

IP LITIGATION AND THE U.S. INTERNATIONAL
TRADE COMMISSION

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, INTELLECTUAL
PROPERTY, AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

SECOND SESSION

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TUESDAY, JULY 23, 2024

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IP LITIGATION AND THE U.S. INTERNATIONAL TRADE COMMISSION

Tuesday, July 23, 2024

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND
THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC

The Committee met, pursuant to notice, at 10:07 a.m., in Room 2141, Rayburn House Office Building, the Hon. Darrell Issa [Chair of the Subcommittee] presiding.

Members present: Representatives Issa, Massie, Fitzgerald, Cline, Kiley, Johnson, Ross, Lofgren, and Ivey.

Mr. ISSA. The Subcommittee will come to order. Without objection, the Chair is authorized to declare a recess at any time.

We welcome everyone here today for a hearing on Intellectual Property Litigation and the U.S. International Trade Commission. I will note that we will work as expeditiously as possible, but we may have a short break during the first round of votes later this morning.

I will now recognize myself for an opening statement.

Today, we are examining the U.S. International Trade Commission, a forum of adjudication of, among other things, intellectual property cases. We want to focus on how IP litigation at the ITC fits into the overall IP system of the United States' IP-related issues raised by the ITC docket and recent developments relevant to the ITC and IP litigation. That is a complex way of saying that, in fact, after the eBay decision, the ITC has clearly become a place for the equivalent of injunctive relief, also known as exclusion.

First, I want to thank the Ways and Means Full Committee Chair Jason Smith and Trade Subcommittee Chair Adrian Smith for graciously working with the Committee so that we could hold this hearing. Although this is not a joint hearing, there will be questions asked today specifically that were brought to us by the Ways and Means Committee, the Committee of Jurisdiction over the ITC.

The ITC's mission, and I will repeat this many times throughout the day, is vital. The ability to enforce on behalf of American businesses and consumers is a role the ITC was formed for and needs to continue doing. The ITC focuses on investigating unfair trade

practices and IP infringement is essential for maintaining the integrity of our market.

Clearly, there were times when the ITC uniquely has the ability to act quickly and to stop the importation of counterfeit or unfair competition including patent-infringing goods. For example, on finding infringement, the ITC can grant exclusion orders and they do so quickly with only limited exemptions for granting them, and they do so because the companies or the individuals are usually outside the United States and anything but an exclusion order would be ineffective.

However, recently, there has been a growing chorus of voices suggesting that the ITC is being misused for purposes other than its intent. Some stakeholders argue the ITC IP litigation system is being leveraged in ways that may distort the broader IP system. That is why the goal of today's hearing is to elevate the ITC's role and effectiveness in the overall landscape.

We understand that the ITC's impact on IP litigation and enforcement is vital for ensuring the system remains balanced and effective. We must ensure the ITC continues to serve its role to maintain fairness, innovation, and competitiveness. This hearing is an opportunity to delve into those areas.

I want to reiterate: The ITC, in the opinion of the Chair, for a very long time, has from time to time been misused. In my own home district, *Qualcomm v. Broadcom*, two multibillion leading corporations, found themselves before the ITC. Why? Because it was a convenient venue. Would Broadcom support the idea that the ITC should have had some limitations? Yes, except it benefited them. Would Qualcomm support the ITC needs to be limited? Yes, except when it benefits them.

That is exactly why Congress must act. Corporations, large and small, want to see the best use of the ITC and, in the opinion of the Chair, a 100 percent retention of their authority over companies or individuals that are outside the financial reach of the United States.

With that, I yield to the Ranking Member for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chair. The International Trade Commission was established as an executive agency by Congress in 1916 to oversee the importation of goods from around the world. Over 100 years later, it continues to protect the U.S. economy, our workers, and our innovators. Few know that the ITC has been around even longer than that.

The agency we know today is the culmination of a series of legislative efforts that began at our Nation's founding. Our forefathers understood, as we do today, that while the importation of goods from overseas can strengthen our financial position on the world stage and enhance our access to innovations around the world, the wrong products can cause grievous harm to our streams of commerce.

American laborers, manufacturing hubs, and intellectual property owners all have a vested interest in ensuring that when products are imported from overseas, the company doing so respects the laws of our Nation. This means that our country also has a vested interest in importing products that do not violate patents, U.S. pat-

ents, trademarks, and copyright laws, products that have not been produced in violation of U.S. human rights laws, and products that do not unduly interfere with vital American manufacturing sectors.

The ITC is the designated venue for weighing such alleged violations. While our colleagues on Ways and Means have jurisdiction over the ITC and its dealings, we on House Judiciary have a particular interest in the proper functioning of the agency's adjudications because of its impact on intellectual property cases relevant to this Subcommittee's work. Under Section 337 of the Tariff Act of 1930, the United States, through the ITC, is permitted to investigate and exclude imported goods that infringe on U.S. intellectual property rights.

Unlike in District Courts, the ITC does not issue damages. Instead, it is required to take into consideration public interest factors to determine whether to issue a remedy such as an exclusion order. These factors include the impact of the importation of public health and welfare, competition in the U.S. economy, production of competitive articles in the U.S., and the best interests of American consumers.

Today, I expect to hear some of my colleagues argue that the differences between patent litigation in the District Courts and the ITC mean that the latter is unfair, that we need to change how the ITC does business and that various shadowy figures are using the ITC to take advantage of the system in U.S. business.

I respectfully disagree. At its core, a patent right is the right to exclude, making the ITC a particularly efficient means by which to enforce the fundamental purpose of a patent. Between exorbitant costs, procedural hurdles, and long wait times, it has become difficult for a small business owner to hold and enforce a patent here in the United States.

It is unsurprising to me that the same folks who say our patent system is doing just fine as is, would also like to reign in the ability of the ITC to take and decide patent disputes. What we must remember is that the ITC is a separate system designed for a different purpose. ITC only issues trade remedies. It doesn't issue determinations of validity or for injunctive relief and is only available to a smaller segment of the patent-owning population. Section 337 investigations are designed to reach determinations quickly because businesses on both sides of the disagreement have an interest in speedy resolution to determine whether a product can be imported into the United States.

On the specific topic of remedies, exclusion orders are narrower than injunctions in District Courts and limited to the importation of infringing products from overseas. Some argue that patent owners are going to the ITC for relief because it has become the only way to prohibit a company from making an infringing product available while a District Court case is ongoing.

I agree that patent owners should not be forced to resort to the limited ITC remedies to solve issues in our patent litigation. That is why I am looking forward to joining Congresswoman Dean later this year when she introduces a bill to restore the availability of preliminary injunctions to patent litigants.

I want to thank Chair Issa for his ongoing commitment to bipartisanship even when at times we disagree on policy. This Sub-

committee's ability to hold serious hearings that delve into complicated topics is unmatched and I am grateful to have Chair Issa as a partner across the aisle.

Thank you also to our witnesses for being here today and I look forward to hearing your testimony and I yield back the balance of my time.

Mr. ISSA. I thank the gentleman. Without objection, all other opening statements will be included in the record. I now would like to introduce our witnesses.

Ms. Tara Hairston is a Senior Director for Technology Policy at the Alliance for Automotive Innovation where she works on technology innovation, artificial intelligence, cybersecurity, intellectual property rights protection, and other issues. She previously served five years as the head of Government Relation at Kaspersky and spent nearly a decade working on Federal and State policies at Honda Corporation.

Mr. Sam Korte is a Senior Principal Counselor for Intellectual Property at the Garmin International Corporation where he works on global intellectual property issues such as portfolio management, inbound and outbound patent licensing, patent prosecution, and patent litigation. Prior to joining Garmin, he was an attorney in private practice where he focused on intellectual property law.

We also have Professor Jorge Contreras. Mr. Contreras is the James T. Jensen Endowed Professor for Transactional Law and the Director of Program on Intellectual Property and Technology Law at the University of Utah. Professor Contreras teaches and researches in the area of intellectual property, property law, technical standardization, antitrust, and science policy.

Professor Michael Doane is the Visiting Assistant Professor of Law at the University of Akron of Law. Before he taught full time as a Professor, he served as General Counsel to Kent Displays and was the intellectual property attorney in private practice.

We welcome all our witnesses and thank them for appearing here today.

We will begin by asking you to rise to take a swearing-in oath. Please raise your right hands. Do you solemnly swear or affirm under penalty of perjury that the testimony you are about to give will be the truth and correct to the best of your knowledge, information, and belief, so help you God?

Thank you, let the record reflect that all witnesses answered in the affirmative.

As is the policy and we probably have all seen it on C-SPAN, your entire written statements and intended oral statements will be placed in the record. We only ask that you try to limit yourself on or very close to five minutes so that we have time for a round of questioning, notwithstanding votes that are inevitably going to take us away.

I now recognize Ms. Hairston for her opening remarks.

STATEMENT OF TARA HAIRSTON

Ms. HAIRSTON. Chair Issa, Ranking Member Johnson, and the distinguished Members of the Subcommittee. My name is Tara Hairston. I am Senior Director of Technology Policy at the Alliance for Automotive Innovation which represents the automakers pro-

ducing most of the vehicles sold in the United States, and other players within the automotive ecosystem.

Thank you for the opportunity to testify at this hearing to share the auto industry's perspective on intellectual property rights' complaints and the U.S. International Trade Commission.

Let me say at the outset, the auto industry knows the value of intellectual property rights to innovation. As significant rights holders, auto companies support robust legal protections for intellectual property rights. However, the auto industry today faces frequent and costly lawsuits alleging intellectual property rights infringement, many of which are filed by nonpracticing entities making spurious assertions. This is happening more and more frequently, and it is a real problem. Auto companies want to ensure that intellectual property rights are properly granted and not being used for anticompetitive purposes.

My full written testimony expands on the following essential points:

- First, auto companies support the ITC Section 337 investigative authority.
- Second, Section 337 disputes involving auto companies have evolved in recent years.
- Third, the auto industry is increasingly concerned about the use of Section 337 by nonpracticing entities or NPEs.
- Fourth, the auto industry supports ITC reform.

The auto industry agrees with and supports the intent of Section 337 to protect domestic industry from unfair foreign competition. Auto companies have filed their own Section 337 complaints at the ITC, when imported products infringe their intellectual property rights and/or when there was unfair competition. Auto companies have also been the targets of Section 337 investigations including those involving abusive claims by NPEs.

Historically, Section 337 auto disputes dealt with importing mechanical and electromechanical articles, but now they involve technologies like semiconductors, microelectronics, and artificial intelligence. These modern technologies have led to a major increase in the number of patents in the automotive space which, in turn, has resulted in more patent infringement lawsuits targeting auto companies both in District Court and at the ITC. At the same time, auto companies are incorporating more technologies that are not unique to the industry into their products which also expands the number of patented technologies on which ITC complaints can be filed.

A significant number of these cases have been brought by NPEs. NPEs regularly bring Section 337 complaints to the ITC often with the intent to gain unfair leverage against an auto company and force a company to settle pending litigation in another venue. They often succeed. The possibility that the ITC will issue an exclusion order makes the ITC an appealing venue for this purpose. This activity diverts important automotive resources from innovation and manufacturing to expensive litigation and settlements.

Complaints filed by NPEs at the ITC frequently relate to small dollar parts within a vehicle. A potential violation of one patent could result in an import ban on an entire vehicle. Shared plat-

forms across a single automaker or shared suppliers with components to multiple automakers could result in the inclusion of multiple vehicles.

Since the primary enforcement remedy available to the ITC is an exclusion order that applies to the entire vehicle, auto companies are frequently forced into settling even when the merits of the complaint are weak. These exclusion orders hurt manufacturers, suppliers, customers, and overall competition by reducing consumer choice, discouraging innovation, and increasing costs for companies compared with others in the marketplace. This is why ITC reform is necessary so that the ITC can focus on its mission of protecting domestic industry and so that it is no longer misused by NPEs to hire manufacturers, workers, and consumers.

The automotive industry supports the following reforms:

- Strengthen the domestic industry requirement to focus on production-based licensing, not revenue-based licensing;
- Reinforce consideration of the public interest throughout a Section 337 investigation;
- Identify potentially dispositive issues that should be decided by ALJs within a 100 days of instituting an investigation;
- Limit the issuance of exclusion orders when an allegedly infringing component is less than or equal to 10 percent of the overall product; and
- Mandate disclosure on real parties and interests by complainants and respondents.

