

6-22-2016

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### Recommended Citation

Brady P. Gleason, *Alternative Forum: A Colorado Farmer and the ITC's Excellent Adventure*, 65 Cath. U. L. Rev. 665 (2016).  
Available at: <http://scholarship.law.edu/lawreview/vol65/iss3/11>

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## Alternative Forum: A Colorado Farmer and the ITC's Excellent Adventure

### **Cover Page Footnote**

J.D. Candidate, May 2016, The Catholic University of America, Columbus School of Law; B.S., 2011, Clemson University. The author would like to thank and his friends and family for their love and support and his colleagues on the Catholic University Law Review for their hard work in editing this Essay.

# ALTERNATIVE FORUM: A COLORADO FARMER AND THE ITC'S EXCELLENT ADVENTURE

*Brady P. Gleason*<sup>+</sup>

Thanks to the legalization of marijuana in certain U.S. jurisdictions, marijuana is now arguably a legitimate article of commerce. This Essay explores the implication of this development as it relates to potential proceedings before the U.S. International Trade Commission (ITC). Specifically, this Essay aims to ascertain whether the ITC, via the agency's section 337 investigatory and remedial authorities, may regulate marijuana that has been imported into the United States.<sup>1</sup>

Determining standing at the ITC is purely a statutory analysis.<sup>2</sup> As one can imagine, however, such an inquiry is largely fact dependent.<sup>3</sup> Proceeding to ascertain the potential of section 337 to regulate marijuana, therefore, would seem rather detached or uninspired without at least surmising a narrative. To illustrate how section 337 might be useful to marijuana farmers in the United States, let us consider the following scenario.

## I. THE FARMERS' STORY

Bill and Ted own a large tract of farmland in Colorado. In 2012, by popular referendum, Colorado approved a constitutional amendment legalizing the sale and use of marijuana.<sup>4</sup> Hoping to take advantage of recent legislation, Bill and

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1. The purpose of this Essay is neither to promote nor discourage the decriminalization or legalization of marijuana, nor is it intended to endorse a particular stance on this contentious issue. Rather, this Essay identifies merely the existence of a locally recognized marijuana industry in select jurisdictions and hypothesizes that such a change in status may have an unexpected legal ramification.

2. See Daniel E. Valencia, *Appeals from the International Trade Commission: What Standing Requirement?*, 27 BERKELEY TECH. L.J. 1171, 1174 (2012); see also Merritt Blakeslee and Scott Daniels, *Do you have what it takes to bring suit at the ITC? — Standing and the ITC's domestic industry requirement*, IPWATCHDOG (Aug. 24, 2010), <http://www.ipwatchdog.com/2010/08/24/itc-standing-domestic-industry-requirement/id=12264/>.

3. See Valencia, *supra* note 2, at 1174. The broad statutory language leaves considerable room for interpretation and “[a]lthough there is no clear rule regarding the extent of the standing requirement, several key observations can be made from several recent Federal Circuit decisions . . .” *Id.*

4. See Angela Macdonald, *Why Marijuana Is Not Regulated Like Alcohol in Colorado: A Warning for States Seeking to Legalize Recreational Marijuana*, 2015 UTAH L. REV. ONLAW 1, 1–2 (2015); see also *60 Minutes: The Marijuana Effect* (CBS television broadcast Jan. 11, 2015), <http://www.cbsnews.com/news/colorado-pot-marijuana-60-minutes/>.

Ted decide to dedicate a portion of acreage to the cultivation and harvesting of marijuana. In doing so, Bill and Ted assent to several compliance and licensing regulations imposed by the state.<sup>5</sup> Bill and Ted must reside in Colorado for at least two years prior to applying for the license.<sup>6</sup> Bill and Ted are required to maintain detailed inventory records,<sup>7</sup> comply with mandated security measures,<sup>8</sup> install video surveillance,<sup>9</sup> and verify customer eligibility.<sup>10</sup> Bill and Ted, in light of the federal government's ongoing prohibition of marijuana, will continue to operate under a canopy of legal uncertainty, fearing federal prosecution.<sup>11</sup> Further, Bill and Ted struggle to find legal representation as many attorneys fear ethical repercussions in representing a business enterprise in violation of federal law.<sup>12</sup> Bill and Ted may also find it difficult to secure bank loans and investors, as banks and other lending services tend to steer clear of marijuana operations.<sup>13</sup> Furthermore, Bill and Ted are forced to operate

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5. See Dion Rabouin, *Colorado Marijuana Legalization 2015: Fighting the Black Market and the Everyday Challenges of Selling Legal Weed*, IB TIMES (May 18, 2015, 3:22 PM), <http://www.ibtimes.com/pulse/colorado-marijuana-legalization-2015-fighting-black-market-everyday-challenges-1913431> (quoting a local marijuana farmer, who exclaimed that “[t]here’s, like, 200 pages of laws and rules. I can’t really iterate it all. There’s a monthly update and compliance officers; you’re expected to be caught up on anything that’s been laid out as law up until a certain time and then from that time forward they’re basically updating, monthly, the changes that are happening in the industry.”); see also COLO. REV. STAT. § 12-43.4-306 (West 2015) (listing some of the statutory preconditions for engaging in the marijuana business, including that an owner must live in Colorado for two full years before applying for a license, be above age twenty-one, and not have discharged a felony conviction in the five years prior to applying).

6. See § 12-43.4-306(k); Silvia Irimescu, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms A Nation*, 50 GONZ. L. REV. 241, 262 (2015) (citing COLO. CODE REGS. § 212-1(M)100 (2014)); Macdonald, *supra* note 4, at 20.

7. See Irimescu, *supra* note 6, at 262 (citing COLO. CODE REGS. § 212-1(M)309 (2014)).

8. See *id.* (citing COLO. CODE REGS. § 212-1(M)305).

9. See *id.* (citing COLO. CODE REGS. § 212-1(M)306).

10. See *id.* (citing COLO. CODE REGS. § 212-1(M)405(C)).

11. See 21 U.S.C. § 812(c) (2012) (listing marijuana as a Schedule I controlled substance under federal law); Kimberly A. Houser, *What Inconsistent Federal Policy Means for Marijuana Business Owners: Washington’s I-502 and the Federal Controlled Substances Act*, 50 GONZ. L. REV. 305, 323-24 (2015) (highlighting the “Kettle Falls Five” case wherein a U.S. Attorney prosecuted a group of citizens operating legally under Washington state law).

12. See Helia Garrido Hull, *Lost in the Weeds of Pot Law: The Role of Legal Ethics in the Movement to Legalize Marijuana*, 119 PENN ST. L. REV. 333, 349 (2014).

