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Trade-Based Remedies for Copyright Infringement: Utilizing a "Loss-Preventative" Synthesis

by

ANTOINETTE M. VON DEM HAGEN*

Introduction

[T]here is only one ideology [governing trade issues] available today. This ideology frames the trade debate in terms of free trade or unfair trade. Only if foreign practices fall into these categories do claims for protection become legitimate.¹

A recent study by the International Trade Commission (ITC) concluded that foreign piracy of intellectual property has assumed monumental proportions, with aggregate U.S. business losses due to inadequate intellectual property protection worldwide estimated at $23.8 billion in 1986.² Over the past fifteen years, concern has grown commensurately with increased losses, reflecting two factors.³ First, losses attributable to piracy have expanded along with a marked growth in international trade, increased production capabilities in countries with inadequate intellectual property protection, and the United States' expansion into foreign markets and production sites.⁴ Second, U.S. businesses are increasingly aware of the importance of intellectual property protection to profitability.⁵ Assuming no improvements are made in in-

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². Foreign Protection of Intellectual Property Rights and the Effect of U.S. Industry and Trade (1988), USITC Pub. 2065, Inv. No. 332-245 (Feb. 1988) [hereinafter ITC REPORT]. Other principal findings were: (1) 245 of the responding 431 firms reported sales of $1.114 trillion, 80% of which were directly affected by intellectual property rights; (2) the largest worldwide losses resulted from lost revenues from fees and royalties, reduced profit margins, displacement by infringing imports, damage to reputations, and business never attempted abroad, in that order; and (3) other adverse effects included lost U.S. exports, lost U.S. jobs, and identification and enforcement costs. Id. at vii-viii.
³. Eighty-four percent of the respondents indicated that losses resulting from inadequate intellectual property protection have "grown greatly" or "grown moderately" during the past 15 years. Id. at Table 5-1.
⁴. Id. at 5-1.
⁵. Id.
intellectual property protection, substantial losses are expected to continue.\textsuperscript{6}

An April 1989 report released by the International Intellectual Property Alliance (IIPA) singled out twelve nations as the most egregious violators of the rights of U.S. copyright holders, with responsibility for $1.3 billion in lost U.S. sales annually.\textsuperscript{7} The high profit potential and the ease by which copyright piracy is accomplished combine to make such piracy the worst widespread intellectual property violation in the world.\textsuperscript{8} Certain industries are particularly prone to copyright piracy because: (1) the technology required to produce infringing copies is readily available and inexpensive; (2) consumers of pirated works are indifferent to, or unaware of, the differences in quality; and (3) innovation is much more costly than copying.\textsuperscript{9} Thus, industries where copyrights are most important—such as computer software, entertainment, character licensing for fashion and miscellaneous consumer goods, publishing, audio, and video—suffer proportionally greater losses.\textsuperscript{10}

As discussed in Part I below, international intellectual property agreements and U.S. border controls are generally incapable of providing or enforcing adequate copyright protection. A growing recognition of the adverse impact of inadequate foreign intellectual property protection

\textsuperscript{6} Eighty-nine percent of the respondents believed that losses would "grow greatly," "grow moderately," "grow slightly," or "stay more or less constant." \textit{Id.} at 5-3, Table 5-2.

\textsuperscript{7} See \textit{China, Saudi Arabia Lead List of 12 Biggest Copyright Pirates, According to IIPA Report}, 6 Int'l Trade Rep. (BNA) 510 (Apr. 26, 1989) (discussing \textit{INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, TRADE LOSSES DUE TO PIRACY AND OTHER MARKET ACCESS BARRIERS AFFECTING THE U.S. COPYRIGHT INDUSTRIES} (1989) [hereinafter \textit{IIPA REPORT}]). The twelve nations are the People's Republic of China, Saudi Arabia, South Korea, India, the Philippines, Taiwan, Brazil, Egypt, Thailand, Nigeria, and Malaysia. \textit{Id.} IIPA members include the Computer Software and Services Industry Association, the Computer and Business Equipment Manufacturers Association, the Motion Picture Association of America, the Recording Industry Association of America, the Association of American Publishers, and the National Music Publishers Association. \textit{Id.} at 511. Recently, the Business Software Association, comprised of six of the largest U.S. personal computer software publishers, joined IIPA. \textit{Also in the News}, 6 Int'l Trade Rep. (BNA) 916 (July 12, 1989).

\textsuperscript{8} \textit{ITC REPORT, supra} note 2, at 2-1. The primary causes of inadequate copyright protection are: (1) failure to protect new technology, such as satellite transmissions; (2) failure to grant certain exclusive rights, such as the right to publicly display works and transmit them electronically; (3) inadequate terms of protection; (4) formalities that inhibit the effective exercise and enforcement of copyright laws; and (5) insufficient penalties and remedies. Note, \textit{A Trade-Based Response to Intellectual Property Piracy: A Comprehensive Plan to Aid the Motion Picture Industry}, 76 GEO. L.J. 417, 425 (1987).

\textsuperscript{9} An industry is vulnerable to infringement whenever: (1) production costs abroad are relatively lower than in the country where the goods are legitimately manufactured; (2) consumers are slower to discover the quality of the goods purchased; and (3) it becomes more costly to produce higher quality noninfringing goods. \textit{ITC REPORT, supra} note 2, at 4-7.

\textsuperscript{10} \textit{Id.} at 2-1. For example, the entertainment industry reported that piracy losses amounted to 14.3% of worldwide sales, the computer industry stated a 7.4% loss, whereas the industrial and extractive firms reported only a 0.4% loss. \textit{Id.} at 4-10.
upon U.S. trade competitiveness has recently focused attention on U.S. trade laws as alternative relief. The rationale behind use of the trade laws is as follows: The incentive for research and development, manufacturing, and marketing expenses is effective intellectual property protection. Such protection not only provides the necessary returns on investment, but also increases the market access and expansion capabilities of U.S. firms in foreign nations. Therefore, any acts by a foreign government that deny adequate intellectual property protection hamper the free flow of trade and thus constitute unfair trade practices, for which certain extraordinary remedies are available.11

The primary U.S. trade-based remedies available to combat foreign copyright infringement are section 301 of the Trade Act of 1974, which allows retaliation against foreign nations that fail to provide adequate and effective protection to U.S. intellectual property rights, and section 337 of the Tariff Act of 1930, which provides an in rem remedy against infringing imports. These sections were extensively amended by the Omnibus Trade and Competitiveness Act of 1988 (the "1988 Trade Act").13

11. This belief is apparent in the premises underlying the April 1986 Administration Statement on the Protection of U.S. Intellectual Property Rights Abroad:

(1) all countries' economic growth and international competitiveness can be enhanced by strong domestic intellectual property protection; and,
(2) if countries do not provide strong protection of intellectual property rights, and an effective system of international enforcement does not exist, then substantial distortions in international trade will result.


The Administration thus believes that inadequate protection and ineffective enforcement of intellectual property rights constitute unfair trade practices that must be eliminated. See generally Mossinghoff, The Importance of Intellectual Property Protection in International Trade, 7 B.C. INT'L & COMP. L. REV. 235 (1984), for a discussion of the economic effects of intellectual property protection on international trade and the growth and expansion of U.S. businesses.

12. While both § 301 and § 337 may be used to address a variety of unfair trade practices, this Note focuses specifically on copyright actions. See infra notes 33 and 186 and accompanying text for a listing of unfair acts within the purview of § 301 and § 337, respectively.

13. Pub. L. No. 100-418, 102 Stat. 1157 (codified as amended in scattered statutes of 19 U.S.C.) [hereinafter 1988 Trade Act]. As §§ 301 and 337 will be discussed both prior to and following the 1988 Trade Act, for convenience, the following references will be used:

Sections 337 and 301 are commonly interpreted as remedies for specific unfair trade practices; separate proceedings that operate independently of the other and which may be instituted following injury to a U.S. business or industry as a curative measure. This Note suggests, however, that the goal of reducing revenue losses from inadequate intellectual property protection, and particularly those due to copyright infringement, is better met by viewing sections 301 and 337 as preventative measures that function far more effectively when used together in a "loss-preventative" synthesis than as separate remedies. This synthesis highlights the advantages of each trade law: the swiftness and effectiveness of section 337 actions and the long-term goal of establishing equitable market access through the use of section 301's formal and informal proceedings.

The focus on "prevention" is particularly appropriate for industries relying on foreign copyright protection, because of the generally short commercial lives of the associated products and the future losses caused by damage to goodwill from inferior-quality infringing copies. This Note thus suggests that a copyright-dependent business incorporate the proposed loss-preventative synthesis as part of its development strategy by: (1) participating in the establishment of international intellectual property rights and enforcement mechanisms through membership in industry organizations that are committed to increased intellectual property rights and expanded market access, and are actively involved in lobbying, treaty negotiations, and consultations; (2) considering the institution of section 301 formal or informal proceedings against specific nations that condone infringement of the company's or industry's products within its borders; and (3) once aware of the presence of infringing imports in the United States, minimizing injury by swiftly proceeding under section 337, possibly in conjunction with section 301 formal or informal procedures, depending upon the particular nation and practice involved. Used efficiently, this synthesis will be much more cost-effective than repeatedly absorbing continual revenue losses, district or foreign court litigation costs, and the occasional heavy lobbying expenditures for particular protectionist legislation.

The proposed synthesis has the added important benefit of minimizing any conflicts with international trade treaty obligations—the most significant treaty being the General Agreement on Tariffs and Trade (GATT). Although some, including this author, believe that the GATT will be a less significant factor in world trade in the future, it is

14. The General Agreement on Tariffs and Trade (GATT), concluded in 1947, is an international agreement dealing with tariffs, quotas and other governmental measures used to influence or control foreign trade. See General Agreement on Tariffs and Trade, opened for
currently the primary treaty governing trade issues. The specific elements of sections 337 and 301 that may violate GATT principles will be examined in Parts IID and IIID, respectively. At this point, however, a brief explanation of the importance of GATT-consistent trade statutes may be helpful.

By authorizing procedures and remedies to combat foreign intellectual property infringement beyond those available against domestic infringers, the United States runs the risk of violating certain GATT principles, in particular, the national treatment obligation. A violation of GATT obligations has several far-reaching effects. First, although the primary sanction for violations is the normative pressure of the ruling itself, the GATT also permits retaliation by an injured government.

Second, the current Uruguay Round negotiations on the GATT contain, for the first time, proposals for intellectual property protection. Any action by the United States that is inconsistent with GATT principles may give a ready-made excuse to those countries attempting to forestall the proposals. Finally, GATT violations destroy U.S. credibility in all international negotiations. This will produce a continued absence of specific intellectual property protection in treaties other than the GATT. Moreover, the United States might be unable to garner international allies when attempting to force an unresponsive foreign nation either to


15. The GATT has an adjudicatory procedure under which complaints of violation can be litigated, resulting in formal legal rulings by the organization. Id. at arts. XII, XIII. The GATT imposes upon its members, inter alia, the "national treatment" obligation contained in Article III: upon entering the internal commerce of a member country, goods produced by foreign signatories must be treated no less favorably than goods produced by the country's own nationals. Id. Thus, U.S. law must treat domestic and foreign products equally unless differential treatment is justified under one of the GATT express exceptions. Article XX(d) allows such treatment if certain conditions, causing adverse effects on trade, are met; it does not constitute express protection for intellectual property rights. Id. The conditions allowing differential treatment are as follows:

1) The measure must not be applied in "a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail;"

2) It must not be applied in a manner which would constitute "a disguised restriction on international trade;" and

3) It must be "necessary to secure compliance with laws or regulations which are not [otherwise] inconsistent with the provisions of this Agreement."


16. GATT, supra note 14, at art. XXIII.

17. See generally Intellectual Property and Trade, supra note 15.
cease its unfair trade practices or to enact intellectual property legislation.

In order to demonstrate the importance of utilizing both sections 301 and 337, this Note first illustrates typical problems faced by copyright-dependent industries by describing a hypothetical computer company with foreign sales. The next two parts examine the effectiveness of sections 301 and 337 in protecting registered U.S. copyrights from foreign copyright infringement both prior to and following passage of the 1988 Trade Act. Each discussion focuses on the elements a practitioner should investigate prior to instituting an action, such as the procedure involved in bringing an action; the requirements for finding a violation; the remedies available; and successful copyright actions under the particular section. GATT considerations are also discussed as they bear significantly upon the continued viability of sections 301 and 337. The accompanying analyses demonstrate that sections 337 and 301 are effective, but underutilized, means to establish equitable and adequate foreign copyright protection for U.S. businesses when foreign concerns or governments engage in actions adverse to U.S. interests. Thus, the final part concludes that those companies contemplating or engaged in international sales of copyrighted products should consider incorporating the proposed section 301/337 synthesis as part of their development strategy, thus focusing their efforts on the long-term prevention of intellectual property-related revenue losses.

I Illustrating the Problem

Consider, for example, certain common difficulties faced by a hypothetical computer software firm that has developed a commercially successful spreadsheet program registered under the U.S. Copyright Act as a computer program. Worldwide distribution of the program has resulted in the manufacture of low-cost, lower-quality infringing copies in a newly industrialized nation whose copyright laws do not protect computer programs. The firm is not only losing potential sales revenues and royalty payments from businesses within that nation, but potential revenue in other countries where the infringing software may be sold as if it were legitimate. Additionally, the firm's future market share in both the particular nation and the other countries may be supplanted by the infringers. Finally, if the firm's reputation is suffering as a result of lower-

18. Along with losses due to inadequate intellectual property protection, the firm will lose potential market share and revenue if trade barriers to market access exist. For example, the IIPA REPORT noted attempts by the South Korean motion picture industry to prevent market access to U.S. motion pictures, including "vandalizing movie houses and planting live snakes
quality copies, its current and future revenue from other products may be jeopardized. The firm has attempted to enforce its rights under the Berne Convention and the Universal Copyright Convention, but has discovered that an effective enforcement mechanism is lacking. 19

The firm has been informed by its U.S. distributors that the infringing program is being imported by unauthorized distributors and is affecting the firm’s revenue and reputation. To battle the infringing imports, the firm has notified the Customs Service, which is attempting to halt the importations at the border. 20 Unfortunately, a significant number of imports are slipping past Customs and, once the goods are in the stream of commerce, the Customs Service lacks jurisdiction to circumscribe this conduct. 21 While litigation of the issue in federal court may result in a

in theatres showing American films.” IIPA REPORT, supra note 7, at 510. Although not specifically discussed in this Note, the discussion of § 301 in Part II is applicable to trade barriers other than inadequate copyright protection.

19. Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, 943 U.N.T.S. 180, as amended (entered into force July 10, 1974). The United States has been a party to the Universal Copyright Convention (U.C.C.) since 1955. Recently, the United States amended the Copyright Act to comport with the standards enunciated in the Berne Convention for the Protection of Literary and Artistic Works, thus qualifying it for membership. See New Bush Administration and Congress Likely to Make Trade A High Priority Again in 1989, 6 Int’l Trade Rep. (BNA) 113, 131 (Jan. 25, 1989). Both the Berne Convention and the U.C.C. are based on the concept of national treatment, requiring member nations to accord foreign works the same protection as it grants to domestic works and to prescribe minimum standards of copyright protection. See generally U.S. Adherence to the Berne Convention, 1986: Hearings before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 1st & 2d Sess. (1986). The Berne Convention offers more comprehensive and specific protection than the U.C.C., but both conventions lack an effective enforcement mechanism. See id. Additionally, a country will not join either convention if granting effective and adequate copyright protection is not in its best interest. For these reasons, the conventions may be unable to deter the worst offenders from continuing their practices.

20. Section 602 of the Copyright Act prohibits the importation of copies into the United States without the authority of the copyright owner. 17 U.S.C. § 602 (1982). Prior to enforcement, the Customs Service may require either a court order enjoining importation or proof of a valid copyright that is being infringed. Id. at § 603(b). Articles imported in violation of the Copyright Act may be subject to seizure and forfeiture. Id. at § 603(c). Forfeited articles will be destroyed unless the importer can demonstrate that he had no reasonable grounds for believing that his acts violated the law. Id. These provisions are promulgated in the U.S. Customs Service Regulations, which contain rules for the recordation and enforcement of U.S. registered copyrights. See 19 C.F.R. §§ 133.31-133.53 (1988).

