FORUM ON SECTION 337

Presented by ABA Section of International Law’s
International Trade Committee and
International Intellectual Property Committee, and
the ABA Section of Intellectual Property’s ITC Committee,
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ORIGIN OF THE PUBLIC INTEREST
REQUIREMENT IN SECTION 337 INVESTIGATIONS.

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I. WHAT IS THE PUBLIC INTEREST REQUIREMENT OF SECTION 337 (19 USC § 1337)

A. Before Commission can issue any exclusion order (permanent or temporary) or any cease and desist order (permanent or temporary), it must consider the order’s effect on:

1. U.S. public health and welfare;

2. Competitive conditions in U.S. economy;

3. U.S. production of like or directly competitive articles; and


B. Commission considers whether remedy would have an adverse impact on any of the statutory public interest factors, and if so, must weigh the public interest in enforcing intellectual property rights against the adverse impact on the statutory public interest factors, determining whether adverse impact is greater than benefit to be gained by protection of the intellectual property rights in issue. Certain
**II. ORIGIN OF REQUIREMENT**

**A. Trade Act of 1974**

1. Requirement among many changes made to Section 337 as part of total reworking of statute, including moving final determination from President to Commission, providing for temporary and final relief, imposing time limits for action, and providing for Presidential disapproval of a Commission order on policy grounds.

2. Amendments were reaction to:
   
a. Lack of action by President under previous law, where Commission decisions were recommendatory only;

b. Watergate;

c. Perceived subjugation of U.S. economic interests to U.S. geopolitical interests (*i.e.*, State Department control of interagency decision-making on international economic interests); and

d. Recognition of IP as increasingly important determinative of comparative advantage, and concern about negative patent bias and slow speed in district courts.

**B. Added by Senate**

1. House bill did not have public interest considerations.

2. Senate Finance added to Senate bill.

   a. To 1337(d), (e), and (f), largely in same form as present language, but also with particular reference to price gouging in Senate Report.
b. Also, specifically added “price gouging” as a separate affirmative defense under 1337(c).

3. House receded in Conference Committee, but with removal of “price gouging” as an affirmative defense.

C. Why

1. Key proponent of provision was Senator Gaylord Nelson
   a. His major concern was brand-name pharmaceutical companies and their pricing.
   b. “Price gauging” is Senator Nelson’s language, and reflects this concern.

2. Rest of Finance Committee (and House) went along.
   a. Struck “price gouging” concept, making language more acceptable.
   b. 337 viewed as a trade law, and concern that there may be instances in which public interest may outweigh relief, and Commission should be one to determine this.
   c. Believed Commission would not abuse public interest override, and Commission’s decision essentially non-reviewable by court.
   d. Could come back and hem-in Commission if it went overboard, i.e., valued protection of IP too little; Commission seen as tied to Congress as much as to executive branch.
   e. Some restraint on Presidential review, because if Commission already had found no overriding public interest, President would have difficulty coming to different conclusion in exercising his disapproved authority; effectively confined President to overriding for international economic reasons.