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THE INTERNATIONAL TRADE COMMISSION'S AUTHORITY IN DOMESTIC PATENT DISPUTES

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INTRODUCTION

These days, Comcast might be able to empathize with Hank Morgan, the titular 19th-century machinist in Mark Twain's *A Connecticut Yankee in King Arthur's Court* (1911) who wakes up in medieval times at the business end of a knight's jousting lance. This is because the Internet technology company from Philadelphia, which offers only American services and imports nothing from abroad, has similarly found itself at the business end of a government order issued not by a court or even by a domestic administrative body, but by an importation agency called the International Trade Commission (ITC).

How did a domestic service company find itself squaring off with a federal agency that deals with foreign trade? The situation arises out of the ITC's recent decision against Comcast

CONTENTS

Introduction	1
The ITC as a Trade Agency	2
Expansion of ITC Authority to Domestic Disputes	2
Facts of the Dispute	2
The Extrema of Suprema: A Questionable Legal Precedent	3
Not all patent disputes are trade cases	4
Bypassing the Courts	5
Forum Shopping	5
Patent Holding	6
Two Bites	6
Conclusion	7
About the Authors	7

entitled *In re Certain Digital Video Receivers*.¹ That decision, now on appeal before the U.S. Court of Appeals for the Federal Circuit, represents a dramatic expansion of the ITC's jurisdiction that almost completely untethers the agency's patent enforcement power from its trade-related mission. Should the decision be left intact, the ITC could decide a great swath of domestic patent disputes that incidentally and unremarkably involve the use of imported products. In effect, the agency's power to block imports will serve as an extra-judicial remedy for domestic patent infringement.

However, this is not a good outcome. No trade or patent policy goals are served by denying American companies accused of patent infringement in the United States the right to defend themselves in a court of law. This is particularly true as the ITC's procedures and remedies lack many features of district court litigation that protect defendants from the abusive tactics of patent trolls. Further, expanding the ITC's jurisdiction to cover domestic patent disputes will do nothing to prevent unfair trade, but it will needlessly expose American businesses to more litigation.

As a result of the *Digital Video Receivers* decision, a variety of domestic businesses could potentially come into the crosshairs of the ITC. For example, service companies that use imported equipment, retailers that stock imported goods and American manufacturers that use imported parts—even if those companies import nothing themselves—could now be hauled before the agency. In short, this takes an agency that should be highly limited in its purview over border control and allows that agency to insert itself into practically every aspect of the domestic American economy. This is a result not intended by Congress and not warranted by good policy.

1. *Certain Digital Video Receivers*, Inv. No. 337-TA-1001 (May 26, 2017) [hereinafter *Digital Video Receivers I*] (final initial determination by administrative law judge). The ITC affirmed the administrative law judge in all relevant parts. See *Certain Digital Video Receivers*, Inv. No. 337-TA-1001, slip op. at 1-2 (Dec. 6, 2017) [hereinafter *Digital Video Receivers II*] (commission op.).

Accordingly, the present study first reviews the nature of the ITC and its focus as a trade agency. It then turns to the Comcast investigation to explain the erroneous legal precedents and theories that allowed such an agency to issue compulsory orders against a domestic company not involved in trade. It next considers the potential breadth of that result and, in particular, how the ITC could potentially inject itself into other purely domestic disputes. Finally, the paper discusses reasons why—as a matter of policy—the ITC is ill equipped and poorly situated to become a general patent court. In fact, should the Federal Circuit fail to reverse this decision, lawmakers should be greatly concerned about this attempted expansion of authority on the part of the ITC.

THE ITC AS A TRADE AGENCY

The International Trade Commission is, by definition and practice, a trade agency. Its authorizing statute, the legislative history behind that statute and the structure of procedure before the Commission all speak to its trade-specific role.