21. In many cases, copyright owners have discovered that the Customs Service cannot adequately enforce their copyrights. Customs lacks “sufficient means for monitoring, analyzing, and disseminating information about fraudulent activities. Consequently, whatever success [Customs has] in detecting and investigating fraud in one area of the country [is] often not known in another.” Unfair Foreign Trade Practices (Part 4): Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 98th Cong., 2d Sess. 11 (1984) [hereinafter Unfair Foreign Trade Practices] (testimony of William von Raab, Comm’r, U.S. Customs Serv., Dep’t of the Treasury). This has led to “port shopping” by importers who look for inconsistencies in classifying and appraising merchandise and in uncovering evidence of fraud. Id. Second, once the articles have passed through Customs, the
restraining order and damages, in personam jurisdiction over the infringers may not be available. Moreover, the litigation could take years and computer programs typically have short commercial lives.22

II

Section 301

First established in the Trade Act of 1974, section 301 was formulated in response to the developing tendency of foreign governments to create a trade surplus by limiting imports through tariff and non-tariff barriers.23 Prior to the 1988 Trade Act, section 301 authorized the President to take all “appropriate and feasible action”24 to enforce U.S. rights under trade agreements or to respond to any act, policy, or practice of a foreign government that is inconsistent with the provisions of any trade agreement, or that is unreasonable,25 unjustifiable,26 or discriminatory27 and burdens or restricts U.S. commerce.28 Such action may include modifying or denying benefits of trade agreement concessions or imposing duties or quotas on the products of the foreign country, and may be exercised either nondiscriminatory or solely against the foreign country or goods involved.29 The statute acknowledges GATT obligations; if a

22. A new study surveying 164 major American, European, and Canadian firms, found that two-thirds of the surveyed companies are currently involved in litigation and are taking other action (e.g., non-compete or non-disclosure convenants with employees) to protect themselves against the worldwide theft and counterfeiting of intellectual property. Also in the News, 6 Int'l Trade Rep. (BNA) 643 (May 17, 1989). However, “many companies do not believe that litigation is the answer to their problems because of time and money constraints.” Id.


25. “Unreasonable” means any act, policy, or practice which is deemed unfair and inequitable although it may not necessarily violate the international legal rights of the United States. The term includes unfair acts that deny market access, establishment of businesses, or “adequate and effective protection of intellectual property rights.” Id. at § 2411(d)(3)(B)(i)(II). Note that this is not a dictionary definition of “unreasonable”, i.e., the policy has no rational relation to the end sought to be achieved, but rather is defined normatively in terms of bad faith, lack of equity, or lack of fair dealing. See Fisher & Steinhardt, supra note 23, at 598.

26. “Unjustifiable” refers to any act, policy, or practice which is in violation of, or inconsistent with, international obligations. The term includes the unfair acts listed as “unreasonable.” 19 U.S.C. § 2411(d)(4).

27. “Discriminatory” is defined as any act, policy, or practice which denies national or most favored nation treatment to U.S. goods, services, or investments. Id. at § 2411(d)(5).

28. “Commerce” includes services associated with international trade and foreign direct investment by U.S. persons with implications for trade in goods and services. Id. at § 2411(d)(1).

29. Id. at § 2411(a)(2), (b).
trade agreement is involved and the matter is not resolved within the consultation period specified in the agreement, the United States Trade Representative (USTR) is required to initiate formal dispute settlement procedures as provided in the agreement.\(^{31}\)

Section 301 is not a substitute for statutes addressing specific unfair trade practices, such as section 337. Rather, it is the only trade law tool available to private parties seeking to force negotiations on the lowering of non-tariff barriers against U.S. exports. Section 301 has been used primarily to seek expanded access to markets that are restricted due to foreign governmental action\(^{32}\) and thus is available to attack the intellectual property acts or policies of foreign nations that lead to condoned infringement of U.S. intellectual property rights.\(^{33}\)

Prior to the 1988 Trade Act, section 301 was essentially an expansion of the long-vested presidential authority to retaliate against discriminatory foreign trade policies that unduly burden U.S. commerce, giving the Executive the diplomatic and economic tools necessary to achieve a more equitable world trading system.\(^{34}\) This discretionary authority was often used to induce other countries to eliminate unfair trade practices.\(^{35}\) Historically, however, the President has considered retaliation a tool of very last resort: "[t]he U.S. Government . . . [has gone] to great lengths to avoid taking action against the foreign country, instead preferring to exert the maximum pressure to get some movement towards a reduction in the complained of act, practice, or policy."\(^{36}\) Dissatisfaction with this

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30. The United States Trade Representative (USTR) has consistently interpreted “trade agreement” narrowly as either the GATT or a trade agreement approved under the Trade Agreements Act of 1979, 19 U.S.C. § 2503(a) (1986). This limited construction allows the USTR to avoid the mandatory formal dispute settlement agreements, such as World Court procedures, required by some non-GATT agreements. Bello & Holmer, U.S. Trade Law and Policy Series #10: "Significant Recent Developments in Section 301 Unfair Trade Cases," 21 INT’L LAW 211, 212 (1987).


33. While the ITC REPORT, supra note 2, was concerned only with losses due to piracy, there are other trade barriers which cause significant damage to the U.S. copyright industry by restricting trade and creating an environment in which piracy flourishes. These barriers include quotas, high duties, discriminatory taxes, domestic ownership requirements, currency controls, and forced subsidies of local industry. Piracy of U.S. Copyrighted Works in Ten Selected Countries, reprinted in Intellectual Property Rights, supra note 11, at 145, 149. Where these trade barriers are particularly oppressive, even improved intellectual property protection may not lessen losses as U.S. companies have little incentive to enforce their rights in these countries. Id. Although this Note focuses specifically on copyright actions under § 301, the discussion also applies to attacking these other trade barriers.

34. Fisher & Steinhardt, supra note 25, at 573.

35. Coffield, supra note 32, at 382.

36. Id. at 399.
gentle policy was clearly expressed in the 1988 Trade Act wherein the President's discretionary authority was delegated to the USTR and retaliation mandated in certain circumstances.\textsuperscript{37}

Section 301 may be used to attack the two major deficiencies in intellectual property rights protection that lead to the trade distortion—absent, inadequate, and non-uniform foreign intellectual property laws, and inefficient enforcement of the existing laws. As will be discussed further below, section 301 investigations may proceed either "formally" or "informally." As of December 1989, seventy-eight formal section 301 investigations had been initiated, with only two filings alleging decreased market access due to inadequate protection of intellectual property rights, which included copyrights.\textsuperscript{38} In both actions, the foreign governments amended their copyright laws in order to prevent retaliation.

As will be discussed further, informal investigations involve consultations with the offending government and may thus achieve the same purpose as formal procedures without some of the international political repercussions. This Note suggests that the informal procedures are generally preferable, particularly in light of the 1988 Trade Act amendments, as both a short-term cure for, and a long-term preventative of, infringement. Thus, rather than viewing section 301 merely as the final step in securing access for U.S. goods to foreign markets, U.S. businesses and lobbies should consider utilizing section 301 as a tool for establishing equitable intellectual property rights in nations whose inadequate or ineffective intellectual property laws have resulted in U.S. trade losses in that nation or in other countries.

A. Procedure

Section 301 is administered by the Office of the USTR.\textsuperscript{39} Investigations may be initiated in response to a petition filed by an interested per-

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\item[\textsuperscript{37}] See infra notes 57-63 and accompanying text.
\item[\textsuperscript{38}] See United States Trade Representative Section 301 Table of Cases (December 1989) [hereinafter Section 301 Table of Cases] (available at the Office of the General Counsel, Office of the United States Trade Representative, Washington, D.C.). The two copyright actions were Brazil Informatics (Inv. No. 301-49) and Korean Intellectual Property Rights (Inv. No. 301-52). Intellectual property petitions not alleging copyright violations are Korea Steel Wire Rope Subsidies and Trademark Infringement (Inv. No. 301-39), Brazil Pharmaceuticals (Inv. No. 301-61), and Argentina Pharmaceuticals (Inv. No. 301-68). The Argentina Pharmaceuticals petition was withdrawn on September 25, 1989, because of Argentina's progress in bilateral consultations. Pharmaceutical Manufacturers Association Withdraws 301 Petition Against Argentina. 6 Int'l Trade Rep. (BNA) 1226 (Sept. 27, 1989). In addition, a petition was recently filed by the Pharmaceutical Manufacturer's Association, who is also the complainant in the Brazil and Argentina Pharmaceutical matters, regarding Chile's lack of process patent protection for pharmaceuticals.
\item[\textsuperscript{39}] The USTR is appointed by the President and has primary responsibility for developing and coordinating the implementation of U.S. international trade policy, including trade
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TRADE-BASED REMEDIES FOR COPYRIGHT INFRINGEMENT

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The Section 301 Committee reviews petitions and develops recommendations to be submitted to the USTR. The USTR has forty-five days following receipt of the petition in which to determine whether to initiate an investigation. If the petition is rejected, the decision must be published in the Federal Register. If the petition is accepted, the USTR must publish a summary of the opinion in the Federal Register and provide an opportunity for the presentation of public views. If the petition includes a request for a hearing, the hear-

negotiations. The USTR coordinates interagency resources by identifying and referring foreign unfair trade practices to the appropriate federal agency or department. Additionally, the USTR serves as the principal advisor to, and spokesperson of, the President on all matters affecting international trade. The USTR is required to report directly to both Congress and the President on trade agreements, barriers to international trade, and the state of trade negoti-


40. Inter alia, the petition must identify: (1) the petitioner and the interest affected by the unfair trade practice; (2) the U.S. rights being denied, referring to the particular part of § 301 involved; and (3) the foreign country and product or service involved. The petitioner must include specific information regarding the volume of trade involved and the impact on the petitioner and U.S. commerce. 15 C.F.R. § 2006.1 (1988).

The 1988 Amendments define “interested persons” as including domestic firms and workers, consumer interest representatives, U.S. exporters, and any industrial user of goods that may be affected by § 301 determinations. 1988 Amendments § 2411(d)(9), supra note 13.

41. The President is also authorized to take action even if no petition has been filed, in which case he must provide an opportunity for a public hearing on the matter, unless “expeditious action” is required. Id. at § 2411(d)(1). In such cases, the President will request that the USTR initiate an investigation in order to advise the President. Id. at § 2412(c). Only four investigations have been self-initiated and those occurred between September and November 1985. See Section 301 Table of Cases, supra note 38.

42. The interagency process under which § 301 cases are handled is not clearly stated in the statute or the governing regulations. At the top is the Cabinet-level Trade Policy Committee; at the other end, at the working level, is the Section 301 Committee. See Coffield, supra note 32, at 396-97. The Section 301 Committee is chaired by a USTR official and composed of officials from other interested agencies including the Departments of State, Commerce, Agriculture, Labor, Justice, Treasury, Interior, Transportation, Defense, and Energy, as well as the Council of Economic Advisers, the Office of Management and Budget, and the National Security Council. Id. Also, depending upon the significance of the matter, White House officials from different levels may be involved. Id. The Committee arrives at its decisions by consensus; depending on the particular issue, some agencies having more influence or interest than others. Id. A matter will be elevated within the trade policy structure if a major agency disagrees with the Committee’s recommendation, or if a large volume of trade, or particularly sensitive political or economic issues, e.g., cases involving the European Community or Japan, is involved. Id. at 397. The Committee forwards its recommendations to the USTR who decides whether or not to accept them.

The Section 301 Committee essentially represents the petitioner in the later bilateral and multilateral negotiations; as such, it is always advisable to consult the Section 301 Committee informally before filing a petition.

44. Id. at § 2412(b).
45. Id.
ing must be held within thirty days following acceptance of the petition.\textsuperscript{46}

On the date that an investigation begins, the USTR is required to request consultations with the foreign country concerned.\textsuperscript{47} If the matter involves a trade agreement, and a mutually acceptable resolution is not reached during the consultation period specified in the agreement, the USTR must request formal dispute settlement procedures.\textsuperscript{48} During the consultation and dispute settlement proceedings, the USTR is required to seek advice and information from the petitioner and certain other appropriate representatives.\textsuperscript{49}

If the investigation involves certain matters that are covered by a trade agreement, as well as issues that are not, in practice the USTR must decide whether to bifurcate the investigation and pursue dispute settlement procedures on the appropriate matters, or whether to consolidate the investigation and request dispute settlement procedures on all issues.\textsuperscript{50} This decision may be crucial to the outcome because if a GATT dispute settlement panel finds the section 301-violative practice to be acceptable under the GATT, the practice will be legitimized. Any retaliatory action by the United States will then violate the nondiscrimination principle of the GATT. Given that the GATT does not protect intellectual property, it is entirely possible that an illegal practice under U.S. law would not be found to violate GATT principles. For this reason, bilateral resolution of intellectual property issues may be in the United States' best interests, despite the persuasive force of a GATT ruling.\textsuperscript{51}

After investigation, consultations, and formal dispute settlement proceedings, if applicable, the USTR must recommend to the President the action to be taken within deadlines dependent upon the subject matter.\textsuperscript{52} The 1988 Trade Act reformulated the deadlines, enacting a specific

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\item \textsuperscript{46} Id. at § 2413(a). Other timely requests for hearings may be granted, but there is no time limit in which the USTR must hold the hearings. 15 C.F.R. § 2006.7.
\item \textsuperscript{47} 19 U.S.C. § 2413(a).
\item \textsuperscript{48} Id.
\item \textsuperscript{49} These include private and non-federal government sectors with interests in the negotiation and operation of trade agreements. Id.; 19 U.S.C. § 2155 (1986). The USTR may also seek the views of the ITC on the probable economic impact of the proposed action. 15 C.F.R. § 2006.11.
\item \textsuperscript{50} Bello & Holmer, supra note 30, at 213 n.13.
\item \textsuperscript{51} For example, Brazil Informatics involved both GATT issues (e.g., tariff and quota questions) and non-GATT issues (e.g., enforcement of intellectual property rights). The USTR proceeded bilaterally on all issues, resulting in new intellectual property protection laws in Brazil.
\item \textsuperscript{52} The USTR must make the recommendation not later than: 1) 7 months following initiation of the investigation if the petition alleges only an export subsidy covered by the GATT Subsidies Agreement; (2) 8 months if the petition alleges any other matter covered by the Subsidies Agreement; (3) 30 days following conclusion of dispute settlement procedures if
\end{itemize}
time limit for intellectual property cases of six months (nine months for complex cases) from the date the investigation was instituted. Time limits on other actions were also shortened.

Within twenty-one days after receipt of a recommendation, the President must determine what action, if any, to take. The determination and the reasons therefor must be published in the Federal Register.

The 1988 Trade Act transferred the authority to make determinations and take action from the President to the USTR. Moreover, retaliation under section 301 is divided into actions mandated against unjustifiable foreign practices, i.e., those which violate the international legal rights of the U.S., and discretionary actions against unreasonable or discriminatory foreign practices. If a matter is designated as mandatory, the USTR must generally take some action within the scope of its authority, subject to the specific direction of the President. With respect to discretionary matters, the USTR is authorized to take all "appropriate and feasible action" within the scope of its authority and subject to the President’s specific direction. The USTR’s discretion in

petition involves any other trade agreement; or (4) 12 months after initiation in all other cases.

53. The time limit will be extended if: (1) the matter involves complex issues requiring additional time; (2) the foreign country involved is making substantial progress in drafting and implementing measures to provide adequate and effective intellectual property protection; or (3) the country is undertaking enforcement measures to provide adequate and effective protection. 1988 Amendments § 2414(a)(3), supra note 13.

54. The other deadlines are: (1) the earlier of either 30 days following the conclusion of the dispute settlement procedure or 18 months following the institution of the investigation, if the matter involves a trade agreement other than the GATT Subsidies Agreement; or (2) 12 months following the initiation of the investigation for all other matters. If a matter is not concluded within the minimum dispute settlement period, as provided for in the trade agreement, the USTR must so notify Congress within 15 days. Id. at § 2414(2), (4).


56. Id.


58. In determining whether or not a practice is "unreasonable," the USTR must take account of several factors: (1) any actions that the country has taken that "demonstrate a significant and tangible overall advancement" in getting rid of the practice; (2) whether the practice is inconsistent with the level of economic development of the foreign country; and (3) reciprocal opportunities for foreign nationals and firms in the United States. Id. at § 2411(d)(3)(C).

59. Id. at § 2411(a).

60. The USTR does not have to take action if: (1) the United States receives an unfavorable determination or ruling under the GATT or other trade agreement settlement procedures; or (2) the USTR finds that the foreign country is taking satisfactory measures to alleviate or eliminate the practice or, where such action is impossible, to compensate the United States; or (3) when, in “extraordinary cases,” the taking of the action would cause the U.S. adverse economic or national security harm. Id. at § 2411(a)(2).

