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### Review at the U.S. International Trade Commission

By Mark A. Kressel – June 28, 2012

The U.S. International Trade Commission (ITC) has become a popular forum for patent infringement litigation in recent years, primarily due to its faster proceedings and relative ease of obtaining injunctive relief. The ITC is a federal agency charged with preventing unfair trade practices related to the importation and sale of goods, including infringement of a valid U.S. patent. *See* 19 U.S.C. § 1337. The ITC is empowered to investigate whether products infringe a valid U.S. patent in an area where the patentee has a “domestic industry” (a requirement that is not the subject of this article), and if so, to exclude their importation to the United States. *See* 19 U.S.C. § 1337(a)(2). The ITC cannot generally grant monetary relief.

Although ITC investigations are quasi-adjudicative, the ITC is not an Article III court, and it follows its own procedural rules, codified largely at 19 C.F.R. § 201.16 and part 210. An investigation is conducted by an administrative law judge (ALJ), and ALJ determinations are reviewed initially by the six ITC commissioners themselves. For experienced appellate practitioners, a first trip through commission review can be something like an American’s first visit to Canada—everything looks just a little bit different. This article reviews some key differences between federal appeals and commission review to help practitioners navigate ITC procedures.

#### Different Treatment

Many of the starkest differences between commission review and traditional appellate review arise from the difference between a district court opinion and an ALJ determination. If an ITC investigation proceeds through a dispositive motion or trial, the ALJ is authorized to issue a ruling, called an “initial determination,” on the merits of the dispute but may not order remedies; the ALJ makes only a “recommended determination” as to the appropriate remedy and usually does so without formally considering the impact the recommended remedy will have on the public. 19 C.F.R. §§ 210.42, 210.50(b)(1). Only the commission may issue a remedy. 19 C.F.R. § 210.50. This distinction reflects the fact that the merits ruling focuses on the patent dispute between the private litigants, whereas the decision to issue a remedy encompasses questions of federal trade policy, which must serve the broader public interest. *See A Lawyer’s Guide to Section 337 Investigations Before the U.S. International Trade Commission* 34, 182–86 (Tom M. Schaumberg ed., ABA Publishing 2010). Although ALJs are occasionally delegated the power to consider public interest questions—and this has happened more frequently in the past year or

two—it is ordinarily the case that only the commission itself may make findings on whether an exclusion order will serve the public interest. 19 C.F.R. § 210.50(a)(2), (b)(1).

Thus, while a district court can conclusively resolve a dispute's merits and order remedies in the first instance, an ALJ at the ITC cannot. The recommended determination has no binding effect but offers guidance for the commission should it find a violation of the trade statute (i.e., infringement of a valid patent). 19 C.F.R. § 210.42(h). Accordingly, commission review is a hybrid that functions like appellate review on the merits and an original determination on the remedy.

### **Commission Review Is Discretionary**

Unlike review in the courts of appeals, which is by right, 28 U.S.C. § 1291, commission review of merits issues is discretionary. The adversely affected party must file a petition for review. 19 C.F.R. § 210.43. The petition must raise all the issues on which review is sought; omitted issues will be forfeited. 19 C.F.R. § 210.43(b). This forfeiture will be binding in a later appeal to the Federal Circuit, so practitioners must approach the petition carefully. *Id.*; see also *Finnigan Corp. v. ITC*, 180 F.3d 1354, 1363 (Fed. Cir. 1999).

The commission may grant review of some or all issues raised in the petition. 19 C.F.R. § 210.43(d). However, the commission may rephrase or alter the questions presented. *Id.* The commission sometimes raises new issues not raised by the parties. The commission may also grant review of an initial determination even if the parties elect not to seek review. 19 C.F.R. § 210.44. The commission will serve its order on review, including the questions on which review is granted, on the parties and on other federal agencies such as the Federal Trade Commission, and the commission will publish it in the *Federal Register*. 19 C.F.R. §§ 201.10, 210.7(c), 210.42(i), 210.43(d)(3).

If neither the parties nor the commission initiates review, or if the commission declines to review the initial determination, the ALJ's initial determination becomes the final determination of the commission for purposes of subsequent review and enforcement. 19 C.F.R. §§ 210.42(d), (h); 210.43(d). Notably, however, if the ALJ issues an initial determination finding a violation, the commission must request briefing for the purposes of ordering a remedy and considering the public interest, because only the commission may issue a remedy. 19 C.F.R. § 210.42(h)(2).

### **Review Is Even Broader Than Typical De Novo Review**

Like an appellate court, the commission may affirm, reverse, modify, set aside, or remand for further proceedings, in whole or in part, the ALJ's initial determination. 28 U.S.C. § 2106; 19 C.F.R. § 210.45(c). However, while the commission may be deferential to the ALJ's findings of fact as a practical matter, the commission reviews the entire initial determination under a de novo standard and may use all the powers that the ALJ has in making the initial determination. See 5 U.S.C. § 557(b).

The commission is even empowered to take new evidence and make new findings of fact. See *id.*; 19 C.F.R. § 210.50(a)(4). On rare occasions, the commission has heard live testimony. See *In*

*re Certain Baseband Processor Chips & Chipsets, Transmitter, & Receiver (Radio) Chips*, Inv. No. 337-TA-543, USITC Pub. No. 4258, 2011 WL 6121182, at \*2 (Oct. 1, 2011). The commission may be particularly likely to take new evidence on remedial issues, as the commission must make findings on a proposed remedy's effect on the public interest, and there is generally no record from the ALJ proceedings on that issue. *See* 19 U.S.C. § 1337(d); 19 C.F.R. § 210.50(a)(2), (b)(1).

