

Public interest considerations in Section 337 investigations

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Administered by the International Trade Commission (Commission), Section 337 of the Tariff Act of 1930¹ provides relief to U.S. industries from unfair or injurious competition involving imported goods.² A number of recent cases and Commission decisions have highlighted the significance of increasing attention to an important consideration in Section 337 proceedings: questions of public interest when the Commission is assessing whether to issue exclusionary orders in patent disputes.

It is imperative that the private parties create a record on the public interest based on sufficient evidence rather than sweeping conclusions.

For example, if the patented technology is important to items like pulse oximeters in smart watches, or potentially life-saving CPAP machines for people with respiratory issues, is the assessment of an exclusion to the patent in a Section 337 proceeding different? If so, how? Similar questions arise with respect to cases involving standard essential patents (SEPs) subject to fair, reasonable and non-discriminatory (FRAND) terms.

Section 337 and public interest considerations

Recent cases highlight the importance of the statutory public interest factors, including the types of evidence sufficient for the Commission to delegate fact finding on public interest to the Administrative Law Judge (ALJ) in the first instance, and the types of evidence the Commission ultimately deems persuasive in tailoring a remedial order. Whether the public interest fact finding is conducted by the ALJ (as part of the evidentiary hearing) or the Commission (if fact finding on the public interest is not delegated to the ALJ), it is imperative that the private parties create a record on the public interest based on sufficient evidence rather than sweeping conclusions.

Section 337 requires the Commission to take into consideration public interest factors in determining whether to issue a remedy after a finding of violation. The public interest factors the Commission will consider include the effect that an exclusion order and cease-and-desist order would have on: (1) the public health and welfare, (2) competitive conditions in the U.S. economy,

(3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers.³

The Commission may, if it finds that early development of public interest information would be beneficial, direct the ALJ to collect public interest evidence. The ALJ is then directed to include findings on the public interest in their recommended determination on remedy and bonding. But the ALJ may only collect such evidence on the public interest factors if the Commission directs them to, and that evidence must pertain to the four statutory factors.

Public interest considerations are often elevated when the Commission delegates fact finding to the ALJ. If fact finding on the public interest is not delegated to the ALJ, the Commission will nonetheless invite the parties, government agencies, and members of the public to submit comments on the public interest after the Commission decides whether to review the ALJ's decision on violation (unless the Commission affirms an ALJ's decision that there is no violation). The end goal is for the Commission to have a more developed and informed record on which to base its analysis of the public interest factors to consider in rendering its remedy decisions in Section 337 investigations.

Particularly when delegated to the ALJ, fact finding on the statutory public interest factors allows complainants and respondents to highlight how (if at all) an exclusion order and/or cease-and-desist order would impact the four public interest factors. These considerations can become critical parts of the parties' narratives and case themes.

That a case may implicate important public health concerns (e.g., pulse oximeters in smart watches) is not dispositive of whether the Commission will delegate fact finding to the ALJ. But similar public health concerns (e.g., potentially life-saving CPAP machines for people with respiratory issues) may be sufficient for the Commission to not only delegate fact finding to the ALJ, but also to tailor a remedial order to accommodate the public interest.

Regardless, the particular facts of each case, and the evidence relied upon to establish those facts, is paramount. An additional common thread running through recent cases is that the Commission is more willing to delegate public interest fact finding to the ALJ when SEPs are involved that implicate FRAND issues.

Important determinations: recent developments

While to date the grant or denial of exclusionary relief in a Section 337 case has rarely turned solely on public interest

considerations, the Commission and ALJs do take them into consideration, especially in cases where exclusionary relief is granted, but may be stayed or tailored. For example, in a 2022 decision⁴ the ALJ found no Section 337 violation, but public interest-related considerations did seem to impact the ALJ's decision to allow a delay of any limited exclusion order (LEO) or cease-and-desist order (CDO).

Even where health-related devices/ technologies are at issue, the public interest argument route is always a steep hill to climb for respondents.

At issue in *Philips/Thales* were communication modules used in connected respiratory care devices, including CPAP machines. There were numerous public interest statements submitted focusing on both public health and FRAND, including: 1) that sleep apnea is a significant public health concern; 2) that the pandemic drove increased demand for CPAP machines; 3) that switching cellular modules could take a year or more; 4) that it was unclear if an alternative supplier could be promptly located given ongoing microchip supply constraints; and 5) that the exclusion of products would have a negative impact on the availability of respiratory care products in U.S., and a significant negative effect on public health and welfare.

