

# Lawyer Insights

## An Attractive ITC Tool To Stop IP-Infringing Online Sales

By Andrew Kasnevich, Aimee Soucie and Paul Qualey  
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Yet another busy year at the U.S. International Trade Commission, the federal agency charged with investigation of unfair competition under Section 337 of the Tariff Act of 1930, has come to a close.<sup>1</sup>

Interestingly, our research indicates that in six investigations in calendar year 2019<sup>2</sup> (and continuing a generally upward trend over the past five calendar years),<sup>3</sup> the commission granted the strongest remedy available to a complainant — a general exclusion order — to halt all importation and U.S. sales of products, ranging from water filters to headphones to archery arrow rests, found to infringe a variety of U.S. intellectual property rights.

Evidence demonstrating unscrupulous e-commerce sales<sup>4</sup> warranted general exclusion in each of these six investigations, with a widespread pattern of violation and likely circumvention of a limited exclusion order resulting in a more robust means of enforcement.

The ITC repeatedly found that online sellers can obscure the source of infringing products by using easily changeable selling names and providing little information as to product manufacturer. Routing sales through various websites and shipping in generic or unmarked packaging are also common tactics, employed by numerous hard-to-identify entities.

### The ITC and Section 337 Investigations

Originally established as the Tariff Commission in 1916, the ITC is an independent, nonpartisan, quasi-judicial federal agency. Its responsibilities include the investigation of potential unfair competition involving imports alleged to violate U.S. intellectual property rights.

When investigating unfair competition, the ITC can take action in response to a filed complaint or on its own initiative (though filed complaints are more common). The ITC conducts investigations under a federal mandate for expediency and aims to issue a final determination within approximately 16 months (or less) of institution of an investigation. Administrative law judges conduct investigations, which resemble district court litigation and include detailed rules of procedure and a formal hearing.

On a basic level, to establish a violation of Section 337, a complainant must show that one or more respondents import an article, i.e., accused product, (or sell an accused product for or after importation) and commit an unfair act, such as infringe an intellectual property right (e.g., a patent or trademark). A complainant must also meet a domestic industry requirement, which varies depending on the type of intellectual property right asserted.

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If a complainant is successful, the ALJ will recommend either a limited or general exclusion order — to be issued by the commission — which instructs U.S. Customs and Border Protection to stop the unfair act by precluding importation and sale of infringing articles.

### **Reasons to File an ITC Complaint**

The ITC as a venue continues to gain popularity. For companies facing unfair competition from foreign or domestic entities, there are a number of reasons why filing an ITC complaint can be an attractive option.

Procedurally, the requirement to conclude an investigation and make a final determination “at the earliest practicable time”<sup>5</sup> means an ITC investigation is usually completed more quickly than district court litigation. The ITC is also unlikely to stay an investigation pending the outcome of an inter partes review of an asserted patent.

The ITC’s jurisdictional reach offers complainants the ability to name respondents that may otherwise be outside of reach in the U.S., e.g., in district court. Specifically, since the ITC possesses in rem jurisdiction over articles imported into the U.S., personal jurisdiction over named respondents is not necessary. Thus, the ITC is a uniquely effective venue for complainants facing competition from foreign entities.

In terms of remedy, the ITC only offers injunctive relief in the form of exclusion orders and cease and desist orders. Monetary damages, such as lost profits and reasonable royalties, are not available. And with permanent injunctive relief difficult to achieve in district court, these ITC orders offer a strong remedy (and, sometimes, incentive for settlement).

### **General Exclusion Orders**

As noted above, there are two types of exclusion orders the ITC may issue: a limited exclusion order and a general exclusion order.

Limited exclusion orders allow the ITC to block the importation and sale of infringing articles of a named respondent found to violate Section 337. LEOs have no effect on anyone other than the respondent(s) specifically identified in the LEO, regardless of whether another entity imports or sells similar, or even identical, products.

General exclusion orders cure this shortcoming; they are “good against the world.” As the ITC’s most powerful remedy, GEOs block all infringing articles from entry into and sale in the U.S., regardless of source, i.e., respondents named in the investigation or otherwise.