The agency’s relevant authority is defined by Section 337 of the Smoot–Hawley Tariff Act of 1930, which authorizes the Commission to prevent “unfair practices in import trade.”² This provision was originally meant to operate as a trade remedy (similar to modern antidumping and countervailing duty laws) by imposing a broad prohibition against “[u]nfair methods of competition and unfair acts in the importation of articles.”³ At the time of its passage, this language was praised as being “broad enough to prevent every type and form of unfair practice and [. . .] therefore, a more adequate protection to American industry than any antidumping statute the country has ever had.”⁴

While the law has been and continues to be used occasionally for antitrust or common law trademark disputes, the most common complaints have always been patent infringement. Recognizing the ITC’s role as a patent enforcement venue, Congress amended Section 337 in 1988 to include additional provisions specifically addressing statutory intellectual property rights. Patent complaints at the ITC are now brought under a more specific provision that prohibits “[t]he importation into the United States, the sale for importation, or the sale within the United States after importation [. . .] of articles that [. . .] infringe a valid and enforceable United States patent.”⁵ Despite its addition of specific patent authority, the 1988 statute still reflects the basic understanding that the ITC is a trade agency. As Congress explained, its purpose

2. 19 U.S.C. § 1337.

3. *Id.* § 1337(a)(1)(A).

4. *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930).

5. 19 U.S.C. § 1337(a)(1)(B).

was to provide domestic patent holders with “adequate protection *against foreign companies.*”⁶

Rules for investigating disputes under Section 337 further reflect the ITC’s trade orientation. For example, complainants at the ITC must prove the existence of a domestic industry that practices that patent.⁷ Additionally, the ITC can refuse to issue a remedy if doing so would be contrary to the “public interest,” and any remedy issued under Section 337 can be vetoed by the President of the United States for “policy reasons” not subject to judicial review.⁸ These requirements all show that the ITC’s actions are political decisions in the pursuit of trade protection.

Patent owners often like to characterize the ITC as an adjunct patent court but the history and nature of the agency belie such a view. Indeed, it was not the intention of the original drafters of Section 337. At best, one might say that the ITC has awkwardly straddled the line between trade law and patent enforcement.⁹

EXPANSION OF ITC AUTHORITY TO DOMESTIC DISPUTES

If the ITC is a trade agency whose patent power exists to provide “protection against foreign companies,” it would be extremely strange for that agency to issue enforcement against a domestic company for its domestic activities. Yet, that is precisely what has happened in a recent dispute before between Rovi and Comcast that is before the ITC.

Facts of the Dispute

Rovi is an American company the primary business of which is the acquisition, licensing and aggressive litigation of patents related to cable television. While most of the company’s targets simply pay for licenses, those who have challenged Rovi’s patent assertions have often been successful due to the

6. Omnibus Trade and Competitiveness Act of 1988 § 1341(a)(2), Pub. L. No. 100-418, 102 Stat. 1107, 1212 (1988) (emphasis added).

7. 19 U.S.C. § 1337(a)(2)–(3). The 1988 amendments changed this test so that licensing activity counts toward establishing a domestic industry. Those amendments also eliminated a requirement that the domestic industry have been injured by the impugned imports. The domestic injury requirement remains for complaints unrelated to statutory IP infringement. *Id.* § 1337(a)(1)(A)(i)–(iii).

8. *Id.* §1337(d)(1), (j)(2). See also *Duracell v. Int’l Trade Comm’n*, 778 F.2d 1578 (Fed. Cir. 1985) (“[T]he [disapproval] decision by the President is not reviewable either directly or indirectly in this court . . .”).

9. K. William Watson, *Cato Inst.*, Still a Protectionist Trade Remedy: The Case for Repealing Section 337 (Sept. 19, 2012), <https://object.cato.org/sites/cato.org/files/pubs/pdf/PA708.pdf>.

weaknesses of the underlying patents.¹⁰ Comcast took this latter route when it refused to renew a licensing agreement covering DVR patents that Rovi had acquired from TiVo in 2016.¹¹ In response, Rovi filed a complaint at the ITC seeking to block the importation of Comcast's cable boxes.

