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NOTE

SYNOPSIS OF THE EXTRATERRITORIAL PROTECTION AFFORDED BY SECTION 337 AS COMPARED TO THE PATENT ACT†

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as Compared to the Patent Act*

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INTRODUCTION

The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law. The traditional understanding that our patent law “operate[s] only domestically and d[oes] not extend to foreign activities” is embedded in the Patent Act itself, which provides that a patent confers exclusive rights in an invention within the United States.¹

Unlike Section 271 of the Patent Act of 1952,² “[s]ection 337 is a trade law which is not necessarily limited by the principles of domestic patent law.”³ When examined more closely, Section 337 of the U.S. Tariff Act of 1930⁴ in effect provides a patentee more protection from infringing foreign activity than Section 271. Accordingly, in many situations involving foreign acts, it may be more advantageous to enforce a U.S.

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1. Microsoft Corp. v. AT&T Corp., 127 S. Ct. 1746, 1758 (2007) (citations omitted).

2. 35 U.S.C. § 271 (2000).

3. *In re* Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same, Inv. No. 337-TA-559, at 26 (U.S. Int’l Trade Comm’n May 11, 2007) (initial determination) (quoting *In re* Certain Recombinantly Produced Human Growth Hormones, Inv. No. 337-TA-358, Order No. 110 (U.S. Int’l Trade Comm’n Apr. 1, 1994)).

4. 19 U.S.C. § 1337 (2001).

patent at the International Trade Commission (“Commission”) as opposed to a federal district court. The analysis discussed *infra* more closely examines those situations and provides the history behind the intended reach of each statute.

I. HISTORY

Prior to 1922, patent holders were limited in the causes of action available against importers of potentially infringing articles. While allegedly infringing articles were often imported in large quantities, and then widely distributed throughout the United States, the only response at that time was to bring suit against each “individual” retailer.⁵ This resulted in multiple, duplicative lawsuits against different infringers, for the same products, in a variety of domestic forums.⁶ Having recognized the ineffectiveness of this system, Congress responded with Section 316 of the Tariff Act of 1922.⁷ Section 316 created—for the first time—the remedy of exclusion, and gave United States domestic patent holders extraterritorial protection against the unlawful “importation and sale of infringing articles.”⁸

The Tariff Act was next revisited at the onset of the Great Depression when Congress enacted Section 337 of the Smoot-Hawley Tariff Act of 1930.⁹ While Section 337 slightly revised its predecessor, Section 316, this legislation affirmed the goal of protecting the United States economy from increasing competition in the import trade.¹⁰

Shortly thereafter, the Court of Customs and Patent Appeals interpreted the extraterritorial nature of Section 337 in *Amtorg* in 1935.¹¹ In

5. *In re Amtorg Trading Corp.*, 75 F.2d 826, 835 (C.C.P.A. 1935) (quoting *In re Orion Co.*, 71 F.2d 458, 467 (C.C.P.A. 1934)).

6. *Id.*

7. Tariff Act of 1922, ch. 356, 42 Stat. 858, 943 (1922).

8. *Amtorg*, 75 F.2d at 835 (quoting *In re Orion Co.*, 71 F.2d 458, 467 (C.C.P.A. 1934)).

9. Smoot-Hawley Tariff Act of 1930, ch. 479, 46 Stat. 590, 703 (codified as amended at 19 U.S.C. § 1337 (2001)). See Nathan G. Knight, Jr., *Section 337 and the GATT: A Necessary Protection or an Unfair Trade Practice?*, 18 GA. J. INT’L & COMP. L. 47, 51–52 (1988).

10. Knight, *supra* note 9, at 52. One change made the exclusion order the only available remedy “[b]y eliminating Presidential authority to levy additional duties” *Id.* See also *Amtorg*, 75 F.2d at 835 (“The only change made by the section over existing law is the elimination of the provision which authorized the President to impose such additional duties not in excess of 50 percent or less than 10 percent of the value of the article imported in violation of the section” (quoting H.R. REP. NO. 71-7 at 166 (1929))).

