industry in terms of the U.S. facilities of the complainant devoted to the production and sale of the article that was the subject of the unfair act.[87] In the past the scope of the industry was further restricted, however, to those products that actually compete with the imports that are the subject of the section 337 action.[88] Nevertheless, the ITC has indicated that

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domestic industry had not been efficiently or economically operated. Nevertheless, Congress decided to remove this requirement in the belief that its existence might discourage U.S. firms from seeking the relief to which they were entitled. *See* H.R. REP. No. 40, 100th Cong., 1st Sess. 156 (1987). Congress also expressly stated that it does not intend the ITC or the President to reintroduce this requirement as a factor to be considered in determining whether relief is in the public interest. *See id.*; S. REP. No. 71, *supra*, at 129.

[83] *See* S. REP. No. 71, 100th Cong., 1st Sess. 128 (1987).

[84] 19 U.S.C. § 1337(c) (1982).

[85] Schaper Mfg. Co. v. United States Int'l Trade Comm'n, 717 F.2d 1368, 1370 (Fed. Cir. 1983).

[86] Bally/Midway Mfg. Co. v. United States Int'l Trade Comm'n, 714 F.2d 1117, 1121 (Fed. Cir. 1983); *see also* Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 77 (Nov. 1979).

[87] Woodworking Machines, USITC Pub. 1979, Inv. No. 337-TA-174, 36 (May 1987).

[88] *See* Certain Coin-Operated Audiovisual Games and Components Thereof (Viz., Rally-X and Pac Man), USITC Pub. 1267, Inv. No. 337-TA-105, 1-2 (July 1982); *see also* Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof, USITC Pub. 1138, Inv. No. 337-TA-82, 28 (Apr. 1981). Thus, a product exploiting a specific patent would not be included within the industry if it did not compete with an import that allegedly infringed the patent. Similarly, in a case where a number of the complainant's products bore a trademark infringed by imports, but only three of those products competed with imports carrying the infringing mark, the ITC restricted the domestic industry to that part of the complainant's facilities that produced those three products. Certain Heavy-Duty Staple Gun Tackers, USITC Pub. 1506, Inv. No. 337-TA-137, 67-68 (Mar. 1984).

it is moving away from its focus on competition between products, at least with respect to trademark infringement, so that all products using a single trademark are considered to be the products of a single industry for purposes of injury.[89]

The definition of what constitutes the domestic industry is further modified by the principle that an industry is that which produces an article of commerce. The ITC has recognized that "it may happen that the article resulting from the exploitation of the involved intellectual property is not itself an actual article of commerce, but is physically incorporated in an article of commerce."[90] The ITC will thus consider whether injury was caused with respect to the industry producing the ultimate article of commerce, rather than the industry producing the product based upon the relevant intellectual property right.[91]

An obvious issue in cases involving a number of trademark or trade secrets, or where a number of different products are produced using the same intellectual property right, is whether there is one or several industries. Generally, separate industries are found if the patents or copyrights are used to produce separate and distinct articles of commerce.[92] Conversely, a number of products using different

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[89] In *Certain Products with Gremlins Character Depictions*, USITC Pub. 1815, Inv. No. 337-TA-201 (Mar. 1986), the ITC considered a case where the complainant claimed that certain imports infringed upon its copyright to the characters in the movie "Gremlins." The ITC noted that the copyright owner had licensed the right to produce a large number of products using characters from "Gremlins," including such diverse things as hats, lunch boxes, posters, and records. The Administrative Law Judge had noted that these items did not necessarily compete with one another. Since only certain products infringing the copyright were imported, the judge held that the domestic industry was restricted to the production of those products that produced articles that competed directly with the infringing imports. *Id.* at 19-20.

The ITC reversed this determination, stating that "the use of competition between domestic production and imports to define the domestic industry is not the proper analysis of the domestic industry requirement of section 337." *Id.* at 13-14. Accordingly, the ITC held that the production of all domestically-produced products employing the Gremlin trademark constituted a single domestic industry. *Id.* at 12.

The ITC consciously reconciled this position with that taken in *Certain Coin-Operated Audiovisual Games*, in which the ITC had held that the industry was limited to the facilities used to produce the Pac-Man game itself, and not those used to produce shirts, boardgames, etc., using the Pac-Man trademarks or copyrights. *Certain Products with Gremlins*, *supra*, at 20.

The ITC explained that the infringement in *Certain Coin-Operated Audiovisual Games* was to the copyright of the audiovisual work of the game itself rather than to the characters of the game. *Certain Products with Gremlins*, *supra*, at 13 n.40.

[90] Certain Modular Structural Systems, USITC Pub. 1668, Inv. No. 337-TA-164, 12 (June 1984).

[91] For example, in *Certain Personal Computers and Components Thereof*, USITC Pub. 1504, Inv. No. 337-TA-140 (Mar. 1984), the ITC found that imports had infringed patents and copyrights on various components of personal computers. As these components were essential components of personal computers, and as the actual article of commerce was the complete personal computer, the ITC defined the relevant domestic industry as that producing complete personal computers using the relevant patents and copyrights. *Id.* at 41.

[92] *See* Certain Limited-Charge Cell Culture Microcarriers, USITC Pub. 1486, Inv. No. 337-TA-129, 37 (Feb. 1984).

patents or trade secrets may be held to constitute a single industry if the various products together constitute an integrated system,[93] or if a number of patents are used to produce a single article of commerce.[94]

The second obvious issue with respect to the definition of the relevant domestic industry is what activities are necessary or sufficient to constitute an industry. Clearly, manufacture of the product in question is sufficient.[95] If some manufacturing operations are carried on outside the United States, the ITC considers the nature and significance of the domestic activities and, specifically, the amount of value added domestically.[96] The basic test is whether the domestic operations differ from the activities normally carried out by any importer, so that a domestic industry can be held to exist.[97]

According to the ITC, "[t]he activities which are of an appropriate nature to be considered as part of the domestic industry may include production-related activities, such as quality control, repair, and packaging."[98] The amount of domestic activity needed to support a finding that a domestic industry exists varies from case to case, but generally, if fifty percent of the total value of the product is added in the United States, a domestic industry is found.[99] The substantial transformation of imported components also supports a finding of a domestic industry.[100]

The ITC has found a domestic industry to exist even if no production operations were carried out in the United States. This is possible when the domestic complainant provides services, such as quality control and packaging and warranty service, that add sub-

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[93] Certain Apparatus for the Continuous Production of Copper Rod, USITC Pub. 1017, Inv. No. 337-TA-52, 55 (Nov. 1979).

