

Happy Holidays from the ITC

ITC infringement cases can be quick and predictable, but they can also upset vacation plans.

BY DANIEL J. BENDER

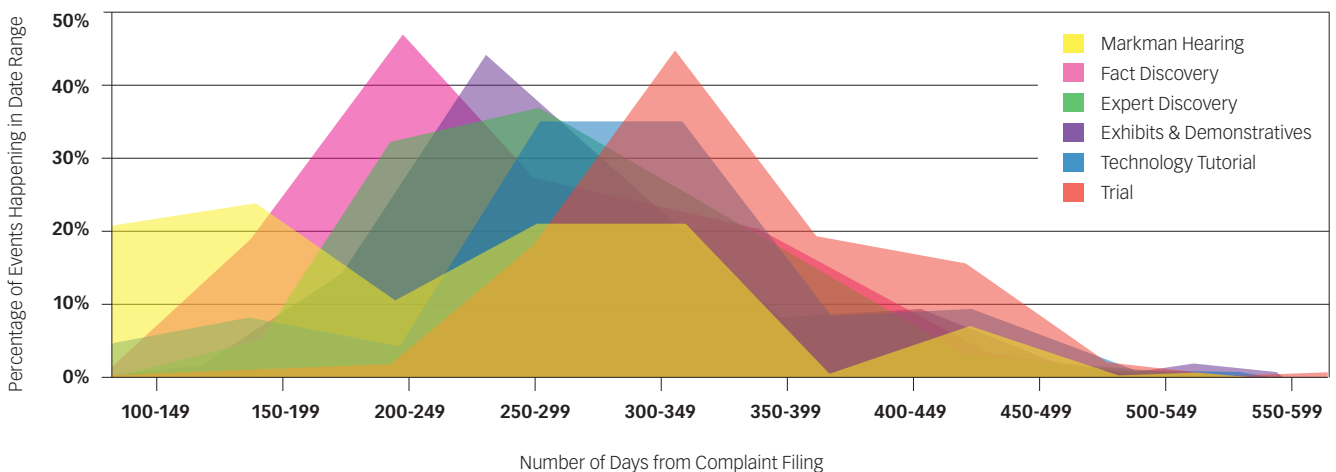
The speedy resolution of cases has made the International Trade Commission one of the most important intellectual property litigation venues in the country. Typically, IP claims are heard within one year of a complaint's filing. But lawyers should also be aware of a quirk in the timing of cases. Major case events are more likely to be scheduled im-

mediately after major holidays, especially New Year's Day. Companies bring ITC actions (also known as section 337 investigations) when they allege the importation into the United States of foreign-made products that infringe patents or violate trademarks. If the ITC finds that infringement has occurred, it can ban the importation of the product in question. Computer manufacturers, cell phone and tablet makers, automakers, software companies, and consumer electronics manufacturers are among the companies that have typically filed complaints at the ITC. And more of these cases are being brought than ever before. A total of 70

new complaints were filed in 2011, the most ever in any one year, although the number of ITC cases remains miniscule when compared to the number of patent cases filed in U.S. district courts nationwide. A total of 829 infringement complaints were filed with the ITC between its founding in 1972 and the end of the 2012 fiscal year. By contrast, more than

ITC cases tend to happen at predictable points in the lifespan of the case and in the course of the year. Just how fast and predictable are ITC cases? For this article, we looked at the 119 cases filed with the commission in fiscal years 2011 and 2012 (October 1, 2010, through September 30, 2012). We found that the order in which major events pro-

Typical Order of Deadlines



mediately after major holidays, especially New Year's Day.

Companies bring ITC actions (also known as section 337 investigations) when they allege the importation into the United States of foreign-made products that infringe patents or violate trademarks. If the ITC finds that infringement has occurred, it can ban the importation of the product in question. Computer manufacturers, cell phone and tablet makers, automakers, software companies, and consumer electronics manufacturers are among the companies that have typically filed complaints at the ITC.

And more of these cases are being brought than ever before. A total of 70

1,000 patent cases were filed in U.S. district courts in November and December 2012 alone. But what the ITC caseload lacks in volume, it makes up in significance. The value of section 337 investigations tends to run in the hundreds of millions of dollars.

