

## [The Licensing Journal, What Qualifies as Domestic Industry at the ITC Expanded Under Lashify, \(May 1, 2026\)](#)

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### **What Qualifies as Domestic Industry at the ITC Expanded Under Lashify**

**Gary Abelev and Matthew Nigriny**

**Gary Abelev** ([gabelev@Hunton.com](mailto:gabelev@Hunton.com)) is a New York-based partner in Hunton's Intellectual Property group. He represents domestic and foreign clients in patent litigation, proceedings before governmental agencies, due-diligence studies, worldwide patent portfolio management and procurement, negotiations, and licensing matters.

**Matthew Nigriny** ([mnigriny@Hunton.com](mailto:mnigriny@Hunton.com)) is an associate in Hunton's Intellectual Property practice in the firm's Richmond office. With more than 10 years of experience in intellectual property prosecution and litigation, he often focuses on trademark matters, helping clients with all aspects of the trademark lifecycle, from inception to registration and beyond, and providing clients with trademark counseling, prosecution, and enforcement advice, as well as overall trademark portfolio management.

E-commerce has transformed the retail industry. Consumers can easily research, compare prices, and purchase goods without leaving home. The benefits of easy online access to goods are clear, but with those benefits come the opportunity for abuse. On many e-commerce platforms, sellers can quickly establish virtual storefronts offering infringing imported products with impunity.

Enforcing the rights of intellectual property holders against numerous online marketplace infringers who may be located abroad and/or operate mostly anonymously can be extremely difficult. Remedies through litigation can pose significant challenges, for instance, going after multiple defendants, jurisdictional issues with extra-territorial infringers, and the time and expense required to adjudicate in a number of jurisdictions.

The US International Trade Commission (ITC) provides an effective alternative to the drawbacks of litigation, especially for pursuing multiple defendants who may be importing from outside the United States, in a single proceeding.

Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) empowers the ITC to investigate unfair trade practices, including infringement of intellectual property rights. Use of the ITC to combat potentially foreign online infringers provides a number of benefits. For example, whereas it may be difficult to obtain the *in personam* jurisdiction over an unknown and potentially foreign individual necessary for federal litigation, ITC investigations only require *in rem* jurisdiction over the allegedly infringing goods, which have been imported into the US. That means it is not necessary to obtain jurisdiction over specific defendants—only over the goods they are importing. Additionally, because the ITC investigation simply requires *in rem* jurisdiction, general exclusion orders (GEOs) from the ITC can be crafted to broadly prevent importation of infringing goods regardless of the source/individual, thereby obviating the potential need for multiple discrete lawsuits against different infringers or a single infringer who changes virtual storefronts.

A patent owner can assert rights in one or more patents and/or one or more trademarks by filing a complaint with the ITC. The complaint must establish:

- (1) Existence of rights in patent(s)/trademark(s), through an identification of a US Patent/Trademark, as well as the relevant claims;
- (2) Identification of imported goods that infringe the identified relevant claims in the US Patent/Trademark Office; and

- (3) Existence of an industry in the US relating to the articles protected by the patent, which includes two prongs:
  - a. *Technical* Prong – the complainant is making, selling, or licensing products covered by the patent/trademark in the United States; and
  - b. *Economic* Prong – there is significant investment in plant and equipment, employment of labor or capital, or substantial investment in the exploitation of the patent/trademark.

While this framework has been in place for decades, interpretation and application of the framework have recently changed. In *Lashify, Inc. v. U.S. Intl. Trade Comm'n*, 130 F.4th 948 (Fed. Cir. 2025), the ITC denied relief, finding that while complainant, Lashify, satisfied the *technical* prong with respect to at least some of its asserted patents, it failed to satisfy the *economic* prong. The rationale provided by the ITC was that even though Lashify established expenditures for sales, marketing, warehousing, quality control, and distribution, these expenditures do not count toward “significant . . . employment of labor or capital.” The ITC concluded that these expenses do not satisfy the economic prong because “it is well settled that sales and marketing activities alone cannot satisfy the domestic industry requirement,” and that regardless of magnitude, warehousing, quality control, and distribution “expenses are akin to those incurred by mere importers.” *Id.* at 956.

The Federal Circuit reversed the ITC’s ruling and stated that the ITC’s interpretation of significant employment of labor or capital that excludes expenses incurred by importers is likely a requirement for domestic manufacturing, which is not supported by the statutory text of Section 337 of the Tariff Act. *See id.* at 958. Thus, the Federal Circuit in *Lashify* held that the complainant satisfied the *economic* prong with its established expenditures for sales, marketing, warehousing, quality control, and distribution, overturning the prior understanding for ITC cases.

*Lashify* represents a significant broadening of the potential applicability of the ITC for patent rights enforcement. No longer are US patent/trademark holders who import their goods but invest significantly in marketing, sales, quality control and/or distribution foreclosed from leveraging the speed and utility of an ITC complaint to prevent infringing third-party importers.