The ALJ did not consider the SEP nature of the patents to prohibit exclusionary relief.

However, all of the other public interest-related considerations (public health, availability of suitable replacements, etc.) did seem to impact the ALJ's decision to some degree in that he allowed for a 12-month delay of any LEO/CDO to accommodate public interest issues.

This type of tailoring is consistent with the decisions in several other recent cases, and would seem to support the importance of making clear public interest arguments based on concrete evidence.⁵

Ericsson and Apple were recently involved in a series of investigations involving SEPs and non-SEPs surrounding Apple's iPhone, iPad and Apple Watch products.⁶ Much of the focus was on FRAND and SEP issues, even though only one of the four investigations actually concerned SEPs. In that investigation (-1299), the ALJ remarked that a Section 337 remedy was not foreclosed due to the existence of FRAND obligations, and that consideration of the parties' FRAND-related arguments should be limited to the public interest phase of the investigation.

Ericsson and Apple disagreed on whether Apple's products were merely communication and entertainment devices or whether their applications in business, healthcare, government, education and safety — and in particular in their ubiquitous use post-COVID in remote work and learning — created public interest issues that would prohibit any exclusionary relief.

While an early 2023 settlement terminated all four investigations, key takeaways included that FRAND issues may even permeate investigations with non-SEPs, and that our remote work/learning environment post-COVID does present some interesting public interest arguments for respondents. Ericsson countered these arguments by effectively stating that the ubiquity of Apple's devices should not preclude remedial relief (i.e., no company should be "too big to fail"), particularly where numerous competing devices exist.

In *Certain Wearable Electronic Devices with ECG Functionality and Components Thereof*,⁷ the ALJ issued an ID finding a violation of Section 337. The investigation was based on a 2021 complaint filed by AliveCor alleging that Apple had violated Section 337 by unlawfully importing and/or selling certain wearable electronic devices with electrocardiogram (ECG) functionality by reason of infringement on one or more of AliveCor's U.S. patent claims.

While again, the Commission was willing to take some tailoring measures, overall they rebuffed Apple's public interest arguments, accepting the ALJ's recommendation to issue limited exclusion and cease-and-desist orders regarding Apple's violation as to two of AliveCor's cardiac monitoring patents, and rejected Apple's argument that the public interest weighed against the issuance of the orders.

"[T]he Commission has determined that the evidence of record supports an exemption for service, repair, and replacement of those infringing watches pursuant to [respondent's] warranty obligations described below. This exemption would enable consumers who possess infringing watches to continue to benefit from the health, wellness, safety and other features that they have accessed since those watches were purchased prior to the orders becoming final.... [T]he [respondent] infringing watches used in those ongoing projects would likewise be unaffected by the remedial orders.... To the extent that [respondent's] concerns relate to potential new customers of infringing watches, [respondent] has failed to substantiate or detail its concerns.... The Commission finds that suitable alternatives are available to meet the public health concerns raised by [respondent's] comments."

These findings underline the fact that even where health-related devices/technologies are at issue, the public interest argument route is always a steep hill to climb for respondents. Both parties in the case have appealed to the Federal Circuit, and that court's determination may provide more clarity.

Creating a public interest record

The Commission must consider and make findings on the public interest in every case in which a violation is found regardless of the quality or quantity of public interest information supplied by the parties. The statute does not place the burden on any party to an investigation to prove that a public interest concern precludes a remedy or requires tailoring of the remedy.⁸ When information has been submitted at the outset of the investigation indicating that there may be serious public interest concerns, the Commission has delegated the issue to the ALJ for the development of a fulsome evidentiary record on the public interest.

Where public interest is delegated to the ALJ, it is important, even if not technically required, that all parties to the proceeding — complainant, respondent, and OUII — seek factual information and statements from knowledgeable sources, including interested third parties, during fact discovery, and present this information and evidence subject to cross-examination and rebuttal at the hearing so that the ALJ's RD will provide a complete and reliable factual record on the statutory public interest considerations.⁹

While there is an advantage to respondents in being able to develop a factual record on the public interest factors during the course of an evidentiary proceeding before the ALJ, respondents must act quickly to highlight the significance of those public interest factors after a complaint is filed, as public interest statements are due about two weeks after the filing of a complaint. If fact finding is delegated to the ALJ, practitioners must be diligent about securing, producing, and presenting evidence that concerns the public interest factors. Even when not delegated to the ALJ, practitioners should still work to procure and preserve such evidence in the event it is needed at the Commission stage.

