Intellectual Property and the International Trade Commission

An Examination of the Role of the ITC in Protecting IP Rights

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Intellectual Property and the International Trade Commission

An Examination of the Role of the ITC in Protecting IP Rights

Introduction

One of the United States’ greatest strengths throughout its history has been its ability to innovate. Simply put, we invent stuff and bring it to market better and faster than anyone else. That quality—technology-driven growth, not just from Silicon Valley but from across the country—helps to propel the world into the future and power the U.S. economy. The bedrock of this innovation is intellectual property rights and strong, independent administrative and judicial systems to protect those rights. One critical element in that effort is a strong International Trade Commission (ITC), and the Commission needs, in turn, a strong vision for the future and clarity in how it operates. The very technological advances it is charged with protecting have presented the Commission with new challenges to the way it understands its mission and to the procedures it employs to fulfill its responsibilities. The Commission’s work on intellectual property is largely undertaken through its administration of Section 337 of the Tariff Act of 1930. This paper examines the history of that provision, efforts to update it that have occurred over the years, recent cases that demonstrate some of the new challenges the Commission faces, a discussion of those challenges, and recommendations for further improvement.

The History of the ITC and Section 337

The U.S. International Trade Commission (USITC) is a quasi-judicial, independent federal agency with the responsibility to investigate "matters of trade." It investigates injury in dumping and countervailing duty cases, and adjudicates cases involving intellectual property rights. It also provides statistics and data on international trade to Congress and the executive branch. Section 337 is the mechanism used by the Commission to adjudicate intellectual property disputes.

The origins of Section 337 go back nearly 100 years to Section 316 of the Tariff Act of 1922. Section 316 protected U.S. businesses from foreign companies unfairly importing goods for a competitive advantage. Specifically, it provided U.S. companies with the right of action, or the ability to bring another party to court over possible wrongdoing, in these situations. The Tariff

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1 Section 337 gives the Commission the authority to exclude from the U.S. market an imported product that infringes a U.S.-owned patent, among other things.
Act of 1922 came on a groundswell of support for protectionism from Republicans at that time. Lawmakers saw European agriculture rebounding after a war-driven slump and, to protect American farmers, decided to act. The implemented tariff, known as the Fordney-McCumber Tariff, did not have the outcome many protectionists envisioned. The U.S. agriculture sector continued to suffer and, as a spillover effect, the lack of a market for European exports made European debt increasingly unstable. The Fordney-McCumber Act was intentionally vague, failing to define what constituted an "unfair method of competition." This was understood by the Senate Finance Committee report on the act to be broad enough to encompass any case that touched upon unfair trade practices.³

The Hoover administration, adamant about helping beleaguered American farmers, promised to raise import tariffs on foreign agricultural goods. This increased demands from other industries for similar protection, ultimately leading to a series of tariff measures that culminated in the 1930 Tariff Act, also known as the Smoot-Hawley Tariff Act. The 1930 Tariff Act altered Section 316 and renumbered it as Section 337.⁴ The act amended the adjudication process and made relief contingent upon finding an import had unfairly damaged a domestic industry. If found in violation, the Tariff Commission was to forward its findings to the president. Under the new Section 337, it was under the president’s discretion whether to exclude the product. This was the primary difference between Section 316 and Section 337. In Section 316, the most severe punishment was only a retaliatory tariff. It was later argued that this was not strong enough. In 337, the law incorporated new provisions that now permitted total exclusion of an infringing product from the U.S. market as the sole remedy.

Section 337 also established a wider structural system for cases. It created an inter-disciplinary Commission staff including an economist, accountant, industry specialist, and attorney. The team gathered data, both quantitative and qualitative, regarding the nature of the industry in question. Section 337 also created a preliminary inquiry to establish if the initial claims could be substantiated since initially, cases brought before the Commission were often found to be without merit.⁵

The first meaningful piece of legislation amending Section 337 was the 1974 Trade Act. Most significantly, Congress changed decisions made by the Commission from “recommendation” to “determination.” Prior to this, the Commission would send its findings to the president, who made the ultimate implementation decision. Now the Commission had the ability to decide whether to exclude a product, though the president could still veto the Commission’s decision for policy reasons. The 1974 amendments also opened the Commission to cases that did not involve patent infringement. While the Commission traditionally applied 337 to IP prior to these amendments, other cases were allowed as exceptions. After the amendments, the Commission chose to put increased emphasis on a wider range of unfair practices. This expanded the

Commission’s authority under Section 337 to police foreign entities aiming “to restrain or monopolize trade and commerce in the United States.”6 Finally, the 1974 changes created the position of administrative law judge (ALJ). The ALJ could both preside over the trial and adjudicate the dispute. ALJs issue a ruling on a given case, called the initial determination, which the Commission can decide to review or approve as is.7 Following these changes, from 1975 to 1984, low-tech firms and small businesses and patent holders predominantly used Section 337. Sixty-two percent of infringing products came from Western Europe, Japan, and Canada.8

The next significant reform of Section 337 came in the Omnibus Trade and Competitiveness Act of 1988. This law removed the requirement of injury for most Section 337 cases, in addition to changing the requirements for demonstrating the existence of a domestic industry. Before 1988, the industry needed to exist and be economically viable. The reforms in the 1988 Omnibus Act were aimed at reforming the law, which by then did not fit the modern infringement landscape. In principle, the owner of any patent should be completely protected from any type of unauthorized copy or use. Therefore, any product inappropriately using someone’s patent is in violation, regardless of whether the industry using it is economically viable. As a result of the 1988 Omnibus Bill, companies could demonstrate industry through an expanded list of factors including investment in physical capital like factories, significant employment of labor or human capital, or substantial investment in the exploitation of the patent including engineering, licensing, or research and development.9

