

Client Alert

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Real or Fake? ITC Investigating Allegations of Importation and Sale of Counterfeit Dresses, Jumpsuits, and Maxi Skirts

Last month, the International Trade Commission (ITC) issued a notice instituting an investigation to determine whether importation into and/or sale in the United States of certain dresses, jumpsuits, and maxi skirts is a violation of Section 337 of the Tariff Act of 1930. *Certain Female Fashion Dresses, Jumpsuits, Maxi Skirts, and Accoutrements*, Inv. No. 337-TA-1157, Notice of Institution (May 22, 2019). Following from a complaint filed by Style Pantry LLC (a company affiliated with the blog StylePantry.com and online retailer ShopFKSP.com), the ITC will investigate allegations of false designation of origin or source, false advertising, and unfair competition against respondents Amazon.com Inc., Xunyun and Jianzhang Liao (both of China). If the ITC were to find in Style Pantry's favor, the accused products could be excluded from the US market.

This is not unusual *per se*, as most ITC complaints filed result in institution of an investigation. However, we believe it is noteworthy for several reasons.

First, the ITC is investigating false designation of origin or source, false advertising, and unfair competition in violation of 15 U.S.C. § 1125(a) whereas, more often than not, Section 337 investigations at the ITC relate to assertions of patent infringement under 35 U.S.C. § 271.

Second, Style Pantry alleges unlicensed sale in and importation into the US of dresses, jumpsuits, and maxi skirts that infringe certain copyrights and trademarks owned by Style Pantry, i.e., that the respondents use images from Style Pantry's websites and Instagram account to sell counterfeit products imported from China. In response, Amazon requested that the ITC decline to institute the investigation. According to Amazon, Style Pantry did not provide a basis—legal or factual—to support a Section 337 investigation relating to the clothing it seeks to exclude from importation into and sale in the US, because it relied on copyrighted *images/photographs* of clothing, while seeking to exclude *physical articles* of clothing, which are not the subject of the asserted copyright registrations or protectable by copyright. (Amazon also argued that Style Pantry did not provide any evidence in its complaint of unauthorized use of trademarks.)

In addition, Amazon requested in the alternative that the ITC put the investigation, if instituted, into the ITC's "Early Disposition Program" to determine within 100 days of institution the jurisdictional issue of whether Style Pantry stated a cognizable claim under Section 337. The ITC denied the request, however, because the issue may be too complex to decide so quickly.

Institution of this investigation is important because, if it proceeds to a decision on the issue of jurisdiction, it will be instructive to future litigants in the ITC. The investigation may also be of interest to companies that encounter the issue of alleged counterfeit sales on third-party websites.

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