These reforms would go a long way to making the ITC a less-attractive venue for NPEs, seeking to force settlements in separate litigation.

The Members of the Subcommittee, the ITC needs reform. This is an essential agency that advises the President and Congress on trade issues, but it is being misused by NPEs. This hurts both consumers and manufacturers. In our view, Congress should require the ITC to demonstrate that any exclusion order preventing the importation of a product into the U.S. is in the public interest, but this is not the case today. The Alliance for Automotive Innovation looks forward to working with Congress on meaningful reforms to the ITC. Thank you and I am happy to answer any questions.

[The prepared statement of Ms. Hairston follows:]

**STATEMENT
OF THE
ALLIANCE FOR AUTOMOTIVE INNOVATION**

**BEFORE THE:
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET
COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES**

**LEGISLATIVE HEARING TITLED:
“IP Litigation and the U.S. International Trade Commission”**

July 23, 2024

**PRESENTED BY:
Tara Hairston
Senior Director, Technology Policy**



Chairman Issa, Ranking Member Johnson, and distinguished members of the Subcommittee, on behalf of the Alliance for Automotive Innovation (“Auto Innovators”) and our member companies, thank you for the opportunity to appear at this hearing to share the automotive industry’s perspective on intellectual property rights complaints and the United States International Trade Commission, or the USITC.

The Alliance for Automotive Innovation was formed in 2020 and represents the automakers producing most vehicles sold today in the United States, original equipment suppliers, technology companies, battery makers, and other value-chain partners within the automotive ecosystem.

Representing approximately 5 percent of the country’s Gross Domestic Product, responsible for supporting nearly 10 million jobs, and driving \$1 trillion in annual economic activity, the automotive industry is the nation’s largest manufacturing sector.

My testimony makes the following essential points:

- Intellectual property rights are key to automotive innovation;
- Automotive companies are supportive of USITC’s Section 337 investigative authority;
- The nature of Section 337 disputes involving the automotive industry has evolved in recent years;
- The automotive industry is increasingly concerned about the use of Section 337 by non-practicing entities; and
- The automotive industry supports USITC reform.

Intellectual Property Rights are Key to Automotive Innovation.

From copyrights to patents to trademarks to trade dress to trade secrets, the automotive industry recognizes the value of intellectual property rights to innovation. For example, the issuance of high-quality patents protects the significant investments that automotive companies make in research and development to bring breakthrough technologies to consumers. Trademark enforcement counters the threat of counterfeit automotive components, which endanger public health and safety and may not operate or perform as a consumer would expect.

As significant rights holders, automotive companies support robust legal protections for intellectual property rights. At the same time, however, the automotive industry faces frequent lawsuits alleging intellectual property rights infringement, many of which are filed by non-practicing entities making spurious assertions. Automotive companies want to ensure that intellectual property rights are properly granted and not being used for anti-competitive purposes.

Automotive Companies Support the USITC’s Section 337 Investigative Authority.

The automotive industry agrees with and supports the intent of Section 337 of the Tariff Act of 1930 to protect domestic industry from unfair foreign competition. Automotive companies have a long history of participation in Section 337 investigations before the USITC. Our member

companies have used Section 337 to file their own complaints at the USITC when imported products infringed their intellectual property rights and/or when there was unfair competition involving such products. Automotive companies have also been the targets of Section 337 investigations, including those involving abusive claims by non-practicing entities.

The Evolution of Automotive Section 337 Disputes at the USITC.

Historically, Section 337 disputes involving automotive companies addressed the “importation of mechanical and electromechanical articles, ranging from such components as tires, wheels, headlamps, engines, transmissions; to security systems, control systems, infotainment systems.”¹ However, new advancements in automotive technology – including automation, connectivity, crash avoidance, cybersecurity, and electrification – involve modern technologies like semiconductors, microelectronics, and artificial intelligence. Increasing use of computerized systems has introduced significant complexity in vehicles and by extension, the global supply chains that contribute to their manufacture. These technologies have also led to an increase in the number of patents being issued in the automotive space, which, in turn, has resulted in more patent infringement lawsuits targeting automotive companies, both in district court and at the USITC.² At the same time, automotive companies are incorporating more technologies that are not unique to the industry into their products, which also expands the number of patented technologies on which USITC complaints can be filed.

Automotive Concerns with Section 337.

Lawsuits against automotive companies alleging patent infringement have increased partially due to automotive companies incorporating more technologies that are not specific to the automotive industry. A fair number of these cases have been brought by non-practicing entities.

These entities regularly bring Section 337 complaints to the USITC, often with the intent to gain unfair leverage against an automotive company and force a company to settle pending litigation in another venue. The possibility that the USITC will issue an exclusion order, a remedy not available in U.S. courts, makes it an appealing venue for this purpose. In the end, important automotive resources are often diverted away from innovation to expensive litigation and settlement negotiations.

Complaints filed by non-practicing entities at the USITC frequently relate to small dollar parts within a vehicle. Since the primary enforcement remedy available to the USITC is an exclusion order that applies to the entire vehicle, automotive companies are frequently forced into settling – even when the merits of the complaint are weak. A potential violation of one patent could result in an import ban on an entire vehicle. Shared platforms across a single automaker or shared suppliers with components to multiple automakers could result in the exclusion of multiple vehicles. Such exclusion orders hurt manufacturers, suppliers, customers, and overall

¹ Foley & Lardner LLP, “Automation, Electrification, and Connectivity: The Auto Industry in the ITC,” Auto Trends Series: Article 5, 11 April 2023, (last accessed July 17, 2024): [Automation, Electrification, and Connectivity: The Auto Industry in the ITC | Foley & Lardner LLP](#).

² See *id.*

competition, by reducing consumer choice, discouraging innovation, and increasing costs for those companies compared with others in the marketplace.

Automotive Support for USITC Reform.

The USITC should be reformed so that it can focus on its mission of protecting domestic industry and so it is no longer misused by non-practicing entities to harm manufacturers, workers, and consumers. To this end, the automotive industry supports the following reforms:

- **Strengthen the domestic industry requirement.** Specify that production-based licensing that leads to the creation of products embodying patented inventions is necessary to rely on the USITC’s “domestic industry” standard. Eliminate the ability of non-practicing entities to satisfy the domestic industry requirement by subpoenaing licensees that are not party to the complaint.
- **Reinforce the public interest requirement.** Direct the USITC to consider the public interest throughout a Section 337 investigation. Require the USITC to make an affirmative determination as to whether an exclusion order preventing the importation of a product into the U.S. is in the public interest. Modify the “production of like articles” public interest factor to focus exclusively on production by the complainant and its licensees and not third-party production.
- **Reduce the time to disposition.** Require the USITC to identify potentially dispositive issues that can be heard on an expedited basis and direct Administrative Law Judges to decide such issues within 100 days of instituting an investigation.
- **Limit the issuance of exclusion orders.** Prohibit the issuance of an exclusion order when an allegedly infringing component is less than or equal to 10 percent of the value of the overall product containing the component.
- **Increase transparency in USITC complaints.** Mandate that complainants and respondents in Section 337 USITC complaints disclose the real parties in interest, including disclosure of any and all beneficial owners and investors.

These reforms would make the USITC a less attractive venue for non-practicing entities seeking to force settlements in separate litigation.

On behalf of the U.S. automotive industry, the Alliance for Automotive Innovation looks forward to working with Congress on meaningful reforms to the USITC that will retain the agency’s important mission, while ensuring that it is no longer misused by non-practicing entities.

Mr. ISSA. Thank you. Mr. Korte, you will be the last witness before we break for about 30 minutes total to do four votes on floor. Please proceed.

STATEMENT OF SAM KORTE

Mr. KORTE. Thank you, Chair Issa, Ranking Member Johnson, and the distinguished Members of the Subcommittee. My name is Sam Korte, and I am a Patent Attorney with Garmin.

Garmin pioneered the GPS industry. Some of you may be familiar with our car navigation devices, smart watches, and fish-finders, but we also make products as diverse as aircraft auto-landing systems and Doppler radars. We are a global company employing over 7,000 people in the United States including thousands of highly skilled engineers. We have three large manufacturing facilities in Florida, Oregon, and Kansas. Intellectual property is very important to Garmin. We hold thousands of patents on our products and are committed to a strong patent system. A balanced patent system is not only necessary, but also a key factor in our ability to grow our U.S. business and employ thousands of Americans.

In my testimony, I will address three issues:

- How the ITC has shifted from this root as a specialized forum for addressing international trade disputes to a super power and super expensive District Court accessible to anyone with a patent.
- How ITC 337 investigations often target American manufacturers impacting the design and manufacture of products within the United States, resulting in a high cost to everyone involved.
- How Garmin, as an American manufacturer, has experienced these effects firsthand and has recommendations for Congress to address these issues.

Section 337, dating back to its roots with the Tariff Commission was never intended to involve routine patent lawsuits, but over the years, through statutory changes by Congress and the ITC's own interpretation of the law, the ITC has become a forum accessible to almost anyone with a patent. In many ways, the ITC is now no different than any Federal Court with one critical exception.

Exclusion orders which bar all imports of infringing products are automatic if the ITC finds a patent violation. District Courts, however, only employ the nuclear option of an injunction by carefully weighing equitable factors related to the parties and the public interest. In almost all cases, ITC exclusion orders against losing companies take effect soon after the ITC issues its final determination. Assuming a losing company is going to remain in business, it must either pay whatever ransom is demanded by the patent holder or go through the expense of changing its products. This is all, in addition, to the cost of defending of parallel lawsuits on the exact same technology with the exact same people in Federal District Court.

Our cost to defend an ITC investigation is multiple to costs of defending a case in Federal District Court, in some cases exceeding \$10 million. None of this is lost on those looking to harm U.S. manufacturers. Patent trolls, or nonpracticing entities if you prefer,

have targeted Garmin at the ITC over basic commodities like computer memory and microprocessors. Because these components are central to Garmin's U.S. product manufacturing process, a loss at the ITC could shutter our critical American factories unless Garmin, of course, pay whatever ransom was demanded.

Congress has many options to address these problems with the ITC.

First, Section 337's domestic industry language has confused the ITC and the Federal Circuit since it was last revised by Congress in 1988. Clarifying the language regarding domestic industry such as by requiring a patent owner to show that it has assisted in bringing a product to market through licensing or other efforts would ensure that the ITC is not merely functioning as another Federal Court.

Today, a patent owner can fabricate domestic industry by sitting on its patent for decades, suing a manufacturer that independently developed its products, chiefly licensing its patents to the manufacturer it just sued, and then racing to the ITC to file a 337 complaint against the rest of the established industry. This practice should end.

Second, Section 337 could also be revised to address automatic exclusion orders by requiring the ITC to engage in a more detailed analysis of the public interest including weighing the impact of an exclusion order on a U.S. company, American workers, and the public at large.

Finally, it is not lost on Garmin that the statutory purpose of the ITC is to protect American domestic industry, companies just like Garmin, with factories and places like Florida, Oregon, and Kansas. The ITC is now routinely used by foreign companies, sometimes funded by their own governments to disrupt American innovation and production. It is impossible to tell the true party behind an ITC investigation and ITC does not ask. This distortion of the ITC's purpose undermines the entire congressional intent behind Section 337 and poses a threat to the ability of American companies to compete on the global stage. Congress is best suited to address this problem.

Thank you again for the opportunity to present testimony on this important issue facing American companies. I look forward to your questions.

[The prepared statement of Mr. Korte follows:]

U.S. House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

IP Litigation and the U.S. International Trade Commission
July 23, 2024

Written Testimony of
Sam Korte
Senior Principal Counsel – IP
Garmin International, Inc.

Chairman Issa, Ranking Member Johnson, and Distinguished Members of the subcommittee:

Good morning and thank you for the opportunity to provide testimony on IP Litigation and the U.S. International Trade Commission. My name is Sam Korte and I am Senior Principal Counsel for Intellectual Property at Garmin. I have been a practicing patent attorney for 19 years, focusing on global intellectual property issues including patent portfolio management, patent licensing, and patent litigation in the U.S. and abroad. During my 17 years at Garmin, I've helped defend multiple cases brought against Garmin at the ITC and have witnessed first hand how the ITC can be weaponized against American manufacturers.

