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## SYMPOSIUM REVIEW

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### WHERE IS THE ITC GOING AFTER KYOCERA?

Bas de Blank<sup>†</sup> & Bing Cheng<sup>††</sup>

#### *Abstract*

*The International Trade Commission (ITC) is an important forum to litigate issues concerning the importation into the United States of articles that allegedly infringe a U.S. patent. Traditionally, patent holders view the broad injunctive remedy and quick resolution available from the ITC as advantages. The Federal Circuit, however, recently limited the scope of some ITC remedies. This paper examines the potential impact of that decision.*

#### I. INTRODUCTION

On October 14, 2008, in *Kyocera Wireless Corp. v. International Trade Commission*,<sup>1</sup> the U.S. Court of Appeals for the Federal Circuit (CAFC) circumscribed the scope of limited exclusion orders (LEO) issued by the International Trade Commission (ITC or Commission). Prior to *Kyocera*, the Commission had issued LEOs prohibiting the importation into the United States of both products found to infringe and “downstream” products that incorporate the infringing articles.<sup>2</sup> In *Kyocera*, the CAFC held that the ITC had no statutory authority to issue a LEO against downstream products of parties not named as

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1. *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340 (Fed. Cir. 2008).

2. *See, e.g., Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Products Containing Same, Including Cellular Telephone Handsets*, USITC Inv. No. 337-TA-543, 2007 ITC LEXIS 621, at \*5, 12-13 (June 2007) [hereinafter *Broadcom Decision*] (excluding “the infringing chips” and “certain handheld wireless communications devices containing the same”).

respondents in the ITC investigation.<sup>3</sup> Thus, *Kyocera* represents a significant change in the scope of a LEO and ITC remedies in general.

Through an overview of ITC litigation prior to the *Kyocera* decision and an analysis of that case, this paper provides an analysis of *Kyocera's* impact and considers possible changes in light of that decision. This paper ends with a brief discussion of possible changes future complainants and the ITC may encounter.

## II. ITC LITIGATION PRIOR TO *KYOCERA*

### A. Brief Overview of the ITC

Section 337 of the Tariff Act of 1930,<sup>4</sup> is an international trade statute that was originally enacted to protect U.S. domestic industries from unfair competition in the importation into the United States of goods made by foreign companies.<sup>5</sup> Over the years, Section 337 has evolved into an alternative and expeditious means for U.S. intellectual property owners seeking to enforce their rights against infringing imports. Compared to traditional patent litigation before a district court, the ITC can provide an alternative—often advantageous—venue to resolve disputes.

The ITC is not a federal court.<sup>6</sup> Instead, it is an independent and quasi-judicial federal administrative agency whose jurisdiction includes unfair trade practices in violation of Section 337.<sup>7</sup> Typically, such cases involve allegations that an imported article infringes a U.S. patent, but the ITC also investigates other forms of unfair competition, such as trademark or copyright infringement, misappropriation of trade secrets, passing off, false advertising, and violations of the antitrust laws.<sup>8</sup>

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3. *Kyocera*, 545 F.3d at 1358.

4. Codified as amended at 19 U.S.C. § 1337 (2006).

5. *Sealed Air Corp. v. U.S. Int'l Trade Comm'n*, 645 F.2d 976, 983 (C.C.P.A. 1981) (“The Tariff Act of 1930 . . . [was] intended to provide an adequate remedy for domestic industries against unfair methods of competition and unfair acts instigated by foreign concerns operating beyond the *in personam* jurisdiction of domestic courts.”).

6. DONALD K. DUVALL, PHILIP J. MCCABE & JOHN W. BATEMAN, UNFAIR COMPETITION AND THE ITC, ACTIONS BEFORE THE INTERNATIONAL TRADE COMMISSION UNDER SECTION 337 OF THE TARIFF ACT OF 1930 § 2:2 (2008 ed.).

7. *Id.*

8. U.S. INT'L TRADE COMM'N, SECTION 337 INVESTIGATIONS: ANSWERS TO FREQUENTLY ASKED QUESTIONS 1 (2009) [hereinafter ITC FAQ], available at [http://www.usitc.gov/intellectual\\_property/documents/337\\_faqs.pdf](http://www.usitc.gov/intellectual_property/documents/337_faqs.pdf).

Unlike an action in federal district court, there are no jury trials in Section 337 investigations. Instead, Section 337 investigations are tried before ITC administrative law judges (ALJs),<sup>9</sup> who are not constitutional Article III judges.<sup>10</sup> The ALJs “conduct formal trial-type hearings under rules of procedure and practice consistent with the Federal Rules of Civil Procedure and the Federal Rules of Evidence.”<sup>11</sup> The ITC Commissioners<sup>12</sup> “sit[] as an administrative review board with final decision-making authority.”<sup>13</sup> Commission decisions that find a violation of Section 337 and result in the issuance of remedial orders become final at the conclusion of the 60 day presidential review period.<sup>14</sup> The final orders are then appealable to the CAFC.<sup>15</sup>

### B. Differences Between the ITC and District Courts

The ITC is experiencing a rise in the number of cases that it hears. In 2007, the number of new ITC cases was nearly 60% more than the number of new cases started in 2003.<sup>16</sup> There were slightly fewer than 80% more active cases in 2007 than in 2003.<sup>17</sup> The rise in popularity of the ITC as an intellectual property litigation venue probably results from a perception by patent owners<sup>18</sup> that the ITC presents a number of distinct advantages over the U.S. district court.

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9. DUVALL, *supra* note 6, § 2:2. The current six ALJs are: Paul J. Luckern, Charles Edward Bullock, Carl C. Charneski, Theodore R. Essex, James E. Gildea, and Robert K. Rogers Jr. See Organizational Listing, [http://www.usitc.gov/ext\\_relations/about\\_itc/4DIVISION.PDF](http://www.usitc.gov/ext_relations/about_itc/4DIVISION.PDF) (last visited Apr. 19, 2009); see also ITC Law Blog, <http://www.itcblog.com> (last visited Apr. 19, 2009).

