



Insight

The Rise of Patent Litigation at the International Trade Commission

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Executive Summary

- A ruling by United States International Trade Commission (ITC) found that components of some Apple Watches infringe patents of medical technology company Masimo, allowing the agency to prohibit the importation of the devices starting in December 2023.
- The ITC was created to protect U.S. firms from international companies essentially copying a product and reselling under the guise of the original; firms often rely on the ITC because it provides more powerful remedies than Article III courts.
- Critics of the ITC process argue that patent trolls are increasingly exploiting the ITC to bring cases seeking the threat of exclusion orders to drive significant settlements, and that the agency isn't adequately considering the public interest as required by law when deciding whether to issue such orders.

Introduction

In October, the International Trade Commission (ITC) ruled that Apple had infringed the patents of Masimo, a company that held the patents on technology that could read the oxygen levels in the blood. Because of this ruling, Apple will not be allowed to import watches that contain the infringing component after (add date) unless [President Biden vetoes the decision](#). The news coverage surrounding the ITC's Apple Watch decision has spurred interest in the relatively unknown agency, as well as some concerns about its patent adjudication process.

Congress created the ITC in 1916 (then known as the Tariff Commission) to administer trade remedy laws, notably for this case Section 337 of the Tariff Act of 1930. The provision prohibits the importation of products that infringe the intellectual property rights of U.S. firms. Proponents of the ITC and its patent enforcement argue that this statute is critical to provide significant consequences for corporations that choose to employ an "efficient infringement" strategy in which the damages in an Article III court will be less than the profits of infringement.

The ITC's enforcement of these provisions has drawn scrutiny, however, as critics claim non-practicing entities (more colloquially known as patent trolls) may use the agency to extract rents on firms that develop new and innovative products rather than going through Article III courts. As the number of these lawsuits increases, the ITC has become a [preferred venue](#) for those with weaker patent cases that are more reliant on procedural advantages to win, leading to more settlements.

This primer explains the ITC’s role in patent enforcement and potential concerns with the agency that Congress may wish to address.

Background

Congress created the U.S. Tariff Commission, the predecessor to the modern ITC, in 1916 – a time when [U.S. protectionism prevailed](#) – to advise Congress and the president on tariff and trade matters. While originally focused on tariffs, Congress expanded the authority of the agency to adjudicate patent disputes with Section 337 of the Smoot-Hawley Tariff Act of 1930. This provision makes it illegal to import products that infringe the patent, copyright, or trademark in the United States.

The protectionist nature of the agency remained, however, and Congress included the [domestic industry test](#) “meant to ensure that Section 337 is ‘utilized on behalf of an industry in the United States’ while providing ‘adequate protection against foreign companies.’” Nevertheless, in recent years the agency has begun to move away from this objective, allowing foreign companies to seek Section 337 enforcement even when [domestic investments are limited to sales activity and customer support](#).

Unlike an Article III court (which can also adjudicate patent infringement cases), the default remedies available to the ITC are extremely powerful. If the ITC determines there is a violation of Section 337, the agency must block the importation of the infringing products unless it finds that the effect of the product’s exclusion on public health and welfare, competitive conditions, production of competitive products, or U.S. consumers would justify allowing importation despite the infringement.

Proponents of the ITC process argue that this power is critical to block what is known as “efficient infringement.” If a firm sues and is awarded some monetary damages, that [price may be worth the benefit](#) of “appropriating a promising product and undercutting a smaller competitor before it can grow into a true threat.” According to these proponents of the current process, only an exclusion order can effectively stop this practice.

Criticisms of the ITC Process

The processes at the ITC have drawn numerous criticisms in recent years.

First, non-practicing entities (NPE) — firms that acquire large amounts of patents simply to enforce the patent right — have increasingly relied on so-called “patent troll” litigation. This is largely due to the rise of third-party litigation funding, which allows outside parties to provide financial assistance to plaintiffs in exchange for a share of the proceeds of litigation, and almost a [third of total patent litigation](#) is now funded by third parties. These NPEs are increasingly [choosing to take their complaints to the ITC](#) because of the [exclusionary power, plaintiff success rate, and the speed with which the complaint is resolved](#). In fact, NPE complainants hit a new high last year at 19, almost a third of the total investigations, with the previous record being 13 in 2012. Section 337 investigations more broadly are also on the rise, almost doubling in each of the last three decades.

With the threat of exclusion in the background, parties often choose to settle, leading to windfalls for the NPEs and the third-party funders. In 2022, for example, 40 percent of the investigations resulted in a [settlement or consent order](#). Of the 59 investigations that did reach a [determination on the merits](#), 18 violations were found (compared to the 16 where no violations were found).

Article III courts, however, can more adequately examine the damages and remediate the harms done to a patent

owner without necessarily going so far as to exclude the product entirely. Indeed, many critics of the ITC see this overlapping jurisdiction as unnecessary, and even harmful, as the law diverges and causes confusion for parties.

Second, even if a product infringes a patent, the ITC can theoretically still allow the importation of that product if it is in the public interest, and yet the ITC rarely uses that authority. In almost 40 years, the ITC has allowed the importation of products that otherwise violate Section 337 on public interest grounds only three times (all before 1985). When the ITC [does recognize negative effects](#) that come with an exclusion order, “it dismisses that harm by claiming that the ‘strong public interest in the protection of intellectual property’ outweighs and justifies all consequences that flow from the enforcement of patent rights.” Many critics have argued the ITC should not issue exclusion orders in cases where the public interest would support importation of the product, and even the Obama Administration has [vetoed ITC decisions](#) that went too far in considering these factors.

Finally, while many debate the merits of protectionism, the ITC process now often harms U.S. firms at the benefit of domestic rivals, and sometimes even foreign ones with a limited presence in the United States. One [R Street study](#) found that between 2017 and 2021, “only 6.5% of ITC investigations involved solely domestic complaints and foreign respondents.” If the ITC is to protect domestic firms from foreign counterfeits or products that infringe U.S. intellectual property, the ITC and its powerful remedies may be better limited to just these types of cases, and Article III courts should resume the role as the adjudicator for most patent disputes.

Advancing America’s Interests Act

Some congressional action has been taken on the issue, and bipartisan legislation targeting some of these concerns has been introduced in the House of Representatives. The Advancing America’s Interest Act would reaffirm the ITC’s existing public interest obligation and [require patent trolls](#) to show their asserted patent has led to the development of products that incorporate the patent. These two reforms would address the main criticisms of the ITC process, specifically the frequent patent troll abuse of the system to exploit the drastic exclusion remedy.

Critics of the bill, however, argue that weakening the exclusion orders would in practice prevent the ITC from [barring importation of the patent-infringing products](#) except in the “rarest of cases.” Without an ability to ban the product, the infringing firm will undercut rivals. Finally, while the bill is bipartisan, similar attempts to reform the ITC have failed in previous sessions, and it unclear that such reforms have widespread political support.