

APPEALS FROM THE INTERNATIONAL TRADE COMMISSION: WHAT STANDING REQUIREMENT?

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ABSTRACT

The U.S. International Trade Commission (“ITC”) is one of the world’s most influential intellectual property adjudicators. Based on its enabling statute, 19 U.S.C. § 1337 (“section 337”), the ITC may use its power to issue exclusion orders to bar importation of goods that infringe U.S. patents. Section 337 includes what appears to be an express standing requirement, which provides that “[a]ny person adversely affected by a final determination of the Commission . . . may appeal such determination” to the Federal Circuit. On its face, this language is broad, but it is unclear how this provision fits with the case or controversy requirement of Article III of the U.S. Constitution.

This Article explores the question of whether a party has standing to appeal an ITC determination to include or omit certain patent claims in an exclusion order, a question that, until recently, had a straightforward answer: ITC complainants always have standing while ITC respondents usually have standing. As illustrated by recent, conflicting decisions, the Federal Circuit is struggling with the scope of ITC exclusion orders as well as questions about the standing doctrine in appeals from ITC determinations. At least for the time being, the Federal Circuit has suggested that the question of whether the ITC’s grant or denial of exclusion has an “immediate practical effect” on the appellant is central in determining whether that potential appellant has standing to appeal from the ITC to the Federal Circuit.

Nevertheless, given the unsettled state of the law, these questions will likely be the subject of future litigation. This Article analyzes the recent case law and sets forth why the Federal Circuit should resist making the standing requirement in ITC appeals difficult to meet, both as a matter of law and public policy.

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† Attorney, U.S. International Trade Commission. The views presented in this Article are the views of the author only. This Article does not represent the views of the International Trade Commission or anyone affiliated therewith. The author would like to thank his brother, Alejandro Valencia, for his time, effort, and thoughtful comments throughout the writing process.

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I. INTRODUCTION

The U.S. International Trade Commission (“ITC”) is one of the world’s most influential intellectual property adjudicators. Based on its enabling statute, 19 U.S.C. § 1337 (“section 337”), the ITC, an administrative agency in the executive branch, may use its power to issue exclusion orders to bar importation of goods that infringe U.S. patents.¹ In recent years, the ITC has become a forum of choice to litigate patent disputes, particularly in the realm of consumer electronics. This is due in large part to fast adjudication and the availability of the powerful exclusion order. Since substantial manufacturing operations have moved abroad, an ITC exclusion order can swiftly close off the U.S. market to imported products.

To issue an exclusion order, the ITC must formally investigate the complainant’s patent claims and decide whether the respondent’s products infringe one of more of those claims. The ITC uses traditional tools of patent law analysis to examine patent claims, which contain descriptive language

1. 19 U.S.C. § 1337(a), (d) (2010).

that provides the legal definition of the patent rights.² A patent can cover a class of products past, present, and future on which the claims read. The breadth of the class of products covered by the patent depends on how broadly the patent claims read. The ITC has consistently issued exclusion orders with broad language to cover infringing future products not yet developed at the time of the investigation.³ Exclusion orders may be appealed to the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”), but recent decisions relating to standing in such appeals have raised questions about the scope of exclusion orders.

Article III of the U.S. Constitution governs standing in exclusion order appeals, as does the ITC’s own statute. The Article III case or controversy requirement includes, among other things, the doctrines of standing and mootness. Standing is the requirement that a litigant demonstrate (1) that it has suffered a particular injury, (2) that “is fairly traceable to the defendant”/respondent, and (3) “that it is likely that a favorable decision will redress that injury.”⁴ The Supreme Court has held that only concrete, particularized injury in fact will suffice to confer standing on a litigant.⁵ In most cases, the Supreme Court has declined to consider future injuries sufficient unless the harm is “imminent.”⁶ Nevertheless, courts have held seemingly speculative injuries to be a particular injury suitable for standing.⁷

Mootness is the requirement that a case or controversy exists at all stages of the dispute.⁸ The Federal Circuit, as an Article III court, is bound by the case or controversy requirement even in appeals from Article II administrative agencies, like the ITC.⁹ Thus, the Federal Circuit faces the task of sorting out appeals by litigants seeking to reverse ITC decisions, including the issuance (or non-issuance) of exclusion orders.

2. See 35 U.S.C. § 112 (2010).

3. See, e.g., *Certain Hardware Logic Emulation Sys. & Components Thereof*, Inv. No. 337-TA-383, USITC Pub. 3089, at 15–16 (Mar. 1998) (Comm’n Op.) (“[T]he Commission’s long-standing practice is to direct its remedial orders to all products covered by the patent claims as to which a violation has been found, rather than limiting its orders to only those specific models selected for the infringement analysis.”).

4. *Massachusetts v. Env’tl. Prot. Agency*, 549 U.S. 497, 517 (2007).

5. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

6. *Lujan*, 504 U.S. at 560.

7. See *Massachusetts v. EPA*, 549 U.S. at 521–23 (finding that the Environmental Protection Agency’s decision not to regulate greenhouse gasses contributed to the particularized injuries associated with global warming).

8. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67–68 (1997).

9. See *Yingbin-Nature (Guangdong) Wood Indus. Co. v. Int’l Trade Comm’n*, 535 F.3d 1322, 1329–30 (Fed. Cir. 2008) (discussing the case or controversy requirement in the context of an appeal from the ITC).

Section 337, the ITC's statute, includes what appears to be an express standing requirement, which provides that "[a]ny person adversely affected by a final determination of the Commission . . . may appeal such determination" to the Federal Circuit.¹⁰ On its face, this language is broad. Still, it is unclear how this provision fits in with the case or controversy requirement of Article III of the U.S. Constitution. Few cases have dealt with standing to appeal from the ITC largely because this requirement, until recently, had been considered easy to meet due to the broad reach of ITC exclusion orders.

Indeed, the scope of ITC exclusion orders and the scope of the standing requirement are integrally related insofar as the scope of exclusion orders defines the class of potential injuries that are appealable to the Federal Circuit. While the language of typical ITC exclusion orders is broad, some have disagreed on whether the practical scope of these orders is coextensive with the broad language of these orders.¹¹ Consequently, the scope of ITC exclusion orders has implications for the manner in which the Federal Circuit applies the standing doctrine. Conversely, the manner in which the Federal Circuit applies the standing doctrine may say something about whether the Federal Circuit views the scope of exclusion orders to be as broad as the ITC intended.

This Article explores the question of whether a party has standing to appeal to the Federal Circuit an ITC determination to *include or omit* certain patent claims in an exclusion order, a question that, until recently, had a straightforward answer: ITC complainants always have standing while ITC respondents usually have standing. Although there is no clear rule regarding the extent of the standing requirement, several key observations can be made from several recent Federal Circuit decisions, including *Yingbin-Nature (Guangdong) Wood Industry Co. v. International Trade Commission*¹² and *Applica Consumer Products, Inc. v. International Trade Commission*.¹³ As illustrated by these decisions, the Federal Circuit is struggling with questions about the scope of ITC exclusion orders as well as constitutional and statutory questions about the standing doctrine in appeals from ITC determinations. Given the unsettled state of the law, these questions will likely be the subject of future litigation. At least for the time being, the Federal Circuit has suggested that

10. 19 U.S.C. § 1337(c) (2010).

11. Paul M. Bartkowski, *ITC Remedial Orders—The Case for Conformity with Patent Injunctions*, 337 REPORTER, Vol. 35, 2011, at 2–3.

12. *Yingbin*, 535 F.3d at 1322.

13. *Applica Consumer Prods., Inc. v. Int'l Trade Comm'n*, 2010 WL 8344380 (Fed. Cir. June 23, 2010) (non-precedential order).

the question of whether the ITC's grant or denial of exclusion has an "immediate practical effect" on the appellant is central in determining whether that potential appellant has standing to appeal from the ITC to the Federal Circuit.¹⁴

Part II of this Article sets forth background information about the ITC, its remedy practice, and the resulting complexity of appeals from the ITC to the Federal Circuit. Section II.C of this Article describes the integral relationship between the scope of ITC exclusion orders and standing to appeal from the entry or denial of those same orders. The remainder of Part II analyzes and attempts to reconcile a pair of somewhat contradictory Federal Circuit decisions on the standing issue. Next, in Part III, this Article tackles an October 2011 decision, *John Mezzalingua Associates v. International Trade Commission*,¹⁵ which many thought would clear up the standing controversy, but instead leaves a few important questions unanswered. Finally, this Part sets forth why the Federal Circuit should resist making the standing requirement in ITC appeals difficult to meet, both as a matter of law and public policy, given the breadth and impact of ITC exclusion orders.