61. The President may also direct the USTR to take other actions that are within the scope of the presidential powers. Id. at § 2411(a)(1).

62. Id. at § 2411(b).
actions requiring mandatory retaliation is limited to the measures listed
in the statute, unlike the full discretion accorded to the President prior
to the 1988 Amendments.

Prior to the 1988 Trade Act, section 301 did not contain any provi-
sions regarding modification or termination of an action. Currently, an
action automatically terminates after four years unless the petitioner or a
representative of a benefiting industry submits a written request for con-
tinuation during the sixty days preceding the termination date. However, the USTR is required to report to Congress on any modifications or
terminations of any section 301 actions and the reasons therefor. Addition-
ally, the USTR is required to monitor foreign compliance with agree-
ments and measures undertaken to enforce the rights of the United States
under a trade agreement.

The most significant change to section 301 is contained in the re-
quirement that the USTR report annually on U.S. trade liberalization
priorities and designate “priority foreign countries.” The USTR is re-
quired to identify as trade liberalization priorities, the acts or practices of
foreign nations that constitute significant barriers to, or distortions of,
U.S. exports or foreign direct investment and to estimate the impact of
the trade-distorting practice on U.S. commerce. The USTR must fur-
ther identify which of those nations are priority foreign countries, based
on the pervasiveness and impact of the trade-distorting practices. Dur-
ing the following twenty-one days, the USTR must initiate section 301
actions against each identified priority country. Understandably, the
breadth of this provision has caused section 301 actions instituted against
priority countries to be renamed Super 301 actions.

63. These include suspension or withdrawal of trade agreement concessions; imposition of
duties, quotas, and fees on services; and entry into binding agreements with the nation, com-
mitting it to eliminating the offending practice or burden on U.S. commerce, or to provide
compensatory benefits to the U.S. economic sector harmed by the practice. Id. at § 2411(c).
64. Id. at § 2417(c). If so requested, the USTR must conduct a review of the effectiveness
of the action and its effect on the U.S. economy, as well as any possible alternatives. Id. at
§ 2417(a)(2).
65. Id. at § 2417(b).
66. Id. at § 2416(a). If compliance is not satisfactory, the USTR is directed to consult
with the petitioner and provide a public hearing before taking further action. Id. at § 2416(c).
67. Id. at § 2420(a)(1). The report must include: (1) trade barriers and trade distorting
practices whose elimination has been identified as having the most significant potential to in-
crease U.S. exports; (2) “priority” foreign countries that have trade agreements with the
United States, the full implementation of which would increase U.S. exports; and (3) the
USTR’s estimate of the total amount by which exports to each such country would have in-
creased in the previous year if the trade distortions did not exist. Id. at § 2420.
68. Id. at § 2420(a).
69. Id. at § 2420(b).
The USTR is required to undertake a similar process of identifying and investigating those nations that deny adequate intellectual property protection or fair market access to U.S. persons relying on such protection, as well as which of these nations are designated as "priority foreign countries" under a 1988 Trade Act measure known as the Special 301 provision. Within thirty days following designation of priority countries, the USTR must initiate section 301 actions against each identified priority country and investigations must be concluded within six months. Possibly because Special 301 actions run the risk of being even less GATT-consistent than other section 301 actions, the USTR did not target any priority countries on the specified deadline of May 25, 1989, but instead created a two-tier "watch list" that required the named countries to make progress on intellectual property reform or to risk designation as a priority country.

Whether attempting to halt current practices through the use of section 301's retaliatory authority, or employing a preventative approach, certain steps should always be taken by an interested party or petitioner. First, the interested party should request information from the USTR as to the nature and extent of the specific trade policy or practice of the foreign nation, U.S. rights and associated remedies under any trade agreement with that nation or under U.S. law, and the availability of U.S. and international proceedings with respect to the specific offensive prac-

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70. \textit{Id.} at § 2412(b)(2) requires the USTR to initiate an investigation into the act, policy, or practice of a foreign nation that caused it to be identified under § 2242(a) (i.e., Identification of countries that deny adequate protection, or market access, for intellectual property rights). Priority foreign countries are defined as those nations with the most onerous or egregious acts and practices that cause the greatest actual or potential adverse impact, and that are not entering into good faith negotiations or making significant progress in current negotiations to provide adequate and effective intellectual property protection. \textit{Id.} at § 2242(b). Such designation is proper only if the USTR finds that "there is a factual basis for the denial of fair and equitable market access as a result of the violation of international law or agreement or the existence of barriers . . . ." \textit{Id.}

71. \textit{Id.} at § 2420(b). The USTR has substantial discretion with respect to self-initiation. \textit{Id.} at § 2412(c). First, the countries must be identified: (1) that have the most egregious practices that deny adequate protection of intellectual property rights, or deny fair and equitable market access to U.S. persons relying on such rights; (2) whose practices have the greatest adverse impact on the relevant U.S. products; and (3) that are not already involved or entering into good faith negotiations. Additionally, if initiation of an investigation would be detrimental to U.S. interests, the USTR is exempted from the self-initiation requirement, although the USTR would have to report to Congress on the reasons for the determination and the economic interests that would be harmed. \textit{Id.} at § 2412(b)(1)(A)-(C).

During the required consultation period, the USTR must attempt to negotiate an agreement which provides for the elimination of, or compensation for, the offending practices. \textit{Id.} at § 2420(c)(1)(A). The practices should be eliminated and incremental increases in U.S. exports to that country should occur within three years. \textit{Id.} at § 2420(c)(1)(B).

72. See infra notes 118-131 and accompanying text for a discussion of the watch list and Super 301 actions.
tice or practices. Requesting this information serves several purposes. It helps to identify and gather evidence regarding the unfair practice, thus producing a more credible petition. Second, particularly with respect to intellectual property petitions that do not charge an express violation of a trade agreement, it may be advisable to obtain government assistance in drafting a petition which must allege restricted U.S. export access to foreign markets. Third, and most importantly, the request may serve to alert the USTR and the foreign government of a potential section 301 action, allowing the possibility of a solution through informal private discussions. In this regard, it would be useful to advise the USTR of current or previous section 337 actions against the citizens of a particular nation in order to illustrate that government's nonresponsiveness to, or ignorance of, intellectual property violations.

An interested party should know precisely what relief is sought and identify it clearly in the petition. One should attempt to present a realistic, final "solution" by describing in economic terms what the action will accomplish.

Finally, an interested party should keep in contact with the members of the Section 301 Committee and the members of the appropriate federal agencies and congressional committees. The Section 301 Committee arrives at its decision by consensus; thus, constant sensitivity to changing political situations is necessary. Such contact will also serve to keep the petitioner more closely involved in the later stages of trade negotiations and/or section 301 negotiation procedures.

73. The USTR is required to make this information available upon request. 1988 Amendments § 2418(a), supra note 13.
74. See Fisher & Steinhardt, supra note 23, at 606.
75. Coffield, supra note 32, at 389. This tactic works well with governments who appear intransigent in order to show they are not being "bullied" by the United States. Other nations may respond to the threat of retaliation, particularly if that government lacks flexibility in negotiations due to domestic or international political concerns. Id. n.63 (citing Japan as an example of domestic protectionist feelings requiring threats of retaliatory action by the United States).
76. The relief requested should not have the potential to adversely affect U.S. industry. It should be effectively and narrowly targeted to the offending practice; and the petitioner should seek relief that can be taken solely by the Executive branch, not relief that is more properly legislative or judicial. Fisher & Steinhardt, supra note 23, at 607.
77. Such contact helps demonstrate the seriousness of the matter as well as providing the Section 301 Committee, Congress, and the appropriate agencies with a ready source of information. Most important, "congressional pressure and pressure from other interest groups will help greatly in stiffening the spine of U.S. officials who, in the final analysis, are going to be the ones to decide" the resolution of a particular case or the negotiation of an agreement. Coffield, supra note 32, at 400.
B. GATT Considerations

Section 301 actions that are not intellectual property-based generally involve violations of international obligations which are also actionable under the GATT, and therefore section 301 requires compliance with GATT dispute settlement procedures. The GATT dispute settlement procedures are as follows:78 If a GATT member believes that any benefit accruing to it under the GATT is being impaired, it is first required to consult with the government of the offending nation. If consultation does not lead to resolution, then the contracting parties are required to promptly investigate and make appropriate findings and recommendations. In practice, this task is delegated to the GATT Council who turns the complaint over to a panel. The Panel Report is generally sent to the disputing parties as part of a “fix-it” approach to the problem. If the problem is not solved according to the recommendations, the full report is made available and on the record so that the contracting parties may take appropriate action, including retaliation.

Although intended to promote free trade and the notion of a “level playing field,” section 301 may easily be viewed as protectionist legislation. Additionally, unless the foreign practices are in fact violations of GATT obligations, the retaliation permitted or mandated under section 301 is itself a GATT violation.

The virtually limitless scope of section 301 and the broad range of retaliation which the President [and, now, the USTR] can impose thereunder may suggest that an aggressive use of section 301 will undermine an open international economy. Unilateral determinations by the President as to the meaning of international rules or his broad authority to adjust trade relations may be viewed . . . as a notorious end-run around GATT . . . .79

Currently, this scenario is eliciting embarrassing results for the United States. Following the imposition of retaliatory measures against the European Community for its decision to ban the sale of hormone-


79. Fisher & Steinhardt, supra note 23, at 689. These authors suggest that § 301 should be used only in instances of clear violations of international rules, and warn of a clear danger in the United States [seeking] to repeal the law of comparative advantage, diluting GATT by moving away from the accepted principle of unconditional most favored nation treatment, and unleashing an aggressive campaign to demand liberalization in other countries by brandishing threats of retaliation under section 301 when it has unilaterally decided that the current balance of opportunities is ‘unfair’.

Id. at 688.

As one commentator put it: “to the extent you regard a Section 301 proceeding as a final and definitive adjudication, you’re really saying that the President of the United States is judge, jury and hangman for an international rule.” Compliance, Disputes, and Citizen Complaints, supra note 78, at 110.
enhanced beef, the United States was forced to rebuff a GATT charge that it resorts to unilateral action to solve trade problems.\textsuperscript{80} In an answer that may indicate the difficulties surrounding the continued existence of the GATT, the United States responded that it would cease such retaliation if other countries would do likewise.\textsuperscript{81} In a separate matter, President Ronald Reagan imposed 100% tariffs on certain Brazilian imports in retaliation for Brazil’s alleged failure to provide adequate patent protection for U.S. pharmaceutical products.\textsuperscript{82} The United States later backed down “in the face of overwhelming pressure,” and accepted the establishment of an investigatory panel to rule on whether punitive import duties levied on Brazilian pharmaceutical products violate the GATT.\textsuperscript{83} It is clear, therefore, that section 301 retaliation is perceived by GATT members as unilateral acts in violation of GATT principles.

If the above concerns were justified prior to the imposition of the 1988 Trade Act amendments, then the broadening of mandatory retaliatory powers and the required institution of Super 301 actions will exacerbate hostility against the United States among the GATT’s member nations.\textsuperscript{84} Super 301 actions may additionally cause resentment abroad because of (1) the emphasis on sectoral reciprocity, \textit{i.e.}, requiring certain U.S.-determined foreign industrial sectors to be open to U.S. trade, regardless of whether other sectors in the United States are open, (2) the determination of what is “fair” or “unfair” regardless of whether such practices are forbidden by international agreement, \textit{e.g.}, unilateralism, and (3) the possibility of Super 301 being controlled or “captured” by U.S. export interests.\textsuperscript{85}

\begin{itemize}
\item \textsuperscript{80} \textit{U.S. Rebuffs Criticism at Council Meeting that It Acts Unilaterally on Trade Problems}, 6 Int’l Trade Rep. (BNA) 194 (Feb. 15, 1989).
\item \textsuperscript{81} \textit{Id.} The United States later agreed to bilateral discussions with the European Community. \textit{See U.S. Accepts Creation of GATT Panel to Study Sanctions on Brazilian Pharmaceutical Goods}, 6 Int’l Trade Rep. (BNA) 238 (Feb. 22, 1989).
\item \textsuperscript{82} \textit{United States Isolated as it Resists Call for Probe of Tariffs on Brazilian Goods}, 6 Int’l Trade Rep. (BNA) 23 (Jan. 4, 1989).
\item \textsuperscript{83} \textit{U.S. Accepts Creation of GATT Panel to Study Sanctions on Brazilian Pharmaceutical Goods}, 6 Int’l Trade Rep. (BNA) 238 (Feb. 22, 1989). More than 50 countries had gathered in Brazil’s corner while no nation supported the U.S. action in imposing 100% duties on pharmaceutical products from Brazil in response to Brazil’s lack of pharmaceutical patent protection. \textit{Id.}
\item \textsuperscript{84} For example, the European Community Commission has designated the entire 1988 Trade Act as “provisions of U.S. trade laws which could be used in a harmful way against the Community’s trading interests” and labeled the Super 301 provision as “potentially dangerous to the whole relationship.” \textit{EC Report Cites 42 U.S. Trade Barriers, Super 301 Provision Called Major Threat}, 6 Int’l Trade Rep. (BNA) 575 (May 10, 1989).
\end{itemize}
These concerns will undoubtedly play a large role in Administration and USTR decisions regarding section 301 actions. Notably, however, the crucial factor inhibiting GATT consistency appears to be the possibility of unilateral imposition of mandatory retaliation. Thus, if U.S. interests in adequate intellectual property protection are accommodated under informal section 301 procedures, there should not be any GATT-consistency problems. For this reason, since the long-term feasibility of section 301 is, in part, dependent upon its consistency with GATT obligations, informal procedures should be used whenever possible. An informal procedure of private negotiations avoids face-saving standoffs and U.S. threats of “priority” country designation from stalling negotiations. Note that use of informal section 301 procedures will not bar companies from using other trade or statutory measures to encourage nations to accord adequate intellectual protection, such as the Generalized System of Preferences.

C. Advantages of Informal Proceedings

Section 301 provides significant relief against nontariff trade barriers, particularly if the barrier violates a trade agreement provision or involves a recognized unfair practice. Occasionally the mere filing of a petition has a sufficiently *interrorem* effect so that the foreign country ceases the offending practice. More typically, the petitioner can expect

86. The Generalized System of Preferences [hereinafter GSP] provides duty-free protection to eligible products from developing countries (who are often the worst intellectual property rights offenders) designated as beneficiaries. One of the purposes of the GSP is to encourage developing countries to provide adequate and effective intellectual property protection. This is to be achieved through GATT-consistent methods. The extent to which a country provided such protection is “given great weight” in deciding the extent of its benefits. *See Intellectual Property and Trade — 1987: Oversight Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 100th Cong., 1st Sess. 64 (1987)* (statement of Alice Zalik, Former Assistant General Counsel, U.S. Trade Representative). Private parties may request review of GSP eligibility of a particular nation based on its practices relating to intellectual property rights. *Unfair Foreign Trade Practices: Hearings before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. 8 (1987)* (testimony of Michael Smith, Deputy U.S. Trade Representative).

Recently, however, the USTR rejected an intellectual property-based petition against awarding GSP benefits to Brazil, on the basis that Brazil had been named under the Special 301 measure, as well as a similar petition against the Philippines. *USTR to Reevaluate GSP Eligibility of Seven Nations Under Review of Duty-Free Program, 6 Int'l Trade Rep. (BNA) 1063 (Aug. 16, 1989).*

87. *Kennedy, Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion, 20 Cornell Int'l L.J. 127, 143 (1987).* For example, the MPEAA, the foreign trade arm of the Motion Picture Association of America, filed a § 301 petition in September 1988. The petition alleged that South Korea had failed to live up to a 1985 agreement with the U.S. film, home video, and television industries by employing a censorship policy aimed at preventing the direct distribution of MPEAA member films. In
the investigation to progress to bilateral negotiations. Because retaliation is considered a last resort, the threat of retaliation is often not taken seriously, with compromise being more common. Thus, from the petitioner's point of view, section 301 has often been a frustrating avenue of relief, involving an uncertain remedy and long negotiation periods.88

Certainly the 1988 Trade Act has broadened the available remedies and strengthened the impact of threatened retaliation. However, as noted above, the spectre of international disapproval and belligerent face-saving standoffs creates a scenario wherein designation of priority countries, or the public threat thereof, would decrease foreign government intervention against infringers and thus actually increase revenue losses.