13. See Ioan Grillo, *U.S. Legalization of Marijuana Has Hit Mexican Cartels’ Cross-Border Trade*, TIME (Apr. 8, 2015), <http://time.com/3801889/us-legalization-marijuana-trade/> (noting that the discrepancy between state and federal law creates difficulties raising capital from investors as well as soliciting financial services in general); Macdonald, *supra* note 4, at 23–25, fig. 4 (noting that, when compared with licensing fees assigned to alcohol dispensaries, the fees associated with selling and cultivating marijuana appear structured to favor large producers over smaller micro-growers).

almost entirely unbanked and cannot deduct costs typically associated with usual business expenses, such as farming equipment, rent, and payroll.<sup>14</sup>

In navigating these bureaucratic waters, Bill and Ted run the continued risk of abrupt political change,<sup>15</sup> personal liability,<sup>16</sup> fiscal uncertainty, and encountering conflicts with federal law.<sup>17</sup> Nevertheless, Bill and Ted embrace the risk, internalize the costs, and comply with each and every costly regulation. Unfortunately—depending on one's perspective—instituting costly business practices to conform to government regulations, coupled with financial difficulties securing loans and a disadvantaged tax position, flows downstream to the customer.<sup>18</sup> Capitalistic in disposition, the customer seeks the lowest price and, given the only contemporaneous development of legalization, many

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14. See Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 91–94 (2015).

15. See Eliza Collins, *Chris Christie Doubles Down on Marijuana Comments*, POLITICO (July 29, 2015, 10:23 AM), <http://www.politico.com/story/2015/07/chris-christie-enforce-marijuana-illegal-2016-120769> (stating that “[i]n a Chris Christie administration, there would be no such thing as legal marijuana use”).

16. See Mishan Wroe, *Growing Concerns: Marijuana Industry Hit with Its First Ever Product Liability Lawsuit*, NAT. L. REV. (Oct. 31, 2015), <http://www.natlawreview.com/article/growing-concerns-marijuana-industry-hit-its-first-ever-product-liability-lawsuit> (reporting the first product liability law suit filed against a Colorado marijuana production company).

17. See 21 U.S.C. § 812(c) (2012); Grillo, *supra* note 13 (suggesting that because federal law prohibits marijuana, marijuana farmers have difficulty banking and securing investors); *The Marijuana Effect*, *supra* note 4 (quoting Meg Sanders, a Colorado grower, who states that “[a]s long as the federal government continues to count pot proceeds as illegal drug money, most banks won’t touch it”).

18. See generally Greg Jericho, *Gee, Westpac Must Have Thought Hard About Passing on the Cost of Regulation to Customers*, GUARDIAN (Oct. 14, 2015, 8:58 PM), <http://www.theguardian.com/business/grogonomics/2015/oct/15/westpac-to-pass-on-cost-of-regulation-to-customers-despite-profit-increase> (explaining that a common practice among businesses is to pass the costs of regulation on to customers); see also Deborah Camiel, *Underground Weed: Colorado's Black Market*, CNBC (Dec. 17, 2014), <http://www.cnbcprime.com/marijuana/video/pot-after-hours-the-black-market/> (explaining that black market marijuana sells at a lower cost).

marijuana customers are likely not as fearful of the black market as other retailers.<sup>19</sup> As such, the black market has survived.<sup>20</sup>

That is not to say that the black market is not shrinking. Approximately sixty percent of marijuana sold in Colorado is grown legally.<sup>21</sup> The black market will only continue to dwindle as advancements in technology empower greater regulatory oversight.<sup>22</sup> Nevertheless, as former Colorado Attorney General John Suthers reported, the presence of Mexican drug trafficking groups in the Colorado marijuana market persists.<sup>23</sup>

One day, when an unknown competitor undercuts their product and they lose out on a large sale, Bill and Ted begin to suspect a foreign marijuana producer has infiltrated their usual market. They reach out to a fellow licensed farmer, who insinuates that Mexican drug cartels indeed have permeated their market. The presence of cheaper, unregulated imported marijuana not only threatens Bill and Ted's bottom line, but also threatens the legitimacy of their chosen trade, and serves to only reinforce the antagonistic tone of those opposing marijuana legalization.<sup>24</sup> Bill and Ted, interminable enthusiasts of marijuana culture and

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19. See Laura Graham, *Legalizing Marijuana in the Shadows of International Law: The Uruguay, Colorado, and Washington Models*, 33 WIS. INT'L L.J. 140, 158 (2015) (suggesting that the DOJ anticipates that black market marijuana will remain a problem after legalization); Emily Gray Brosious, *Colorado's Marijuana Black Market is Thriving Despite Legalization*, SUN TIMES (Sept. 22, 2015, 12:53 PM), <http://extract.suntimes.com/news/10/153/3427/colorado-marijuana-black-market-legalization>; Rafa Fernandez De Castro, *How Mexican Drug Cartels are Reacting to Marijuana Legalization in the U.S.*, FUSION (Mar. 23, 2015, 7:43 PM), <http://fusion.net/story/108575/how-mexican-drug-cartels-are-reacting-to-marijuana-legalization-in-the-u-s/> (interviewing Mexican security analyst Alejandro Hope, who states that "there's still a market niche for Mexico's lower-end drug trade weed, since legal marijuana in states like Washington and Colorado is more expensive"); Kirk Siegler, *Colorado's Pot Industry Looks To Move Past Stereotypes*, NPR (Dec. 2, 2014, 9:04 AM), <http://www.npr.org/2014/12/02/367767955/colorados-pot-industry-looks-to-move-past-stereotypes> (noting the concern held by some business owners that the black market may threaten the legitimacy of the marijuana industry).

20. See *The Marijuana Effect*, *supra* note 4 (interviewing Greenwood Village Police Chief John Jackson, president of the Colorado Association of Chiefs of Police, who states that "[t]here's a common belief that by legalizing it, you will get rid of the black market. I can resoundingly say that the black market is alive and doing well.").

21. Camiel, *supra* note 18.

22. See Siegler, *supra* note 19; see also, Jacob Sullum, *This Is What Legalizing Marijuana Did to the Black Market in Colorado*, REASON.COM (Nov. 2014), <http://reason.com/archives/2014/10/30/the-lingering-black-market> (predicting that the black market will decline as production streamlines and prices decrease).

23. See Camiel, *supra* note 18. While the U.S. Border Patrol noticed a precipitous drop in the amount of marijuana being smuggled across the boarder, they still reported confiscating approximately 664 tons of cannabis in 2014. See Grillo, *supra* note 13.

24. See Andrés E. Muñoz, *Blunt the Violence: How Legal Marijuana Regulation in the United States Can Help End the Cartel Violence in Mexico*, 13 SEATTLE J. SOC. JUST. 691, 695 (2014) (stating that the marijuana legalization "movement . . . is still young, and many states and the federal government refuse to even consider this type of legislation for a variety of reasons"); see also Siegler, *supra* note 19 (noting that unregulated market players have a considerable impact on industry stability).

proponents of legalization, have more than a mere political interest; they have a profound financial interest.

Upon investigating the merit of their colleague's allegation, Bill and Ted's worst fears are realized: a Mexican drug cartel has invaded their market, and Bill and Ted face considerable loss if the cartel's presence is not eradicated. What are Bill and Ted to do now that their product is being undercut by unregulated, and therefore cheaper, imported marijuana?