The ITC ultimately found that two TiVo patents – directed to the use of a mobile app to schedule a DVR recording over the internet – were valid and had been infringed. But the interesting feature of the case was the particular activity in which Comcast engaged that led to a violation of Section 337—activity that looked nothing like “importation [. . .] of articles that [. . .] infringe” by any reasonable definition of those terms. Comcast is a domestic company that imports nothing into the United States. Instead, it contracts with third-party suppliers who import cable boxes and sell them to Comcast. Moreover, the imported cable boxes do not infringe any of Rovi's patents. Instead, the boxes connect to an online cloud service that Comcast runs and which allows Comcast customers to schedule DVR recordings through a variety of means, including by mobile phone.

According to Comcast, only about 1 percent of its customers who use these cable boxes also use the mobile app to record shows through the DVR service.¹² This means that about 99 percent of the boxes are never used to infringe any patents. Remarkably, Comcast's suppliers were also brought before the ITC but the Commission decided they had not violated Section 337 themselves, specifically because the cable boxes they imported did not directly infringe any of Rovi's patents.¹³

How, then, did the ITC deem Comcast liable for importation of articles that infringe when Comcast never imported anything and the articles themselves were already deemed not to have done so? The answer reveals just how dramatically the ITC has sought to expand its administrative authority over trade, rendering itself a pseudo-court for domestic patent disputes.

First, the ITC deemed Comcast an “importer” based on its purported “control” over the design and manufacture of the cable boxes. Specifically, the Commission found that the cable boxes were made to Comcast's specifications, that the

boxes “would not function within another cable operator's system” and that “the software at issue in the heart of this investigation is attributable squarely to Comcast.”¹⁴ These factors led the ITC to turn a purely domestic company into an “importer” over which the Commission could assert jurisdiction.¹⁵

Second, the ITC held that Comcast was guilty of “inducing” infringement of Rovi's patents. Under the Patent Act, liability may attach to one who “induces” infringement – that is, one who knowingly instructs or persuades another to infringe.¹⁶ Comcast knew of Rovi's patents and provided instructions to its customers on how to schedule their DVR with their mobile device.¹⁷ Thus, because Comcast performed the inducing actions, the ITC held that the cable boxes were articles that infringed Rovi's patents.¹⁸

The Extrema of *Suprema*: A Questionable Legal Precedent

Ordinarily, inducement to infringe a patent is based on human intentions. How, then, can inanimate objects like cable boxes “induce” infringement? That illogic is the direct result of a controversial 2015 appeals court decision in *Suprema v. ITC*.¹⁹

In *Suprema*, a holder of patents on a method of fingerprint scanning brought an investigation against an importer of fingerprint scanners. The scanners themselves did not infringe and were capable of being used for totally different, non-infringing scanning methods; any infringement occurred only because the importer had worked with a downstream purchaser to write potentially infringing software. The software was not added to the scanners until after importation. The Federal Circuit affirmed the ITC's decision to issue an exclusion order on the grounds that the importer had induced infringement. The Federal Circuit recognized the oddity of calling the scanners “articles that [. . .] infringe,” despite the fact that inducement was a matter of individual intention not ordinarily attributed to inanimate goods.²⁰ Nevertheless, the court held that the ITC was entitled to deference in its interpretation and that the infringement-inducing

10. When Rovi sued online streaming services for things like sorting TV shows into categories or letting customers select pay-per-view programs from an on-screen menu, those patents were either invalidated by the court or found not to cover the defendant's activities. See, e.g., *Netflix Inc. v. Rovi Corp.*, No. 4:11-cv-6591 (N.D. Cal. July 15, 2015) (invalidating all patents in suit), *aff'd without opinion*, No. 15-1917 (Fed. Cir. Nov. 7, 2016); *United Video Props. v. Amazon.com, Inc.*, 561 F. App'x 914 (Fed. Cir. 2014) (affirming district court ruling on claim construction in favor of Amazon).

11. Leslie Picker, *Rovi Buys TiVo in \$1.1 Billion Deal*, N.Y. Times, Apr. 19, 2016, <https://www.nytimes.com/2016/04/30/business/dealbook/rovi-buys-tivo-in-1-1-billion-deal.html>.