For these reasons, the 1988 Trade Act amendments have increased the possible repercussions of formal filings. The informal procedures are therefore more significant as an alternative avenue for relief. In many instances, the goal of reducing both current and future revenue losses from foreign infringement will be better achieved through the "behind the scenes" actions of the USTR and the involved industries. Formal complaints should be considered a last resort, particularly now that retaliation may be mandated, because the offending nation will merely refuse to budge for fear of appearing weak. Moreover, once a formal complaint is filed, retaliation may be mandated, which will further increase hostilities as well as probable conflicts with GATT obligations, thus allowing the offending nation to retaliate. The end result of the increased tension is, of course, a decrease in U.S. credibility in international trade negotiations as well as hampering any further intellectual property negotiations between the United States and the particular nation. A formal investigation may thus be a shortsighted response to a long-term problem. In addition, as a practical matter, the short time limits imposed on bilateral negotiations by section 301, and particularly the Special 301 provision, may sabotage any pre-agreement progress that has been made. Thus, unless section 301 is amended to omit mandatory retaliation, informal discussions may be the most appropriate way to achieve a reduction in revenue losses due to infringement.

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88. See, e.g., Kennedy, supra note 87, at 158, stating that "experience shows that retaliation under section 301 has been anything but swift, credible, or certain."
A "loss-preventative" synthesis would recommend informal discussions with problem countries prior to designation as priority nations. Thus, any industries threatened by harm through offensive foreign practices may act to cease or prevent unfair trade practices by: (1) tracking changes in foreign policies designed to protect foreign industries through inequitable intellectual property rights protection; (2) immediately and aggressively attacking such changes; and (3) calling upon the USTR to recognize inequitable policies and to introduce curative advances in intellectual property protection in any new trade agreements with offending nations.

D. Section 301 Copyright Actions

The following matters were the only section 301 intellectual property investigations that included copyright issues. The cases illustrate the variety of situations a section 301 petitioner may experience, from the stalling in Brazilian Informatics to the rapidly-concluded Korean agreement.

1. Brazilian Informatics

On September 16, 1985, under instruction from the President, the USTR initiated an investigation into the Brazilian "Informatics Law," which was established in 1984 in order to promote development of a "national" informatics industry by restricting foreign competition.\(^8^9\) Pursuant to this authority, Brazil restricted the importation of informatics products covered by this "market reserve" policy, including U.S. computers and computer-related products as well as a broad range of U.S. products incorporating digital technology.\(^9^0\) Additionally, U.S. subsidiaries located in Brazil were prohibited from manufacturing products covered by the market reserve policy.\(^9^1\) Finally, Brazil withheld full copyright protection for computer software resulting in heavy losses due to software piracy.\(^9^2\) These policies resulted in "rapid and unchecked

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89. See generally Informatics Trade Problems with Brazil: Hearing before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. (1987). At the time, Brazil's computer industry was the sixth or seventh largest in the world but was treated by the Brazilian government as an infant industry. Industry Representatives Strongly Oppose Brazil's Informatics Policy, Urge 301 Action, 4 Int'l Trade Rep. (BNA) 387 (Mar. 18, 1987) [hereinafter Industry Representatives].


91. Brazil severely restricted foreign investment, in some cases forcing out U.S. firms with operations in Brazil. Id.

92. Id.
proliferation of restrictions”93 with extensive lost sales to U.S. computer companies.94

On October 6, 1986, in an attempt to resolve the problem through negotiation, the President instructed the USTR to “redouble” negotiating efforts and deferred the final decision to December 31, 1986.95 The USTR was also directed to inform the GATT of the United States’ intent to suspend the application of U.S. tariff concessions to Brazilian imports.96 On December 9, 1986, Brazilian President Sarnay received the final draft of Brazil’s proposed software law, which provided twenty-five year copyright protection for Brazilian and foreign-made software, imposed fines and jail sentences for violations, and regulated the registration of software through the Special Secretariat for Informatics in Brazil.97 At the last minute, a provision allowing the establishment of consortia of foreign and national businesses for the development, production, and merchandising of software was withdrawn.98

Meetings held with the USTR three days later were apparently quite positive and the United States further postponed retaliatory action until July 1, 1987, pending resolution of the consortium issue and passage of the software protection legislation.99 The USTR was, however, directed to conduct public hearings on Brazil’s informatics policy and to solicit private sector recommendations.100 The hearings raised the following issues: (1) The proposed software did not meet international norms because it granted protection for only twenty-five, rather than fifty years; (2) the legislation imposed obligations on foreign software owners who authorize software reproduction and marketing by Brazilian distributors “to the point of almost constituting indirect forms of compulsory licensing”; and (3) the Brazilian law of similars would not permit the registration of software for hardware outside of the market re-

93. Id.
94. White House spokesperson Larry Speakes suggested that U.S. companies had already lost approximately $1.5 billion in lost sales and projected losses of $8.1 billion by 1992 if the current practices continued. White House Council Agrees to Pursue 301 Complaint with Brazil over Informatics, 3 Int’l Trade Rep. (BNA) 685 (May 21, 1986).
96. Id.
98. Brazilian business associations had lobbied for the provision, which would have allowed national partners to hold the Brazilian copyright for consortium-developed software while foreign partners would have held the rights abroad. It was removed following an debate among Brazilian officials as to what Brazil could bargain with at a meeting scheduled with the USTR three days hence. Id.
100. Industry Representatives, supra note 89.
serve if "functionally equivalent programs" were available from Brazilian companies. 101

Despite such concerns, President Ronald Reagan suspended the intellectual property portion of the investigation, although he continued discussions on investment barriers. 102 This decision was severely criticized by Congress 103 and may have provided some of the impetus for the later transfer of discretionary powers to the USTR. On November 13, 1987, President Reagan announced the imposition of sanctions against Brazil because of its failure to implement the computer software law in a flexible, reasonable, and just fashion. 104

After threatening to retaliate and appealing to the GATT, 105 Brazil enacted the software law in December, 1987. 106 U.S. software companies generally applauded the new law, noting that the strong Brazilian market has compensated them for their efforts toward enacting the law. 107 On October 6, 1989, the USTR concluded the four-year investigation, noting Brazil's willingness to continue consultations with the United States to allow expanded business opportunities for U.S. computer and other elec-

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101. Id. The Brazilian "attempt to implement the [functionally equivalent] phrase may lead to such absurdities as denying registration to a new word processor program on the grounds that Brazil already registered one word processor program, and therefore there is a preexisting 'functional equivalent'". Id. (quoting Thomas White of the State Department).

102. President Suspends Copyright Part of Brazil Case, But Talks Will Continue on Investment, 4 Int'l Trade Rep. (BNA) 867 (July 8, 1987).

103. House. Energy & Commerce Committee Chairman John Dingell (D-Mich) and the Committee's ranking Republican, Norman Lent (R-NY), wrote a scathing letter to the USTR noting that during the suspended retaliation periods, Brazil had introduced software legislation "that was even worse than existing law" and that the President's action indicated an unwillingness "to take a tough stance against blatantly unfair practices." Id. Michael B. Smith, United States Deputy Trade Representative, defended the action citing "political sensitivity and divided U.S. industry position" as well as the domestic political and economic issues facing the Brazilian legislature which, under the first civilian government in years, was drafting a constitution. Administration Move on Brazil Informatics Comes Under Congressional Fire at Hearings, 4 Int'l Trade Rep. (BNA) 930 (July 22, 1987).

104. The President stated that, "[I]n particular, the Brazilian government has rejected efforts by an American software company to license its product in Brazil, asserting that a domestic company makes a product that is 'functionally equivalent'." Brazil to Consider Retaliatory Measures Following U.S. Announcement of Sanctions, 4 Int'l Trade Rep. (BNA) 1419 (Nov. 18, 1987). The software company referred to was Microsoft Corporation who, along with six Brazil firms, was denied a license for the sale of MS-DOS operating system in Brazil. Id.

105. Id.

106. In the process, Brazil's legislature attempted to impose a 200% ad valorem fee on all foreign software sold in Brazil. Brazil's President Sarney Vetoes 200 Percent Ad Valorem Fee on New Software Legislation, 5 Int'l Trade Rep. (BNA) 18 (Jan. 6, 1988).

107. See Access to Brazil's Software Market Improved Under New Law, U.S. Executives, Officials Say, 6 Int'l Trade Rep. (BNA) 1077, 1078 (Aug. 16, 1989). Since enactment, approximately 2700 foreign software products have been approved, and 23 have been denied, for marketing in Brazil. Id.
tronics hardware and software firms.\textsuperscript{108} The decision was applauded by the Computer and Business Equipment Manufacturers Association, whose president, John L. Pickitt, noted that the USTR would continue to "pursue solutions outside the formal 301 process . . . ."\textsuperscript{109} Hence, the USTR has turned to the section 301 informal process to achieve future results.

2. Korean Intellectual Property Rights

On November 4, 1985, the USTR initiated an investigation of South Korea's lack of adequate and effective intellectual property protection.\textsuperscript{110} The USTR consulted with Korea through July, 1986, and, in sharp contrast to the protracted and highly-charged Brazilian Informatics matter, announced an agreement on July 21, 1986.\textsuperscript{111} The agreement stipulated that Korea would: (1) introduce for enactment by July 1, 1987, a comprehensive copyright bill protecting traditional works as well as computer programs;\textsuperscript{112} (2) accede to the Universal Copyright Convention and Geneva Phonograms Convention by October 1987; (3) provide domestic protection and adhere to international conventions for certain product and process and microorganism patents; and (4) remove certain restrictions on trademarked goods and licenses.\textsuperscript{113}

On March 10, 1988, the Pharmaceuticals Manufacturers Association charged that Korea had failed to keep the agreement.\textsuperscript{114} In lieu of accepting petitions filed by Bristol Myers Company and Squibb Corpora-

\begin{itemize}
\item \textsuperscript{108} \textit{USTR Terminates Section 301 Investigation of Brazil's Informatics Sector Policies, 6 Int'l Trade Rep. (BNA) 1291} (Oct. 11, 1989).
\item \textsuperscript{109} Id. at 1292.
\item \textsuperscript{110} 50 Fed. Reg. 45883 (1985). The investigation was prompted by the denial of copyright protections to works by U.S. authors and by the lack of patent protection for chemical compounds and compositions and process patent protection only for chemicals and pharmaceuticals. \textit{U.S. Concludes Section 301 Investigation of Korea's Intellectual Property Laws, 32 Pat. Trademark & Copyright J. (BNA) 268} (July 24, 1986). The investigation was applauded by the International Intellectual Property Alliance (IIPA): "What happens in Korea will provide a framework for negotiations with all countries that do not at this time provide adequate and effective protection for intellectual property. Because the copyright law that results from the negotiations could very well be a model for the rest of the developing world, the U.S. government must ensure that the law provide full, modern and complete protection for foreign works." Note, \textit{supra} note 8, at 446 n.198 (citing letter from the IIPA to Jeanne Archibald, Office of the USTR).
\item \textsuperscript{111} \textit{U.S. Concludes Section 301 Investigation of Korea's Intellectual Property Laws, 32 Pat. Trademark & Copyright J. (BNA) 268} (July 24, 1986).
\item \textsuperscript{112} In addition, Korea would further study the feasibility of extending copyright protection to data bases as compilations, semiconductor chips, satellite telecasts, and cable television. Id.
\item \textsuperscript{113} 51 Fed. Reg. 29445 (1986).
\item \textsuperscript{114} \textit{USTR Requests Information on Korean Patent Protection, 36 Pat. Trademark & Copyright J. (BNA) 306} (July 21, 1988).
\end{itemize}
tion, the USTR set up an Interagency Fact Finding Task Force to determine whether treatment of foreign patent applicants and owners in Korea or deficiencies in the patent enforcement system is discriminatory.\textsuperscript{115} On May 25, 1989, South Korea was placed on the Special 301 priority watch list.\textsuperscript{116} On November 1, 1989, it was removed from the priority list for having made "'steady progress' toward improving enforcement of intellectual property rights in its domestic market," such as creating a task force to improve intellectual property rights and stepping-up its enforcement of existing laws.\textsuperscript{117} As noted in the next subpart, the decision to remove South Korea from the priority list was criticized by industry representatives, who believe that the situation has not significantly changed since Korea's May 25th priority list designation.

3. Special and Super 301 Actions

On May 25, 1989, the Administration named three Super 301 candidates: Brazil, cited for its improper restrictions, including import licensing; Japan, cited for barriers to supercomputers, satellites, and forest products; and India, cited for barriers to investment and closed insurance industry.\textsuperscript{118} Japan reacted angrily to the announcement and rejected formal bilateral negotiations.\textsuperscript{119} Brazil called the designation "a unilateral attempt to 'identify and define legal and legitimate Brazilian policies as unfair trade practices'" and noted the "severe negative effect" the Super 301 measure would have on the Uruguay Round.\textsuperscript{120} India termed the Administration's decision "totally unjustified, irrational, and unfair."\textsuperscript{121}

On June 16, 1989, the U.S. formally initiated investigations against the Super 301 candidates.\textsuperscript{122} Since this time, the Indian government has announced its intention to consider easing investment restrictions but reiterated its opposition to negotiating under the threat of trade retaliation.\textsuperscript{123}

\begin{itemize}
  \item \textsuperscript{115} 53 Fed. Reg. 26706 (1988).
  \item \textsuperscript{116}  \textit{USTR Defends Administration's Naming of Japan, India, Brazil Under Super 301}, 6 Int'l Trade Rep. (BNA) (May 31, 1989) [hereinafter \textit{Super 301 Actions Named}].
  \item \textsuperscript{117}  \textit{Hills Removes Taiwan, Korea, Saudi Arabia from Priority List, Five Countries Remain}, 6 Int'l Trade Rep. (BNA) 1436 (Nov. 8, 1989) [hereinafter \textit{Priority List Removals}].
  \item \textsuperscript{118}  \textit{Super 301 Actions Named, supra note 116}.
  \item \textsuperscript{120}  \textit{Brazil Says U.S. Action Under Super 301 Will Have 'Negative Effect' on GATT Talks}, 6 Int'l Trade Rep. (BNA) 688 (May 31, 1989).
  \item \textsuperscript{121}  \textit{Indian Trade Minister Says U.S. Action is "Unjustified, Irrational, and Unfair,"} 6 Int'l Trade Rep. (BNA) 688 (May 31, 1989).
  \item \textsuperscript{122}  \textit{U.S. Formally Initiates 'Super 301' Probes into Trade Practices of Japan, India, Brazil}, 6 Int'l Trade Rep. (BNA) 797 (June 21, 1989).
  \item \textsuperscript{123}  \textit{India to Study Easing Investment Limits Cited Under Super 301, Ambassador Says}, 6 Int'l Trade Rep. (BNA) 1087 (Aug. 23, 1989).
\end{itemize}
On May 25, 1989, the Administration also named twenty-five countries to a Special 301 two-tier watch list, which requires countries to proceed with, or make significant progress on, negotiations regarding intellectual property protection. The priority category, in which the USTR requires improvements within 150 days, was composed of Brazil, the People's Republic of China, India, Mexico, Saudi Arabia, South Korea, Taiwan, and Thailand. The second group of nations did not have time limits for improvement specified: Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, the Philippines, Portugal, Spain, Turkey, Venezuela, and Yugoslavia.

On November 1, 1989, the USTR downgraded the status of Taiwan, South Korea, and Saudi Arabia after each country displayed "significant commitments" to changing its intellectual property policies. Saudi Arabia had pledged to enact a copyright law that meets the obligations contained in the Berne Convention and which would apply to computer software as well as to literary works. Taiwan and South Korea had both demonstrated a "'strong commitment' to improving the climate for intellectual property protection and to strengthening enforcement."

The International Intellectual Property Alliance (IIPA) criticized the removals, charging that the priority countries have not made significant progress since May 25, and warning that "if improvements are not made by [April 30, 1990, the date of the next Special 301 deadline], it would seek the 'immediate designation' of some of the countries under the Special 301 provision." As to the removed countries, the IIPA stated that it expected these countries to continue their efforts at improving intellectual property protection, presumably under informal section 301 procedures.