Bill and Ted could alert the authorities of the continuing criminal violation, hoping to precipitate the commencement of criminal proceedings.<sup>25</sup> In doing so, a local district attorney would precede on their behalf.<sup>26</sup> Such a path, however, deprives Bill and Ted of any direct control over their cause of action and fails to compensate them for their financial loss.

Bill and Ted could also initiate a civil action, availing themselves to both monetary remedies and control over the cause of action. The wheels of justice, however, often unfortunately turn rather slow on the civil side of a court's docket. Difficult questions of jurisdiction may further distract and delay relief, and recalling the financial difficulties associated with operating a business the federal government classifies as criminal, one can easily recognize why proceeding through the civil court system may be less than ideal economically.<sup>27</sup> These concerns are especially problematic as marijuana businesses continue to struggle to find legal representation.<sup>28</sup>

This is not to say standard criminal and civil proceedings have no benefit to Bill and Ted. In fact, both forums stand presently as the anticipated forum and a favorable decision in either obviously benefits Bill and Ted. There, however, is another potential forum for Bill and Ted. Somewhat paradoxically, the alternative forum may be a federal agency.

## II. THE ITC: JUSTICIABILITY AND DOMESTIC INDUSTRY

Established in 1916, the ITC operates as a quasi-judicial independent federal agency.<sup>29</sup> The agency's initial undertaking was to investigate unfair trade competition in conjunction with United States custom laws.<sup>30</sup> Section 337 of

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25. Controlled Substances Act, 21 U.S.C. § 801 et seq. (2012). This federal legislation proscribes marijuana possession and distribution. *Id.*

26. *See supra* note 11–12 and accompanying text.

27. *See generally* Chemerinsky, *supra* note 14, at Part II (discussing the potential difficulties stemming from the federal prohibition of marijuana).

28. *Id.* at 95.

29. *See* Elizabeth A. Rowe & Daniel M. Mahfood, *Trade Secrets, Trade, and Extraterritoriality*, 66 ALA. L. REV. 63, 83 (2014).

30. *See id.* (quoting Revenue Act of 1916, ch. 463, title VII, §§ 702, 704, 39 Stat. 795, 796).

the Smoot-Hawley Tariff Act, since codified in 19 U.S.C. § 1337, functions as the Commission's organic statute for unfair trade investigations.<sup>31</sup>

The statute's language, broadly drafted, grants the Commission expansive investigative and remedial powers.<sup>32</sup> Over time, statutory tinkering, technological advancements, and economic globalization have rendered the Commission a burgeoning source of adjudicative relief.<sup>33</sup>

Section 337 prescribes the agency's authority to adjudicate claims of unfair trade practices,<sup>34</sup> enumerates standing requirements,<sup>35</sup> and identifies available remedies.<sup>36</sup> To obtain a remedy under subsection (a)(1)(A), a complainant must demonstrate: (i) an *unfair act* or method of competition, in the (ii) *importation* of an *article*, and (iii) "the threat or effect of which is to destroy or substantially injure" an efficient and economically established *domestic industry*.<sup>37</sup>

#### A. A Violation of Section 337: An Unfair Act

It is rather clear, in examining the ITC's organic statute, that section 337 embraces an incredibly broad mechanism, designed "to create and animate a cause of action out of any 'unfair act' that is prohibited under U.S. law—state or federal."<sup>38</sup> Since the days of the Tariff Commission, the precursor to the ITC, the "unfair methods of competition and unfair acts" language "is broad and inclusive," designed to cover an expansive assortment of conduct.<sup>39</sup> The statute

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31. See Holly Lance, *Not So Technical: An Analysis of Federal Circuit Patent Decisions Appealed from the ITC*, 17 MICH. TELECOMM. & TECH. L. REV. 243, 249 (2010); see also 19 U.S.C. § 1337 (2012).

32. See Andrew R. Kopsidas, *ITC Says it Has the Power to Stop Infringing Transmissions of Digital Materials*, FISH AND RICHARDSON: FISH'S LITIGATION BLOG (Mar. 13, 2015), <http://www.fr.com/fish-litigation/itc-says-it-has-the-power-to-stop-infringing-transmissions-of-digital-materials/> (explaining that the ITC's statutory authority gives it broad investigatory and remedial powers); Lance, *supra* note 31, at 249.

33. See Cecilia H. Gonzalez et al., *The Parallel Universes of the USITC & the District Courts*, 10 SEDONA CONF. J. 167, 167–68 (2009); Valencia, *supra* note 2, at 1172.

34. 19 U.S.C. § 1337(a) (2012).

35. See Valencia, *supra* note 2, at 1175 (citing 19 U.S.C. § 1337(a)(2012)) (stating that "[b]y statute, the ITC's 'jurisdiction' derives from unfair acts in the importation, sale for importation, or sale after importation of articles that infringe U.S. patents").

36. 19 U.S.C. § 1337(d)–(g).

37. 19 U.S.C. § 1337(a)(1)(A) (emphasis added).

38. Jonathan J. Engler, *Section 337 of the Tariff Act of 1930: A Private Right-of-Action to Enforce Ocean Wildlife Conservation Laws?*, 40 ENVTL. L. REP. 10513, 10514 (2010), [http://www.adduci.com/sites/default/files/2010-05-00%20Wildlife%20Conservation%20\(JJE\).pdf](http://www.adduci.com/sites/default/files/2010-05-00%20Wildlife%20Conservation%20(JJE).pdf).

39. Jay H. Reiziss, *The Distinctive Characteristics of Section 337*, 8 J. MARSHALL REV. INTELL. PROP. L. 231, 234 (2009) (citing *In re Von Clemm*, 229 F.2d 441, 443 (C.C.P.A. 1955)). In fact, because the ITC is provided "great latitude in deciding what constitutes 'unfair methods of competition' or 'unfair acts in importation,'" the scope of the agency's subject matter jurisdiction is much broader than that of the federal courts. See *id.* at 235–36; see also Engler, *supra* note 38, at 10514.



underwent occasional modifications throughout the twentieth century, but retained largely the original language.<sup>40</sup>

### 1. Two Subsections of Unfair Acts

A typical violation of section 337 today arises in the context of the importation of an infringing article; the “unfair act” is the act of importing the infringing article.<sup>41</sup> It should be noted, however, that the term “unfair act” has never been tied exclusively to pure violations of intellectual property exclusivity rights.<sup>42</sup>

Prior to 1988, the establishment of an “unfair act” encompassed patent infringement, but evidence of infringement alone failed to satisfy the unfair trade practices prong.<sup>43</sup> A violation existed, rather, when certain economic circumstances resulted from an unfair act—i.e. the statute tied the alleged unfair act to economic impact on a particular domestic industry.<sup>44</sup> Only then were the unique remedies available in a section 337 investigation justified. Positioning the violation threshold predominantly in terms of the harm to the relevant domestic industry, rather than from the existence of an infringement itself, allowed the ITC to compliment the role of the federal courts.<sup>45</sup>

Section 337 analysis, post-1988, bifurcated the original unfair trade practices that had an “effect . . . to destroy or substantially injure an industry in the United States,” from a newly unfair acts prong, based entirely upon intellectual property rights.<sup>46</sup> The new intellectual property prong, codified in 19 U.S.C. § 1337(a)(1)(B), now considers as an “unfair act” the mere importation of an infringing article.<sup>47</sup> A domestic industry still must be proven to exist, or in the process of coming into existence, but there is no resulting injury to that industry nexus limitation in subsection (a)(1)(B).<sup>48</sup> The amended statute—under 19

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40. See Rowe & Mahfood, *supra* note 29, at 86. For examples of past amendments to 19 U.S.C. § 1337, see Customs Courts Act of 1980, Pub. L. No. 96-416, 94 Stat. 1727 (1980); Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673 (1958).