II. BACKGROUND

A. SECTION 337 GENERALLY

A § 337 investigation can be based on a complaint filed by an ITC complainant alleging patent infringement against one or more ITC respondents.¹⁶ An ITC respondent is typically a foreign manufacturer or a domestic entity that imports products manufactured abroad.¹⁷ Unlike district courts of the United States, however, the ITC does not have jurisdiction over all domestic patent infringement under the Patent Act.¹⁸ By statute, the ITC's "jurisdiction" derives from unfair acts in the importation, sale for importation, or sale after importation of articles that infringe U.S. patents.¹⁹

14. *John Mezzalingua Assocs. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1326 (Fed. Cir. 2011).

15. *Id.*

16. *See* 19 C.F.R. §§ 210.9–12 (2011) (governing the filing of a complaint and the institution of an investigation).

17. *See* 19 U.S.C. § 1337(a)(1)(B) (2010) (defining a violation of § 337 as the importation, sale for importation, or sale after importation by owner, importer, or consignee of the subject article).

18. *See* § 1337(a); 35 U.S.C. § 271 (2010).

19. 19 U.S.C. § 1337(a); *see also* *Amgen, Inc. v. Int'l Trade Comm'n*, 565 F.3d 846, 849 (Fed. Cir. 2009) ("Section 337 assigns to the Commission the authority and obligation to investigate and prohibit importation based on unfair competition derived from patent, trademark, and copyright infringement . . .").

The ITC's statute further specifies that there must be an "industry in the United States" that conducts a sufficient amount of economic activity related to the patent(s) being asserted to warrant ITC action against infringing imports.²⁰ In addition to these requirements, an ITC complainant must prove that the relevant patent or intellectual property right at issue is both valid and infringed.²¹

B. ITC EXCLUSION ORDERS GENERALLY

The primary remedy the ITC issues is an exclusion order. Such an order is *in rem*, meaning it is effective against offending articles of entities over which the courts of the United States might not otherwise have jurisdiction.²² An exclusion order directs Customs and Border Protection ("CBP") to bar infringing articles from entry into the United States at the port of entry.²³ Thus, at least in theory, enforcement of a limited exclusion order against offending articles is "automatic," meaning the patentee is not required to take additional action to effect enforcement.

An exclusion order can be limited or general. An ITC complainant might seek a limited exclusion order to bar importation of an infringing product of a particular respondent.²⁴ On the other hand, a complainant might seek a general exclusion order to bar importation of infringing articles regardless of the foreign manufacturer or importer with whom they originate.²⁵ While the limited exclusion order is considered the default remedy of § 337, a complainant may seek a general exclusion order by making additional proofs.²⁶ Given the prevalence of the limited exclusion order in ITC practice, many of the practical concerns of ITC remedies arise in this context.

A typical exclusion order, limited or general, might direct CBP to exclude from entry articles "that infringe" or "are covered by" one or more specified claims of a specified patent.²⁷ The scope of an exclusion order, limited or

20. 19 U.S.C. § 1337(a)(2)–(3).

21. § 1337(a)(1)(B).

22. *See Sealed Air Corp. v. Int'l Trade Comm'n*, 645 F.2d 976, 985 (C.C.P.A. 1981) ("An exclusion order operates against goods, not parties.").

23. 19 U.S.C. § 1337(d)(2).

24. *See id.*

25. *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008).

26. 19 U.S.C. § 1337(d).

27. *See, e.g., Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-650, USITC Pub. 4283, at 1 (Sept. 13, 2011) (General Exclusion Order) (excluding from entry coaxial cable connectors that infringe one or more of claims 1 and 5 of U.S. Patent No. 5,470,257); *Certain GPS Devices & Prods. Containing*

general, is typically defined by the notice of investigation, which sets out the complainant's key allegations according to the § 337 complaint.²⁸ If, for example, a patent-based complaint is filed against a respondent's "certain coaxial cable connectors, and components thereof, and products containing the same," these same terms will likely define the notice of investigation and any relief that the ITC ultimately issues at the conclusion of the investigation.²⁹

The ITC cannot award monetary damages for past infringement, and thus the relief it gives a successful complainant is meant to be prospective in nature.³⁰ Indeed, the ITC has recognized that in order for any exclusion order to provide an adequate remedy for violations of § 337, the order must be flexible enough to cover future products that may be different from those presented to the ITC during the evidentiary hearing, but may nevertheless infringe the patent(s) that such an order covers.³¹ Otherwise, infringers could make trivial changes to their products and easily sidestep a previously issued exclusion order.³² Thus, the ITC has repeatedly declined to restrict its exclusion orders to specific models or configurations found to infringe, opting instead for language directed to any articles that infringe the identified patent claims.³³

Same, Inv. No. 337-TA-602, USITC Pub. 4137, at 1 (Jan. 15, 2009) (Limited Exclusion Order).

28. See *Certain Silicon Microphone Packages & Prods. Containing Same*, Inv. No. 337-TA-629, USITC Pub. 4951, at 17–18 (July 16, 2009) (Comm'n Op.) (adopting the administrative law judge's recommendation to limit the scope of exclusion to silicon microphone packages based on the notice of investigation after complainant argued for exclusion of silicon microphones).

29. *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-650, USITC Pub. 4283, at 1 (Sept. 13, 2011) (General Exclusion Order).

30. See *Certain Sortation Sys., Parts Thereof, & Prods. Containing Same*, Inv. No. 337-TA-460, USITC Pub. 3588, at 474 (Mar. 1, 2003) (Comm'n Op.).

31. *Certain Hardware Logic Emulation & Components Thereof*, Inv. No. 337-TA-383, USITC Pub. 3089, at 15–16, 32–33 (Apr. 1, 1998) (Comm'n Op.) (footnotes and citations omitted); see also, e.g., *Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. 3046, at 17–18 n.37 (June 2, 1997) (Comm'n Op.) ("[Respondent] requested that we craft the order to apply only to the specific models of flash memory chips adjudicated before the administrative law judge. We have not adopted this recommendation, however, because we believe it would [be] too easy to circumvent such an order by simply changing model numbers.").

32. *Certain Flash Memory Circuits & Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. 3046, at 17–18 n.37 (June 2, 1997) (Comm'n Op.).

33. The Commission explained its rationale for this practice in *Certain Hardware Logic Emulation Systems and Components Thereof*:

The ITC's approach is one of presumptive inclusion whereby all infringement is "fenced" in even though the ITC did not (and could not) examine all possible types of infringement.³⁴ Unless the ITC expressly specifies to the contrary, an exclusion order covers all infringement. The ITC's practice of issuing broadly worded exclusion orders dates back at least forty years.³⁵ This practice is based, at least in part, on the practice of its sister agency—the Federal Trade Commission ("FTC").³⁶ The ITC, like the FTC, is entitled to "fence" in certain behavior so long as the remedy is "reasonably related" to the unlawful practices found to exist.³⁷ Indeed, the Federal Circuit has recognized that the same administrative law principles govern review of remedy determinations of these two Commissions.³⁸ The ITC's broad remedy practice has gone largely undisturbed since its inception. Indeed, the Federal Circuit recently upheld the ITC's practice of issuing broadly worded

[T]he Commission's jurisdiction extends to all models of infringing products that are imported at the time of the Commission's determination and to all such products that will be imported during the life of the remedial order. . . . [T]he central purpose of remedial orders is to ensure complete relief to the domestic industry. An exclusion order covering only specific models of an accused device could easily be circumvented, thereby denying complete relief to the domestic industry.

Certain Hardware Logic Emulation Sys. & Components Thereof, Inv. No. 337-TA-383, USITC Pub. 3089, at 16, 31–32 (Apr. 1, 1998) (Comm'n Op.) (footnotes and citations omitted).

34. Certain Erasable Programmable Read Only Memories, Components Thereof, Prods. Containing Such Memories, & Processes for Making Such Memories, Inv. No. 337-TA-276, 1990 ITC LEXIS 265, at *49 (Aug. 1, 1990) (Comm'n Op.) ("A broad reading of the Commission's cease and desist authority is consistent with the broad interpretation of the Federal Trade Commission's analogous authority to issue cease and desist orders. It has long been established that the Federal Trade Commission's cease and desist authority is not limited to proscribing the precise practices for which a substantive violation has been found.>").

35. *See, e.g.*, Convertible Game Tables & Components Thereof, Inv. No. 337-TA-002, at 3 (Apr. 2, 1976) (Exclusion Order) (providing "exclusion from entry into the United States of convertible game tables . . . made in accordance with the claim(s) of U.S. Patent No. 3,711,099").