Although the IP environment of the time was a significant factor in drafting the Omnibus Act, it should also be noted that the changes were influenced by how expensive it was to find damage within an industry or a business. Before the 1988 changes, an estimated half of the cost of each case went into investigating the extent of damages. Eliminating the need to prove damages provided significant cost reductions.10

After the Omnibus reforms, the next wave of changes to Section 337 came after the Uruguay Round of Negotiations, which created the World Trade Organization (WTO), concluded in 1994. These changes were precipitated by the Aramid Fibers decision of 1986 (see notable cases). This case caused the WTO’s predecessor, the General Agreement on Tariffs and Trade (GATT), to determine that Section 337 was discriminatory on the following grounds:

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1. The law discriminated against foreign companies, since there was no corresponding forum for foreigners to challenge products made in the United States, while U.S. companies can easily turn to the Commission.

2. The law additionally discriminated against foreign companies due to its fixed time limits. In Section 337 cases, that was a potential disadvantage for foreign producers, but there were no time limits when it comes to challenging products of U.S. origin in patent litigation cases.

3. Unlike in federal district court, companies lacked the ability to raise counterclaims in Section 337 proceedings.

4. There was no comparable remedy for products made in the United States akin to the general exclusion order provided for infringing imports.

5. Automatic enforcement of exclusion orders interfered with injunctive relief from the federal court required for enforcement individual proceedings brought by a successful plaintiff.

6. Producers or importers of challenged products may have to defend themselves in both the federal district court and the USITC; however, there was no parallel process for U.S.-made products.\(^{11}\)

The Uruguay Round Agreement Act (1994), which implemented the Uruguay Round of Multilateral Negotiations, addressed these problems in several ways. It removed time limits and allowed for counterclaims in district courts. Additionally, it created the basis that, for a general exclusion order to be acceptable, it had to prevent circumvention. Finally, the bond remedy was changed to allow the infringing party to pay the other party instead of the U.S. Treasury.\(^{12}\) Since then there have been no further significant changes in the statute.

### How Section 337 Works

There are important distinctions that differentiate the USITC from the District Court. In the Commission, the only relief available is an exclusion order while the court can provide injunctive relief. The Commission is also the speedier option. A typical 337 investigation takes roughly 18 months. A case in district court has no definite timeline, and intellectual property cases often take longer than at the Commission. The Commission also provides a detailed brief of the rationale for its decision, which would not occur in a trial with a jury verdict.

Commission hearings take place in accordance with the Administrative Procedure Act. The act allows for complainants, respondents, and a Commission attorney representing the public interest. The act allows each party the right to have adequate notice, cross-examination,\(^{11}\)


\(^{12}\) Ibid.
presentation, objection, motion, argument, and all aspects of a fair hearing. These proceedings take place in front of an administrative law judge (ALJ). The ALJ issues a preliminary determination into the violations of 337. After this is filed, the Commission has the right to “adopt, modify, or reverse the ALJ’s decision.” If the Commission chooses not to review the ALJ’s decision, the USITC may then issue a notice of violation.

The Commission website addresses the types of complaints that can be brought under Section 337. Most involve “allegations of patent or registered trademark infringement” or “unfair competition, such as misappropriation of trade secrets, trade dress infringement, passing off, false advertising, and violations of the antitrust laws.”

Traditionally, the Commission has had two requirements for issuing an exclusion order: the complainant must be a domestic industry and the economic damage of patent infringement needed to be of sufficient magnitude. Before 1988, all that needed to be proven was a minor sales loss due to the importation of an infringed product. In 1988, however, the statute was amended to permit nonpracticing entities (NPEs) to file. An NPE is an entity that owns a patent but is not currently acting to build an industry off that patent. The amendments did this by eliminating the injury requirement and expanding the domestic industry requirement to establish that patent rights constituted evidence of a domestic industry. These changes are ultimately what allowed NPEs to take advantage of Section 337. The Commission classifies NPEs in two categories:

1. **Category-One NPEs:** “Entities that do not manufacture products that practice the asserted patents, including inventors who may have done 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.”

2. **Category-Two NPEs:** “Entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents.”

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14 Ibid., 7.

The Process

A Section 337 case takes roughly 16 months, relatively short compared to other judicial proceedings. The first step is filing a complaint, 30 days after which the Commission will begin an investigation. When a complainant comes to the Commission, it will often bring many claims, which typically are whittled down for various reasons to a select few by trial. The claims that remain are the ones that form the basis of the investigation. The second step is fact discovery, which takes between four to five months. Step three is to gather expert testimony. This takes about two months. Step four is the hearing, which typically starts 9–10 months after the filing of the complaint, and usually takes between one and two weeks. Step five is the posttrial submissions phase, where counterarguments may be filed over issues raised in the trial phase. Step six is the ALJ’s initial determination. This usually takes place three months after the trial and it includes detailed legal analysis, findings, and the judge’s conclusions. If a violation is found, it is included in the determination. Then, within 12 days from the initial decision, the losing party would be able to petition to the Commission for review. The Commission reviews the initial determination and then enters a final determination. The president has 60 days to review the decision and veto. If the president chooses not to, the Commission decision is final. If a party would like to, it could appeal the Commission decision to the Federal Circuit court, into which the Commission becomes the appellee.