E. Section 301 Summary

Section 301's usefulness to U.S. industries has increased with the 1988 Trade Act. Tightening the investigation deadlines, removing presidential discretion, and mandating retaliation in certain instances certainly increases the impact of a section 301 formal proceeding. The

125. Id.
126. Id.
127. Priority List Removals, supra note 117.
128. Id.
129. Id. Taiwan's representative to the United States, Eric Chaing, noted that Taiwan had worked "especially hard" to modify its copyright laws and to resolve a dispute regarding pirating of Music Television (MTV) videotapes. Id. Korean officials pointed to new patent laws about to be introduced to the Korean National Assembly for consideration. Id.
130. Id.
131. Id.
ramifications of the 1988 Trade Act, however, are equally as strong and disturbing. First, as intellectual property is not covered by the GATT, mandatory retaliation may well be a GATT violation. Apart from permitting retaliation by the injured country, GATT violations will impact U.S. credibility in the Uruguay Round as well as other trade negotiations. Second, particularly with section 301's emphasis on sectoral reciprocity, the United States may be perceived as heavy-handed and exercising a modern form of "gunboat diplomacy." With certain nations, this perception may increase resistance to modifying or enforcing intellectual property protection. Third, the Super and Special 301 provisions are not working to the benefit of either the USTR or U.S. industry. The USTR requires discretion in order to achieve the long-term goal of "a level playing field," which requires adequate and equitable intellectual property protection. Industry representatives want fast progress on intellectual property issues. Although not at odds with each other, there is a tension between these long- and short-term goals as evidenced by the USTR's creation of a watch list in order to avoid designating numerous priority countries. As the actions discussed indicate, both the USTR and industry is dissatisfied with the performance of Super and Special 301.

This Note suggests that the problems with GATT-consistency, the perception of the United States as heavy-handed, and the tension between the USTR and industry representatives may be greatly alleviated through the use of section 301 informal, as opposed to formal, proceedings. Thus, the proposed synthesis recommends early involvement in informal proceedings, prior to the development of difficulties. Such informal discussions allow industry participation at every level—from recognizing the existence of inadequate intellectual property protection to consulting with the USTR during negotiations with the offending nations. Moreover, the informal procedures are entirely consistent with the GATT. This cannot be said for any formal proceedings under section 301, regardless of whether retaliation is mandatory or merely permitted. Thus, formal proceedings, and Super 301 proceedings in particular, should generally be considered as a last resort.

If infringing products are imported into the United States, informal proceedings should also be considered in conjunction with section 337 proceedings. The next part of this Note examines section 337 procedures, requirements, and actions, as well as its consistency with GATT obligations.
Section 337 is intended to provide quick and effective protection for domestic industries injured by unfair methods of competition and unfair acts instigated by foreign concerns beyond the in personam jurisdiction of United States courts. Section 337 imposes strict time limits upon the proceedings, requiring investigations to be concluded within twelve months, with a six-month extension for cases designated as "more complicated." If a section 337 violation is found, "cease and desist" and/or general exclusion orders may be issued, provided such actions do not conflict with the public interest. The determination and the action are transmitted to the President who has sixty days to disapprove the action for "policy reasons," following which period the determination is final.

Although established in 1930, section 337 was virtually unused prior to 1975. However, as of September 1989, a total of 302 actions had been filed, with 74% of the concluded actions resulting in either a settlement agreement or a finding of a section 337 violation and application of the corresponding remedy. Copyright actions demonstrate an even better track record; of the thirteen complaints that included allegations of copyright infringement, five have resulted in the issuance of general exclusion or cease and desist orders, six were terminated on the basis

132. 19 U.S.C. § 1337(a) (1986) allows the International Trade Commission to prevent "[u]nfair methods of competition and unfair acts in the importation of articles into the United States or in their sale by the owner, importer, consignee or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States . . . ."

133. Id. at § 1337(b).

134. See discussion in Part IIIC, infra.

135. Following a finding of a § 337 violation, the ITC must consult with interested agencies as to the effect of an order upon the public welfare and competitive conditions in the United States 19 U.S.C. § 1337(d), (f).

136. Id. at § 1337(j).


138. SECTION 337 TABLE OF CASES, supra note 137. In approximately 10 investigations, the complainant failed to demonstrate the existence of a domestic industry; in another 11 investigations, substantial injury to a domestic industry was not shown. The majority of the remaining failed investigations were terminated when the ITC concluded that the patent at issue was invalid or was not infringed. See id.

of a settlement agreement, one was terminated upon the complainant’s motion, and only one was dismissed for lack of a section 337 violation. In view of the generally short commercial life of copyrighted products and the future revenue loss associated with inferior-quality infringing copies, the existence of a quick and effective remedy to control infringing imports is particularly significant. However, the paucity of section 337 copyright actions suggests that in practice this is either an underutilized or, at least prior to the 1988 Trade Act, an ineffective remedy for copyright infringement.

A. Procedure

The International Trade Commission (ITC) conducts section 337 proceedings as part of a broad range of “trade overseer” responsibilities. A proceeding commences upon filing of a detailed complaint with the ITC. Within thirty days following receipt of the petition, or as soon as possible thereafter, the ITC must decide whether to institute


143. The ITC is composed of six members appointed by the President and approved by the Senate. A Commissioner must be “possessed of qualifications requisite for developing expert knowledge of international trade problems, and efficient[ly] in administering the duties and functions of the [ITC].” Additionally, no more than three of the commissioners may be members of the same political party. 19 U.S.C. § 1330(a) (1986).

144. These responsibilities include studying and reporting to the President and Congress on the general status of U.S. trade, with respect to the operation of customs laws, including their effect on federal revenue and upon U.S. industries; investigating tariff relations between the United States and foreign countries, including conditions, causes and effects relating to competition of foreign industries with those of the United States, as well as export/import comparisons; and compiling and analyzing statistical aspects of trade, e.g., ascertaining production costs in principal U.S. manufacturing centers. Id. at § 1332.

an investigation. Notice of the commencement of an investigation must be published in the Federal Register.

The respondents, the foreign governments representing each respondent, and the various federal agencies that may be requested to advise the ITC as to the "public interest," are served with a copy of the complaint and notice of the investigation. Respondents have twenty days from the date of service to respond in writing and under oath by admitting, denying, or explaining each allegation; failure to do so is deemed an admission. Copies of the answers are forwarded to the complainant.

Under the 1988 Trade Act, if a respondent fails to answer the complaint, the ITC must presume the allegations to be true and may issue an exclusion order and/or a cease and desist order limited to that respondent. Additionally, the 1988 Trade Act authorizes issuance of a general exclusion order when no respondents appear to contest the action and the violation is established by "substantial, reliable, and probative evidence."

The investigation is conducted in accordance with the Administrative Procedures Act. The presiding officer is an administrative law judge (ALJ) who conducts the hearing and writes an initial determination as to the existence of a section 337 violation within nine to fourteen months depending on the complexity of the case. ITC regulations provide for the submission and consideration of amendments, motions, further responses, and submissions of other documents. Should the ITC decide to reject the petition, the complainant must be presented with written reasons for the determination. Furthermore, respondents must set forth the facts constituting any possible defense and must include statistical data on the value and quantity of imports, respondent's capacity to produce article and the relative significance of the U.S. market to its operations. The ITC is still required, however, to consider the effect of such orders upon the public interest.

Previously, complainants faced with nonappearing respondents were forced to present evidence regarding infringement, the existence of a domestic industry, and substantial injury to that industry. Thus, this change will result in reduced costs and speedier enforcement of copyrights should respondents fail to appear.

146. Id. at § 210.12.
147. Id. Should the ITC decide to reject the petition, the complainant must be presented with written reasons for the determination. Id.
148. Id. at § 210.13.
149. Furthermore, respondents must set forth the facts constituting any possible defense and must include statistical data on the value and quantity of imports, respondent's capacity to produce article and the relative significance of the U.S. market to its operations. Id. at § 210.21.
150. Id. at § 210.13.
151. 1988 Amendments § 1337(g)(1), supra note 13. The ITC is still required, however, to consider the effect of such orders upon the public interest.
152. Id. at § 1337(g)(2). Previously, complainants faced with nonappearing respondents were forced to present evidence regarding infringement, the existence of a domestic industry, and substantial injury to that industry. Thus, this change will result in reduced costs and speedier enforcement of copyrights should respondents fail to appear.
155. Id. at § 210.22.
156. Id. at § 210.24.
discovery, \(^\text{157}\) depositions, \(^\text{158}\) interrogatories, \(^\text{159}\) subpoenas, \(^\text{160}\) prehearing conferences, \(^\text{161}\) and temporary relief. \(^\text{162}\)

Any party may move for summary judgment \(^\text{163}\) or termination of the investigation in whole or in part as to any or all respondents. \(^\text{164}\) An order terminating an investigation is not considered a final determination of an alleged section 337 violation. \(^\text{165}\)

The ITC adopts the ALJ's initial determination forty-five days after filing \(^\text{166}\) unless it orders a review of the determination within that period. \(^\text{167}\) Review is directed if any one commissioner votes for it \(^\text{168}\) and is limited to the ALJ-certified record. \(^\text{169}\)

If a violation is found, the ITC must serve the determination and the resulting action to each party, \(^\text{170}\) publish them in the Federal Register, and transmit them to the President. \(^\text{171}\) The President has sixty days in

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\(^{157}\) Id. at § 210.30.

\(^{158}\) Id. at § 210.31.

\(^{159}\) Id. at § 210.32.

\(^{160}\) Id. at § 210.35.

\(^{161}\) Id. at § 210.40.

\(^{162}\) See infra notes 239-42 and accompanying text for further discussion on temporary relief.

\(^{163}\) 19 C.F.R. § 210.50.

\(^{164}\) Termination may result from a consent order or from a licensing or other settlement agreement. Id. at § 210.51.

\(^{165}\) Id. The 1988 Amendments explicitly provide that terminations on the basis of consent orders or settlement agreements are not determinative on the question of § 337 violations. 1988 Amendments § 1337(c), supra note 13.

\(^{166}\) If the determination involves an ancillary matter, such as a motion for temporary relief or summary termination, the determination is final five days after filing. 19 C.F.R. § 210.54.

\(^{167}\) A party may request an ITC review or the ITC may review on its own motion. Id. at § 210.53.

\(^{168}\) Id. at § 210.54.

\(^{169}\) Id. at § 210.56. Documents and testimony made subject to in camera orders are not made part of the public record, although all other information and testimony admitted will be considered as part of the record. See id. at §§ 210.43-.44.

\(^{170}\) An exclusion order is effective upon receipt by the Secretary of the Treasury who then directs the Customs Department to enforce it; a cease and desist order is effective upon receipt by the respondent. Id. at § 210.57.

\(^{171}\) Id. Articles subject to an exclusion order are entitled to entry under a bond (the amount to be determined by the ITC) until the determination is final. 1988 Amendments § 1337(e), supra note 13. The determination (including the remedy) is effective immediately upon publication, but is not final until presidential approval is given or the statutory disapproval period is over. Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1311 (Fed. Cir. 1983).
which to notify the ITC of his disapproval for "policy reasons."  

The President's veto power has been criticized for adding needless uncertainty to ITC proceedings. This criticism is clearly undeserved. The veto power has been exercised only four times and, more importantly, fulfills its purpose of maintaining presidential discretion in foreign trade matters. As will be discussed further, section 337 may violate the United States' obligations under the GATT. It is therefore essential that the President, privy to information that the ITC may not possess, retain the ability to resolve disputes in a more appropriate, alternative manner than that suggested by the ITC.

172. Although such "policy reasons" are not defined in the statute, they include, but are not limited to, the "impact on United States foreign relations, economic and political . . . [and] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." Duracell, Inc. v. United States Int'l Trade Comm'n, 778 F.2d 1578, 1582 (Fed. Cir. 1985) (quoting S. Rep. No. 1298, 93d Cong., 2d Sess. 199 (1974)). The President is not required to articulate the reasons for his disapproval, but merely must state that the decision was made "for policy reasons." Id. at 1581.

173. The President may explicitly approve the action during the 60-day period, resulting in a final determination as of the date of ITC notification. 19 C.F.R. § 210.57 (1988).

174. Kennedy, supra note 87, at 151.


176. Congress apparently granted this discretionary authority on the belief that "the President would often be able to best see the impact which the relief ordered by the [ITC] may have upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." Kennedy, supra note 87, at 153 (quoting S. Rep. No. 1298, 93d Cong., 2d Sess. 199 (1974)). As these are the same "public interest" factors that the ITC is required to consider prior to issuing an order, Kennedy infers Senate distrust regarding the ITC's ability to evaluate the political and economic implications of issuing an order, and notes that such distrust is probably unwarranted given the expertise and resources at the disposal of the ITC. Id.

This Note suggests that the Senate was not concerned with the ITC's lack of ability, but was foreseeing the possibility of international trade conflicts arising from the application of ITC remedies. See S. REP. No. 1298, 93d Cong., 2d Sess. 199, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186.

This view is supported by Federal Circuit decisions construing presidential disapproval as not affecting the validity of the ITC's determination, thus allowing the ITC to refashion disapproved remedies and resubmit them for presidential approval. E.g., Young Eng'rs, Inc. v. United States Int'l Trade Comm'n, 721 F.2d 1305, 1311 (Fed. Cir. 1983). In addition, the presidential vetoes themselves have contained specific policy considerations pertaining to international relations. For example, in Certain Welded Stainless Steel Pipe & Tube, 43 Fed. Reg. 17789, President Carter included as reasons for his disapproval (1) the detrimental effect of the imposition of the remedy on international relations, and (2) duplication and conflicts in the
Any party may file a petition to reconsider a determination within fourteen days following service if new questions have been raised by the determination and the ordered action. An adversely affected party may appeal the final determination to the Court of Appeals for the Federal Circuit (CAFC) within sixty days. However, presidential disapproval for policy reasons is not subject to review by the CAFC. Neither a pending petition for reconsideration nor an appeal prevents interim imposition of the recommended action.

In response to practitioners' concerns, the 1988 Trade Act amended section 337 with respect to confidential business information and the duty of candor. Section 337 now limits access to confidential information submitted in connection with an investigation to officials involved with the investigation or review of the determination and to U.S. Customs officials responsible for administering any exclusion orders. In response to these amendments, the ITC recently proposed new rules for administration of unfair trade practice laws which would exacerbate trade relations between Japan and the United States. President Carter suggested the imposition of a cease and desist order under the circumstances would be viewed as an "unjustified burden on international trade" and "would invite retaliation against United States exports [as well as] complicate our current efforts to negotiate revisions of the international trading rules." Id. at 17790.

178. Adversely affected parties are not limited to the parties in the ITC proceedings. LSI Computer Sys., Inc. v. United States Int'l Trade Comm'n, 832 F.2d 588 (Fed. Cir. 1987).
179. 1988 Amendments § 1337(c), supra note 13. The "appropriate function" of the Federal Circuit [hereinafter CAFC] is "to decide whether substantial evidence supports the facts relied on and whether the [ITC's] determination, on the record, is arbitrary, capricious, or an abuse of discretion." Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1568 (Fed. Cir. 1986). However, the CAFC may review the ALJ's findings because the fact that the ITC confirmed the ALJ's initial determination makes the ALJ's findings necessary in reviewing a final determination of a section 337 violation. Akzo N.V. v. United States Int'l Trade Comm'n, 808 F.2d 1471, 1476 (Fed. Cir. 1986), cert. denied, 482 U.S. 909 (1987).

The CAFC does not have jurisdiction over ITC decisions that do not constitute final determinations, such as: (1) Interlocutory orders, World Wide Volkswagen Corp. v. United States Int'l Trade Comm'n, 414 F. Supp. 713 (D.C. 1976); (2) advisory opinions, Allied Corp. v. United States Int'l Trade Comm'n, 850 F.2d 1573 (Fed. Cir. 1988), cert. denied, 109 S. Ct. 791 (1989); or (3) decisions to terminate self-initiated investigations, Block v. United States Int'l Trade Comm'n, 777 F.2d 1568, 1571 (Fed. Cir. 1985). Accordingly, a determination unfavorable to the complainant may be appealed immediately, but if the determination is favorable to the complainant and an order is issued, the respondent may not appeal until the 60-day presidential disapproval period is over. See Allied Corp. v. United States Int'l Trade Comm'n, 782 F.2d 982, 984 (Fed. Cir. 1986).
182. 1988 Amendments § 1337(n), supra note 13. Limited disclosure may be authorized under a protective order issued by the ITC. Id.
enforcing a complainant’s duty of candor. The moving party must prove a violation of this duty by clear and convincing evidence of a failure to disclose material information and an intent to mislead.

