ALERT MEMORANDUM

Lashify, Inc. v. International Trade Commission: The Expansion of Section 337 to Encompass Entities With Only Non-Technical Activities in the U.S.

April 14, 2025

On March 5, 2025, the Federal Circuit reversed decades of precedent and opened up the ITC to many potential complainants to which the ITC's powerful remedies had previously been out of reach, particularly non-U.S. entities.

Background. Section 337 of the Tariff Act of 1930 "declares certain activities related to importation to be unlawful trade acts and directs the [U.S. International Trade] Commission generally to grant prospective relief if it has found an unlawful trade act to have occurred." *ClearCorrect Operating, LLC v. Int'l Trade Commision*, 810 F.3d 1283, 1289 (Fed. Cir. 2015). In order to obtain relief, a complainant in a patent-based case must satisfy certain conditions, including by showing there is an "industry" in the U.S. relating to an article that is protected by the patent. 19 U.S.C. § 1337(a)(2). A complainant who can successfully show both the existence of this domestic industry and that importers infringe the patent may obtain several forms of relief, including an exclusion order (which excludes infringing products from entry into the U.S.) and a cease and desist order (which prohibits a range of conduct relating to imported infringing articles).

If you have any questions concerning this memorandum, please reach out to your regular firm contact or to the Cleary authors below.

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Lashify recognizes for the first time that sales, marketing, distribution, and other non-technical activities in the U.S. may ***alone*** qualify as a domestic industry. Thus, a company with no manufacturing, R&D, engineering, or technical support activities in the U.S. may now nonetheless potentially be an ITC complainant.

I. *Lashify, Inc. v. International Trade Commission*. In its March 5, 2025 decision, the Federal Circuit held that a company whose manufacturing is entirely abroad, and that only performs distribution, warehousing, quality control, sales, and marketing in the U.S., can still establish a domestic industry under Section 337(a)(3)(B). The Court's holding expressly overruled *Schaper Manufacturing Co. v. U.S. International Trade Commission* and subsequent Commission decisions that declined to find a "domestic industry" where a complainant's manufacturing and R&D processes occurred outside of the U.S., even if the complainant had "very large expenditures for advertising and promotion" in the U.S.[1]

- The Court found the Commission's prior interpretation to be "contrary to the provision's language"[2] and faulted the Commission for putting legislative history ahead of the plain language of the statute.

- In contrast, the Court read Section 337(a)(3)(B) to cover "significant use of labor and capital" of any kind with no "carveout" for "sales, marketing, warehousing, quality control, or distribution" activities.[3]

- The Court held that a complainant who shows "significant-in-amount labor or capital" investments in solely non-technical activities such as sales and marketing may prevail in a Section 337 action.[4]

II. Key Implications. The Court's decision has significant implications for non-U.S. entities with manufacturing and R&D operations that take place entirely outside of the U.S., as well as U.S. companies who compete with such entities.[5] In the past, the ITC has required complainants to engage in significant technical activities within the U.S., such as manufacturing, engineering, or R&D. The *Lashify* decision expands Section 337's reach to companies whose manufacturing and technical operations are entirely outside of the U.S.. The ITC is now a potentially viable forum for such patent owners.

The ITC offers significant advantages to complainants as compared to plaintiffs in federal district courts, including: (i) the automatic issuance of an exclusion order barring the respondent's products from entry into the U.S. upon a finding that Section 337 has been violated; and (ii) speedy proceedings that are not stayed for proceedings such as inter partes review and conclude, on average, roughly 18 months after the filing of the complaint.

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1 *Schaper Mfg. Co. v. U.S. Int'l Trade Comm'n*, 717 F.2d 1368, 1372–73 (Fed. Cir. 1983) (rejecting complainant's domestic industry argument because complainant's domestic activities were not "substantially different" from what a "normal importer would perform upon receipt" and its "very large expenditures for advertising and promotion cannot be considered part of the production process.").

2 *Lashify, Inc. v. Int'l Trade Comm'n*, 130 F.4th 948, 958 (Fed. Cir. 2025).

3 *Id.* at 958–59.

4 *Id.* at 960.

5 In at least one very recent decision, an administrative law judge found that expenditures relating to "customer-facing technical sales activities" supported a finding of domestic industry, referring specifically to the *Lashify* decision. *See In re Certain Liquid Coolers for Electronic Components in Computers, Components Thereof, Devices for Controlling Same, and Products Containing Same*, Inv. No. 337-Ta-1394 (Mar. 21, 2025) (Initial Determination).