

## Kyocera Wireless Corp. v. Int'l Trade Comm'n

Nos. 07-1493 et al., Fed. Cir. (Rader,\* Bryson, Linn)

***Section 337 permits exclusion of the imports of non-respondents only via a general exclusion order, and then too, only by satisfying the heightened requirements of 1337(d)(2)(A) or (B) [but permits limited exclusion orders] to exclude only the violating products of named respondents.***

On October 14, 2008, the Federal Circuit, inter alia, vacated and remanded the ITC's limited exclusion order (LEO) against the importation by non-respondents of all downstream products that infringed U.S. Patent No. 6,714,983, which related to mobile computing devices that can both communicate with wireless networks and operate in a reduced power mode to extend battery life. The Federal Circuit stated:

Aside from Qualcomm, the appellants in this action are Qualcomm's customers. Some customers are wireless device manufacturers whose products are subject to the LEO. Others are wireless network operators whose networks depend on products subject to the LEO. Despite the broad downstream scope of the LEO, Broadcom named only Qualcomm as a respondent in its ITC complaint. . . .

Congress created two distinct forms of exclusion orders: one limited and one general. The default exclusion remedy "shall be limited to persons determined by the Commission to be violating this section." By contrast, a "general exclusion" order ("GEO") is only appropriate if two exceptional circumstances apply. Specifically, under subsection d(2)(A), the Commission may issue a GEO if it is "necessary to prevent circumvention of an exclusion order limited to products of named persons" or, under subsection d(2)(B), if "there is a pattern of violation of this section and it is difficult to identify the source of infringing products." By implication, an LEO is both "an order limited to products of named persons," and one where the complainant has not demonstrated "a pattern of violation of this section and [difficulty in identifying] the source of infringing products." Thus, on its face, the statutory context limits LEOs to named respondents that the Commission finds in violation of Section 337. The ITC cannot expand its authority from "persons determined by the Commission to be violating" to "articles manufactured by persons determined by the Commission to be violating." If a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO by satisfying the heightened burdens of §§ 1337(d)(2)(A) and (B).

Any reading of Section 337(d) that would enable LEOs to exclude articles manufactured by non-respondents would impermissibly render sections of the statute superfluous. . . . The Commission and Broadcom argue that Congress could not possibly have intended to limit the effect of LEOs to named respondents, because unnamed, difficult-to-identify importers of infringing articles might escape enforcement through this loophole. To the contrary, this court does not perceive that its ruling today renders Section 337 relief illusory. Rather, the trade law speaks directly to the very concerns voiced by the Commission and

Broadcom in Section 337(d)(2). A party concerned about potential “circumvention” of an LEO “limited to products of named persons” or fearing the difficulty of identifying “the source of infringing products” has the option to bring a case under either subsection 337(d)(2)(A) or 337(d)(2)(B). In other words, the trade act has made it clear that a party must meet these heightened requirements before the ITC has authority to issue a general exclusion order against products of non-respondents.

Broadcom has a particular difficulty making its argument about the drastic potential consequences of following the statutory requirement of a general exclusion to reach imports beyond those of a respondent. The record in this case shows that the Commission explicitly found that Broadcom knew the identity of the handset manufacturers whose products contain the accused chips. Broadcom thus could have named such manufacturers as respondents to the Section 337 investigation.

Broadcom knew when it filed its complaint that almost all of the accused chips entering the United States were incorporated into handsets by third parties, rather than being imported separately by Qualcomm. Broadcom appears to have made the strategic decision to not name downstream wireless device manufacturers and to not request the ITC to enter a GEO. Thus, Broadcom chose to forego the full advantage of an LEO’s statutory scope by not naming known downstream respondents. Broadcom also chose to forego the burden of proving the extra statutory requirements for a GEO. Based on those choices, Broadcom does not stand in the best position to attempt to blur the clear line drawn by the statute between LEOs and GEOs. . . .

Section 337 permits exclusion of the imports of non-respondents only via a general exclusion order, and then too, only by satisfying the heightened requirements of 1337(d)(2)(A) or (B). The statute permits LEOs to exclude only the violating products of named respondents. . . . Because the Commission did not issue a GEO under either of the two statutory exceptions in 19 U.S.C. § 1337(d)(2), the Act prevents the Commission from issuing a limited exclusion order that excludes products of those who are not “persons determined . . . to be violating [Section 337].” Accordingly, this court vacates the ITC’s exclusion order. On remand, the Commission can reconsider its enforcement options.

*The previous statements are for information purposes only, and do not constitute legal advice. Questions regarding the matters discussed above, and any requests to be subscribed to the free electronic distribution of this publication, may be directed to Lawrence M. Sung, Ph.D., at +1 202.346.7850 or lsung@dl.com, or to any other Dewey & LeBoeuf LLP attorney with whom you regularly consult.*

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