11. *Amtorg*, 75 F.2d at 832. The patent at issue was directed towards a flotation process: the separation of minerals that were useful in producing acid from the surrounding unusable substances. The respondent mined apatite in Northern Russia, used the flotation process, and imported the resulting product to the United States. Reasoning that “a process patent is not infringed by the sale of a product made by the process,” the court ruled that “[t]he Russian exporter had the perfect right to sell and the American importer had the right to buy the apatite

doing so, it held that Section 337 was limited, and could only be applied in instances where there was unlawful importation of a product, not when the infringement was of a process by which these products were manufactured abroad.¹² Congress reacted in 1940 by enacting Section 337a. The territorial reach was broadened under Section 337a to make the importation of articles manufactured by patented processes actionable, and subject to exclusion. Under Section 337a, any distinction that once existed between performing the steps of a process patent abroad with infringement of that process in the U.S. was removed.¹³

On the other hand, the Patent Act of 1952 independently codified the common law of infringement in Section 271(a).¹⁴ Unlike Section 337, to be actionable under Section 271(a), the act of infringement must have occurred in the United States.¹⁵ The Supreme Court affirmed this when it applied Section 271(a) in the *Deepsouth* decision in 1972.¹⁶ The Court held there could be no infringement where the manufacture and use of accused products occurred outside the United States, even though the critical components of the infringing product were made in the U.S.¹⁷ This would not become actionable for years to come.

The Trade Act of 1974 was passed with the intent of moving trade laws away from protectionism and towards free trade competition, and Congress amended Section 337.¹⁸ Like patent infringement actions

and resell it in the United States . . .” In support, the court analogized to the reverse situation, noting that had the patentee had a Russian patent on the flotation process, but not a U.S. patent, the patentee would have no cause of action in a United States court.

12. See *In re Certain Recombinant Erythropoietin*, 1989 WL 608775, USITC Inv. No. 337-TA-281 (U.S. Int’l Trade Comm’n Jan. 10, 1989).

13. *Id.* at 10–11 (citing S. REP. NO. 76-1903, at 1–2 (1940)).

14. S. REP. NO. 82-1979 (1952), reprinted in 1952 U.S.S.C.A.N. 2394, 2394.

15. 35 U.S.C.A. § 271(a) (2003) (defining infringement as acts that occur “within the United States”). See also Paul Marguilies, Note, *What’s All the Fuss? The “Parade of Horribles” When Applying 35 U.S.C. § 271(f) to Software Patents*, 14 CARDOZO J. INT’L & COMP. L. 481, 485 (2006) (noting that there was a historic presumption of territoriality in patent law. “[T]he patent laws ‘do not, and were not intended to, operate beyond the limits of the United States.’” (quoting *Brown v. Duchesne*, 60 U.S. 183, 195–96 (1856))).

16. *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 527 (1972).

17. See *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1751 (2007) (noting that in *Deepsouth*, the defendant sold and shipped the components of a deveining machine to foreign buyers who would assemble and use the machines abroad. *Deepsouth* was a case that involved a product rather than a process.).

18. See Knight, *supra* note 9, at 52–53. This legislation gave Section 337 unprecedented strength by empowering the Commission to adjudicate acts of foreign infringement similarly to the way a District Court would adjudicate acts of domestic infringement. The Commission was empowered to “investigate any alleged violations of the statute, make a final determination of violation, and then to invoke a suitable remedy” (citations omitted); see also *Lannom Mfg. Co. v. U.S. Int’l Trade Comm’n*, 799 F.2d 1572, 1577 (Fed. Cir. 1986) (The Trade Act of 1974 was enacted “in response to ‘the need to find cooperative solutions to common domestic and international economic problems.’”) (citing S. REP. NO. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7187).

brought in the District Courts under Section 271, the 1974 Act allowed respondents accused of infringement to challenge the validity of a U.S. patent, and all respondents could avail themselves of due process adjudication of all the infringement issues under Section 337.¹⁹ The Trade Act of 1974 was intended to harmonize actions involving foreign and domestic infringement.²⁰ However, the harmony was not complete. Congress was explicit in its intent that Section 271 and Section 337 remain separate; Section 271 was a domestic patent statute and Section 337 was an international trade statute.²¹

Despite these advances, there remained a sentiment in the late 1970s that the U.S. economy still lagged behind that of its capitalist allies.²² Congress and the President responded and attempted to further “strengthen[] investor confidence in the certainty of patent rights” in order to increase productivity through industrial innovation.²³ Legislation followed, and resolved the unprotected activity described by the *Deepsouth* decision when Congress enacted Section 271(f) in 1984. Domestic patent holders were now protected from the export of the components of patented articles for assembly and use abroad.²⁴

Congress then enacted Section 271(g) in 1988 to protect domestic patent holders from imported goods. Specifically, Section 271(g) protects process patent holders from domestic competition caused by the importation of products made by patented processes abroad.²⁵ The result

19. *Lannom Mfg. Co. v. U.S. Int’l Trade Comm’n*, 799 F.2d 1572, 1577 (Fed. Cir. 1986). Patent invalidity was not a defense in a Section 337 action because the remedy of excluding infringing articles from entry did not “require or permit redetermination of patent validity.”

