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Expert Q&A on AI and Section 337 Investigations

by Practical Law Intellectual Property & Technology

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An expert Q&A with Eric J. Fues and Abhinav Garg of Finnegan, Henderson, Farabow, Garrett & Dunner, LLP on the potential for litigation involving AI-related technologies before the US International Trade Commission (ITC) under Section 337 of the Tariff Act (19 U.S.C. § 1337). The Q&A discusses the background for potential litigation, including the ITC's experience with new technologies, outlines the types of AI-related technologies that may become subjects of Section 337 investigations, and assesses potential obstacles to the ITC's Section 337 authority over products involving AI-related technologies, including the Federal Circuit decisions in *ClearCorrect Operating, LLC v. Int'l Trade Comm'n* and *Suprema, Inc. v. Int'l Trade Comm'n*.

To obtain relief under Section 337 of the Tariff Act (19 U.S.C. § 1337), the US International Trade Commission (ITC) requires proof that imported products infringe a valid US intellectual property (IP) right. In investigations involving alleged infringement of federal IP rights—such as patents, copyrights, and trademarks—this typically involves applying federal IP law to establish infringement.

However, software-related cases raise unique jurisdictional issues, because Section 337 focuses on imported goods. For example, software transmitted electronically into the US may fall outside the ITC's Section 337 authority, while software added in the US to an imported product may be sufficient to establish jurisdiction. These scenarios have resulted in challenges to ITC jurisdiction that are likely to recur with AI-related technologies.

For a deeper dive into this topic, Practical Law discussed the future of AI litigation before the ITC with Eric J. Fues, partner, and Abhinav Garg, associate, at the IP law of firm of Finnegan LLP. Eric Fues has extensive experience practicing before the Commission in investigations related to a variety of products and has led the ITC Trial Lawyers Association. Abhinav Garg also litigates at the ITC and has published articles related to the jurisdictional peculiarities of the agency.

For a collection of Practical Law resources on Section 337 investigations, see ITC Section 337 Investigations Toolkit.

What led you to begin thinking about potential litigation at the ITC involving artificial intelligence?

Artificial intelligence (AI) is developing at an extraordinary pace and is already reshaping the global economy. US companies are investing heavily in AI research and development, and they will undoubtedly use all available means to protect IP rights arising from these investments. One tool for stopping competitor imports is the ITC's Section 337 authority, which allows the Commission to block the importation of infringing articles into the US.

What role does the ITC play in protecting companies from violations of their US IP rights?

The ITC is a federal agency that investigates and adjudicates complaints brought by private parties concerning unfair import practices under Section 337.

Most Section 337 investigations involve allegations of infringement of federal IP rights—such as patents, trademarks, and copyrights—but the statute also covers some non-federal IP rights violations, such as trade secret misappropriation.

If a complainant proves a Section 337 violation—either through dispositive motion practice or after a hearing before the presiding administrative law judge (ALJ)—the ITC can issue powerful remedies, including exclusion and cease-and-desist orders. These remedies can block infringing articles from entering the US market and prevent their importation, sale, and distribution, effectively shutting down access to the entire US market for those articles.

What are the elements of a Section 337 violation in an investigation involving federal IP rights?

Three things: (1) an imported article or sale for importation; (2) infringement under governing US IP law; and (3) a domestic industry that meets both economic and technical criteria (see Practice Notes, ITC Section 337 Non-Patent Investigations: Overview: Claim Elements and ITC Section 337 Investigations: The Domestic Industry Requirement: Domestic Industry Requirement for Statutory Causes of Action).

What is required to meet these elements?

Importation, Sale for Importation, or Post-importation Sale of Infringing Articles

To determine whether there has been an importation or sale for importation, the Commission examines whether an accused article has entered the US. Although the statute does not define importation, US trade practice generally interprets it as:

- Shipping merchandise into US customs territory (for non-vessel shipments).
- Arriving by vessel at a US port with intent to immediately unload merchandise.

(19 C.F.R. § 101.1 (defining date of importation).)