In my testimony, I will address three issues:

- How the ITC has shifted from its roots as a specialized forum for addressing international trade disputes, to a superpowered district court accessible to anyone with a patent.
- How ITC 337 Investigations often target American manufacturers, impacting the design and manufacture of products within the United States.
- How Garmin, as an American manufacturer, has experienced these effects firsthand.

Founded in 1989, Garmin pioneered the GPS industry. We are a global company, employing over 7,000 associates in the United States, including thousands of high-skilled engineers, with three large manufacturing facilities in Kansas, Oregon and Florida as well as numerous engineering, R&D and other facilities across the country. You may already be familiar with our car navigation devices, smartwatches, or fish finders. But we also make products as diverse as aircraft autonomous landing systems

and Doppler radars. We hold thousands of patents on these products and are committed to a robust and enforceable patent system in the US. We face aggressive competitors, big and small, from around the globe. Intellectual Property is very important to Garmin, and we support and depend on a regulatory and legal framework that simultaneously encourages innovation while protecting against bad actors seeking to misuse our courts and administrative agencies.

Although litigation in federal district court is certainly not fun or cheap, Congress and our courts have developed safeguards over the years to protect due process and provide basic fairness. The ITC, which is vested with incredible and unparalleled enforcement powers under Section 337, lacks the statutory, procedural, and common law protections found in federal court. All at mind-boggling expense to the parties involved.

Ironically, the Commission was created to address trade disputes and not be a duplicate federal district court. Section 337 was never intended to involve routine patent lawsuits. The ITC, known initially as the Tariff Commission when it was formed almost 100 years ago, was provided patent enforcement powers to address trade violations that could not be remedied by tariffs alone¹.

Over the years, through statutory changes by Congress and the ITC's own interpretation of the law, the ITC has shifted away from its original mission and has become a forum accessible to almost anyone with a patent. In many ways, the ITC is now no different than any federal district court—with one critical exception. Exclusion orders—barring all imports of products—are virtually automatic if the ITC finds a patent violation. District courts only employ their equivalent nuclear option of an injunction by carefully weighing various factors related to the parties and the public interest. Federal courts do not issue injunctions on trivial functionality and do not issue injunctions to non-practicing entities. The same can not be said for the ITC.

In almost all cases, ITC exclusion orders take effect soon after the ITC issues its final determination. And as appeals to the U.S. Court of Appeals for the Federal Circuit can take years to be heard and resolved, the result is that a losing company at the ITC does not have access to effective appellate review. Assuming it is going to remain in business, the losing company must either pay whatever amount is demanded by a patent holder or go through the expense of changing its products². This effectively becomes a ransom for the defendant.

¹ S. Alex Lasher, [The Evolution of the Domestic Industry Requirement in Section 337 Investigations Before the United States International Trade Commission](#), 18 U. Balt. Intell. Prop. L.J. 157 (2010).

² Colleen V. Chien & Mark A. Lemley, [Patent Holdup, the ITC, and the Public Interest](#), 98 Cornell L. Rev. 1 (2012).

As the patent owner's ransom may be untethered to the actual value of its patent, many companies, including Garmin, now start modifying their products as soon as the ITC begins its investigation—otherwise they risk not having any products to sell if there is an adverse ITC ruling. Even minor tweaks—like the angle of a particular part or the color of an icon—can cause major disruption to years-long supply chain, production and distribution schedules. And, once a change has been made, there's little reason for the targeted company to settle—it has already addressed, at great cost, the only remedy available to patent owners at the ITC. Regardless of the type of resolution reached, millions of dollars are ultimately squandered due to the overwhelming threat of an exclusion order banning a product—or entire family of products—from import and sale.

The Tariff Commission's initial patent investigations involved importers who could not easily be hauled before U.S. courts³. Personal jurisdiction, or service, may have been impossible to secure over bulk importers of knockoff goods. In those situations, Section 337 provided an effective process for patent owners faced with an unknowable enemy. In contrast, Section 337 Investigations today almost always have counterpart litigation in federal court and therefore involve disputes that could be—and already are—heard in federal court. This only further increases the cost and complexity of defending patent allegations in the United States, as well as exacerbates the administrative burden on courts and the ITC. This administrative burden is ultimately borne by U.S. taxpayers⁴.

Federal courts narrowly tailor injunctions to ensure they can be easily followed and enforced. The ITC does not narrowly tailor its exclusion orders. It typically bars all infringing products without elaboration. These overboard exclusion orders may be useful for addressing trade disputes like those addressed by the Tariff Commission in its infancy, but they are not suitable for the typical private, commercial dispute between two companies that now comprises the bulk of the ITC's docket. Assuming no ransom is paid to the patent owner once an exclusion order is issued, the losing party and the patent owner must then head to U.S. Customs and Border Protection (CBP) and further litigate with CBP's specialists over the scope of the ITC's exclusion orders.

Again, these observations are based on my personal experience with ITC investigations over my 17 years at Garmin. Our cost to defend an ITC investigation is multiples the cost of defending a case in federal district court—in some cases exceeding \$10 million dollars. Anecdotally, we know others have faced litigation costs 2 or 3 times greater. This cost, complexity, and what amounts to a nuclear option through the ITC's exclusion

³ See, e.g., H.R. REP. NO. 100-40, pt. 1 at 157 (1987) and related history of the 1988 amendments to Section 337.

⁴ The ITC requested \$132 million for FY 2025. The agency notes it faces a high workload because few 337 Investigations settle.
https://www.usitc.gov/documents/fy_2025_congressional_budget_justification_executive_summary.pdf

order authority is not lost on those looking to harm U.S. manufacturers. Patent trolls, or non-practicing entities if you prefer, have targeted Garmin at the ITC over basic commodities like computer memory and microprocessors. Because these components are central to Garmin's U.S. product manufacturing process, a loss at the ITC could easily shutter our critical American factories—unless Garmin of course paid whatever ransom was demanded⁵. Fortunately, Garmin successfully fought and won these fights. We chose to defend our engineers, the design of our products and our thousands of jobs and numerous operations in the US. But it was an unnecessary exercise completely untethered from the type of disputes the Tariff Commission was created to solve. Even worse, the disputes were duplicative of what we were already fighting at great cost in federal court.

Moreover, Garmin is faced with floods of knockoff products from China that misappropriate our patented technology, but we have not used Section 337 to address these imports. Instead, U.S. District Court has proven to be the most effective way to combat these unfair trade practices as the range of remedies available to patent owners facilitates settlement and resolution.

Positively, Congress has many options to address these problems at the ITC. Section 337's domestic industry language has confused the ITC and the Federal Circuit since it was last revised in 1988. Clarifying the language regarding domestic industry, such as by requiring a patent owner to show that it has assisted in bringing a product to market before filing a complaint with the ITC—even through licensing in advance of manufacturing—would ensure that the ITC is not merely functioning as another federal court while still providing an accessible venue to manufacturers, small inventors, and universities who are establishing an actual domestic industry⁶. Today, a patent owner can fabricate domestic industry by sitting on its patent for years, suing a manufacturer that independently developed its products, cheaply licensing its patent to the manufacturer, and then running to the ITC to file a 337 complaint against the rest of the established industry.

Section 337 could also be revised to address automatic exclusion orders by requiring the ITC to engage in a detailed analysis of the public interest, including weighing the impact on a U.S. company against the benefit of the exclusion order to the patent

⁵ This is not a theoretical risk. In 2022, Siemens laid off 200 workers in Kansas and Iowa due to a 337 investigation. <https://www.desmoinesregister.com/story/business/2022/02/10/siemens-gamesa-renewable-energy-lays-off-190-workers-fort-madison-iowa-hutchinson-kansas/6735971001/>

⁶ The Federal Trade Commission recommended such an approach in 2011. THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION, March 2011 (ftc.gov).

owner. A full consideration of the actual public interest would deter ransom-seeking at the ITC while still protecting patent owners involved in the market.

The U.S. patent system protects Garmin every day by ensuring that incredible technology created by our thousands of engineers cannot be easily stolen. There's no doubt the ITC can play a critical role in protecting American industry including companies like Garmin. But the ITC has shifted far from its roots of adjudicating trade disputes and now exists as a superpowered district court, but without juries or adequate appellate oversight. Refocusing the ITC on its statutory purpose of protecting U.S. industry will be beneficial to all.

Finally, it's not lost on Garmin that the statutory purpose of the ITC is to protect American domestic industry, like the large factories we operate in the United States. But the ITC is now routinely used by foreign companies, sometimes funded by sovereign wealth funds, to disrupt American innovation and production⁷. Congress is best suited to address this distortion of the ITC's mission.

Thank you again for the opportunity to present testimony on this important issue facing American companies and consumers alike. I look forward to your questions.

⁷ As one recent example, see the June 17, 2024, letter regarding the MimirIP ITC investigation sent by Senators Schumer, Crapo, Risch, Kaine, and Warner to Secretary Barton of the ITC.

Mr. ISSA. Thank you. As promised, we will now take a hopefully very short recess. We stand in recess.

[Recess.]

Mr. ISSA. The Committee will reconvene. When we left off, we had heard from two witnesses. We are now hearing from Professor Contreras. Yes, the mic both has to be turned on and held as close as possible. It is more effective that way. Thank you.

STATEMENT OF JORGE L. CONTRERAS

Mr. CONTRERAS. There we go. Thank you for that.

Mr. Chair, the distinguished Members of the Committee, my name is Jorge Contreras and I am a Professor of intellectual property law at the University of Utah.

In the years following World War I European manufacturers were accused of flooding U.S. markets with cheap goods that violated U.S. intellectual property rights. In response Congress authorized what became the International Trade Commission to investigate unfair acts pertaining to U.S. imports including the importation of infringing articles.

This authority was needed to fill gaps in then-existing law. For example, the U.S. Patent Act did not then offer a remedy against the sale of noninfringing products made abroad using processes patented in the U.S., nor could U.S. courts hearing patent cases assert jurisdiction over foreign producers of infringing goods.

Today more than a century later the world is a different place. The Patent Act has been amended to prohibit the sale of goods made abroad using infringing processes. Likewise, overseas firms routinely establish subsidiaries in the U.S. bringing them squarely within the jurisdiction of the U.S. courts. As a result, in 2022–2023 only six percent of ITC patent cases lacked a domestic respondent subject to personal jurisdiction in the U.S.

So, what about the other 94 percent of ITC patent cases? Ironically, they are brought against domestic companies who offer American consumers lower prices by manufacturing products overseas. They are brought by nonpracticing entities seeking to pressure manufacturers to enter into monetary settlements. Most surprisingly nearly a third of ITC patent cases are brought by foreign companies seeking to prevent U.S. companies from importing their own products for sale to U.S. consumers.

So, patent asserters will tell you that the ITC is a wonderful thing, that it affords them exclusionary remedies that are no longer available in the courts, that it is fast, that its judges and staff have unprecedented expertise in patent matters. So, whatever the merit of these assertions, and some of them are somewhat questionable, they do not avail.

Notwithstanding any tactical litigation advantages the ITC may offer to patent holders, there is little justification for the maintenance at an annual taxpayer expense of nearly \$40 million of a duplicate patent litigation system in the U.S.

With respect to patent matters, the ITC is duplicative. In the last two years 83 percent of all ITC patent cases had parallel proceedings in District Court often involving the same parties, the same patents, and the same infringing product. The result is costly and inconsistent parallel litigation.

We have recently seen examples in which patents are found invalid at the ITC and then asserted again in court. We have also seen the ITC extend its reach even beyond the patent statute blocking the importation of noninfringing goods that might someday be used for infringing purposes.

The truth is that the ITC offers patent holders a second bite at the apple, an unprecedented opportunity to prevail in one venue on claims that were rejected in another. This privilege, while understandably attractive to patent holders, is virtually unknown in any other form of litigation, from medical malpractice to breach of contract.