36. Certain Erasable Programmable Read Only Memories, Components Thereof, Prods. Containing Such Memories, & Processes for Making Such Memories, Inv. No. 337-TA-276, 1990 ITC LEXIS 265, at *49 (Aug. 1, 1990) (Comm'n Op.) (recognizing that "[a] broad reading of the Commission's cease and desist authority is consistent with the broad interpretation of the Federal Trade Commission's analogous authority to issue cease and desist orders").

37. *Id.*

38. *See* *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548–49 (Fed. Cir. 1986) (applying remedy principles set forth in an FTC case: *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946)).

remedial orders where a respondent challenged ITC remedial orders as unconstitutionally vague.³⁹

As discussed in the following Section, the breadth of the ITC's remedy practice has resulted in complex appeals to the Federal Circuit, especially as the products subject to ITC investigations increase in complexity. The complexity of these appeals plays a key role in the Federal Circuit's recent decisions on the important issue of standing.

C. THE COMPLEXITY OF ITC EXCLUSION ORDER APPEALS TO THE FEDERAL CIRCUIT

In general, the ITC will issue an exclusion order only if it finds a violation of § 337.⁴⁰ A finding of a violation of § 337 is based on, among other things, infringement of a patent for which a domestic industry exists.⁴¹ This means that a respondent challenging an exclusion order must successfully appeal at least one dispositive issue—e.g., the patent's validity, the question of infringement, or the existence of a domestic industry⁴²—for each patent claim the exclusion order identifies. By comparison, a complainant challenging an ITC finding that no violation of § 337 exists must gain reversal of *each* finding that supports the ITC's determination of violation for each patent. In other words, while a respondent appealing an exclusion order must simply show that the ITC erred on one dispositive issue for each patent claim identified in the exclusion order, a complainant appealing the non-issuance of an exclusion order must successfully challenge every dispositive issue decided adversely against that complainant.

In recent years, appeals from ITC final exclusion orders have become increasingly complex. Typically, these cases involve multiple patents, multiple asserted patent claims, multiple accused products, multiple respondents, and sometimes even multiple appeals.⁴³ It is not uncommon, when multiple

39. *Ninestar Tech. Co. v. Int'l Trade Comm'n*, 667 F.3d 1373 (Fed. Cir. 2012).

40. *See* 19 U.S.C. § 1337(d)(2) (2010).

41. § 1337(a)(2).

42. The question of whether a § 337 violation exists often turns on whether the asserted patent is invalid and whether the ITC respondent infringes the asserted patent. These issues are presented in largely the same manner as they would be in a district court. The violation question also turns on whether the ITC complainant has shown enough domestic activity relating to the asserted patent to justify Commission remedial action—i.e., whether a “domestic industry” exists. § 1337(a)(2)–(3).

43. *See, e.g.*, *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-650, USITC Pub. 4283, at 2–3 (Mar. 31, 2010) (Comm'n Notice of General Exclusion Order, Limited Exclusion Order & Remand Order). In the wake of *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340 (Fed. Cir. 2008), a trend

patents are involved, to have cross-appeals or companion appeals originating from the same ITC determination.⁴⁴ This happens, for example, when a complainant obtains an exclusion order for one of its patents, but is denied exclusion for another of its patents.⁴⁵ The complainant then appeals the denial of relief for the patent not granted exclusion, and the respondent appeals the issuance of relief for the patent granted exclusion. Because of timing differences involved in this legal crossfire, the Federal Circuit treats the respondent's appeal and the complainant's appeal as separate appeals.

For example, in the ITC investigation underlying the *Mezzalingua* case discussed Part III, *infra*, the Commission made a final determination in March 2010 regarding four patents asserted in the investigation.⁴⁶ The Commission granted exclusion orders for the first two patents, remanded the investigation with respect to the third patent to the Administrative Law Judge for further proceedings, and outright denied an exclusion order for the last patent.⁴⁷ The complainant immediately appealed to the Federal Circuit regarding the fourth patent for which the Commission denied exclusion.⁴⁸ The remand proceedings before the Administrative Law Judge for the third patent terminated in July 2010, after which the second appeal in the *Mezzalingua* case followed.⁴⁹ Significantly, there was no appeal of the Commission's grant of exclusion orders for the first two patents because this case was based on defaulting respondents who did not challenge the allegations made at the Commission. Thus, this case resulted in two separate appeals to the Federal Circuit, but could have resulted in more appeals had the respondents not defaulted.

In addition, the expansive language of § 337(c) invites a broad range of parties to appeal ITC determinations. The statute provides that “[a]ny person

among complainants has been to name every possible respondent in the complaint, leading to an increase in the number of parties involved at the ITC.

44. See, e.g., *Pass & Seymour, Inc. v. Int'l Trade Comm'n*, 617 F.3d 1319 (Fed. Cir. 2010); *General Protecht Group, Inc. v. Int'l Trade Comm'n*, 619 F.3d 1303 (Fed. Cir. 2010). Both *Pass & Seymour, Inc. v. International Trade Commission* and *General Protecht Group, Inc. v. International Trade Commission* were appeals arising from the Commission's final determination in *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, USITC Pub. 4146 (Mar. 9, 2009) (Notice of Final Determination).

45. See, e.g., *Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same*, Inv. No. 337-TA-650, USITC Pub. 4283, at 2–3 (Mar. 31, 2010) (Comm'n Notice of General Exclusion Order, Limited Exclusion Order & Remand Order).

46. *Id.*

47. *Id.*

48. *John Mezzalingua Assocs. v. Int'l Trade Comm'n*, 437 F. App'x 886 (Fed. Cir. 2010).

49. *John Mezzalingua Assocs. v. Int'l Trade Comm'n*, 660 F.3d 1322 (Fed. Cir. 2011).

adversely affected by a final determination of the Commission . . . may appeal such determination”⁵⁰ Because the issues the ITC decides in any one investigation are numerous, it is likely that some issue or another “adversely affect[s]” every party involved in an investigation. Further complicating matters, under Federal Rule of Appellate Procedure 15, the ITC is the appellee in appeals to the Federal Circuit.⁵¹ As such, the ITC is tasked with defending its own determinations at the Federal Circuit, thus adding an additional party to the complainant-respondent litigation. Usually, one or more parties who have an interest in defending the ITC’s determination will intervene in the appeal.⁵² Thus, a typical appeal includes the ITC as the appellee, at least one appellant, and at least one intervenor. Given the complexity of ITC appeals and the potential for many litigants to have an interest in intervening in the proceedings, standing becomes a key issue in determining who can appeal an ITC determination to the Federal Circuit.

As mentioned above, the ITC has taken the position that the caption of the investigation defines the scope of its investigation and the subject matter of any resulting exclusion order.⁵³ For example, if the ITC complainant files a complaint entitled *Certain Doohickeys and Products Containing Same* and the ITC finds infringement of a patent by the subject “doohickeys and products containing same,” then the resulting exclusion order would have the same subject matter—i.e., doohickeys and products containing the same.⁵⁴ In other words, CBP can enforce the exclusion order against an import that falls within this class of products if that import infringes the patent at issue.⁵⁵ Because the § 337 complainant can generally name the investigation however it wants, the potential subject matter of an exclusion order can be very broad. The scope of these matters can be broader than traditional patent litigation in district court practice, where a plaintiff must accuse specific products of

50. 19 U.S.C. § 1337(c) (2010) (emphasis added).

51. FED. R. APP. P. 15(a).

52. FED. R. APP. P. 15(d); *see also, e.g.*, *Pass & Seymour, Inc. v. Int’l Trade Comm’n*, 617 F.3d 1319 (Fed. Cir. 2010) (discussing three respondent intervenors who each filed their own briefs addressing all the issues on appeal).

53. *See, e.g.*, *Certain Biometric Scanning Devices, Components Thereof, Associated Software, & Prods. Containing Same*, Inv. No. 337-TA-720, Order No. 10, 2010 WL 4786591, at *2 (Sept. 7, 2010); *Certain Automated Mech. Transmission Sys. for Medium-Duty & Heavy-Duty Trucks & Components Thereof*, Inv. No. 337-TA-503, USITC Pub. 3934, at 4 (May 2005) (Comm’n Op.).

54. *See Certain Automated Mech. Transmission Sys. for Medium-Duty & Heavy-Duty Trucks & Components Thereof*, Inv. No. 337-TA-503, USITC Pub. 3934, at 4 (May 2005) (Comm’n Op.) (“[T]he scope of the remedy is dependent upon the scope of the investigation, which is determined by the notice of the investigation.”).

