

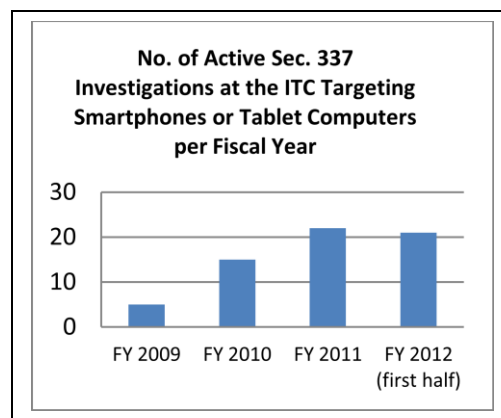
FACTS AND TRENDS REGARDING USITC SECTION 337 INVESTIGATIONS

Prepared by the U.S. International Trade Commission

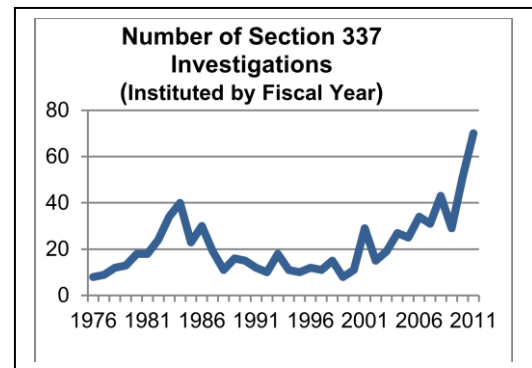
The U.S. International Trade Commission (USITC) adjudicates allegations of unfair acts in connection with imports under Section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337. Most Section 337 investigations involve allegations of infringement of patents or other IP rights. Facts and trends regarding certain aspects of Section 337 proceedings are provided below.

1. Increased Caseload

The number of new Section 337 investigations has increased by over 530% from FY 2000 to FY 2011. New complaint filings in FY 2012 indicate that the active caseload will likely remain stable or increase in the current fiscal year. Given the USITC's speed and patent



expertise, Section 337 proceedings involving high tech products,



such as smartphones and tablet computers, account for an increased share of these investigations in recent years. Smartphone companies involved in Section 337 investigations during the first half of FY 2012 include: Apple (14), HTC (8), Motorola (4), Samsung (3), RIM (3), Nokia (3), and LG (1). The USITC has taken steps to

accommodate the burgeoning caseload including increased staffing for the Office of Administrative Law Judges and the General Counsel's Office. The USITC is also building a new courtroom for Section 337 proceedings that is expected to be completed by the fall of 2012. The USITC continues to focus its efforts on maintaining expeditious target dates for completion of its investigations.

2. Domestic Industry Requirements & Non-Practicing Entities

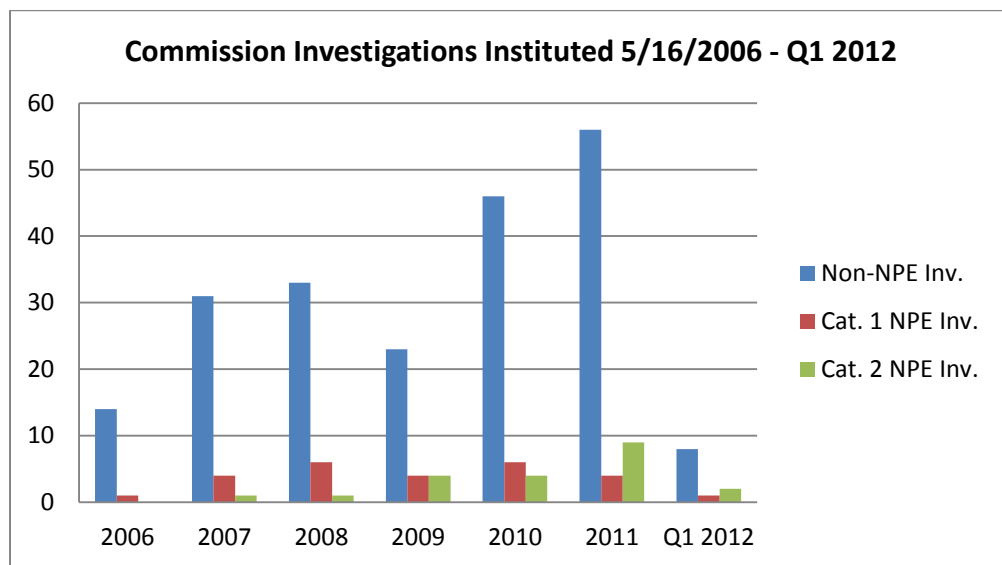
An essential element of a Section 337 violation is the domestic industry requirement. This requirement may be met by showing that the complainant has made sufficient investments in the United States with respect to articles protected by the IP right concerned.