As a consequence of increased protection, GEOs are more difficult to obtain than LEOs. The ITC will only issue a GEO if it is necessary to prevent circumvention of an exclusion order limited to products of named respondents, or if there is a pattern of violation and it is difficult to identify the source of infringing products. Notably, the ITC can look to the activities of named respondents as well as nonrespondents when considering whether to issue a GEO.

GEOs are thus usually issued less frequently than LEOs.<sup>6</sup>

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### A Survey of GEOs From 2015-2019

Based on our research, the ITC has issued GEOs to exclude a wide variety of products found to infringe a wide variety of intellectual property rights over the past five years.

**Table 1. Calendar Year 2019 GEOs (6)**

| Infringing Product Type       | Infringed IP                           | ITC Inv. No. | Complainant(s)                              |
|-------------------------------|--|--------------|---|
| Water filters                 | Patent (utility)                       | 337-TA-1126  | Electrolux Home Products<br>KX Technologies |
| Earpiece devices (headphones) | Patent (utility)                       | 337-TA-1121  | Bose  |
| LED lighting devices          | Patent (utility)                       | 337-TA-1107  | Fraen                                       |
| Full-capture arrow rests      | Patent (utility)                       | 337-TA-1117  | Bear Archery                                |
| Phone mounting devices        | Patent (utility & design)<br>Trademark | 337-TA-1086  | National Products                           |
| Industrial automation systems | Trademark                              | 337-TA-1074  | Rockwell Automation                         |

**Table 2. Calendar Year 2018 GEOs (4)**

| Infringing Product Type                | Infringed IP              | ITC Inv. No. | Complainant(s)                                 |
|--|---------------------------|--------------|--|
| Self-anchoring beverage containers     | Patent (utility)          | 337-TA-1092  | Alfay Designs<br>Mighty Mug<br>Harry Zimmerman |
| Collapsible sockets for mobile devices | Patent (utility)          | 337-TA-1056  | PopSockets                                     |
| Arrowheads                             | Patent (utility & design) | 337-TA-1033  | Flying Arrow Archery                           |
| Mobile device holders                  | Patent (utility)          | 337-TA-1028  | Nite Ize                                       |

**Table 3. Calendar Year 2017 GEOs (5)**

| Infringing Product Type            | Infringed IP                           | ITC Inv. No. | Complainant(s)                |
|------------------------------------|--|--------------|-------------------------------|
| Hand dryers                        | Trade dress                            | 337-TA-1015  | Excel Dryer                   |
| Pumping bras                       | Patent (utility)                       | 337-TA-988   | Simple Wishes                 |
| Arrowheads                         | Patent (utility & design)<br>Trademark | 337-TA-977   | FeraDyne Outdoors<br>Out RAGE |
| Woven textile fabrics (bed sheets) | False advertising                      | 337-TA-976   | AAVN                          |
| Electric skin care devices         | Patent (utility)                       | 337-TA-959   | Pacific Bioscience            |

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**Table 4. Calendar Year 2016 GEOs (3)**

| Infringing Product Type      | Infringed IP     | ITC Inv. No.            | Complainant(s)                                 |
|------------------------------|------------------|-------------------------|--|
| Footwear products (sneakers) | Trademark        | 337-TA-936 <sup>7</sup> | Converse                                       |
| Ink cartridges               | Patent (utility) | 337-TA-946              | Epson Portland<br>Epson America<br>Seiko Epson |
| Personal transporters        | Patent (utility) | 337-TA-935              | Segway<br>DEKA Products                        |

**Table 5. Calendar Year 2015 GEOs (2)**

| Infringing Product Type | Infringed IP     | ITC Inv. No. | Complainant(s)                       |
|-------------------------|------------------|--------------|--------------------------------------|
| Toner cartridges        | Patent (utility) | 337-TA-918   | Canon<br>Canon USA<br>Canon Virginia |
| Loom kits               | Patent (utility) | 337-TA-923   | Choon's Design                       |

### Notable 2019 GEO Examples

A review of the commission's opinions issuing GEOs in calendar year 2019 makes clear that e-commerce provides a prime opportunity for anonymous sellers, sellers who provide incorrect company addresses, and sellers who can easily change their company name, product name and/or corporate structure, to attempt to evade enforcement of U.S. intellectual property rights — and that GEOs may provide a remedy to prevent such evasion.

