



## **Federal Circuit: Aggregated Financial Data From Different Products That Practice Different Patents Insufficient to Establish Domestic Industry**

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In an appeal from the ITC, the Federal Circuit recently held that by presenting cumulative financial data across different products that practice various combinations of patents, appellant provided insufficient evidence for a court to evaluate domestic industry for any individual patent. And as a result, the court affirmed the ITC's determination that the appellant failed to satisfy its burden to establish a domestic industry for any of its asserted patents.

The technology in this case related to stud finders. The appellant in this case asserted three patents each of which covered different features of its stud finder technology, including methods of calibration and features of the grips. In an effort to show domestic industry at the ITC, the appellant alleged that it met the domestic industry requirement based on investments in manufacturing, labor and capital, research and development, and the exploitation of its patents. As evidence of these investments, appellant provided financial data across 53 different products. Not all 53 products, however, practiced all three patents. Rather, only 14 of the 53 products practiced at least one claim of each asserted patent. The remaining products practiced only one or two of the asserted patents. But appellant's domestic industry evidence aggregated the financial data for all products—it did not allocate the investments separately by product or patent.

At the ITC, the administrative law judge (ALJ) found that this evidence did not satisfy the economic prong for any of the asserted patents because it did not show a substantial or significant investment specific to any particular patent. On review, the ITC upheld the ALJ's

determination, explaining that instead of establishing domestic industry for products protected by each asserted patent, the complainant “aggregated its domestic industry products without regard for whether or which patents they practiced and then argued that a domestic industry in all of its products exists.” The aggregated information “failed to provide the Commission with an adequate basis to evaluate the investments and the significance of those investments with respect to **each** asserted patent.”

On appeal, appellant argued that Section 337 permits it to rely on investment data in the aggregate, so long as it ties expenditures to articles that practice some or all of the asserted patents. In other words, it need not show investments on a patent-by-patent basis.

The Federal Circuit rejected this argument, adopting the reasoning of the ALJ and ITC. As the court explained, a complainant must show “how much of its investment in each statutory category was attributable to **each group of products**” that practices an asserted patent. Thus, while it may be possible to aggregate data in certain circumstances, such as where all of the products practice all of the patents, such a method was inappropriate here where many of the products practiced fewer than all of the asserted patents. The court also confirmed its decision here does not preclude a party from grouping data for products that practice the same patents, so long as domestic industry can be determined for each patent.

**Practice Tip:** This case illustrates that, similar to damages apportionment, parties should give attention to ensuring that domestic industry evidence connects specific products to the specific patents they practice and does not depend on data for products that are not covered by the claims.

*Zircon Corp. v. Int’l Trade Comm’n*, 101 F.4d 817, 818 (Fed. Cir. 2024).

## Categories

ITC Section 337 Investigations

Patent Law

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