So, what should be done? Over the years a range of proposals have been made to reign in the ITC's ever-expanding patent jurisdiction, all to no avail. This month in its landmark decision in *Loper Bright v. Raimondo* the Supreme Court issued a clear message to the Nation that the power of administrative agencies in the U.S. has gone too far and that the authority of these agencies must yield to that of our constitutionally empowered courts. As such, the time is right for Congress to reconsider the patent jurisdiction of the ITC.

A few potential corrective measures might include:

(1) Restricting ITC actions to parties over which the Federal Courts lack jurisdiction;

(2) narrowing the definition of the U.S. domestic market to exclude patent assertion and licensing by parties that don't actually make or sell products in the U.S.;

(3) requiring the ITC to follow judicial precedent when issuing remedies for patent infringement; and

(4) enabling the courts to work directly with the Customs and Border Protection Agency to prevent the importation of patent-infringing goods as they already do with products that infringe U.S. copyrights and trademarks.

With one or more of these straightforward measures Congress can correct the ITC's course to focus again on its primary mission of protecting U.S. markets from unfair foreign imports. Thank you for your time.

[The prepared statement of Mr. Contreras follows:]

U.S. HOUSE OF REPRESENTATIVES (118th CONGRESS)
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE
INTERNET

IP Litigation and the U.S. International Trade Commission

Jorge L. Contreras
James T. Jensen Endowed Professor for Transactional Law
Director, Program on Intellectual Property and Technology Law
University of Utah S.J. Quinney College of Law

Written Testimony

July 23, 2024

Mr. Chairman and distinguished members of the Committee, my name is Jorge Contreras and I am the James T. Jensen Endowed Professor for Transactional Law and Director of the Program on Intellectual Property and Technology Law at the University of Utah S.J. Quinney College of Law. Prior to entering academia in 2010, I practiced law for seventeen years, advising clients on a range of transactional matters in the U.S., Europe and elsewhere. As an academic, I have published more than 150 articles and book chapters, and written or edited 12 books, on these and related topics.¹ I thank you for the opportunity to testify before you today.

In 1916, Congress created the U.S. Tariff Commission to advise the President on import tariff levels. Congress expanded the Commission's jurisdiction in 1922, and again in 1930 as part of the infamous Smoot-Hawley Tariff Act, to investigate *unfair acts* pertaining to U.S. imports. The courts soon interpreted Section 337 of the Tariff Act to cover the importation of articles that infringed U.S. patents. Yet the patent laws, and the global economic order, of the 1920s were radically different than they are today.

By authorizing the Commission to investigate matters of patent infringement, Congress sought to fill gaps in then-existing law. For example, the U.S. Patent Act did not then offer a remedy against the sale of noninfringing products made abroad using processes patented in the United States. Nor could U.S. courts hearing patent cases assert jurisdiction over foreign producers of infringing products. As a result, cheap infringing goods were flooding U.S. markets as European manufacturers scrambled to recover from the economic devastation of World War I.

¹ A more comprehensive treatment of the topics discussed in this testimony can be found in Jorge L. Contreras, *Reconsidering the Patent Jurisdiction of the International Trade Commission*, 38 HARVARD JOURNAL OF LAW & TECHNOLOGY (2024, forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4840731. Other scholars who have raised some of the critiques noted in my comments include Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at The International Trade Commission*, 50 WM. & MARY L. REV. 63 (2008); Robert W. Hahn & Hal J. Singer, *Assessing Bias in Patent Infringement Cases: A Review of International Trade Commission Decisions*, 21 HARV. J. L. & TECH. 457 (2008); Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLORIDA LAW REVIEW 529 (2009); Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1 (2012); Thomas F. Cotter, *The International Trade Commission Reform or Abolition? A Comment on Colleen v. Chien & Mark A. Lemley, Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL LAW REVIEW ONLINE 43 (2013); Charles Duan, *The U.S. International Trade Commission: An Empirical Study of Section 337 Investigations*, R STREET POLICY STUDY NO. 246 (2021).

Today, more than a century later, the world is a different place. The U.S. Patent Act has been amended to prohibit the sale of non-infringing products made abroad using infringing processes. Likewise, manufacturing firms based overseas routinely establish subsidiaries in the U.S., bringing them squarely within the jurisdiction of the U.S. courts. In fact, in 2022 and 2023, only 6% of ITC patent cases were brought against foreign manufacturers that were allegedly beyond the jurisdictional reach of U.S. courts.

What about the other 94% of the ITC's patent cases? They are brought by domestic companies against domestic rivals who offer lower prices to U.S. consumers by having products manufactured or assembled overseas. They are brought by non-practicing entities seeking an exclusion order to pressure manufacturers to enter into monetary settlements with them. And, most surprisingly, nearly a *third* of ITC cases in the last two years were brought by *foreign* companies seeking to prevent *U.S.* companies from importing their own products back into the U.S. Think about this for a moment: the U.S. International Trade Commission, which was created to protect U.S. markets from unfair foreign imports, is now a venue where *foreign* companies can seek to prevent *domestic* manufacturers from selling their own products in the U.S. Members of the Committee, I submit to you that something has gone very wrong with the International Trade Commission.

You will undoubtedly hear from patent holders, domestic and foreign, that the ITC is a wonderful place. That it affords patent holders exclusionary remedies that are no longer available in the courts. That it is fast. That its judges and staff have unprecedented expertise in patent matters.

Whatever the merit of these assertions, and some of them are indeed questionable, they do not avail. Notwithstanding any tactical advantages the ITC may offer to patent holders, there is little justification for the maintenance, at an annual taxpayer expense of nearly \$40 million, of a duplicate patent litigation system in the United States.

And with respect to patent matters, the ITC *is* duplicative. In the last two years, 83% of all ITC patent cases had parallel proceedings in district court, often involving the same parties, the same

patents (or nearly identical members of the same patent families) and the same allegedly infringing products. And while the courts have discretion to stay some proceedings pending the resolution of ITC matters, they do not always do so.

The result is costly and often inconsistent litigation on two fronts. We have recently seen examples in which patents are found invalid at the ITC and then asserted again in court, which gives no preclusive effect to ITC validity determinations. We have also seen the ITC extend its reach even beyond the patent statute, blocking the importation of noninfringing goods that *might* someday be used for infringing purposes. The truth is that ITC offers patent holders a supercharged “second bite at the apple” – an unprecedented opportunity to succeed in one venue on claims that were rejected in another. This privilege, while understandably attractive to patent asserters, is virtually unknown in any other form of litigation in the United States, from medical malpractice to breach of contract to tax evasion.

So what should be done? Over the years, a range of proposals have been made to rein in the ITC’s ever-expanding patent jurisdiction, all to no avail. But this month, in its landmark decision in *Loper Bright v. Raimondo*, the Supreme Court issued a clear message to the nation that the power of administrative agencies in the U.S. has gone too far, and that the authority of these agencies must yield to that of our Constitutionally empowered courts. As such, the time is ripe for Congress to reconsider the patent jurisdiction of the ITC.

A few potential measures might include (1) limiting the availability of the ITC to parties over which the federal courts cannot assert personal jurisdiction, (2) narrowing the definition of the U.S. domestic market to exclude patent assertion and licensing by parties that don’t manufacture or sell products in the U.S., (3) requiring the ITC to follow judicial precedent when issuing patent remedies, (4) aligning the ITC’s public interest analysis with that of courts assessing injunctive relief, and (5) enabling the courts to work directly with the Customs and Border Protection agency to prevent the importation of patent-infringing goods, as they already do with products that infringe U.S. copyrights and trademarks.

Contreras

ITC Patent Jurisdiction

With one or more of these straightforward measures, Congress can correct the ITC's course so that it can focus once again on its primary mission of protecting U.S. markets from unfair foreign imports.

I thank you again for the opportunity to share these thoughts with you today.

Mr. ISSA. Thank you. Professor Doane?

STATEMENT OF MICHAEL DOANE

Mr. DOANE. Chair Issa, Ranking Member Johnson, and the distinguished Members of the Subcommittee, thank you for this opportunity to speak with you today about intellectual property litigation before the U.S. International Trade Commission.

My name is Michael Doane and I'm a Law Professor at the University of Akron School of Law where I teach intellectual property law including a course on intellectual property practice at the U.S. International Trade Commission. Before I became an academic, I was a lawyer specializing in ITC litigation and general counsel for a small technology startup company. I have viewed Section 337 investigations for over 30 years from the perspective of the litigator and in-house counsel and now as an academic.

During that time Congress strengthened Section 337 to make it an effective tool to address infringement of U.S. intellectual property rights by unfair imports. Congress was particularly concerned with protecting American innovators such as startups, universities, and individual inventors from foreign infringers. Congress should be cautious of proposals to restrict access to relief under Section 337 to ensure that they do not harm this important sector of the United States' innovation economy.

Small startups face many challenges when bringing a new product to market. These include not only creating the patented technology but also developing a product that embodies the technology, obtaining financing to develop and bring that product to market, creating manufacturing capability, developing a distribution network, and ultimately finding customers. This is all expensive and time-consuming, particularly if the startup company is faced with infringing products sometimes before it is even able to fully develop and market its own product.

Quite frequently, indeed in almost every circumstance these infringing products are imported into the United States. Section 337 provides startups with the most direct and efficient remedy for this problem. Efforts to limit access to relief under Section 337 will ultimately do more harm than good.

Section 337, as has been noted, is a trade remedy statute, not an intellectual property statute, which was designed to address unfair imports and is one of the most effective mechanisms for defending U.S. intellectual property rights from imported infringing products, particularly from China.

Section 337 provides many advantages: Expert administrative law judges, comparatively expedited proceedings, interim jurisdiction, and effective relief. It is perhaps this last advantage in the form of an exclusion order that is the most significant. Because of this remedy Section 337 is frequently the most effective, if not the only option for addressing two specific challenges that startup companies face: (1) Patent holdout and (2) knockoff products offered in online marketplaces.

Patent holdout is when a large well-funded infringer uses its size and market dominance to ignore an IPR owner's infringement claims, imposes its own product on the product, and usually seeking to litigate the IPR owner into oblivion. Without a Section 337

exclusion order small entities could be forced in effect to license their technology to large importers at a reasonable royalty as determined by a District Court after years of litigation.

As to knockoff products, numerous infringers, usually Chinese, offer their products in large online marketplaces. Infringing goods are offered by countless difficult-to-identify entities. Such entities are not burdened by the expense of developing technology or creating a new product, simply create a low-quality copy that is sold at a discount. When challenged such online entities easily disappear and reemerge elsewhere under a different name to continue selling in the online marketplaces.

Policing online marketplaces to take down infringing products would be substantially more difficult if not impossible without Section 337. It is important that small entities have an avenue through which infringing products can be removed from the marketplace in a more efficient manner.

Monetary damages, if they can even be obtained, are certainly important, but the ability to develop and market one's own product free from unfair competition from infringing imported products, particularly for a small startup company, is infinitely more important. When faced with infringing imports the high cost of potential litigation may effectively deter a small company from seeking to enforce its IP rights particularly against a well-funded infringer.

Section 337 investigations, while also a potentially expensive endeavor, offer an effective and expedited remedy if successful. This is what Section 337 provides. In fact, Congress expressly amended 337 to make this relief more easily available to small innovators. As Senator Frank Lautenberg, one of the drafters of these amendments, noted, smaller businesses should not be denied the right to seek relief merely because they may have made smaller financial investments than large companies in developing or exploiting an intellectual property right.

Section 337 provides unique and effective relief against imported infringing products. Any effort to limit access to Section 337 will ultimately negatively impact those that Section 337 was expressly amended to protect and should be carefully considered. Thank you.

[The prepared statement of Mr. Doane follows:]

STATEMENT OF

Michael Doane

Visiting Assistant Professor of Law

University of Akron School

BEFORE THE

COMMITTEE ON THE JUDICIARY

Subcommittee on Courts, Intellectual Property and the Internet

U.S. House of Representatives

IP Litigation and the US International Trade Commission

July 23, 2024

INTRODUCTION

Chairman Jordan, Chairman Issa, Ranking Member Nadler, Ranking Member Johnson, and Members of the Subcommittee:

Thank you for this opportunity to speak with you today about Intellectual Property Litigation before the U.S. International Trade Commission.¹ I have viewed Section 337 Investigations for over 30 years from the perspective of a litigator, an in-house counsel and now as academic. During that time, Congress strengthened Section 337 to make it an effective tool to address infringement of U.S. intellectual property rights by unfair imports.²

¹ Professor Doane is speaking on his own behalf, and his views do not necessarily reflect the views of any institution with which he is affiliated.