20. *Id.* (The Trade Act of 1974 was enacted “in response to ‘the need to find cooperative solutions to common domestic and international economic problems.’”) (citing S. REP. NO. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7187).

21. See S. REP. NO. 93-1298 (1974), reprinted in 1974 U.S.C.C.A.N. 7186, 7329 (“The Commission would also consider the evolution of patent law doctrines . . . in the determination of violations of [§ 337].”).

22. H.R. REP. NO. 96-1307(I) (1980), reprinted in 1980 U.S.C.C.A.N. 6460, 6460 (“The rate of investment as a proportion of GNP has averaged about one half the rate for France and Germany and about one third the rate for Japan.”).

23. *Id.* at 6462. Actions taken included the establishment of the Federal Circuit, making the Patent Office more efficient, and increasing government funded research.

24. *NTP, Inc. v. Research In Motion*, 418 F.3d 1282, 1322 (Fed. Cir. 2005) (citing S. REP. NO. 98-663, at 3, 6 (1984); 130 CONG. REC. 28,069 (1984)). See also *Microsoft*, 127 S. Ct. at 1759–60 (“Section 271(f) does not identify as an infringing act conduct in the United States that facilitates making a component of a patented invention outside the United States; nor does the provision check ‘suppl[y]ing] . . . from the United States’ information, instructions, or other materials needed to make copies abroad.”). Since Congress was specifically fixing a gap in the patent laws illustrated in *Deepsouth* by enacting Section 271(f), the Court noted that it was Congress and not the courts which had the authority to fix the other gaps in the patent laws. *Id.*

25. S. REP. NO. 100-83, at 60–61 (1987). This is particularly true in industries where the best or only intellectual property protection is for process patents, including “the pharma-

was an added extraterritorial reach to Section 271(g) similar to what Section 337 addressed over 40 years earlier, which defined the offending act as the importation of the resulting article into the United States.²⁶ In the same legislation, former Section 337a was relabeled as Section 337(a)(1)(B)(ii) while its scope remained unchanged.²⁷

While neither statute—Section 1337 of Title 19 nor Section 271 of Title 35—has changed further, it is evident that each has evolved separately and in response to different events. This becomes more apparent when the actual language of each statute is analyzed, and the scope of protection for extraterritorial activities interpreted by representative cases.

II. TERRITORIAL REACH OF SECTION 271 V. SECTION 337

Historically, the United States' patent laws are territorially limited to acts that occur within its borders.²⁸ The language of Section 271(a),²⁹ (f),³⁰

chemical industry, the development of solid state electronics, for manufacture of certain amorphous metals, and . . . the biotechnology industry.”

26. *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1373–75 (Fed. Cir. 2003) (citing H.R. REP. NO. 99-807, at 5 (1986)).

27. *Amgen, Inc. v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1539 (Fed. Cir. 1990). This is evidenced by how one of the bill's sponsors, Senator Lautenberg, twice stated “that amended section 1337 merely *reenacts* former section 1337a” (emphasis added); *See also In re Certain Abrasive Products Made Using A Process for Powder Preforms, and Products Containing the Same*, 2002 WL 31093607, USITC Inv. No. 337-TA-449, Order No. 40, at 2 (U.S. Int'l Trade Comm'n July 26, 2002) (noting that section 271(g) was the codification of section 9003 of the Omnibus Trade and Competitiveness Act, and that section 9006(c) of that Act explicitly entitles a patent owner to any remedies that would otherwise be available, including those under section 337).

28. *NTP*, 418 F.3d at 1313 (citing *Pellegrini v. Analog Devices, Inc.*, 375 F.3d 1113, 1117 (Fed. Cir. 2004)).

29. 35 U.S.C.A. § 271(a) (2003) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”).