In particular, obfuscation of source and seller (via third-party online retailers and commerce sites) and a high volume of internet sales were mentioned in each of the six commission opinions discussing the reasons supporting issuance of GEOs in 2019.<sup>8</sup> We chose three of the six investigations as notable examples:

Electrolux Home Products Inc. and KX Technologies LLC obtained a GEO to exclude infringing water filters in Investigation No. 337-TA-1126.<sup>9</sup> Various online sales listings were used to import and sell infringing products via generic, unmarked shipments (or in some cases, packaging falsely marked with the name of Electrolux or KX Technologies). That all foreign sellers named in the investigation used third-party internet platforms for sales increased the likelihood an LEO would be circumvented.

Electrolux and KX Technologies also established that certain named respondents were routing infringing water filters through other sellers to mask their origin. The ITC found a pattern of violation based on sales volume (thousands of suspect online listings) and evidence that domestic sellers on third-party platforms operate virtually anonymously, using easily changeable pseudonymous names and providing no information about the real account owner.

In-ear headphones were the subject of a GEO obtained by Bose Corp. in Investigation No. 337-TA-1121.<sup>10</sup> Difficulty obtaining information about entities selling infringing devices supported the conclusion

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that an LEO would likely be circumvented, as Bose established that many sellers used false or nonexistent addresses and misleading information on their websites and seller profiles and shipped in generic packaging with ambiguous labeling and that certain respondents were conducting operations essentially anonymously on major online marketplaces.

The large number of online sellers and frequent concealment of source demonstrated a pattern of violation. Worth noting is that the foreign sellers' price advantage, where infringing earpieces could be sold at a substantial profit margin while still considerably undercutting Bose's legitimate sales, provided a "significant incentive" for circumvention.

National Products Ltd., the maker of RAM device mounts for hands-free use of portable electronic devices in vehicles, obtained a GEO in Investigation No. 337-TA-1086.<sup>11</sup> Internet sales listings were again a key factor in the ITC finding a likely circumvention of an LEO and a widespread pattern of violation, due to their anonymity and the difficulty in identifying the true seller.

In addition to generic product shipments and uninformative online listings, National Products introduced evidence of a low barrier to entry into the device mount market and of infringers making minor modifications to counterfeit products to promote confusion with legitimate products.

Adding to the likelihood of circumvention was National Products' demonstration that the number of infringers had increased despite its efforts to stop infringement, and new sellers quickly replaced any removed listings. Moreover, the fact that named respondents had defaulted in the investigation made their compliance with an LEO unlikely.

### **Conclusion**

U.S. companies frequently face competition, much of which is legitimate. But online marketplaces and third-party resale websites can be venues for dishonest sellers to conceal their identities and attempt to violate intellectual property rights while going undetected, resulting in unfair competition. In these circumstances, it may be time to file an ITC complaint and provide evidence that supports issuance of a GEO; the ITC has shown that it won't hesitate to implement this powerful and effective remedy when warranted.

### **Notes**

1. According to ITC statistics, 44 new complaints were filed and 43 new investigations were instituted in fiscal year 2019. See [https://usitc.gov/intellectual\\_property/337\\_statistics.htm](https://usitc.gov/intellectual_property/337_statistics.htm) (updated Oct. 16, 2019) (last visited Jan. 2, 2020). The ITC issued 22 determinations on the merits during the same time period. See [https://usitc.gov/intellectual\\_property/337\\_statistics\\_number\\_cases\\_which\\_violation.htm](https://usitc.gov/intellectual_property/337_statistics_number_cases_which_violation.htm) (updated Oct. 16, 2019) (last visited Jan. 2, 2020).

2. While the ITC provides statistics by fiscal year, we used EDIS, the ITC's document management system, to research GEOs by calendar year. See <https://edis.usitc.gov/external/>.

3. See Tables 1-5, *infra*. (Each Table lists GEOs in order from most recent to oldest for its calendar year.)

4. (Sometimes among other evidence.)

