The "Public Interest" Element of Section 337 Proceedings at the U.S. International Trade Commission

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Public Interest Topics

1. Legislative History
2. Statutory Limitation on Exclusion Orders, Preliminary Relief, Cease & Desist Orders, and Default
3. Regulations
4. Public Interest in IP Enforcement
5. Four Cases Where Public Interest Trumped Violations
6. Case Study: Baseband Processors, Inv. 543

Legislative History

1. "The Committee believes that the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute."
2. "[T]he public interest must be paramount in the administration of this statute."
   Id. at 193.
Legislative History (cont.)

"[T]he Commission must examine whether ... that issuing an exclusion order would have a greater adverse impact on
[1] the public health and welfare;
[2] on competitive conditions in the United States economy;
[3] on production of like or directly competitive articles in the United States; or
[4] on the United States consumer,
than would be gained by protecting the patent holder ... ."

Public Interest as a Statutory Limitation on Exclusion Orders

(d) Exclusion of articles from entry

(1) If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall
direct that the articles concerned, imported by any person
violating the provision of this section, be excluded from entry
into the United States, unless, after considering the effect of
such exclusion upon the public health and welfare, competitive
conditions in the United States economy, the production of like
or directly competitive articles in the United States, and United
States consumers, it finds that such articles should not be
excluded from entry.
Public Interest as a Statutory Limitation on Preliminary Relief

(e) Exclusion of articles from entry during investigation except under bond; procedures applicable; preliminary relief

(1) If, during the course of an investigation under this section, the Commission determines that there is reason to believe that there is a violation of this section, it may direct that the articles concerned, imported by any person with respect to whom there is reason to believe that such person is violating this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

Public Interest as a Statutory Limitation on Cease & Desist Orders

(f) Cease and desist orders; civil penalty for violation of orders

(1) In addition to, or in lieu of, taking action under subsection (d) or (e) of this section, the Commission may issue and cause to be served on any person violating this section, or believed to be violating this section, as the case may be, an order directing such person to cease and desist from engaging in the unfair methods or acts involved, unless after considering the effect of such order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such order should not be issued.

Public Interest as a Statutory Limitation on Default Remedies

(g) Exclusion from entry or cease and desist order; conditions and procedures applicable

(1) If - (A) a complaint is filed against a person under this section; (B) the complaint and a notice of investigation are served on the person; (C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice; (D) the person fails to show good cause why the person should not be found in default; and (E) the complainant seeks relief limited solely to that person, the Commission shall determine the facts alleged in the complaint to be true and shall, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person, upon determining the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued.
Intergovernmental Trade Policy Committee

19 C.F.R. § 210.50: (a) During the course of each investigation under this part, the Commission shall—

(2) Consult with and seek advice and information from the U.S. Department of Health and Human Services, the U.S. Department of Justice, the Federal Trade Commission, the U.S. Customs Service, and such other departments and agencies as it considers appropriate, concerning the subject matter of the complaint and the effect its actions (general or limited exclusion of articles from entry or a cease and desist order, or exclusion of articles from entry under bond or a temporary cease and desist order) under section 337 of the Tariff Act of 1930 shall have upon the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers. . . . .

Application of Public Interest Factors

1. **Must Find a Violation First:** "It is clear from the plain language of the statute that the Commission is to first determine whether there has been a violation of section 1337 before considering whether issuance of an exclusion order would be contrary to the public health and welfare." *Ankara Viruses*, Inv. No. 550, Order No. 10 at p.6 (Nov. 30, 2005).

2. **Balancing Test:** "The Commission has construed the legislative history to mean that it should decline to issue relief when the adverse effect on the public interest would be greater than the interest in protecting the patent holder." Donald K. Duvall, *Unfair Competition and the ITC 441* (West Group 2002).

Application of Public Interest Factors (cont.)

3. Factors Are Considered Separately

4. Preponderance of the Evidence Standard

5. No Injury Requirement in Public Interest Analysis —Injury element eliminated by 1988 Act
Two-Step Public Interest Analysis

1. Threshold Issue: Public Health & Welfare
   The Commission must decide as a threshold matter, "whether there is a public health and welfare interest in the invention, that is, whether a remedy under section 337 would have an impact of the public health and welfare."

   "Once that is established, the Commission must balance the damage to the patent holder’s rights against the adverse impact of the remedy on ‘the public health and welfare and the assurance of competitive conditions in the United States economy.’"
   It is a well-accepted S. Dep’t No. 107-1256, 93rd Cong., 2d Sess. 197 (1974).

The Public Interest in Protecting Intellectual Property

1. "The owner of intellectual property has been granted a temporary statutory right to exclude others from making, using, or selling the protected property. . . The importation of any infringing merchandise degrades from the statutory right, diminishes the value of the intellectual property, and thus indirectly harms the public interest."

2. "We also agree with the Commission’s rejection of the view that the public interest inevitably lies on the side of the patent owner because of the public interest in protecting patent rights, although that is one factor to consider and may be a dominant factor."
   American C. C. I., 810 F.2d 819, 822 (Fed. Cir. 1990).