It should be noted that the Commission has implemented new rules that will codify its 100-Day program. This program allows it to conclude certain investigations in 100 days if sufficient conditions are met. These conditions are determined by an ALJ and are precipitated by early signs that the outcome of the case is predictable. It is designed to encourage more high-quality cases at the Commission. Overall, the Commission and the ALJs more specifically have tremendous discretion when it comes to what allows them to throw out a case during this period.

Notable Past Cases and Litigation

Beyond legislative amendments to the original law, a few cases have also fundamentally influenced the process and interpretation of Section 337.

Certain Aramid Fibers 337-TA-194 (1986)

As mentioned above, the Aramid Fibers case had a drastic impact on Section 337. Aramid fibers are the material used to manufacture fireproof jackets, bulletproof vests, and tires, among other products. In this case, the Commission investigated AKZO’s alleged infringement of certain

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16 Andrew Lepczyk interview with Deanna Okun, March 25, 2018.
aramid fibers produced by DuPont.\textsuperscript{20} DuPont held two patents covering manufacturing processes and four patents covering fiber products. AKZO, a Dutch company now known as AkzoNobel, held three process patents and three product patents. DuPont accused AKZO of manufacturing and importing aramid fibers using a process that DuPont held a U.S. patent on.\textsuperscript{21}

AKZO filed a counterclaim, stating DuPont’s process in manufacturing of aramid products in fact infringed one of its own patents. AKZO argued that if both AKZO and DuPont had valid patents, and that both were infringed upon, then DuPont could not continue manufacturing aramids. DuPont’s manufacturing process involved the patent held by AKZO, and a finding against DuPont would render it unable to manufacturing the fibers. Furthermore, if AKZO owned the patent and rendered DuPont’s process untenable, then there would be no economically efficient industry for aramid fibers and thus DuPont could not file for an exclusion order. However, the Commission refused to hear the counterclaim, and AKZO was excluded from selling products in the United States.\textsuperscript{22}

This case was sufficient for the GATT to conclude that Section 337 was discriminatory since it did not allow AKZO to argue a counterclaim. According to Nathan Knight in the \textit{Georgia Journal of International and Comparative Law}, the discrimination ultimately came only in confining the Commission’s examination to one particular patent. In this case, DuPont chose one patent and argued that it was infringed upon and requested a general exclusion order. After failing to have its dispute heard in a single forum, AKZO decided to file a case in federal court charging DuPont with infringing its patents. DuPont argued against AKZO’s patent and eventually succeeded. The most important aspect of this case was that AKZO could not have its claims heard in a single forum with the same set of procedures and privileges as a domestic respondent. If AKZO had been a domestic respondent, DuPont’s patents would have been put to the test over their validity and AKZO would not have had to defend itself in multiple forums.\textsuperscript{23}

\textbf{eBay v. MercExchange (2006)}

This case took place in District Court, not the Commission, and ultimately made its way to the Supreme Court. The dispute involved MercExchange, which owned multiple patents pertaining to e-commerce, and eBay, a company whose business model revolves around e-commerce. MercExchange ultimately sued eBay for violating three of its patents pertaining to the exchange of merchandise at a fixed price. The District Court found eBay to be in violation of two patents and ordered it to pay MercExchange monetary relief but did not grant injunctive relief. Eventually, the case was overturned at the Federal Appellate Court level and MercExchange did receive injunctive relief. While the District Court concluded that, since MercExchange licensed its patent and did not act on it, injunctive relief was not appropriate, the United States Court of Appeals for the Federal Circuit suggested that this standard did not justify denying them injunctive relief.

\textsuperscript{22} Ibid.
\textsuperscript{23} Ibid.
eBay appealed this decision to the United States Supreme Court, which determined that neither the United States Court of Appeals for the Federal Circuit nor District Court correctly applied the traditional equitable principles for whether to grant injunctive relief. The Supreme Court overturned the Federal Court's decision and remanded the case to the District level. According to Justice Thomas, who gave the opinion for a unanimous court,

Neither the District Court nor the Court of Appeals below fairly applied these traditional equitable principles in deciding respondent’s motion for a permanent injunction. Although the District Court recited the traditional four-factor test, 275 F. Supp. 2d, at 711, it appeared to adopt certain expansive principles suggesting that injunctive relief could not issue in a broad swath of cases. Most notably, it concluded that a “plaintiff’s willingness to license its patents” and “its lack of commercial activity in practicing the patents” would be sufficient to establish that the patent holder would not suffer irreparable harm if an injunction did not issue. Id., at 712. But traditional equitable principles do not permit such broad classifications.24

While this case was not at the Commission, its implications have carried over to Commission cases and proceedings. This case set the precedent (at the district court level) that patent owners, like other litigants, must meet four criteria to receive injunctive relief. A company or patent holder must demonstrate that it suffered irreparable damage; remedies short of permanent injunction were not enough; the damage was sufficient that remedy in equity, or injunction, is necessary; and that the public interest would not be disserved by the injunction.25

To avoid the requirement of proving each of these four criteria in district court, companies now bypass the court system entirely and instead seek an exclusion order at the Commission, which lacks a similar four-factor burden of proof.26 Since the Commission is only empowered to issue exclusion orders, those looking for an exclusion order now go straight to the Commission. The judicial precedent set by the Supreme Court, many scholars suggest, contributes to the increased caseload at the Commission versus other avenues.27