30. 35 U.S.C.A. § 271(f) (2003)

(1) Whoever without authority supplies or causes to be supplied in or from the United States all or a substantial portion of the components of a patented invention, where such components are uncombined in whole or in part, in such manner as to actively induce the combination of such components outside of the United States in a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.

(2) Whoever without authority supplies or causes to be supplied in or from the United States any component of a patented invention that is especially made or especially adapted for use in the invention and not a staple article or commodity of commerce suitable for substantial noninfringing use, where such component is uncombined in whole or in part, knowing that such component is so made or adapted and intending that such component will be combined outside of the United States in

and (g),³¹ especially when compared to Section 337(a)(1)(B),³² illuminates this point and the limited extraterritorial reach of Section 271.³³

A. *Section 271(a) v. Section 337(a)(1)(B)*

Section 271(a) states that patent infringement is only actionable when it occurs in the United States.³⁴ This limitation becomes apparent where the infringed patent is directed towards a process where one or more steps occur abroad.

The Federal Circuit had held that all steps of a method of use claim must be performed in the United States in order to infringe under Section 271(a).³⁵ In *NTP*, the method claims at issue were allegedly infringed through the use of a system that was partially in the United States and partially in Canada.³⁶ The court distinguished the use of a method, where each step is performed individually, from the “use of a system as a whole, in

a manner that would infringe the patent if such combination occurred within the United States, shall be liable as an infringer.).

31. 35 U.S.C.A. § 271(g) (2003)

(Whoever without authority imports into the United States or offers to sell, sells, or uses within the United States a product which is made by a process patented in the United States shall be liable as an infringer, if the importation, offer to sell, sale, or use of the product occurs during the term of such process patent. In an action for infringement of a process patent, no remedy may be granted for infringement on account of the noncommercial use or retail sale of a product unless there is no adequate remedy under this title for infringement on account of the importation or other use, offer to sell, or sale of that product. A product which is made by a patented process will, for purposes of this title, not be considered to be so made after—

- (1) it is materially changed by subsequent processes; or
- (2) it becomes a trivial and nonessential component of another product.).

32. 19 U.S.C. § 1337(a)(1)(B) (1994) (the following are unlawful)

(The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that—

- (i) infringe a valid and enforceable United States patent or a valid and enforceable United States copyright registered under Title 17; or
- (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.).

33. 35 U.S.C.A. § 271 (2003). Subsections (a), (f), and (g) are important for this comparison because they are the parts of Section 271 that have extraterritorial aspects or a potential overlap with Section 337. Since Section 271 (b) and (c) define indirect infringement, violation of them requires direct infringement under Section 271 (a), so comparison of them here would be redundant. Subsections (d) and (e) are specialized and are also less relevant to actions that could be brought under Section 337.

34. 35 U.S.C.A. § 271(a) (2003); *NTP*, 418 F.3d at 1313.

35. *NTP, Inc. v. Research In Motion*, 418 F.3d 1282, 1318 (Fed. Cir. 2005).

36. *Id.*

which the components are used collectively. . . .”³⁷ This rationalization led the court to hold that “a process cannot be ‘used’ within the United States as required by section 271(a) unless each of the steps is performed within this country.”³⁸ Thus, while system claims can be infringed even though part of the system is located abroad, claims directed towards the use of that system cannot be.³⁹

By contrast, Section 337(a)(1)(B) does not contain such a limitation. The importation of any article that practices one or more of the method steps abroad is actionable under Section 337(a)(1)(b)(i).

In *Digital Processors*, the imported product performed a patented process.⁴⁰ The claim at issue required three steps: “(1) determining natural concurrencies; (2) adding intelligence; and (3) processing instructions.”⁴¹ However, only the third step was performed in the United States, while the first two were performed abroad.⁴² Respondents argued that this meant that there could be no direct infringement because Section 271(a) defines infringement and requires that all steps to a process be performed in the United States.⁴³ For support, respondents relied on *NTP*, in which the Federal Circuit found that in order for a process to be infringed under Section 271(a), all of the steps must be performed in the United States.⁴⁴

In rejecting respondent’s argument, the Judge distinguished Section 337(a)(1)(B) from Section 271(a).⁴⁵ “Unlike section 271(a), section 1337(a)(1)(B) contains no territorial limitation.”⁴⁶ This is because the “within the United States” language present in Section 271(a) is not in Section 337(a)(1)(B).⁴⁷ For instance, while the sale of an infringing article for importation is a violation of Section 337(a)(1)(B) even before the importation occurs, such is not a violation of Section 271(a) if the sale occurs entirely outside the United States.⁴⁸ The Judge also rejected the notion that Section 271(a) should be imported into Section 337(a)(1)(B),

37. *Id.*

38. *Id.*

39. *Id.* at 1317.