[94] Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 65 (Nov. 1979). Similarly, in *Woodworking Machines*, USITC Pub. 1979, Inv. No. 337-TA-174 (May 1987), the ITC held the production facilities for several different products constituted a single industry. The ITC explained that each of the products utilized the infringed intellectual property right (in this case the "Rockwell" trademark and logo), so that it was appropriate to define the industry in terms of the commonly shared intellectual property rights. *Id.* at 49.

[95] *See Certain Personal Computers*, USITC Pub. 1504 at 41-43.

[96] Certain Cloisonne Jewelry, USITC Pub. 1822, Inv. No. 337-TA-195, 59 (June 1985).

[97] *See* Schaper Mfg. Co. v. United States Int'l Trade Comm'n, 717 F.2d 1368, 1372-73 (Fed. Cir. 1983).

[98] Certain Cloisonne Jewelry, USITC Pub. 1822 at 59.

[99] *Id.*

[100] In *Certain Cloisonne Jewelry*, the complainant imported the cloisonne components, and mounted, shaped, and attached them, so that the components were transformed into actual jewelry. The ITC noted in particular that all materials used in the assembly operations were purchased in the United States. *See* USITC Pub. 1822 at 59; *see also* Certain Personal Computers and Components Thereof, USITC Pub. 1504, Inv. No. 337-TA-140, 42 (Mar. 1984). The presence of these substantial production activities formed the basis of the finding of a domestic industry. Certain Cloisonne Jewelry, USITC Pub. 1822 at 61-62; *Certain Personal Computers*, *supra*, at 42.

stantially to the value of the imported article.[101] Alternatively, no domestic industry was found where the inventor of a product designed the product and licensed its production, but did not manufacture or sell it.[102] Nor did the quality control and sales activities of the importer in that case create a domestic industry, where those activities were no more elaborate than those carried on by any importer, and where the importer did not perform any manufacturing, servicing, or installation activities.[103] A domestic producer that might otherwise be considered part of the domestic industry will not be included if it is the importer of an infringing product.[104]

B. Injury to the Domestic Industry

The final requirement for the provision of relief under section 337 is a showing that the threat or effect of unfair acts or methods of competition is to "destroy or substantially injure" an industry in the United States.[105] Although the language of the statute appears to impose a stringent injury requirement, in fact the ITC and the courts have applied a relatively broad standard of injury in section 337 cases, so that a lower quantum of injury is required than in antidumping or countervailing duty cases.[106] Consequently, although proof of injury is necessary under section 337, and although relief has been denied in some cases due to absence of sufficient injury, the proof of injury in a section 337 case is normally not the barrier to relief it might pose in other types of import relief actions.

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[101] In *Certain Cube Puzzles*, USITC Pub. 1334, Inv. No. 337-TA-112 (Jan. 1983), the complainant imported finished Rubik's Cubes into the United States, where they were subjected to stringent quality control inspection—virtually every cube was inspected at some point in the United States. *Id.* at 27-28. The complainant also packaged the cubes with packaging materials produced in the United States, and repaired broken ones. *Id.* at 28-29. The complainant testified that its quality control, packaging and repair activities added approximately 92% to the value of the product as sold in the United States, a level the ITC held was sufficient to establish the existence of a domestic industry.

Similarly, the ITC held in *Certain Air-Tight Cast Iron Stoves*, USITC Pub. 1126, Inv. No. 337-TA-69 (Jan. 1981), that a purely service industry could constitute a domestic industry for purposes of section 337, where the domestic importer tested the stoves upon import from Norway, produced and provided advertising and service manuals, and provided dealers with information on installation. A major part of the importer's business consisted of repairing stoves as well. The ITC held that these service aspects of the business added sufficient value to the product to qualify it as a domestic industry. *Id.* at 10-11.

[102] Schaper Mfg. Co. v. United States Int'l Trade Comm'n, 717 F.2d 1368, 1371 (Fed. Cir. 1983).

[103] *Id.* at 1372-73. Consistent with this opinion is the ITC's determination in *Certain Products with Gremlins Character Depictions*, USITC Pub. 1815, Inv. No. 337-TA-201 (Mar. 1986). The ITC found that the licensing activities of the complainant alone were not sufficient to create a domestic industry. *See id.* at 11.

[104] *See* Certain Fluidized Supporting Apparatus and Components Thereof, USITC Pub. 1667, Inv. No. 337-TA-182/188, 14 (Oct. 1984).

[105] Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)).

[106] *See* Perry, *Administration of Import Trade Laws by the United States International Trade Commission*, 3 BOSTON U. INT'L L.J. 345, 445 (1985).

The injury requirement under section 337 is independent of the requirement that an unfair act or method of competition be shown. In other words, proof of an unfair act does not automatically give rise to a finding of injury.[107] Rather, the complainant in a section 337 investigation carries the burden of proving injury, or a tendency to injure.[108]

Section 337 contemplates two possible types of injury. First, the section provides for relief if unfair acts or methods of competition have the effect of causing substantial injury. The ITC has interpreted this provision to refer to present or past injury to the domestic industry.[109] "Threat" to injure, on the other hand, refers to probable future injury.[110] This distinction is worth making, as the factors considered in determining effect and tendency to injure are somewhat different.

1. Quantum of injury required

The Court of Appeals for the Federal Circuit has held that "[t]here is no precise and all-inclusive definition of 'injury' under section 337 . . . ."[111] Thus, the courts and the ITC have used a flexible approach that takes into account the diversity of practices covered by the statute.[112] With respect to cases involving infringement of intellectual property rights, the Court of Federal Trade has set a relatively low standard of injury:

> Where the unfair practice is the importation of products that infringe a domestic industry's copyright, trademark, or patent right, even a relatively small loss of sales may establish, under section 337(a), the requisite injury to the portion of the complainant's business devoted to the exploitation of those intellectual property rights.[113]

Even in these cases, however, the domestic industry must usually show that the infringer holds or threatens to hold a significant market share or that the infringer has made significant sales of the article.[114]

The quantum of injury required in intellectual property cases

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[107] *See* Textron, Inc. v. United States Int'l Trade Comm'n, 753 F.2d 1019, 1028 (Fed. Cir. 1985).

[108] *See id.* at 1029; *see also* Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1567 (Fed. Cir. 1986).

[109] *See* Woodworking Machines, USITC Pub. 1979, Inv. No. 337-TA-174, 44-45 (May 1987).

[110] *Id.* at 45. As discussed *supra* note 82, the statute now speaks of *threat* rather than *tendency*, but the legislative history of the provision, and ITC practice, establish that the two terms in fact mean the same thing. Therefore, past ITC decisions of *tendency* are relevant to the interpretation and application of the threat provision of the section.

