

# ITC general exclusion orders: a consideration for patent owners amid tariff uncertainty

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During his reelection campaign, President Trump made no secret of his love for tariffs and, so far, the administration seems to be delivering on that campaign promise. But tariff whiplash is creating volatility in the market for foreign manufacturers who seek to sell their goods in the United States. Those manufacturers face new uncertainties and potentially significant disparities in costs, depending on where they ship their goods from.

Tariffs may also have implications for intellectual property (IP) enforcement strategies. While U.S. patent owners may be accustomed to seeing counterfeit or infringing products come into the country from specific channels or geographic areas, the ever-changing tariff landscape may prompt foreign manufacturers to attempt to circumvent high tariffs by restructuring their supply chains. Those shifts could pose new challenges for U.S. companies, as they make it more difficult to determine where the infringing products are coming from and who is bringing them into the country.

Despite the complexities introduced by fluctuating tariffs, the International Trade Commission (ITC) is a viable forum for addressing foreign IP infringement. It provides a structured environment for U.S. patent holders to combat counterfeiting and infringement even when foreign manufacturers try to take advantage of the lowest possible tariffs via supply chain reorganization. The ITC's processes and regulations help maintain a level playing field and ensure that U.S. companies can protect their IP rights regardless of the shifting tariff landscape.

## General exclusion orders: global solutions for global problems

The ITC is an independent quasi-judicial federal agency. It maintains the U.S. tariff schedule and investigates, reports, and makes determinations on issues concerning international trade, including foreign IP infringement. U.S. patent owners can enforce their rights in the ITC through Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), which authorizes the ITC to exclude the importation and sale of foreign products upon a showing that the products infringe a U.S. IP right.

Typically, when a U.S. patent owner seeks relief through an investigation at the ITC, the patent owner knows the identity of the alleged foreign infringer or at least can reasonably ascertain the entities manufacturing and/or importing the infringing products. When this is the case, the patent owner may seek a limited exclusion order (LEO) to bar importation of that specific party's goods.

But what about situations in which patentees cannot determine where the infringing goods are coming from (other than from abroad) or who is manufacturing or importing them?

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Online retailers of counterfeit goods typically operate in the shadows and are loath to reveal their true identities, which can make it difficult for patent owners to pursue LEOs against specific, named entities.

In such situations, patent owners can seek issuance of a general exclusion order (GEO) from the ITC. GEOs are much broader than LEOs and are intended to address the classic "whack-a-mole" problems many online retail platforms face where the sources of the infringing products are not easily traceable or identifiable.

With a GEO, the ITC can exclude all infringing products from being imported into the U.S. regardless of who is making, importing, or selling them or where they are being imported from. To put it another way, GEOs focus more on the infringing products themselves rather than the party manufacturing, selling, or importing those products.

A GEO is a remedy most appropriate for patent owners who can show evidence of widespread violation. If the knockoff

problem is localized or limited to only a handful of infringers, the ITC typically will not grant such broad and powerful relief. For example, in the 2022 investigation *Certain Plant-Derived Recombinant Human Serum Albumins (“rHSA”) and Products Containing Same*, the ITC found that a GEO was not warranted when only a handful of parties contributed to the selling and importing of the infringing products and the products came from a single source. In that case, the ITC found that an LEO was a more appropriate remedy.

### Obtaining a general exclusion order

Though the bar of proving the need for a GEO is high, it can be an extremely useful tool for combatting pervasive infringement problems.

Complainants (i.e., parties alleging patent infringement in the ITC) seeking a GEO must prove all the typical burdens of proof of an ITC investigation, including infringement, technical domestic industry, economic domestic industry, and public interest, among other statutory requirements. But these complainants also need to prove why a GEO is necessary, which requires a comprehensive understanding of the extent of the knockoff problem and a grasp of where at least some of the infringing products at issue are coming from.

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While a GEO complainant need not list every instance of infringement by potential respondents in the investigation — and likely *cannot* since obtaining identifying information of online sellers for purposes of service of process may be impossible — the complainant still needs to list respondents that can be identified and located with reasonable diligence.

Pursuant to § 1337(d)(2), the ITC may issue a GEO if the complainant shows (1) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products or named persons; or (2) there is a pattern of violation, and it is difficult to identify the source of infringing products.

First, complainants must show why the typical remedy — an LEO — would be inadequate under the circumstances. With widespread knockoff problems, infringing sellers often “pop up” for only a short time, and once they are reported or

otherwise challenged, they disappear and then “pop” back up under a different seller name.

In those situations, LEOs targeting the initial seller or importer name would be meaningless, since the sellers close their online presence and then reappear under a different name selling the same infringing products. Obtaining evidence of this behavior can be challenging and requires time and diligence to track the market for knockoffs and “pop up” patterns, but it is essential for showing that an LEO would be inadequate to address the pervasive infringement problem.

Second, or in the alternative, complainants must show a pattern of infringement in the market whereby the sources of the infringement are hard to identify. Often, knockoff product sellers use various brand and product names, making it difficult to identify where the products are actually coming from and how to trace them to their source. Even more often, many sellers obtain their infringing products from the same foreign manufacturer, resulting in a pattern of nearly identical infringing products being sold under many different seller and brand names.

Showing how widespread the infringement problem is, as well as presenting evidence that nearly identical products are being offered for sale from different sources under different seller and brand names, strengthens the case for why a GEO is necessary.

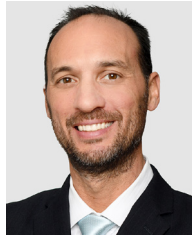
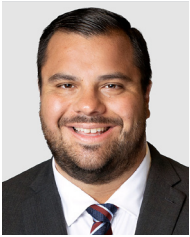
### Practical guidance for U.S. patent owners

While the current tariff landscape may make it more difficult for complainants to track and show widespread patterns of infringement due to supply chain reorganization, it nonetheless demonstrates the value of GEOs, as they allow for infringing products to be excluded regardless of where they are imported from or the identity of the entity importing them. U.S. patent owners considering seeking relief at the ITC should keep the following practical tips in mind:

- Proactively keep tabs on infringement in the market. Track infringing listings in a central location, where the selling link, screenshots, and information about the brand and seller can be recorded.
- Use foreign contacts. Legitimate foreign manufacturers operating in the same city or region as infringers may have insight into where knockoff products are being made and how the products are being imported.
- Don’t shy away from the ITC. Both big and small patent owners can seek relief at the ITC so long as they satisfy the statutory requirements for a §337 investigation. There is no one-size-fits-all approach at the ITC.

Amid upheaval in the global economy, the ITC is a steady and reliable avenue for enforcing IP rights, and U.S. patent owners facing “whack-a-mole” infringement issues from abroad would be well-suited to take advantage of it.

## About the authors



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