²Uruguay Round Agreements Act of 1994, Pub. L. 103-465, 108 Stat. 4809 (1994); Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (1988).

Of particular concern was the protection of innovation centers such as startups, universities and individual inventors.³ Proposals to restrict access to relief under Section 337 should be carefully considered first to ensure that they do no harm to this important sector of the United States' innovation economy.

ADVANTAGES OF SECTION 337

Although not itself an intellectual property rights statute, Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, as Amended, plays an important and valuable role in the enforcement of intellectual property rights in the United States. The advantages Section 337 provides to U.S. intellectual property rights (IPR) owners are well documented:

- Expert Administrative Law Judges;
- Comparatively expedited proceedings;
- *In rem* jurisdiction;
- Broad discovery; and
- Effective relief.

It is perhaps this last advantage, effective relief against infringing imported products in the form of an exclusion order, that is the most significant.

Monetary damages are certainly important, but the ability to develop and market one's own product free from unfair competition from an infringing imported product, particularly for a small startup company, is infinitely more important. Small companies that rely on intellectual property, whether technology-based startups or small manufacturers of consumer products, face numerous challenges bringing a product to market even without the added distraction of enforcing intellectual property rights. When faced with infringing imports, the high cost of potential litigation, including the threat of post grant reviews at the U.S. Patent and Trademark Office, may effectively deter a small company from seeking to enforce its intellectual property rights, particularly against a well-funded infringer. Section 337 investigations are also a potentially expensive endeavor, but offer an effective remedy, if successful.

Section 337 is frequently the most effective option for addressing two specific challenges that startup companies face:

³ H.R. Rep. No. 100-40, Pt. 1, at 155 (1987); S. Rep. No. 100-71, at 128 (1987).

- Patent holdout – a large well-funded infringer uses its size and market dominance to ignore the IPR owner’s claims, impose its own product on the market and usually seek to litigate the IPR owner into oblivion.⁴
- Infringers offering their products in online marketplaces such as Amazon.com.

Without the *in rem* protections of Section 337, small entities could be forced, in effect, to license their technology to large importers at only a “reasonable royalty” as determined by a district court (after years of litigation). Policing large online marketplaces to take down infringing products would be substantially more difficult, if not impossible. It is important that small entities have an avenue through which infringing products can be removed from the marketplace in a more efficient manner.

PATENT TROLLS AT THE USITC

In 2006, the U.S. Supreme Court held in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) that patent holders in U.S. District Court litigation must satisfy the standard four-factor test, including a showing of irreparable harm, to obtain a permanent injunction against continued patent infringement. Since then, debate has been particularly vociferous as to the proper scope of Section 337. Because Section 337 does not require a showing of either injury or irreparable harm to obtain an exclusion order from the USITC to bar importation of infringing products into the United States,⁵ allegations of purported misuse of Section 337 by non-practicing entities (NPE), including patent assertion entities (PAE), euphemistically called “patent trolls,” have arisen. Although Section 337 is used by some PAEs to enforce their intellectual property rights, the claims of a “flood” of Section 337 complaints by such entities is overstated and not born out by the data.

The USITC annually publishes statistics setting forth the number of Section 337 investigations filed by NPEs. For this analysis, the USITC divides NPE’s into two categories:

⁴ Colleen V. Chien, *Holding Up and Holding Out*, 21 MICH. TELECOMM. & TECH. L. REV. 1, 20 (2014).

⁵ To strengthen Section 337, Congress, in the 1988 amendments, specifically removed injury as a requirement for obtaining relief under Section 337 for investigations involving infringement of a federally registered intellectual property right. Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107 (1988).

Category 1 NPEs. Entities that do not manufacture products that practice the asserted patents, including, e.g., inventors who may have conducted R&D or built prototypes but do not make a product covered by the asserted patents and therefore rely on licensing to meet the domestic industry requirement; research institutions, such as universities and laboratories, that do not make products covered by the patents, and therefore rely on licensing to meet the domestic industry requirement; start-ups that possess IP rights but do not yet manufacture products that practice the patent; and manufacturers whose own products do not practice the asserted patents.

Category 2 NPEs. Entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents.⁶

Although gray areas may exist, these categories seek to distinguish between innovative NPEs (startups, universities, etc.) and the less favored “revenue driven” PAEs. This division is useful for statistical analysis, but unfortunately such classifications do not prevent Category 1 NPEs from being negatively impacted by reforms intended to address the activities of Category 2 NPEs, i.e., PAEs.

These statistics reveal that since the 2006 *eBay* decision, Section 337 complaints filed by Category 2 NPEs accounted for approximately 8% of all Section 337 complaints and averaging less than 4 complaints per year.⁷ Over the same period, Section 337 complaints filed by Category 1 NPEs accounted for approximately 11% of all Section 337 complaints and averaging between 4 to 5 complaints per year. Over this 18-year period the number of Category 1 complaints remained reasonably consistent each year with the highest number of complaints (10) filed in 2023. The Category 2 numbers are slightly skewed as approximately 60% of these complaints were filed in two short spans, 2011-2013 and 2021-2022. The average for the remaining 13 years is approximately two complaints per year and approximately 5% of all Section 337 complaints. As the USITC noted, those alleging that NPEs were increasing the caseload at the USITC “have not offered a convincing analysis of the data on investigation institutions to support this suggestion.”⁸ Moreover, the efforts to reform Section 337 to address purported abuses fail to distinguish adequately between true PAEs and small non-manufacturing innovators

⁶ https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm

⁷ The percentages set forth in this section are the Witness's calculations based on the data published by the USITC. This data only shows the number of complaint filed, not whether complainants succeeded in obtaining relief.

⁸ *Facts and Trends Regarding USITC Section 337 Investigations*, April 15, 2013.

such as startups, universities and individual inventors and often negatively impact these entities.

SECTION 337 AND SMALL INNOVATORS

Section 337 is a trade remedy statute, not an intellectual property statute, and is designed to address unfair acts or unfair methods of competition in the importation of articles into the United States. Domestically manufactured articles are exempt from Section 337. To obtain relief under Section 337, a complainant must establish certain trade elements, i.e., importation, domestic industry and, in certain cases, injury to a domestic industry. Prior to 1988, a domestic industry had to be based on manufacturing or production-related activities in the United States. In the context of patent infringement, that meant that the complainant expended resources to produce or manufacture an article that practiced a claim of the asserted patent and was manufactured, at least in part, in the United States.⁹ Recognizing the growing importance of innovation and technology transfer to the United States economy, in 1988 Congress amended Section 337 to permit a domestic industry relating to an intellectual property right to be based on “substantial investment in its exploitation, including engineering, research and development, or licensing.”¹⁰

The legislative history of these amendments makes evident the intent of Congress to aid non-manufacturing innovators by giving them access to relief under Section 337. One of the original drafters of these amendments, Senator Lautenberg, stated:

For those who make substantial investments in research, there should be a remedy. For those who make substantial investments in the creation of intellectual property and then license their creation, there should be a remedy. . . . This provision should enable independent inventors and small businesses who otherwise lack the capacity to produce their product to seek relief under Section 337. Substantial investment for these intellectual property owners should be defined in terms of the labor, time, as well as financial resources they have committed to developing, patenting, or licensing their inventions. Smaller businesses should not be denied the right to seek relief merely because they may have made smaller financial

⁹ *Schaper Mfg. Co. v. USITC*, 717 F.2d 1368 1372-73 (Fed. Cir. 1983).

¹⁰ Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107, Aug. 23, 1988.

investments than large companies in developing or exploiting an intellectual property right.¹¹

This legislative purpose has become obscured as large importers of high technology-based products have shifted the focus of the debate to alleged “patent hold-up” when their products face exclusion from importation into the United States.

Much of the concern centers around circumstances in which the infringing component or functionality is part of a larger product that would be the subject of the exclusion order. What many do not appreciate, however, is that these importers make a business decision to expend billions of dollars to develop infrastructure to manufacture their products abroad, particularly in China.¹² This decision is what subjects their products to the jurisdiction of the USITC. Such importers, however, claim that barring the importation of such an article because of one patent would harm consumers or distort competition, in essence arguing that, even without a serious effort to obtain a license, the infringer is too big to infringe.

Congress understood that Section 337 could support innovation by protecting entities whose business models do not include manufacturing such as universities, individual inventors, startup companies or other entities that may be unable to develop or bring a commercial product to market. Some are unable to do so due to lack of funding, whereas others may have difficulty entering the market because of unfair competition from infringing importers, particularly those that engage in “patent holdout.”

Patent hold-out is described as “the practice of companies ignoring patents and patent demands because the high costs of enforcing patents makes prosecution unlikely - or, in other words, because they can get away with it.”¹³ The difficulties faced by startup companies confronting a well-funded accused infringer are illustrated in two recent Section 337 investigations in which, after years of district court litigation and multiple IPR proceedings before the U.S. Patent Trial and Appeal Board (PTAB), the only relief the startups have been able to secure thus far are limited exclusion orders issued by the USITC (one of which is currently stayed).¹⁴ These cases epitomize why Section 337 provides the

¹¹ 100 Cong. Rec. S 10714 (Aug. 3, 1988).

¹² See e.g., Patrick McGee, *How Apple Tied Its Fortunes to China*, The Financial Times (January 17, 2023); <https://www.ft.com/content/d5a80891-b27d-4110-90c9-561b7836f11b>

¹³ Colleen V. Chien, *Holding Up and Holding Out*, 21 MICH. TELECOMM. & TECH. L. REV. 1, 20 (2014).

¹⁴ *Certain Light-Based Physiological Measurement Devices and Components Thereof*, Inv. No. 337-TA-1276; *Certain Wearable Electronic Devices with ECG Functionality and Components Thereof*, Inv. No. 337-TA-1266.

most, and quite frequently only, effective remedy for small or non-manufacturing innovators against the infringing imports of opportunistic patent holdouts.

Unfortunately, many of the actions taken to make the USITC and Section 337 less attractive to Category 2 NPEs (aka patent trolls) apply with equal force to and to the detriment of Category 1 NPEs (startups, universities, etc.) For example, a complainant in the early stages of developing a product such as a startup or a university,¹⁵ an entity not expected to manufacture a product, may be precluded from seeking relief under Section 337 because they cannot prove the existence of a sufficiently developed product. Small entities such as startups typically cannot develop their inventions into marketable products without the prospect of near-term market returns. Such returns are unlikely if a larger competitor is already on the market with an infringing product. As a result, a startup company may be denied a Section 337 exclusion order simply because a larger, better-funded company may use its market dominance to keep the startup from fully developing its product.

ONLINE MARKETPLACES

Another problem faced by small startup companies, particularly those that produce small consumer goods, is the almost immediate availability of inexpensive knockoff products in online marketplaces such as Amazon.com. Infringing goods are offered by countless (usually Chinese) entities, sometimes with the same or similar address. When challenged, such online entities easily disappear and re-emerge elsewhere under a different name. Some online marketplaces claim to have procedures in place to address such infringement, but the value and effectiveness of what is essentially an infringer itself policing the other infringers in its online marketplace is, at best, questionable. This is particularly true when these online marketplaces actively recruit and induce these infringers to sell on their website.¹⁶

This issue can be effectively addressed by Section 337. Using Section 337's general exclusion order procedure, a complainant can sweep the marketplace of infringing products rather than try to knock them down one at a time in the equivalent of a game of Whac-A-Mole. To obtain such relief a complainant already must meet a higher standard of proof, i.e. potential circumvention of a limited exclusion order and difficulty identifying

¹⁵ *Certain Filament Light-Emitting Diodes and Products Containing Same*, Inv. Nos. 337-TA-1220.

¹⁶ See, e.g., Wade Shepard, *How Amazon's Wooing of Chinese Sellers is Killing Small American Businesses*, Forbes, Feb. 14, 2017.

infringers.¹⁷ The ability to address infringement even if the infringers are not a named respondent is an advantage unique to Section 337 that should not be impeded by further limitations on access to Section 337.