**Baseband Processor Chips and Chipsets 337-TA-543 (2011)**

The rising number of respondents in cases brought before the Commission through Section 337 has much to do with the decision in the case of *Kyocera Wireless Corp. v. International Trade Commission*.28 In this case, Kyocera appealed to the Commission following a decision in a dispute between Broadcom and Qualcomm. In that case, Broadcom claimed Qualcomm was infringing on its patent for mobile computing devices. Kyocera together with Qualcomm appealed on the grounds the Commission did not have the authority to issue exclusions for

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26 Ibid.
downstream products that used the technology, such as the products made by Kyocera, but not named in the original complaint by Broadcom. Following a decision in Kyocera and Qualcomm’s favor, the number of respondents per complaint increased as complainants attempted to cover all their bases in advance.


Pioneer Electronics filed this Section 337 investigation against Garmin, the GPS company. Pioneer alleges that the importation of Garmin’s products violated Patent ‘448. These products included the Nuvi and Zumo lines, with their map update cards. The significance of this case is that it tests the extent to which a complainant may rely on licensing activities directed to an entire patent portfolio to prove the existence of a domestic industry related to the asserted patents under section 337(a)(3)(C), that is, under the section which is premised on substantial investment in exploitation.29

Since Pioneer holds both patents it uses in production and patents it does not, the crux of this case came down to how closely related the activities are to the asserted patents. The Commission ordered Pioneer to present evidence of the nexus between the two. If a patent holder can prove that there is a significant nexus between its licensing activities and the asserted patent in a portfolio, or if the asserted patent is particularly important to the portfolio, then the patent holder can demonstrate the evidence needed. By demonstrating the value or relative importance of the patent, the Commission decided this could show the investment the complainant has in the patent and thus prove the nexus between the patent and the activities.30

**Certain Electronic Devices 337-TA-794 (2013)**

Samsung alleged Apple infringed on five of its patents, two of which were allegedly essential to Samsung’s development of 3G capabilities.31 Central to this case is the concept of Fair, Reasonable, and non-Discriminatory (FRAND) obligations for standard-essential patents (SEP). The FRAND obligation was created to allow patent owners to license their patents but without gaining an unfair bargaining advantage32 over standard essential patents, which are any patented technology that is integral to the technical standard of a given industry. For example, if the entire pen industry uses one specific, standardized ballpoint patent, FRAND obligations prevent the owner of that ballpoint patent from unfairly using its leverage as an essential, standard setting patent in the pen industry to extract greater concessions from companies or other patents used in the creation of ballpoint pens.

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30 Ibid.
Apple claimed that Samsung’s FRAND obligations on its SEP for 3G capabilities negated Samsung’s ability to obtain an exclusion order. The hearing was held in June 2012, presided over by Judge E. James Gildea. In September of that same year, Judge Gildea issued an initial determination, finding Apple did not violate Section 337 and thus did not infringe Samsung’s patents. The Commission declared that it would review the initial determination and issue a Notice of Review asking Samsung and Apple questions:

1. Does the mere existence of a FRAND obligation mean an exclusion order cannot be made?

2. What framework should be used for determining whether a licensing offer complies with FRAND? How would a rejection by the accused infringer (Apple) change the analysis, if at all?

3. Would there be a significant cost or delay to new technology covered by the two patents?

4. What portion of the accused devices is covered by the two infringed patents?

Following review of the responses, the Commission concluded that the patents were licensed on FRAND terms and thus issued an exclusion order. The Commission disagreed with Apple’s belief that meeting FRAND obligations precludes requests for exclusion orders, and stated Apple did not provide sufficient evidence to the Commission to satisfy the burden of proof. President Obama overturned the Commission’s order on the grounds of improving competition in the market, the benefits to the American consumer of maintaining access to Apple products, and the enforcement of standard essential patents. The case is particularly noteworthy as it was the first time since 1987 that a presidential veto (in this case delegated to USTR) overturned the Commission’s decision. This potentially sets a precedent for other popular and widely used products to overcome a patent infringement charge via executive action.


In April 2012, Align Technology submitted to the Commission a claim that ClearCorrect infringed on its patents relating to technology for repositioning teeth. In Section 337, the Commission is empowered to prevent “unfair acts in the importation of articles,” with “article” generally understood to be tangible goods or products. The biggest implication of the case


was the Commission’s determination that digital code also constituted an “article.” The United States Court of Appeals for the Federal Circuit later ruled that the Commission did not have jurisdiction to decide over the alleged patent infringement and overturned the Commission’s decision. This story, however, begins in 2005, with the former CEO of Align using the patented technology and setting up another company in the United States and Pakistan known as OrthoClear. When Align previously opened Commission cases, the two sides reached a settlement. Align was skeptical that OrthoClear was upholding the Consent Order barring production, and believed a new company with the same CEO, ClearCorrect, was continuing to violate Align’s patents. Align filed two more Commission patent infringement claims. ClearCorrect claimed that the digital files being imported into the United States were not covered in the Consent Order. The Federal Court overturned the decision by the Commission that digital data constituted an “article” and thus digital data was not protected by Section 337.