55. Bartkowski, *supra* note 11, at 7.

infringement.⁵⁶ As at least one commentator has observed, this can make it difficult to delineate the scope of appeals from ITC matters.⁵⁷

Moreover, unlike a district court that can issue monetary damages as a remedy for past infringement, the ITC's relief is prospective in nature. This can sometimes cause the focus of the litigation to shift over the course of ITC proceedings based on the types of products an ITC respondent is currently importing or plans to import in the future.⁵⁸ In particular, an ITC respondent may change its design in the middle of an investigation, compelling the complainant to prove that both the new and the old designs infringe. Moreover, because the ITC's "jurisdiction" extends to "imminent importation," the parties' efforts can focus on products not yet sold or imported into the United States.⁵⁹ As a result, parties are left to examine the anticipated future behavior of the ITC respondent. This prospective relief construct can lead to quasi-hypothetical questions about what products the ITC actually considered and on which products it based its findings. As discussed *infra*, the answer to the standing question depends on the scope of the ITC's remedy.

D. THE STANDING QUESTION: WHAT DOES AN EXCLUSION ORDER COVER?

The scope of an ITC exclusion order is integrally related to whether a losing respondent or a losing complainant has standing to appeal the ITC's determination to the Federal Circuit. In other words, is the losing party at the ITC *injured* by the ITC's determination to *include or omit* a particular patent claim in an exclusion order? More specifically, does a complainant who loses at the ITC have standing to challenge, at the Federal Circuit, an ITC determination *to omit* certain patent claims from an exclusion order? Similarly, does a respondent who loses at the ITC have standing to challenge, at the Federal Circuit, an ITC determination *to include* certain patent claims in an exclusion order? Answers to these questions depend on the circumstances.

Perhaps in response to the growing complexity of § 337 appeals, which have prompted the questions above, the Federal Circuit has issued recent decisions that focus on the case or controversy requirement of Article III

56. *Id.*

57. *Id.* at 5.

58. *See, e.g.,* Vizio, Inc. v. Int'l Trade Comm'n, 605 F.3d 1330, 1335 (Fed. Cir. 2010) (comparing legacy products being imported when the complaint was filed and work-around products that were being imported at the time of the hearing at the ITC and the appeal to the Federal Circuit).

59. Certain GPS Chips, Associated Software & Sys. & Prods. Containing Same, Inv. No. 337-TA-596, USITC Pub. No. 4133, at 52 (Feb. 2009) (Final Initial Determination).

and its application in the context of exclusion orders. In *Yingbin-Nature (Guangdong) Wood Industry Co. v. International Trade Commission*⁶⁰ and *Applica Consumer Products, Inc. v. International Trade Commission*,⁶¹ the court dismissed appeals for failing to meet the case or controversy requirement.⁶²

In *Yingbin*, the respondent Power Dekor appealed the ITC's determination in *Certain Laminated Floor Panels*, Inv. No. 337-TA-545, where the ITC issued a general exclusion order directed to articles that infringed the '836 patent and the '292 patent, two utility patents owned by ITC complainant Unilin.⁶³ Power Dekor challenged the ITC's conclusion of infringement for Unilin's '292 patent and certain claims of Unilin's '836 patent, but did not challenge the ITC's finding of infringement for other claims in Unilin's '836 patent.⁶⁴ Notably, Power Dekor was attempting to challenge the ITC's inclusion of the Unilin '292 patent in the general exclusion order by challenging infringement findings for two products of other respondents: the "Lock 7" and "Engagement 2." Importantly, Power Dekor did not challenge the infringement findings with respect to its own products.⁶⁵ Apparently, Power Dekor wanted to import products utilizing the "Lock 7" and "Engagement 2" designs that were found to infringe the Unilin '292 patent and was therefore concerned with the collateral estoppel effects of the ITC's infringement findings in future proceedings—for example, if Power Dekor were to present a design-around product for importation.⁶⁶

The court unanimously found Power Dekor's challenge to the '292 and '836 patents moot in light of the finding that there would be no preclusive effect against any future Power Dekor design-around products if the court upheld the Commission's finding of infringement with regard to "Lock 7" and "Engagement 2."⁶⁷ Stated differently, the court held that Power Dekor's appeal did not present an actual injury that could be redressed by the Federal

60. *Yingbin-Nature (Guangdong) Wood Indus. Co. v. Int'l Trade Comm'n*, 535 F.3d 1322 (Fed. Cir. 2008).

61. *Applica Consumer Prods., Inc. v. Int'l Trade Comm'n*, 2010 WL 8344380 (Fed. Cir. June 23, 2010) (non-precedential order).

62. In both cases, the court raised these issues sua sponte. In *Yingbin*, for example, the court first raised the issue in a letter to the parties on the eve of oral argument asking them to be prepared to discuss whether part of the ITC respondent's appeal was moot. *Yingbin*, 535 F.3d at 1329. The court again raised the issue sua sponte in *Applica* after the case had been fully briefed and scheduled for oral argument. See *Applica*, 2010 WL 8344380, at *1. The *Yingbin* and *Applica* panels had at least one judge in common.

63. *Yingbin*, 535 F.3d at 1331.

64. *Id.* at 1329.

65. *Id.* at 1331–32.

66. *Id.* at 1333.

67. *Id.* at 1332–34.

Circuit because collateral estoppel would not apply to Power Dekor's proposed future products.⁶⁸ The court noted that collateral estoppel would not apply to Power Dekor in this case because findings adverse to other respondents would not bind Power Dekor in future proceedings, and that findings adverse to Power Dekor's current products would not necessarily have preclusive effect on Power Dekor's future products.⁶⁹ As such, the court found that Power Dekor failed to allege an actual injury and lacked standing to appeal the ITC's findings of infringement with regard to "Lock 7" and "Engagement 2" in the general exclusion order.⁷⁰ In reaching its conclusion regarding collateral estoppel, the court noted that Power Dekor's products were subject to exclusion under the ITC's exclusion order directed to Unilin's '836 patent regardless of the outcome for the appeal of the '292 patent. Thus, Power Dekor's appeal did not present an actual injury that the Federal Circuit could redress.

The Federal Circuit had, in prior cases, denied standing to ITC respondents who sought to challenge the ITC's specific factual findings where it found *no violation* of § 337.⁷¹ In these cases, the Federal Circuit found that ITC respondents are not "adversely affected" by the ITC's finding of no violation of § 337; therefore, ITC respondents cannot lodge their own appeal.⁷² Rather, these ITC respondents are allowed to intervene in the ITC complainant's appeal and should instead raise their issue as a possible alternate ground for affirming the ITC's finding of no violation. *Yingbin*, however, was arguably the first time the Federal Circuit denied standing to an ITC respondent seeking to import a real product at issue in the investigation even though that product was the product of another respondent.⁷³ Thus, the *Yingbin* case was a departure from prior precedent.

In *Applica Consumer Products, Inc. v. International Trade Commission*, a complainant appealed from the ITC's determination in *Certain Self-Cleaning Litter Boxes and Components Thereof*, Inv. No. 337-TA-625. The Federal Circuit, in a non-precedential order, dismissed the appeal by successful complainant, Applica, because the complainant lacked standing to challenge a determination of non-infringement of certain claims for respondents Lucky

68. *Id.* at 1334.

69. *Id.* at 1332–33.

70. *Id.* at 1334.

71. *See, e.g.,* Sinochem Modern Envtl. Prot. Chems. (Xi'an) Co. v. Int'l Trade Comm'n, 358 F. App'x 161 (Fed. Cir. 2009); *Surface Tech., Inc. v. Int'l Trade Comm'n*, 780 F.2d 29 (Fed. Cir. 1985); *Am. Tel. & Tel. Co. v. Int'l Trade Comm'n*, 626 F.2d 841 (C.C.P.A. 1980).

72. *See Sinochem*, 358 Fed. App'x at 162; *Surface Tech.*, 780 F.2d at 30–31; *Am. Tel. & Tel. Co.*, 626 F.2d at 160.

73. *Surface Tech.*, 780 F.2d at 30.