10. James E. Milterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1911, 1198 (2006).

11. DUVALL, *supra* note 6, § 2.2.

12. The current six Commissioners are Shara L. Aranoff (Chairman), Daniel R. Pearson (Vice Chairman), Deanna Tanner Okun, Charlotte R. Lane, Irving A. Williamson, and Dean A. Pinkert. See United States International Trade Commission, About Us, [http://www.usitc.gov/ext\\_relations/about\\_itc/bio.htm](http://www.usitc.gov/ext_relations/about_itc/bio.htm) (last visited Apr. 19, 2009).

13. DUVALL, *supra* note 6, § 2.2.

14. ITC FAQ, *supra* note 8, at 25 (2009).

15. *Id.* at 26.

16. SHAYERAH ILLIAS, INTELLECTUAL PROPERTY RIGHTS PROTECTION AND ENFORCEMENT: SECTION 337 OF THE TARIFF ACT OF 1930, at 4 (Cong. Research Serv., CRS Report for Congress Order Code RS22880, May 16, 2008), available at [http://ipmall.info/hosted\\_resources/crs/RS22880\\_080516.pdf](http://ipmall.info/hosted_resources/crs/RS22880_080516.pdf).

17. *Id.*

18. One ITC official has stated that over 90% of matters heard before the ITC concern patent infringement. *Id.* at 1.

1. ITC investigations have been historically faster than district court cases

ITC investigations are required by statute to be complete “at the earliest practicable time after the date of publication of the notice of such investigation.”<sup>19</sup> Although investigation periods have increased over time because of an increased case load and the complexity of the cases, the ITC will typically render its final decision within 12-18 months after an action has been initiated.<sup>20</sup> Prior to 2006, the typical length for an ITC investigation was less than 15 months.<sup>21</sup> In 2007, the typical length expanded to 16.6 months: the shortest time to completion was 8 months while the longest time was 23.5 months.<sup>22</sup> In comparison, a district court case might last for years, allowing an infringing company to continue importing and producing its goods in the meantime.<sup>23</sup> Thus, the ITC potentially offers a relatively expedited decision compared to those available in the typical district court case.

2. ITC injunctions can be broader than district court injunctions

An ITC adjudication may offer broader injunctive relief than is attainable in an infringement action before a district court. If the ITC finds that Section 337 has been violated, it may issue an exclusion order banning the importation of infringing products.<sup>24</sup> A LEO, the most commonly issued type of exclusion order, is akin to a district court injunction and directs the U.S. Customs and Border Protection (Customs)<sup>25</sup> to prevent the importation of respondent’s products that were found to infringe.<sup>26</sup> A general exclusion order (GEO) is a

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19. 19 U.S.C. § 1337(b)(1) (2006). Upon receiving a complaint, the ITC has 30 days to determine whether or not to initiate a § 337 investigation. 19 C.F.R. § 210.10(a)(i) (2008).

20. DUVALL, *supra* note 6, § 1:5.

21. ILLIAS, *supra* note 16, at 2.

22. *Id.*

23. GARY HNATH & MONTY AGARWAL, A RECORD NUMBER OF SECTION 337 CASES FILED AT THE ITC, AS THE SUPREME COURT’S EBAY DECISION MAKES SECTION 337 AN EVEN MORE ATTRACTIVE ALTERNATIVE THAN EVER TO DISTRICT COURT LITIGATION (2006), available at <http://www.bingham.com/Media.aspx?MediaID=2830>.

24. § 1337(d)(1).

25. *Fuji Photo Film Co. v. Int’l Trade Comm’n*, 474 F.3d 1281, 1286 (Fed. Cir. 2007). Customs is part of the Department of Homeland Security and has the power to inspect and deny entry of goods within the scope of the order. See CBP.gov, <http://www.cbp.gov> (last visited Apr. 19, 2009).

26. § 1337(d)(1); *Fuji Photo*, 474 F.3d at 1286.

remedy unique to the ITC and has no counterpart in district court.<sup>27</sup> A GEO prohibits not only the respondents' infringing articles but also downstream products from non-respondents that incorporate the infringing articles regardless of the goods' source, manufacturer, or importer.<sup>28</sup> A GEO applies to non-parties<sup>29</sup> and allows a complainant to avoid repeated litigation against numerous infringers.

The ITC also has authority to issue cease and desist orders.<sup>30</sup> Cease and desist orders direct named respondents to terminate infringing-related activities and are frequently issued in conjunction with exclusion orders.<sup>31</sup> The ITC enforces cease and desist orders by imposing civil penalties or by replacing the cease and desist order with a LEO or a GEO.<sup>32</sup>

District courts, on the other hand, may award monetary damages in addition to issuing an injunction.<sup>33</sup> Unlike the ITC, federal district courts cannot issue injunctions that extend to third parties.<sup>34</sup> Although a district court may award monetary damages, the collection of a judgment may prove difficult and expensive if the infringer is located outside the U.S. or has no assets in the U.S.<sup>35</sup> An action in Federal court may also be a bad choice if the allegedly infringing goods are just entering the U.S. market and the intellectual property owner would like a speedy resolution in order to protect that market.<sup>36</sup>

In addition, the *eBay*<sup>37</sup> decision makes Section 337 a more attractive alternative forum for the protection of U.S. intellectual property rights, either by itself or in conjunction with a parallel district court action for damages. In *eBay*, the Supreme Court held that the traditional four-factor test for permanent injunctions must be applied by federal courts when determining whether to issue an

27. Collen v. Chien, *Patently Protectionist?: An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 73-74 (2008).

28. *Fuji Photo*, 474 F.3d at 1286; see also Certain Integrated Circuit Telecommunication Chips and Products Containing Same Including Dialing Apparatus, USITC Pub. 2670, Inv. No. 337-TA-337, at 26 (Aug. 1993) [hereinafter *IC Decision*].

29. *Fuji Photo*, 474 F.3d at 1286.

30. 19 U.S.C. § 1337(f)(1) (2006).

31. ILLIAS, *supra* note 16, at 5.

32. Tom M. Schaumberg et al., *Advantages of a Section 337 Investigation at the US International Trade Commission*, IP LITIGATOR, May-June 2006, at 38.