41. See Jacqueline Lee, *Is the U.S. International Trade Commission Protectionist? A Comparative Study of Border Enforcement Measures*, 40 AIPLA Q.J. 593, 627 (2012) (noting that the majority of recent investigations undertaken by the ITC relate to patent infringement).

42. See Engler, *supra* note 38, at 10514–15.

43. See Allen M. Sokal & Joyce Craig, *Federal Circuit Discards the “Nexus” Test for Infringement at the ITC, Potentially Narrowing the Scope and Effectiveness of § 337*, 41 AIPLA Q.J. 637, 640-48 (2013); see also Rowe & Mahfood, *supra* note 29, at 79–81.

44. Sokal & Craig, *supra* note 43, at 640.

45. *Id.*; see Lee, *supra* note 41, at 625.

46. See 19 U.S.C. § 1337(a)(1)(A)(i) (2012) (emphasis added).

47. Anne L. Spangler, *Intellectual Property Protection and Import Trade: Making Section 337 Consistent with the General Agreement on Tariffs and Trade*, 43 HASTINGS L.J. 217, 229 (1991); see also 19 U.S.C. § 1337(a)(1)(B).

48. See Jose M. Recio, *A Change in Establishing the Domestic Industry Requirement at the International Trade Commission*, 39 AIPLA Q.J. 131, 133 (2011).

U.S.C. § 1337(a)(1)(A)—retains the antecedent interconnected unfair act coupled with economic harm analysis.<sup>49</sup>

*i. Returning to the Farm(ers): Possibility of 19 U.S.C. § 1337(a)(1)(A) Violations*

Recalling the pre-1988 inquiry's focus on economic harm to a domestic industry, the ITC investigated traditionally injuries related to: "lost sales, declining domestic production, declining profits, loss of royalties, competition between the domestic product and the imported infringing product, and increased import and sale of infringing goods."<sup>50</sup> When these "injuries caused the domestic industry to lower its prices, reduce its employment, or lose potential or actual sales," a successful complainant was entitled to relief.<sup>51</sup>

Under subsection (a)(1)(A) and its statutory predecessors, the ITC's section 337 jurisprudence extends to false designation of original source actions,<sup>52</sup> and business torts such as false advertising,<sup>53</sup> tortious interference with contractual and customer relations,<sup>54</sup> product disparagement,<sup>55</sup> and fraudulent inducement to enter into a license.<sup>56</sup> How does this relate to our farmers Bill and Ted?

Bill and Ted can declare that their industry is being injured by the unfair acts of a foreign drug cartel that has infiltrated the Colorado market with an inferior quality and lower priced crop; they can then be joined by similarly situated Colorado marijuana farmers, and submit a complaint that identifies the illicit importation practices in violation of federal and state law.<sup>57</sup> In support of their complaint, documents and economic records delineating the resulting harm may also be submitted.<sup>58</sup>

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49. See 19 U.S.C. § 1337(a)(1)(A).

50. Spangler, *supra* note 47, at 228.

51. *Id.*

52. William P. Atkins, *Appreciating 337 Actions at the ITC: A Primer on Intellectual Property Issues and Procedures at the U.S. International Trade Commission*, 5 U. BALT. INTELL. PROP. L.J. 103, 105 (1997) (referencing *In re* Certain Plastic Food Storage Containers, Inv. No. 337-TA-152 (ITC 1984); *In re* Certain Caulking Guns, Inv. No. 337-TA-139 (ITC 1984)).

53. *Id.* at 105–06 (referencing *In re* Certain Power Woodworking Tools, Their Parts, Accessories and Special Purpose Tools, Inv. No. 337-TA-115 (ITC 1982)).

54. *Id.* (referencing *In re* Certain Electrically Resistive Monocomponent Toner and "Black Powder" Preparations Thereof, Inv. No. 337-TA-253 (ITC 1988); *In re* Certain Floppy Disk Drives and Components Thereof, Inv. No. 337-TA-203 (ITC 1985); *In re* Certain Power Woodworking Tools, Their Parts, Accessories and Special Purpose Tools, Inv. No. 337-TA-115 (ITC 1982)).

55. *Id.* (referencing *In re* Certain Fluidized Bed Combustion Systems, Inv. No. 337-TA-213 (ITC 1985); *In re* Certain Axes, Inv. No. 337-TA-113 (ITC 1983)).

56. *Id.* (referencing *In re* Certain Fluidized Bed Combustion Systems, Inv. No. 337-TA-213 (ITC 1985)).

57. See *supra* note 38–39 and accompanying text; see also Colleen V. Chien, *Protecting Domestic Industries at the ITC*, 28 SANTA CLARA COMPUTER & HIGH TECH. L.J. 169, 177 (2011) (explaining that some cases before the ITC involve more than one, or even groups of plaintiffs).

58. See Engler, *supra* note 38, at 10513.

At the complaint's core, Bill and Ted's marijuana distribution is in direct competition with the unregulated foreign product. The foreign enterprise circumvents costly regulation and can sell its crop at a lower cost. Bill and Ted's domestic industry will suffer economic harm as a result.

In addition to the Cartel's unfair presence in the market, depending on the particular conduct of the foreign drug cartels, specific business torts and claims of false designation of original source could constitute the requisite "unfair act."<sup>59</sup> Considering the belief that Colorado marijuana has surpassed Mexican marijuana in terms of industry quality, coupled with strict state regulation of packaging and crop identification, one can easily imagine actions giving rise to allegations of purposeful misleading of crop origin, various packaging state violations, and customer confusion.<sup>60</sup> Moreover, given the market pressures and the Mexican Cartel's violent propensity, some Coloradoans fear extortion and tactics constituting other business torts.<sup>61</sup>

Even in the absence of such specific conduct, the inherent unfairness of binding local farmers to expensive regulations—a cost not internalized by black market importers—should trigger subsection (a)(1)(A).<sup>62</sup> The unfair competition would force Bill and Ted to lower their prices, which reduces profit. The two cannot reinvest in their farm, they cannot expand their business, they struggle to find business partners, they may be forced to reduce their operation by terminating employees, or even close. In the presence of clear unfair acts and resulting economic harm, the expansive nature of the section 337 justiciability boundaries should encompass a claim under subsection (a)(1)(A) brought against a foreign drug cartel importing marijuana into Colorado.<sup>63</sup>

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59. See *supra* notes 53–54 and accompanying text.