Thus, practitioners should bear in mind that commission review offers significant opportunities to develop the record. This provides a way to improve the factual record that may be presented to the Federal Circuit, where ITC factual findings will be reviewed under the deferential “substantial evidence” standard. *See, e.g., Spansion, Inc. v. ITC*, 629 F.3d 1331, 1343 (Fed. Cir. 2010).

### **Many More Participants Are Invited**

Commission review features both more listeners and more speakers than a federal appeal. Unlike a federal appellate court, which sits initially in three-judge panels drawn from a larger court, the six ITC commissioners sit en banc in every case. The commission rarely hears oral argument, however. *See* 19 C.F.R. § 210.45. While the commissioners do not always agree, “dissents” or “concurrences” in ITC practice are generally confined to footnotes or small addenda to an otherwise unanimous opinion.

There are also more litigants. In addition to the patentee, called the “complainant,” and the accused infringers, called the “respondents,” the Office of Unfair Import Investigations (OUII) also participates fully as a third, independent party in the commission review with the mission of representing the public interest—just as the OUII did in the underlying ALJ proceedings. *A Lawyer's Guide to Section 337 Investigations, supra*, at 33–34.

As in an appellate court, others interested in the merits of an investigation may file amicus briefs. *See In re Certain Universal Transmitters for Garage Door Openers*, Inv. No. 337-TA-497, 2003 WL 22385981 (U.S.I.T.C. Oct. 15, 2003). The commission also invites “interested” members of the public to file submissions on the proposed remedy if a violation is found. 19 C.F.R. § 210.50(a)(4). Unlike amici curiae filing briefs on merits issues, members of the public filing briefs on remedial issues do not need to assert any unique standing or interest in the proceeding or seek permission to file. Furthermore, in vivid contrast with amicus practice in federal court, commission practice allows members of the public filing submissions on remedy to submit evidence and thus expand the record.

In some instances, the commission may invite members of the public to file submissions on non-remedial legal issues on which the commission would like broader input from the public. Thus, practitioners are well advised to follow the commission's *Federal Register* notices for opportunities to weigh in on issues important to their clients.

### **Authority Functions Differently**

In commission review, legal authority carries different weight than it does in a court of appeals. Federal Circuit precedent binds the commission on issues of federal law, but the commission will apply state law where necessary, for example, to interpret patent ownership agreements. *See, e.g., In re Certain Digital Cameras & Components Thereof*, Inv. No. 337-TA-593, 2007 WL 1794141, at \*3 (U.S.I.T.C. May 11, 2007).

“There is no doctrine of *stare decisis* in administrative practice.” *In re Certain NAND Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-526, USITC Pub. No. 3970, 2007 WL 4861334, at \*7 (Dec. 2007) (Final Initial and Recommended Determinations). Thus, the commission is not bound by its own precedent, which may be the only available authority on issues such as the interpretation of ITC rules, the appropriateness of a remedy, or the application of similar fact patterns to existing law. In practice, however, the commission usually does follow its precedent, and ITC practitioners routinely cite commission precedent to the ALJs and to the commission itself. Therefore, practitioners should demonstrate the persuasiveness of ITC precedent they cite, or they should show why deviation from past practice is unwarranted.

### **Appeal to the Federal Circuit Has Nuances**

Ultimately, a party adversely affected by a final ITC determination ends up in the same place as a party adversely affected by a district court patent decision—the Federal Circuit. 28 U.S.C. § 1295(a)(1), (a)(6).

There are still a few key differences in the route taken, however. If the commission does not find a violation, the patentee may immediately file an appeal. If the commission does find a violation, however, before a party may appeal to the Federal Circuit, the commission must transmit the determination to the president for review. 19 U.S.C. § 1337(j)(1)(B); 19 C.F.R. § 210.49(b). During the review period, the president—usually through a designee—has 60 days before a remedial order enters to disapprove the determination, in which case it becomes unenforceable and unappealable. *A Lawyer’s Guide to Section 337 Investigations, supra*, at 188, 194; 19 C.F.R. § 210.49(d). There is no formal litigation to affect the president’s decision, although traditional political processes such as lobbying may be used. *A Lawyer’s Guide to Section 337 Investigations, supra*, at 188–89. Notably, the president has disapproved an ITC remedy under this procedure in only five instances, the most recent being in 1987. *Id.* at 187.

It is only after the president approves the determination—or, as is more common, allows the 60-day period to elapse—that the commission determination is appealable and the 60-day time limit for filing an appeal in a case involving a federal agency begins. 19 U.S.C. § 1337(c); Fed. R. App. P. 4(a)(1)(B).

When an appeal is initiated, there is another difference in the alignment of parties. On appeal from an ITC determination, the adversely affected party is the appellant, and the ITC is now the appellee. Thus, the ITC, which previously acted as the adjudicator, is now an interested litigant in the appeal. Represented by the ITC’s General Counsel’s Office (a different part of the ITC than the OUII), it will defend its determination, using an advocate’s zeal. The party who

prevailed before the ITC must file a motion to intervene in the appeal. All three parties may present oral argument, with the ITC traditionally splitting its time with the side that supports the ITC's determination.

Keeping these procedural differences in mind, appellate practitioners will be able to better serve their clients in this increasingly common, quasi-appellate forum.

**Keywords:** litigation, appellate practice, International Trade Commission, ITC, USITC, Federal Circuit, appeals, de novo review, administrative law judge, ALJ

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