12. Daniel Frankel, *Comcast Says It No Longer Relies on Rovi for X1 Tech*, Fierce Cable (Jan. 12, 2018), <https://www.fiercecable.com/cable/comcast-says-it-no-longer-relies-rovi-for-x1-tech>.

13. *Digital Video Receivers I*, *supra* note 1, slip op. at 611.

14. *Id.* at 12.

15. *Id.*

16. 35 U.S.C. §271(b).

17. *Digital Video Receivers I*, *supra* note 1, slip op. at 232–34.

18. *Digital Video Receivers II*, *supra* note 1, slip op. at 15–22.

19. *Suprema, Inc. v. Int'l Trade Comm'n*, 796 F.3d 1338 (Fed. Cir. 2015).

20. *Id.* at 1346–47.

acts of the importer could be imputed to the products it imported.²¹

In his dissent, Judge Timothy B. Dyk noted that *Suprema* represented a significant departure from the traditional understanding of ITC authority, since the effective message of the decision was that domestic activity (in this case, the assistance in writing software) could lead to trade sanctions against non-infringing articles.²² If there was a saving grace for *Suprema*, it was the fact that the affected party was still an importer, which gave the ITC at least the semblance of acting upon its trade authority.

In its own case, Comcast argued before the Commission that even the Federal Circuit's *Suprema* decision was not enough to justify an exclusion order when importation was not part of the inducing activity. In response, the ITC ignored the minimal nexus between importation and inducement present in *Suprema* and claimed that a violation of Section 337 merely "requires importation of articles, proof of direct infringement, and proof of inducement."²³ According to the ITC, the fact that Comcast's inducing activity all took place in the United States "is no defense to the violation of a trade statute."²⁴

Under this interpretation, the ITC can act even when there is no relationship between the importation and the infringing activity. In essence, then, the Commission's power to exclude imports becomes a remedy for domestic infringement involving imports rather than a tool to prevent infringing articles from entering the United States. In such cases, the ITC is no longer a trade agency concerned with unfair imports but rather an administrative patent court that provides an extrajudicial remedy against American companies. This case thus represents the "extrema of *Suprema*"; whereas *Suprema* untethered the patent-infringing act from importation, *Digital Video Receivers* wholly untethers the respondents, the infringing acts and the instrumentalities of infringement from importation.

NOT ALL PATENT DISPUTES ARE TRADE CASES

The practical consequences of the ITC's broad interpretation of its jurisdiction are far reaching. Imports are ubiquitous in the U.S. economy. Indeed, American service providers, retailers and manufacturers all rely on imported products to conduct nearly every facet of their business. With the power to

block non-infringing imports tangentially related to indirectly-infringing domestic activity, the ITC will undoubtedly end up hearing many cases that have nothing to do with trade.

Consider the countless American service providers who, like Comcast, use imported supplies or components to provide those services: Transportation companies rely on imported vehicles; hospitals use imported medical supplies; mobile broadband providers rely on complex telecommunications infrastructure that requires an incredible number of imported, high-tech components. American companies in these industries do not typically sell products, but they are often involved in patent disputes. The fact that they rely on imports could result in those disputes being settled by a trade agency instead of a court of law.

Several hypothetical examples illustrate the potential breadth of the ITC's decision to issue an exclusion order against a domestic company operating domestic services.

American service providers. Most obviously, other service companies that rely on imported equipment could find themselves before the ITC. For example, an American bike-share company could easily end up there over a domestic patent dispute. In this scenario, the company likely buys imported bicycles (even if it does not import them itself) and, like Comcast did with its cable boxes, the company probably custom-designs the bicycles to operate within its network. It might also add value over its competitors by allowing its customers to purchase bicycle time through a mobile app. If one of those mobile apps is alleged to infringe a patent, the ITC could judge every aspect of the dispute and block the company from purchasing bicycles.

Domestic retailers. Like service providers, American retailers rely extensively on imports for their business operations. But they also deal in imported merchandise. Enabling the ITC to ban those imports to remedy a patent dispute over how customers use those products exposes retailers to unreasonable risk. American retailers have been common targets of patent trolls claiming to own the rights to mundane activities like using office equipment or connecting to the internet. The ITC's decision will only further empower these trolls that seek only to frighten small businesses into agreeing to quick settlements.