33. Robert W. Hahn & Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions*, 21 HARV. J.L. & TECH. 457, 462 (2008).

34. Schaumberg, *supra* note 32, at 37.

35. *Id.* at 36.

36. *Id.* at 32-33.

37. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

injunction in the patent context.<sup>38</sup> This requirement makes injunctive relief more difficult to obtain in federal court. Complainants in Section 337 cases does not need to prove the four traditional factors in order to obtain injunctive relief.<sup>39</sup> Instead, the ITC grants intellectual property holders virtually automatic injunctive relief if it finds infringement. As of September 2006, there were 109 completed patent cases in which a violation was found, and the ITC issued injunctive relief in 103 of those cases (94%).<sup>40</sup> Discounting the two cases in which the ITC declined to impose any remedy, the ITC granted injunctive relief in 103 of 107 cases, or 96% of the time.<sup>41</sup> A comparison to cases in which infringement was found by federal district courts shows that the ITC grants injunctive relief more than three times as often as district courts.<sup>42</sup> The virtual certainty of injunctive relief is a major benefit for complainants.

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38. *Id.* at 391. The traditional four factor test, as elaborated by the *eBay* Court, requires that the Plaintiff demonstrate:

(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balances of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*Id.*

39. In a footnote, the *Broadcom* Commissioners noted that:

The [ITC], in interpreting its organic statute, takes the position that the Tariff Act of 1930, as amended, represents a legislative modification of the traditional test in equity [as applied by the Supreme Court in *eBay*] . . . [First, t]he Tariff Act of 1930 replaced the monetary remedy of § 316 of the Tariff Act of 1922 with the remedy of exclusion. This represents a legislative determination that there is an inadequate remedy at law for infringement by importation. Second, the Tariff Act of 1930 was amended in 1988 to remove the requirement of proof of harm to domestic industry. This represents a legislative determination that it is unnecessary to show irreparable harm to the patentee in the case of infringement by importation.

*Broadcom Decision*, *supra* note 2, at \*102 n.230 (citation omitted). With respect to the last two traditional factors, the Commissioners noted that “[the] balance of hardships and public interest, are analyzed by the Commission in its EPROMs factors and public interest analysis.” *Id.* The Commissioners finally noted that “[t]he difference between exclusion orders granted under the Tariff Act of 1930, as amended, and injunctions granted under the Patent Act, is reasonable in light of the long-standing principle that importation is treated differently than domestic activity.” *Id.* (citation omitted).

40. Hahn, *supra* note 33, at 483-84.

41. *Id.* at 484.

42. In federal district court, 42 out of 145, or 29% of adjudicated cases resulted in permanent injunctions. *Id.* (citing Jay P. Kesan & Gwendolyn G. Ball, *How Are Patent Cases Resolved? An Empirical Examination of the Adjudication and Settlement of Patent Disputes*, 84 Wash. U. L. Rev. 237, 277, 279 n. 244 (2006)).

### 3. The ITC has broader jurisdiction than a district court

The jurisdiction of the ITC in Section 337 investigation is nationwide and in rem, not requiring in personam jurisdiction.<sup>43</sup> Such jurisdiction affords complainants effective and less expensive remedies by allowing a complainant to join, in a single proceeding, “all known companies involved in the sale for importation, importation, or sale after importation of the accused infringing products.”<sup>44</sup> In contrast, in federal district courts an intellectual property holder “may need to bring multiple lawsuits against parties in different jurisdictions in the United States in order to satisfy jurisdiction and venue requirements.”<sup>45</sup>

### 3. The ITC limits defenses available in litigation before district courts

Generally, the same defenses of noninfringement, invalidity, and unenforceability available before the district court will be considered by the ITC.<sup>46</sup> There are, however, two noteworthy exceptions that can make the ITC an attractive forum for patent owners under certain circumstances.

First, the ITC’s refusal to consider §271(g) defenses makes Section 337 investigations an attractive forum for enforcing process patents.<sup>47</sup> Section 271(g) of the Patent Act prohibits the importation into the U.S. of an article that was manufactured abroad by a process that infringes valid U.S. patents.<sup>48</sup> Section 271(g) also sets forth two defenses to an allegation of infringement—specifically, there is no infringement when “(1) [the infringing product] is materially changed by subsequent processes; or (2) [the infringing product] becomes a trivial and non-consequential component of another product.”<sup>49</sup> The Section 271(g) defense is usually raised in patent infringement actions involving methods of manufacturing pharmaceutical or biotech

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43. Schaumberg, *supra* note 32, at 36.

44. Hnath & Agarwal, *supra* note 23.

45. *Id.*

46. 19 U.S.C. § 1337(c) (2006) (“All legal and equitable defenses may be presented in all cases.”).

47. GILBERT B. KAPLAN, TARYN L. KOBALL & AMY J. STANLEY, INTERNATIONAL TRADE COMMISSION SECTION 337 PRACTICE DEVELOPMENTS 5 (2008) (document on file with the Santa Clara Computer & High Technology Law Journal).

48. 35 U.S.C. § 271(g) (2006).

49. *Id.* at § 271(g)(1)-(2); WILLIAM P. ATKINS, LITIGATING A PATENT INFRINGEMENT CASE—THE ITC VERSUS UNITED STATES DISTRICT COURTS 3 (2008), available at [http://www.aipla.org/Content/ContentGroups/Speaker\\_Papers/Spring\\_Meeting/200812/Atkins-paper.pdf](http://www.aipla.org/Content/ContentGroups/Speaker_Papers/Spring_Meeting/200812/Atkins-paper.pdf).



products.<sup>50</sup> Despite the fact that section 337 also prohibits the importation of articles manufactured abroad by an infringing process, the CAFC has affirmed the ITC's decision that section 271(g) does not apply in section 337 proceedings.<sup>51</sup>

Second, unlike district courts, the ITC has jurisdiction to investigate and remedy matters potentially covered by the safe harbor provision of 35 U.S.C. § 271(e)(1). This statute provides a "safe harbor" from claims of patent infringement based on activities related to the pursuit of Food and Drug Administration<sup>52</sup> approval for drugs, medical devices, or color and food additives.<sup>53</sup> In *Amgen, Inc. v. International Trade Commission*,<sup>54</sup> the CAFC determined that while the safe harbor provision applies in Section 337 actions, the ITC has jurisdiction in cases involving imported products pending federal approval, whether or not there has been a sale or contract for sale.<sup>55</sup> *Amgen* bestows upon patent holders the ability to bring an ITC action against "an alleged infringer who imports a product for federal approval and to obtain an exclusion order that would be applicable once the alleged infringer has obtained federal approval and the safe harbor provision expires."<sup>56</sup> Under Section 271(e)(1) of the Patent Act, this type of action would be unsuccessful in federal district courts.<sup>57</sup>

These advantages to complainants make an ITC investigation a more effective vehicle to enforce U.S. intellectual property rights.