[111] *Textron*, 753 F.2d at 1029.

[112] *See id.*

[113] Bally/Midway Mfg. Co. v. United States Int'l Trade Comm'n, 714 F.2d 1117, 1124 (Fed. Cir. 1983).

[114] Textron, Inc. v. United States Int'l Trade Comm'n, 753 F.2d 1019, 1029 (Fed. Cir.

varies according to the character of the product and the structure of its market. In a case involving patent infringement, the ITC held that the loss of even a single sale can constitute injury, if the product has a very restricted market with a limited number of sales per year.[115] Similarly, in the case of a product with a very short life, even a small loss of sales established substantial injury.[116]

2. Factors considered in making an injury determination

The factors the ITC considers in making an injury determination include: (1) lost sales; (2) underselling; (3) volume of imports; (4) decreased employment in the domestic industry; (5) excess domestic production capacity; (6) foreign capacity to increase exports; and (7) whether, in the absence of an exclusion order, the imported product would capture an increasing share of the U.S. market.[117] Detailed economic data regarding lost sales, profits, or customers are particularly helpful, but the complainant need not document every lost sale.[118]

The volume of imported sales is significant, but the absolute amount of those sales is not determinative. Rather, import volume is considered in the context of the industry as a whole. Accordingly, even a high volume of sales was held not to have caused injury where the domestic producers were unable to supply all demand.[119] The domestic industry must also prove there is a connection between negative trends in these factors and the unfairly traded imports.[120]

Proof of threat to injure is based upon a prediction of the future effect of foreign imports. Among the factors considered in weighing tendency are the intent of the foreign producer to enter the U.S. market, the foreign producer's production capacity, and the probable effect the foreign producer's sales will have on prices for the

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1985). The standard for injury is somewhat more stringent in cases that do not involve intellectual property rights, such as cases of false advertising. *Id.*

[115] *See* Certain Steel Rod Treating Apparatus and Components Thereof, USITC Pub. 1210, Inv. No. 337-TA-97/A (Jan. 1982). In that case, for example, the loss of one sale was held to cause injury, when only one sale of the product in the United States had occurred during the relevant period. *Id.* at 60.

[116] *Bally/Midway*, 714 F.2d at 1125.

[117] *See* Certain Drill Point Screws for Drywall Construction, USITC Pub. 1365, Inv. No. 337-TA-116, 18 (Mar. 1983); *see also* Astra-Sjuco, A.B. v. United States Int'l Trade Comm'n, 629 F.2d 682 (C.C.P.A. 1980).

[118] Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation, USITC Pub. 1246, Inv. No. 337-TA-97, 10 (May 1982).

[119] *See* Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1569 (Fed. Cir. 1986).

[120] Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 75 (Nov. 1987). This can normally be done by showing that the imported product occupies a significant share of the United States market. *See id.* at 76.

domestic product.[121] Other relevant conditions include foreign cost advantages, ability to undersell the U.S. product,[122] and aggressive import sales plans.[123] The ITC also considers other factors, such as the opening of facilities owned by the foreign producer in the United States which are likely to increase demand for imports.[124]

Although the statute speaks of substantial injury or destruction of an industry, the ITC and the courts have not applied this standard. Therefore, to prove threat to injure the domestic industry need not even show that its revenues or profits will decline. Rather, it is sufficient to show that imports will "substantially injure" the domestic industry's business during the relevant period, which is the life of the patent or trademark.[125] The ITC also finds injury upon a showing that the unfair acts prevented the establishment of a domestic industry.[126]

C. *Existence of an Industry with Respect to Intellectual Property Rights*

Although there is no injury requirement in section 337 cases involving infringement of patents, copyrights, or registered trademarks, the petitioner must show that a domestic industry exists or is being established with respect to the relevant intellectual property right. The statute sets forth specific criteria for determining if such

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[121] *See* Akzo N.V. v. United States Int'l Trade Comm'n, 808 F.2d 1471, 1487 (Fed. Cir. 1986).

[122] Woodworking Machines, USITC Pub. 1979, Inv. No. 337-TA-174, 44 (May 1987).

[123] Certain Silica-Coated Lead Chromate Pigments, USITC Pub. 1374, Inv. No. 337-TA-120, 17 (Apr. 1983).

[124] *See Corning Glass Works*, 799 F.2d at 1570.

[125] *See Akzo N.V.*, 808 F.2d at 1487.

[126] Certain Caulking Guns, USITC Pub. 1507, Inv. No. 337-TA-139, 54 (Mar. 1984). *Caulking Guns* represents the only case in which the ITC addressed the issue of establishment prevention. In the decision, the ITC determined that the particular domestic industry was in the developmental stage because it had not yet produced the goods in question. *Id.* The agency stated, however, that the applicable standard was whether the industry had shown it was ready to commence production. *Id.*

The facts of *Caulking Guns* show that the complainant had executed an agreement with a company to produce the subject merchandise. The agreement stated that the complainant would provide the licensee with the necessary stamping dies; the licensee would then be obligated to provide samples within a fixed period. If the samples were acceptable, full-scale production would begin within 30 days, and the agreement would continue for seven years. The complainant had already located sources for various product materials. *Id.* at 58-59. The ITC found that taken together, these acts established that the complainant was ready to commence production, and thus constituted an appropriate domestic industry. The agency consequently found that the tendency of imports was to injure the domestic industry. *Id.* at 68.

In 1988, Congress considered but rejected an amendment that would have expanded the coverage of the statute to include actions that impaired as well as prevented the establishment of a domestic industry. *See* S. REP. No. 71, 100th Cong., 1st Sess. 128 (1987). This change was not adopted by the conference committee considering the bill, *see* H.R. REP. No. 576, 100th Cong., 1st Sess. 633 (1988), and was not included in the bill as passed.

an industry exists, including significant investment in plant and equipment, significant employment of capital or labor, or substantial investment in the exploitation of the right.[127] The purpose of this provision is to preclude holders of U.S. intellectual property rights who have no other contact with the United States from using section 337.[128] Congress has stressed that the new definition of industry represents an expansion over the definition formerly used by the ITC, and that it does not intend that the domestic industry requirement be interpreted in an overly narrow manner. Nevertheless, it must be shown that significant investment and activities of the enumerated types are taking place in the United States; marketing and sales alone will not satisfy this test.[129]

The statute provides that relief is available for an industry that is in the process of being established as well.[130] The essential test is whether "the steps being taken [by the holder of the intellectual property right] indicate a significant likelihood that the industry requirement will be satisfied in the future."[131] Mere ownership of a patent or copyright does not meet this requirement.[132]

IV. Remedies Under Section 337

Once the ITC determines that an unfair act or method of competition exists, and that the domestic industry has been injured or threatened with injury, it must decide upon the appropriate remedy. In general, the ITC has broad discretion in selecting the form, scope, and extent of the remedy to be provided in a section 337 proceeding.[133] The remedies the ITC may provide in section 337 cases are the most powerful available under the trade laws of the United States. The ITC has the power to order partial or total exclusion of imports of the product in question. The ITC may also issue a cease and desist order, an order that is enforceable by federal district courts. The agency may provide the domestic industry with interim relief by temporarily excluding imports pending the completion of the investigation. Under some circumstances the ITC can also order the forfeiture of infringing imports that have already entered the

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127 Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212-13 (to be codified as amended at 19 U.S.C. § 1337(a)(1)(A)(ii)).