60. See Elana Rodman, *From Criminalization to Regulation: New Classifications of Cannabis Necessitate Reform of United Nations Drug Treaties*, 40 *BROOK. J. INT'L L.* 647, 663 (2015) (citing *COLO. CODE REGS.* § 212-2 (2015)); *What's the Preferred Weed? Mexican or American?*, CBS NEWS (Mar. 17, 2015, 5:35 PM), <http://www.cbsnews.com/news/what-do-marijuana-smokers-like-better-mexican-or-american/> (stating that the United States and Europe has supplanted Mexico as the "gold standard" for marijuana aficionados).

61. See *Marijuana Legalization Raises Fears of Drug Cartels*, *HERE & NOW* (Feb. 21, 2014), <http://hereandnow.wbur.org/2014/02/21/marijuana-drug-cartels> (interviewing Tom Gorman, who believes legalization will shift the Mexican Cartel's focus to extorting Colorado marijuana businesses).

62. See Engler, *supra* note 38, at 10515 (suggesting that, where domestic fishing fleets are internalizing regulatory costs while international fleets ignore them, fish caught in violation of international treaties should trigger section 337 remedial relief).

63. See *id.* at 10514 (recalling that section 337 embraces an incredibly broad mechanism, designed "to create and animate a cause of action out of any 'unfair act' that is prohibited under U.S. law—state or federal"); see also 19 U.S.C. § 1337(a)(1)(A) (2012).

*ii. Intellectual Property Prong: Possibility of 19 U.S.C. § 1337(a)(1)(B) Violations*

Recalling the pivot in analysis under the intellectual property prong of section 337—that a violation arises not through an unfair act interconnected with a particular economic harm analysis—an “unfair act” is assumed harmful to a domestic industry if importation of an infringing article is discovered.<sup>64</sup> Accordingly, all that is required under subsection (a)(1)(B) is an identifiable intellectual property right and the infringing nature of the imported article.<sup>65</sup>

This subsection is triggered upon the importation of articles into the United States that “infringe a valid and enforceable United States patent or a valid and enforceable United States copyright . . . or are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.”<sup>66</sup> Subsection (a)(1)(C) elaborates restrictions on the importation “of articles that infringe a valid and enforceable United States trademark registered.”<sup>67</sup>

Returning to Bill and Ted, imagine if the duo invested considerable time and money and were able to genetically engineer a new seed that sprouts what their market considers to be the ideal marijuana strain. The exact process by which the seeds are planted, maintained, and harvested is novel and nonobvious in the industry, and particular machines are fashioned to assist in this unique cultivation process. These particular methods and cultivation tools are essential to maintaining the high quality of Bill and Ted’s strain. To promote the new strain, Bill and Ted generate popular slogans and develop a brand name to identify the source of the strain. Ted, an artist, designs an iconic and unique label featuring his artwork.

The particular strain becomes a smashing commercial success, known nationally as one of the highest quality strains, and Bill and Ted hope to guard their investment by seeking various forms of intellectual property protection.<sup>68</sup>

Patents, considered the strongest form of intellectual property protection, afford the owner the right to exclude; they prevent others from making, using,

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64. See Sokal & Craig, *supra* note 43, at 640.

65. See Dong Woo Seo, *Material Retardation Standard in the U.S. Antidumping Law*, 24 LAW & POL’Y INT’L BUS. 835, 860 (1993) (stating that the 1988 Act removes such an injury requirement in cases involving infringement of a patent, copyright, registered trademark, or mask work; in these cases, proof of particular injury is not required, as long as the petitioner can show that a domestic industry exists or is in the process of being established with regard to the intellectual property right involved).

66. 19 U.S.C. § 1337(a)(1)(B)(i)–(ii).

67. *Id.* § 1337(a)(1)(C).

68. While identified as a public policy means of promoting the sciences and useful arts, the “putative justification for intellectual property protection” is the economic incentive for inventors to create and maximize monetization. See Llewellyn Joseph Gibbons, *Fake It Till You Make It: A Justification for Intellectual Property “Piracy”*, 48 IND. L. REV. 65, 70 (2014).

selling, or even offering to sell any patented invention.<sup>69</sup> Some have speculated that now that marijuana is legal within some jurisdictions and the fact that patent law has minimal moral analytical components,<sup>70</sup> pending marijuana plant patents may now be issued by the United States Patent and Trademark Office (USPTO).<sup>71</sup> At the very least, process or method claims specific to optimizing marijuana cultivation, or even inventions not specific to marijuana but were used in the production of marijuana, would be articles worthy of patent protection.

Given the popularity of Bill and Ted's particular marijuana strain, it is entirely plausible that a member of the Mexican Cartel would obtain Bill and Ted's marijuana crop, harvest the crop's seeds, replant and reproduce the crop, and attempt to sell a copied plant. If the USPTO were to begin issuing patents on marijuana plants, and Bill and Ted were able to receive a patent on their plant, such conduct could constitute patent infringement and trigger section 337 relief under subsection (a)(1)(B).<sup>72</sup> If Bill and Ted were able to patent their specialized cultivation method or the machines utilized in the production of marijuana, and the Mexican Cartel was to mimic Bill and Ted's patented cultivation method or employ Bill and Ted's patented machine, such acts would also trigger section 337 relief under subsection (a)(1)(B).<sup>73</sup>

Copyright or Trademark infringement presents a more exceptional prospect for establishing a cause of action. Copyright protection extends to package text, artwork, labels, or even the manner in which facts are expressed so long as a

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69. 35 U.S.C. § 271(a) (2012); *see* Aleksey Khamin, *America Invents Act's Prior User Defense: Lessons from Global Patent Regimes and Legislative History*, 15 U. PITT. J. TECH. L. POL'Y 132, 134 (2015).

70. Historically, the moral utility doctrine functioned as an ethical barrier to patent protection. *See* Benjamin D. Enerson, *Protecting Society from Patently Offensive Inventions: The Risk of Reviving the Moral Utility Doctrine*, 89 CORNELL L. REV. 685, 687, 690–92 (2004). However, the United States Supreme Court and the United States Court of Appeals for the Federal Circuit have largely decreased reliance upon the doctrine, and many believe the doctrine today has no place in American patent law. *See id.*

71. *See* Hilary Bricken, *The Possibility of Marijuana Plant Patents*, ABOVE THE LAW (July 6, 2015, 4:20 PM), <http://abovethelaw.com/2015/07/the-possibility-of-marijuana-plant-patents/>; *see, e.g.*, Cannabis Plant Named Erez, App. No. US14193197 (2014), *pending* (Google Patents), <https://patents.google.com/patent/US20140245494A1/en?q=marijuana&q=plant>. Plant patent protection, compared to utility patents, has its limitations. *See The Fifteenth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit Washington, D.C. June 12, 1997*, 180 F.R.D. 467, 542 (1998). A doctrine of equivalents theory of infringement is not available; instead, actual derivation from the patent plant must be proven for infringement purposes. *See id.*

72. *See* *Bowman v. Monsanto Co.*, 133 S. Ct. 1761, 1768 (2013) (“[I]f simple copying were a protected use, a patent would plummet in value after the first sale of the first item containing the invention. The undiluted patent monopoly, it might be said, would extend not for 20 years (as the Patent Act promises), but for only one transaction. And that would result in less incentive for innovation than Congress wanted. Hence our repeated insistence that exhaustion applies only to the particular item sold, and not to reproductions.”); *see also* 7 U.S.C. § 2541(a) (2012); 19 U.S.C. § 1337(a)(1)(B)(ii) (2012).

