Articles + Publications | March 11, 2025

New Federal Circuit Ruling Opens the ITC to Many More IP Owners

WRITTEN BY

Mark Hannemann | Mikaella Evaristo

In a recent ruling, the U.S. Court of Appeals for the Federal Circuit upended years of settled law and ruled that sales and marketing expenses, by themselves, can be the basis for a finding of domestic industry in an International Trade Commission (ITC) enforcement action. This decision will make the ITC available to U.S. IP owners who import their goods from overseas and do not have a manufacturing base in the U.S.

Lashify, Inc., a U.S.-based company that distributes, markets, and sells DIY eyelash extensions and other accessories manufactured abroad, filed a complaint with the ITC under Section 337. Lashify alleged that certain other importers of like products violated Section 337 because their eyelash extension products infringed claims of three Lashify-owned design and utility patents.

To obtain relief against such importation under Section 337 in the ITC, Lashify had to demonstrate that there is a relevant industry in the U.S. relating to the invention protected by the patent that either already exists or is being established. This requirement demands a showing of an "industry" defined by Section 337 (a)(3), referred to as the "economic prong," and a connection between that industry and the patented products, referred to as the "technical prong."

In the ITC investigation, the administrative law judge (ALJ) denied Lashify relief because it found Lashify failed to satisfy the economic prong requirement, a determination that was dispositive and defeated Lashify's claim for relief. Because all of Lashify's manufacturing occurs outside the U.S., Lashify cited labor expenditures related to sales, marketing, warehousing, quality control, and distribution for its products. When evaluating whether Lashify established a significant employment of labor or capital pursuant to Section 337(a)(3)(B), the ALJ did not consider Lashify's cited expenses relating to sales, marketing, warehousing, quality control, and distribution. In reviewing the ALJ's ruling pursuant to Lashify's petition for review, the Commission majority agreed with the ALJ and rejected Section 337 relief, stating that it is settled that sales and marketing activities alone cannot satisfy the domestic industry requirement pursuant to Section 337 (a)(3)(B). The Commission majority found similarly with respect to expenses related to warehousing, quality control, and distribution.

On appeal, the Federal Circuit interpreted Section 337 (a)(3)(B) without deference to the Commission's interpretation of the statute, citing the Supreme Court's recent decision in *Loper Bright.* The Federal Circuit analyzed whether the phrase "significant employment of labor or capital" in Section 337 (a)(3)(B) includes expenses such as sales, marketing, warehousing, quality control, and distribution, without any U.S. manufacturing. The Federal Circuit held that it does. It clarified that the relevant section does not exclude expenses related to sales, marketing, warehousing, quality control, or distribution from the domestic industry analysis, nor does it

require these costs to be accompanied by significant employment in other areas. Since Lashify's expenses were tied to its patented products, the ITC had no basis to disregard them. As a result, the ITC must now consider these expenses when determining whether a complainant has established a domestic industry.

The court's decision makes clear that companies can manufacture entirely overseas and still establish a domestic industry through substantial U.S. investments in nonmanufacturing activities. The Federal Circuit's ruling reshapes the ITC's domestic industry requirement, expanding access to import bans for U.S. owners of intellectual property.

RELATED INDUSTRIES + PRACTICES

- ITC Litigation
- Intellectual Property
- Patent Litigation
- Patent Prosecution, Counseling + Portfolio Management
- Trademark + Copyright