Four Investigations Finding a Violation of Section 337, But Limiting Remedy Based on Public Interest

**Automatic Crankpin Grinders: Fuel Economy**

1. In 1979, Ayatollah Khomenei's Iranian Revolution overthrew the Shah of Iran, followed by hostage crisis. Gas shortages, rationing coupons printed but not distributed, unleaded $0.86/gal.

2. Crankpin grinders are industrial machines for making pins on crankshafts for internal combustion motors. Automakers were developing new generation of fuel efficient motors.

3. "Failure of complainant to show that it can supply additional crankpin grinders in quantities needed to meet market needs and to enable the domestic industry to meet fuel economy standards, it is not in the public interest to completely exclude imported crankpin grinders from the domestic market."

*Certain Automatic Crankpin Grinders, Inc. No. 337-TA-60, Commission Order, 1979 ITC LEXIS 126, at *98 (Dec. 1979).*

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**Inclined-Field Acceleration Tubes: Scientific Research**

1. 1980 remembered for continuing fuel shortages, focus on alternative energy such as nuclear power plants, and Three Mile Island accident.

2. Inclined-Field Acceleration Tubes are one type of particle accelerators used in basic research, carbon dating of artifacts, and weapons research.

3. "Pure scientific research and the advancement of knowledge... such as the nuclear structure research conducted with inclined-field acceleration tubes, is precisely the kind of activity intended by Congress to be included when it required the Commission to consider the effect of a remedy on the public health and welfare... The benefits to public health and welfare of pure research are indirect and perhaps more difficult to demonstrate, but they are nonetheless there."


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**Fluidized Supporting Apparatus: Relief of Human Suffering**

1. Specialized hospital beds for burn patients.

2. Motion for temporary relief includes public interest:
   - Complainant's probability of success on the merits
   - Immediate and substantial harm
   - Harm, if any, to the complainants if the temporary relief is granted
   - Effect of temporary relief on the public interest

   "The fourth factor, i.e., the public interest, refers to at least the enumerated public interest factors in section 337(d)(10)."


3. "Commission has determined that although there is reason to believe a violation of section 337 exists... the factors relevant to the discretionary grant of temporary relief, as well as the public interest factors which are by statute required to be considered, indicate that such relief should not be granted."

*Id. at *2.*
**Baseband Processors: Telco Infrastructure Relief**

1. Baseband processor chips are a main component of cell phones that handle communications between the phone and the cellular towers.

2. Broadcom only named chip designer Qualcomm as a respondent, but sought remedial orders against Qualcomm's customers, downstream cell phone companies.

3. Violation was found, but ITC determined that public interest required a limitation on remedy.

**Baseband Processor Chips: Downstream Remedy Issues**

EPROMs discretionary downstream remedy factors are:

1. Value of infringing components vs downstream products;
2. Whether respondents or third parties made downstream products;
3. Incremental value of downstream remedy to complainant;
4. Incremental detriment of downstream remedy to respondents;
5. Burden on third parties from exclusion of downstream products;
6. Availability of alternative noninfringing downstream products;
7. Likelihood downstream products contain the infringing components;
8. Opportunity for evasion of an exclusion order without downstream exclusion;
9. The enforceability of an order by Customs; and any other factors the Commission determines to be relevant.

**Baseband Processors: Two Step Public Interest Analysis**

"Having formulated a remedy that is appropriate under the EPROMs factors, we must now examine whether that remedy would have an adverse impact with respect to the statutory public interest factors and, if so, we must balance the patent holder's rights and the public interest in enforcing intellectual property rights against the impact on these other enumerated public interests."

Broadband Processors: Three Public Interest Issues

1. Public Health & Welfare: “With respect to public health and welfare, there is evidence that the data capabilities of EV-DO and WCDMA networks provide some enhancement to the ability of first responders and other public safety officials to perform their duties. . . . If some 3G handsets are excluded from the U.S. market, the public would lose some of the public health and safety benefits that could flow from enhanced data transmission capabilities, improved ability to locate a caller, and elimination of voice blanking as more members of the public move to phones with 3G technology.” Id. at *237-38.

2. Interest of U.S. Consumers: “[E]xcluding at least some 3G devices could limit consumers' access to enhanced services offered by 3G networks. . . . Given the growing market for these services, we find that there would be at least some negative impact on consumers if some 3G devices were barred from the U.S. market.”

   Id. at *238-39.

3. Competitive Conditions in the U.S. Economy: “[E]xclusion would likely result in some adverse impact on the development of advanced telecommunications technology and on expansion of broadband internet access. . . . Downstream relief would make it more difficult for telecommunications companies to expand 3G cellular telephone services and broadband internet access, and make it more difficult for consumers, including businesses, to access these services.”

   Id. at *239.
But see Kyocera v. ITC...

"Section 337 permits exclusion of the imports of non-respondents only via a general exclusion order. . . . The statute permits IEOs to exclude only the violating products of named respondents. . . . [T]his court vacates and remands the exclusion order fashioned by the Commission because Section 337 unambiguously limits the ITC's exclusionary authority to persons named by the complainant."


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