This case had a variety of parties filing briefs as it pertained to illegal piracy overall, including digital piracy and downloads in the entertainment space. Since the courts ruled that the importation of digital data is outside the purview of the Commission, complainants are unable to use Section 337 if the case concerned digital data. In 2014, Align Technology sought to appeal to the United States Court of Appeals for the Federal Circuit but was denied. In the court’s words, “We write briefly only to address certain points newly raised by the dissent, none of which support its incorrect interpretation of the statute.” Sorting this out will have significant implications as 3D printing becomes more complex and advanced. Is this a traded good? Is it domestic manufacturing? Is it something else? These are aspects of Section 337 precedent the Commission and the Congress must eventually decide.

**Certain Network Devices 337-TA-945 (2017)**

In this case, Arista was importing switches, including their software and components, on which Cisco sought an exclusion order. This case ultimately came down to the issue of timing. Arista’s dormant devices did not violate the patent at the time of importation, but once turned on, the software on the switches infringed on Cisco’s patents. The Commission’s exclusion order covered both the switch components and the finished product. Upon appeal, this decision was upheld in the Federal Circuit. This decision has been controversial. It leads to the question: should a product that when imported does not violate Section 337 be subjected to the exclusion order if, upon receipt by the customer and made to function, it will violate Section 337?

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U.S. Steel filed a complaint asking the Commission to exclude almost all Chinese alloy and carbon steel products from entering the United States. The company alleges unfair practices by China pertaining to price-fixing, trade secrets theft, and circumventing antidumping and countervailing duty orders by manipulating their country of origin designations. According to the law firm Foley & Lardner, each of these reasons carries implications for the future of Section 337. The price-fixing measure could conclude that any product coming from a nonmarket economy is unfair because their prices are not determined by a global marketplace. Although the claim of trade secret theft was dismissed, U.S. Steel claimed the hacking was done on behalf of the Chinese government. It is unclear whether the Commission has jurisdiction over the illegal activity of a foreign government. The charge of circumventing antidumping measures brought on by the Lanham Act would also alter the way the Commission operates as antidumping is under the jurisdiction of the U.S. Department of Commerce. Ultimately, the Commission decided to terminate the investigation because, for a party to file a Section 337 based on antitrust injury, it must show antitrust injury. U.S. Steel failed to do so and has said it would not be able to. This case is particularly noteworthy because it was an attempt to expand the scope of the Commission and Section 337 beyond patent infringement into other aspects of anticompetitive trade practices. The Commission officially concluded the case on April 9, 2018.

Policy Questions

Based on our interviews, conversations, and research, the following questions are designed to facilitate a better understanding of the issues at hand and explore possible answers to problems facing Section 337.

1. Why has the case load increased?

Overall, the trend of 337 cases instituted has steadily increased. Former ITC commissioner Shara Aranoff believes this rapid increase has been brought on due to an economic shift toward more imported high technology and the hastening pace of innovation that requires quick adjudication. She does not believe amendments to the law in 1974 or 1988 precipitated the growth in cases we have seen of late.

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Figure 1: Number of New Cases Instituted per Fiscal Year


Figure 2: Accused Products in FY 2015

Source: House Judiciary Committee.
Notable in Figure 2, electronics and other high-tech products account for roughly half of the cases, supporting former commissioner Aranoff’s position. The overall shift of high-tech industries overseas has possibly created 337 cases, causing technology-related imports to have a larger portion of products.

According to Commission experts gathered at a CSIS roundtable, the increased caseload is a natural consequence of the increased complexity of modern manufacturing. New products build off the intellectual property of older products, and production methods are dependent on a complex global web of supply chains. Experts such as former commissioner Shara Aranoff suggest that the Commission’s higher caseload is also a result of more patent-holding companies looking to protect their rights on increasingly complex and patent-reliant products. This shift began in 2001 and was greatly exacerbated by the 2006 eBay v. MercExchange case in District Court for the Eastern District of Virginia described above.

2. Has there been increased politicization of the process?

The Commission’s relationship with politics and political pressures can be complicated and indirect. Congress purposely insulated the Commission and sought to protect commissioners from political pressures. This insulation arises from the structure of the Commission. Commissioners are appointed for nine-year terms and are difficult for a president to fire. Overall, it does appear the Commission has seen an increase in lobbying efforts on the part of companies named in cases. Whether the Commission feels that lobbying pressure is another story. While lobbying has a presence, lobbyist efforts do not appear to have had any identifiable influence on outcomes. According to former ITC commissioners, opinions are read and considered but fail to provide significant extra weight or political pressure on the Commission’s decisions.

The Certain Electronic Devices case is one instance of political pressure in decisionmaking related to the 337-adjudication process, but not at the Commission level. This was the first case since 1987 to be overturned by the president. One may argue that political pressures can enter the process at this juncture, with Commission decisions overturned due to political pressures at the presidential level—though not during the Commission’s original process. More can be found on this case in the Notable Cases section. Additionally, the Commission and its commissioners are neither oblivious nor wholly immune to the heated political environment in Washington and increasingly sophisticated efforts by interested parties to advance their views in creative ways. It is possible Commission decisions can be influenced by this, though this a problem for all government bodies and the people who serve in them, and we found no specific examples in the case of the Commission.