Litter and OurPet's products that were already excluded by virtue of infringement of another claim in the same patent.⁷⁴ More specifically, complainant *Applica* sought more exclusion by appealing the ITC's determination to omit certain patent claims in the exclusion order. *Applica* appealed even though the accused products were already subject to exclusion because they infringed other claims from the same patent covered by the same exclusion order.⁷⁵ So while complainant *Applica* had already obtained relief, it sought to obtain broader relief through the inclusion of several more claims than those that the ITC included in that exclusion order. The *Applica* court concluded that this case was governed by *Yingbin* and that complainant *Applica* lacked standing.⁷⁶

Although non-precedential, *Applica* was a case in which the Federal Circuit held that a complainant was not injured for standing purposes by an ITC determination to omit certain patent claims from among the claims identified in the exclusion order. In *Yingbin*, on the other hand, a losing respondent was not injured for standing purposes by an ITC determination to include additional patent claims in an exclusion order when the respondent's products were already barred by other patent claims in the exclusion order that had not been appealed. Together, *Yingbin* and *Applica* can be read to stand for the proposition that a party may not appeal a determination affecting only products for which a final determination to exclude has already been made.⁷⁷ A complainant may not appeal because that complainant has already obtained exclusion order coverage against the accused product, and a respondent may not appeal because that respondent's product has already been finally excluded. Thus, so long as a complainant has obtained a final exclusion order with respect to at least one of its patent claims, the complainant may not appeal in an attempt to obtain broader coverage by inclusion of more claims in the exclusion order.

Like *Yingbin*, *Applica* was a departure from existing precedent regarding standing, but this time on the ITC complainant's side. Prior to *Applica*, the Federal Circuit had liberally conferred standing on complainants. For example, in *Amgen, Inc. v. International Trade Commission*,⁷⁸ the court granted ITC complainant *Amgen* standing to appeal from the ITC's dismissal of the

74. *Applica Consumer Prods., Inc. v. Int'l Trade Comm'n*, 2010 WL 8344380, at *1 (Fed. Cir. June 23, 2010) (non-precedential order).

75. *Id.*

76. *Id.*

77. Responsive Brief of Appellee at 24–27, *John Mezzalingua Assocs. v. Int'l Trade Comm'n*, Appeal No. 2010-1536 (Fed. Cir. Mar. 21, 2011); Brief for Appellants at 20–21, *Ninestar Tech. v. Int'l Trade Comm'n*, Appeal No. 2009-1549 (Fed. Cir. Dec. 17, 2009).

78. *Amgen, Inc. v. Int'l Trade Comm'n*, 902 F.2d 1532 (Fed. Cir. 1990).

investigation on jurisdictional grounds, noting that dismissal on jurisdictional grounds is “intrinsicly a final determination not to exclude articles from entry.”⁷⁹ For similar reasons, the Federal Circuit has granted complainants standing to appeal when the ITC modifies its exclusion orders.⁸⁰ The Federal Circuit has even recognized that the “any person adversely affected” language in § 337(c) is broad enough to cover non-parties to the ITC investigation who have a sufficient stake in the outcome of the appeal.⁸¹

In the context of prior precedent, the *Yingbin* and *Applica* standing decisions have implications regarding the proper scope of ITC exclusion orders. The language of an exclusion order is broad in that it covers any and all infringement of the patent claims identified in that order. If the only question impacting standing under the *Yingbin* and *Applica* cases is whether an accused product is excluded on other grounds (i.e., there are unchallenged claims in the exclusion order that will still bar the accused products), then the order must not cover potential future products not considered by the ITC, such as redesigned products. If the order did cover other potential future products, then parties would virtually always have standing to appeal to the Federal Circuit because the accused product would only matter for determining whether a substantive violation exists, not for whether a redressable injury exists for the purpose of determining standing. In other words, a complainant would always be injured by a negative determination on any claim or patent because he would not receive the maximum scope of exclusion, irrespective of the status of the accused products.

III. *MEZZALINGUA*: STANDING TO APPEAL AN ITC DETERMINATION IS A LOW BAR

The Federal Circuit had the opportunity to address many of these standing issues in a recent case, but the court’s decision has produced as many questions as it has answers. In October 2011, the Federal Circuit issued its decision in *John Mezzalingua Associates v. International Trade Commission*,⁸²

79. *Id.* at 1535.

80. *See, e.g.*, *Crucible Materials Corp. v. Int’l Trade Comm’n*, 127 F.3d 1057, 1060–61 (Fed. Cir. 1997) (finding that ITC complainant Crucible Materials Corporation properly appealed the ITC’s determination to modify an exclusion order in the context of ongoing enforcement proceedings).

81. *See, e.g.*, *LSI Computer Sys., Inc. v. Int’l Trade Comm’n*, 832 F.2d 588, 590–91 (Fed. Cir. 1987) (noting that the legislative history does not indicate that “Congress did not also contemplate giving standing to appeal to non-parties”); *Import Motors, Ltd. v. Int’l Trade Comm’n*, 530 F.2d 937, 940 (C.C.P.A. 1975) (finding that appellants “could” be adversely affected if denied the right to participate in the ITC proceedings).

82. *John Mezzalingua Assocs. v. Int’l Trade Comm’n*, 660 F.3d 1322 (Fed. Cir. 2011).

which addresses the standing requirement on appeal from the ITC to the Federal Circuit. Under legal circumstances similar to those in *Yingbin* and *Applica*, where the court denied standing for appellants, the *Mezzalingua* court found an appellant to have standing to appeal an ITC determination. But, the reasoning for the court's grant of standing in *Mezzalingua* remains uncertain in light of *Yingbin* and *Applica*.

In *Mezzalingua*, the second of two appeals arising from the ITC's determination in *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, complainant PPC appealed to the Federal Circuit the ITC's determination that no violation of § 337 occurred with respect to PPC's '539 design patent even though the product accused of infringement was already excluded for infringement of another PPC patent, the '194 utility patent.⁸³ Citing *Yingbin* and *Applica*, the ITC, as appellee, argued that the previous decisions, particularly the binding *Yingbin* decision, required dismissal of PPC's appeal. The Federal Circuit, however, distinguished *Yingbin* from *Mezzalingua* and did not cite *Applica* in its opinion. The *Mezzalingua* court emphasized that claims in *Yingbin* were held to be moot because of their speculative nature.⁸⁴ The concerns regarding the effect of any past ITC infringement findings on product redesign efforts present in *Yingbin*, the court opined, would have been "too hypothetical to confer standing on the respondent to press an appeal that would have no immediate practical effect."⁸⁵

But, the court found that "PPC [was] in a different position."⁸⁶ According to the court, even though "the only product . . . found to infringe the '539 design patent was also found to infringe the '194 utility patent[,] PPC's concerns [were] not related to possible future effects of the Commission's decision, as was the case for the appellant in *Yingbin*."⁸⁷ Thus, the *Mezzalingua* court found that exclusion of the accused product and the outcome of the appeal did "not moot PPC's interest in obtaining the much broader relief that would be provided by a general exclusion order, which would cover all products deemed to infringe the '539 design patent."⁸⁸ The court concluded that complainant PPC did, in fact, have standing because "a

83. A utility patent covers structural and functional features of an article, while a design patent covers ornamental features.

84. *Mezzalingua*, 660 F.3d at 1326.

85. *Id.*

86. *Id.*

87. *Id.* at 1326–27.

88. *Id.* at 1327.

favorable judicial decision could therefore significantly enhance PPC's legal rights with respect to imported [products]."⁸⁹

A. EXPLAINING *MEZZALINGUA* IN LIGHT OF PRIOR CASES

Drawing a legal distinction between the circumstances of *Mezzalingua* and those of *Yingbin* and *Applica* has proven a difficult task. Similar to *Yingbin* and *Applica*, *Mezzalingua* involved the hypothetical that the CBP might determine that a future product presented for importation does not infringe a patent for which an exclusion order had issued, even though that product does infringe a patent for which no exclusion order exists. The court cited this as the driving factor in conferring standing upon PPC to appeal the non-issuance of an exclusion order for PPC's '539 design patent when PPC had already obtained exclusion for its '194 utility patent.⁹⁰ The court relied on this reasoning even though complainant/appellant PPC admitted before the ITC that a finding of violation for the '539 design patent would have "little practical significance" because any product that would have infringed PPC's '539 design patent would also have infringed PPC's '194 utility patent.⁹¹ Despite PPC's statement to the ITC that a second exclusion order issued on its design patent would not provide any extra protection, the *Mezzalingua* court proceeded to give PPC the standing to appeal the denial of the second exclusion order anyway. If the criteria for granting standing to appeal an ITC determination is that an actual, redressable injury exist, why then did the court grant standing to a complainant that itself believed potential injury to be a non-issue? Given the legal similarities between *Mezzalingua*, *Yingbin*, and *Applica*, there are few explanations for the seeming contradiction. Given that the only factor cited by the *Mezzalingua* court was present in other cases in which the court had denied standing, one can only speculate as to what distinction the court actually relied on. The following is a discussion of possible distinctions between these cases, which may provide insight as to some factors considered in the court's analysis.

