



Client Alert



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A Measure of Self-Help Against Cyber Attacks: Using Section 337 to Mitigate Losses from Intellectual Property or Trade Secret Theft

On February 20, 2013, the White House said it is taking action to stem the threat to American businesses from cyber attacks, including hacking directed by foreign governments. This effort is partly in response to a report from the cybersecurity firm Mandiant that described how a hacking collective with ties to the Chinese military has stolen sensitive data from at least 141 U.S. businesses since 2006. Cyber attacks on U.S. companies originate from many jurisdictions in addition to China. In fact, it is estimated that U.S. companies suffered losses in 2012, including amounts from revenue lost to infringing products, of more than \$300 billion. Much of that loss is the result of the theft of trade secrets and intellectual property through cyber attacks.

Self-Help Through Section 337

As the Federal government begins to act, companies should consider a measure of self-help: filing with the US International Trade Commission ("ITC") for a section 337 investigation. For example, section 337 prohibits infringement of statutory intellectual property rights and other forms of unfair competition in import trade. Specifically, section 337 declares illegal the importation of products that infringe a registered U.S. patent, copyright or trademark; a registered mask work; or a protected boat hull design. Section 337 also outlaws certain unfair methods of competition and unfair acts related to the importation and sale of products into the United States developed through misappropriation of trade secrets or trade dress infringement or if they threaten to destroy or substantially injure a domestic industry.

A section 337 complaint may be based on the import of products that use intellectual property rights or trade secrets stolen from a U.S. company through a cyber attack. However, section 337 is not limited to be only a response to cyber attacks.

Requesting a Section 337 Investigation

The ITC may initiate a section 337 investigation in response to a properly-filed complaint prepared and filed by a U.S. company. The complaint should (i) reference specific respondents, usually the importers of record for the infringing products; (ii) include specified background materials relating to the intellectual property rights or trade secrets asserted as well as the alleged infringement; and (iii) detail the harm done to the U.S. company.

Timing

The ITC Commissioners will vote within 35 days of receipt of a complaint on whether to institute an investigation and a temporary relief hearing, if requested. If the ITC accepts the complaint, it will serve notice on the respondents, who then have 20 days to respond to the claim. Investigations are assigned to an administrative law judge (“ALJ”), who creates a schedule and issues a set of “ground rules” governing proceeding consistent with the Administrative Procedure Act. The ALJ is supposed to issue a determination on the merits of the claim and proposed relief no later than four (4) months prior to the investigation’s target date of completion. If the ITC Commissioners adopt such determination, it becomes the ITC’s “Final Determination.”

Section 337 Remedies

A section 337 exclusion order could keep infringing products (products derived from stolen intellectual property or trade secrets) from being imported into the U.S. While a 337 order is not a comprehensive remedy, at least the U.S. market can be protected from illegal knock offs. The most common form of relief under section 337 is a limited exclusion order. Exclusion orders are enforced by the U.S. Bureau of Customs and Border Protection at the point of entry. A limited exclusion order only applies to the named respondents of the section 337 action, and is limited to the goods at issue. A general exclusion order, another form of relief available under section 337 prevents any importation of the goods at issue, regardless of the party importing them. Because the effects of a general exclusion order are so broad, the ITC requires additional evidence to warrant this form of relief: (i) a risk that a limited exclusion order will simply be circumvented; or (ii) a pattern of rampant infringement where it is difficult to determine the source of the infringing products. Companies that have suffered a cyber attack may consider requesting a general exclusion order for infringing products.

A cease and desist order acts as a limited exclusion order, but also includes a bar on named respondents from selling any inventory of imported goods that have been already imported into the U.S.. A cease-and-desist order will be issued if respondents have already accumulated a significant inventory of imported infringing products.

Three Questions to Ask Yourself

When deciding about whether to request a section 337 investigation, companies should ask themselves three questions:

1. Do your business operations include or otherwise leverage your own intellectual property rights or trade secrets?
2. Does your company believe it has been the target of a cyber attack or does it otherwise have information or evidence that its computer systems have been hacked or compromised?

3. Do any imports look as if they are based on, or otherwise incorporate, your intellectual property or trade secrets? Is your company losing revenue to such imported products?

If the answer to each of these three questions is yes, then your company should consider filing with the ITC for a section 337 investigation. While a section 337 exclusion order will not make your company whole from the adverse effects of a cyber attack, it can, at the least help mitigate some damage by preventing import of infringing products into the U.S. soil. It's a measure of self-help that can positively impact your company.

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