CONCLUSIONS

Section 337 provides U.S. intellectual property rights owners unique and effective relief against infringing products imported into the United States. The USITC and the U.S. Court of Appeals for the Federal Circuit have already taken steps to limit the ability of patent trolls to use Section 337 through tightening the domestic industry requirement. Efforts to address purported abuse will ultimately negatively impact those that Section 337 was expressly amended to protect. Amendments to Section 337, therefore, are unnecessary.

¹⁷ 19 U.S.C. § 1337(d)(2).

Mr. ISSA. Thank you. I want to thank all the witnesses.

With that, we are going to go—there are a lot of people who have various other requirements, so I am going to try to go to people in the order in which they can ask questions. So don't be surprised when it skips around on both sides.

With that, we go to the gentleman from Kentucky, Mr. Massie.

Mr. MASSIE. I thank the Chair.

Ms. Hairston, Mr. Korte, and Professor Contreras, you all mentioned this thing called public interest. Do any of you want to explain to me what public interest is in the context of deciding a patent dispute?

Ms. HAIRSTON, what do you mean by public interest, that the ITC should consider public interest?

Ms. HAIRSTON. Thank you for the question, Congressman Massie. We would say that in the—public interest means that it is for the four factors that have been articulated in the ITC statute in terms of public health and welfare, competitive conditions, and other factors should be considered when looking at the public interest, that it should not be left solely to the ITC to determine that potentially infringing or noninfringing goods would constitute a violation of public interest.

Mr. MASSIE. Mr. Korte, how would you describe the public interest consideration that you proposed?

Mr. KORTE. Yes, thank you, Congressman. So, public interest should be tied to the statutory purpose of the International Trade Commission, which is to protect American domestic markets. The ITC should not be taking any action, let alone an exclusion order, if it's damaging American industry. That should be the sort of analysis the ITC should do under Section 337. That should analysis—that analysis should include what's already in the statute in addition to other requirements like the impact on American workers, American factories, and the American industry at large.

Mr. MASSIE. Ms. Hairston, one of the remedies you said is, if there is 10 percent of the product that is infringing, or deemed to be infringing, assumed to be infringing, that you should still be able to import that product. Is that true?

Ms. HAIRSTON. Yes, Congressman Massie. That is a number that—the 10 percent threshold is something that we suggested in terms of to inviting conversation and dialog. Yes, a 10 percent of the overall product is attributable to the allegedly infringing product. We believe an exclusion order should not be issued.

Mr. MASSIE. OK. Let me just say something: I am appalled that you guys are here testifying like this. This is shameless. You are like here trying to divvy up the goods of the American inventor. What you are saying is that if you are only stealing 10 percent of the product, let us keep importing it. Let us just keep stealing it as long as the theft is at a low enough level.

Then this public interest notion. This is a communist term. What you are saying is it may be in the public interest to let somebody keep infringing. The Constitution guarantees the right to exclude somebody from infringing. It doesn't say that the government can come in and figure out what a fair price to pay is for that infringement, yet that is what all three of you, even you, Professor, are

suggesting with this term public interest, because we have seen it used in the past.

Really, I am just appalled that you have no shame in saying that you should be able to steal a product from an inventor in the United States, have it manufactured overseas in China, import that as a knockoff and if you are only stealing 10 percent of the idea.

Professor Doane, Professor Contreras suggested it seemed like that this ITC concept is archaic, that it is no longer needed, it has been supplanted by other means. Then, I hear you say, well, Congress has actually updated it. Mr. Korte said that the intent of Congress needs to be clarified. The intent of Congress is in the Constitution. We don't want you stealing things, getting them made overseas, ripping off American inventors, and then bringing it in here and selling cheap knockoffs to Americans that are faulty.

Professor Doane, is the ITC obsolete?

Mr. DOANE. Absolutely not, Congressman. As I said, it was specifically amended for the purpose of at least small innovators in 1988 and 1994 to make it easier for small inventors/universities to bring these cases. I think that's an important task of the commission.

Mr. MASSIE. Let me give you an example of whose hand has been caught in the cookie jar here. Apple saw this pulse oximeter technology. Said, oh, let's put that in an Apple Watch. They stole the idea, stole all the people that developed it from the original company that was making these in the United States, went to China, had this cheap CRAP made, and tried to bring it in and the ITC said you are infringing. Are you aware of this case, Professor Doane?

Mr. DOANE. Yes, sir, I am.

Mr. MASSIE. That seems like that is the way this should work when you have got a big corporation ripping off a smaller corporation and trying to get the CRAP made over in China instead of made here. Doesn't the ITC have a role to play there, Professor Doane?

Mr. DOANE. I think that is specifically one of the important reasons for the commission particularly in the circumstance of a small inventor like—a small innovation company like Masimo going up against a large importer of a product to be able to after years of litigation—they've been in litigation for I believe almost 10 years in District Courts and the only relief they've been able to obtain is this ITC exclusion order.

Mr. MASSIE. Thank you. I yield back.

Mr. ISSA. Thank you. I would caution all Members if you are going to use acronyms like CRAP, please define what the letters stand for.

With that, we recognize the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chair.

Professor Doane, this Subcommittee has a keen bipartisan interest in preventing the government of China from stealing U.S. intellectual property. How does the ITC prevent China from ongoing infringement of the property of U.S. inventors and would weakening

the ITC help China import infringing goods into the United States? If so, why or how?

Mr. DOANE. I believe weakening Section 337 would certainly benefit China in particular. If you look at where the source of most challenge products come from, infringing products, by far I believe you would find they come from China. They come in a variety of forms. As I mentioned, all these little companies that come in, manufactured cheap knockoffs of U.S. products and sell them in on-line marketplaces and just end up dominating the marketplace.

Or in the circumstance of bigger companies that have spent billions of dollars building infrastructure in China to manufacture there rather than manufacturing in the United States. In that circumstance a Section 337 exclusion order might be the only way a small company can get any kind of relief after extensive litigation against a large well-established importer of what is essentially Chinese products.

Mr. JOHNSON. Professor Doane, we have heard the arguments of some in the room who want to change the ITC and some in Congress have introduced legislation to amend the domestic industry requirement to make it more difficult to petition the ITC to investigate a trade violation. In your written statement you wrote that the ITC should not be amended by Congress. Could you explain to us why the ITC is functioning as intended as it is now?

Mr. DOANE. I believe the ITC does take its mandates seriously as to meeting the domestic industry requirement. I think that in the face of the criticism, particularly involving alleged patent MPEs, they've taken a lot of steps to try and make sure that there is a substantial domestic industry.

In cases where the complaint comes in with a weak domestic industry in the complaint, they will frequently place these into what's called a 100-day proceeding to determine whether there is a sufficient domestic industry to go forward. So, I think they've put mechanisms in place to try and weed out potentially problematic cases.

Also, I think to the extent that there's a claim of a flood of MPEs coming to the commission, I don't think there's—the data has borne that out. There are certainly some that come there, but I think the commission has taken steps in its own review and in use of things like the 100-day proceeding to make sure that cases like that, if it's merited, are weeded out. So, I don't think amending the statute would add anything to what the commission has already done to make sure that the statute is not abused.

Mr. JOHNSON. Thank you. Some have argued that Congress should revise Section 337 to effectively make it harder for U.S. companies to obtain exclusion orders at the ITC for infringement of their patent rights especially against U.S. companies, or other U.S. companies.

As you know, since the Supreme Court's 2006 decision in eBay patent owners have struggled to obtain injunctions in Federal District Court with some studies showing a 90-percent decline in courts granting injunctions in cases where patents were found infringed. What is the difference between patent cases in the ITC and in Federal District Court and why are both tracks critical to protecting and incentivizing U.S. innovation?

Mr. DOANE. Well, I think Section 337 is critical because—in large the remedy it provides. It gives the patent owner the ability to say, no, you cannot use my patent. I can't be forced to license it to you for a monetary award. You have to—I can keep your product out of the United States.

The difference between the ITC and District Court right now is the fact that to obtain an exclusion order you do not need to establish injury, and that is there for the simple reason that Congress decided that it should be such. Congress expressly removed injury from the statute in 1988 after almost a decade of hearings on it, and because it felt that too many U.S. companies were losing because of requiring them to show injury. It was felt that infringement of your patent is injury enough. So, the injury was expressly removed by Congress, which is why eBay does not apply to Section 337 investigations.

Mr. JOHNSON. Thank you.

Mr. ISSA. Thank you. For the record, the acronym is Chinese Rip-off of American Products (CRAP). Just want to make sure that we understand that it was an acronym.

With that, we go to Mr. Fitzgerald.

Mr. JOHNSON. Mr. Chair, if I might—as for unanimous consent to enter into the record a letter from Conservatives for Property Rights, a letter from the Council for Innovation Promotion, and also an op-ed in *The Hill* entitled, “The Unheralded Agency Protecting America’s Innovation Edge.”

Mr. ISSA. Of course. Gladly. Without objection. So ordered.

Mr. JOHNSON. Thank you.

Mr. ISSA. Mr. Fitzgerald?

Mr. FITZGERALD. Thank you, Chair.

Professor Contreras, I introduced a bill, the Prohibiting Adversarial Patents Act. What we were trying to get at is it would prohibit companies on certain national security-related sanctions lists from licensing or asserting their U.S. patents, much as we discussed here this afternoon.

To your knowledge are adversaries like China using forums like ITC to assert U.S. patents that generate revenue in circumvention of U.S. sanctions?

Mr. CONTRERAS. Congressman, I'm not aware of any concerted effort by the Chinese government in that respect. Certainly, companies from many different countries are able to utilize the ITC against U.S. companies and against other foreign companies if they do so through their U.S. subsidiaries, which almost every foreign company of any size has today, which does make the ITC a forum available to foreign companies controlled by whoever to take advantage of U.S. manufacturers.

Mr. FITZGERALD. Right. I don't think we are concerned about some of our friends, but adversaries like China using patent assertion entities to bring infringement suits that generate revenue in circumvention of U.S. sanctions. So, is there anybody out there that have already demonstrated that they are moving in that direction, I guess is maybe a broader way of asking the question. Do you see any of these activity?

Mr. CONTRERAS. I'm not aware of a specific national security type of circumvention that's going on at the ITC. My other copanelists may be.

Mr. FITZGERALD. OK. Mr. Korte, please explain kind of briefly how ITC rules of procedure defer from U.S. District Courts and why they often lead to higher cost for litigation, right?

Mr. KORTE. Yes, thank you, Congressman, for the question. So, there's two main areas where ITC procedure drives up cost. First, in U.S. District Court District Court Judges often manage their docket through motion practice, motion dismisses, and summary judgment motions. These motions before trial often resolve the case or lead to a settlement.

At the ITC typically in a hearing none of these motions are decided until the morning before the trial. So, very few ITC investigations settle before the trial. The ITC noted this in their last budget request that they have increased workload because almost no ITC 337 investigations are settling. That drives up costs because every case is going to trial.

The second main way that ITC cases drive up costs is the exclusion order. If you are a company either making a product in the United States or importing a product, you have to prepare in advance for that exclusion order in the event that you lose by designing your products, by changing your product supply lines, and by changing your inventory levels. That all adds incredible cost on top of the standard cost that you would face in a parallel lawsuit in Federal District Court.

Mr. FITZGERALD. Yes, so ITC litigation kind of—the costs associated with it, which is probably difficult to put a hard number on, but there are so many different steps in that suit that you are engaged on a regular basis. I am sure the bills are just astronomical after a while for somebody involved in this, right?

Mr. KORTE. Yes. They're multiples of two, three, and four times the cost of a patent lawsuit in Federal Court where those lawsuits are already one of the most expensive activities on earth. Some years our ITC investigation defense costs are by far the biggest line item on our legal budget globally.

Mr. FITZGERALD. Just really quick, Professor Contreras, when an entity brings a complaint to the ITC under Section 337, are they required—do they have to disclose who is funding their complaint? Is that something that is disclosed along the way?

Mr. CONTRERAS. No, they don't. There's a lot of ambiguity around who is behind some of these entities, many of which are names that you wouldn't recognize at all. Their sole purpose is bringing these actions.

Mr. FITZGERALD. Because of the lack of disclosure there are some risks there, right, I am sure.