### III. THE SIGNIFICANCE OF *KYOCERA*

Two of the biggest advantages of an ITC action are the broad injunctive relief afforded to the ITC by statute and the relative speed of ITC investigations.<sup>58</sup> *Kyocera* is significant because it may reduce these perceived advantages.

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50. RUSSEL E. LEVINE, THE PROS AND CONS OF PATENT LITIGATION BEFORE THE INTERNATIONAL TRADE COMMISSION (2006),

[http://www.abanet.org/litigation/committees/intellectual/roundtables/1106\\_outline.pdf](http://www.abanet.org/litigation/committees/intellectual/roundtables/1106_outline.pdf).

51. *Kinik Co. v. Int'l Trade Comm'n*, 362 F.3d 1359, 1363 (Fed. Cir. 2004).

52. 35 U.S.C. § 271(e)(1) (2006).

53. What FDA Regulates, <http://www.fda.gov/comments/regs.html> (last visited Apr. 24, 2009).

54. *Amgen Inc. v. Int'l Trade Comm'n*, 519 F.3d 1343 (Fed. Cir. 2008).

55. *Id.* at 1352.

56. KAPLAN, *supra* note 47, at 8.

57. *Id.*

58. *See supra* Part II.B.1-2.

A. *The ITC's Traditional Approach to Exclusion of Downstream Products*

Before *Kyocera*, the ITC “maintain[ed] that [it] ha[d] authority to order a[] LEO which exclude[d] all of a respondent’s articles that are determined to [be in violation], regardless of the identity of the importer.”<sup>59</sup> The ITC’s apparent authority to exclude non-respondent downstream devices derived from the Commission’s decision in the *Certain Erasable Programmable Read-Only Memories (EPROMs)* investigation, which was affirmed by the CAFC on review in *Hyundai Electronics Industrial Co. v. United States International Trade Commission*.<sup>60</sup> In *EPROMs*, the Commission identified nine factors to be considered in issuing a LEO that would include downstream devices.<sup>61</sup> The *EPROMs* test has been routinely applied by the ITC in later cases in assessing the potential impact of exclusion orders on downstream products of named respondents.<sup>62</sup> The ITC has also

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59. *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1355 (Fed. Cir. 2008).

60. *Certain Erasable Programmable Read-Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories*, USITC Pub. 2196, Inv. No. 337-TA-276, at 125 (May 1989), *aff’d sub nom.* *Hyundai Elec. Indus. Co. v. U.S. Int’l Trade Comm’n*, 899 F.2d 1204 (Fed. Cir. 1990).

61. The *EPROMs* factors are:

[1. ] the value of the infringing articles compared to the value of the downstream products in which they are incorporated, [2. ] the identity of the manufacturer of the downstream products (i.e., are the downstream products manufactured by the party found to have committed the unfair act, or by third parties), [3. ] the incremental value to complainant of the exclusion of downstream products, [4. ] the incremental detriment to respondents of [ ] exclusion [of downstream products], [5. ] the burdens imposed on third parties resulting from exclusion of downstream products, [6. ] the availability of alternative downstream products which do not contain the infringing articles, [7. ] the likelihood that imported downstream products actually contain the infringing articles and are thereby subject to exclusion, [8. ] the opportunity for evasion of an exclusion order which does not include downstream products, [and 9. ] the enforceability of an order by Customs.

*Id.* (noting that the *EPROMs* factors are nonexclusive).

62. *Certain High-Brightness Light-Emitting Diodes, and Products Containing Same*, USITC Pub. 4011, Inv. No. 337-TA-556, at 28 (June 2008) [hereinafter *High-Brightness LED*] (applying the *EPROMs* factors to permit exclusion at the first level of respondent’s downstream products); *Certain Display Controllers and Products Containing Same*, Inv. Nos. 337-TA-491, 337-TA-481 (consolidated), 2005 WL 996252, at \*28 (Feb. 2005) (using *EPROMs* factors and approving a LEO excluding downstream products including display controllers and circuit boards, LCD monitors but excluding monitors); *Certain Audio Processing Integrated Circuits, and Products Containing Same*, USITC Pub. 3991, Inv. No. 337-TA-538, at 9 (May 2008) [hereinafter *Audio Processing*] (using *EPROMs* factors to analyze and approve a LEO directed to infringing audio processing ICs and extending to downstream MP3 player containing the infringing chip).

historically utilized the *EPROMs* factors to exclude downstream products produced by third parties who are not named respondents in a Section 337 investigation.<sup>63</sup>

For example, after the determination of a violation of Section 337 in the *Certain Integrated Circuit Telecommunications Chips (IC)* investigation,<sup>64</sup> the Commission issued a LEO covering certain downstream products containing infringing chips including telephones manufactured by persons other than named respondents.<sup>65</sup> The Commission rejected the respondent's contention that by so providing, the Commission improperly turned its LEO into a GEO,<sup>66</sup> holding "[t]hat the source or manufacturer of those downstream products is not specified or limited is a factor . . . in determining whether the exclusion of those products is warranted, but does not turn the order into a general exclusion order."<sup>67</sup>

In the *IC* investigation, the ITC determined that a downstream exclusion order was necessary to provide effective relief since the accused products were generally imported by parties other than the named respondent.<sup>68</sup> The Commission's rationale was, "given that virtually all tone dialer chips are imported into the United States already installed in telephones, it would be inequitable to deprive [complainant SGS-Thompson] of relief merely because it did not name all possible telephone manufacturers as respondents."<sup>69</sup>

### B. *Kyocera Changed the Scope of ITC Remedies*

The *IC* investigation and other similar cases illustrate the significant attraction that a downstream exclusion order can have for a patent holder. In the *IC* investigation, the patentee obtained a LEO that prohibited the importation into the United States of products from parties that never appeared in the ITC investigation. This would not

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63. *E.g., Broadcom Decision, supra* note 2, at 44-45; *High-Brightness LED, supra* note 62, at 30; *Audio Processing, supra* note 62, at 9.