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5. 19 U.S.C. § 1337(b)(1).

6. For example, in calendar year 2019, we found the ITC issued GEOs in 6 investigations, and LEOs in 7 (Investigation Nos. 337-TA-1068, -1121, -1067, -1081, -1088, -1076, and -1058). In calendar year 2018, we found the ITC issued GEOs in 4 investigations, and LEOs in 11 (Investigation Nos. 337-TA-1101, -1084, -1057, -1053, -1046, -1108, -1044, -1016, -1012, -1003, and -1055). Similarly, in calendar year 2017, we found the ITC issued GEOs in 3 investigations, and LEOs in 12 (Investigation Nos. 337-TA-1005, -1007, -1001, -1035, -1048, -989, -1008, -972, -971, -945, -959, and -965).

The ITC's own statistical data shows that there are only 2 fiscal years since 2006 in which the ITC did not issue more LEOs than GEOs (2012 and 2013). See

[https://usitc.gov/intellectual\\_property/337\\_statistics\\_remedial\\_orders\\_issued\\_leo\\_v\\_geo.htm](https://usitc.gov/intellectual_property/337_statistics_remedial_orders_issued_leo_v_geo.htm) (updated annually) (last visited Jan. 2, 2020).

7. Note that the GEO related to US Trademark Registration Numbers different than the one addressed by the Federal Circuit in *Converse, Inc. v. US International Trade Commission*, Case No. 2016-2497 (Oct. 30, 2018).

8. Certain Water Filters and Components Thereof, Inv. No. 337-TA-1126, Comm'n Op. at 7-10 (Nov. 15, 2019); Certain Earpiece Devices and Components Thereof, Inv. No. 337-TA-1121, Comm'n Op. at 35-37 (Nov. 8, 2019); Certain LED Lighting Devices and Components Thereof, Inv. No. 337-TA-1107, Comm'n Op. at 6-9 (Sept. 11, 2019); Certain Full-Capture Arrow Rests and Components Thereof, Inv. No. 337-TA-1117, Comm'n Op. at 5-8 (Jul. 31, 2019); Certain Mounting Apparatuses For Holding Portable Electronic Devices and Components Thereof, Inv. No. 337-TA-1086, Comm'n Op. at 6-9 (June 24, 2019); Certain Industrial Automation Systems and Components Thereof, Inv. No. 337-TA-1074, Comm'n Op. at 7-8 (Apr. 23, 2019).

A GEO may issue to Varidesk in early calendar year 2020 regarding height-adjustable desk platforms in Investigation No. 337-TA-1125, for similar reasons as those discussed above. According to the ALJ, Varidesk presented evidence that respondents obscured the source of infringing desks in internet-based sales. Certain Height-Adjustable Desk Platforms and Components Thereof, Inv. No. 337-TA-1125, ID/RD at 35-38 (Sept. 13, 2019). Varidesk showed that the same stock image of a desk was used online by multiple different sellers, foreign sellers "hijack" webpages by posting links under sales listings of one company that redirect to the webpage of another, and various entities sell the same desks under different names through different sellers without product origin information. That the sellers provide little or no contact information and do not indicate product origin on shipping boxes further supported this finding. Thus, the ALJ recommended a GEO because an LEO directed to the named respondents was likely to be circumvented and Varidesk demonstrated a pattern of violation by pointing to 3 previous similar ITC investigations and a total of 44 foreign respondents, establishing the ease with which entities can sell desks under multiple names and model types. The Commission determined not to review the ALJ's initial determination, but requested briefing on remedy and the public interest factors, and a final determination is pending. Height-Adjustable Desk Platforms, Inv. No. 337-TA-1125, Comm'n Notice (Oct. 29, 2019).

9. Water Filters, Inv. No. 337-TA-1126, Comm'n Op. (Nov. 15, 2019) and GEO (Nov. 12, 2019).

10. Earpiece Devices, Inv. No. 337-TA-1121, Comm'n Op. (Nov. 8, 2019) and GEO (Oct. 31, 2019).

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11. Mounting Apparatuses, Inv. No. 337-TA-1086, Comm'n Op. (June 24, 2019) and GEO (June 17, 2019).

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