

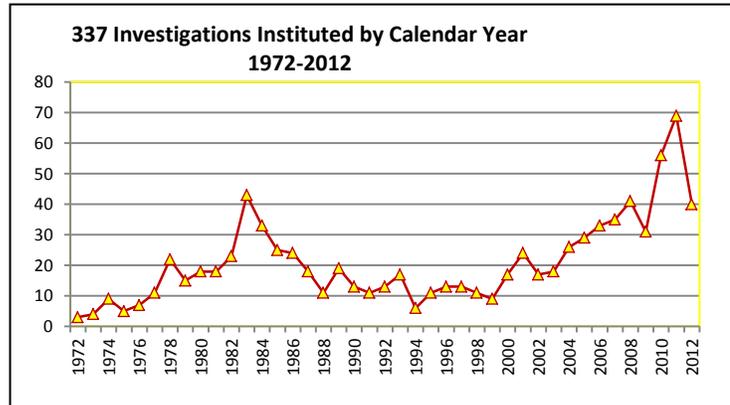
FACTS AND TRENDS REGARDING USITC SECTION 337 INVESTIGATIONS

Prepared by the U.S. International Trade Commission

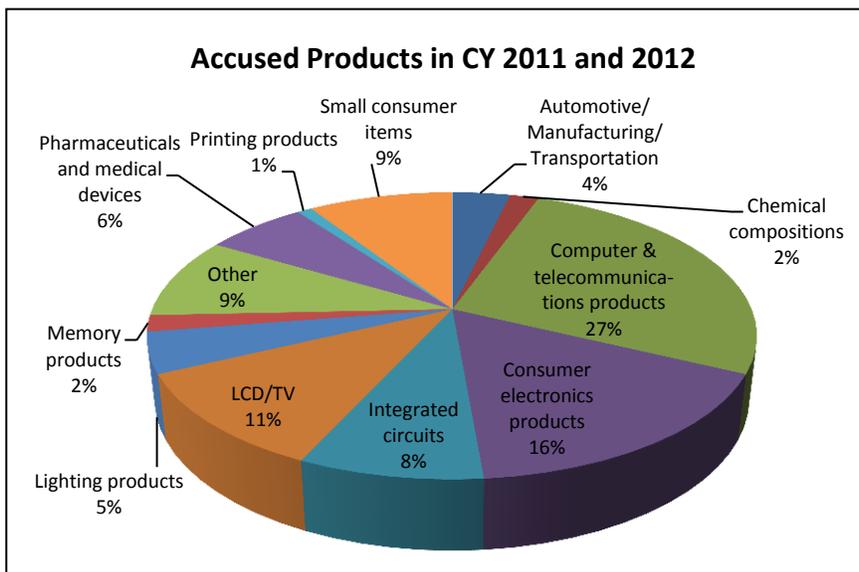
The U.S. International Trade Commission (USITC) adjudicates allegations of unfair methods of competition and unfair acts involving imported articles under Section 337 of the Tariff Act of 1930 as amended, 19 U.S.C. § 1337. Most Section 337 investigations involve allegations of infringement of patents or other intellectual property rights. Facts and trends regarding certain aspects of Section 337 proceedings are provided below.

1. Increased Caseload

Section 337 investigations have increased significantly over the past five years and are expected to remain at elevated levels. A shortage of courtrooms has hampered scheduling of evidentiary hearings in recent years. In response, the USITC acquired additional space in its building and completed construction of a new courtroom in October 2012. This new courtroom is specially equipped to handle the complex cases that account for much of the IP-based Section 337 docket and will help to maintain expeditious target dates for completion of its investigations.



A substantial number of Section 337 investigations involve IP-based matters regarding high tech products. Computer and telecommunications products accounted for about 25 percent of new investigations instituted in calendar year 2011 and about 30 percent of new investigations in 2012; other consumer electronic products accounted for about 15 percent of new investigations in 2011 and about 20 percent of new investigations in 2012; and liquid crystal displays/TVs accounted for about 15 percent of new investigations in 2011 and about 5 percent in 2012.



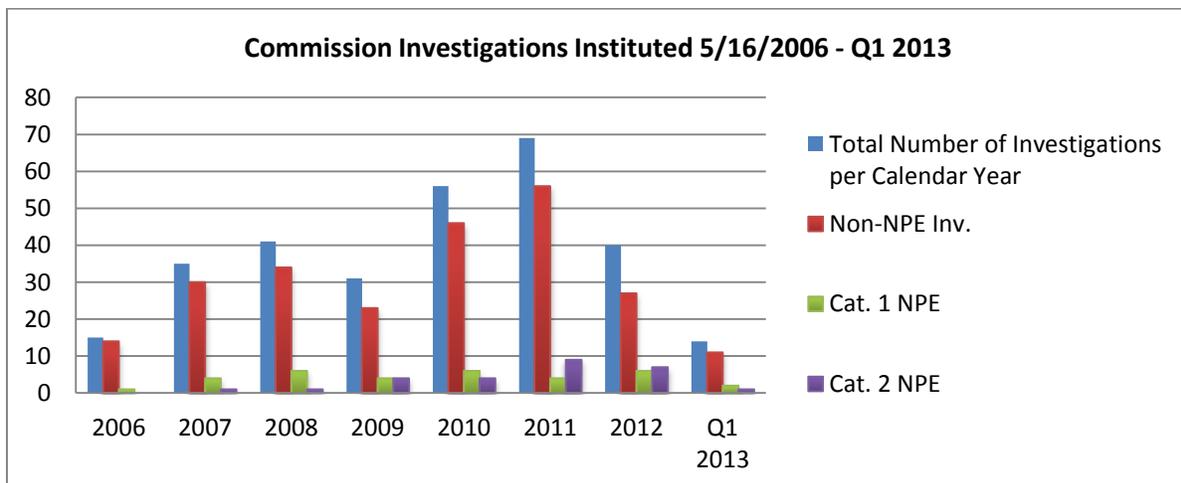
2. Domestic Industry Requirements & Non-Practicing Entities

