



INTERNATIONAL TRADE COMMISSION

[Investigation No. 337-TA-887]

Certain Crawler Cranes and Components Thereof;

Commission's Determination to Review in Part A Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the final initial determination ("ID") issued by the presiding administrative law judge ("ALJ") on July 11, 2014, finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. 1337, in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Amanda Pitcher Fisherow, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2737. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on July 17, 2013, based on a complaint filed by Manitowoc Cranes, LLC (“Manitowoc”) of Manitowoc, Wisconsin. 78 *FR* 42800-01 (July 17, 2013). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337 (“section 337”), by reason of infringement of U.S. Patent Nos. 7,546,928 (“the ’928 patent”) and 7,967,158 (“the ’158 patent”) (collectively “the asserted patents”), and that an industry in the United States exists or is in the process of being established as required by subsection (a)(2) of section 337. The complaint further alleges violations of section 337 by reason of trade secret misappropriation, the threat or effect of which is to destroy or substantially injure an industry in the United States or to prevent the establishment of such an industry under section 337(a)(1)(A). The Commission’s notice of investigation named Sany Heavy Industry Co., Ltd. of Changsha, China, and Sany America, Inc. of Peachtree City, Georgia (collectively “Sany”) as respondents. The Office of Unfair Import Investigations (“OUII”) was also named as a party.

On July 11, 2014, the ALJ issued his final ID finding a violation of section 337 with respect to claims 1, 2, 5, 8, and 23-26 of the ’928 patent and misappropriation of Trade Secret Nos. 1, 6, 14, and 15. The ALJ further found no violation of section 337 with respect to claims 6, 10, and 11 of the ’928 patent, claim 1 of the ’158 patent, and Trade Secret Nos. 3 and 4.

On July 28, 2014, OUII, Manitowoc, and Sany each filed petitions for review. On August 5, 2014, the parties replied to the respective petitions for review. The Commission has determined to review the ALJ’s findings with respect to: (1) importation of the accused products; (2) infringement of the asserted patents; (3) estoppel; (4) the technical prong of the domestic industry requirement; and (5) the asserted trade secrets.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Please provide any legal support for the proposition that “sale for importation” requires that the article be constructed and ready for use. In addressing this question, please discuss whether the “original” UltraLift package was ever constructed and whether the “original” UltraLift package was modified to create the “redesigned” UltraLift package.
2. Are separate agreements or acts necessary to find that the original UltraLift package and redesigned UltraLift package were both sold for importation? Please discuss the facts surrounding the individual sales for importation of both the original and redesigned UltraLift packages, including the parties involved in the sale, when the sale occurred, where the sale occurred, and what the parties agreed was sold for importation.
3. Can there be a violation of section 337 when there is a “sale for importation,” with no later act of importation? Can there be a “sale for importation” of “articles that infringe” a patent claim, under section 337 (a)(1)(B)(i), without proof of direct infringement in the United States? *See Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Comm’n Op. (Dec. 1, 2011). Please address this question in the context of both method and apparatus claims.
4. Are the holdings, for example, in *Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-89, Comm’n Op. (April 1981), *Enercon GmbH v. Int’l Trade Comm’n*, 151 F. 3d 1376 (Fed. Cir. 1998), and *Lang v. Pacific Marine*, 895 F.2d 761 (Fed. Cir. 1990), still viable after the Supreme Court’s decision in *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 134 S.Ct. 2111 (2014), particularly with respect to direct infringement as a necessary predicate for indirect infringement?
5. Discuss whether the accused SCC8500 crane with the original UltraLift package directly infringes asserted apparatus claims 23-26 of the ’928 patent, including whether crane operation is required for a finding of infringement. Please address each limitation of the asserted apparatus claims.

6. What evidence in the record, if any, shows that the accused SCC8500 crane was used to perform each step of the asserted method claims? In what country, if any, was each step of the asserted method claims performed?
7. What evidence in the record, if any, supports finding that there are no non-infringing uses of the accused products, for asserted claims 6, 10, and 11 of the '928 patent and claim 1 of the '158 patent, when the accused products are operated?
8. Did Sany waive its argument that Trade Secret Nos. 1 and 6 are not protectable as trade secrets based on email CX-0116C?
9. Under what circumstances does a third party have a duty to refrain from disclosing a trade secret? What are the consequences of a trade secret being disseminated by a third party? How extensive must the disclosure of a trade secret by a 3rd party be in order to prevent or destroy trade secret protection? Please discuss the facts of this investigation and the relevant case law in answering these questions.
10. Are any of the asserted trade secrets disclosed in U.S. Patent Application No. 2011/0031202 ("the '202 patent application") published in February of 2011? If so, is Manitowoc precluded from obtaining relief on the trade secrets disclosed in the '202 patent application?
11. Please discuss the relevant case law that identifies how much specificity is required to define the "metes and bounds" of an asserted trade secret, focusing in particular on asserted Trade Secret No. 3. Is Manitowoc required to prove trade secret protection for every possible combination of elements of asserted Trade Secret No. 3?
12. Discuss whether asserted Trade Secret No. 4 can be found to be independently protectable as a trade secret if Trade Secret No. 3 does not qualify for trade secret protection.
13. Discuss whether Sany misappropriated Trade Secret No. 3 and Trade Secret No. 4.
14. Discuss whether Sany can be held liable for misappropriation of the asserted trade secrets where Mr. Lanning, or other former Manitowoc employees, disclosed Manitowoc confidential information to Sany within the scope of their employment. Please address these issues within the context of the theories of respondeat superior and agency law.

15. Did Sany improperly acquire the asserted trade secrets from former Manitowoc employees?
16. What evidence is there that Sany “used” the elements of Trade Secret No. 15 to assist or accelerate Sany’s research and development?
17. Please discuss with respect to each trade secret allegation the appropriate length of the remedy the Commission may impose if the Commission finds a violation of section 337 for misappropriation of the asserted trade secrets.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. When the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *FR* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant is also requested to submit proposed remedial orders for the Commission's consideration.

Complainant is also requested to state the date that the '928 and '158 patents expire and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on Wednesday, October 1, 2014. Reply submissions must be filed no later than the close of business on Wednesday, October 8, 2014. No further submissions on these issues will be permitted unless otherwise ordered by the Commission. The page limit for the parties' initial submissions on the questions posed by the Commission is 125 pages. The parties reply submissions, if any, are limited to 75 pages.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by

noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-887") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: September 19, 2014.

Lisa R. Barton,
Secretary to the Commission.

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