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Intellectual Property Update

Federal Circuit Axes Years of 'Domestic Industry' Precedent in ITC § 1337 Investigations

By Kecia Reynolds and Madeleine Moss

The Court of Appeals for the Federal Circuit (CAFC) has taken an axe to years of precedent in § 1337 investigations at the International Trade Commission (ITC). The ITC has long denied "mere importers" the protection of § 1337 by finding that they have no domestic industry to protect. Exercising its new jurisdiction bestowed by the U.S. Supreme Court in *Loper Bright*, the CAFC in one opinion reshapes the domestic industry requirement, opening the doors of the ITC to IP owners whose domestic industry centers on significant employment of a salesforce, a marketing team and customer service representatives. Yesterday, in *Lashify v. Int'l. Trade Comm'n*, the CAFC found that these previously nonqualifying expenditures can in fact satisfy the economic prong of the domestic industry requirement, if significant.

At the ITC, the administrative law judge (ALJ) found that Lashify failed to meet the economic prong of the domestic industry requirement in § 1337. Lashify alleged a domestic industry in labor engaged in sales, marketing, quality control, warehousing and distribution related to the products protected by the patents under § 1337(a)(3)(B). Applying the ITC's years of jurisprudence on the issue, the ALJ determined that Lashify's expenses did not satisfy the economic prong because "no additional steps [were] required to make these products saleable" after importation and that Lashify's activities were of the kind "a normal importer would perform." The Commission agreed with the ALJ, finding that these expenses were those incurred by "mere importers" and alone cannot satisfy the domestic industry requirement.

The CAFC did not agree. Applying their "independent judgment" as authorized by the Supreme Court in *Loper Bright* and giving no deference to the Commission's interpretation of the statute, the CAFC found that the plain language of §1337(a)(3)(B) does not have a "carveout of employment of labor or capital for sales, marketing, warehousing, quality control, or distribution" and does not require that these expenses "must be accompanied by significant employment for other functions." The ITC must now count these expenses when evaluating whether a complainant has established a domestic industry.

The CAFC is reshaping the ITC's domestic industry requirement, making the ITC's powerful injunctive remedy available to IP owners. Now, IP owners whose U.S. investments are significant but concentrated in the commercialization of products in the United States, as opposed to in U.S. R&D or manufacturing, can finally find protection at the ITC.

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

Kecia Reynolds
+1-202-551-1740
keciareynolds@paulhastings.com

Madeleine Moss
+1-202-551-1954
madeleinemoss@paulhastings.com