128 *See* S. REP. No. 71, 100th Cong., 1st Sess. 129-30 (1987); H.R. REP. No. 40, 100th Cong., 1st Sess. 157-58 (1987).

129 *See* S. REP. No. 71, 100th Cong., 1st Sess. 129 (1987); H.R. REP. No. 40, 100th Cong., 1st Sess. 157 (1987).

130 Trade Act of 1988, *supra* note 9, § 1342(a)(1), 102 Stat. at 1212 (to be codified as amended at 19 U.S.C. § 1337(a)(2)).

131 *See* H.R. REP. No. 40, 100th Cong., 1st Sess. 157 (1987).

132 *See* S. REP. No. 71, 100th Cong., 1st Sess. 130 (1987).

133 Viscofan, S.A. v. United States Int'l Trade Comm'n, 787 F.2d 544, 548 (Fed. Cir. 1986); *see also* Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 82 (Nov. 1987).

United States. If successful, the complainant in a section 337 action can specify the remedy it wishes to obtain, but the final decision rests with the ITC. In deciding which form of remedy to provide, the ITC must "reconcile complainant's interest in the most complete relief possible for the unfair act found to exist with the need to avoid disruption of legitimate trade."[134]

A. General Exclusion Order

The main remedy available to the ITC under section 337 is the authority to order the total or partial exclusion of imports. The statute states that if the ITC determines that a violation of 337 has occurred, it "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States . . . ."[135] The ITC has noted that an exclusion order is the most effective means of ensuring that imported goods that violate section 337 do not enter the commerce of the United States, and the issuance of such orders is the ITC's preferred remedy.[136] Nevertheless, the ITC may decide not to order exclusion if it determines that the effect of exclusion upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive products in the United States, and U.S. consumers is such that exclusion should not be ordered.[137]

As with all remedies, in considering a request for general exclusion, the ITC balances the complainant's interest in obtaining protection against the inherent potential for disruption of legitimate trade posed by a general exclusion order.[138] To obtain a general exclusion order, the ITC requires that the complainant prove "both a widespread pattern of unauthorized use of its [intellectual property right] and certain business conditions from which one might reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles."[139] The use of general exclusion orders is not restricted to intellectual property right cases, however, but may extend to cases involving false advertising and passing off as well.[140]

In order to establish a widespread pattern of unauthorized use, there must be: (1) an ITC determination of unauthorized importation of infringing articles by a number of foreign manufacturers; or

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134 Certain Aramid Fiber, USITC Pub. 1824, Inv. No. 337-TA-194, 8 (Mar. 1986).

135 19 U.S.C. § 1337(d) (1982).

136 Certain Plastic Food Storage Containers, USITC Pub. 1563, Inv. No. 337-TA-152, 3 (Aug. 1984).

137 *Id.*

138 Certain Airless Paint Spray Pumps and Components Thereof, USITC Pub. 1199, Inv. No. 337-TA-90, 18 (Nov. 1981).

139 *Id.* at 18.

140 *See* Certain Miniature Plug-In Blade Fuses, USITC Pub. 1337, Inv. No. 337-TA-114, 41-42 (Jan. 1983).

(2) pending foreign infringement suits based upon foreign intellectual property rights which correspond to the U.S. rights at issue; and (3) other evidence which demonstrates a history of unauthorized use of the intellectual property right.[141] The business conditions the ITC considers in determining whether to issue a general exclusion order include: (1) an established demand for the product in the U.S. market; (2) conditions in the world market; (3) the availability of marketing and distribution networked in the United States for potential foreign manufacturers; (4) the cost to foreign producers of building a facility capable of producing the product; (5) the number of foreign producers who have facilities capable of being retooled to produce the product; and (6) the cost of retooling for foreign manufacturers.[142] Other factors militating for the use of a general exclusion order (as opposed to a limited exclusion order) include the presence of potential exporters other than the respondents in the investigation, the difficulty the complainant had in identifying the ultimate source of supply of the infringing product, the recalcitrance of the respondents in identifying their sources of supply, and the absence of any markings on the imported product that identified the manufacturer.[143]

An exclusion order by the ITC becomes effective upon its publication in the Federal Register. Nevertheless, the statute also provides that excluded articles may enter under bond until the ITC determination becomes final upon the President's approval or disapproval.[144] The ITC has been directed to fix an exclusion bond in an amount adequate to offset the competitive advantage enjoyed by the person benefiting from the importation.[145]

A general exclusion order may be of indefinite or limited duration. The statute states that an exclusion order shall continue in force until the ITC determines it is no longer necessary.[146] The ITC may ameliorate the effect of a general exclusion order by allowing individual persons seeking to import the excluded product to peti-

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[141] *See* Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-197, 85 (Nov. 1987).

[142] Certain Compound Action Metal Cutting Snips and Components Thereof, USITC Pub. 1831, Inv. No. 337-TA-197, 4-5 (Mar. 1987).

[143] *Miniature Plug-In Blade Fuses*, USITC Pub. 1337 at 43-44.

[144] 19 U.S.C. § 1337(g)(3) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(5)(A), 102 Stat. at 1213 (to be recodified in original form at 19 U.S.C. § 1327(j)(3)).

[145] Certain Double-Sided Floppy Disk Drives and Components Thereof (TEO), USITC Pub. 1859, Inv. No. 337-TA-215, 25 (May 1985).