64. *IC Decision, supra* note 28, at 1, 19, 21.

65. *Id.* at 32.

66. *Id.* at 26. Respondents Hualon Microelectronics Corp. and United Microelectronics Corp. argued that exclusion of downstream products manufactured by third parties was a de facto GEO with respect to the excluded products. *Id.*

67. *Id.*

68. *Id.* at 28.

69. *Id.*

have been possible in a district court.<sup>70</sup> *Kyocera* is significant because it makes obtaining such an exclusion order much more difficult.

### 1. The history of *Kyocera*

On June 21, 2005, Broadcom Corporation (Broadcom) filed a complaint with the ITC.<sup>71</sup> Broadcom alleged that Qualcomm Incorporated (Qualcomm) infringed several of Broadcom's patents covering chips that "improve device power management and network integrity and efficiency."<sup>72</sup> Qualcomm was the only respondent named in the suit.<sup>73</sup> Broadcom sought a LEO that would cover both the subject chips as well as downstream product wireless handsets that incorporated the infringing chips.<sup>74</sup> Specifically, Broadcom asked the ITC to issue a LEO barring the importation into the United States of Qualcomm "baseband processor chips and chipsets, transmitter and receiver (radio) chips, power control chips, and products containing same, including cellular telephone handsets by reason of infringement of certain [Broadcom U.S. patents]."<sup>75</sup> Importantly, Broadcom did not seek a GEO.<sup>76</sup>

On October 19, 2006, the ALJ issued his Initial Determination finding infringement.<sup>77</sup> The ALJ recommended issuance of a LEO that would exclude Qualcomm's infringing chips, but did not recommend the exclusion of downstream products<sup>78</sup> such as handsets incorporating the Qualcomm chips made by manufacturers not parties to the investigation.<sup>79</sup> The ALJ believed that Broadcom had made a tactical decision in naming only Qualcomm as a respondent, and that exclusion of downstream products was not necessary for Broadcom to

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70. Injunctions granted by a district court only bind parties to the litigation, officers, agents, employees, and attorneys of those agents, and others who actively participate in concert with parties to the litigation. FED. R. CIV. P. 65(d)(2).

71. *Broadcom Decision*, *supra* note 2, at \*5.

72. Brian Busey & John L. Kolakowski, *Federal Circuit Limits ITC's Authority to Issue Downstream Exclusion Orders*, MORRISON FORESTER, Apr. 20, 2009, <http://www.mofo.com/news/updates/files/14618.htm>.

73. *Broadcom Decision*, *supra* note 2, at \*7.

74. *Id.* Broadcom argued that a remedy excluding cellular telephone handsets from entry except those that feature a full QWERTY-style keyboard was appropriate. *Id.* at \*44.

75. *Id.* at \*6-7.

76. *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1357 (Fed. Cir. 2008).

77. *Broadcom Decision*, *supra* note 2, at \*9.

78. *Id.*

79. *Id.*

have “complete and effective relief,” considering the manner in which Broadcom framed its complaint.<sup>80</sup>

The central issue in the Commission’s review of the Qualcomm ITC investigation was whether or not the LEO should include downstream products.<sup>81</sup> The Commission took the position that it had discretionary power to issue a LEO that covers “downstream products” incorporating the infringing articles as components.<sup>82</sup> In making this determination, the Commission applied the so-called “*EPROMs* factors,” of which the Federal Circuit appeared to have previously approved.<sup>83</sup>

On June 7, 2007, the Commission, despite strong oppositions from Qualcomm and the Intervenor<sup>84</sup> against an order excluding downstream products,<sup>85</sup> affirmed the ALJ’s infringement ruling and issued a LEO excluding both (1) Qualcomm’s infringing articles (baseband processor chips programmed to enable the power saving features) and (2) downstream products (handheld wireless devices that contained such Qualcomm chips).<sup>86</sup> The Commission exempted from the exclusion order models of handheld devices that had been imported for sale before the date of the order.<sup>87</sup> The Commission believed that the “grandfathering” exemption represented a compromise that would ameliorate the decision’s impact on the public and the wireless communication industry.<sup>88</sup> Thus, non-respondent manufacturers of wireless devices were subject to the LEO since they purchased and incorporated the chips in question into their products outside the United States and then imported them back into the country for sale.<sup>89</sup>

80. *Id.* at \*63-64.

81. *Id.* at \*44.

82. *Broadcom Decision*, *supra* note 2, at \*44.

83. *See supra* notes 60-61 and accompanying text.

84. According to 19 C.F.R. § 210.19 (2008), a non-respondent can file a motion to intervene in an ITC investigation as a respondent. “On February 15, 2006, the ALJ issued an Initial Determination . . . granting the motions of Verizon, LGEMU, Kyocera, Motorola, Sprint, and Samsung . . . to the extent that they were permitted to intervene for the limited purpose of presenting evidence related to remedy and bonding.” *Broadcom Decision*, *supra* note 2, at \*8.

85. *Broadcom Decision*, *supra* note 2, at \*30.

86. *Id.* at \*5-6.

87. *Id.* at \*6.

88. *Id.* at \*243.

89. *Case Law Review: Limited Exclusion Orders Granted by the ITC Do Not Apply to Downstream Manufactures Not Named As Respondents to An ITC Complaint*, Kyocera Wireless Corp. v. International Trade Commission (*Fed Cir.* 2008), IP STRATEGIES (Vedder Price P.C., Chicago, Ill.), Nov. 2008, at 7, available at [http://www.vedderprice.com/docs/pub/10a07943-cd74-4881-949d-89880804cb6b\\_document.pdf](http://www.vedderprice.com/docs/pub/10a07943-cd74-4881-949d-89880804cb6b_document.pdf).

