



Professional Perspective

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# ITC General Exclusion Orders Against Infringing Imports

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In the coming year, thousands of companies will import hundreds of billions of dollars of infringing goods into the U.S. Many of those companies didn't even exist last year and may not exist the next. For intellectual property holders, the International Trade Commission (ITC) offers a powerful alternative to seeking individual remedies from countless fleeting infringers: a general exclusion order (GEO).

Unlike its counterpart, the limited exclusion order (LEO), a GEO bans all imports of infringing goods, regardless of who is importing. This article discusses factors the commission has considered in issuing a GEO and what non-parties may want to do when facing a potential GEO.

## Uptick in Use

Due to such considerable impact on international trade, the commission has applied some scrutiny to requests for a GEO, in one case suggesting that they require "extraordinary circumstances." Indeed, in the last 10 years, 40 GEOs have been issued, comparing with 80 LEOs. However, recent data shows an uptick in this remedy, including at least 10 GEOs issued so far this year, suggesting that modern consumer behaviors are causing those circumstances to become more common.

A GEO requires that one of the two conditions be met: it is 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 goods.

In many cases, the commission has found these conditions to be met when infringing products are frequently sold through the internet. Online sale and distribution of infringing products can support granting a GEO, because such activity makes it difficult to identify the true source of the products. As digital shopping rises and consumers expand the categories of products they purchase online, GEOs have been issued more frequently.

As online shopping becomes more commonplace, so may the reach of a GEO. So far, GEOs have covered a wide variety of products, such as personal transporters, ink cartridges, lighting devices, electric devices, arrowheads, beverage containers, height-adjustable desks, filters, footwear, food processing equipment, and so on. As a result, parties and non-parties alike should understand the circumstances that such a remedy may be issued.

## Factors in GEO Issuance

For complainants, the commission has offered some guidance on how to identify circumstances where a GEO may be warranted. To find those circumstances, the commission looks not only to the activities of active respondents, but also those of terminated respondents and parties never named in the complaint at all. See *Toner Cartridges and Components Thereof*, Inv. No. 337-TA-918, Comm'n Op. at 9-10 (Oct. 1, 2015). In prior cases, the commission has identified the following factors and reasoning as potentially probative of a GEO.

### **Internet Sale**

Internet sales and operations have been considered in the issuance of a GEO. Sales over the internet sometimes allow for anonymity, which can increase the difficulty in identifying the sources of infringing products, facilitating the circumvention of an LEO. Internet retailers and distributors sometimes package their products with no clear identifiable designation of source and with unreliable manufacturer identification numbers. Unsuccessful efforts to remove internet listing of infringing products also support a GEO.

### **Packaging Without Identifying Information**

Lacking identifying information on packaging or labeling was also considered to find that it was difficult to identify source and origin of goods, therefore favoring a GEO. Examples include that the products are in unmarked, generic, or rebranded packaging without origin markings; that the packaging information does not identify the true source of the products; that the products do not bear name or marks of the actual importer of record, distributor, or manufacturer; and that the products are shipped or sold in plain white boxes with no markings to indicate origin.

## ***Involvement of Multiple Entities***

The involvement of multiple entities can be another factor the commission reviews when considering a GEO. Complex distribution networks with multiple intermediaries make it more difficult to identify the source of products. A large number of shippers and consignees involved in importation increase the difficulty to identify the source of the goods.

## ***Corporate Structure***

The commission has also considered corporate structure when deciding whether to grant a GEO. Evidence that has been considered includes whether the company's name and logo can quickly change, whether previous or continued importation was made under another name, whether the manufacturer operates under multiple names, whether the same product were sold under different names, and whether the same product has been re-branded using different sales channels.

## ***Pattern of Violation***

A pattern of violation supports issuing a GEO. To find a pattern of violation, the commission has considered whether multiple respondents have sold infringing products, the number of defaulting and non-participating respondents, and the number of non-respondent internet retailers with potentially infringing products.