[146] 19 U.S.C. § 1337(e) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(3)(A), 102 Stat. at 1213 (to be recodified in original form at 19 U.S.C. § 1337(e)(1)). In a case involving misappropriation of trade secrets, for example, the ITC imposed a general exclusion order to last for 10 years, as this is the length of time the agency determined it would have taken the respondents to develop the technology independently. *See* Viscofan, S.A. v. United States Int'l Trade Comm'n, 787 F.2d 544, 550 (Fed. Cir. 1986).

tion the ITC for a determination to allow importation.[147] Absent such a decision by the ITC, a general exclusion order applies to all imports of the product in question, whether or not the importer of the product was a respondent to the section 337 investigation that resulted in the issuance of the order.[148]

B. Limited Exclusion Order

An alternative to the general exclusion order is the limited exclusion order, which has the effect of barring from importation into the United States only products of certain producers or importers. The ITC imposes a limited exclusion order where a violation of section 337 has been proved, but the conditions warranting a general exclusion order are not present.[149] The chief instance in which limited exclusion orders are used occurs when there is evidence that no persons other than the respondents have committed the unfair acts, that is, when there is no widespread unauthorized use. In such cases only the products of the respondents and their affiliates have been subjected to the exclusion order.[150] A limited exclusion order has also been held proper where a general exclusion order might have the effect of barring the importation of products that had not infringed the relevant intellectual property right.[151]

The statute provides the ITC with further power to enforce a general or limited exclusion order by prescribing the forfeiture of goods imported in violation of such an order. Forfeiture may occur only if the importer previously tried to enter such goods, entry was denied, and the Secretary of the Treasury provided the importer with a written notice of the order.[152] The purpose of this provision is to prevent the past practice of "port shopping" by importers seeking to avoid enforcement of an exclusion order.[153]

C. Temporary Exclusion Order

The ITC also has the power to provide the domestic industry with interim relief during a section 337 proceeding by issuing an or-

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147 *See* Certain Processes for the Manufacture of Skinless Sausage Casings and Resulting Products, USITC Pub. 1624, Inv. No. 337-TA-148/169 (Dec. 1984).

148 *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 639 (1988).

149 Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same, USITC Pub. 2034, Inv. No. 337-TA-242, 87 (Nov. 1987).

150 *See* Certain Plastic Food Storage Containers, USITC Pub. 1563, Inv. No. 337-TA-152, 3 (Aug. 1984); Certain Large Video Matrix Display Systems and Components Thereof, USITC Pub. 1158, Inv. No. 337-TA-75, 3 (June 1981).

151 *See* Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof, USITC Pub. 1197, Inv. No. 337-TA-82/A, 11 (Nov. 1981).

152 Trade Act of 1988, *supra* note 9, § 1342(a)(5)(B), 102 Stat. at 1214 (to be codified as amended at 19 U.S.C. § 1337(i)).

153 *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 639 (1988).

der that temporarily excludes the subject products except upon the payment of a bond.[154] The factors governing the grant of temporary relief are: (1) the probability of the complainant's success on the merits; (2) whether the complainant will suffer immediate and substantial harm in the absence of temporary relief; (3) the harm to the respondent if relief is granted; and (4) the public interest.[155]

To obtain a temporary exclusion, the complainant is not required to prove the existence of a violation of section 337; it need only provide information sufficient to give rise to a reason to believe that such a violation will occur.[156] Evidence of immediate and substantial injury most often takes the form of irretrievably lost sales.[157] Other evidence includes the loss of customers and price reductions, complainant's probable future income, and the future prospects for the relevant market.[158] Among the public interest factors considered are the effects of a temporary exclusion order on availability of the product, the impact on public health and welfare,[159] and the resulting loss or gain of jobs.[160] The ITC may also require the applicant to post a bond as a prerequisite to the issuance of a temporary exclusion order.[161]

D. Cease and Desist Order

In addition to exclusion orders, the ITC also has the power to issue cease and desist orders requiring the respondents to end their unlawful conduct.[162] This is a particularly powerful instrument of enforcement, as it provides the complainant with direct relief from the unlawful method of competition. Moreover, the ITC has the means to enforce the order, as violation of it is subject to an action in federal district court, with the penalty for noncompliance being the

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154 19 U.S.C. § 1337(e) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(3)(B), 102 Stat. at 1213 (to be recodified in original form at 19 U.S.C. § 1337(e)(1)).

155 Certain Fluidized Supporting Apparatus and Components Thereof, USITC Pub. 1667, Inv. No. 337-TA-182/188, 22-23 (Oct. 1984). The ITC has issued such a temporary exclusion order where it had preliminarily determined that a product infringed a patent, that it was likely to be imported before the conclusion of the investigation, and where the failure to exclude would cause immediate and substantial harm to the domestic industry. *See* Certain Apparatus for the Continuous Production of Copper Rod, USITC Pub. 1132, Inv. No. 337-TA-89, 7 (Apr. 1981).

156 Certain Apparatus for the Continuous Production of Copper Rod, USITC Pub. 1132, Inv. No. 337-TA-52, 4 (Nov. 1982).

157 *See id.* at 17.

158 *See Certain Fluidized Supporting Apparatus*, USITC Pub. 1667 at 18-19.

159 *Id.* at 23.

160 *See Apparatus for the Continuous Production of Copper Rod*, USITC Pub. 1132 at 19-20.

161 Trade Act of 1988, *supra* note 9, § 1342(a)(3)(B), 102 Stat. at 1213 (to be codified as amended at 19 U.S.C. § 1337(e)(2)). Congress considered, but rejected, an amendment that would have provided for the forfeiture of the bond in cases where the ITC ultimately determined that there had been no violation of section 337. *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 635 (1988).

162 19 U.S.C. § 1337(f)(1) (1982).

greater of $100,000 or twice the domestic value of the articles entered and sold in violation of the order per day of violation.[163] Accordingly, a cease and desist order under section 337 can provide especially effective relief to a domestic industry from unfair acts or methods of competition with respect to imports. A cease and desist order is most appropriate where the respondent has engaged in a specific kind of conduct that is not limited to any particular product, for example, where the conduct does not involve the infringement of a patent through the production of a product.[164] The ITC has also indicated that a cease and desist order is proper to prevent the sale of an infringing product after it has been imported into the United States if there is evidence that importers held large amounts of the product in inventory.[165]

A cease and desist order can be used in connection with other remedies.[166] The ITC may issue a limited exclusion order applying to the products of the respondents only.[167] Alternatively, the ITC can combine a cease and desist order with a general exclusion order.[168] What remedy or remedies the ITC ultimately employs depends upon the particular facts of the case. As with exclusion orders, imports subject to a cease and desist order may enter under bond until the determination becomes final.[169]

Somewhat ironically, importations by the United States govern-

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[163] Trade Act of 1988, *supra* note 9, § 1342(a)(4)(B), 102 Stat. at 1213 (to be codified as amended at 19 U.S.C. § 1337(f)(2)). The 1988 amendment to section 337 significantly strengthened the relief obtainable through a cease and desist order, as it increased the potential penalty assessable from $10,000 to $100,000 or from the value of the goods to twice the value of the goods. *Id.*