40. *In re Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-342 (U.S. Int’l Trade Comm’n May 11, 2007) (Initial Determination).

41. *Id.* at 21.

42. *Id.*

43. *Id.*

44. *Id.* (citing *NTP, Inc. v. Research In Motion*, 418 F.3d 1282, 1318 (Fed. Cir. 2005)).

45. *Id.* at 22.

46. *Id.*

47. *Id.*

48. *Id.* (citing 19 U.S.C. § 1337(a)(1)(B)(i) (2000)).

noting that “offers for sale” can amount to infringement under Section 271(a), but are not a violation of Section 337(a)(1)(B).⁴⁹

Unlike Section 271(a), which is explicitly territorial, Section 271(f) and (g) are extraterritorial. However, their intended international reach comes with limitations not found in Section 337(a)(1)(B).

B. Section 271(f) v. Section 337(a)(1)(B)

Section 271(f) differs from Section 337(a)(1)(B) in both form and purpose. Section 337(a)(1)(B) is a broad statute intended to cover many different foreign acts of infringement. Meanwhile, Section 271(f) was enacted to cover the specific factual situation involving exportation of components of a patented article in the *Deepsouth* case. Section 271(f) also does not apply to steps of a process claim performed abroad after exportation.⁵⁰ Aside from not applying Section 271(f) to process claims, the Supreme Court also refused to apply it to exported information that could be used to assemble the components of a patented article.⁵¹

From the standpoint of economic policy, Section 271(f) was also “ill-conceived” in that it created an “incentive for U.S. companies who compete in foreign markets to move their manufacturing facilities abroad.”⁵² Multinational U.S. corporations already had incentives to house their manufacturing facilities in developing nations rather than domestic locations due to considerably lower transaction and labor costs.⁵³ This development further made the actionable manufacturing trends discussed in *Deepsouth* less likely to occur, which is evidenced by the high-technology markets in Asian countries that already successfully attracted “R&D investment and participation.”⁵⁴

Section 337 is not relegated as such. Although it does not cover the exportation of components, it applies at the moment goods are imported, and also covers any steps performed in the manufacture of products abroad. This enables a broad level of protection against foreign manufacturers who are the greatest threat to U.S. based patent holders.

49. *Id.* (citing *Certain Pump Top Insulated Containers*, Inv. No. 337-TA-59, Commission Opinion at 7, USITC Pub. 1010 (1979)).

50. *NTP, Inc. v. Research In Motion*, 418 F.3d 1282, 1322–23 (Fed. Cir. 2005) (noting the conceptual difficulty in supplying “all or a substantial portion of the steps of a patented method in the sense contemplated by the phrase ‘components of a patented invention’”).

51. *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1759 (2007).

52. Donald S. Chisum, Note, *Normative and Empirical Territoriality in Intellectual Property: Lessons from Patent Law*, 37 VA. J. INT’L L. 603, 607 (1997).

53. See Mark B. Baker, *Tightening the Toothless Vise: Codes of Conduct and the American Multinational Enterprise*, 20 WIS. INT’L L.J. 89, 92 n.14 (2001).

54. Edward T. Foley & Mark C. Hersam, *Assessing the Need for Nanotechnology Education Reform in the United States*, 3 NANOTECHNOLOGY L. & BUS. 467, 471 (2006).

C. Section 271(g) v. Section 337(a)(1)(B)(ii)

Section 271(g) was intended to protect patented processes abroad; the primary target being a manufacturer who performs all the steps of the process and the importer of the resulting product into the United States.⁵⁵ However, the protections of Section 271(g) cannot “prevent” the use of the process in another country.⁵⁶ Therefore, a patent holder has no rights against foreign manufacturers who use the patented process abroad but do not import the resulting products into the United States.⁵⁷ Moreover, Section 271(g) has available defenses that Section 337(a)(1)(B)(ii) does not offer.⁵⁸ If an imported product has been “materially changed by a subsequent process” or has become a “trivial and nonessential component of another product,”⁵⁹ then the patentee can only obtain relief through a Section 337(a)(1)(B)(ii) action.⁶⁰ These two limitations on Section 271(g) narrow the scope of that section as compared to Section 337(a)(1)(B)(ii), and allow “exceptions” to conduct that would otherwise be actionable under Section 337(a)(1)(B)(ii).