B. Requirements

Complainants must demonstrate the existence of an unfair act in the importation of the good, the existence of a U.S. industry injured by the unfair act, and that the injury was substantial. Prior to the 1988 Trade Act, the complainant also had to show that the domestic industry was economically and efficiently operated. These requirements will be reviewed below.

1. Unfair Acts

The definition of an unfair method of competition or unfair act in importation of articles into the United States is broad, including copyright infringement, registered and common law trademark infringement, patent infringement, induced infringement, trade secret misappropriation, passing or palming off, copying trade dress, false and deceptive advertising, failure to mark, and false designation of origin.

In addition to unfair acts and methods of competition, the 1988 Trade Act specifically prohibits the importation, selling for importation, or sales following the importation, of articles that infringe a valid and enforceable U.S. registered copyright, patent, process patent, trademark, or mask work.

183. Id. at § 1337(h), authorized the ITC to prescribe sanctions for abuse of discovery and process to the extent authorized by Rules 11 and 37 of the Federal Rules of Civil Procedure. Sanctions for violation include any combination of: (1) private or public reprimand by the ITC; (2) suspension or disqualification from appearing before the ITC; (3) notification of professional associations or licensing authorities; (4) costs and attorney fees caused by duty violation; and (5) possible criminal prosecution by the Justice Department. 53 Fed. Reg. 44900, 44902-03 (1988) (to be codified at 19 C.F.R. §§ 210.80-.85).

184. “Material information” is defined as “a substantial likelihood that a reasonable decisionmaker would have considered the information important in deciding whether to institute the investigation.” 53 Fed. Reg. 44900, 44901 (1988).

185. Such intent includes gross negligence. Id.

186. See Section 337 Table of Cases, supra note 137. Additionally, predatory pricing, tying arrangements, and other antitrust violations are presumably within the jurisdiction of the ITC. However, such allegations have been infrequent, particularly since President Carter's 1978 disapproval of the ITC's determination in Certain Fabricated Steel Plate Products from Japan, Inv. No. 337-TA-58 (1978). See id. See also Lever, Unfair Methods of Competition in Import Trade: Actions before the International Trade Commission, 41 Bus. Law. 1165, 1172 (1986); Victor, Preventing Importation of Products in Violation of Property Rights, 53 Antitrust L.J. 783, 784 (1987).

187. 1988 Amendments § 1337(a)(1)(B)-(D), supra note 13. These sections apply only if an industry relating to the named intellectual property rights exists or is in the process of being
2. Domestic Industry

In order for a complainant to invoke section 337, a domestic industry must be injured by a foreign concern's unfair acts or methods of competition. The existence of a domestic industry is determined on a case-by-case basis.\(^1^{88}\) There is no requirement that an industry be of a particular size,\(^1^{89}\) although it must be geographically located within the United States.\(^1^{90}\) Originally, manufacturing activities in the United States were required,\(^1^{91}\) however, the ITC later expanded the definition of "domestic industry" to include service industries with substantial domestic repair and installation activities.\(^1^{92}\)

The most recent ITC decisions have identified a domestic industry by measuring the "nature and significance of the activity" in the United States.\(^1^{93}\) The "significance" factor is a quantitative measurement, often appearing as a "value-added" test—for example, the ITC has found domestic industries to exist where U.S. quality control, repair, packaging, marketing, distribution, or sale added half of a product's value.\(^1^{94}\) However, where the bulk of the manufacturing and quality control takes place overseas, with only "ordinary sampling techniques" constituting the quality control activities in the United States, the ITC has found no domestic industry.\(^1^{95}\)

\(^{188}\) The determination is made as of the date on which the complaint is filed rather than the date of the ITC's determination. To do otherwise would vitiate the effect of § 337, because the more successful infringers are at obtaining a market share, the smaller the domestic industry will be by the time the determination is rendered. Bally/Midway Mfg. Co. v. United States Int'l Trade Comm'n, 714 F.2d 1117, 1121 (Fed. Cir. 1983).

\(^{189}\) In re Von Clemm, 229 F.2d 441, 444 (C.C.P.A. 1955).


\(^{191}\) See id. at 1372.


\(^{195}\) E.g., Schaper, 717 F.2d at 1368, aff'g Certain Minature Battery-Operated All-Terrain Wheeled Vehicles, USITC Pub. 1822, Inv. No. 337-TA-122, 4 Int'l Trade Rep. (BNA) 1920 (1982). Schaper involved the infringement of a patent on certain toy vehicles imported into the United States from an unlicensed Hong Kong manufacturer. Schaper manufactured the vehicles in Hong Kong through a licensed manufacturer and conducted research and development, quality control, and sales activities in the United States. Schaper also manufactured all of the accessories for the vehicles in the United States. The court approved the ITC's determination that Schaper's domestic activities with respect to the vehicles did not constitute a domestic industry. Furthermore, the court held that the domestic manufacture of toy vehicle accessories did not constitute a domestic industry with respect to the toy vehicles themselves: "[t]he fact that the existence of the accessories derives from the toy vehicles does not make their
“Domestic industry” has been defined in section 337 intellectual property actions as the domestic operations of the complainant that are devoted to the exploitation of the intellectual property right at issue. As a result, a distinction is made between the activities of “invention,” e.g., research and development (R&D), and production-related activities, e.g., manufacturing. Although invention and licensing are often necessary precursors to production, the ITC has never found R&D and licensing activities to be sufficiently “production-related” to comprise a domestic industry. The limitation is arbitrary, particularly with respect to intellectual property rights, the development of which often involves substantial R&D expenditures and where overseas manufacture may be the most efficient way to recoup returns on capital, risk taking, and entrepreneurial activities. As such, there is no apparent reason to distinguish returns from R&D and licensing activities from the returns of any other domestic activity.

Complainants have repeatedly and unsuccessfully called upon the ITC and the courts to recognize the vital economic role R&D and licensing activities play in the development and manufacture of products. The court affirmed the ITC’s finding that Schaper’s activities were too minimal to constitute an industry under § 337. See also Trade of the House Comm. on Ways and Means, 99th Cong., 2d Sess. 705 (1986) [hereinafter Trade Reform] (testimony of Donald Dinan, former Acting Director, Unfair Imports Div., ITC).

The ITC has clearly stated that “design or licensing activities cannot be considered part of the domestic industry because they [do] not involve either manufacture, production, or servicing of the subject goods.” Certain Soft Sculpture Dolls, Popularly Known as “Cabbage Patch Kids,” Related Literature and Packaging Therefor, USITC Pub. 1923, Inv. No. 337-TA-231, 9 Int’l Trade Rep. (BNA) 1292 (1986). Furthermore, the CAFC has stated that nothing in § 337's legislative history would indicate that activities such as design, licensing, and collection of royalties are meant to be protected. Schaper, 717 F.2d at 1371. This would seem to be a historical limitation, reflecting the nature of economic activity in the United States at the time of § 337's original enactment. However, the rule remains that a domestic industry must be found to exist apart from any value added by the licensing or design activities. Certain Soft Sculpture Dolls, supra.

Industries built on developing and manufacturing souvenirs and functional products representing popular commercial film characters are good examples. In such businesses, licensing programs are an integral part of the original money-making scheme. See Warner Bros., Inc. v. United States Int’l Trade Comm’n, 787 F.2d 562 (Fed. Cir. 1986), aff’g Certain Products with Gremlin Character Depictions, USITC Pub. 1815, Inv. No. 337-TA-201, 8 Int’l Trade Rep. (BNA) 1585 (1986).

See Trade Reform, supra note 195, at 80-82 (comments of the National Association of Manufacturers) (suggesting a deficiency where significant economic activities are ruled not to be a domestic industry, thus allowing substantial injury to go unpunished); Feinberg, Intellectual Property, Injury and International Trade, 22 J. WORLD TRADE 45, 51 (1988).
ing activities play in the establishment and continuing vitality of an industry. Instead of acting affirmatively, courts have thrown the gauntlet at Congress’ feet: “If . . . present-day ‘economic realities’ call for a broader definition to protect American interests (apparently including many of today’s importers) it is for Congress, not the courts or the [ITC], to legislate that policy.”

Congress responded in the 1988 Trade Act by establishing a new statutory definition of domestic industry with respect to certain explicitly-named intellectual property rights. In a copyright, patent, trademark, or mask work action, a domestic industry is now considered to exist if there is: (1) significant investment in plants and equipment; (2) significant employment of labor or capital; or (3) substantial investment in the exploitation of the intellectual property right at issue, including engineering, R&D, and licensing activities. This expansion of the intellectual property industry clearly aids complainants, particularly those copyright holders whose businesses are built around foreign manufacturing. Additionally, broadening the definition of domestic industry should allow practitioners to better project the feasibility and success of a section 337 action.

The lower industry standard has not, however, met with complete approval. It is quite probable that foreign litigants will utilize section 337 proceedings, regardless of whether they maintain an economic presence in the United States. This is not necessarily undesirable since

200. E.g., Schaper, 717 F.2d at 1373 (proposed definition of “domestic industry” as a “significant employment of American land, labor and capital for the creation of value” flatly rejected); Warner Bros., 787 F.2d at 588 (despite acknowledging the “large sums of money” and “significant personnel” involved in planning, developing, and executing a licensing program, the ITC “has never determined that the servicing of intellectual property rights . . . qualifies as the type of ‘servicing’ activity that may be considered to be part of the domestic industry”).

201. Schaper, 717 F.2d at 1373.

202. 1988 Amendments § 1337(a)(3), supra note 13. The last factor regarding exploitation of intellectual property rights is presumably broad enough to include marketing, distributional, and promotional expenditures.

203. However, several important gray areas remain; such as whether “significant” and “substantial” should be measured in absolute or relative terms; and whether the value-added test is still a correct measure of “significance” and, if so, how much “value” must be “added.”

204. Removal of the industry requirement has the “anomalous result of permitting foreign companies with no economic stake in plants or equipment in the United States to petition the ITC to prevent U.S. companies from importing a component of a product for assembly in the United States. Indeed . . . [it] would also permit a foreign company with no economic presence in the United States to use the ITC to prevent another foreign company which also has no economic presence in the United States from importing an article.” Trade Reform, supra note 195, at 689 (comments of the ITC Trial Lawyers Association). Lest one think this is an idle threat—almost half of the U.S. patents granted in 1987 went to non-U.S. holders. Section 337 Changes Could Increase Conflict with Other Federal Laws, ITC’s Cass Says, 37 Pat. Trademark & Copyright J. (BNA) 92, 93 (November 24, 1988) [hereinafter Cass’ Remarks]. Seven of the
strong intellectual property protection encourages the presence of, and resultant benefits to, the protected articles in the United States. Nonetheless, such foreign utilization could fundamentally alter the purpose of section 337—to protect U.S. industry.205

3. Domestic Industry Economically and Officially Operated

Section 337 requires that a domestic industry be "economically and efficiently operated" before any action may be taken. This phrase has never been defined. Most of the data considered in determining economic and efficient operation is also relevant to determining the existence of a domestic industry.206 Accordingly, section 337 relief has never been denied because a "domestic industry" was not "economically and efficiently operated."207

In any event, the 1988 Trade Act discarded this requirement. Abolishing the requirement will reduce the discovery costs of a proceeding, although the extent of the reduction is disputed.208

4. Substantial Injury

Section 337 requires the unfair acts to have "the effect or tendency . . . to destroy or substantially injure an industry, . . . or to prevent the establishment of . . . an industry, or to restrain or monopolize trade and commerce in the United States."209 The injury requirement serves to "insure that the extreme and internationally provocative remedy contemplated [by Congress]—exclusion of imports from particular countries—would be implemented only when this is compelled by strong economic reasons."210 This requirement thus addresses the same concern as does

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11 companies having the most U.S. patents granted in 1984 were foreign. Trade Reform, supra note 195, at 692 (comments of the ITC Trial Lawyers Association).
205. See Trade Reform, supra note 195, at 687-93 (comments of the ITC Trial Lawyers Association).
207. See SECTION 337 TABLE OF CASES, supra note 137.
208. Ronald Cass, an ITC Commissioner, has suggested that the deletion of this requirement is probably the most significant change in § 337 and will result in extensive cost savings. Cass' Remarks, supra note 204.
210. Textron, Inc. v. United States Int'l Trade Comm'n, 753 F.2d 1019, 1028 (Fed. Cir. 1985). First, the injury requirement establishes the necessity of § 337's extraordinary relief by showing that domestic remedies are inadequate, thus permitting application of § 337 under Article XX(d) of the GATT. Additionally, the substantial injury requirement acts as a substitute for the domestic due process requirement that demands proof of infringement by particular individuals before relief is granted, thus allowing issuance of an in rem exclusion order without violating the national treatment obligation of the GATT. See Part III D for a discussion of § 337's conformity to GATT obligations.
the presidential veto: permitting discretion in the imposition of internationally objectionable remedies.

The ITC has terminated at least eleven investigations for failure to prove substantial injury to a domestic industry. The criteria for a finding of substantial injury include lost or declining sales; decreases in domestic production and profitability; decreases in the volume of imports and their degree of market penetration; underselling; reduction in the complainant's prices; decline in domestic employment and investment; and loss to intangible business assets, such as goodwill. Sales figures are apparently crucial; in most cases where no injury was found, the ITC described the complainant's sales or profits as increasing or excellent.

The complainant bears the burden of showing a causal connection between the injury and the infringing imports. If a relevant market includes non-infringing alternatives, this showing may be a difficult task, requiring proof of a market shift to the infringing imports.

The injury criteria have been criticized as "descriptions of the health of the industry" and more illustrative of supply and demand conditions in the industry and in the U.S. economy than of the effects of the unfair act. The criteria are also "at odds with the [commonly held] view that the holder of an intellectual property right should be able to exploit it fully and exclusively." In other words, that harm should be presumed when infringement of any intellectual property right occurs. The stringent injury requirement thus clearly illustrates congressional intent in enacting section 337: it is a remedy that should be utilized only when a district court cannot provide the extraordinary relief necessary to protect an industry.

The ITC and the CAFC have found the requisite injury in intellectual property cases with a smaller quantum of proof than that required in

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211. See Section 337 Table of Cases, supra note 137.
213. Id. at 1571.
215. Feinberg, supra note 199, at 53.
217. Feinberg, supra note 199, at 52-53.
218. Id.
219. "[S]ection 337 does not function merely as an international extension of private rights" under the intellectual property statutes, thus standards different from those of federal courts are applied. Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559, 1567 (Fed. Cir. 1986).
non-intellectual property cases.\textsuperscript{220} In one matter, the CAFC came close to adopting a presumed harm standard by stating that "a relatively small loss of sales may establish . . . the requisite injury to the portion of the complainant's business devoted to the exploitation of . . . intellectual property rights."\textsuperscript{221} While this holding would suggest that a business devoted solely to the exploitation of intellectual property rights, such as licensing, should be able to presume harm with infringement, that idea has been repeatedly rejected.\textsuperscript{222} Instead, the injury test still appears to require uncontroverted proof of substantial loss of sales or market share.\textsuperscript{223}

The 1988 Trade Act differentiates copyright, patent, trademark, and mask work infringement from other unfair methods of competition by removing the injury requirement with respect to these unfair acts.\textsuperscript{224} Thus, if a domestic industry exists, injury is presumed with a showing of infringement of a valid and enforceable intellectual property right.