73. *See* 19 U.S.C. § 1337(a)(1)(B)(ii).

“modicum of originality” exists.<sup>74</sup> Marijuana sold in Colorado, as a condition of licensing, requires appropriate packaging and conspicuous labels that identifies sufficiently, among several other requirements, “[t]he license number of the cultivation licensee . . . [a]n identity statement and standardized graphic symbol . . . .”<sup>75</sup> If Bill and Ted were to create packaging and a label “so as to make them original to a specific author,” copyright protection would exist over such a package and label.<sup>76</sup> A nefarious distributor of unregulated marijuana may forge Bill and Ted’s label or packaging to give the appearance of legitimacy or to artificially raise the value of their inferior crop.

Trademark protection extends to “symbols, words, pictures, slogans, colors, or virtually any other mark” that identifies the source of the good or service.<sup>77</sup> Trademarks, similar to copyrights, would only tender relief under the intellectual property prong of section 337 in situations following a rather specific fact pattern.<sup>78</sup> Nevertheless, one could expect trademark infringement in a similar fact pattern to the copyright infringement example outlined above. Mexican cartels would be motivated to misidentify their product as grown by Bill and Ted, and would attempt to confuse consumers into believing their inferior product originated from Bill and Ted.<sup>79</sup>

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74. 17 U.S.C. § 102(a) (2012); see Michael Yang, *Creative Classification: A Modicum of Originality Provides Entry into the Domain of Copyright*, 6 U. BALT. INTELL. PROP. L.J. 95, 95 (1997).

75. Adrian A. Ohmer, *Investing in Cannabis: Inconsistent Government Regulation and Constraints on Capital*, 3 MICH. J. PRIVATE EQUITY & VENTURE CAP. L. 97, 121 n.166 (2013) (citing a letter from Robert J. Corry, Jr., to Chairman and Members of the Joint Select Committee on the Implementation of Amendment 64 Task Force Recommendations, Colorado General Assembly, State Capitol 21–22 (Mar. 20, 2013), [http://www.colorado.gov/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/e299e8e1e892b0d387257b36006925fd/\\$FILE/130322%20AttachF.pdf](http://www.colorado.gov/clics/clics2013a/commsumm.nsf/b4a3962433b52fa787256e5f00670a71/e299e8e1e892b0d387257b36006925fd/$FILE/130322%20AttachF.pdf)).

76. Yang, *supra* note 74, at 95; see Gina S. Warren, *Regulating Pot to Save the Polar Bear: Energy and Climate Impacts of the Marijuana Industry*, 40 COLUM. J. ENVTL. L. 385, 418 (2015).

77. Melissa Ann Gauthier, *The SJC and Dunkin’ Donuts: Squeezing the Filling Out of the Small Franchisee*, 41 NEW ENG. L. REV. 757, 765 (2007) (stating that trademarks perform the following functions: (1) they identify a seller’s goods or services and distinguish these from the goods and services of other sellers; (2) they inform the purchaser that all goods or services bearing the mark are from the same source; (3) they certify that all goods bearing the mark are of equal quality; (4) they serve the owner as a form of advertising; and (5) they are a symbol of the company’s goodwill).

78. See Gonzalez et al., *supra* note 33, at 168.

79. See Peter Robinson et al., *America’s Quality Pot is Changing the Drug War*, BLOOMBERG BUSINESSWEEK (June 3, 2015, 6:13 PM), <http://www.bloomberg.com/news/articles/2015-06-03/quality-pot-is-changing-the-drug-war>.

### B. A Violation of Section 337: The Importation of an Article

Section 337 does not define “articles.”<sup>80</sup> Such statutory silence resulted in the recent, highly debated, case *ClearCorrect Operating, LLC v. ITC*,<sup>81</sup> which forced the U.S. Court of Appeals for the Federal Circuit to ascertain whether “articles” could include electronic transmissions.<sup>82</sup> The Federal Circuit, practicing standard statutory interpretation procedures, analyzed several contemporary dictionaries in determining the proper scope of the term “article.”<sup>83</sup> Each dictionary definition, restrictive or broad, suggests the term at least encompasses material things.<sup>84</sup> A crop, such as marijuana, is clearly a material thing. Further, crops have been recognized as an “article” under section 337,<sup>85</sup> and there does not appear to be any evidence that the term “article” contemplates exclusion of materials considered by some to be immoral.<sup>86</sup>

Understanding that marijuana is an “article,” and that this article is being imported into the United States, the only question that remains is whether there is an efficiently and economically established domestic industry.

### C. Domestic Industry

Section 337 relief can only be requested by, or on behalf of, a domestic industry.<sup>87</sup> Bill and Ted, therefore, can only seek remedy at the ITC if they have an established, or are in the process of establishing, a domestic industry. Pursuant to the intellectual property prong, a domestic industry is efficiently and economically operating when, “with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in its exploitation.”<sup>88</sup> If Bill and Ted were selling tomatoes instead of marijuana, there would be little debate as to whether

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80. *ClearCorrect Operating, LLC, v. ITC*, No. 2014-1527, at 13 (Nov. 10, 2015), <http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/14-1527.Opinion.11-6-2015.1.PDF>.

81. *Id.*

82. *See id.* at 3.

83. *See id.* at 13–18.

84. *See id.*; *see also* Sapna Kumar, *Guest Post: Digital Information at the Border*, PATENTLY O (July 28, 2015), <http://patentlyo.com/patent/2015/07/digital-information-border.html>.

85. *See* Eric P. Salonen, “*One Tomato, Two Tomato . . .*” *Selection of Trade Remedy Laws in the Florida-Mexico Tomato Conflict*, 11 FLA. J. INT’L L. 371, 385 (1997) (citing *Fresh Winter Tomatoes*, 60 Fed. Reg. 25,119, 25,248 (May 11, 1995) (identifying an ITC investigation over tomatoes)).

86. *ClearCorrect*, No. 2014-1527, at 13 (noting that the court definition does not contemplate morality). *See also* Enerson, *supra* note 70, at 690–92 (observing that federal courts are becoming less likely to apply morality standards when adjudicating infringement disputes).