Mr. CONTRERAS. Absolutely. Absolutely. It could go back to the other question that you asked previously. It could be a pure corporate maneuver. It could be a governmental maneuver. We just don't know.

Mr. FITZGERALD. Yes. Thank you. I yield back, Chair.

Mr. ISSA. I thank the gentleman.

We now go to the gentlelady from North Carolina, Ms. Ross.

Ms. ROSS. Thank you, Mr. Chair and Mr. Ranking Member, for holding this hearing.

Just for context I represent the Research Triangle in North Carolina. We don't have as many great big patent holders, but we have a lot of innovators, small startups. Then, of course, we have North Carolina State University which has a tremendous number of patents and does some of the most work in the textile industry in the entire country.

The ITC is one of the best tools that American innovators have for addressing patent infringement. Even though the ITC hears relatively few patent cases when compared to district courts, it serves a key function for small inventors, startups, and other innovators who find themselves facing patent infringement, of course from people abroad.

Our intellectual property system is not always friendly to patent holders, particularly small patent holders, and it is often far too difficult to obtain an injunction from a District Court. The PTAB is too often misused to the detriment of innovators and small patent holders.

The ITC on the other hand has a strong record of issuing exclusion orders to protect patent holders from counterfeit and infringing products even when these patent holders are facing large companies seeking to dominate them through litigation spending.

Professor Doane, I frequently hear from patent holders about how the law does not protect their intellectual property. This is one of the reasons that I am a sponsor of the PREVAIL Act, a bill to address the high rate of patent invalidations at PTAB and prevent dual challenges at PTAB and District Court. Do you think the fact that the ITC is one of the only venues where patent holders feel that they are treated fairly has contributed to the rise in patent cases that the ITC hears?

Mr. DOANE. Yes, I believe the companies, patent owners, come there because they do believe they get a fair shake at the ITC. They get an effective mechanism. They get an efficient mechanism.

We've heard mention about how long it takes for a summary determination motion and how they're not granted at the ITC. Well, in part, because the ITC moves so much faster than District Court, that there's simply no time. By the time you're in trial at the ITC, in a District Court, you're just getting started.

So, it provides small patent owners an attractive forum because it gives them quick, effective, and predictable relief that will remove the product from the marketplace, not just force a license agreement on them.

Ms. ROSS. Thank you. Then I want to followup on Ranking Member Johnson's question about domestic industry requirements. Because, as I said, I represent a large university. It has a lot of patents, and those issues are front of mind in my district.

How could proposed changes to the domestic industry requirement, such as limiting how patent licensing can satisfy the requirement, harm small investors and patent holders?

Mr. DOANE. I think it would injure them in a number of ways. We know that there's the claim about patent assertion entities, and I just think that's not borne out by the data. I think that these changes to the domestic industry fall with greater harm on the

shoulders of small innovators who are still maybe trying to develop a product, maybe trying to—who've invented something, like a university that wants to license.

These additional requirements would just simply further burden them, as opposed to actually dealing with the purported problem of patent restriction entities. I think it just adds another hoop that these complainants, these patent owners, would have to jump through to get any kind of relief for enforcement of their patents.

Ms. ROSS. Thank you very much.

I was going to ask another question, but, instead, I'm going to agree with Congressman Massie, who has since had to leave, and just say that we've heard some testimony here in favor of weakening the ITC to some degree and it's troubling—to make it harder for a patent owner to stop competitors from bringing infringing products manufactured abroad into the United States.

That's on top of the eBay decision, which, since 2006, has made it nearly impossible for patent owners to get injunctions in court to protect their property. I don't think that U.S. innovators should be left with no way in court or in the ITC to protect their businesses from infringing products manufactured overseas.

With that, I yield back.

Mr. ISSA. I thank the gentlelady. We now go to the gentleman from California, Mr. Kiley, for five minutes.

Mr. KILEY. Good morning. I wanted to get a little better sense in the circumstance where an exclusion order is issued. What is the sort of typical response by the infringing entity? Mr. Korte or Ms. Hairston, if you want to weigh-in? Is a license usually the result of that? Do they shift their manufacturing domestically? What is the typical response?

Mr. KORTE. Yes, thank you for the question, Congressman. So, the typical response is years more of fighting. So, once an exclusion order is issued, the company that lost probably has already planned for that, as I mentioned earlier, and has products if things don't fall within the scope of that order.

So, the next step after a loss at the ITC is to go to Customs, Customs and Border Protection. There's months or years of briefing and argument by lawyers at Customs over the scope of the exclusion order and what products it should apply to. So, oftentimes, there is no license after a loss at the ITC. There are product changes on the market, and then, more fighting at Customs, and eventually at the Federal Circuit over what the scope of an exclusion order might actually be.

Mr. KILEY. Well, that part of it seems problematic to me and maybe everyone, both sides, would agree on that. Professor Doane, what do you think about this issue of fighting with Customs for years? Is that beneficial to the system?

Mr. DOANE. Well, I don't know about how much fighting there is, but, with Customs, I do know that respondents that have lost do try to redesign their products, which, by the way, is kind of the point of a patent, is that, if you infringe it, the idea for the patent is that you will then try to design around it, and thus, advance technology even further by coming up with something different.

The Commission does, in fact, provide respondents with the opportunity to present redesigns to the Commission as well. Either

during the course of an investigation, if they can get them in on time, or in an advisory opinion proceeding at the Commission, you can say, "I, Commission, I want to import my new product. Here's why I think it doesn't infringe. Will you give me permission?" The Commission can then say yes or no, and if you win, then you are free to import. You don't even have to talk to Customs. It has been blessed by the Commission.

Mr. KILEY. Right. So, maybe that's an area where we could focus on our forum as well, is sort of streamlining that process, so that it would at least set the stage for a better negotiation over a license or let folks know what kind of alternatives are available to them.

Also, when it comes to the consideration of the public interest, I guess, Professor Doane, this would be a good question for you. Do you know in what percent of cases an exclusion order is not issued based on the public interest factors, roughly?

Mr. DOANE. Well, I could tell you the number—if the question is the number that has been denied because of a public interest consideration, I believe there has been, actually, very few, maybe four or five. The Commission always does take, particularly in the last 10–20 years, has taken public interest not to deny relief, but to modify the scope of relief. They consider it in how they draft the exclusion order, whether particular products are covered, whether to grandfather in already imported products or new products. They do take public interest into consideration to make sure that there is no harm.

For example, this is a trade secret case, not a patent infringement case, but there was a case in which it was found that batteries for electric cars were going to be excluded because they were being produced after a theft of trade secrets. The Commission modified the exclusion order, giving American car companies the opportunity, several months before the exclusion order would go into force, to allow them to switch to it and design in the types of batteries into their cars, so that they wouldn't be using an infringing battery.

Mr. KILEY. So, what do you make of this notion that these proceedings are duplicative because you might have parallel litigation going on in U.S. courts? Is there any validity to that? From my perspective, it seems that, if you're importing a product that may be infringing, then maybe in that situation, we should have more scrutiny and perhaps the additional remedy in an exclusion order, which we don't really have now in the U.S. system. What do you make of that argument?

Mr. DOANE. Well, it certainly is the case that one can file a District Court complaint with a Section 337 complaint. In fact, I would say it's probably more common than not that this is done, largely because the ITC does not grant, does not have the authority to give money damages. So, if you do actually want to get compensation for past infringement, you do have to go to District Court to get that. The exclusion order is the perspective going forward and removes the product from the market.

There is 28 U.S.C. 1659, I believe is the number, which gives the—if you are a respondent in an ITC case and a defendant in a District Court case, you are automatically entitled to a stay of the District Court case until the ITC litigation is completely completed,

including all the way through appeal. So, you're not facing two trials at once, unless you choose to. You can decide to waive that right. The statute gives a respondent in that circumstance an absolute right to stay the District Court action.

Mr. KILEY. Thank you. Well, I think that there are a number of opportunities for reform to make this process work better, but in the process we need to make sure that we're not in any way making it easier for China to infringe on American intellectual property, which seems to be a huge risk here.

Also, need to be mindful of the impact that weakening the availability of exclusion orders would have on innovation in this country and, particularly, small innovators.

So, I thank the Chair for holding this hearing, and I think there's a lot we can work on this going forward. I yield back.

Mr. ISSA. I thank the gentleman. We now go to the gentlelady from San Jose, Ms. Lofgren.

Ms. LOFGREN. Thanks very much, Mr. Chair.

Standard essential patents—those are SEPs, Mr. Chair, for the acronyms—for many products comply with industry standards. As you know, owners of SEPs agree to license these patents on fair, reasonable, and nondiscriminatory (FRAND) terms—that's, Mr. Chair, the acronym—to ensure that the technology is accessible.

At the same time, the ITC can issue exclusion orders to stop the import of products that infringe on patents. However, these orders can be disruptive, especially when it comes to SEPs, because they could block the import of widely used products, impacting businesses and consumers.

I'm wondering if each one of you has an opinion on these two questions.

First, the issue of monetary remedies versus exclusion orders. Considering the potential disruption of exclusion orders, do you believe that monetary remedies should be the first option, with exclusion orders reserved only for the most severe cases when SEPs and FRAND are involved?

Second, given that commitment to license on fair terms, should the ITC avoid issuing exclusion orders when they conflict with FRAND commitments? How should we handle these situations to balance the needs of patent holders and their rights with those of the broader market?

Anybody have an opinion on those two questions?

Ms. HAIRSTON. Thank you for the question, Congresswoman. With regard to monetary remedies versus exclusion orders, our position is that, if there is actual infringement, that the first option should be those monetary damages and potential royalties, particularly as it relates to standard essential patents. They are licensed largely with the intent to monetize the IP, intellectual property, and, therefore, we don't think that an exclusion order is appropriate.

With regard to fair, reasonable, and nondiscriminatory terms, we don't think that the ITC should be granting exclusion orders. We think that injunctive relief is not appropriate in that context because of the FRAND commitment that the SEP patent holders have made to license all willing implementers.

Ms. LOFGREN. Yes?

Mr. CONTRERAS. Yes, thank you for the question. As you know, undoubtedly, in 2013, U.S. Trade Representative Froman, representing the administration, issued the last disapproval of an ITC exclusion order that had been issued to Samsung against Apple, precisely because it involved standard essential patents. Trade Representative Froman was very clear in his explanation of the disapproval that standard essential patents and standardized products are important for the U.S. economy, for U.S. producers, and to block the importation of products on the basis of a standard essential patent was a very significant matter, and that the ITC had not adequately developed the record in terms of FRAND and standard essential patents in that particular case.

To its credit, the ITC has modified its procedures in the intervening 11 years, so that there is a much more detailed record developed around SEPs. The ITC has not issued any exclusion order against a product by virtue of infringing standard essential patents.

That's absolutely the right approach to take. When a company is involved in the standardization process, it makes a commitment, a binding contractual commitment to the standards body, that it will grant licenses of its patents on fair, reasonable, and nondiscriminatory terms.

That means it agrees that, if others are going to use its patents, it will accept a monetary royalty, and as long as a company is willing to pay that reasonable royalty, there's really no cause for an exclusion order or an injunction in court, either. So, the only question is how much money that reasonable royalty ought to be, and that's a question that the courts will decide.

So, yes, so I think that absolutely the ITC should stay away from exclusion orders in the FRAND context.

Mr. DOANE. As Professor Contreras pointed out, the Commission has developed a procedure to develop a record on a SEP and to determine whether an exclusion order might be necessary. I think that the availability of an exclusion order, the threat of an exclusion order needs to stay in place, even for a potential SEP, to avoid the problem of holdout, of companies that say, "Well, yes, you haven't offered me good enough FRAND terms. So, I'm not going to license and I'm going to keep going, infringing, because you can't make me stop."

Ultimately, I think that the threat of the exclusion order is beneficial in that, ultimately, it might force the end of patent holdout in the circumstance, in a case of an SEP.

Ms. LOFGREN. I see my time is just about up, Mr. Chair. So, I yield back. Thank you all for your testimony today.

Mr. ISSA. I thank you so much.