## 2. The CAFC's decision in *Kyocera*

The *Kyocera* decision marked a sea change in the scope of ITC remedies. In *Kyocera*, the Federal Circuit expressly held that “the ITC ha[d] no statutory authority to issue a[] LEO against downstream products of non-respondents.”<sup>90</sup> This is in sharp and deliberate contrast to the ITC's perceived authority to “exclude[] all of a respondent's articles that are determined to violate, regardless of the identity of the importer.”<sup>91</sup>

The CAFC reached this conclusion by considering the statute underlying the ITC's jurisdiction<sup>92</sup>:

### (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. The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.<sup>93</sup>

The CAFC then applied the *Chevron* standards governing statutory interpretation.<sup>94</sup> *Chevron* requires that “a reviewing court must first

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90. *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1345 (Fed. Cir. 2008).

91. *Id.* at 1355.

92. *Id.* (“The ITC is a creature of statute, and must find authority for its actions in its enabling statute.”).

93. 19 U.S.C. § 1337(d) (2006).

ask ‘whether Congress has directly spoken to the precise question at issue.’”<sup>95</sup> After reviewing the statute, the CAFC determined that Congress had spoken:

According to the plain language of the statute, Congress created two distinct forms of exclusion orders: one limited and one general. The default exclusion remedy “shall be limited to persons determined by the Commission to be violating this section.” . . . Thus, on its face, the statutory context limits LEOs to named respondents that the Commission finds in violation of Section 337.<sup>96</sup>

Thus, “[i]f a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO by satisfying the heightened burdens of § 1337(d)(2)(A) and (B).<sup>97</sup>

Once the CAFC determined that a LEO was limited to named respondents,<sup>98</sup> it then found that “[t]he ITC cannot expand its authority from ‘persons determined by the Commission to be violating’ to ‘*articles manufactured* by persons determined by the Commission to be violating.’”<sup>99</sup> If a LEO could exclude *articles* manufactured by non-respondents, the CAFC stated that the “imported by any *person*” clauses of §337(d)(1) and §337(e)(1) would be rendered superfluous.<sup>100</sup>

### 3. The CAFC rejects the ITC’s pre-*Kyocera* reasoning

Prior to *Kyocera*, the ITC considered the so-called *EPROMs* factors in determining whether a LEO would exclude non-respondent downstream devices.<sup>101</sup> Since the CAFC had affirmed *EPROMs* on appeal, this appeared a reasonable course for the ITC to take.<sup>102</sup> The CAFC explicitly rejected this approach in *Kyocera*.

The CAFC sought to harmonize its decisions by stating that its earlier application of the *EPROMs* factors in *Hyundai*<sup>103</sup> was directed to downstream products of the named respondent and did not address whether the ITC has statutory authority to issue LEOs to exclude

94. *Chevron U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

95. *Kyocera*, 545 F.3d at 1355.

96. *Id.* at 1356.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. For the *EPROMs* factors, see *supra*, note 61.

102. *Broadcom Decision*, *supra* note 2, at \*71-72.

103. *Hyundai Elec. Indus. v. U.S. Int’l Trade Comm’n*, 899 F.2d 1204 (Fed.Cir.1990).

downstream products of third parties.<sup>104</sup> That was distinguishable from the *Kyocera* investigation, where the downstream products were from non-respondent third parties.<sup>105</sup>

The CAFC also expressly rejected the ITC's justification for downstream exclusion orders. As explained above, the ITC determined that a downstream exclusion order was appropriate in the *IC* investigation because "virtually all tone dialer chips are imported into the United States already installed in telephones, [and] it would be inequitable to deprive [complainant SGS-Thompson] of relief merely because it did not name all possible telephone manufacturers as respondents."<sup>106</sup> In *Kyocera*, however, the CAFC stated that "virtually all putatively infringing articles sold for importation or imported into the United States [were] contained in handsets manufactured by downstream third parties,"<sup>107</sup> and these products are outside the scope of the LEO. Unlike the ITC, the CAFC faulted Broadcom for its decision not to name known importers as respondents in the investigation: "Broadcom appears to have made the strategic decision to not name downstream wireless device manufacturers and to not request the ITC to enter a GEO. . . . Broadcom does not stand in the best position to attempt to blur the clear line drawn by the statute between LEOs and GEOs."<sup>108</sup> By reducing the scope of the LEO to Qualcomm chips (and excluding downstream devices), the CAFC essentially eliminated Broadcom's remedy.

#### IV. POSSIBLE CHANGES AFTER *KYOCERA*

The CAFC's decision in *Kyocera* reaffirms the availability of permanent injunctive relief against third party downstream products under Section 337. However, exclusion of third party downstream products may be obtained only through issuance of a GEO by satisfying the "heightened requirements" of 337(d)(2)(A) or (B).<sup>109</sup> The ITC's historic practice of extending downstream relief through a LEO to the products of non-respondents that incorporate infringing articles was fully rejected.<sup>110</sup> These changes will significantly impact

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104. *Kyocera*, 545 F.3d at 1358.

105. *Id.*

106. *IC Decision*, *supra* note 28, at 28.

107. *Kyocera*, 545 F.3d at 1354.

108. *Id.* at 1357.

109. *Id.* at 1358.

110. *IC Decision*, *supra* note 28, at 28.



a patent holder's decision to assert its patents before the district court, the ITC, or both.

As set forth above, one of the significant advantages that the ITC offered a patent holder was the ability to obtain injunctive relief against non-parties.<sup>111</sup> In a post-*Kyocera* world, a patentee faces a harder choice. When infringing articles are imported as downstream products by a large number of known parties, a complainant may (1) name multiple parties as respondents in the Section 337 investigation to obtain the broadest relief; (2) seek a GEO; or (3) forego exclusion of downstream products. None of these options will be attractive to a patent holder.

