

US International Trade Commission: Design Patents Outperform on Obtaining GEOs

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In May 2020, we reported in an article published by *Law360*, “design patents outperform utility patents when it comes to injunctive relief.” The same is true when it comes to a rare form of injunctive relief—a general exclusion order (GEO)—issued in Section 337 investigations by the US International Trade Commission (ITC).

The ITC may issue injunctive relief in the form of a cease and desist order (CDO), a limited exclusion order (LEO), or a general exclusion order (GEO).

- A CDO prevents a named respondent in an investigation from, for example, continuing to sell infringing products already in the US.
- A LEO bans named respondents in an investigation from importing infringing products into the US.
- A GEO bans the importation of all infringing products into the US, regardless of its source—including ones that were not party to an ITC investigation.

Because of its sweeping scope, a GEO is the least commonly issued of the three, available only where “necessary to prevent circumvention of an exclusion order limited to products of named persons,” or “there

is a pattern of violation ... and it is difficult to identify the source of infringing products.” 19 USC 1337 (d). And because ITC investigations target completion within 16 months of being instituted, a GEO can be a swift, powerful tool in stopping and deterring the importation of infringing products into the US.

Take for example a recently terminated investigation, *Certain Vacuum Insulated Flasks and Components Thereof* (Inv. No. 337-TA-1216). That investigation resulted in a final determination issuing a GEO relating to three design patents for flask caps (US Design Patent Nos. D806,468; D786,012; and D799,320) owned by Hydro Flask Steel Technology, LLC d/b/a Hydro Flask and Helen of Troy Limited, in about 17 months after the investigation’s institution. Another recent investigation, *Certain Electric Shavers and Components and Accessories Thereof* (Inv. No. 337-TA-4230), appears to be heading in the same direction, receiving an initial determination issuing a GEO relating to one utility patent and one design patent (US Patent Nos. 8,726,528 and D672,504) for electric head shavers, only a little over a year after the investigation’s institution.

Section 337 investigations that terminated in 2015 or later

	No Design Patents	Had Design Patents	Total
No GEO issued	256	14	270
GEO issued	18	6	24
Total	274	20	294

A survey of the Section 337 investigations that terminated in 2015 or later show that the rate of getting a GEO issued is more than four times greater for investigations involving design patents than those asserting just utility patents.

Design patent holders considering filing a Section 337 investigation should keep in mind that such investigations, unlike a district court patent litigation, have a “domestic industry” requirement. One aspect of this requirement is that every element of at least one claim in the asserted patent exists in an actual product.

Because design patents may include only one claim, it can be more challenging for design patents to satisfy this requirement. However, in cases where the patentee has protected its commercial embodiment with a design patent, satisfying the domestic industry prong is more likely.