Moreover, Section 271(g) has additional limitations. In *Bayer*, the court rejected the claim that the importation of *information* was protected under Section 271(g) and held that the products protected must be physical articles.⁶¹ The information at issue was “the identification and characterization of a drug” that was made by the patented process.⁶² Similarly, in *NPT*, the court refused to treat e-mail that was formatted by the patented process as a product under Section 271(g).⁶³ The court reasoned that Section 271(g) did not apply to the transmission of

55. *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1375 (Fed. Cir. 2003) (citing S. REP. NO. 100-83, at 39 (1987)).

56. S. REP. NO. 100-83 (1987); *See also Bayer*, 340 F.3d at 1374–75 (citing H.R. REP. NO. 99-807, at 5 (1986)). “[R]eading the statute to cover processes other than manufacturing processes could lead to anomalous results.” *Id.* at 1376. In fact, the principle aim of a bill that served as a precursor to Section 271(g) explicitly expressed its purpose: “to declare it to be patent infringement to import into, or to use or sell in the United States, a product *manufactured by a patented process.*” *Id.* at 1374 (quoting and adding emphasis to S. REP. NO. 98-663 at 1 (1984)).

57. S. REP. NO. 100-83 (1987) (“These amendments will not give extraterritorial effect to U.S. law. U.S. patents will not prevent foreign manufacturers from using abroad the process covered by the U.S. patents, so long as the products they make thereby are sold and used abroad.”).

58. *Kinik Co. v. Int’l Trade Comm’n*, 362 F.3d 1359, 1363 (Fed. Cir. 2004) (holding that “the defenses established in § 271(g) are not available in § 1337(a)(1)(B)(ii) actions”).

59. 35 U.S.C.A. § 271(g) (2003).

60. *See Kinik*, 362 F.3d at 1363.

61. *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1377 (Fed. Cir. 2003).

62. *Id.* at 1370.

63. *NTP, Inc. v. Research In Motion*, 418 F.3d 1282, 1323 (Fed. Cir. 2005).

information because it did not involve the manufacturing of a physical product.⁶⁴

NTP is an example where Section 337 would foreseeably apply but Section 271(g) would not. Section 337(a)(1)(B)(i) would apply to the importation of the devices that formatted the emails using the patented process, even if they were made abroad. This is because they are “articles that infringe a valid and enforceable United States patent,”⁶⁵ and they are actionable under Section 337(a)(1)(B)(i) even though part of the infringing process is performed in Canada. However, the importation of the devices performing the process would not be actionable under Section 271(g) because the patented process was directed toward their use. Section 271(g) would only apply if the patented process involved their manufacture.

CONCLUSION

Section 337 is not a patent statute but an unfair trade statute for international trade. Unlike Section 271 of the Patent Act, which is a domestic statute, Section 337 of the Tariff Act was originally enacted to protect domestic actors from foreign unfair trade practices, including patent infringement.⁶⁶ The Commission has acknowledged the international implications of Section 337 in stressing that while it may look to the domestic patent laws for guidance, it is not bound to strictly apply them.⁶⁷ As such, Section 337 can protect against certain foreign activities that Section 271 cannot reach. Combining the prevalence of foreign manufacture with the territorial limitations of Section 271, a Section 337 action at the International Trade Commission may be the best, and sometimes only, game in town.

64. *Id.*

65. 19 U.S.C. § 1337(a)(1)(B)(i) (2001).

66. *In re Certain Minutiae-Based Automated Fingerprint Identification Systems, Inv. No. 337-TA-156*, Order No. 10, 1983 WL 20707327 (U.S. Int'l Trade Comm'n Aug. 31, 1983).

67. *Id.* (citing *In re Certain Apparatus for the Continuous Production of Copper Rod, Inv. No. 337-TA-89*, 214 U.S.P.Q. 892, 895 (1980)). In *Fingerprint Identification*, the defendant importer sought to defeat a § 337 complaint by having the commission apply the domestic patent laws, but the court stressed § 337's role as an international trade statute as opposed to a patent statute, noting that it would be unreasonable to suggest that “Congress has mandated application of domestic patent laws in such a way as to defeat the effect and purpose of § 337.”