87. *See* Chien, *supra* note 57, at 177 (stating that “the purpose of the Commission is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad”) (citing H.R. Rep. No. 100-40, pt. 1, at 157 (1987) (emphasis added)); Engler, *supra* note 38, at 10515.

88. 19 U.S.C. § 1337(a)(3) (2012).

a domestic industry would be found to exist. However, the giant elephant remaining in this hypothesis is whether a federal agency would recognize the legitimacy of industry dedicated to the commercialization of marijuana. Given the importance of section 337 economically, public policy favors using the ITC to protect U.S. industries.<sup>89</sup>

The ITC was designed to “encourage the industries of the United States.”<sup>90</sup> As one commentator suggests, the American desire to protect its domestic industries is so grounded in tradition that it dates to the Boston Tea Party.<sup>91</sup> The availability of the ITC as a forum for relief secures for those jurisdictions opting to the legalized cultivation, distribution, and sale of marijuana exactly the same public policy considerations evaluated by those jurisdictions.<sup>92</sup> The recognition of Bill and Ted’s industry by the ITC does not sanction marijuana or even legitimize it at the federal level. Rather, the ITC is simply protecting domestic jobs, domestic innovation, and domestic commerce. Furthermore, if the ITC were to recognize Bill and Ted’s industry, such an action would promote self-regulation within the legalized marijuana community, and foster more intimate and individualized federal regulation of marijuana.

Such would also conflict with the cooperative federalism arrangement currently entrenched. The U.S. Department of Justice indicated that the enforcement of the Controlled Substances Act (CSA) remains a viable option in jurisdictions that have legalized marijuana, but such would only occur if federal “policy concerns about marijuana—e.g., the sale to minors, the diversion of marijuana between states, and the involvement of organized crime”—were unable to be addressed by the implementing jurisdictions.<sup>93</sup> If the CSA were to deny the availability of section 337 remedies to Bill and Ted, the federal government would effectively destroy a valuable resource in the fight against illicit foreign incursion and criminal enterprises that have invaded the market.

### III. WHY WOULD BILL AND TED WANT TO ADJUDICATE THEIR CLAIMS AT THE ITC?

The ITC offers unique and appealing adjudication procedures. It is internationally renowned for its expeditious adjudication process.<sup>94</sup> A congressional mandate, implementing regulations (19 C.F.R. Part 210), and even section 337 incorporate and instill an ambitious policy that charges the agency with conducting each stage of the adjudication process with upmost

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89. Engler, *supra* note 38, at 10515.

90. *See id.*

91. *See* Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 66 (2008).

92. *See* Engler, *supra* note 38, at 10516–17.

93. Sam Kamin, *Cooperative Federalism and State Marijuana Regulation*, 85 U. COLO. L. REV. 1105, 1110–11 (2014) (citing Deputy Attorney General James Cole’s letter identifying the federal position following Washington and Colorado’s legalization of marijuana).

94. *See* Gonzalez et al., *supra* note 33, at 169.



expedition.<sup>95</sup> Despite a congressional repeal of a mandatory deadline, the average time to trial is seven to nine months, and a typical ITC investigation concludes within twelve to sixteen months.<sup>96</sup> In addition to the expeditious adjudicative process, the ITC imposes “few limitations on interrogatories, document requests, depositions, and foreign discovery”; it grants more freely and is more familiar with foreign discovery;<sup>97</sup> it has nationwide subpoena power, a massive advantage in compiling evidence given that the subpoena power of federal courts is relatively limited by the constitution;<sup>98</sup> and it relaxes the rule against hearsay.<sup>99</sup> Not only are litigants drawn to the ITC’s rapid adjudication process and favorable evidentiary rules, but they are also seeking the advantageous procedural and powerful remedial measures unique to the ITC.

First, the standard of proof for obtaining equitable relief in section 337 investigations is less than in federal courts.<sup>100</sup> Federal courts, in consideration of *eBay v. MercExchange*,<sup>101</sup> require a heightened standard of proof—irreparable harm in the absence of an injunction.<sup>102</sup> ITC litigation, meanwhile, only requires evidence of a violation of section 337.<sup>103</sup> An exclusion order from the ITC, accordingly, is easier to obtain than an injunction issued by a federal district court.<sup>104</sup>

Second, the ITC is given broad discretion in issuing remedial orders in fashioning a remedy “to ensure complete relief to the domestic industry.”<sup>105</sup> The statute, in fact, does not require personal jurisdiction over the foreign bad actor

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95. *See id.* at 169–70.

96. *See id.* at 170; K. William Watson, *Still a Protectionist Trade Remedy, The Case for Repealing Section 337*, THE CATO INST., POL’Y ANALYSIS NO. 708 5 (Sept. 19, 2012), <http://object.cato.org/sites/cato.org/files/pubs/pdf/PA708.pdf>.

97. Gonzalez et al., *supra* note 33, at 170. *See also* John C. Low, *Finding the Right Tool for the Job: Adequate Protection for Research Tool Patents in A Global Market?*, 27 HOUS. J. INT’L L. 345, 373 (2005).

98. *See* Yang Yu & Lei Zhang, *Analysis of Enforcement Mechanism of Section 337 of the US Tariff Act Through Perspective in Law and Economics*, 17 J. INTELL. PROP. RTS. 209, 211 (2012), [http://nopr.niscair.res.in/bitstream/123456789/14077/1/JIPR%2017\(3\)%20209-217.pdf](http://nopr.niscair.res.in/bitstream/123456789/14077/1/JIPR%2017(3)%20209-217.pdf).

99. Barry D. Rein & John J. Normile, *Enforcement of Patent Rights When Confronted with Foreign and Domestic Infringement*, 67 N.Y. ST. B.J. 60, 63 n.21 (1995).

100. Matthew Duescher, *Controlling the Patent Trolls: A Proposed Approach for Curbing Abusive Section 337 Claims in the ITC*, 96 J. PAT. & TRADEMARK OFF. SOC’Y 614, 618–19 (2014) (stating that “[p]rior to *eBay*, injunctive relief for patent infringement was granted automatically barring exceptional circumstances”).

101. 547 U.S. 388, 394 (2006).

102. *See id.* at 391 (stating that a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction).

103. Duescher, *supra* note 100, at 618–19.

104. *Id.* at 619.

105. *See* Gonzalez et al., *supra* note 33, at 173 (quoting *Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, USITC Pub. 3089 16 (Mar. 1998)).

to issue a general exclusion order.<sup>106</sup> Rather, the ITC has the authority to investigate any claim arising from the unfair importation of an article at the U.S. border, and has the authority to issue an in rem remedy against articles whose import constitutes unfair trade practice.<sup>107</sup> In short, the agency's jurisdiction exists over the articles, not the actors.