## ***Market Incentive***

Incentive for outside market participants is another factor to consider when issuing a GEO. A high profit margin in importing and selling the infringing goods, a fast-growing business in many countries, a technology that is not too complex, a low barrier to market entry for future participants can all be factors the commission considers to decide whether to issue a general exclusion order.

## **Unnamed Party Protection**

By its nature, a GEO excludes all infringing products, regardless of whether the parties were named in an investigation. This leads to the paradoxical result of having a remedy issued against a company that does not have an opportunity to defend itself in court. Indeed, when a GEO is issued, non-parties manufacturing or selling any potentially infringing products may be subject to that order. As a result, parties with at-risk products may want to intervene, seeking to have their products adjudicated as non-infringing.

The recent Federal Circuit decision in *Mayborn* illustrates the importance for non-parties to participate in the investigation involving a general exclusion order. *Mayborn Grp., Ltd. v. Int'l Trade Comm'n*, Case No. 19-2077 (Fed. Cir. July 16, 2020). In this case, Mayborn was not named as a respondent, and even though it was notified of the then-ongoing investigation, Mayborn took no action. After the named respondents either settled or defaulted, the commission issued a general exclusion order. The complainant notified Mayborn that its products infringed the patent in violation of the general exclusion order. Mayborn petitioned to rescind the general exclusion order, contending that the asserted claim is invalid. The commission denied the petition, and Mayborn appealed.

The Federal Circuit decided that Mayborn had standing to appeal the commission's decision because it was injured by the GEO, had lost sales, and had other harm stemming from the threats to the GEO asserted against it. However, the Federal Circuit decided that Mayborn's invalidity challenge was not a permissible basis to seek rescission of the GEO. If Mayborn had intervened early during the investigation, it would have been able to raise the invalidity challenge and defend against the allegations of patent infringement.

In fact, a recent example demonstrates how an intervenor can obtain a better outcome. Converse, Inc., a subsidiary of Nike, sued dozens of companies for copying the look of its sneaker, and requested a GEO to forbid entry into the U.S. of footwear products that violate Converse's trademarks and trade dress. *Certain Footwear Products*, Inv. No. 337-TA-936, Complaint (Oct. 14, 2014).

New Balance was not named in the complaint, but moved to intervene to become a respondent, so that it could present evidence and argument to protect New Balance's footwear from the scope of Converse's desired GEO. Just recently, the commission issued a GEO barring importation of shoes that infringe Converse's rights, but New Balance's product was not

subject to the exclusion order, because the Commission found it did not violate the law. *Certain Footwear Products*, Inv. No. 337-TA-936, Comm'n Op. (Sep. 24, 2020).

It's also important to intervene early during the investigation. For example, in 337-TA-739, a non-respondent filed briefing during the commission review period, requesting to be carved out from a GEO or that an LEO should be issued. *Certain Ground Fault Circuit Interrupters and Products Containing Same*, 337-TA-739, Comm'n. Op. at 91-92 (June 8, 2012). The commission declined non-respondent's requests. It commented that the non-respondent knew about the investigation as early as the institution phase, but chose not to intervene to protect its interest. The commission further stated that "[a]ny burden imposed on [non-respondent] by remedial orders could have been avoided if [non-respondent] had participated in the present investigation and had presented meritorious defenses."

## Conclusion

The value of a GEO can be significant for intellectual property owners not only for its effect to stop existing infringements from being imported, but as a deterrent to potential future infringers. It also allows complainants the opportunity to exclude all infringing products in a single investigation. In deciding whether to seek a GEO, a complainant should examine the market condition, the internet sales, the corporate structure of respondents, and the packaging of the infringing products.

Also, because of the far-reaching consequence of a GEO, a company not named as a respondent should also monitor ITC complaints filed by its competitors to determine whether their products may be at risk. If a GEO is sought and its products are at risk of exclusion, the company should think about intervening during the investigation to have its products adjudicated in order to preserve all possible defenses.