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## Recent Federal Circuit Ruling Shows the Value of the U.S. International Trade Commission in Addressing Intellectual Property Infringement

In a precedential opinion, the Federal Circuit on December 7, 2018 reversed the final determination of the U.S. International Trade Commission (ITC) that Laerdal Medical Corp. (“Laerdal”) failed to plead its trade dress claims with adequate detail, and vacated the ITC’s decision that no relief was warranted for those claims. The Federal Circuit remanded the case for the ITC to evaluate public interest concerns and, if none existed, to issue the appropriate remedy. The decision demonstrates the value of the ITC for intellectual property rights holders seeking to combat a wide variety of intellectual property infringement, particularly in instances where one or more of the potential respondents may not appear in the ITC to defend against the infringement claims.

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### Background

Laerdal filed its complaint with the ITC on March 21, 2016, alleging that eleven respondents were infringing Laerdal’s patent, trademark, trade dress, and copyright rights by importing, selling for importation, or selling within the United States certain products, including spine boards, cervical collars, CPR masks, training manikins, and accompanying product literature, in violation of 19 U.S.C. § 1337. Among other remedies, Laerdal sought a general exclusion order covering the infringing products, as well as limited exclusion orders and cease and desist orders directed to each respondent.

The ITC instituted an investigation as to a subset of Laerdal’s claims—specifically, its trade dress claims, one patent claim, two copyright claims, and one trademark claim. After none of the respondents appeared or responded to the Notice of Investigation, on October 20, 2016, Laerdal moved for an order requiring the respondents to show cause as to why they should not be found in default under 19 U.S.C. § 1337(g)(1). The Administrative Law Judge (“ALJ”) granted this order to show cause, and after no response or acknowledgement of the order by any respondent, the ALJ issued an initial determination finding all respondents in default. Laerdal then modified its requested relief from a general exclusion order to immediate entry of limited exclusion orders (and cease and desist orders, where appropriate) against the defaulting respondents in response to the ALJ’s initial determination. In response to a request from the ITC, Laerdal and the ITC’s Office of Unfair Import Investigations (the “Staff”) both provided briefing on remedy, the public interest, and bond, and submitted proposed remedial orders. Both responded that public interest factors did not preclude relief and requested a 100% bond rate, a cease and desist order against the sole domestic respondent, and limited exclusion orders for all respondents. Laerdal and the Staff also indicated that because the requirements of § 1337(g)(1) were satisfied, the ITC must presume the facts alleged in the complaint to be true and issue an exclusion order, cease and desist order, or both, unless such relief was precluded by public interest concerns.

On June 14, 2017, the ITC issued its final determination, granting Laerdal limited exclusion orders against three respondents and a cease and desist order against one respondent, all based on Laerdal’s patent and trademark claims. However, the ITC issued no relief on Laerdal’s trade dress and copyright claims, finding Laerdal’s allegations in those claims inadequate because even if the pleaded facts were presumed true, Laerdal failed to show that any respondent violated § 1337 with respect to the alleged trade dresses and copyrights.

### The Federal Circuit’s Opinion

Laerdal appealed only the ITC’s determination of its trade dress claims, arguing that the ITC acted in violation of § 1337(g)(1) by terminating the investigation and issuing no relief for its trade dress claims against defaulting respondents.

The main issue on appeal was that Section 1337(g) provides, in relevant part, that if (A) a complaint is filed against a person under Section 337; (B) the complaint and a notice of investigation are served on the person; (C) the person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice; (D) the person fails to show good cause why the person should not be found in default; and (E) the complainant seeks relief limited solely to that person; the Commission *shall* presume the facts alleged in the complaint to be true and *shall*, upon request, issue an exclusion from entry or a cease and desist order, or both, limited to that person unless, after considering the effect of such exclusion or order upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such exclusion or order should not be issued. 19 U.S.C. § 1337(g)(1) (emphases added). According to Laerdal, the ITC acted outside the scope of its authority by revisiting the sufficiency of the complaint after institution.

In its December 7, 2018 opinion, the Federal Circuit (O'Malley, Lourie, Stoll) explained that the use of the "shall" in § 1337(g)(1) unambiguously requires the ITC to grant relief against defaulting respondents, subject only to public interest concerns, if an investigation is instituted and all elements of § 1337(g)(1) are satisfied. The court held that the ITC "may not institute an investigation and then decide post-hoc that it is dissatisfied with an unchallenged complaint upon which the investigation was predicated." Indeed, "[h]aving approved Laerdal's trade dress claims without any additional questioning and instituted an investigation thereof . . . the [ITC] cannot now, post-institution and without opposition or appearance from respondents, assert insufficient pleading as a basis for denying relief." In the end, the Federal Circuit remanded for the ITC to determine the appropriate remedy, subject to public interest concerns, and made clear that, had the ITC found Laerdal's trade dress claims insufficient, it should have requested additional information or denied institution (as it did with respect to certain of Laerdal's patent and trademark claims that were not included in the investigation).

### Takeaways

This decision provides clear guidance for parties before the ITC under 19 U.S.C. § 1337(g)(1): Once an investigation has been instituted, as long as all of the prerequisites of the § 1337(g)(1) are satisfied, then the ITC is *required* to grant relief (such as a limited exclusion order) against defaulting respondents, subject only to overriding public interest concerns. For parties considering initiating Section 337 investigations at the ITC, this decision highlights the value of the ITC as an effective forum for protecting a variety of intellectual property rights and combating them relatively swiftly and severely against unresponsive or dilatory parties.