One possible explanation is that the *Mezzalingua* court found a distinction based on the relationship between the patents in question in *Yingbin*. *Yingbin* involved claims of two different patents that were viewed as integrally related—to infringe the claims of one patent necessarily meant that the claims of the other patent would be infringed.⁹² *Mezzalingua*, on the other

89. *Id.*

90. *Id.* at 1326–27.

91. *See id.* The court even acknowledged PPC's admission in a footnote before coming to the seemingly opposite conclusion.

92. *Yingbin-Nature (Guangdong) Wood Indus. Co. v. Int'l Trade Comm'n*, 535 F.3d 1322, 1333 (Fed. Cir. 2008).

hand, involved two patents with related subject matter, but infringement of one would not necessarily implicate the other in any way. Thus, the *Mezzalingua* court could have been distinguishing *Yingbin* based on the attenuated relationship between the claimed subject matter of the two PPC patents at issue in *Mezzalingua*.

Another explanation is the *Mezzalingua* court may have been differentiating Power Dekor's "hypothetical" collateral estoppel concerns in *Yingbin* from PPC's "immediate practical" remedial concerns in *Mezzalingua*.⁹³ Indeed, *Yingbin* can be read to apply only to the potential scope of collateral estoppel effect of ITC determinations.⁹⁴ The *Yingbin* court assessed whether the appealed finding of infringement of Unilin's '292 patent would have a collateral estoppel effect against respondent Power Dekor's potential future products and concluded that it would not.⁹⁵ Collateral estoppel effect of ITC infringement findings, the court held, applies only against "articles found by the ITC to infringe and articles that are 'essentially the same,' meaning that the differences between them are merely 'colorable' or 'unrelated to the limitations in the claim of the patent.'" ⁹⁶ Moreover, the *Yingbin* court observed that respondent Power Dekor would not be bound by factual findings against other respondents in a case involving a general exclusion order because Power Dekor did not have a full and fair opportunity to litigate, before the ITC, infringement issues pertaining to those other respondents.⁹⁷ *Mezzalingua*, on the other hand, involved more practical considerations, such as whether an exclusion order directed to PPC's '539 design patent would be enforced against products that would not be covered by the exclusion order directed at PPC's '194 utility patent. So where Power Dekor's concern was with the speculative potential of adverse future

93. *Mezzalingua*, 660 F.3d at 1326 ("We held those concerns about the possible future effects of the Commission's ruling as to the 'lower lip' claims to be too hypothetical to confer standing on the respondent to press an appeal that would have no immediate practical effect.") (summarizing *Yingbin*, 535 F.3d 1322).

94. Collateral estoppel, also known as issue preclusion, protects a litigant from having to re-litigate an issue that has been decided in a prior proceeding. Collateral estoppel applies only if the party against whom estoppel is sought had a "full and fair opportunity" to litigate, if the issue was actually litigated based on the same controlling facts and law, and if the resolution of the issue was essential to the final judgment in the first action. *See Comair Rotron, Inc. v. Nippon Densan Corp.*, 49 F.3d 1535, 1537 (Fed. Cir. 1995) (noting that, in order for collateral estoppel to apply, "the party against whom estoppel is sought [must have] had a full and fair opportunity to litigate the issue" in the prior action).

95. *Yingbin*, 535 F.3d at 1334.

96. *Id.* at 1333.

97. *Id.* at 1332–33.

litigation consequences for products Power Dekor had not yet designed, PPC concerned itself only with the existing coverage of its exclusion order.

To the same end, the *Mezzalingua* court may have distinguished *Yingbin* even more simply by considering whether the appellant was a losing complainant, as in *Mezzalingua* and *Applica*, or a losing respondent, as in *Yingbin*. While a losing complainant would concern itself with the “immediate” interest of broader exclusion order coverage, a losing respondent might only be concerned with potential collateral estoppel issues arising from the infringement findings and issuance of an exclusion order against one of that respondent’s products. It may be that, unlike an ITC respondent who is only concerned about its rights with respect to the ITC complainant’s patent, the complainant is more broadly concerned with its rights against the world of possible importers and/or infringers. This is especially true in the context of a general exclusion order because, unlike a limited exclusion order, a general exclusion order can cover products of non-respondents. Thus, in the case where the respondent’s product is subject to exclusion under another patent, a complainant potentially stands to gain or lose much more by denial of exclusion. However, this distinction between the motives for appeal, although not technically contrary to precedent, is inconsistent with the *Applica* non-precedential order because *Applica* actually involved a complainant seeking more exclusion by appealing the ITC’s determination to omit certain claims in the issued exclusion order.

Yet another explanation for the apparent discrepancy between *Mezzalingua*, *Yingbin*, and *Applica* is that the *Mezzalingua* court was concerned with the differences in enforcement between exclusion orders directed at design patents and those directed at utility patents. In *Mezzalingua*, the ITC granted complainant PPC’s request for a general exclusion order directed to PPC’s ’194 utility patent but declined to issue relief for PPC’s ’539 design patent.⁹⁸ Even though PPC indicated that the ’194 utility patent and the ’539 design patent covered the same products, PPC stood to benefit immediately and practically, from an enforcement standpoint, by having an exclusion order directed to PPC’s ’539 design patent. This is because the infringement analysis for a utility patent, such as PPC’s ’194 patent, requires claim interpretation that is often technically complex. The infringement analysis for a design patent, on the other hand, involves a simple comparison of ornamental design. Thus, whereas an imported product violating the general exclusion order directed to PPC’s utility patent would be difficult to detect,

98. Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same, Inv. No. 337-TA-650, USITC Pub. 4283 (July 12, 2010) (Comm’n Notice).

an exclusion order directed to PPC's design patent would allow CBP to easily spot questionable products. With this enforcement emphasis, the court may have recognized that the exclusion order directed to PPC's utility patent would be more difficult to enforce and granted standing to appeal the ITC's determination not to issue a design patent exclusion order as a result.

As is evident, there are several factors that can be taken into account by the Federal Circuit when granting or denying standing to appeal an ITC exclusion order determination. However, given the relatively small body of existing law in the area and the fairly unclear reasoning behind that law, one seeking to explain precisely the rationale going into such a determination is left to hypothesize about what is truly at the heart of that determination.

B. RELATIONSHIP BETWEEN CONSTITUTIONAL STANDING AND STATUTORY § 337(C) STANDING

Though the case law is admittedly underdeveloped and somewhat contradictory, as described *supra*, these cases are the best insight into how the Federal Circuit fits the Constitution's Article III case or controversy requirement with the ITC's statutory standing requirement under § 337(c), which allows "any person adversely affected" to appeal from the final determination of the Commission. While the *Mezzalingua* and *Yingbin* decisions both refer to mootness, the *Applica* court did not address the mootness doctrine, opting instead to decide based on the statutory standing requirement.⁹⁹ In a roundabout way, the *Applica* court almost addressed both requirements by characterizing its decision in terms of the "adversely affected" language in the ITC's statute,¹⁰⁰ while also citing to *Yingbin*—a case that focused on Article III—as controlling precedent on standing.¹⁰¹ Of course, the *Applica* decision is limited in value because it is non-precedential, but prior to these three cases, the Federal Circuit had only approached these questions in terms of the statute's "adversely affected" language, never in terms of Article III constitutional standing.¹⁰²

99. See *John Mezzalingua Assocs. v. Int'l Trade Comm'n*, 660 F.3d 1322, 1326 (Fed. Cir. 2011); *Yingbin*, 535 F.3d at 1331–32; *Applica Consumer Prods., Inc. v. Int'l Trade Comm'n*, 2010 WL 8344380, at *1 (Fed. Cir. June 23, 2010) (non-precedential order).

100. *Applica*, 2010 WL 8344380, at *1.

101. *Id.* at *2–3.

102. See, e.g., *Sinochem Modern Env'tl. Prot. Chems. (Xi'an) Co. v. Int'l Trade Comm'n*, 358 F. App'x 161, 162 (Fed. Cir. 2009); *Crucible Materials Corp. v. Int'l Trade Comm'n*, 127 F.3d 1057, 1060–61 (Fed. Cir. 1997); *LSI Computer Sys., Inc. v. Int'l Trade Comm'n*, 832 F.2d 588, 591 (Fed. Cir. 1987); *Surface Tech., Inc. v. Int'l Trade Comm'n*, 780 F.2d 29, 30 (Fed. Cir. 1985); *Am. Tel. & Tel. Co. v. Int'l Trade Comm'n*, 626 F.2d 841, 842 (C.C.P.A. 1980); *Import Motors, Ltd. v. Int'l Trade Comm'n*, 530 F.2d 937, 940 (C.C.P.A. 1975), *vacated*, 530 F.2d 940 (C.C.P.A. 1976).

