

Alert | International Trade Commission's Section 337 Litigation



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Federal Circuit Rules US International Trade Commission's Interpretation of Section 337's Domestic Industry Requirement is Overly Narrow

On March 5, 2025, the Federal Circuit published its decision in *Lashify, Inc. v. Int'l Trade Comm'n*, finding that the U.S. International Trade Commission (ITC) has been incorrectly interpreting its enabling statute when analyzing Section 337's so-called domestic industry requirement. The court found the ITC's practice of limiting a complainant from relying on expenses for certain activities, including sales and marketing, warehousing, distribution, or quality control, runs contrary to the plain language of Section 337 (19 U.S.C. § 1337). The ruling represents a major shift from long-standing ITC practice of excluding certain investments such as sales and marketing expenses without evidence of other qualifying expenses. As a result, the decision expands the scope of activities and related investments that may be relied upon by companies seeking relief at the ITC and may result in increased filings with the ITC.

Section 337's Domestic Industry Requirement

Section 337 investigations at the ITC focus on unfair practices in the importation of products into the United States. Most often, these investigations involve claims regarding intellectual property rights, such as patent or trademark infringement. To succeed in a patent-based Section 337 proceeding at the ITC, a party who files a complaint must show the existence of a "domestic industry." Specifically, a complainant must show that it has made domestic investments with respect to its products that are protected by an asserted patent. Section 337 provides that these investments may fall within one or more of the following

three categories: (a) significant investment in plant and equipment; (b) significant employment of labor or capital; or (c) substantial investment in exploitation of the patent through activities such as engineering, research and development, or licensing. 19 U.S.C. § 1337(a)(3)(A)-(C). The ITC has long maintained that investments in sales and marketing activities *alone* are not sufficient to meet the domestic industry requirement without evidence of other sorts of ongoing activities.

The ITC's Underlying Section 337 Investigation and Determination

In October 2020, the ITC instituted an investigation based on a complaint filed by Lashify Inc., which alleged a violation of Section 337 based on patent infringement by various entities. Lashify is headquartered in the United States, where it develops, distributes, markets, and sells eyelash extensions and accessories that are manufactured overseas. Lashify claimed the existence of a domestic industry based in part on its employment of labor or capital in the United States, relying on expenses related to activities such as sales, marketing, warehousing, quality control, and distribution. The Administrative Law Judge (ALJ) presiding over the proceedings before the ITC determined that Lashify had not satisfied the domestic industry requirement based on its labor and capital expenditures. This decision was based in part on the ALJ's exclusion of sales and marketing and similar types of expenses in accordance with past ITC precedent holding that such activities are the types that a mere importer would perform.

In reviewing that determination, the ITC affirmed that Lashify had failed to satisfy the domestic industry requirement.¹ The ITC explained that, with respect to the category of labor and capital expenditures, sales and marketing expenses could not be credited toward the existence of a domestic industry without other qualifying investments. The Commission applied the same principle to warehousing, distribution, and quality control expenses. Lashify appealed the ITC's determination to the Federal Circuit.

The Federal Circuit's Decision

On appeal, the Federal Circuit vacated the ITC's determination, finding that its interpretation of what activities and expenses may be included within the scope of "employment of labor or capital" is contradicted by Section 337's plain language. In doing so, it proclaimed its exercise of "independent judgment" in interpreting Section 337 based on the Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). The Federal Circuit explained the provision at issue contains "no carveout of employment of labor or capital for sales, marketing, warehousing, quality control, or distribution. Nor is there a suggestion that such uses, to count, must be accompanied by significant employment for other functions, such as manufacturing." The Federal Circuit elaborated that, on the contrary, "[t]here is no exclusion from labor when the human activity employed is for sales, marketing, warehousing, quality control, or distribution, which are common aspects of providing goods or services."

In reaching this conclusion, the Federal Circuit rejected various arguments the ITC advanced to support its interpretation. First, the Federal Circuit rejected the ITC's claim that certain statements in the legislative history from the 1988 amendments to Section 337 suggested that sales and marketing alone were insufficient to establish a domestic industry, finding the ITC's inference on this point unwarranted and inconsistent with the statutory language. Second, the court dismissed the ITC's argument that a 1983 decision by the Federal Circuit supported its view, finding the reasoning of that decision to be outdated in light of the 1988 amendments.

¹ It is worth noting that the ITC's Commissioners were split 3-2 on whether Lashify had shown the existence of a domestic industry, although the two dissenting members agreed that a domestic industry cannot be predicated on sales and marketing alone.

Assessing the Impact of the *Lashify* Decision

The *Lashify* decision represents a major development in interpreting the scope of Section 337's domestic industry requirement. A decade ago, in *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879 (Fed. Cir. 2015), the Federal Circuit vacated the ITC's domestic industry findings because they focused on qualitative factors, clarifying that a Section 337 domestic industry assessment must begin with a quantitative analysis. That remains true today. However, in *Lashify*, by emphasizing that certain provisions of Section 337 fail to enumerate any specific types of activities that should be excluded, the Federal Circuit has established a more expansive domestic industry standard. What this means is that companies primarily engaged in activities such as sales and marketing, warehousing, quality control, or distribution, as opposed to research and development, engineering, or manufacturing, may no longer find the doors of the ITC closed to them.

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