It is easy to imagine a scenario where the ITC would get involved in such a dispute. Consider, hypothetically, an American hardware store that sells two-inch M4 screws that it acquires from an importer. The store runs a website with instructions on how to use these screws to construct a variety of furniture, such as tables, chairs, beds and cabinets. One particular set of instructions for a chair infringes a patent. Because the company controlled the manufacturing and specifications to produce a screw incompatible

21. The court applied the two-step test of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and determined that the phrase "articles that . . . infringe" in § 1337(a)(1)(B) is ambiguous and that the Commission's interpretation was reasonable.

22. *Suprema*, 796 F.3d at 1353-54.

23. *Digital Video Receivers I*, *supra* note 1, slip op. at 21.

24. *Id.*

with others (no one orders a metric screw thread in Imperial lengths), the ITC deems the hardware company an importer of the screws and thus excludes them from importation.

This could just as readily happen to a grocery store, a coffee shop, a big-box chain or even an online retailer. In every case, it would significantly alter the legal rights of American companies despite the complete absence of unfair trade or articles that infringe a patent.

American manufacturers. The ITC’s expanding jurisdiction could also imperil the group of people whose interests are most commonly served by U.S. trade policy: American manufacturers. Surely no one believes Congress intended for Section 337 to burden U.S. manufacturers with new patent penalties or force them to defend themselves from accusations of domestic infringement before a trade agency. In fact, the law’s legislative history makes clear that the ITC’s patent powers are meant to provide “protection to American industry” from “foreign companies.”²⁵

An American manufacturer who builds tractors in the United States, for instance, might use a mix of domestic and imported parts. The company could sell its American-made tractors to American consumers with a 200-page owner’s manual that, among many other things, shows the customer how to attach and operate an implement in a way that would cause the customer to infringe a patent. The patent owner could then file a lawsuit in court seeking compensation for damages attributable to the handful of infringing tractor operators that the manufacturer induced. Or, the patent owner could go to the ITC seeking to bar the company from importing non-infringing hitch assemblies, hydraulic valves or other tractor parts.

This is not a far-fetched hypothetical. By value, over half of all imports into the United States are raw materials and intermediate goods used by American manufacturing companies.²⁶ If the ITC gets its way, an American manufacturer accused of inducing infringement by providing an American-made product could be hauled before a trade agency and have an imported component essential to its business blocked at the border without a jury trial.

BYPASSING THE COURTS

The U.S. patent system does not need a trade agency to judge its domestic patent disputes. On the contrary, the availability

25. See *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247, 259 (C.C.P.A. 1930); Omnibus Trade and Competitiveness Act of 1988 § 1341(a)(2), Pub. L. No. 100-418, 102 Stat. 1107, 1212 (1988).

26. See Mark J. Perry, *Nearly All Imports, Even Consumer Goods, Are Inputs for US Firms, Retailers and Factories*, Am. Enter. Inst. (Aug. 19, 2016), <http://www.aei.org/publication/nearly-all-imports-even-consumer-goods-are-inputs-for-us-firms-and-factories>.

of the ITC as an enforcement venue necessarily diminishes the role of courts and enables abusive litigation tactics that harm American companies and innovators. District court litigation is more flexible and balanced than ITC investigations. And, some features of ITC litigation directly encourage bad outcomes.

Forum Shopping

The reason patent owners initiate Section 337 investigations is not because the ITC is their *only* option—it is because the ITC is their *best* option. ITC investigations are significantly faster than those in district court. Due to the agency’s superior powers to compel discovery, its use of administrative law judges with patent expertise, its lack of a jury trial and its statutory mandate to complete its work “at the earliest practicable time,” ITC investigations typically conclude within 18 months.²⁷ Reaching an infringement verdict in district court can easily take twice that long.