An essential element of a Section 337 violation is the domestic industry requirement. The complainant must show that it has made sufficient investments in the United States with respect to articles protected by the IP right concerned. The statute was amended in 1988 to allow IP rights-holders that do not manufacture products (*i.e.*, non-practicing entities or NPEs) to obtain remedies at the USITC. Congress made note in amending the statute that inventors, universities, start-ups, and other entities that conduct research and development, engineering, or licensing activities are equally entitled to Section 337 relief as are manufacturing industries.

An issue receiving some attention is whether certain NPEs should be permitted to obtain relief against infringing imports at the USITC. No commonly understood definition of an NPE exists. For analytical purposes, the Commission used the following categories:

- Category 2 NPEs. Entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents.
- Category 1 NPEs. All other entities that do not manufacture products that practice the asserted patents, including inventors who may have done R&D or built prototypes but do not make a product covered by the asserted patents and therefore rely on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore rely on licensing to meet the domestic industry requirement; start-ups that possess IP rights but do not yet manufacture products that practice the patent; and manufacturers whose products do not practice the asserted patents.

Some commentators have suggested that NPE filings, particularly by Category 2 NPEs, account for the increased caseload at the USITC because of the U.S. Supreme Court's decision in *eBay, Inc. v. MercExchange, LLC*, which made injunctions more difficult to obtain in district courts. However, those commentators have not offered a convincing analysis of the data on investigation institutions to support this suggestion.



Data concerning NPE filings at the USITC show the following:

- Since the *eBay* decision on May 15, 2006, the USITC instituted 301 investigations through the first quarter of 2013. Of these, Category 1 NPEs accounted for 33 (or 11 percent). Category 2 NPEs accounted for 27 (or 9 percent).
- Since the *eBay* decision issued, only four NPEs were successful in obtaining exclusion orders: two Category 1 NPEs and two Category 2 NPEs. In each of these four investigations, the involved NPE or its subsidiary developed the technology at issue in the investigation.

3. Settlements

Public policy favors settlement of disputes. The USITC offers a mediation program that is modeled on the U.S. Court of Appeals for the Federal Circuit’s mediation program and is available to all parties in Section 337 investigations. To date in FY 2013, 28 parties in 13 investigations have sought mediation through this program. Nearly half of all investigations instituted at the USITC ultimately terminate based on settlements or consent orders as the data below indicate. Due to the relatively small number of NPE investigations, data breaking out settlements by complainant category appear inconclusive, but the data do not show a greater settlement rate for NPE investigations compared to non-NPE investigations.

Settlements (5/16/2006 to Q1 2013)			
	Number of Completed Inv.	Number of Settled Inv.	Settlement Rates
Total Inv.	256	124	48.44%
Cat. 1 NPEs	28	10	35.71%
Cat. 2 NPEs	22	12	54.55%
All NPEs	50	22	44.00%
All Other	206	102	49.51%

4. Number of Respondents

USITC jurisdiction and remedies are *in rem*, relating to the imported articles in issue. In 2008, the U.S. Court of Appeals for the Federal Circuit, in *Kyocera v. Int’l Trade Comm’n*, rejected the USITC’s long-standing practice of including within the scope of its remedial orders not only infringing components but also downstream products containing such components that were manufactured by non-parties who were not named respondents in its investigations. As a result of this decision, commentators have observed an increase in the number of respondents named in Section 337 investigations because complainants can no longer rely on the

pre-Kyocera USITC practice to reach non-party downstream products containing accused components.

The data concerning named respondents show great variability across all investigations. The table below shows the range of numbers of named respondents in USITC investigations. These data include all named respondents regardless of whether the entities are related. In 2012, for example, investigations instituted based on complaints filed by Category 1 NPEs ranged from 2 to 35 respondents; Category 2 NPE investigations ranged from 2 to 45 respondents; and all other investigations ranged from 1 to 35 respondents. The average numbers of respondents by complainant category are: Category 1 NPE--10.3 respondents; Category 2 NPE--14.6 respondents; and All Others--6.5 respondents. Due to the relatively small number of NPE investigations, data for average numbers of respondents per investigation by complainant category appear inconclusive.

Range of Number of Respondents Investigations Instituted 5/16/2006 - Q1 2013			
YEAR	Category 1 NPEs	Category 2 NPEs	All Other
2006	4	0	1-21
2007	2-7	1	1-46
2008	4-40	17	1-36
2009	3-6	3-17	1-22
2010	1-20	2-11	1-32
2011	4-50	4-35	1-30
2012	2-35	2-45	1-35
Q1 2013	10-15	2	1-10

Data concerning the total number of named respondents likewise indicate that the number of named respondents varies substantially from year to year across all complainant categories.