[164] In *Certain Plastic Food Storage Containers*, USITC Pub. 1563, Inv. No. 337-TA-152 (Aug. 1984), the respondents had displayed on their packaging registered trademarks of the complainant's prominently, together with claims that the products were interchangeable; had copied the form and appearance of the complainant's products; and had used the complainant's trademarks in their advertisements and displays. *Id.* at 7. The ITC found that the respondent had committed trademark infringement, false advertising, and passing off. In fashioning a remedy in light of these acts, the ITC determined that the most effective and least restrictive remedy would be a cease and desist order directing the respondents not to use the complainant's trademarks in any manner. *Id.* at 7-8. The order also forbade the respondents from claiming that their products were interchangeable with those of the complainant, or to aid or encourage other producers to make such a representation. *Id.* at 10. A cease and desist order was used in similar circumstances in *Certain Airtight Cast-Iron Stoves*. *See* USITC Pub. 1126, Inv. No. 337-TA-69, 14 (Jan. 1981).

[165] *See* Certain Silica-Coated Lead Chromate Pigments, USITC Pub. 1374, Inv. No. 337-TA-120, 17 (Apr. 1983); Certain Compound Action Metal Cutting Snips and Components Thereof, USITC Pub. 1831, Inv. No. 337-TA-197, 6 (Mar. 1986).

[166] 19 U.S.C. § 1337(f)(1). Prior to 1988, it was the ITC's practice to combine cease and desist orders with other forms of relief; the 1988 amendment codified this authority. *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 636 (1988).

[167] *See, e.g.*, Certain Plastic Food Storage Containers, USITC Pub. 1563, Inv. No. 337-TA-152, 4-8 (Aug. 1984).

[168] *Certain Compound Action Metal Cutting Snips*, USITC Pub. 1831 at 5.

[169] 19 U.S.C. § 1337(g)(3) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(5)(A), 102 Stat. at 1213 (to be recodified in original form at 19 U.S.C. § 1337(j)(3)).

ment of products infringing a registered patent, copyright, or mask work are exempt from remedial orders under section 337.[170]

V. Procedure In Section 337 Cases

The procedure in section 337 investigations differs from that of most other unfair trade actions in that it calls for three separate and distinct stages of the investigation. In the first stage, after a complainant has filed a complaint, the ITC conducts an investigation and a hearing is held before an Administrative Law Judge (ALJ). The ITC may then review part or all of the ALJ's decision, at which time that determination can be substantially modified or even reversed. If the ITC makes an affirmative determination and prescribes a remedy, the President must decide whether to allow the remedy to go into effect. Finally, judicial review is available for ITC decisions, and in a very limited scope for Presidential determinations as well. It should be noted that there is a separate procedure for seeking interim relief.

A. Procedure before the Administrative Law Judge

A section 337 action is commenced normally by the filing of a complaint, although the ITC can begin an investigation upon its own initiative.[171] The requirements for a complaint are fixed by regulation so that a complaint must describe the alleged unfair methods of competition and unfair acts, and give specific instances of allegedly unlawful importations and sales. It must identify each person who has committed such violations, and describe the nature of their business. The complaint must also contain a description of the domestic industry and of the complainant's business and interest in the trade and commerce affected. In cases involving infringement of intellectual property rights, the complainant must show that it is the owner or exclusive licensee of the property.[172] If the complaint concerns infringement of a patent, the complainant must provide detailed information about the patent.[173]

If relevant, the complainant is also required to provide detailed information regarding the presence of injury. The complainant must explain how the unlawful acts are injuring the domestic industry.

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[170] Trade Act of 1988, *supra* note 9, § 1342(a)(7), 102 Stat. at 1215 (to be codified as amended at 19 U.S.C. § 1337(l)). Prior to 1988, such an exemption was available only for imports using patents. *See* 19 U.S.C. § 1337(i) (1982).

[171] 19 U.S.C. § 1337(b)(1) (1982).

[172] 19 C.F.R. § 210.20(a)(1)-(7) (1988). At the time this article was written, the ITC was operating under interim regulations incorporating the changes made to section 337 by the Omnibus Trade and Competitiveness Act of 1988. *See* Interim Rules Governing Investigations and Enforcement Procedures Pertaining to Unfair Practices in Import Trade, 53 Fed. Reg. 33,043 (1988) [hereinafter Interim Regulations]. Although details may change, it is likely that the ITC's final regulations will be substantially the same as the interim regulations.

[173] 19 C.F.R. § 210.8(a)(10) (1988).

Among the information normally included in this section of the complaint are data regarding the volume and trend of production, sales, and inventories of the relevant product; the facilities and number and types of workers involved in producing the article; profit and loss information covering overall operations of the industry and the involved article in particular; pricing information regarding the article; volume and sales of imports; and finally, any other pertinent information relating to injury.[174] In cases not involving injury, the complaint must still provide information describing the domestic industry, including information regarding investment in plant and equipment, employment and labor, and substantial investment in exploitation of the patent that is the subject of the complaint.[175]

At the time a complaint is filed, the ITC serves the complaint upon the named respondents.[176] Within thirty days of the filing of the complaint, the ITC must decide whether or not to institute an investigation.[177] The respondent has twenty days after service of the notice of initiation of an investigation to file its response.[178]

Once the ITC has initiated an investigation, the investigation is referred to an Administrative Law Judge, who controls the procedural aspects of the case.[179] The regulations provide for elaborate discovery provisions, including the use of depositions, interrogatories, and subpoenas.[180] Confidential information of one party can be released to counsel for another party under an administrative protective order, with sanctions for unauthorized disclosure of that information.[181] Release of information under protective order is limited to outside counsel for a party, however. The ITC decided that it will not release confidential information to in-house counsel or management personnel of a party, a determination the Court of International Trade has upheld.[182] The parties to the investigation, besides the complainant and the respondent, include the investigative attor-

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174 *Id.* § 210.8(a)(8).

175 *Id.* § 210.20(a)(6)(iii).

176 *Id.* § 210.13.

177 *Id.* § 210.12.

178 *Id.* § 210.21.

179 *See id.* § 210.53(f); *see also* Perry, *supra* note 106, at 435.

180 *See* 19 C.F.R. § 210.30-.37 (1988). The 1988 amendments to section 337 provide the ITC with authority to prescribe sanctions for abuse of discovery. *See* Trade Act of 1988, *supra* note 9, § 1342(a)(5)(B), 102 Stat. at 1214 (to be codified as amended at 19 U.S.C. § 1337(h)). This amendment apparently codified the ITC's authority, as the agency's regulations already contained sanctions for abuse of discovery. *See* 19 C.F.R. § 210.36 (1988). The ITC has stated that it has not changed these regulations, as it believes they are consistent with those contemplated by the statute. *See* Interim Regulations, *supra* note 172, at 33,052.

