

Foreign Knock-Offs v. American Companies with Foreign Manufacturing: For Whom is the Trump Card Played?

Chase Hemmelgarn

Imagine this: you start a company that designs, patents, and sells tweezers in the United States, but all manufacturing happens overseas. When foreign knock-offs start flooding the market, you weigh your options to stop this infringing activity. Suing for patent infringement in district court could secure damages against an infringing importer, but this relief could take years.¹ On the other hand, the International Trade Commission (ITC) offers a much faster route to stem the influx of infringing knock-offs.² But there is a catch: a patent holder seeking an importation exclusion order from the ITC must show they meet the “domestic industry” statutory requirement.³ Hinging on this requirement, American companies with foreign manufacturing were historically denied an exclusion order because the ITC has downplayed the importance of sales, marketing, and distribution and has preferred to see domestic manufacturing.⁴

However, the Federal Circuit recently gave hope to American companies with foreign manufacturing operations. In *Lashify*, the Federal Circuit held that a United States patent holder can satisfy the “domestic industry” requirement—and thus secure an ITC exclusion order—even if the patent holder’s domestic industry includes only non-manufacturing activities.⁵

This pathway for off-shoring companies to utilize ITC exclusion proceedings may be short-lived because the *Lashify* ruling is at odds with President Trump’s policy goal to increase domestic manufacturing.⁶ This conflict is significant because the President has broad discretion to veto ITC exclusion orders within 60 days for any “policy reason.”⁷ To punish American companies for off-shoring their manufacturing operations, President Trump could veto any ITC exclusion orders where the patent holder’s domestic industry was proven only with non-manufacturing activities.⁸ This approach would effectively impose an extra-judicial domestic manufacturing prerequisite for an ITC exclusion order, regardless of what the Federal Circuit has to say about the statutory requirements for such exclusion orders.⁹ While this approach might encourage domestic

¹ Dennis Crouch, *Federal Circuit Offers Another Important Expansion of the Domestic Industry Requirement for USITC Jurisdiction*, PATENTLY-O (Mar. 6, 2025), <https://patentlyo.com/patent/2025/03/important-requirement-jurisdiction.html> [<https://perma.cc/5ZV7-Y2JB>] (such suits often involve “multi-year district court proceedings”).

² *Id.* (discussing that the “ITC is attractive to patent holders because of its relatively expeditious ‘target date’ of 16–18 months from institution to final determination (compared to multi-year district court proceedings)”).

³ *Id.* (citing 19 U.S.C. § 1337(a)(2)).

⁴ *Id.* (noting ITC’s view that—without domestic manufacturing or other qualifying activities—expenditures on sales, marketing, warehousing, quality control, and distribution were insufficient to meet domestic industry requirement).

⁵ *Id.* (discussing that a foreign company could potentially satisfy the ITC’s domestic industry requirement “even if it designs and manufactures its products entirely outside the United States—so long as it also expended a significant amount on [domestic] activities such as warehousing, distribution, quality control, marketing, and sales”) (citing *Lashify, Inc. v. Int’l Trade Comm’n*, No. 23-1245 (Fed. Cir. Mar. 5, 2025)).

⁶ *Id.* (noting President Trump’s emphasis on domestic manufacturing “stands in stark contrast” to the Federal Circuit’s loosening of the domestic industry requirement).

⁷ *Id.* (citing 19 U.S.C. § 1337(j); *Duracell, Inc. v. Int’l Trade Comm’n*, 778 F.2d 1578 (Fed. Cir. 1985)).

⁸ *See id.* (“President Trump could establish a practice of vetoing ITC exclusion orders in cases where the domestic industry was proven only with non-manufacturing activities.”).

⁹ *Id.* (noting presidential review could be wielded to “create a parallel domestic industry requirement centered on actual U.S. manufacturing, regardless of what the Federal Circuit has determined [Section 1337] to require”).

manufacturing, it may also make it more difficult for American companies with foreign manufacturing to timely stop the flow of infringing knock-offs into the American marketplace.