Even if the article is not actually imported, a "sale for importation" is sufficient under Section 337. A sale for importation occurs when an entity sells an article with the intent to import into the US or has actual or constructive knowledge that the article will be imported into the US. A "sale for importation" does not require actual importation. (See *Enercon GmbH v. Int'l Trade Comm'n*, 151 F.3d 1376 (Fed. Cir. 1998); *Certain Carbon and Alloy Steel Prods.*, No. 337-TA-1002, 2017 WL 5167413 at *13-14 (Oct. 2, 2017) (Order No. 103).)

The Commission interprets the term "article" very broadly to cover products:

- Of any origin, whether US or foreign (see *Certain Sputtered Carbon Coated Comput. Disks*, No. 337-TA-350, 1993 WL 854336, at *5 (Nov. 1, 1993) (Comm'n Op.) ("The statute, by its terms, does not limit coverage to articles of foreign manufacture" and can cover reimportation of articles into the US)).
- Of any quantity (see *Certain Chem. Mech. Planarization Slurries*, No. 337-TA-1204, 2022 WL 100271, at *5 (Jan. 6, 2022) (Comm'n Op.) ("Importation of even a single infringing article is sufficient to support an action under section 337 . . . ."); *Certain Trolley Wheel Assemblies*, No. 337-TA-161, 0084 WL 951859, at *4 (Nov. 1, 1984) (Comm'n Op.) (single sample assembly)).
- Entering the US for any purpose, including products used for:
  - promotional samples (see *Certain Abrasive Prods.*, No. 337-TA-449, 2002 WL 480986, at *49 (Feb. 8, 2002) (ID));
  - trade show displays (see *Certain Acesulfame Potassium and Blends*, No 337-TA-403, 1999 WL 176207, at *80 (Jan. 15, 1999) (ID));
  - clinical trials (see *Certain Recombinantly Produced Human Growth Hormones*, No. 337-TA-358, 1994 WL 931690, at *2-3 (Jan. 26, 1994) (ID) ("Human Growth Hormones"); and
  - basic research (see *Human Growth Hormones*, 1994 WL 931690, at *2-3).

For more information, see Practice Note, ITC Section 337 Investigations: The Importation Requirement.

Infringement of a US IP Right

The Commission separately evaluates importation and infringement despite the fact that they are

closely tied to each other by the statute's delineation of unlawful activities in "the importation . . . of articles that infringe" a US IP right.

An infringing article is determined by the substantive federal law that governs the alleged IP infringement, including patent infringement (see *Certain Carbon and Alloy Steel Prods.*, No. 337-TA-1002, 2018 WL 7572059, at *7 (Mar. 19, 2018) (Comm'n. Op.)). This includes the principles of literal and doctrine of equivalents infringement, and the law concerning direct and indirect infringement (see, for example, *Certain Power Converter Modules*, No. 337-TA-1370, 2025 WL 857695, at *7, 13-14 (Feb. 26, 2025) (Comm'n Op.)).

Existence or Emergence of a Domestic Industry

Unique to the ITC's authority under Section 337, the complainant must satisfy the economic and technical prongs of the domestic industry element. The economic prong is satisfied by showing one or more of the following:

- Significant US investment in plant and equipment.
- Significant US employment of labor or capital.
- Substantial US investment in the IP's exploitation, including engineering, research and development, or licensing.

(19 U.S.C. § 1337(a)(3)(A) to (C).)

There is no rigid formula for satisfying the economic prong of the domestic industry element. Rather, the courts take a holistic view of the facts. For example, courts consider factors such as the size of the complainant entity, the size of the market for the articles in question, the size of the investments in question relative to the entity's total domestic investment, and the entity's investment to revenue ratio. (See *Wuhan Healthgen Biotechnology Corp. v. Int'l Trade Comm'n*, 127 F.4th 1334, 1338 (Fed. Cir. 2025); *Lelo Inc. v. Int'l Trade Comm'n*, 786 F.3d 879, 883-85 (Fed. Cir. 2015)).

The technical prong is satisfied when the complainant's investments are "with respect to the articles protected by the" IP right (19 U.S.C. § 1337(a)(3)(A) to (C)). In practical terms, the investments must relate to an article that actually practices the IP right. For example, if the IP right is a patent, the technical prong analysis closely resembles an infringement analysis: that is, an assessment of whether the article practices every limitation of at least one claim of the asserted patent.

