

## USITC Issues Important Opinion Concerning Section 337's Domestic Industry Requirement

Article By:

Bryan A. Schwartz

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The U.S. International Trade Commission issued an important opinion on Friday concerning Section 337's "domestic industry" requirement, holding that investments in non-manufacturing activities, such as engineering and research and development, can be used to satisfy the required "significant investment in U.S. plant and equipment" or "significant employment of U.S. labor or capital."

The [Commission's opinion](#) (in *Certain Solid State Storage Drives, Stacked Electronics Components, and Products Containing Same*, Inv. No. 337-TA-1097) is noteworthy because it directly addresses, for the first time, a difference of opinion among the Commission's administrative law judges (ALJs) concerning the proper treatment of engineering and research and development investment under the statutory scheme. The issue arises because the statute provides three, seemingly distinct, options for satisfying the domestic industry requirement in cases involving alleged infringement of statutory intellectual property rights:

. . . an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, [registered U.S.] trademark, mask work, or design concerned—

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital; or

(C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3). As the Commission opinion notes, this provision was added to the statute in 1988; prior to 1988 there was "no definition in the statute as to what constitutes a domestic industry." Quoting the legislative history, the Commission explains that the first two factors (subsection A and B) were relied on in Commission precedent up to that point, but the third factor (subsection C) went "beyond" the ITC's then-existing precedent on the domestic industry issue.

In the instant case, the complainant sought summary determination that it met the statutory investment requirements, “rel[ying] at least in part on the domestic engineering, and research and development activities of its licensee . . . to demonstrate the existence of a domestic industry under subsections 337(a)(3)(A) and (B).” These “domestic engineering activities included ‘customer integration and sustaining engineering activities,’ ‘customer service engineering activities,’ ‘warranty and repair work,’ ‘testing of replacement parts,’ and ‘preparation of responses to statement of work (“SOW”) requests.’” The presiding ALJ (Judge Lord), however, “concluded that investments in ‘non-manufacturing activities,’ including engineering, and research and development activities related to the domestic industry products, cannot support a finding of domestic industry under subsections (A) and (B).” According to Judge Lord, the legislative history suggests that Congress “understood that subsections (A) and (B) covered only manufacturing.”

The Commission, in a unanimous opinion, disagreed. Following several pages of analysis, the Commission concludes that

the text of the statute, the legislative history, and Commission precedent do not support narrowing subsections (A) and (B) to exclude non-manufacturing activities, such as investments in engineering and research and development.

As a result, the Commission vacated the ALJ’s analysis and conclusion that subsections A and B cover only manufacturing activities. Relatedly, it also vacated the ALJ’s conclusion that all three subsections require connecting the U.S. investments to exploitation of the patent; rather, only subsection C requires such proof. Nonetheless, the Commission did not disturb the ALJ’s ultimate conclusion that the domestic industry investment requirement (the so-called “economic prong”) was satisfied with respect to three of the four patents, but based its determination on different reasoning from that of the ALJ.

**Takeaway:** Section 337’s unique, “domestic industry” requirement is often referred to as a “gatekeeper” provision for proceedings under the statute. The Commission’s interpretation of the enumerated domestic industry factors arguably loosens the requirements for establishing a domestic industry in two ways. First, it expands the types of investments that can be used to satisfy the “plant and equipment,” “labor,” or “capital” investment requirements of subsections A and B. Second, it clarifies that the Commission’s jurisprudence regarding engineering and research investments under subsection C—which requires a Section 337 complainant to show a “nexus between the investments and the asserted patent(s)”—is inapplicable to subsection A or B. Although the Commission’s opinion appears to have no practical impact on the outcome in this case, it seems likely to affect how the domestic industry issue will be litigated in future investigations.

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