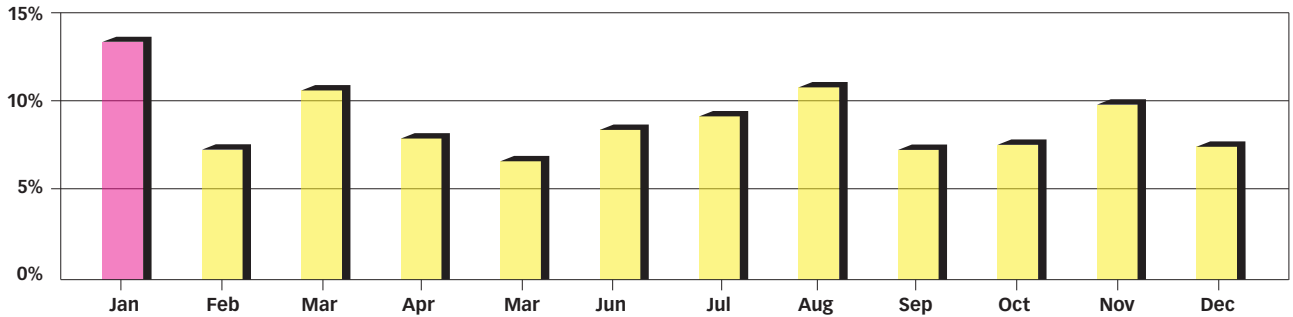
ITC cases are usually a sprint from the day the complaint is filed until the end of the trial. The speed is intentional. By statute, section 337 investigations must be completed "at the earliest practicable time." This has translated to less than a year from complaint to trial—about half the duration of infringement cases in U.S. district court. A side effect of that speed is that many of the key events in

ceeded, and the average amount of time that elapsed from complaint filing, was as follows:

- Markman hearing: 7.8 months
- Fact discovery cutoff: 7.9 months
- Expert discovery cutoff: 9.1 months
- Deadline for complainants and respondents to serve exhibits and demonstratives: 9.9 months
- Technology tutorial: 9.9 months
- Trial start: 11.3 months

It has to be stressed that these statistics are just averages. The least predictable event is the Markman hearing. The administrative law judges (ALJs) who preside over ITC cases will formally docket a Markman hearing only 25 percent of

Percent of Case Deadlines Per Month



the time. There tend to be two reasons why a Markman may never show up on the procedural schedule—sometimes ALJs find the hearing unnecessary, and at other times they just roll the Markman into the technology tutorial or trial.

To a lesser degree, the technology tutorial and the expert discovery deadline are also variable. About 20 percent of cases have no docketed tutorial. ALJs sometimes do not require a tutorial at all. Sometimes they will combine it with

the Markman or trial. Most tutorials take place between 8.2 and 11.5 months after filing but are sometimes scheduled in the first 5 to 6.5 months. Expert discovery tends to close anywhere between 6.5 and 11.5 months from the date of filing.

Some case events are more predictable. On average, fact discovery will close between 6.6 and 8.2 months from filing; exhibits and demonstratives will be served between 8.2 and 9.8 months from filing; and the trial will start between 9.9

and 11.5 months from filing. Trials last, on average, eight days.

Just as major events tend to happen at predictable times within the lifespan of a case, our study also found some trends in when they happen within the course of a year. Certain months are more popular for deadlines than others. More than 13 percent of all deadlines happen in January, for example; by contrast, most months have between 6 percent and 10 percent of all deadlines. *—continued on page 20*

continued from page 18— The January spike meshes with another trend—the likelihood that winter holiday plans will be ruined by an ITC trial. To no one’s surprise, few trials are scheduled between Christmas and New Year’s. But a trial is twice as likely to start within a week after New Year’s as compared to other weeks. Given the speed, size, and complexity of ITC cases, it is almost assured that a trial starting within a week of New Year’s will ruin any winter holiday that the lawyers (and to a lesser degree their clients) were hoping to take.

Lawyers who want to be sure that they’ll be able to take their vacation should look at other holidays. The possibility that deadlines will fall in the weeks after Memorial Day, Labor Day, and Thanksgiving is no greater than that they will fall in any other week of the year; deadlines are less likely to fall after Independence Day and Christmas.

As far as which events are most prone to holiday scheduling, trials are by far the biggest offenders. A trial is nearly twice

as likely to take place during the week after a holiday as compared with any other week, and as already noted, many of these trials will take place right after New Year’s. Deadlines for the close of fact discovery, expert discovery, and exchange of exhibits and demonstratives are no more or less likely to fall after a holiday when compared to other weeks. The same may

ITC trials are twice as likely to be scheduled in the week after New Year’s as in any other week—assuredly ruining any holiday plans.

be true for tutorials and Markmans, although since they are often not docketed, the data does not tell the whole story.

Since ALJs typically calendar bigger dates such as the hearing date and require the attorneys to propose most other deadlines, it is unclear who is responsible for the intersection of deadlines and holidays. Do ALJs schedule trials after holidays in the hope of making cases so unpleasant that attorneys will be motivated to settle?

Does one party propose inconvenient dates in order to test the resolve of the other side? Do these scheduling trends simply happen because of indifference on the part of the ALJs or the attorneys? Or is there some other reason or combination of reasons? There is no definite way to know without more data.

But what you can know is that if you

have a case before the ITC, it will likely move fast and with a fair degree of predictability. So strap yourself in for a rocket ride—and cancel your holiday plans! ■

Daniel Bender, formerly a litigator, is senior manager at Digital Evidence Group in Washington, D.C., which provides court reporting, graphics, and in-court trial presentation consulting on high-profile patent and other cases, including many before the ITC.