For more information, see Practice Note, ITC Section 337 Investigations: The Domestic Industry Requirement.

What is the ITC's history with Section 337 litigation over new technologies?

The ITC has consistently been at the forefront of technology when it comes to the types of products it investigates under Section 337. This trend stems from the fact that when a US patent holder experiences strong market demand for a new product, competitors often move quickly to import similar products to take advantage of the large US market. Patent holders frequently turn to the ITC because of its strong exclusionary remedies and its expedited process—investigations typically proceeding from institution to hearing within nine months and through Commission review within 16 months.

The ITC has handled disputes involving some of the most significant and impactful technologies for US consumers and companies—from memory chips and batteries in the 1980s to smart phones and medical devices in the 2010s.

This trend has continued with recent:

- Patent-based investigations, such as:
  - *Certain Light-Based Physiological Measurement Devices*, No. 337-TA-1276, 2023 WL 8109999 (Nov. 14, 2023) (Comm'n Op.) (involving the Apple watch).
  - *Certain Robotic Floor Cleaning Devices*, No. 337-TA-1252, 2023 WL 3033552 (Apr. 13, 2023) (Comm'n Op.) (involving SharkNinja robotic vacuums and mops); and
  - *Certain Tobacco Heating Articles*, No. 337-TA-1199, 2021 WL 4947427 (Oct. 19, 2021) (Comm'n Op.) (involving R.J. Reynolds and Philip Morris e-cigarettes).
- Trade secret-based investigations, such as:
  - *Certain Lithium Ion Batteries*, No. 337-TA-1159, 2021 WL 856373 (Mar. 4, 2021) (Comm'n Op.) (filed by EV battery maker LG Chem); and
  - *Certain Botulinum Toxin Prods.*, No. 337-TA-1145 2021 WL 141507 (Jan. 13, 2021) (Comm'n Op.) (filed by makers of Botox).

What areas of AI technology do you see as potentially leading to litigation at the ITC and why?

Given the explosion in market interest, AI technologies are poised to be aggressively challenged at the ITC. These emerging technologies can be broken down into four key areas:

- AI training data and algorithms, which is the digital information used to train AI systems to recognize patterns or make decisions.
- Computer hardware for AI systems, such as specialized chips and devices that power AI functionality.
- Software utilizing AI, such as applications that incorporate AI capabilities.
- AI-first products, such as robots using computer vision in product assembly operations, whose primary functionality relies on AI technologies.

There is a high likelihood of future litigation at the ITC over AI technology, especially when considering what has happened in the past. For example, it is reasonable to expect that key industry players, including some that have been frequent Section 337 litigants, such as Apple, Google, and Microsoft, will become involved in AI-related investigations.

For information on patent issues concerning AI, see Practice Note, AI: Patentability Considerations.

For information on patent and other IP protections for software generally, see Practice Note, Legal Protection of Software.

What trends have you observed in 2025 that might lead to more ITC litigation?

In 2024, we predicted that AI-first products would serve as the linchpin for ITC litigation by providing the necessary jurisdictional hook: the "material things" needed to satisfy the statutory requirement for "articles" under *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283 (Fed. Cir. 2015).

In Q3 of 2025, we are seeing a wave of AI-first products entering the consumer electronics market, including:

- Wearables, such as smart watches, smart rings, and smart glasses, which are promising to provide AI-powered sports coaching, live navigation, and health analytics.
- Smart phones with embedded AI chips, which are being released with their AI features—such as generative writing tools, photo editing, and voice assistants—and are front and center in product launches.
- Laptops shipped with AI chips and AI software built in.
- Smart TVs with an "AI Remote," AI software, and AI-based resolution and audio upscaling.
- Cars with upgraded interfaces, allowing for more human interaction with voice controls.

Each of these product areas will likely face increased competition as market adoption increases.