*A. A Complainant May Be Reluctant to Name Multiple Respondents*

A complainant may be reluctant to name a large number of respondents for a variety of reasons. For instance, multiple respondents may increase the duration of the investigation (thus reducing the attraction of a quick result). Consider, for instance, the situation where a party manufactures an allegedly infringing component outside of the United States and sells it to a dozen manufacturers that integrate the component into their devices. If those devices are then imported into the United States, the patent holder may be required to name each of the dozen manufacturers as respondents because each manufacturer imports the accused devices. It seems likely that the ITC would consider such an investigation significantly more complicated (and, thus, provide a longer target date) than one where the complainant named a single component manufacturer.

One practitioner has also pointed out that “[i]n many cases[,] the downstream manufacturer or distributor may be an actual or potential customer of the complainant that the complainant would not ordinarily wish to sue.”<sup>112</sup> A patent holder will be reluctant to sue his or her own customers for obvious business reasons. In the above example, the complainant would have to name the known importers to obtain relief through a LEO.<sup>113</sup>

Finally, multiple respondents may be able to cooperate and, thus, reduce each of their own costs while increasing complainant's litigation expenses. For instance, respondents might share the cost of

111. See *Supra* Part II.B.1.

112. Busey & Kolakowski, *supra* note 72.

113. *Id.*

an invalidity defense while the complainant would still have to expend resources to prove that each respondent infringes.

*B. A GEO Requires Higher Burden of Proof*

Pursuant to statute, the ITC “shall” issue a LEO absent a compelling reason otherwise.<sup>114</sup> Before *Kyocera*, the ITC issued LEOs that could exclude non-party downstream devices if warranted after a consideration of the *EPROMs* factors. Now, such relief can only be obtained through a GEO. As the CAFC notes, there are “heightened requirements” that must be satisfied to obtain a GEO.<sup>115</sup>

1. The heightened standard for a GEO

A GEO may be issued only if the ITC determines that it “is necessary to prevent circumvention” of a LEO; or “there is a pattern of violation of [Section 337] and it is difficult to identify the source of the infringing products.”<sup>116</sup>

The ITC articulated the test for a GEO in the *Spray Pump* investigation.<sup>117</sup> The ITC has historically issued GEOs only upon a showing of “(1) a widespread pattern of unauthorized use of its patented invention and (2) certain business conditions from which one would reasonably infer that foreign manufacturers other than the respondents to the investigation may attempt to enter the U.S. market with infringing articles.”<sup>118</sup> The Commission has also noted that the criteria of section 337(d)(2) “do not differ significantly” from the *Spray Pumps* factors.<sup>119</sup>

In *Spray Pumps*, the Commission held that the types of evidence that might prove a “widespread pattern of unauthorized use of the patented invention” included:

114. 19 U.S.C. § 1337(d) (2006).

115. *Kyocera*, 545 F.3d at 1358.

116. 19 U.S.C. §§ 1337 (d)(2)(A)-(B) (2006).

117. *Certain Airless Paint Spray Pumps and Components Thereof*, 216 U.S.P.Q. 465, 473 (Nov. 1981) [*hereinafter Spray Pumps Decision*]. See also *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Articles Containing Same*, USITC Pub. 2964, Inv. No. 337-TA-372, at 5 (May 1996) [*hereinafter Neodymium Decision*].

118. *Certain Automotive Parts*, USITC Pub. 4012, Inv. No. 337-TA-557, at 10 (June 2008).

119. *Neodymium Decision*, *supra* note 117, at 5. See also *Certain Digital Multimeters, and Products with Multimeter Functionality*, USITC Inv. No. 337-TA-588, 2008 ITC LEXIS 139, at \*5 (Jan. 2008) (Order No. 22) (“The conditions set forth in subsection (d)(2) are referred to generally as the “*Spray Pumps*” factors, after the Section 337 investigation that established them prior to their 1988 codification into that subsection.”).

(1) a Commission determination of unauthorized importation into the United States of infringing articles by numerous foreign manufacturers; or (2) the pendency of foreign infringement suits based upon foreign patents which correspond to the domestic patent in issue; [or] (3) other evidence which demonstrates a history of unauthorized foreign use of the patented invention.<sup>120</sup>

The evidence which might be used to prove the “business conditions” included:

(1) an established demand for the patented product in the U.S. market and conditions of the world market; (2) the availability of marketing and distribution networks in the United States for potential foreign manufacturers; (3) the cost to foreign entrepreneurs of building a facility capable of producing the patented article; (4) the number of foreign manufacturers whose facilities could be retooled to produce the patented articles; or (5) the cost to foreign manufacturers of retooling their facility to produce the patented articles.<sup>121</sup>

## 2. GEOs are historically rare

During the ten years between January 1, 1995 and December 31, 2004, there were 158 complaints filed alleging unfair trade practices.<sup>122</sup> Of those, the ITC issued a total of eleven GEOs.<sup>123</sup> While this is likely due, in part, to the difficulty in obtaining a GEO, it may also be a result of the fact that, pre-*Kyocera*, a complainant could obtain essentially similar relief through a LEO that was easier to acquire and that also excluded downstream devices.

Now that the CAFC has limited the scope of LEOs, it is logical that more complainants will seek GEOs. This will complicate and perhaps further slow ITC investigations.

## 4. Additional GEOs may increase the likelihood of Presidential review

If the ITC determines that there is a violation of Section 337, the President of the United States has 60 days to review the decision.<sup>124</sup> Since the ITC is an administrative court under the executive branch of

120. *Spray Pumps Decision*, *supra* note 117, at 473.

