

## Robert Vlasits Discusses Federal Circuit Opinion Discarding ITC Limits on Qualifying Domestic Expenses with Law360

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Winston & Strawn partner Robert Vlasits spoke with Law360 about the recent Federal Circuit decision discarding the U.S. International Trade Commission's (ITC) limits on what types of domestic expenses qualify a company to bring a patent suit at the agency. To bring a suit at the ITC, litigants must prove that they have a domestic industry of products protected by the patent. Under Section 337 of the Tariff Act, which governs IP cases at the ITC, the requirement can be met by demonstrating a "significant employment of labor or capital," but the ITC has said marketing-related costs are not included.

In a [case](#) involving Lashify, the commission found that the company's patents were infringed, but refused to ban the infringing imports since the company's U.S. investments were in sales, marketing, and other activities that the ITC said don't count towards the requirement. The appeals court's decision stated that the commission has wrongly held that money spent on sales, marketing, warehousing, quality control, and distribution in the U.S. does not count as the type of investment that permits companies to bring ITC intellectual property suits, as Section 337 doesn't have any carveouts barring such costs from being considered.

"This is one of the most significant changes in the law of the ITC that I've seen in my almost two decades of practice," said Robert. "I think it will be a sea change for potential cases being considered for filing at the ITC, as it greatly expands the type of investments that can be relied upon for a complaint."

Many companies whose primary activities in the U.S. relate to marketing and distribution were very likely reluctant to bring patent litigation at the commission in the past, so "I believe there will be an uptick in cases being filed at the ITC," he said.

Businesses that could benefit from the ruling include large technology companies that don't make products in the U.S. While they have been able to bring ITC cases in the past, doing so involved piecing together other U.S. investments to meet the requirement, Robert said. Since such companies often spend "enormous amounts of money" on advertising and retail stores in the U.S., showing that they have a domestic industry could now be a much easier lift, he added.

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