At least five Section 337 complaints accusing AI-first products have been filed in Q3 2025, such as:

- AI-chips used in applications such as autonomous vehicles (*Certain Integrated Circuits*, Inv. No. 337-TA-1450; *Certain Foreign-Fabricated Semiconductor Devices*, Inv. No. 337-TA-1443).
- Electroencephalogram (EEG) devices with AI algorithms (*Certain Wearable Electroencephalogram Devices and Systems*, Inv. No. 337-TA-1458).
- WI-FI routers utilizing AI to intelligently monitor network usage (*Certain Wi-Fi Routers, Wi-Fi Devices, Mesh Wi-Fi Network Devices and Components Thereof*, Inv. No. 337-TA-1454).
- Data connectivity wiring for AI backend networks (*Certain Active Electrical Cables and Components Thereof*, Inv. No. 337-TA-1446).

What unique legal issues might arise from Section 337 investigations involving AI?

For computer hardware and AI-first products, unique legal issues are likely minimal. Both involve tangible, high-tech products, which are longstanding staples of Section 337 investigations. For example, computer chips, typically protected by various patents, have frequently been the subject of these investigations. Some of the biggest cases of the 1980s involved

high-profile manufacturers, such as Fujitsu and Samsung, litigating over memory chips such as DRAMs and SRAMs. While semiconductor cases have fluctuated over time, the ITC's Section 337 docket almost always includes active investigations involving these products. Examples of investigations litigated in 2025 involving semiconductor products include: *Certain Integrated Circuits*, Inv. No. 337-TA-1450, *Certain Foreign-Fabricated Semiconductor Devices*, Inv. No. 337-TA-1443, and *Certain Semiconductor Devices*, Inv. No. 337-TA-1414.

On the other hand, the intangible nature of AI training data and software that leverages AI may lead to challenges to the ITC's jurisdiction.

What are the potential jurisdictional issues regarding AI training data?

The primary challenge for a complainant seeking to bring a complaint involving an intangible product such as AI training data stems from the Federal Circuit's decision in *ClearCorrect*.

In that case, the Federal Circuit held that the ITC lacks jurisdiction over digital imports because they are not "articles" under Section 337. By limiting the ITC's authority over digital goods, the *ClearCorrect* decision is likely to make any complaint concerning digital AI training data subject to jurisdictional challenge.

What were the details of the *ClearCorrect* case?

The *ClearCorrect* decision was an appeal from an ITC violation finding in *Certain Digital Models*, No. 337-TA-833, 2014 WL 12935963 (Apr. 9, 2014) (Comm'n Op.)). The investigation involved patent infringement allegations concerning digital 3D models of patients' teeth used to manufacture plastic teeth aligners.

ClearCorrect's US operations scanned physical models of the patient's teeth and created digital recreations, which were transmitted electronically to ClearCorrect Pakistan. There, the company created digital data models for aligning the teeth into final position and transmitted them back to the US, where they 3D-printed physical models and manufactured the aligners. Although the process combined US and overseas steps, the products accused of infringing were the digital models sent from Pakistan.

The Commission held that "articles" under Section 337 includes the electronic transmission of digital data and found a violation. On appeal, the Federal Circuit reversed, applying the two-part test outlined in *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024). The Federal Circuit held that the ITC lacked the authority to regulate ClearCorrect's importation of digital data because electronic transmissions of digital data are not "material things" and therefore not "articles" under the statute (*ClearCorrect*, 810 F.3d at 1299-1302).

The decision in *ClearCorrect* limited the ITC's authority over digital-only imports, creating significant obstacles for complainants seeking to address infringement based solely on intangible products, such as AI training data. Accordingly, complainants seeking ITC remedies for digital products should consider incorporating physical components or emphasizing hardware associations to avoid jurisdictional challenges under *ClearCorrect*.

For more information, see Legal Update, ITC Cannot Regulate Importation of Digital Data: Federal Circuit and Practice Note, ITC Section 337 Investigations: The Importation Requirement.

Despite *ClearCorrect*, how have other courts handled intangible products and their impact on US IP Rights?