There are several possible relationships between these two requirements. First, it may be that constitutional standing and § 337(c) standing are separate requirements that must be fulfilled in every case.¹⁰³ If this is in fact the case, constitutional standing would seem to present the bigger hurdle in appeals from the ITC given the breadth of the “adversely affected” language of § 337(c). Alternatively, Congress may have intended the “adversely affected” language to create a substantive right to challenge final determinations of the ITC if the appellant can make some threshold showing of the adverse effect.¹⁰⁴ In this case, the “adversely affected” provision would enlarge the potential class of persons who can appeal from the ITC.¹⁰⁵ The Supreme Court has characterized analogous language in the Administrative Procedure Act as Congress’s intent to make “agency action presumptively reviewable.”¹⁰⁶ Regardless of the relationship between these two standing requirements, it seems fairly clear that if an appellant satisfies the constitutional Article III case or controversy requirement, which includes both mootness and standing, the Federal Circuit will hear the merits of the appeal.

C. THE BEST VIEW OF THE STANDING REQUIREMENT

The importance of the ITC exclusion order process, combined with difficult-to-square precedent in the Federal Circuit, invites discussion about what the optimal view of standing should be both from a legal and public policy standpoint. Standing to appeal the various aspects of the ITC’s final determination should be a low bar to clear because the potential impact of the final determination to exclude or not to exclude is broad. Contrary to what the *Applica* decision suggests, ITC complainants should always have standing to appeal the denial of exclusion for a patent claim, even if that

103. See *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395 n.7 (1987) (“Congress can, of course, resolve the question [of standing] one way or another, save as the requirements of Article III dictate otherwise.”) (internal quotation omitted); see also *United States v. 8 Gilcrease Lane*, 641 F. Supp. 2d 1, 5 (D.D.C. 2009) (finding that a litigant is required to meet both statutory and constitutional standing requirements); *Allied Corp. v. U.S. Int’l Trade Comm’n*, 850 F.2d 1573, 1579 (Fed. Cir. 1988) (“Because we hold that this court has not been granted statutory authority to review ITC advisory opinions [under § 337(c)], we need not discuss the ‘case or controversy’ provision of Article III of the Constitution.”).

104. See *LSI*, 832 F.2d at 591; see also *Import Motors*, 530 F.2d at 940 (finding that § 337(c) broadens the class of potential appellants beyond those that were parties to the ITC investigation).

105. See *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 154 (1970) (“Where statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action. The whole drive for enlarging the category of aggrieved ‘persons’ is symptomatic of that trend.”).

106. *Clarke*, 479 U.S. at 399.

complainant was granted exclusion for other claims in the same patent or a different patent altogether. As to ITC respondents, they should be granted standing whenever their appeal involves real products that are currently imported or will be imported in the near future. When an ITC respondent's appeal involves nothing more than hypothetical concerns about future litigation proceedings, the Federal Circuit should deny the appellant standing.

1. *Standing for Complainants*

Notwithstanding the lack of clear guidance on this point, the best view of the standing requirement with respect to complainants after *Mezzalingua* is that an ITC complainant seeking broader exclusion should always have standing to appeal an ITC determination to the Federal Circuit, regardless of whether the ITC has found a violation of § 337. This concern is especially immediate in light of how quickly technology evolves and the frequency with which respondents seek to redesign their products to avoid the scope of previously issued exclusion orders. Because a complainant is “adversely affected” within the meaning of § 337(c) by the ITC denying exclusion of a present or future product that infringes one of its valid patents, that denial essentially provides the complainant with the injury required to show standing. Indeed, this interpretation of the statutory standing requirement is consistent with the legislative history of § 337(c).¹⁰⁷ Both the House and Senate reports indicate that § 337(c) was meant to extend the right to judicial review to complainants as well as “owners, importers, and consignees of subject articles.”¹⁰⁸ This approach to the standing issue should remain true even when applying the Article III case or controversy requirement because that ITC complainant always has an interest in obtaining the broadest possible exclusion order against past, present, and future infringing products.¹⁰⁹ So, only when the ITC grants exclusion for all patent claims requested, closing off as much product space as possible for any potentially infringing re-designed products, should the complainant not have standing to appeal an ITC determination to the Federal Circuit.

This broad view of the standing requirement with respect to complainants should hold regardless of whether the patent claim at issue is part of a design patent or a utility patent. All patent claims, design or utility, cover different products. Regardless of the type of claim, an omission of any

107. See H.R. REP. NO. 93-571, at 76–78 (1973); S. REP. NO. 93-1298, at 196–97 (1974).

108. S. REP. NO. 93-1298, at 196–97; see also *LSI*, 832 F.2d at 590–92.

109. See *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150 (1970) (finding that even harm to a non-economic interest can be an injury for the case or controversy requirement).

patent claim from an exclusion order adversely affects a complainant because that omitted claim has a different scope and may cover products that are not covered by other patent claims included in the exclusion order. The complainant has an immediate and practical concern in obtaining the maximum protection against infringement by importation of both existing products and future products.

The view that the Federal Circuit should grant ITC complainants standing to appeal aspects of ITC determinations liberally also makes practical sense. Given that each patent has a different scope of protection, each patent could, in theory, be enforced against a different product. Seeing as how the denial of an exclusion order for any one patent claim could lead to importation of an infringing product, a complainant suffers injury sufficient for standing. Thus, an ITC complainant has an immediate and practical interest in appealing all adverse aspects of the ITC's determination.

While there are a number of reasons the Federal Circuit should grant ITC complainants standing liberally, it is difficult to reconcile those reasons with *Applica*, where the Federal Circuit denied a complainant standing to appeal an ITC determination. *Applica* involved a complainant seeking more exclusionary relief than the ITC had granted it.¹¹⁰ And although *Applica* involved independent claims in the same patent, these independent claims had different scope and could cover different products, like the '539 design patent and the '194 utility patent at issue in *Mezzalingua*. Thus, like the complainant in *Mezzalingua*, complainant *Applica* stood to benefit immediately and practically by a reversal of an ITC determination that would require additional claims to be added to the exclusion order. Hence, at least in principle, both cases involved two different patent rights.

Unlike *Mezzalingua*, though, *Applica* did not involve a requested general exclusion order for a design patent; rather, it involved a limited exclusion order. Is it possible that this distinction between limited and general exclusion orders made the difference? Probably not, given the ITC found no remedy was warranted for the '539 design patent in *Mezzalingua* because it found no violation of § 337.¹¹¹ Thus, on appeal in *Mezzalingua*, there was no basis to assume that PPC would have been entitled to a general exclusion order even if the Federal Circuit had reversed the ITC's finding that no

110. *Applica Consumer Prods., Inc. v. Int'l Trade Comm'n*, 2010 WL 8344380, at *1 (Fed. Cir. June 23, 2010) (non-precedential order).

111. It is typical for the ITC to decline to make a remedy determination when it finds that no violation of § 337 exists.

violation of § 337 occurred with respect to PPC's '539 design patent.¹¹² Regardless, these differences do not change the fact that a favorable decision on appeal, requiring the ITC to add patent claims to *Applica*'s limited exclusion order, would have significantly enhanced *Applica*'s legal rights with respect to the products of infringing respondents at issue in that case. It appears, therefore, that either the non-precedential dismissal in *Applica* rests on shaky legal grounds or the Federal Circuit judges disagree on the breadth of the Article III case or controversy requirement in ITC appeals. Given the frequency with which these issues arise in appeals from ITC determinations, it is likely the Federal Circuit will provide further guidance on the issue in the near future.

2. *Standing for Respondents*

The Federal Circuit should not confer standing upon respondents quite as easily as it confers standing upon complainants, however. As mentioned previously, a respondent against which the ITC has issued an exclusion order will frequently appeal the ITC determination to issue the exclusion order. ITC respondents should only be able to appeal findings when the ITC has found a violation of § 337 against them.¹¹³ When the ITC finds no violation of § 337 against an ITC respondent, that respondent is not "adversely affected." That respondent should therefore be required to raise any issues decided adversely against it as alternate grounds for affirmance if and when the ITC complainant appeals.