In developing a public interest strategy and related arguments, it is important to keep in mind the statutory factors — i.e., how (if at all) an exclusion order and/or cease-and-desist order would impact (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers.

While FRAND issues will likely engender significant public interest-related arguments from the parties (and surely policy debates), parties should keep in mind the types of evidence and arguments that are more likely to impact the Commission for non-SEPs. For example:

- Would an exclusion order exacerbate the worldwide semiconductor shortage?
- Would an exclusion order impact remote work, learning, or telehealth in our post-COVID environment?
- Would an exclusion order impact critical research studies that depend on the accused devices/functionality?
- Do reasonable substitutes exist, and how long it would take to switch to a non-infringing alternative (whether a design-around or a non-accused competitor product)?

In another recent and ongoing case involving Apple Watch technology,¹⁰ the Commission did not delegate fact finding to the ALJ. Because the Commission determined to review the ALJ's initial determination in part, the Commission requested written submissions on various issues under review, as well as on public interest, including from the parties, interested government agencies, and other interested persons.

The Commission's specific questions directed to the public interest are informative of the types of evidence that parties should strive to procure (and that would otherwise be addressed at the evidentiary

hearing if public interest fact finding were delegated to the ALJ). For example, the Commission inquired about the following:

- (1) Any ongoing or formally planned studies that use the blood oxygen features of the Apple Watches, and whether the Commission should allow an exemption or delay the effective date of any remedial relief so as to permit importation of the infringing Apple Watches for purposes of conducting such studies;
- (2) How the Commission should define a reasonable substitute for the infringing Apple Watches and whether any like or directly competitive products are produced in the United States;
- (3) The identity and availability of any reasonable substitutes;
- (4) The removability of the infringing features of the Apple Watches and whether Apple is working on any redesigns and how long implementation of any redesigns would take; and
- (5) Whether and how the Commission should include any exemption for repair and/or replacement of broken products impacted pursuant to any potential remedy.

The key takeaways from *Masimo/Apple* at this point are that when public interest is not delegated to the ALJ for fact finding, parties need to be diligent about submitting all the necessary statements and comments, and weaving those statements into their briefs. It is essential to note that in these situations, the Commission highly values specific evidence, and the more factual evidence that can be provided, the better.

Overall, when working with public interest considerations in Section 337 investigations, given the Commission's precedent, it is highly unlikely that public interest concerns supersede implementation of remedial relief altogether. However, these factors can be pivotal in obtaining any necessary tailoring.

Notes

¹ 19 U.S.C.A. § 1337.

² *Id.*

³ *Id.*

⁴ *Certain UMTS and LTE Cellular Communication Modules and Components Thereof* (Inv. No. 337-TA-1240) ("Philips/Thales")

⁵ See, e.g., *Certain Road Milling Machines*, Inv. No. 337-TA-1067, Comm'n Op. (July 18, 2019); *Certain Microfluidic Devices*, Inv. No. 337-TA-1068, Comm'n Op. (Jan. 9, 2020); *Certain Lithium Ion Batteries*, Inv. No. 337-TA-1159 (March 4, 2021); *Certain Chemical Mechanical Planarization Slurries*, Inv. No. 337-TA-1204, Comm'n Op. (Jan. 6, 2022).

⁶ 337-TA-1266 (2022) ("AliveCor/Apple").

⁷ *Certain Mobile Telephones, Tablet Computers with Cellular Connectivity, and Smart Watches with Cellular Connectivity, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1299 (ALJ Moore); *Certain Mobile Phones, Tablet Computers, Smart Watches, Smart Speakers, and Digital Media Players, and Products Containing Same*, Inv. No. 337-TA-1300 (ALJ McNamara); *Certain Mobile Phones and Table Computers, All With Switchable Connectivity, and Products Containing Same*, Inv. No. 337-TA-1301 (ALJ Elliot); *Certain Cellular Base Station Communication Equipment, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1302 (ALJ Bhattacharyya).

⁸ 19 CFR § 210.50(b)(1).

⁹ *Certain Microfluidic Devices*, Inv. No. 337-TA-1068, Comm'n Op. (Jan. 9, 2020).

¹⁰ *Certain Light-Based Physiological Measurement Devices and Components Thereof*, 337-TA-1276 ("Masimo/Apple")

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