181 19 C.F.R. § 210.37 (1988). The 1988 amendments essentially codified the ITC's practice with respect to release of confidential information, so that the regulations have not been changed. *See* Interim Regulations, *supra* note 172, at 33,052.

182 *See* Akzo N.V. v. United States Int'l Trade Comm'n, 808 F.2d 1471, 1483-84 (Fed. Cir. 1986); *but see* U.S. Steel Corp. v. United States, 792 F.2d 1101 (Fed. Cir. 1986).

ney for the ITC,[183] who is charged with representing the public interest in the investigation.[184]

After discovery has been completed, the ALJ holds a public hearing.[185] This hearing is similar to a trial, as witnesses testify and exhibits are submitted.[186] The hearing and the ALJ's decision are governed by the provisions of the Administrative Procedure Act.[187] Accordingly, the ALJ makes his decision on the basis of the record before him.[188] The ALJ decides whether all of the prerequisites for relief under section 337 are present, including the existence of a violation of the section and injury to a domestic industry, and determines the proper remedy. The ALJ must make his determination within nine months of publication of the ITC's notice of investigation, or within fourteen months in complicated cases. This determination constitutes the "initial determination" of the ITC.[189]

The parties may agree to settle before the ALJ makes his determination,[190] but the ITC must approve any settlement of a section 337 case.[191] If the ITC issues a consent order or accepts a settlement agreement, it may terminate its investigation without reaching a final determination.[192]

An investigation may also be concluded by a default judgment. If the respondent in a section 337 case fails to respond, the ITC is directed to presume that the facts alleged in the complaint are true, and to issue an exclusion order or a cease and desist order, or both, upon request of the complainant.[193] The ITC may determine not to do so, however, if it decides that such an action would not be in the public interest.[194] A default judgment operates only against the spe-

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183 19 C.F.R. § 210.4(b) (1988).

184 *See* Perry, *supra* note 106, at 434.

185 19 C.F.R. § 210.41 (1988).

186 *See* Perry, *supra* note 106, at 435.

187 *See* 19 U.S.C. § 1337(c) (1982).

188 *See* 5 U.S.C. § 554(a) (1982).

189 19 C.F.R. § 210.53(a) (1988).

190 Such a settlement may be comprised of an agreement to license, or of the issuance of a consent order by the ITC. *See* 19 C.F.R. § 210.51(b) & (c) (1988); *see also* Glick, *Settling Unfair Trade Practice Cases under Section 337 of the Tariff Act of 1930*, 21 HARV. INT'L L.J. 129 (1980).

191 19 C.F.R. § 210.51(b) (1988).

192 Trade Act of 1988, *supra* note 9, § 1342(a)(2), 102 Stat. at 1213 (to be codified as amended at 19 U.S.C. § 1337(c)). Before this provision was added, the ITC terminated such investigations under its inherent authority. *See* Interim Regulations, *supra* note 172, at 33,043.

193 Trade Act of 1988, *supra* note 9, § 1342(a)(5)(B), 102 Stat. at 1213-14 (to be codified as amended at U.S.C. § 1337(g)(1)(E)). Prior to 1988, the complainant was required to show a prima facie violation of section 337 before a default judgment could be issued. *See* 19 C.F.R. § 210.25(c) (1988); H.R. REP. No. 576, 100th Cong., 1st Sess. 636 (1988).

194 Trade Act of 1988, *supra* note 9, § 1342(a)(5)(B), 102 Stat. at 1213-14 (to be codified as amended at 19 U.S.C. § 1337(g)(1)(E)). Among the factors the ITC shall consider are the effect such an order would have upon public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.

cific respondent who failed to appear. Nevertheless, the ITC may issue a general exclusion order if no respondent appears in an investigation, and a violation of section 337 is established by substantial evidence.[195]

B. Determination by the ITC

Upon making his or her initial determination, the ALJ transmits that decision to the ITC, and certifies the record in the case to it.[196] The initial determination of the ALJ becomes the final determination of the ITC automatically after forty-five days unless the ITC decides to review that determination.[197] A party to the proceeding may petition for review,[198] or the ITC may decide on its own to review the determination.[199] This decision must be made within the forty-five day limit. The ITC may decide to review some or all of the issues embodied in the initial determination.[200] For those issues not reviewed, the initial determination becomes final.

The ITC may allow the parties to submit briefs and present oral arguments,[201] and after reviewing an initial determination, the ITC may "affirm, reverse, modify, set aside or remand for further proceedings" the initial determination, in whole or in part.[202] The standard for review employed by the ITC with respect to factual matters decided by the ALJ is whether the finding was clearly erroneous. A legal conclusion of the ALJ is reversed if it was erroneous, without governing precedent, rule, or law, or constituted an abuse of discretion.[203] There is no strict time after its decision to review in which the ITC must make its final determination, but the statute requires that the final determination be made within one year of the date of publication of the notice of investigation, although this period can be extended to eighteen months in more complicated cases.[204]

C. Final Determination by the President

Although the ITC determines whether there is a violation of section 337, whether injury exists, and what the appropriate remedy is, the final decision as to whether that remedy shall go into effect is reserved for the President. Upon making its determination, the ITC is required to publish the determination in the Federal Register and

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195 Trade Act of 1988, *supra* note 9, § 1342(a)(5)(B), 102 Stat. at 1214 (to be codified as amended at 19 U.S.C. § 1337(g)(2)).

196 19 C.F.R. § 210.53(a) (1988).

197 *Id.* § 210.53(h).

198 *Id.* § 210.54(a).

199 *Id.* § 210.55.

200 *Id.* § 210.55.

201 *Id.* § 210.56(a).

202 *Id.* § 210.56(c).

203 *See id.* § 210.54(a)(ii).