I now ask unanimous consent that two pieces of litigation history be placed in the record. (1) *Code Alarm v. Directed Electronics, ED*, Michigan, 1996. *Code Alarm*, Plaintiff, v. *Directed Electronics*, Defendant; (2) *Code Alarm*, Plaintiff, v. *Magnadyne Corporation*, Defendant. One is an ITC hearing or process, and the other is an Article III Court in Michigan.

Mr. ISSA. Since no one else is here, I'll now recognize myself. I put those in the record because those are my cases. I was a defendant. The ITC very appropriately found that the accuser had un-

clean hands and, in fact, did not have a valid patent, but, in fact, was asserting a patent that they had applied for after a vendor gave them not only the idea, but the chip.

The ITC, for the first time that I know of, refused a dismissal by the plaintiff, continued the case, and the plaintiff then said,

That's great. You made your decision on summary judgment to find my patent invalid, but I'm going to continue an Article III.

Where we continued an Article III, ultimately, having it decided twice at the Federal Circuit, once, sustaining the ITC; once, opposing the defendants' plea; that is, the patent in Article III was valid.

All of that goes to say that my experience with the ITC, although quick and expensive, in fact, was fair. Now, the question is for all of you—and I'll start with Professor Doane—do you believe that the ITC is appropriate, for example, when Broadcom and Qualcomm, two very large, multibillion dollar companies, face each other over a portion of their intellectual property and they are a simultaneously an Article III case? Yes or no, please.

Mr. DOANE. Yes.

Mr. ISSA. Professor Contreras?

Mr. CONTRERAS. No.

Mr. KORTE. No.

Ms. HAIRSTON. No.

Mr. ISSA. So, this doesn't surprise me. What does surprise me is that much of the discussion today has been about small entities, large entities, and so on. So, I'm going to go into a couple of areas that were brought up and try to tie together some of the testimony today.

SEPs, Professor Doane, they exist to collect revenue. Your belief is that, even though their attempt is to collect revenue, that injunctive or exclusion should still be granted as a leverage tool to get them not to be holdouts, or in other words, not to assert their full rights in Article III, where they might prevail. Is that correct?

Mr. DOANE. Were you saying SEPS or—

Mr. ISSA. An SEP, a potential infringer of a standard essential patent.

Mr. DOANE. I think that—

Mr. ISSA. You're saying it should still be explored and that an exclusion should still be granted in the ITC?

Mr. DOANE. I think the availability of an exclusion order should be an option in cases where there has been holdout. I think I would hope that—

Mr. ISSA. OK. I got you. I just wanted to make sure. So, for the other three, because I'm suspecting a different answer, the idea that the ITC is, in Professor Doane's experience of 30 years of practicing, a tool for leverage on what, ultimately, is a royalty-only product—meaning that a royalty will be granted; it will be paid if the defendant loses. Yet, the professor has said that it's an effective, from his litigation history, an effective tool. Would you (a) agree it's an effective tool, and (b) do you believe it should be a tool, essentially, used as a hammer to predetermine the outcome of an Article III Court case?

Yes, Professor Contreras?

Mr. CONTRERAS. Yes, I have been involved in numerous cases where this has been used as a tool and it is effective, but whether

it's appropriate is another question. It's not an appropriate tool. Of course, it's a tool that is favored by patent holders because any tool in the litigation toolkit should be—

Mr. ISSA. There's a reason Broadcom sued Qualcomm in the ITC. It is it was a tool available to them, just as Kodak and Apple, and lots of other large companies.

Mr. Korte, has Garmin used the tool ever? You're an American manufacturer. Have you used it against Asian imports?

Mr. KORTE. No. Although we do face our own flood of Asian imports, and including from China, we have never used 337 against those imports. We've found other recourse, including Article III Courts, to be much more cost-effective and useful to stem the flood of knockoff products.

Mr. ISSA. Ms. Hairston?

Ms. HAIRSTON. I would agree with Professor Contreras that, while it can be a very effective tool, we don't necessarily believe that it's an appropriate tool to use, particularly as it relates to standard essential patents.

Mr. ISSA. OK. We have another person coming. So, I'm going to take a few extra seconds here.

One question—and I'll start with Professor Contreras—when there is an SEP, for example, we could suggest to the other Committee of Jurisdiction that a bond in lieu would be a remedy that we could make available to the ITC—not mandate, but make available. Do you think that a bond in lieu, where the full cost of the holdout would then be paid in and continue to be paid until the Article III Case reaches final adjudication? Is that a reasonable alternative to exclusion?

Mr. CONTRERAS. I would say it's an improvement. As you undoubtedly know, many European jurisdictions have this idea of a bond in lieu of the injunction. It's still not really necessary.

We do have Article III Courts to adjudicate these matters. Even with a bond, the bond is a significant cost. The small companies are the ones who won't be able to pay the bond; the large companies will.

Mr. ISSA. Mr. Doane, or Professor Doane, would you say that a bond—but a cost that is an alternative to exclusion is this at least something that should be a tool in the quiver, if you will, of the ITC?

Mr. DOANE. It is difficult to say without knowing how such a bond would work, but it's certainly something that can be, should be discussed.

Mr. ISSA. OK. Ms. Hairston, you talked about your various manufacturers, auto manufactures, and so on. Is this something where the idea that you're perfectly willing to pay the damages, capable of paying the damages, if a license—and we're assuming that we're only talking for a moment about companies which are licensors; in other words, not a company that demands an exclusive and only has an exclusive. Is that something that you think would improve the treatment at the ITC, assuming they still took the cases?

Ms. HAIRSTON. I think it is something definitely worth exploring. I'd like to take it back to my member companies to discuss to get more insight and share that with you at a later time.

Mr. ISSA. Thank you. That's what this hearing is for.

I now go to the gentleman from Virginia, Mr. Cline.

Mr. CLINE. Thank you, Mr. Chair.

Professor Contreras, would you agree that there is a rising trend in abusive investor-funded patent litigation in legal venues across the United States, including at the ITC?

Mr. CONTRERAS. There's certainly a trend in investor-funded litigation. Much of this investor-funded litigation is for NPE litigation, both the District Courts and definitely at the ITC.

Mr. CLINE. In fact, increasingly, shell companies and other intermediaries conceal the involvement of parties, often foreign, including sovereign wealth funds, hedge funds, and other opaque entities, in patent litigation against U.S. companies?

Mr. CONTRERAS. This is an issue across the board in patent litigation, yes.

Mr. CLINE. Do these shell companies target critical manufacturers and industries which could disrupt fragile supply chains and undermine the industries and companies that are vital to America's national and economic security?

Mr. CONTRERAS. That is certainly what happens.

Mr. CLINE. Does Section 337 currently require the disclosure of who is funding the complaint?

Mr. CONTRERAS. No.

Mr. CLINE. So, it would be accurate to say that absent adequate transparency in the disclosure of the real parties and interests in these ITC cases, the extent of this harm will remain unknown to the U.S. public and to the government?

Mr. CONTRERAS. That's correct. We just don't know.

Mr. CLINE. Would it also be accurate to say that the lack of routine disclosure of the real parties and interests raises serious concerns when determining whether ethical conflicts exist during ITC proceedings?

Mr. CONTRERAS. This is a concern as well, yes. There's really no reason that there shouldn't be full transparency.

Mr. CLINE. I'm pleased that, as a Member of the Appropriations Committee during the Fiscal Year 2024 and Fiscal Year 2025 cycles, I was successful in including tort language in the CJS bill to, essentially, articulate what you just confirmed and direct the ITC to consider implementing a standing rule that would require each party to disclose the real parties and interests in all Section 337 litigation at the ITC.

This is a temporary victory, but it seems that legislation is necessary to ensure the disclosure of real parties and interests. Would you agree?

Mr. CONTRERAS. I would agree.

Mr. CLINE. OK. Thank you for that.

Mr. ISSA. Would the gentleman yield?

Mr. CLINE. Yes, happy to yield.

Mr. ISSA. Let me ask a question. The reverse of the complaint about eBay that I've been hearing here today—and I'll go, start with Professor Doane—if an Article III Court were to find infringement, and the ITC then was empowered, essentially, sua sponte, to issue an exclusion based on that decision, notwithstanding eBay, would you support that?

Mr. DOANE. I don't know if I need to support that. I think that's how that would work. I think if—

Mr. ISSA. Well, even if you haven't been in the ITC, you would simply go to the—

Mr. DOANE. Yes, if you have a finding of infringement, and you, then, say, "Well, they're continuing to import, even though I have this finding of infringement against them," the Commission would be bound by the District Court's order, the finding of infringement. To the extent there were validity findings, they would be bound by those as well. If the other requirements of 337 were met, then, certainly, they can issue an exclusion order.

Mr. ISSA. So, as a summary decision, Professor Contreras, do you agree that, notwithstanding the eBay decision, that a Federal Court that finds infringement, and the ITC finds that the product is still being imported, that an exclusion would be something you could grant in a matter of, basically, days—not a year?

Mr. CONTRERAS. Yes, that is certainly possible. It's really Customs and Border Protection that is the relevant implementer here. The ITC—

Mr. ISSA. The ITC, this could be an effective power that would dissuade people from going to the ITC at greater expense, but have everyone recognize that you can't rely on eBay if, in fact, you're importing?

I'm asking because we're looking to try to find common ground here. We are not the Committee of Primary Jurisdiction, even though our Article III Judges find themselves a little amused that they are stayed while an administrative act that may not be a complete remedy occurs.

The other two witnesses, any comment on that? You certainly have Article III against infringers.

Mr. KORTE. Yes, certainly, and my only reservation with that process is the ITC's statutory requirement is to protect American domestic industry. So, before it takes any action, including an exclusion order, it should be looking to see if that exclusion order is in furtherance of that American investment.

Mr. ISSA. Sure. That's why I said days, not hours.

Mr. KORTE. Yes.

Mr. ISSA. How about for the auto industry? Is this something that would be comfortable as a possibility that the ITC would act in an expeditious manner, but after an Article III case was adjudicated?

Ms. HAIRSTON. I think that certainly sounds reasonable. I would agree with Mr. Korte's reservations, but that's something that could be potentially workable.

Mr. ISSA. OK. Then, having no other questioners, I'm just going to quickly give you the synopsis—I'll give you a written copy—of questions from the other Committee of Jurisdiction, Ways and Means.

They were particularly interested in activities that are on the order of the Chinese Government, the Chinese Communist Party.

One question was:

How might Section 337 be improved to be a more powerful tool to block imports of products that infringe U.S. patents, misappropriate U.S. trade secrets, and otherwise undermine intellectual property of Americans?

So, as you can see, their question is, how do we make it stronger?
Mr. Doane, Professor Doane, I think you'll enjoy answering, helping us answer that.

The next one is:

To the extent that some witnesses call for reforms related to 337 litigation, will these reforms be helpful to better hold China accountable for abuse of intellectual property?

I would assume that's both directions, infringing and perhaps the patent troll process.

Then:

To the extent that some of the witnesses call for reforms related to 337 litigations, to what extent would the problems you identified be solved by administrative action by the ITC rather than a statutory change?

In other words, can they heal thyself is the question?

That is an important question that occurs to me, too; that we may—sometimes our hearings provoke changes at agencies.

Mr. ISSA. Do you want to make any closing statements?

Mr. JOHNSON. No, I have none. I'm just ready to get to my next Committee.

Mr. ISSA. Seeing that there are not, I would ask, in closing, would you all agree, pursuant to our normal closing statement, that there would be five legislative days in which, for Members of the Committee, either that did ask questions or those that weren't able to, to send you questions for the record, in addition to the ones you got from the Ways and Means Committee?

Mr. DOANE. Yes.

Mr. CONTRERAS. Yes.

Mr. KORTE. Yes. Thank you.

Ms. HAIRSTON. Yes.

Mr. ISSA. Thank you.

That's actually the only thing I need to ask. So, thank you very much, again, for attending. We will take your additional remarks, in addition to questions, if you have further thoughts during that same period. Well, five days to get it to you and a reasonable time for you to answer.

Mr. ISSA. Thank you very much. We stand adjourned.

[Whereupon, at 12:15 p.m., the Subcommittee was adjourned.]

All materials submitted for the record by Members of the Subcommittee on Courts, Intellectual Property, and the Internet can be found at: <https://docs.house.gov/Committee/Calendar/ByEvent.aspx?EventID=117532>.