An interesting area involves US copyrights. In June 2025, the Northern District of California decided that AI tools' use of copyrighted materials for training falls under the "fair use" exception (*Bartz v. Anthropic PBC*, 787 F. Supp. 3d 1007 (N.D. Cal. 2025)). Judge Alsup reasoned that training a generative AI (GAI) tool is "like any reader aspiring to be a writer," not like a copyist seeking to "replicate" the author (*Id.* at 1022). By GAI, we mean AI that generates new content—such as text, images, or audio—based on patterns learned from training data. However, the court criticized Anthropic's actions of compiling and storing pirated copies of literature and suggested that the output of GAI remains subject to copyright enforcement (*Id.* at 1033-34).

In contrast, under *ClearCorrect*, any digital transmission of GAI output that violates a copyright would fall outside the ITC's jurisdiction—even though Section 337 covers

copyright infringement. Moreover, imported physical AI-first products trained on US-copyrighted materials might evade substantive infringement analysis at the ITC under the holding of *ClearCorrect*.

For example, consider a guitar amplifier with AI software trained on hundreds of copyrighted songs to auto-compose riffs. The physical nature of the guitar amplifier would qualify as an "article" under Section 337, but the use of copyrighted material to train the auto-composing feature would likely evade liability under *Bartz*. Only if the guitar amplifier reproduced the copyrighted riffs or songs it was trained on might a Section 337 complaint be successful.

For more information on copyright issues presented by AI, see Practice Note, Generative AI and Copyright.

Could the Supreme Court's 2024 *Loper Bright* decision overruling *Chevron* call the *ClearCorrect* decision into question?

Likely not. In *Loper Bright*, the Supreme Court eliminated the doctrine known as "*Chevron* deference," effectively shifting statutory interpretation authority from agencies to federal courts. However, agency statutory interpretations remain subject to a modicum of deference, called *Skidmore* deference (see *Loper Bright Enter.*, 603 U.S. at 388 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). The Federal Circuit has also continued to respect pre-*Loper Bright* decisions as binding precedent (see *Sonos, Inc. v. Int'l Trade Comm'n*, 2024 WL 1507605, at *10 (Fed. Cir. Apr. 8, 2024)).

In *ClearCorrect*, while the Federal Circuit applied the *Chevron* framework, it reversed the ITC's interpretation of Section 337. The court relied on several contemporaneous and modern dictionary definitions of "articles;" analyzed different portions of Section 337 for consistent usage; considered the legislative history; and noted the impracticalities of "seizing" digital "articles" at the US border. (*ClearCorrect*, 810 F.3d at 1291-1302.)

Judge O'Malley's concurring opinion argued that the major questions doctrine precludes reliance on *Chevron*, opining that Congress in 1922 could not have intended "articles" to cover digital transmissions and that only Congress could expand ITC jurisdiction to cover them (*ClearCorrect*, 810 F.3d at 1302-03). A litigant would therefore face an uphill battle arguing that the case would have turned out differently absent *Chevron* deference.

Judge Newman's dissent forcefully argued that the majority had substantially weakened the rights of US IP holders by refusing to reasonably adapt the scope of Section 337 to "[t]he new technologies of the Information Age" (*ClearCorrect*, 810 F.3d. at 1304). However, given the Supreme Court's emphasis on the contemporaneous meaning of the text, such forward-looking and pragmatic arguments may not succeed in future litigation.

What are the potential jurisdictional issues regarding software using AI?

AI software that is not tied to a tangible article, such as loaded onto a physical device like a memory stick, may fall outside the ITC's Section 337 authority under *ClearCorrect*.

However, AI-software IP holders may be able to explore creative ways to pursue infringement at the ITC, such as alleging induced infringement under the Federal Circuit's en banc decision in *Suprema, Inc. v. Int'l Trade Comm'n*, even though these allegations may invite challenges to the ITC's statutory authority under the Supreme Court's *Loper Bright* decision.

What were the details of the *Suprema* case?

The Federal Circuit's *Suprema* decision arose from the ITC's investigation in *Certain Biometric Scanning Devices*, Inv. No. 337-TA-720.

Suprema, Inc., the principal respondent, made fingerprint scanners outside the US. To function, the scanners had to be connected to a computer equipped with custom-developed software. Although Suprema did not make or sell the software, it shipped a software development kit (SDK) and instruction manual enabling third parties to develop custom programs for controlling its scanners.