The statute was amended in 1988 to allow IP rights-holders that do not manufacture products (*i.e.*, non-practicing entities) to obtain remedies at the USITC. Congress made note in amending the statute that inventors, universities, start-ups, and other entities that conduct R&D, engineering, or licensing activities are equally entitled to Section 337 relief as are

manufacturing industries. In fact, one of the motivations behind the amendments was to overturn the USITC's decision denying relief to a licensing entity, Warner Brothers, in connection with copyrighted Gremlins products because the USITC did not recognize licensing as a domestic industry.

An issue currently receiving attention is whether non-practicing entities (NPEs) should be permitted to obtain relief at the ITC. There is no commonly understood definition of an NPE. For analytical purposes, entities that do not manufacture a product that practices the specific patents asserted in a Section 337 complaint are referred to here as Category 1 NPEs. Category 1 NPEs include manufacturers whose products do not practice the asserted patents; inventors who may have done R&D or built prototypes, but do not make a product covered by the asserted patents and are therefore relying on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore are relying on licensing to meet the domestic industry requirement; and start-ups that possess IP rights but do not yet manufacture a product that practices the patent. Another category of NPEs that do not manufacture products that practice the asserted patents, and whose business model primarily focuses on purchasing and asserting patents, are referred to here as Category 2 NPEs.

Some commentators have recently suggested that NPE filings, particularly by Category 2 NPEs, account for the increased caseload at the USITC, because of the U.S. Supreme Court's decision in *eBay v. MercExchange*. However, this suggestion does not appear to be supported by data concerning complaint filings at the USITC since the *eBay* decision was issued.



Data concerning NPE filings at the USITC show the following:

- Since the *eBay* decision on May 15, 2006, the USITC instituted 258 investigations through the first quarter of 2012. Of these, **only 21 investigations (or 8%)** involved complaints that were filed by **Category 2 NPEs**.

- Only **one Category 2 NPE complainant was successful** in obtaining an exclusion order – this was Rambus in Inv. No. 337-TA-661.
- **Category 1 NPEs** accounted for **26 investigations (or 10%)** of the 258 investigations.
- Only **two Category 1 NPEs were successful** in obtaining an exclusion order – these were Tessera in Inv. No. 337-TA-605, and UNeMed Corporation, the technology transfer office of the University of Nebraska Medical Center, in Inv. No. 337-TA-679.

3. Settlements

About half of all investigations instituted at the USITC ultimately terminate based on settlements or consent orders. It has been suggested by some commentators that NPEs file complaints at the USITC for the purpose of obtaining settlements. However, due to the relatively small number of NPE investigations, data concerning settlements are inconclusive.

Settlements (5/15/2006 to Q1 2012)			
	Number of Completed Inv.	Number of Settled Inv.	Settlement Rates
Total Inv.	196	97	49.49%
Cat. 1 NPEs	21	8	38.10%
Cat. 2 NPEs	13	8	61.54%
All NPEs	34	16	47.06%
All Other	162	82	50.62%

4. Number of Respondents

USITC jurisdiction and remedies are *in rem*, relating to the imported articles in issue. In 2008, the U.S. Court of Appeals for the Federal Circuit in *Kyocera v. Int'l Trade Comm'n*, rejected the USITC's long-standing practice of including within the scope of its remedial orders not only infringing components but also downstream products containing such components that were manufactured by third parties who were not named respondents in its investigations. As a result of this decision, commentators have observed an increase in the number of respondents named in Section 337 investigations as complainants can no longer rely on the pre-*Kyocera* Commission practice to reach third party downstream products containing accused components.

Some commentators have suggested that the total number of respondents in NPE investigations has increased significantly. The data concerning respondents named in Section 337 investigations show that there is great variability in the numbers of respondents across all investigations. The table below shows the range of numbers of respondents named in USITC investigations. In 2009, for example, investigations instituted based on complaints filed by

Category 1 NPEs involved from 3 to 6 respondents; investigations instituted based on complaints filed by Category 2 NPEs involved from 10 to 16 respondents; and investigations instituted based on complaints filed by all other complainants involved from 1 to 22 respondents.

Range of Number of Respondents Investigations Instituted 5/16/2006 - Q1 2012			
YEAR	Category 1 NPEs	Category 2 NPEs	All Other
2006	4	0	(1-21)
2007	(2-7)	1	(1-46)
2008	(4-40)	18	(1-34)
2009	(3-6)	(10-16)	(1-22)
2010	(1-17)	(2-10)	(1-30)
2011	(4-49)	(4-33)	(1-39)
Q1 2012	35	(2-21)	(2-33)

Data concerning the total number of named respondents indicate that the number of respondents named in investigations varies substantially from year to year in each category of investigations.