204 19 U.S.C. § 1337(b)(1) (1982).

to transmit to the President a copy of its determination, along with the remedy provided.[205] The President then has sixty days to decide whether or not to disapprove of the determination, and he may disapprove of a determination for policy reasons only.[206] In deciding whether or not to allow a determination to go into effect, the President takes into consideration the effect the determination could have on the foreign relations of the United States, as well as upon the public health and welfare, competitive conditions within the U.S. economy, the production of like or competitive articles in the United States, and upon U.S. consumers.[207] He may not disapprove of a determination because he disagrees with the ITC's determination regarding the merits of the case.[208] If the President does not disapprove of a determination, it automatically takes permanent effect sixty days after publication.[209]

D. Judicial Review of Section 337 Determinations

Parties to an ITC section 337 investigation may seek judicial review of a final determination under the Administrative Procedure Act.[210] The Court of Appeals for the Federal Circuit has exclusive jurisdiction over all appeals from section 337 determinations of the ITC;[211] nevertheless, the court's review is restricted to final determinations of the ITC.[212] Traditionally, only a party to the proceeding that was adversely affected by the ITC's final determination has standing to file for judicial review.[213] The court recently held, however, that a nonparty can appeal a final ITC determination if it is

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205 *Id.* § 1337(g)(1)(A) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(5)(A), 102 Stat. at 1213 (to be recodified in original form at 19 U.S.C. § 1337(j)(1)(A)).

206 *Id.* § 1337(g)(2) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(5), 102 Stat. at 1214 (to be recodified in original form at 19 U.S.C. § 1337(j)(2)).

207 *See* S. REP. No. 1298, 93d Cong., 2d Sess. 199 (1974).

208 *See* Young Engineers, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1313 (Fed. Cir. 1983).

209 19 U.S.C. 1337(g)(4) (1982), *recodified by* Trade Act of 1988, *supra* note 9, § 1342(a)(5)(A), 102 Stat. at 1213 (to be codified as amended at 19 U.S.C. § 1337(j)(4)). In fact, the President has used his power to disapprove ITC determinations under section 337 only very sparingly. *See* Perry, *supra* note 106, at 451-52. It should also be noted that the United States Trade Representative solicits public comments concerning foreign or domestic policy issues that should be considered by the President in making his decision regarding the ITC order. *See, e.g.*, Request for Public Comments in Connection with Presidential Review of Exclusion Order Under Section 337, 52 Fed. Reg. 37,243 (1987).

210 5 U.S.C. § 704 (1982).

211 28 U.S.C. § 1295(a)(6) (1982).

212 Import Motors Ltd. v. United States Int'l Trade Comm'n, 530 F.2d 940, 944 (Fed. Cir. 1973). Accordingly, review is restricted to those parts of the ALJ's initial determination that are specifically affirmed or reversed by the ITC. *See* Lannom Mfg. Co. v. United States Int'l Trade Comm'n, 799 F.2d 1572, 1580-81 (Fed. Cir. 1986).

213 *See, e.g.*, Krupp Int'l, Inc. v. United States Int'l Trade Comm'n, 626 F.2d 841, 845-46 (Fed. Cir. 1980).

adversely affected by it.[214]

The court's standard of review regarding factual matters is whether the ITC determination is supported by substantial evidence.[215] This standard of review is a narrow one, and the court is not free to substitute its judgment for that of the agency.[216] While the court is not bound by the legal conclusions of the ITC,[217] it shows deference to the interpretation of section 337 by the ITC as constituting the interpretation of a statute by the agency charged with administering that statute.[218]

E. Procedure for Interim Relief

A complainant seeks interim relief under section 337 by filing a petition with the ITC for such relief. The ITC must make a determination within ninety days, unless it finds that the case is more complicated, in which case it may take up to an additional sixty days.[219] The standard for granting interim relief is the same as for the grant of preliminary injunctions under the Federal Rules of Civil Procedure.[220] Normally, temporary relief will be granted only after the ITC has held a hearing at which all the parties are able to appear.[221] The ITC may require the complainant to post a bond[222] for the purpose of preventing applications for temporary relief as a form of harassment.[223]

F. Modification or Rescission of an ITC Order

Once issued, an exclusion or cease and desist order under section 337 is not permanent; rather, a respondent in an investigation may petition the ITC for modification or rescission of the order on

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214 LSI Computer Systems, Inc. v. United States Int'l Trade Comm'n, 832 F.2d 588 (Fed. Cir. 1987).

215 SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365, 371 (Fed. Cir. 1983). Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* at n.10 (quoting Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229 (1938)).

216 Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1568 (Fed. Cir. 1986). With regard to patent issues in particular, the court recently stated that Congress had intended that ITC findings and conclusions regarding patent validity should be given greater weight than that accorded to findings of a trial court. Tandon Corp. v. United States Int'l Trade Comm'n, 9 I.T.R.D. 1330, 1331 (Fed. Cir. 1987).

217 *SSIH Equip.*, 718 F.2d at 371-72.

218 *Corning Glass Works*, 799 F.2d at 1565.

219 Trade Act of 1988, *supra* note 9, § 1342(a)(3)(B), 102 Stat. 1213 (to be codified as amended at 19 U.S.C. § 1337(e)(2)). Prior to 1988, there was no statutory deadline for the ITC's decisions, although the ITC's regulations imposed a 7 month limit. *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 635 (1988).

220 Trade Act of 1988, *supra* note 9, § 1342(a)(3)(B), 102 Stat. at 1213 (to be codified as amended at 19 U.S.C. § 1337(e)(3)).

221 *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 635 (1988).

222 Trade Act of 1988, *supra* note 9, § 1342(a)(3)(B), 102 Stat. at 1213 (to be codified as amended at 19 U.S.C. § 1337(e)(2)).

223 *See* H.R. REP. No. 576, 100th Cong., 1st Sess. 635 (1988).

grounds that the respondent is no longer in violation of section 337.[224] The burden of proof is on the petitioner in such a proceeding.[225] The ITC may grant the relief requested only upon the basis of new evidence, or on grounds which would permit relief under the Federal Rules of Civil Procedure.[226]

VII. Conclusion

Section 337 offers domestic industries a powerful weapon against unfair import trade practices. The changes made in the law by the Omnibus Trade and Competitiveness Act of 1988 increased the effectiveness of the section as a form of relief while clarifying aspects of the ITC's authority under the section. As counterfeiting and other similar practices claim an increasing cost on United States industry, resort to section 337 should become more frequent. Given the fairly lenient standards imposed by the International Trade Commission, successful petitions should also correspondingly increase.

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[224] Trade Act of 1988, *supra* note 9, § 1342(a)(6)(B), 102 Stat. at 1214 (to be codified as amended at 19 U.S.C. § 1337(k)(2)). Before 1988, the statute did not provide specifically for modification or rescission of section 337 orders. *See* 19 U.S.C. § 1337(h) (1982); H.R. REP. No. 576, 100th Cong., 1st Sess. 637 (1988).

[225] Trade Act of 1988, *supra* note 9, § 1342(a)(6)(B), 102 Stat. at 1215 (to be codified as amended at 19 U.S.C. § 1337(k)(2)(A)).

[226] *Id.* (to be codified as amended at 19 U.S.C. § 1337(k)(2)(B)).