

ITC Sheds Light on Economic Prong of Domestic Industry Under Subsection 337(a)(3)(C) and Issues General Exclusion Order

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On June 26, 2015, the ITC handed down its Commission Opinion in *Certain Loom Kits for Creating Linked Articles*, Inv. No. 337-TA-923, Comm'n Op. (Feb. 3, 2015) (hereinafter "*Loom Kits*"), granting a general exclusion order. In its opinion, the Commission provided express rulings on what does and does not count towards the establishment of the economic prong of the domestic industry requirement under 19 U.S.C. § 1337(a)(3)(C).

The complainant in the investigation is Choon's Design, LLC, which was founded by the sole inventor of the patent-at-issue, Mr. Ng, to protect its loom kit product for children. *Id.* at 1. After Mr. Ng's product became successful, many similar products appeared on the market. Mr. Ng made numerous attempts to halt the sale of the knockoffs—filing "nine lawsuits against multiple piece loom kits," sending "multiple cease and desist letters," and "161 advisory letters to 161 U.S. malls informing them of the infringement problems," and registering the "RAINBOW LOOM" trademark and copyright. *Loom Kits*, Init. Det., Order No. 13, at 47-48 (Feb. 3, 2015). Yet, after these efforts were insufficient, Mr. Choon filed an ITC investigation seeking a general exclusion order. *Id.* at 1.

Administrative Law Judge Essex had previously held that the complainant satisfied the economic prong of domestic industry under subsection 337(a)(3)(C), relying on various expenditures and activities, including money paid to manufacturers in China, the cost of travel to China to inspect a manufacturing facility for one week, and patent prosecution fees. *Id.* at 40-41. The Commission Investigative Attorney ("IA") submitted a petition for review of the ALJ's analysis, asking the Commission to review the ALJ's determination that certain expenditures, such as foreign expenditures and patent prosecution fees, counted towards domestic industry, while other investments, including Mr. Ng's time and effort in developing prototypes, and expenses in domestically manufactured prototypes, did not. *Loom Kits*, Comm'n Op. at 4-5.

The Commission affirmed the ALJ's determination that the economic prong was satisfied, but, like the IA, disagreed with the ALJ's analysis of some of the expenditures. *Id.* at 6-8. The Commission "set aside" the ALJ's reliance on expenditures for Mr. Ng's "[t]rip to visit [a] Chinese factory," and his "[l]ost salary from weeklong trip to China." *Id.* at 6. The Commission also found that investments in "paying a patent attorney to prosecute U.S. and international patent applications" could not be counted towards the economic prong of the domestic industry requirement. *Id.* In contrast, the Commission held that the following investments—each expressed as a dollar amount—contributed to a finding that there was a substantial investment under subsection 337(a)(3)(C), sufficient to satisfy the economic prong of the domestic industry requirement:

- Domestically-produced instruction manual;
- Assembly/quality control time for loom kits;
- Raw materials for freight elevator in home to store kits;
- Time spent making freight elevator in home;
- Rent based on dedication of 25% of home to assembly space and warehousing;
- Website costs;
- Time spent writing website for products;
- YouTube instructional videos;
- Craft and Hobby association membership;
- Booth at Craft and Hobby show;
- Advertising to support Craft and Hobby show booth;
- Booth at Novi Library;

- Other marketing efforts;
- Value of Mr. Ng's development work time;
- Modeling clay for prototypes; and
- Domestic manufacture of prototypes at Wichita State University.

Id. at 6-7. For “[a]ssembly/quality control time,” “[t]ime spent making freight elevator in home,” “[t]ime writing website,” “YouTube instructional videos,” and “[v]alue of Mr. Ng's development work time,” it is interesting to note that the Commission has counted unpaid labor as contributing to the establishment of domestic industry.

In total, The Commission held that all the investments together established a substantial investment under 337(a)(3)(C), noting that establishing an entirely new industry—as Mr. Ng and Choon's Design had done—amounts to “many times what a follow-on competitor would spend to begin manufacturing loom kits.” *Id.* at 7. The Commission noted that because they determined that the complainant satisfied subsection (C), there was no need to address the ALJ's conclusion that there existed genuine issues of material fact regarding whether the complainant had satisfied the domestic industry requirement under subsections (A) and (B). *Id.* at 8. The Commission issued a general exclusion order barring all infringing products. *Id.* at 19.

Authors