Upon the determination that a violation of section 337 exists, the agency will issue an exclusion order.<sup>108</sup> Exclusion orders are either limited or general.<sup>109</sup> The standard exclusion order applies, for notice purposes, only to those respondents named in a particular complaint filed at the ITC—i.e., it is limited.<sup>110</sup> In special circumstances, however, section 337 authorizes the issuance of a general exclusion order.<sup>111</sup> A general exclusion order is authorized when “there is a pattern of violation of this section and it is difficult to identify the source of infringing products,” as would likely be the case in the black market marijuana smuggling business.<sup>112</sup> This designation affords the ITC the ability to exclude all articles, irrespective of the source.<sup>113</sup> The international reach of section 337 is especially vital to Bill and Ted because the primary source of illegal marijuana is often uncertain. Section 337 also contains no “minimum contacts” jurisdictional limitation—likely important, considering preeminent individuals steering the illicit operation are less likely to be intimately involved with the actual transport of marijuana.<sup>114</sup> There are no distracting and expensive jurisdiction disputes.<sup>115</sup> There are no “stream of commerce” uncertainties because complainants must work with the Customs Bureau to identify “infringing products.”<sup>116</sup> So long as products are transported over the U.S. border, the ITC may investigate and impose remedies against those products.<sup>117</sup>

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106. Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 535 (2009).

107. 19 U.S.C. § 1337(a)(1), (b)(1), (d)(1) (2012).

108. *Id.* § 1337(d)(2).

109. Kumar, *supra* note 106, at 537–38.

110. 19 U.S.C. § 1337(g)(1).

111. Taras M. Czebiniak, *When Congress Gives Two Hats, Which Do You Wear? Choosing Between Domestic Industry Protection and IP Enforcement in S 337 Investigations*, 26 BERKELEY TECH. L.J. 93, 102 (2011) (citing 19 U.S.C. § 1337(d)(2)).

112. 19 U.S.C. § 1337(d)(2)(B).

113. See Gonzalez et al., *supra* note 33, at 171.

114. *Enercon GmbH v. ITC*, 151 F.3d 1376, 1383 (Fed. Cir. 1998) (“It is clear that neither the language of section 337, nor traditional “minimum contacts” analysis inherently limits the jurisdiction of the ITC to situations in which there has been a delivery of control of the goods to a U.S. domiciliary intending to import them into the United States.”).

115. Steven E. Adkins, *Protecting America's Borders: Section 337 Intellectual Property Investigations at the ITC*, 13 ANDREWS INTELL. PROP. LITIG. REP. 1, 2 (2006).

116. *Id.* at 5.

117. *Id.* at 3. See also 19 U.S.C. § 1337(a)(1)(A) (2012).

These procedural and remedial advantages, in a case filed by a pair of Colorado farmers against a Mexican Cartel, are significant considering that it is highly unlikely that the Mexican Cartel is actually going to respond.<sup>118</sup> A default judgment would be entered and likely ignored. To anticipate this, Bill and Ted could request in the complaint that a general exclusion order be issued, even in default judgment, when a violation of section 337 “is established by substantial, reliable, and probative evidence.”<sup>119</sup>

Lastly, while the ITC cannot award monetary damages in the event an exclusion order is violated,<sup>120</sup> subsection (f)(2) provides that recipients of cease-and-desist orders are subject to potentially massive civil penalties.<sup>121</sup> Cease-and-desist orders are designed to “limit[] sales of infringing products already imported” and provide an avenue that allows complainants to recover monetary damages on behalf of the ITC.<sup>122</sup> Section 337 does not provide guidance on issuing cease-and-desist orders, nor are there any “regulatory justification[s]” for when the ITC issues one.<sup>123</sup> Rather, the ITC relies mostly on precedent, issuing cease-and-desist orders, even in instances of default judgment, “only in cases where a respondent has ‘commercially significant’ inventories of infringing products.”<sup>124</sup> Nevertheless, these civil penalties are a powerful tool when implemented, “increase[ing] the efficiency and speed of ITC remedies[,] lower[ing] the costs of ITC litigation[,]” and acting as a powerful deterrent.<sup>125</sup> They are calculated to be the “greater of \$100,000 or twice the domestic value of the articles entered or sold on such day in violation of the order,” and may be recovered by the complainant in a civil action filed in federal district court.<sup>126</sup>

The powerful general exclusion order broadly drafted against all imported marijuana, coupled with massive statutory civil damages imposed upon entities and individuals not typically considered to have availed themselves to personal jurisdiction in the United States, provides Bill and Ted with a unique form of remedial relief.

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118. See 19 C.F.R. § 210.16(a) (2013) (failing to respond to the complaint and notice of investigation results in default). In cases of default, the “facts alleged in the complaint will be presumed to be true,” and the ITC “may issue an exclusion order, a cease and desist order, or both.” 19 C.F.R. § 210.16(c). These equitable remedies are only available after the ITC considers the public health and welfare of U.S. consumers, among other public interest factors. See 19 C.F.R. § 210.16(c).

119. *Id.* at 19 C.F.R. § 210.16(c)(2).

120. See Timothy Q. Li, *Exclusion Is Not Automatic: Improving the Enforcement of ITC Exclusion Orders Through Notice, A Test for Close Cases, and Civil Penalties*, 81 GEO. WASH. L. REV. 1755, 1760 (2013).

121. 19 U.S.C. § 1337(f)(2).

122. Thomas A. Broughan, III, *Modernizing § 337's Domestic Industry Requirement for the Global Economy*, 19 FED. CIR. B.J. 41, 45 (2009); Li, *supra* note 120, at 1760.

123. Li, *supra* note 120, at 1777–78.

124. *Id.* at 1777–78, 1780.

125. *Id.* at 1781–82.

126. 19 U.S.C. § 1337(f)(2).

## CONCLUSION

The ITC more than complements federal criminal and civil actions. It imparts distinctive and beneficial evidentiary procedures, and it is known for its expeditious litigation process. Because its organic statute embraces a broad mechanism designed to combat any unfair trade practices in the importation of articles, a local and otherwise legitimate marijuana farmer is not forced to rely upon federal statutes—laws marijuana farmers themselves violate. Despite the evils associated with marijuana use, a number of jurisdictions determined public policy favors legalization. These policy considerations should not concern the ITC. Instead, the ITC should acknowledge that policing drugs and narcotics is a battle best left to the individual states, and where a state has legitimized a particular industry, the ITC should recognize that industry in consideration of its justifiability doctrines.

The ITC is not forced to condone marijuana cultivation practices, nor is it forced to condone the practice of marijuana cultivation and ingestion. The ITC, instead, is simply tasked with advancing its foundational objective: protect domestic jobs, domestic innovation, and domestic commerce. As marijuana regulations continue to become more local and individualistic, the use of section 337 to enforce domestic interests abroad will embolden and reward individuals seeking to destroy noncompliant market participants. Closing this door would only to inhibit states and their respective constituents' ability to self regulate the market—an unfavorable outcome for all parties involved. Section 337 is unique because it empowers individuals to advance U.S. commercial interests. Because the ITC is known for its familiarity with international discovery and is capable of providing meaningful and rapid relief, section 337 would serve as a powerful tool for individuals to advance the shared interest of eradicating marijuana imported into the United States.