Omitting the injury requirement in intellectual property actions was clearly a correct decision, recognizing the realities underlying intellectual property-dependent industries. Newly-emerging, high technology industries often demonstrate excess demand over supply and declining prices. Using these factors to deny the existence of substantial injury has resulted in conflicting ITC and CAFC decisions. More importantly, foreign infringers have thereby been granted a toe-hold in the U.S. market at the expense of the rightful intellectual property right owner, who has lost the opportunity to reap where it has sown.\textsuperscript{225} In addition, presuming injury will make ITC litigation more predictable and will probably re-

\begin{itemize}
\item \textsuperscript{220} E.g., Textron v. United States Int'l Trade Comm'n, 753 F.2d 1019, 1029 (Fed. Cir. 1985); Fischer & Porter Co., 831 F.2d at 1577.
\item \textsuperscript{221} Bally/Midway Mfg. Co. v. United States Int'l Trade Comm'n, 714 F. 2d 1117, 1124 (Fed. Cir. 1983).
\item \textsuperscript{222} For example, in Corning the CAFC rejected the argument that any "conceivable loss of sales" should be sufficient to show injury, stating that it will not eliminate the injury requirement because of the extraordinary remedy sought. Corning, 799 F.2d at 1566.
\item \textsuperscript{223} E.g., injury is established when the "infringer holds, or threatens to hold, a significant share of the domestic market in the covered articles or has made a significant amount of sales of the articles." Textron, 753 F.2d at 1029.
\item \textsuperscript{224} 1988 Amendments § 1337(a)(1), supra note 13.
\item \textsuperscript{225} This situation was demonstrated by the anomalous results in the following actions. Corning Glass Works filed a § 337 complaint against Sumitomo Electric Industries, a Japanese corporation, for importing certain optical waveguide fibers that infringed Corning's U.S. patents. Certain Optical Waveguide Fibers, Inv. No. 337-TA-189 (1984), aff'd sub nom., Corning Glass Works v. Sumitomo Electric Industries, 799 F.2d 1559 (Fed. Cir. 1986). The imports were manufactured in Japan and sold through Sumitomo's U.S. subsidiary. The ITC found that the corresponding patents were infringed by Sumitomo's imports and that a domestic industry existed. Corning, 799 F.2d at 1563. Corning suggested that the determination of injury should take into account the stage of development of the industry. However, the ITC found no substantial injury with respect to past sales primarily because (1) Corning was im-
duce costs significantly. However, the omission of an injury requirement for intellectual property rights is frequently criticized, primarily because it may transform the ITC into a forum for intellectual property litigation. Critics have also argued that an injury requirement reduces

importing fiber as its domestic capacity could not meet the burgeoning consumer demand, and (2) Corning's sales did not decline during the disputed period. Id. at 1569-70.

Sumitomo intended to open a fiber manufacturing plant in the United States. Despite Corning's arguments that Sumitomo's infringing imports had allowed it to gain a toe-hold in the market at Corning's expense, the ITC refused to consider evidence of prospective sales of U.S. manufactured goods, holding that only sales of imports could be taken into account in finding a tendency to substantially injure. Id. at 1570-71. Thus, the result: the economic success of Corning's patented product not only disallowed protection for past loss of market share, but also legitimized future market losses resulting from Sumitomo's entry to the market, all to the detriment of Corning's future revenue.

Decided four months after Corning, Akzo N.V. v. United States Int'l Trade Comm'n similarly involved allegations of patent violation and attempts to exploit the applications and penetrate the market created by the complainant, E.I. du Pont de Nemours and Company (DuPont). 808 F.2d 1471 (Fed. Cir. 1986), aff'g Certain Aramid Fibers, Inv. No. 337-TA-194 (1984). In this matter, however, an exclusion order was granted. The injury determination was based on a finding that DuPont's business would be injured during the remaining life of the patent due to a probable price reduction, and corresponding revenue loss, by DuPont in response to Akzo's entry into the market. Akzo, 808 F.2d at 1487. In contrast to Corning, the CAFC held that a "conceivable loss of sales" is sufficient to establish a tendency to substantially injure, finding this standard to be "entirely consistent with the legislative history of [section 337]." Id. Even more curiously, the court approved the "stage of development" theory it had rejected in Corning. Id. at 1487-88.

The distinguishing factor between the outcomes appears to be profit: in Akzo, the complainant had yet to realize a profit; in Corning, the complainant's profits were described as good. Thus, the crucial issue is one of subjective equity rather than objective injury: has the complainant already received a fair share of the pie.

226. The General Accounting Office (GAO) estimates that one-half of the $250,000 to $1 million cost of bringing a § 337 investigation is attributable to the injury requirement. Reform of Section 337 of Tariff Act of 1930 Debated at Chicago Meeting, 32 Pat. Trademark & Copyright J. (BNA) 80, 81 (May 22, 1986). However, ITC Commissioner Ronald Cass disputes this figure, pointing out that injury findings are often channeled into other issues such as infringement. Cass' Remarks, supra note 204, at 93. Additionally, these factors are reviewed by the ITC when considering the public interest, and by the President following an affirmative finding. As a result of removing the injury requirement, the factors would be removed from a due process record but used in a quasi-judicial hearing following the determination. In the view of the ITC Trial Lawyers Association, it would be "fairer for all of those involved [to have a due process record of the factors] rather than [to] come in afterwards and not have the same opportunities as an adversary to develop the facts." Trade Reform, supra note 195, at 722 (testimony of Paul Plaia, Chairman, Legislation Committee, ITC Trial Lawyers Association).

227. Easing of a domestic industry requirement and deletion of an injury requirement make § 337 even more substantively similar to other intellectual property laws. There are three concerns associated with this similarity. First, if the ITC is perceived as an intellectual property forum, it will serve the same function as a district court. However, with specialized remedies and the absence of counterclaims, § 337 is open to attack by GATT signatories as a non-tariff barrier. See Trade Reform, supra note 195, at 688 (comments of the ITC Trial Lawyers Association). Second, ITC commissioners are required to be qualified in international trade, not legal doctrine; thus, transforming the ITC into a court may be inappropriate. House Subcommittee Holds Hearings on Section 337 Reform, 31 Pat. Trademark & Copyright J.
This is not a sound argument as the focus in the GATT-arena is on the necessity of the remedy—not the extent of the injury. It is true, however, that the specter of international trade conflicts may result in increased presidential disapproval of ITC actions for policy reasons, thereby actually decreasing the predictability of section 337 actions.

C. Remedies Authorized Under Section 337

If a violation is found, the ITC must consider the effects of an exclusion order or a cease and desist order on the public interest and determine the appropriate action. The ITC may tailor remedies to fit particular offenses. For example, the ITC might issue a cease and desist order preventing inventory sales against certain respondents in conjunction with a general exclusion order against all respondents preventing further importations. Damages will not be awarded in section 337 proceedings.

A general exclusion order is a remedy in rem, covering all violating imports, regardless of whether the specific manufacturer participated in the proceedings or whether personal jurisdiction over such manufacturers could have been obtained, thus making it an extremely potent remedy. It is granted when the pattern of infringement and the business conditions are such that it is reasonable to conclude that foreign manufacturers other than respondents may attempt to enter the U.S. market with similar infringing articles. An exclusion order is effective upon

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(BNA) 532, 533 (Apr. 17, 1986) (citing Representative Robert Kastenmeier (D-Wis), who noted that at the time, five of the six ITC Commissioners were not attorneys). Finally, separate bodies of law are developing in the ITC and in federal and state courts that create “all sorts of possibilities for difficulties arising [from and] tensions between the different sorts of proceedings.” Cass' Remarks, supra note 204, at 93.

228. See infra note 256.

229. The public interest includes “the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers...” 1988 Amendments § 1337(d), supra note 13.


231. Although a contemporaneous federal district court suit is possible, it increases costs considerably. Whether this is a significant factor depends upon the type of industry concerned as well as the stage of development of the particular business. For example, a newly-emerging high-technology business may discover that its future, or perhaps its very existence, may depend upon the speed of the proceedings. Thus, its main concern would be stopping infringement quickly, with the issue of monetary compensation a secondary concern.

232. See, e.g., Certain Coin-operated Audiovisual Games, USITC Pub. 1160, Inv. No. 337-TA-87, 3 Int'l Trade Rep. (BNA) 1212 (1981). With respect to “business conditions,” the ITC has considered:

(1) established demand for product in the U.S. market and conditions of the world market; (2) the availability of marketing and distribution networks in the U.S. for
receipt by the Secretary of the Treasury and remains in effect until the Treasury is notified that the conditions that led to the issuance of the order no longer exist. The order is enforced by the Customs Department.

The 1988 Trade Act allows seizure and forfeiture of infringing imports if: (1) the owner or importer previously attempted to import the articles into the United States; (2) the article was previously denied entry by an exclusion order; and (3) the owner was given notice by the Secretary of the Treasury that seizure and forfeiture would result from any further attempts to import the article. Although this provision is useful, similar provisions already exist in the Customs Department regulations as well as in the Copyright Act, thus the extent of the punitive and deterrent effects of seizure and forfeiture under section 337 are unknown.

A cease and desist order prohibits a respondent from engaging in the unfair act and is often used to prevent sales of pre-existing inventories in the United States. If a cease and desist order is violated, a civil penalty is imposed. The ITC may recover the penalty for the benefit of the United States in a federal suit.

potential foreign manufacturers; (3) the cost to foreign entrepreneurs of building a facility capable of producing the articles; (4) the number of foreign manufacturers whose facilities could be retooled to produce the article; or (5) the cost to foreign manufacturers of retooling their facilities to produce the article.

Id. 233. 1988 Amendments § 1337(h), supra note 13.

234. Id. at § 1337(i).

235. See 19 C.F.R. § 133.52 (1988); 19 U.S.C. § 603 (1986). The ITC Trial Lawyers Association asserts that such duplication of remedies is not necessary because there have been few problems with enforcement. Trade Reform, supra note 195, at 704. However, one survey indicated that nearly two-thirds of the firms that had received exclusion orders found that counterfeited goods covered by the order continued to enter the country in smaller numbers. Intellectual Property Rights, supra note 11, at 237 n.38 (statement of Allan Mendelowitz, Associate Director, National Security and International Affairs Div., General Accounting Office). Because Customs was only authorized to exclude goods covered by an order, foreign infringers would re-export the goods losing only shipping charges. Id. Thus, seizure and forfeiture have been applauded as necessary remedies to halt “port shopping.” See id. at 238.


237. Prior to the 1988 Trade Act, the penalty was the greater of $10,000 per day or the value of all articles entering or sold in the United States on each day. 19 U.S.C. § 1337(f)(2) (1986). The 1988 Trade Act raised the penalty to the greater of $100,000 per day or twice the value of all articles entering or sold in the United States. 1988 Amendments § 1337(f)(2), supra note 13.

Codifying current ITC practice, the 1988 Trade Act gives the ITC authority to grant preliminary relief in the form of cease and desist orders or temporary exclusion orders to the same extent as the Federal Rules of Civil Procedure allow preliminary injunctions and temporary restraining orders. Thus, even if the ITC believes that a section 337 violation is occurring, it will not issue preliminary relief unless the complainant demonstrates that immediate and substantial harm will occur prior to the final determination. The 1988 Trade Act reduced the period within which the ITC must rule with regard to temporary relief to ninety days, or 150 days for a "more complicated case," following the publication of notice in the Federal Register.

The 1988 Trade Act allows section 337 litigants to petition for a determination that they are no longer in violation (advisory opinions) and for modification or rescission of relief. In all cases, relief will be granted only on the basis of undiscovered evidence or on other grounds which permit relief from a judgment under the Federal Rules of Civil Procedure.

D. Section 337 and the GATT

The issue of GATT consistency boils down to whether section 337 remedies are "necessary" to provide the same degree of enforcement against foreign infringers that the domestic intellectual property laws

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240. 1988 Amendments § 1337(e)(3), supra note 13. However, articles subject to a temporary exclusion order are entitled to entry under bond, the amount to be determined by the ITC. Id. at § 1337(e)(1).

241. The ITC will consider: (1) complainant's probability of success on the merits; (2) immediate and substantial harm to industry in the absence of temporary relief; (3) the possible harm to respondents if temporary relief granted; and (4) the possible effect temporary relief might have on public interest. 19 C.F.R. § 210.24(e) (1988). See Certain Products with Gremlin Character Depictions, USITC Pub. 1815, Inv. No. 337-TA-201, 8 Int'l Trade Rep. (BNA) 1585 (1986), for application of these factors.

242. 1988 Amendments § 1337(e)(2), supra note 13. In a "more complicated" case, the complainant may have to post a bond before a temporary exclusion order is issued. Id. While the time limits are particularly appropriate for the generally short economic lives of copyrighted articles, patent cases may be more problematic because the high standards required for the issuance of a preliminary injunction in patent cases necessitate longer discovery. See Trade Reform, supra note 195, at 701 (comments of the ITC Trial Lawyers Association). The simplest solution is probably to designate patent cases as "more complicated."


244. Id. An advisory opinion or an order modifying relief may necessitate an entirely new proceeding with issues different from those previously litigated. Thus, this vague standard will probably provoke additional litigation as to what is or is not "new evidence" and "evidence which could not be presented earlier." See Trade Reform, supra note 195, at 702 (comments of the ITC Trade Lawyers Association).
provide against domestic infringers. This question has two parts: (1) whether the remedy of a general exclusion order is necessary; and (2) whether the existence of a separate ITC procedure is necessary.

The first issue was raised in a complaint raised by Canada against the United States (the "Canada Report") arguing that, because no analogue to general exclusion orders exists in domestic infringement actions, such orders constitute excessive enforcement against foreign products. The United States justified general exclusion orders on the grounds that the jurisdictional difficulties in obtaining effective damage awards against foreign infringers rendered such remedies ineffective as a deterrent against continued infringement. The GATT Panel decided that those facts justified a general exclusion order under the "necessity" exception of Article XX(d).

The decision . . . appear[ed] to rest on the ground that the specific product in question was easy to copy, that infringement by other foreign suppliers was thus a substantial danger, and that, in this case, the danger could not effectively be deterred or controlled by domestic infringement actions against either foreign producers or domestic users.

The Panel's decision did not, therefore, resolve the fundamental question of the legitimacy of general exclusion orders.

In a recent ruling, a GATT Panel considered a complaint filed by the European Community regarding a section 337 patent action involving a Netherlands corporation (the "EC Report"). Directly addressing exclusion orders, the Panel found that both limited and general exclusion orders violated the national treatment obligation, but that limited exclusion orders could be justified by Article XX(d)'s necessity exception.

245. See supra note 15, discussing GATT national treatment obligation and the "necessity" exception.


247. Id. at 197. The complaint was raised following issuance of a general exclusion order against Canadian respondents in Certain Spring Assemblies, Inv. No. 337-TA-88.

248. Id.

249. Id.

250. Id. at 197-98.


The CAFC used a broad definition of injury in deciding the matter: a "conceivable loss of sales" was sufficient to establish a tendency to substantially injure. Akzo, 802 F.2d at 1487. The European Community did not raise any issues with respect to the injury requirement, confirming that the injury requirement is irrelevant to GATT consistency.
emption as "the functional equivalent of an injunction enjoining named domestic manufacturers."252 This rationale did not hold true for general exclusion orders, although the Panel suggested that general exclusion orders may be justified as "necessary" under Article XX(d) in certain situations.253

Although the GATT will review the necessity of exclusion orders on a case-by-case basis, the Canada Report factors are commonly found in section 337 copyright infringement actions. Moreover, even the EC Report acknowledged that preventing importation at the border could require the issuance of general exclusion orders.254 The Customs Department has freely admitted its inability to prevent widespread importation of infringing products, absent general exclusion orders.255 Thus, it is quite possible that the application of general exclusion orders to prevent such importation would, in most cases, be considered "necessary."256

The second, and more serious, issue was the focus of the EC Report. Basing its decision on features of section 337 prior to the 1988 Trade Act amendments, the GATT Panel concluded that section 337 "is inconsistent with Article III:4, in that it accords to imported products challenged as infringing United States patents treatment less favorable than the treatment accorded to products of United States origin similarly challenged, and that these inconsistencies cannot be justified in all respects under Article XX(d)."257 The specific elements found to violate the national treatment clause were: the restriction on raising counterclaims in

252. EC Report, supra note 251, at ¶¶ 5.31-.32.
253. Id. at ¶ 5.32.
254. [T]he Panel did not rule out entirely that there could sometimes be objective reasons why general in rem exclusion orders might be "necessary" in terms of Article XX(d) against imported products even though no equivalent measure was needed against products of United States origin. For example, in the case of imported products it might be considerably more difficult to identify the source of infringing products or to prevent circumvention of orders limited to the products of named persons, than in the case of products of United States origin.

Id.
255. See Unfair Foreign Trade Practices, supra note 21, at 11 (testimony of William von Raab, Commissioner, United States Customs Service).
256. Note that the presence or absence of an "injury" requirement is irrelevant; if § 337 remedies are necessary to the adequate enforcement of intellectual property rights, it does not make any difference whether the injury requirement exists. If § 337 remedies are not "necessary" to the enforcement of intellectual property rights, then omission of the requirement does not make the law any more or less GATT-conforming. Intellectual Property and Trade, supra note 15, at 175-76.
257. EC Report, supra note 251, at ¶ 6.3. Interested third parties submitted arguments—all in favor of the European Community's position—alleging that the use of a separate and distinct adjudicatory process is a denial of the national treatment obligation and that § 337 is protectionist and constitutes a disguised restriction on trade. See id. at ¶¶ 4.2-.8.
section 337 proceedings as opposed to federal courts; the complainants' opportunity to choose a forum in which to challenge imported products, but not products of U.S. origin; the possibility that foreign respondents, but not those whose products originate in the United States, will have to litigate in both federal court and the ITC; and the potential disadvantage to respondents of short and fixed time limits under section 337 when no comparable time limits apply to suits involving products of U.S. origin. According to the Panel, these extra burdens cannot be justified under Article XX(d) because an alternative measure is available that the United States "could reasonably be expected to employ and which is not inconsistent with other GATT provisions . . . ." This measure would consist of granting the remedial powers and procedural regulations of section 337 to a federal district court, thereby treating products of either foreign or U.S. origin equally.