Despite the possibility of a presidential veto for policy purposes, the Commission is still an independent agency. Due to Humphrey’s Executor v. United States the president does not have the power to fire the commissioner of an independent agency. (In that case, the Supreme Court

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43 Francine Friedman, interview by William A. Reinsch, March 12, 2018, private notes.
45 eBay Inc. et al. v. MercExchange L.L.C. No. 05-130 (Supreme Court 2006).
46 Panel of experts, interview by William A. Reinsch, March 12, 2018, private notes.
overruled Franklin Roosevelt’s decision to fire Federal Trade Commissioner William E. Humphrey on the grounds that the FTC’s implementing law specifically created the FTC as an independent agency and did not provide the president with the power to fire commissioners.47)

In aggregate, there is no discernable trend over the last two decades of official correspondence between the Commission and Congress. Assuming formal, on-the-record letters are the primary mode of communication, the lack of increase in the number of such letters suggests that direct congressional pressure has not changed much and demonstrates that Congress perhaps is not placing political pressure on the Commission and its cases.

Figure 3: Correspondence between Congress and the USITC

Source: U.S. International Trade Commission. Data for 2018 only cover the first five months.

3. What are patent trolls and are they a problem?

The issue of nonpracticing entities (NPEs) has been growing in the debate over intellectual property protection. The Omnibus Trade and Competitiveness Act of 1988 established that the domestic industry requirement in Section 337 applied to licensing activity not squarely tied to manufacturing. Thus, patent holders could receive an exclusion order without previously establishing a more traditional form of domestic industry. This created an environment some years later whereby nonpracticing entities could acquire patents and license them without the intention of utilizing the patent for any manufacturing purpose.

While no generally accepted definition of an NPE exists, the Commission does categorize nonpracticing patent holders in the two categories, previously discussed and defined in “How Section 337 Works.” Category-One entities do not manufacture products but do considerable R&D. This includes well-established companies, universities, and startups that possess IP rights but do not manufacture. Category-Two entities are those that do not manufacture products with the patent and whose business model relies on earning profits from licensing patents to others.

The Commission has tried to establish a precedent around the extent to which Category-Two entities should be able to use Section 337 to obtain favorable licensing agreements. If a patent holder wants relief, it must provide proof of its industry’s existence for the Commission’s scrutiny. At issue is which investments or other activities are necessary for establishing a domestic industry. In Coaxial Cable Connectors the Commission found that litigation activities may satisfy the necessary requirements for proving domestic industry, if the complainant can prove that these activities are related to the patent at hand. In Certain Multimedia Display & Navigation Devices, the Commission established a framework for deciding if a domestic industry existed for nonpracticing entities and whether their investments relate to a license portfolio. The investment must have a connection to the exploitation of the asserted patent, relate to licensing, and occur in the United States. This is known as a nexus to the economic prong. The nexus is a factor that attaches the patent to the alleged exploitation. In the case of Category-Two NPEs, this can include litigation costs.48

Another hotly contested aspect of NPEs is the “technical prong.” This refers to whether there is a protected article that incorporates the patent. For example, if a device is manufactured by an entity that owns the patent then it would be considered to satisfy the “technical prong”; not only is the patent owned by a party, it is also a component in a product manufactured by that party. The Commission long felt that trademark, copyright, patent rights, or design could satisfy this requirement. The Commission standard had long been that this technical prong did not need to be satisfied for an NPE to receive injunctive relief. This was overturned in the 2013 case of InterDigital Communications v. International Trade Commission. The Federal Circuit found that the investment must pertain to the patent’s exploitation, including engineering, research and development, or licensing. Since this ruling, nonpracticing entities have had a more difficult time in their efforts to litigate at the Commission.49

In each year since 2006, Category-Two nonpracticing entities accounted for between roughly 4 percent and 18 percent of Section 337 cases involving an NPE. Since 2006, the largest number of Category-Two cases in a single year has been nine. In many of the years surveyed, Category-One NPEs use the Commission more than Category-Twos. However, since 2011 Category-Twos have become much more common at the Commission, prompting criticism that the Commission has moved away from its core goal of protecting domestic industry. This pattern is seen in Figure 4.

49 Ibid.
Figure 4: Section 337 Statistics

<table>
<thead>
<tr>
<th>Calendar Year</th>
<th>Total No. of Invs</th>
<th>Non-NPE Invs</th>
<th>Category 1 NPE</th>
<th>Cat. 2 NPE</th>
</tr>
</thead>
<tbody>
<tr>
<td>5/16/2006 through 12/31/2006</td>
<td>15</td>
<td>14</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>35</td>
<td>30</td>
<td>4</td>
<td>1</td>
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<tr>
<td>2008</td>
<td>41</td>
<td>34</td>
<td>6</td>
<td>1</td>
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<tr>
<td>2009</td>
<td>31</td>
<td>23</td>
<td>4</td>
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<td>2010</td>
<td>56</td>
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<td>69</td>
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<td>Q1 2018</td>
<td>15</td>
<td>12</td>
<td>3</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: U.S. International Trade Commission, “Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs (Updated Quarterly).”

A related issue worth mentioning is what is known as “industry by subpoena.” It arises when a nonpracticing entity sues a defendant in District Court, receives a settlement, and then takes this decision to the Commission to seek an exclusion order that covers the entire industry. The end goal of the Category-Two nonpracticing entity, however, is not to receive an exclusion order. Its intention at the Commission is to force manufacturers to pay royalties or to settle and receive compensation. Following the decision to take the case to the Commission, the nonpracticing entity will then seek to subpoena other companies to compel them to provide information that demonstrates the existence of a domestic industry. An example is the case of the Siemens-Microsoft cross licensing agreement.  


