

Nextt Up

In October 2015, AAVN, Inc., filed a 337 complaint to the US International Trade Commission (USITC). Within the complaint, AAVN alleges that AQ Textiles, LLC and Creative Textile Mills Pvt. Ltd, known as the respondents, are infringing on a patent owned by AAVN, called the [790 patent](#). In my prior two posts, I have discussed [the technology involved in the complaint](#) and the [specific allegations being made by AAVN](#) about how the respondents are infringing the patent underlying this technology.

In the final post of this trilogy, I want to discuss the details of how a 337 complaint is processed at the USITC. Readers who would like an [overview of the 337 law and its implementation by the USITC](#) are referred to the link provided.

The process for evaluating a 337 complaint within the USITC has five steps and a wild card. The five steps are: 1) the filing of the complaint; 2) the assignment of an investigative attorney by the USITC; 3) the collection and hearing of the evidence by an administrative law judge; 4) the recommendation of action by the administrative law judge; and, 5) the approval of the recommended action by the commission that leads the USITC.

The initial process in a 337 complaint is the filing of the complaint. Once the 337 complaint is filed the USITC reviews the actual complaint. In order to be approved for investigation, a 337 complaint must: 1) provide a prima facie case that an investigation is warranted; 2) demonstrate that the investigation is in the public interest (or at least will not harm the general public); and, 3) identify specific products against which the remedy will be applied.

Once the complaint is filed and the investigation is approved, an investigating attorney and an administrative law judge are assigned to the case. In one of the great misnomers of modern governance, the investigating attorney does not actually investigate the case. The investigating attorney represents the government through the process. The investigating attorney is a full participant in the case and can request discovery, make motions and file briefs on behalf of the US government throughout the process. If this seems a little strange, that is because it is. While, technically, the government has nothing at stake in the outcome of the case, it does have an interest in the results of investigations which can potentially be used in other legal proceedings. The role of the investigating attorney is to insure that a complete investigative record is compiled during the judicial proceedings. Put another way, the goal of the investigating attorney is to make sure that the investigation addresses all the relevant questions of the case – not just the questions relevant to the matters of law being addressed.

The actual collection of evidence and investigation is done as a judicial proceeding that is managed by the administrative law judge. The tools of the judicial proceeding includes the standard legal tools and proceedings of discovery, motions, and briefs. Under the statute, the penalties for a respondent not participating in the judicial proceedings are steep. In such an instance, the administrative law judge is permitted to assume that all the allegations stated in the complaint are true when making the final ruling. Once the collection of evidence is completed the case is argued as to whether the patent in question has been infringed.

After the arguments have been made the administrative law judge makes a ruling on the matters of law. If the administrative law judge determines that the patent has been infringed, he or she can choose a remedy from the following options:

**General Exclusion Order:** This is a general exclusion order that prohibits the importation of the infringing product without restriction.

**Restricted Exclusion Order:** The restricted exclusion order is similar to the general exclusion order except that its application is limited, or restricted, in some way. Typically, a restricted exclusion order is limited to one or more specific companies.

**Temporary Exclusion Order:** The administrative law judge has the option to issue a temporary exclusion order to limit the importation of a product pending the completion of the 337 process. The administrative law judge has the discretion to require a bond in lieu of a temporary exclusion order if that is more appropriate.

Cease and Desist Order: The administrative law judge has the option to issue a cease and desist order. I am a little fuzzy on this but I believe that this option is limited to US companies.

Consent Order: The case can be disposed of through the approval of a consent order between the parties.

After the administrative law judge makes the decision, the decision is forwarded to the Commission for final approval. If for some reason the Commission fails to act on the decision then the judge's decision is final and has the force of law.

Finally, we need to discuss the wild card: all exclusion orders generated by the 337 process are subject to presidential review and can be overturned by an administration. This is not an insignificant risk. For example, in June 2013, the USITC determined that Apple had violated the 337 act by importing technology that was infringing on a patent owned by Samsung. Because of the impact the decision and the resulting import exclusions would have on existing Apple customers [the administration disapproved the exclusion order](#). The decision only impacted the USITC proceedings and had no impact on Samsung's ability to pursue their infringement suit in Federal Court.

Jim Carson is a principal of [RB Consulting, Inc](#) and a registered patent agent. He has over 30 years of experience across multiple industries including the biotechnology, textile, computer, telecommunications, and energy sectors. [RB Consulting, Inc](#) specializes in providing management, prototyping, and IP services to small and start-up businesses. He can be reached via email at [jim@rbconsulting.us](mailto:jim@rbconsulting.us) or by phone at (803) 792-2183.

Copyright 2016