

## “Mediation of Intellectual Property Disputes Under the Tariff Act of 1930, as Amended (19 U.S.C. § 1337)”

*An Informative Discussion  
of IP Mediation at the  
USITC*

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## USITC Section 337 Mediation Program

Lisa R. Barton, Acting Secretary  
U.S. International Trade Commission  
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## About the USITC

The United States International Trade Commission (USITC) was established in 1930. It is an independent, nonpartisan federal administrative agency whose mission is to:

- 1) Administer U.S. trade remedy laws within its mandate in a fair and objective manner;
  - 2) Provide the President, the United States Trade Representative (USTR), and Congress with independent, quality analysis, information, and support on matters relating to tariffs and international trade and competitiveness; and
  - 3) Maintain the Harmonized Tariff Schedule of the United States.
- In so doing, the Commission serves the public by implementing U.S. law and contributing to the development of sound and informed U.S. trade policy.

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## Section 337 Investigations Claims & Remedies

- Section 337 investigations conducted by the U.S. International Trade Commission most often involve claims regarding intellectual property rights, including allegations of patent infringement and trademark infringement by imported goods.
- The primary remedy available in Section 337 investigations is an exclusion order that directs Customs to stop infringing imports from entering the United States.
- In addition, the Commission may issue cease and desist orders against named importers and other persons engaged in unfair acts that violate Section 337.

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## Section 337 Investigations Adjudication

- The USITC is considered a "rocket docket" -- completion of the investigation in Section 337 cases often occur within 16 months, much faster than proceedings in federal district court.
- Section 337 investigations, which are conducted pursuant to 19 U.S.C. § 1337 and the Administrative Procedure Act, include trial proceedings before administrative law judges.
- Determinations by the ALJ are subject to review by the Commission.
- Decisions of the Commission may be appealed at the Court of Appeals for the Federal Circuit (CAFC).

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## Section 337 Investigations Complaint Filing Trends

- Streamlined, efficient, economic legal process has made USITC a popular forum.
- During the recent recession, USITC saw a surge in new 337 Complaint filings:
  - FY 2009 - 29 investigations instituted
  - FY 2010 - 51 investigations instituted
  - FY 2011 - 70 investigations instituted
  - FY 2012 - 48 investigations instituted

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## 337 Mediation Program

- On October 29, 2008, the Commission established a pilot mediation program for Section 337 investigations.
- The program was modeled operationally on the highly successful CAFC mediation program.
- On August 30, 2010, the Commission converted the pilot program into a permanent agency program.
- The 337 Mediation Program is aimed at facilitating the settlement of disputes and enhancing the efficiency of Section 337 adjudication by reducing the number of issues, patent claims, and/or respondents and otherwise assisting the Commission in managing its 337 caseload.

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## Benefits of Mediation

- Risk-free, inexpensive, confidential
- Quick method of case evaluation
- 337 Mediation does not alter the procedural schedule, it is not a cause for delay
- May narrow issues and settle some claims
- Reduces length and expense of litigation
- May result in settlement as to some parties, which may later lead to settlements by remaining parties
- Settlements at USITC often settle other matters involving the same parties and issues in other courts

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## Why Mediate IP Disputes?

- Mediation can be particularly valuable for intellectual property disputes because of the complexity of the applicable law and complex technological issues.
- A mediator with knowledge of the relevant law, business field, or technology, can confidentially provide each party with a candid neutral assessment of the strengths and weaknesses of its case.
- Choice is the fundamental advantage of mediation over litigation. Mediation provides the opportunity to tailor resolution to meet business goals, stabilize old or establish new business relationships and provide certainty regarding the intellectual property at issue.