The ITC is friendlier to patent owners in a number of other ways as well. Unlike district courts, the ITC will not delay litigation when a patent’s validity is under review by the Patent and Trademark Office.²⁸ And the agency’s bureaucrats are much less likely than district court judges to find a patent invalid.

Expanding the ITC’s jurisdiction to cover more cases will enable just the sort of forum shopping that the Supreme Court’s 2017 decision in *TC Heartland v. Kraft Foods* recently curtailed.²⁹ Prior to *TC Heartland*, litigants could file patent lawsuits in almost any district court regardless of where the defendant was located. This enabled plaintiffs to bring their suits in particularly plaintiff-friendly places like the Eastern District of Texas – a sparsely populated part of the country where more than 40 percent of new patent infringement suits were filed in 2015.³⁰ In *TC Heartland*, the Supreme Court limited this practice by holding that, for the purposes of patent litigation, a corporate defendant’s residence is its place of incorporation.³¹ Allowing patent owners seeking plaintiff-friendly venues for infringement claims to simply go to the ITC instead of the district courts will significantly mute the impact of the *TC Heartland* decision.

27. See William P. Atkins & Justin A. Pan, *An Updated Primer on Procedures and Rules in 337 Investigations at the U.S. International Trade Commission*, 18 Balt. Intell. Prop. L.J. 105, 128–29 (2010).

28. See Colleen V. Chien & David L. Schwartz, *Empirical Studies of the International Trade Commission*, in 2 Research Handbook on the Law & Economics of Intellectual Property (forthcoming 2017) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963251.

29. 137 S. Ct. 1514 (2017).

30. Brian Howard, *Lex Machina 2015 End-of-Year Trends*, Lex Machina (Jan. 7, 2016), <https://lexmachina.com/lex-machina-2015-end-of-year-trends>.

31. See *TC Heartland*, 137 S. Ct. at 1517.

Patent Holdup

The main draw of Section 337 for patent owners is the ITC's powerful exclusion-order remedy, which bans the offending product from entering the U.S. market. The ITC's remedy is analogous to a district court's power to issue injunctive relief. Injunctive relief is, of course, appropriate in some cases to vindicate the interests of patent owners. But it can be unwarranted in other ones, such as when the patent owner produces no competing products to meet market demand or when the patent covers only a small component of the product to be enjoined.

In 2016, the Supreme Court acknowledged these possibilities in *eBay v. MercExchange, LLC*, when it held that courts may only grant an injunction in patent cases after examining the traditional four factors for equitable relief.³² One of those is that money damages must be inadequate as a remedy for the plaintiff's injury. This shift had a significant impact on the remedies available for non-practicing entities; that is, plaintiffs who monetize patents solely through licensing or litigation rather than by developing or manufacturing a product. Because those patent owners can always be made whole by a monetary award, they could no longer use the threat of injunctive relief to extract excessive royalties in a settlement.

By contrast, the ITC does not follow the *eBay* four-factor test. Instead, it applies its own "public interest" considerations that almost always result in the issue of an exclusion order.³³ As a result, a strong remedy is all but guaranteed in the ITC, a significant advantage for patent owners over alleged patent infringers.

Empirical studies of patent litigation in federal court show that *eBay's* impact is felt almost entirely by non-practicing entities. Operating companies still receive injunctive relief at very high rates, while non-practicing entities rarely do.³⁴ Since it is more easily obtained than injunctive relief, the ITC's exclusionary remedy unsurprisingly tends to attract non-practicing entities who effectively obtain injunctions that they could not have obtained in district court. This is an improper result that imposes serious costs on innocent businesses and innovation generally.³⁵

32. See 547 U.S. 388 (2006).

33. See *Spanson, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010); Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1, 19–20 (2012) (noting that public interest prevented issuance of exclusion order in only three cases).

34. Christopher B. Seaman, *Permanent Injunctions in Patent Litigation After eBay: An Empirical Study*, 101 Iowa L. Rev. 1949 (2016), <https://ilr.law.uiowa.edu/assets/Uploads/ILR-101-5-Seaman.pdf>.