Suprema sold scanners to respondent Mentalix, Inc., a US company that developed custom software using Suprema's SDK to control and operate the scanners.

Cross Match Technologies, Inc., the owner of a US patent claiming a method for capturing and processing a fingerprint image, filed a complaint with the ITC. The presiding ALJ found that several of Suprema's scanners directly infringed one of the patent's method claims (claim 19) when combined with Mentalix's software (2011 WL 2458696 (Jun. 17, 2011) (ID)).

On review, the Commission agreed that:

- Mentalix directly infringed claim 19 by integrating its software with Suprema's scanners and SDK and using them in the US.
- Suprema induced infringement by willfully ignoring Mentalix's infringing activities and collaborating to import and adapt Mentalix's software to work with Suprema's scanners.

(2011 WL 8883591, at *7-8 (Nov. 10, 2011) (Comm'n Op.).)

Applying *Chevron* deference, the Federal Circuit—reversing the original panel in a 6-4 en banc decision—affirmed the Commission's decision (796 F.3d 1338 (Fed. Cir. 2015)).

Patent holders targeting imported hardware later paired with infringing software in the US may therefore still find remedies at the ITC under *Suprema*, provided there is evidence of inducement.

How could the *Suprema* case be applied to software using AI?

Suprema effectively holds that a hardware importer cannot avoid Section 337 liability by importing hardware without software and then providing instruction or assistance for downloading or developing software once the hardware enters the US: in other words, by committing infringing acts post-importation.

Consider the automotive electronics sector, where machine-learning use is increasing. Suppose a company makes camera/LiDAR modules abroad, designed for use with software enabling lane-keeping or traffic-sign recognition. After importation, the company instructs or assists its US-based dealerships in installing the software. Under *Suprema*, an owner of a US patent covering the integrated product—or conceivably the software itself—could bring a Section 337 complaint against the module maker based on induced infringement. *ClearCorrect* likely does not apply because, unlike that case, where the digital models were electronically imported, the software in this hypothetical is not.

Accordingly, complainants in analogous circumstances should consider collecting evidence showing deliberate support or instructions provided to US importers to support induced infringement claims at the ITC.

You said inducement allegations might lead to challenges to the ITC's Section 337 jurisdiction. Why?

The Supreme Court's decision in *Loper Bright*, which overruled *Chevron*, may lead to challenges to Section 337-related Federal Circuit precedents that relied on *Chevron* deference, including *Suprema*.

It is not a foregone conclusion, however, that revisiting the statute's requirement of "articles that infringe" under *Loper Bright* would result in a different outcome. While some practitioners expected *Loper Bright* to shrink federal agency authority, recent developments suggest otherwise. For example, in *Lashify, Inc. v. Int'l Trade Comm'n*, the Federal Circuit—post-*Loper Bright*—rejected the Commission's interpretation of the economic prong of the domestic industry requirement as too narrow (130 F.4th 948, 959-63 (Fed. Cir. 2025)), a view that some practitioners interpret as expanding Section 337's coverage to include a greater variety of potential complainants. The Commission has also noted that *Loper Bright*'s overruling of *Chevron* does not "automatically overrule or even call into question the Commission's interpretation of Section 337" (*Certain Movable Barrier Operator Sys.*, No. 337-TA-1118, 2024 WL 5378881, at *31-32 (Dec. 20, 2024) (Comm'n Op.)).

However, there are indications that the Commission may be considering narrowing the reach of its decision in *Biometric Scanning Devices* (the decision affirmed by the Federal Circuit in *Suprema*) by reexamining how much involvement in the importation process is sufficient for Section 337 liability (see *Certain Components for Certain Environmentally-Protected LCD Digital Displays*, No. 337-TA-1349, 2024 WL 3051877, at *4 (Jun. 17, 2024) (Notice) (posing questions for participating

litigants to address in post-hearing briefs to the Commission)). This suggests that the Commission may eventually determine that a company too far removed from importation or sale for importation may escape Section 337 liability—even if they infringe directly or indirectly after the products enter the US.