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## Confidentiality Assured

- Request to enter mediation is confidential and processed by the Secretary
- 337 Mediation Program staff's role is purely administrative. They do not participate in or have knowledge of the substance of mediation proceedings
- Mediators do not communicate with the Administrative Law Judge, the staff, the Office of the General Counsel, or the Commissioners
- Investigative Staff Attorney assigned to the case will not participate in or have knowledge of the substance of mediation proceedings
- Settlement agreements do not identify the method of reaching resolution. However all settlement agreements are reviewed by the ALJ and included in an Initial Determination, which is subject to Commission review regarding whether a settlement of any or all issues is in the public interest

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## Mediators

- Roster of exceptional volunteer mediators recruited from the ranks of distinguished retired Federal jurists and senior counsel from intellectual property practices
- Located in major IP commerce centers across the country
- Mediators provide a single-day session of pro bono mediation
- Additional sessions are compensated by private contract between the parties and the mediator
- Mediator candidates are screened by the Secretary and the best qualified are submitted to the Commission for approval
- Expanding roster to provide for greater geographic diversity, eventually global
- Rotating new, well-qualified mediators into the program as veteran mediators conclude their service

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## Timing of Mediation

Certain times have been identified as optimal for conducting a productive mediation:

- After the completion of the Markman Hearing
- At the close of fact discovery and exchange of expert witness reports
- After the filing of trial briefs
- At the conclusion of the trial, but before issuance of ALJ's Final Initial Determination on Violation
- Cases that go to mediation early sometimes come back to mediation for a second try after one of these important benchmarks

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## Scheduling a 337 Mediation

- Request to Enter Confidential Mediation can be submitted using a “save-and-send” form found on the ITC mediation webpage or a request in an email may be sent to 337Mediation@usitc.gov
- Any party can request to enter mediation, though parties are encouraged to gain the consent of the necessary parties so the request is joint
- Parties are requested to provide an individual who will serve as the 337 Mediation Program point of contact
- Mediation case manager assists the parties in selecting a mediator based on mediator availability and location
- Once a mediator has been selected and his/her availability confirmed, a conflicts check is performed by the mediator using a complete roster of parties in the investigation

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## Conflicts Check and Nondisclosure Agreements

- Any potential conflicts are reported to the parties who will decide if the conflicts may be waived or another mediator must be selected
- When the mediator selection is established the mediator is requested to execute a Non-disclosure Agreement and submit it to the Secretary for counter-signature subscribing to the Judge’s Protective Order
- Parties identified as expecting to participate in the mediation are provided Non-disclosure Agreements for all participants, including counsel, parties with settlement authority, in-house counsel
- Non-disclosure agreements are exchanged between the parties and copies are provided to the Secretary

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## Mediator Process

- After the mediator has received the countersigned NDA from the Secretary, he/she may request any documents filed with the Commission in the matter that they believe would be helpful in conducting the mediation
- The mediator’s contact information is provided to all parties intending to participate in the mediation
- At this point, the parties and mediator handle all remaining arrangements privately, including location, duration, pre-mediation statements, execution of contracts for compensation for preparation time and subsequent mediation sessions, etc.
- Should the parties be unable to provide a place to conduct the mediation that is mutually agreeable, the parties may request to conduct the mediation at the USITC. Conferences rooms may be reserved if no trials are taking place on the requested dates

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## Concluding 337 Mediation

- If the parties have been ordered to mediation by the ALJ, they may be required to provide a report to the ALJ if so ordered.
- No report is made to Secretary regarding any specifics on the mediation by either the parties or the mediator
- Parties are encouraged to provide feedback to assist the agency in providing an effective and helpful program

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## 337 Mediation Program Firmly Established

- Commission's Chief Administrative Law Judge now includes a provision in his Ground Rules requiring litigants to participate in mediation in place of one of three required settlement conferences
- Other judges are strongly encouraging or ordering mediation on a case-by-case basis
- There is increased interest by the parties, many of whom have experienced positive results through mediation
- 22% of open investigations are now participating in mediation

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## Conclusion

The U.S. International Trade Commission is a well-established forum with a strong track record of efficient and timely resolution of Section 337 investigations. The 337 Mediation Program also offers an important approach to alternative resolution of intellectual property disputes that should become increasingly useful to parties in the future.

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**Contact Information**

Email: [337Mediation@usitc.gov](mailto:337Mediation@usitc.gov)  
or visit:  
[http://www.usitc.gov/intellectual\\_property/mediation.htm](http://www.usitc.gov/intellectual_property/mediation.htm)

A graphic of a balance scale, symbolizing justice or mediation, is positioned behind the contact information text.

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