It should be noted that the number of cases filed by NPE Category-Two entities has dropped dramatically in the last few years. This could be because of changes in the way the ITC considers them.

4. Should the definition of an “Article of Trade” be changed?

There are two primary means of changing the definition of an article of trade. The first is through the judicial system. That would require a different case that touched on similar issues as
the ClearCorrect case that might produce a different outcome. Such an approach would be lengthy and expensive for those directly involved in the litigation, and the prospects of a definitive outcome are uncertain. Another route is through legislation. Congress can pass a new law or amend the current one to clarify the issue. This would likely be a more definitive outcome, but it also suffers from the slow and uncertain nature of the legislative process.

That is how the definition may be changed. Whether the definition should be changed is another matter. The Electronic Frontier Foundation, a nonprofit organization defending digital privacy, free speech, and innovation, and Public Knowledge, a nonprofit that advocates for an open internet, filed a brief opposing what they believe is the Commission’s overreach in the ClearCorrect v. ITC decision. Their view is that the Tariff Act of 1930 did not give the Commission authority over telecommunication, and they “thus disfavor the Commission’s manufacturing of new powers over data transmissions.”53

This issue presents an interesting policy challenge. On its face, insuring the opportunity for strong action against infringement is an important public policy goal, and it is clear the 1930 statute is not equipped to deal with the changes in the conduct of commerce in the intervening 88 years. The Commission recognized that in its ClearCorrect decision and effectively reinterpreted the law to accommodate the transition to digital trade. The Court of Appeals for the Federal Circuit concluded that the Commission’s interpretation went beyond the limits of what the statute permits. While it is tempting to conclude that the court’s decision, if it stands, leaves a serious problem without a remedy; in fact, aggrieved parties have an alternative—seeking damages in federal court. That can be an expensive, time-consuming path, but it is nonetheless a viable alternative that also avoids the difficulties of enforcing an exclusion order in a digital environment.

Companies that provide digital services, such as cloud storage, are concerned that ultimately the burden of enforcing an exclusion order would fall on them, requiring them either to attempt to monitor all of a company’s individual transactions so they can identify and block infringing transactions or simply to deny the company services, whether infringing or not. This is in some respects analogous to the ongoing debate over intermediary liability for posted content, which also remains unsettled. Congress might well choose to address this issue in one context or another, but in the case of Section 337 exclusion orders, the existence of an alternative path (seeking damages) constitutes a better approach, at least in the short run.

5. How is the public interest accounted for in Section 337?

Many cases before the Commission could have a significant impact on the public. Therefore, it has become more important to analyze how a Commission decision may impact the public interest. When considering the public interest, the ALJ studies four factors:

1. The public health and welfare;

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2. Competitive conditions in the U.S. economy;

3. The production of like or directly competitive articles in the United States (the Commission is saying you must prove that if the exclusion order was applied, the industry would still exist); and

4. How U.S. consumers may be impacted by the exclusion of the infringed product.54

Starting in 2011, the Commission began receiving public interest comments prior to the start of an investigation. This change, from considering public interest at the end to considering it at the beginning, gives a more complete documentation of the public interest factors in order to help both the Commission and the presidential review process. In the five-year period after the Commission changed its procedures in the collection of public interest comments, the Commission noted 49 cases that deserve public interest attention. This amounted to roughly a quarter of cases in that time. If the Commission believes the public interest may be affected by the outcome, it orders the ALJ to collect public interest comments and evidence. Prior to 2011, an investigation could have public interest comments submitted in the beginning phase. After 2011, the procedure was institutionalized, requiring the comments to be a part of the response to the initial complaint.

In soliciting public comments, the Commission aims to understand the following:

1. How do the affected articles in the exclusion order pertain to the United States?

2. Can we identify the effects relating to the remedial orders on public health, welfare, and safety?

3. Can we identify like or similar products to the article the complainant, licensee, or third parties make?

4. Could the complainant, licensee, or third party replace the volume of articles that would be excluded if the injunction were in place?

After comments are collected, they must also be addressed in any remedy. In issuing a determination in the form of a remedy or a bond, a commissioner must explain the public interest factors that went into making that decision. Before 2011, the public interest component was often left to the latter part of the process. The problem with this became apparent to the Commission in Certain Baseband Processor Chips and Chipsets. During this investigation, then-current technology did not offer a commercially viable alternative to the Qualcomm baseband chipsets for mobile phones. The Commission received many public interest arguments about the economic harm of excluding these chipsets, the competitive harm, and the harm to first responders of not having this type of 3G technology readily available. Ultimately, after many rounds of deliberation, the Commission concluded that the general exclusion would make an

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exception for handsets that are “grandfathered in” because if not, the public interest would suffer as there was no viable alternative.

The Certain Baseband Processor Chips and Chipsets case highlighted two aspects of the public interest. First, it brought attention to the importance of well-developed and well-argued public interest assertions. Second, it encouraged more litigants to make the public interest central to their arguments in front of the Commission.

The public interest is increasingly at the forefront of Section 337 cases. Perhaps most notably in Certain Electronic Devices [337-ITC-796]. In this case, the USTR, having had the Presidential Policy Review authority delegated to it, overturned a Section 337 decision for the first time since 1987 over issues relating to American consumers, competition in the U.S. economy, and the issue of Standard Essential Patents. This case, however, broke from the 2011 procedural change by going forward with the investigation, giving an initial determination, and then having parties submit public interest arguments to the Commission.