121. *Id.*

122. Gary M. Hnath, *General Exclusion Orders Under Section 337*, 25 NW. J. INT'L L. & BUS. 349, 356 (2005).

123. *Id.*

124. 19 U.S.C. § 1337(j)(2) (2006).

the government, the President has the right to disapprove of the decision “for policy reasons”<sup>125</sup>:

There is no requirement in Section 337 or in the legislative history that the President articulate or detail the reasons for his disapproval of a Commission determination. It is sufficient that the President disapprove the determination for *his* policy reasons. “Policy” is a broad concept which includes, but is not limited to: “impact on United States foreign relations, economic and political . . . [and] 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.”<sup>126</sup>

Such presidential disapproval renders ITC determinations void and is not appealable to any court.<sup>127</sup>

Presidential disapproval of an ITC determination of a Section 337 violation has been rare. The President has exercised his right to disapprove in only five ITC Section 337 determinations prior to *Kyocera*.<sup>128</sup> To the extent that *Kyocera* encourages more complainants to seek GEOs (and, consequently leads to the ITC issuing more GEOs), it will probably increase the chance of the President weighing in and disapproving of the remedy. Indeed, the President has disapproved of the exclusion of non-respondent downstream products.<sup>129</sup>

Furthermore, a broad exclusion order may not be necessary to protect intellectual property owners.<sup>130</sup> In these circumstances, “[a]n exclusion order directed only to the respondent’s products,” or a tailored drafted remedy order “would appear to be entirely justified.”<sup>131</sup>

125. *Id.*

126. *Duracell, Inc. v. U.S. Int’l Trade Comm’n*, 778 F.2d 1578, 1581-82 (Fed. Cir. 1985) (quoting S. REP. NO. 93-1298 (1974), as reprinted in 1974 U.S.C.C.A.N. 7186, 7331).

127. *Id.* at 1581.

128. Those decisions are: *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, 52 Fed. Reg. 46,011 (Dec. 3, 1987); *Certain Alkaline Batteries*, 50 Fed. Reg. 1655 (Jan. 11, 1985); *Certain Molded-In Sandwich Panel Inserts and Methods for their Installation*, 47 Fed. Reg. 29,919 (July 9, 1982); *Certain Multi-Ply Headboxes*, 46 Fed. Reg. 32,361 (June 22, 1981); *Certain Welded Stainless Steel Pipe and Tube*, 43 Fed. Reg. 17,789 (Apr. 26, 1978). For a general overview of the presidential review process, see Robert T. Edell, *The International Trade Commission: Final Determinations, Presidential Review, and Appeal*, 10 AM. PAT. L. ASS’N Q.J. 160, 165-66 (1982).

129. *See, e.g., Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, 52 Fed. Reg. at 46,012.

130. *Certain Multi-Ply Headboxes*, 46 Fed. Reg. at 32,361.

131. *Id.*

Indeed, the very breadth of a GEO may lead to additional instances where the President rejects the ITC's determination. For instance, in *Welded Stainless Steel Pipe and Tube*, the ITC's remedy was disapproved by the President on the basis of four "policy considerations": (1) detrimental effects to the "national economic interest;" (2) "international economic relations;" (3) a "need to avoid duplication and conflicts in administration of [] unfair trade practice laws;" and (4) "probable lack of any significant benefit" to U.S. consumers or producers.<sup>132</sup> It is not difficult to see how such policy considerations make it easy for the President to block what might be perceived as an overly broad GEO.

At the very least, the prospect of additional presidential review makes an ITC determination less certain. This uncertainty may become an additional factor in a patent holder's decision whether or not to assert patent rights before the ITC.

#### *B. The ITC May Become Less Attractive To Certain Complainants*

The *Kyocera* decision is not relevant to all potential complainants. For instance, a LEO can still provide effective relief if the named respondents are the primary source of importation. Otherwise, the complainant may be able to obtain a GEO that will exclude non-party downstream products or may elect to name additional respondents.

If a complainant is unwilling or unable to either name all of the importers or meet the "heightened standard" required for a GEO, the complainant will not be able to exclude downstream products of non-respondents. Such a complainant may believe that a LEO is an insufficient remedy and may elect to pursue its claims before a federal district court that can also award monetary damages.

Moreover, one of the largest perceived advantages of the ITC is its speed relative to that of a typical district court. If this speed is reduced—either because the ITC requires additional time to consider the more complicated issues of a GEO or because complainants name large numbers of respondents—district courts may become relatively more attractive options.

It is possible that *Kyocera* has already caused decreases in ITC investigations. Between the October 14, 2008 *Kyocera* decision and December 31, 2008, there were 8 Section 337 complaints filed before

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132. *Certain Welded Stainless Steel Pipe and Tubes*, 43 Fed. Reg. at 17,789-90.

the ITC.<sup>133</sup> During that same period in 2007, there were 14 complaints—a 43% decrease.<sup>134</sup> Note that this is hardly a statistically significant sample, and in the same period in 2005 and 2006, there were only 6 and 3 complaints filed, respectively.<sup>135</sup>

The decline in ITC popularity is hardly a foregone conclusion. For instance, since *Kyocera* leads complainants to seek and receive more GEOs than before, it may actually increase the perceived advantages of the ITC. Similarly, if some number of complainants elect not to pursue ITC investigations, the resulting reduction in case load may cause the remaining investigations to proceed even faster than before.

Further, it is important to note that *Kyocera* rests entirely on the CAFC's interpretation of the statutory language of § 337. Were Congress to amend that statute, it could have the effect of nullifying *Kyocera*.

#### IV. CONCLUSION

The Commission was presented with a new enforcement dilemma after CAFC's decision in *Kyocera*. The strict statutory interpretation marks a dramatic shift in ITC jurisprudence on the scope of LEOs, which were historically drafted to encompass particular infringing devices irrespective of whether the importer was named as a respondent. Given the CAFC's rejection of this practice, the ITC will be forced to rethink its remedial framework.

After *Kyocera*, complainants can no longer assume that the ITC will grant a LEO covering downstream products of third parties who are not named as respondents in the Section 337 proceedings. Thus, a patent holder must either (1) name all known respondents, (2) seek a GEO, or (3) forego such relief. While this presumably will have an impact on the decision whether to assert a patent before the ITC or a district court, the precise effect of *Kyocera* remain to be seen.

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133. Recent Section 337 Complaints Filed with USITC, <http://info.usitc.gov/sec/dockets.nsf/337?OpenView> (last visited Apr. 24, 2009).

134. USITC-EDIS Home, <https://edis.usitc.gov/edis3-external/app> (instructions on how to conduct search).

135. *Id.*

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