When the ITC finds a violation, the respondent may appeal by challenging any adverse finding pertaining to the patent claims identified in the order. For example, a respondent will often challenge the validity of a patent claim identified in an exclusion order. In other words, the respondent will seek to show that the patent in question should never have issued in the first place. Should the Federal Circuit rule for the respondent, agreeing then that certain claims of a given patent are invalid, the exclusion order becomes unenforceable to the extent it includes those invalid claims. However, if the respondent is not given the opportunity to appeal an exclusion order to the Federal Circuit because of lack of standing, the respondent is also prevented from challenging the validity of the patent. That respondent is "adversely affected" by the remedy issued for an invalid patent, for example, by being

112. On the contrary, a *limited* exclusion order is considered the default remedy for a violation of § 337. While PPC was injured by the ITC's determination that no violation of § 337 existed, PPC was not injured by a remedy determination the ITC declined to make.

113. *Sinochem Modern Env'tl. Prot. Chems. (Xi'an) Co. v. Int'l*, 358 F. App'x 161 (Fed. Cir. 2009); *Surface Tech., Inc. v. Int'l Trade Comm'n*, 780 F.2d 29, 31 (Fed. Cir. 1985); *Am. Tel. & Tel. Co. v. Int'l Trade Comm'n*, 626 F.2d 841 (C.C.P.A. 1980).

wrongfully closed out from the product space covered by the invalid patent in connection with possible re-designed products. This not-uncommon scenario demonstrates one form of potential injury to a respondent who is denied standing to appeal the issuance of an exclusion order against one of its products.

A related concern for respondents is the over-enforcement of ITC exclusion orders against their products. CBP does not have regulations in place that make it easy for respondents to communicate with CBP regarding possible enforcement of exclusion orders against their products. At present, CBP enforcement of exclusion orders is less than transparent.¹¹⁴ Oftentimes, a successful ITC complainant will take an exclusion order to CBP and present its view of the scope of the exclusion order in an *ex parte* meeting or communication—i.e. without the benefit of the respondent's viewpoint.¹¹⁵ Because CBP initially hears the complainant's side of the story only, respondents are at risk of over-enforcement of the exclusion order against its products. For example, in more than one instance, CBP has enforced an exclusion order against their product that the ITC has subsequently indicated is not covered by that exclusion order.¹¹⁶ It is possible that the *Yingbin* court did not fully appreciate this possibility. This is simply the nature of CBP enforcement at present. Given the not so hypothetical possibility of wrongful enforcement of exclusion orders against legitimate products, a respondent should be allowed to challenge any adverse aspect of an ITC determination that supports an exclusion order in an appeal to the Federal Circuit.

The Federal Circuit should grant respondents standing liberally, regardless of whether a respondent appeals some, rather than all, grounds for exclusion of its product. The court's decision in *Yingbin*, for example, suggests that Power Dekor's decision to appeal infringement findings for one of Unilin's asserted patents, but not both, precluded Power Dekor's ability to qualify for standing to challenge the Unilin patent it elected. This should not be the case. An appellant's choice of issues to raise on appeal should not determine whether that appellant has standing to prosecute those issues it selected to present to the appeals court. The standing injury at issue should be determined at the time the ITC issues its final determination, not by

114. Bartkowski, *supra* note 11, at 4.

115. *Id.*

116. *See, e.g.*, Certain Coaxial Cable Connectors & Components Thereof & Prods. Containing Same, Inv. No. 337-TA-650, USITC Pub. 4283, at 2 (Feb. 9, 2012) (Advisory Op.) (finding that a product of a non-respondent is not covered by a general exclusion order); Certain GPS Devices & Prods. Containing Same, Inv. No. 337-TA-602, USITC Pub. 4137, at 4–5 (Apr. 20, 2010) (Advisory Op.) (finding a product of a non-respondent is not covered by a limited exclusion order).

strategic litigation decisions following the ITC's determination. Indeed, the ITC's statute sets forth that "[a]ny person adversely *affected by a final determination of the Commission*" may appeal.¹¹⁷ The "any person adversely affected" language of § 337(c) is broad. As such, the Federal Circuit should also broadly apply standing to appeal. Given Congress's inclusion of this provision, the Federal Circuit's approach should be one of presumptive standing.¹¹⁸

Appeals from ITC determinations to the Federal Circuit do not ask for advisory opinions, nor do they involve purely hypothetical scenarios. These appeals involve real businesses, real remedies, real products, and immediate concerns. This is evidenced by CBP and the ITC's increased enforcement activity over the past few years regarding products not in existence when the ITC remedy was issued. The Federal Circuit should not treat these appeals as mere advice or hypothetical scenarios.

3. *Potential Negative Implications of Liberal Standing Grants*

Notwithstanding the reasons to grant standing liberally, granting potential appellants broad standing rights will also have some negative implications. Essentially, litigation about the reach of ITC exclusion orders will continue to be complex and will involve multiple parties. ITC patent appeals will continue to be substantially more complex than their district court counterparts. And, as a result, this will likely continue to frustrate litigants as well as the Federal Circuit. Nevertheless, the court's preference for tidy appeals from ITC proceedings should yield to the right of litigants to have the Federal Circuit decide the merits of their controversies with respect to present and future importation. Indeed, it should be relatively easy for litigants (and non-litigants) to show that they are "adversely affected" by an ITC exclusion order and therefore entitled to appeal the ITC's determination to the Federal Circuit. Nevertheless, the "adversely affected" language of § 337(c), as interpreted by the Federal Circuit before the *Yingbin* decision, provides enough of a gatekeeping function to ensure judicially efficient use of the Federal Circuit in appeals from the ITC.

117. 19 U.S.C. § 1337(c) (2010) (emphasis added).

118. *See Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 399 (1987) ("We recognized the presumption in favor of judicial review of agency action, but held that this presumption is 'overcome whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme.'") (internal quotation omitted); *LSI Computer Sys, Inc. v. Int'l Trade Comm'n*, 832 F.2d 588, 591 (Fed. Cir. 1987); *Import Motors, Ltd. v. Int'l Trade Comm'n*, 530 F.2d 937, 940 (C.C.P.A. 1975), *vacated*, 530 F.2d 940 (C.C.P.A. 1976) (finding that § 337(c) broadens the class of potential appellants beyond those who were parties to the ITC investigation).

If the Federal Circuit does not grant standing liberally, there will be less certainty regarding the scope of exclusion orders issued by the ITC. The robust appeal process envisaged by the broad “any person adversely affected” language of § 337(c) provides for exclusion orders that are more fully vetted before the federal government commits taxpayer resources to the administrative costs of exclusion order enforcement. Moreover, without broad standing, many of the issues that would be decided on appeal from the ITC would instead be decided in the enforcement context based on CBP actions. The disadvantage of this possibility is that some CBP actions can only be challenged in the Court of International Trade (“CIT”), which does not have the same expertise in dealing with complex patent issues as the ITC does. Thus, not only does the involvement of the CIT add a redundant (and some would say unnecessary) layer of judicial review, the involvement of the CIT also adds some unpredictability.

An immediate appeal to the Federal Circuit from the ITC, where the ITC is involved as the appellee and where parties and non-parties alike can challenge various aspects of the ITC’s final determination, provides the most certainty in an uncertain world of exclusion order enforcement. Thus, the Federal Circuit should grant standing liberally. Not only is this approach consistent with the language of § 337(c) and its legislative history, but it will likely lead to less litigation in the long-run over enforcement issues and is therefore consistent with the policy objectives of saving government resources.

IV. CONCLUSION

Although some developments involving standing to appeal ITC determinations to the Federal Circuit have recently called the scope of ITC orders into question, the *Mezzalingua* decision clarifies that § 337 complainants have a real interest in obtaining the broadest possible exclusion against future products of respondents or products other than those considered by the ITC, even if the accused products are already subject to a final exclusion. The court’s reliance on possible future infringement as sufficient to confer standing on PPC reaffirms the ITC’s view that its orders broadly cover infringement of the subject patent. After *Mezzalingua*, it seems fairly clear that ITC complainants seeking a broader exclusion order should always have standing to appeal to the Federal Circuit, even if the accused product has already been finally excluded for infringement of another patent claim or under a different exclusion order.

The Federal Circuit should also grant respondents standing liberally, though not quite as liberally, given respondents’ interest in minimizing impediments to importation of their products. The certainty gained by

allowing challenges to broad and potentially market-altering ITC determinations to proceed immediately following the ITC's investigations outweighs concerns about the complexity of these appeals. Given the frequency with which standing issues arise and the complexity of technologies for disputed products, which often involve many entities' cooperation to make a single product, it is likely that the Federal Circuit will speak again on this issue in the near future—this time with more clarity.