The United States blocked adoption of the Panel Report by the GATT for nine months. As United States Trade Representative Carla Hills noted, "while it [is] 'troubling' to block a report, the ruling could have wide ranging implications for international law. Acceptance of the report would mean that the United States would have to take action to bring section 337 into compliance with GATT rules." The blocking had a severe impact on the Uruguay Round negotiations. In December 1989, the USTR reconsidered the international trade implications, deciding that effective dispute procedures were more advantageous to U.S. trade interests than continued blocking of the EC Report. The Administration apparently believes that adopting the EC

258. Id.
259. Id. at ¶ 5.26.
260. Because the question was not specifically raised, the Panel did not conclude whether the differences in treatment could be traced to the structure of the ITC as an administrative agency and not a court of law, and thus whether this structural difference itself violated Article III. Id. at ¶ 5.21. However, the Panel clearly believed that a reasonable "alternative measure" would be to treat products of foreign and U.S. origin similarly, either by allowing § 337 actions against U.S. goods or by granting federal district courts the same powers as the ITC possesses. See, e.g., id. at ¶ 5.32 (general exclusion orders consistent with Article I:4 if they were available "in like situations" against products of U.S. origin). Given the generally non-legal make-up of the ITC, the latter suggestion is more plausible.

Robert Hudec believes that the "necessity" could be justified under Article XX(d) "if there were in fact some basic constitutional impediment to empowering district courts with the kind of remedial powers needed." See Intellectual Property and Trade, supra note 15, at 201. However, Hudec concludes that, except for the Presidential veto which may raise problems under Article III of the Constitution, there would be no constitutional difficulty with empowering the federal courts to administer § 337 remedies. Id. at 205.
263. Id.
Report will, by itself, satisfy the GATT members, allowing the Uruguay Round to progress. There is no move to amend section 337 to comply with the GATT and, indeed, President Bush has remarked that he would continue “to enforce section 337 without change.”

It seems clear that, if the presidential veto power is maintained, exclusion orders may be consistent with GATT obligations. It appears to be only a matter of time, however, that the United States will be forced to make a choice between amending section 337 to treat foreign and domestic parties equally, and thus meet the GATT’s nondiscrimination requirement, or enforcing section 337 as it currently exists and thereby guaranteeing the eventual demise of the GATT as a credible, effective international trade treaty.

E. Section 337 Copyright Actions

The following examples illustrate the variety and success of copyright infringement actions brought under section 337. As noted above, other than the *Gremlins* matter reviewed below and one other action terminated on the complainant’s motion, every section 337 copyright action has resulted in an exclusion order or a settlement agreement.

1. *Rally-X and Pac-Man*\(^{265}\)

Bally/Midway Manufacturing Company filed a petition alleging, *inter alia*, copyright infringement of their copyrighted video games Pac-Man and Rally-X. The ITC adopted the AL’s findings that the registered copyrights on the audiovisual works were valid and were infringed by respondents.\(^{266}\) Domestic industry was defined as “that portion of [the] complainant’s business devoted to the exploitation of the intellectual property rights in issue,” and a domestic industry was found to exist for Pac-Man.\(^{267}\) Following a finding of substantial injury, the ITC issued a general exclusion order against imports that infringed the Pac-Man copyright.\(^{268}\)

With respect to Rally-X, the ITC concluded that a domestic industry did not exist, citing low inventories and the current absence of manufacture and marketing of Rally-X.\(^{269}\) Upon appeal, the CAFC noted that

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\(^{264}\) *Id.* at C2, col. 4.


\(^{266}\) *Bally/Midway*, 714 F.2d at 1120.

\(^{267}\) *Id.*

\(^{268}\) The ITC cited lost sales to identical but substantially cheaper infringing imports as the basis for its injury finding. *Id.*

\(^{269}\) *Id.*
“a particular video game generally has only a brief period of popularity, accompanied by high production and sales,” and recognized that, in many cases, infringing imports could destroy a domestic industry before the ITC could complete the investigation. Based on the sale of a “substantial number of Rally-X games” prior to and during the investigation, the CAFC found that a domestic industry existed. After determining that the Rally-X industry had been substantially injured through the sale of a “significant” number of infringing games, the matter was remanded to the ITC for further proceedings on relief, which resulted in the issuance of a general exclusion order eight months later.

2. Apple Computers

Apple Computer, Inc. filed a complaint alleging, inter alia, infringement of its registered copyrights in Autostart ROM, an operating system program embedded in a ROM chip, and in Applesoft, an interpreter program stored in a ROM chip. The ITC determined that the copyrights were valid and infringed by imported personal computers. Additionally, the ITC determined that the respondents had contributorily infringed Apple's copyrights with regard to ROM-less computers and

270. Id. at 1119.
271. The CAFC therefore instructed the ITC to make industry and injury findings as of the date on which the complaint was filed. Id. at 1121.
272. Id. at 1123.
273. Evidence in this regard included the testimony of several respondents who had entered into consent decrees, Customs officials who noted that the number of infringing games was increasing, video game operators who informed Bally of copies in their areas, and complaints from Bally's distributors. Id.
274. Id. at 1125.
277. Autostart ROM is a derivative work based on a work entitled Apple II System Monitor which was separately registered. Apple failed to plead infringement of the Apple II System Monitor copyright, thus raising the question whether the copyright in Autostart Rom was limited to the new material distinguishing it from Apple II System Monitor. Citing Apple Computers, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3rd Cir. 1983), Apple argued that other courts had found infringement of the entire Autostart Rom program where only that copyright was pleaded. The ITC managed to avoid the question by ruling that the issue of the Apple II System Monitor program copyright was litigated with the implied consent of the appearing respondents through the introduction of pertinent evidence without objection. Apple Computers, supra note 276.
278. Along with the “virtual identity” of the programs, the ITC found that all the respondents had access to the copyrighted works as they had been embodied in commercially available Apple computers for some time. Apple Computers, supra note 276.
279. “As a general rule, a contributory infringer is one who with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another . . . However, where the contributory infringement is alleged to lie in the sale or distribution of an article, it will not be found if that article is capable of commercially significant noninfringing
motherboards which required ROMs containing the Apple programs in order to operate.\textsuperscript{280}

Since the product involved was the "complete personal computer," domestic industry was defined in such terms and included the labor and resources involved in the following areas: R\&D; engineering support; manufacture and assembly of the keyboard; purchase from U.S. producers of custom integrated circuit chips, random access memory chips and assorted hardware; and final assembly, testing, quality control, and packaging. Injury was established on the basis of consumer price sensitivity to personal computers and the "substantially lower prices" of the infringing imports. As a result, the ITC issued a general exclusion order.\textsuperscript{281}

3. Laurel Burch Jewelry\textsuperscript{282}

Laurel Burch, Inc. (LBI) filed a complaint alleging violation of section 337 through the importation and sale of cloisonne earrings\textsuperscript{283} which infringed nineteen registered copyrights. None of the named respondents appeared at any time during the proceedings and LBI submitted a motion for summary determination. The copyrights were found to be valid and infringed.\textsuperscript{284} Although the cloisonne components were manufactured in Taiwan, the ALJ determined that the domestic production activities and stringent quality control\textsuperscript{285} composed over 50% of the finished product's value. Substantial injury was established by evidence uses. Of course, there must first be a finding that direct copyright infringement is occurring." The respondents were unable to present sufficient probative evidence as to commercially significant noninfringing uses of the ROM-less motherboards and computers. \textit{Id.}

\textsuperscript{280} The respondents would insert the infringing ROMs following importation of the ROM-less computers and motherboards. This ruling was indeed a victory for Apple who, "hampered by regulatory obstacles," had attempted to obtain the same ruling from the Customs Department earlier. \textit{Unfair Foreign Trade Practices, supra} note 21, at 410 (testimony of Gary Hecker, attorney, on behalf of Apple Computer, Inc.).

\textsuperscript{281} The order excluded from importation all personal computers and components that directly infringed the copyrights as well as ROMless motherboards and computers "which can be shown to be associated with imports of infringing ROMs or which are intended to receive infringing ROMs in the United States." \textit{Apple Computers, supra} note 276.


\textsuperscript{283} The earring designs were "highly stylized abstractions based upon personal interpretations of objects of nature, such as birds, plants and flowers." \textit{Id.}

\textsuperscript{284} The infringing earrings were identical to Laurel Burch, Inc.'s (LBI) designs, but differed significantly in quality. LBI had arranged for the manufacture of the earrings in Taiwan; the respondents included both the original Taiwanese manufacturers and North American importers. Such evidence was held as proof of access. \textit{Id.}

\textsuperscript{285} These included mounting and shaping post studs and earwires or clasps with all of the required materials being purchased in the United States. \textit{Id.}

\textsuperscript{286} "[C]omplainant engages in 100\% inspection of every pair of cloisonne earrings." \textit{Id.}
of lost sales\textsuperscript{287} and damage to LBI's reputation and goodwill.\textsuperscript{288} A general exclusion order was issued one year after the filing of the complaint.

4. \textit{Gremlins}\textsuperscript{289}

Warner Brothers, Inc. filed a complaint alleging a section 337 violation in the unauthorized importation and sale of products infringing three of its copyrights in the characters from the movie \textit{Gremlins}. The ALJ identified two separate domestic industries:\textsuperscript{290} one involving the products in which the copyrights were incorporated and the other consisting of the actual licensing of the copyrights.\textsuperscript{291} Although substantial injury was not found in the product industry because the infringing products were not in competition with the domestically produced products,\textsuperscript{292} injury was found in the licensing industry.\textsuperscript{293}

The ITC reversed the part of the determination that found a domestic licensing industry existed, arguing that it "has never determined that the servicing of intellectual property rights, as contrasted with the servicing of products, qualifies as the type of 'servicing' activity that may be considered to be part of the domestic industry."\textsuperscript{294} The action was therefore dismissed for lack of a section 337 violation.

\textsuperscript{287} Although the number of infringing imports could not be established (due to nonappearance of respondents as well as importation from undefinable parties), it was estimated that LBI was aware of only 10\% of the total sales of the imports. However, even this 10\% had a significant impact on LBI's market; long standing customers ceased or reduced LBI purchases and cancelled orders "in favor of purchasing the [significantly] lower cost imports." \textit{Id.}

\textsuperscript{288} Having made "a concerted, and successful, effort to establish" a reputation as to quality, LBI was harmed by the poor quality of the imports which were passed off as LBI originals. \textit{Id.}


\textsuperscript{290} Warner licensed 48 domestic companies to produce products containing Gremlins character depictions, with 31 of those companies engaging in manufacturing activities within the United States. Approximately one-half of the Gremlins products royalty revenues resulted from domestic manufacture. \textit{Gremlins, supra} note 289.

\textsuperscript{291} Such industry included the marketing, financial and legal activities related to the licensing and legal protection of the Gremlin copyrights. The ALJ explained that Warner's activities involved "far more than the usual activity of any inventor or copyright holder and is part of an established industry . . . [licensing is] an integral part of their original profit-making domestic activity . . . large sums of money are invested in the planning of the licensing program and significant personnel are utilized in developing and executing it . . . ." \textit{Id.}

\textsuperscript{292} The infringing imports consisted of inexpensive "souvenir" items such as key chains and pins, whereas the domestic licensed products were higher priced "utilitarian" objects such as clothing and school lunch boxes. \textit{Id.}

\textsuperscript{293} "The presence of unauthorized infringing merchandise may endanger the overall marketing program because of a licensor's loss of control over product quality and safety." \textit{Id.}

\textsuperscript{294} The ITC suggested that allowing Warner's licensing activities to constitute an industry would allow foreign manufacturers to be considered domestic industries based on extensive marketing and legal activities (to protect the copyright) in the United States. These activities
E. Section 337 Summary

The advantages of section 337 actions include speed, effective in rem protection, and a forum generally favorable to complainants. The 1988 Trade Act has additionally benefited complainants by lessening the industry standard and deleting the injury requirement in intellectual property cases and by adding a default provision in case of non-appearance. The result should be more predictable outcomes and lower costs.

The disadvantages of section 337 copyright actions include cost (although costs should decrease following the changes in the industry and injury requirements and the new default provision for nonappearing respondents), the absence of damage awards, and the remote possibility of a presidential veto following an affirmative determination. Most importantly, the predictability of section 337 actions—indeed, the continued existence of section 337 itself—may be in jeopardy following the recent EC Report. If Congress refuses to amend section 337 to treat products of both foreign and U.S. origin equivalently, international disapproval will steadily increase as more affirmative determinations lead to further GATT complaints. Such disapproval, in conjunction with the compromises required in negotiating the Uruguay Round or any new multilateral trade treaty, could increase the possibility of retaliation against, or significant trade concessions by, the United States. In an attempt to avoid additional stress in the international trade arena, section 337 could, therefore, be subjected to increased presidential disapproval as well as strict and narrow interpretations of section 337 by the ITC. Although Congress could grant section 337 powers to federal courts, thus avoiding GATT charges of discriminatory treatment, this is unlikely to occur in the near future.

IV
Conclusion

Foreign infringement of U.S. intellectual property rights continues to grow along with revenue losses from such infringement, particularly affecting copyright-dependent industries. Both sections 301 and 337 are powerful tools which may be used to protect U.S. industry from inadequate intellectual property protection. The 1988 Trade Act strengthened these trade-based remedies, making them extremely useful to U.S. industries, but have also intensified the possible international trade problems associated with sections 337 and 301.

could be performed by an importer and Congress did not intend to protect the activities of importers when it enacted § 337. Id.
Sections 301 and 337 have typically been used separately to attack different problems. This Note has suggested using the remedies in tandem and focusing on the prevention of revenue losses. The proposed synthesis suggests that companies develop marketing strategies which include annual expenditures for section 301-based lobbying and negotiation activities, possibly by participating in industry organizations working with the USTR. Companies interested in expanding into, or marketing in, particular nations should consult with the USTR and consider requesting informal section 301 discussions if current or future problems emerge. Section 301 formal procedures or Super 301 petitions should be reserved as a last resort; actions that function as a short-term curative measure with high costs in terms of GATT conflicts and future trade negotiations. If section 301 informal discussions are appropriate, such procedures should continue following resolution of the immediate issue.

If infringing products are imported into the United States, section 337 actions should be instituted immediately. Particularly for copyright infringement, section 337 has proven to be a quick and generally satisfactory method of halting infringement. Section 301 informal discussions should be conducted in conjunction with a section 337 proceeding to enlist the support of the foreign infringer's government in ceasing the offending practices.

The loss-preventative synthesis is especially applicable for copyright-dependent industries where the ease of copying and the long-term effects of lower-quality infringing copies makes quick curative and far-reaching preventative measures necessary. Moreover, the existence of copyright treaties, such as the Berne Convention and the Universal Copyright Convention, have established copyright as a legitimate intellectual property right not subject to dispute, in comparison to newer forms of intellectual property such as process patents. Thus, although this synthesis may be used to combat other types of intellectual property infringement, it will be most effective when used against copyright infringement.

In conclusion, returning to our hypothetical computer software company, the synthesis would suggest joining an industry organization, such as the Computer Software and Services Industry Association or the Business Software Association, at the time the company contemplates international sales. The organization should be one which maintains discussions with the USTR, and thus has access to information regarding the intellectual property policies of specific nations as well as the status of any current negotiations. Upon realizing that foreign infringement is occurring, the company should contact the USTR to initiate informal section 301 discussions with the offending nation(s). If these proceedings
prove unsatisfactory, the company may consider instituting formal section 301 proceedings or requesting Super 301 status for the nation, keeping in mind the USTR's recommendations as to the feasibility and long-term consequences of such actions. If the infringing products are imported into the United States, the company should immediately institute section 337 proceedings, accompanied by informal section 301 discussions. These steps will help mitigate current, as well as prevent future, revenue losses. Moreover, this synthesis decreases the possibility of GATT conflicts, and allows the development of other multilateral and/or bilateral intellectual property agreements more hospitable to U.S. business interests.