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Federal Circuit Lashes Out at the ITC's Narrow Ruling Regarding the Domestic Industry Requirement

***Lashify, Inc. v. Int'l Trade Comm'n*, No. 23-1245, 2025 WL 699368 (Fed. Cir. Mar. 2025)**

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On March 5, 2025, the Federal Circuit vacated the International Trade Commission ("ITC")'s decision and exercised its "independent judgment" based on the Supreme Court's *Loper Bright* decision, which overturned *Chevron*, to evaluate the ITC's long-standing practice of narrowly interpreting the domestic industry requirement of Section 337 of the Tariff Act of 1930 to require domestic manufacturing activities in order for a company to receive protection through the ITC. In particular, the Federal Circuit ruled that the ITC improperly analyzed the economic prong of the domestic industry requirement when the ITC held that investments in "labor or capital for sales, marketing, warehousing, quality control, and distribution," alone were insufficient to establish the domestic industry requirement. This decision opens the door for companies who manufacture overseas but have significant U.S. sales and marketing operations to seek injunctive relief from the ITC for patent disputes.

Section 337 (19 U.S.C. § 1337) empowers the ITC to investigate and take action against unfair trade practices in the importation of goods in the U.S and to grant relief as a way to protect U.S. industries. To qualify for a Section 337 ITC proceeding, a complainant must demonstrate the existence of a "domestic industry" via domestic investments that are protected by an asserted patent. The economic prong of the domestic industry requirement—i.e., domestic investments of "significant investment in plant and equipment," "significant employment of labor or capital," or "substantial investment in exploitation of the patent though activities such as engineering, research and development, or licensing"—was at issue for Lashify's utility patent and its two design patents. 19 U.S.C. § 1337(a)(3)(A)-(C).

In 2020, Lashify, a U.S. eyelash extensions and accessories company that manufactures overseas, filed a complaint with the ITC alleging a Section 337 violation based on patent infringement by various importers. At the ITC, Lashify sought to establish a domestic industry through the labor or capital costs it had incurred in the U.S.—specifically, expenses related to sales and marketing, warehousing, distribution, and quality control activities. The ITC found that, because Lashify's products were not made in the U.S. and Lashify's labor and capital expenditures were typical of a "mere importer," Lashify had failed the economic prong without other qualifying investments for all three patents. Lashify appealed.

On appeal, the Federal Circuit vacated the ITC's decision as to the economic prong for all three patents, holding that the ITC's interpretation—that labor or expenses related to U.S. sales, marketing warehousing, quality control, and distribution did not count towards the domestic industry requirement in absence of domestic manufacturing—was inconsistent with the plain language of Section 337. Indeed, the Federal Circuit noted that Section 337's "significant employment of labor or capital" did not provide restrictions on what the labor or capital was being used for. The Federal Circuit remanded the case for further consideration as to whether Lashify's expenses were significant or substantial for the two design patents.

Although the Federal Circuit expanded the domestic industry standard, the Federal Circuit did not specify what minimum level of labor and/or capital satisfies the domestic industry requirement. As such, the threshold level of labor and/or capital required to establish domestic industry, for now, remains a mystery.