35. See Erik Hovenkamp & Thomas F. Cotter, *Anticompetitive Patent Injunctions*, 100 Minn. L. Rev. 871 (2016). Though the ITC is sometimes thought to be inhospitable to non-practicing entities because of its domestic industry requirement, in practice that requirement has posed only a minor barrier to non-practicing entities because "substantial investment in . . . licensing" counts as a domestic industry. 19 U.S.C. § 1337(a)(3)(C).

Congress has considered addressing the problem of excessive remedies at the ITC through legislation. Most recently, the House Judiciary Committee held hearings related to a bill called the Trade Protection Not Troll Protection Act.³⁶ The bill sought to reduce the ability of non-practicing entities to use the ITC by removing licensing activity as evidence of a domestic industry and aligning the ITC's public interest test to mirror *eBay's* four-factor equitable relief test.

Two Bites

Section 337's supporters note the law's effectiveness at preventing infringement by foreign entities operating beyond the powers of American courts.³⁷ But ITC respondents are not always elusive foreign pirates. On the contrary, the typical respondent is a large multinational or American company fully subject to the jurisdiction of a federal district court.³⁸ And most patent disputes that the ITC adjudicates are also the subject of an infringement suit in a court of law between the same parties.³⁹

When a patent owner files a complaint at both the ITC and district court, defendants are allowed to delay the court proceedings pending completion of the ITC's investigation.⁴⁰ This means the ITC gets to go first. Interestingly, the ITC's decisions on infringement or patent validity have no preclusive effect on the district court.⁴¹

The patent owner has a significant advantage in this situation: If they win at the ITC, the products are blocked regardless of what happens in district court. If they lose, the patent owner gets a second chance to make its case before a district court, starting from a clean slate.

Patent owners that can quickly secure an exclusion order at the ITC have extraordinary leverage in settlement negotiations. Well before any court of law has examined the validity of the plaintiff's patents or the scope of its claims, a defendant can find itself subject to business-crippling administrative action – unless it accepts the plaintiff's settlement offer. This arrangement is especially advantageous for owners of

36. See *International Trade Commission Patent Litigation: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 114th Cong. (2016), <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg99782/pdf/CHRG-114hhrg99782.pdf>.

37. Alden Abbott, Heritage Found., Section 337 of the Tariff Act: Fighting Distortional Import Trade and Strengthening American Intellectual Property Rights (June 2, 2016), <http://thf-reports.s3.amazonaws.com/2016/BG3114.pdf>.

38. See Bill Watson, *Preserving the Role of the Courts Through ITC Patent Reform 3* (R Street Shorts No. 57, Mar. 2018).

39. See Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm. & Mary L. Rev. 63 (2008).

40. 28 U.S.C. § 1659.

41. *Tex. Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1568–69 (Fed. Cir. 1996).

weak patents covering minor technology embedded in a very valuable product.

CONCLUSION

The ITC has asserted the power to block non-infringing imports based on the domestic activity of American companies. But this power was not what the drafters of Section 337 intended to authorize. The ITC is a trade agency whose powers and procedures are tailored toward protecting domestic industries from foreign competition and infringing imports. Excluding Comcast's cable boxes because the company induced its customers to use a mobile app does nothing to prevent unfair trade.

Allowing the ITC to maintain this power turns the agency into an administrative patent court the import exclusion powers of which act as a ham-fisted remedy for domestic patent infringement. Expanding ITC jurisdiction significantly diminishes the role of courts in adjudicating patent disputes, undermines efforts to prevent abusive patent litigation and denies American companies their right to defend themselves in a court of law.

The ideal resolution of this issue would be for the Federal Circuit to reverse the ITC. The court could either overrule *Suprema* to hold that inducement not tied to the actual imported articles at the time of importation is outside the ITC's jurisdiction or, less preferably, it could limit *Suprema* to cases where the inducer of infringement was also the importer.

Should the Federal Circuit fail to take these steps, lawmakers would need to begin looking at the ITC not merely as an administrator of foreign trade but as an executive agency that has seized the power to reach enormous swaths of domestic business – with potentially enormous ramifications beyond trade policy for the American economy at large.

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