According to former commissioner Shara Aranoff, the lessons to be learned from five years of public interest debate at the Commission are that more emphasis is given to public interest arguments. The effectiveness of considering the public interest at the beginning of the investigation will only go as far as the Commission’s ability to predict which cases will likely have public interest components. In her view, the successes of these new procedures with respect to their intended goals have been modest. The only case so far that reached the merits of public interest at the time of her writing in 2015 was Optoelectric Devices. That case took 18 months to complete. This compares favorably to Baseband Processor Chips, which took two years.55

6. What is the Sunshine Act and why does it matter?

The Government in the Sunshine Act was passed in 1976 in the aftermath of the Watergate scandal. It is intended to improve transparency in the operations of multimember federal agencies.56 The Commission’s general counsel has interpreted the act as requiring a meeting of three or more commissioners (a quorum) to be considered an official meeting. A quorum meeting requires seven days advance public notice of such an event, the ability of the general public to attend, and for a meeting transcript to be released publicly among other things. This makes it difficult for commissioners to meet informally and discuss cases among themselves, whether stopping by one another’s office or simply going out for lunch. While there are workarounds to allow commissioners to communicate off the record, such as sending aides, many point to this as a hindrance to effective communication. The issue of communication between commissioners is something that has been commented on by past commissioners Alfred Eckles and Anne Brunsdale. In the latter’s view, the Commission would greatly benefit from allowing commissioners to hear the views and opinions of other commissioners.57 Allowing commissioners to communicate more informally could create better

57 Michael A. Lawrence, ‘Finding Shade from the ‘Government in the Sunshine Act’: A Proposal to Permit Private
outcomes at the Commission, enabling commissioners to discuss cases and share their thoughts on them more spontaneously and naturally. Some commissioners, however, feel current operating procedures are proper and adequate.

7. Does the ITC have the resources to meet current challenges?

With an increased caseload, the question must be asked whether the Commission has sufficient resources to meet the demand. Many experts believe the Commission’s budget is appropriate to meet its needs, and the Commission can effectively carry out its mission. For FY 2019, the Commission has requested $93 million.

The Commission also maintains other internal resources to improve its operation. A recent development in the Commission that has allowed Section 337 to flow more seamlessly is 337Info. Created in 2014, it is a repository of information about Section 337 investigations that have been instituted since 2008. This website has allowed the public access to more information such as scheduling, staff, and information about the illegal or unfair acts committed and the status of the investigation. Another digital development that the Commission has implemented to help streamline the 337 system is its Electronic Document Information System (EDIS). This is a repository for all documents filed in Section 337 investigations. Not only does EDIS help the public’s knowledge of investigations, it is also a useful tool for internal review. Since system’s launch, the Commission has continued to modernize it.

In terms of physical space, the Commission has signed a 15-year lease on a court room. This ensures that the Section 337 caseload can be met in a physical sense. The Commission estimates that the lease will save $16 million over 15 years.

8. Is Section 337 being properly enforced?

When it comes to enforcing the Commission’s exclusion orders, the responsibility falls to Customs and Border Protection (CBP) under the Department of Homeland Security to ensure compliance with the law and Commission orders. In 2017, seizures by CBP rose 8 percent from 31,560 in 2016 to 34,143. The estimated retail price of the goods collected stood at $1,206,382,219. This was a decrease from 2016 where the goods were estimated to be worth $1,382,903,001. In 2017, the Customs and Border Protection completed 115 exclusion orders enforcement actions. Below is a chart reflecting the 10-year trend for intellectual property seizures by the Customs and Border Patrol. The trend is obvious, with the past 10 years witnessing a significant increase in the seizure of infringed goods.

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While the seizure of illegal goods has gone up, enforcement can still be a mixed bag. In July of 2013, Microsoft took Customs and Border Protection to court over claims of a lack of enforcement. After receiving an exclusion order against Motorola Mobility devices, Microsoft was still not satisfied with enforcement. While all Google Android phones were subject to this exclusion order, Microsoft claimed that many of these phones were getting through Customs.61

Pending Legislation

Several bills relevant to Section 337 are pending in Congress.

First is the Trade Protection Not Troll Protection Act (HR 2189), introduced into the 115th Congress by Rep. Tony Cardenas (D-CA) and then-Rep. Blake Farenthold (R-TX). HR 2189 aims to modify the domestic industry requirement, requiring a patent to reach the production stage to gain Commission protection. It would also require any licensee who wants to join a Commission case to prove domestic industry status beforehand, to minimize costs for those named as respondents in a case that could ultimately be dismissed. The stated goal of this

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legislation is to return the Commission to its core responsibilities to protecting U.S. trade, not patent trolls. As it stands, the bill is awaiting committee review.

Trade Protection Not Troll Protection also seeks to expand the public interest by allowing ALJs to throw out a case based on more than the four factors discussed in Question Five of the “Policy Questions” chapter. It would create a catch-all that would allow the ALJ to cite “all relevant factors” that would pertain to public interest.

This bill is intended to curb the practice of patent assertion entities (PAEs), analogous to Category-Two NPEs, using the Commission as an adjudication body. According to Representative Farenthold’s website,

> PAEs are firms that rely on patents they purchase and assert after a product is already in production. Today, PAEs are using the ITC as another venue in their litigation strategies against US companies, alleging that PAEs need trade protection as a domestic industry.

This process is known as “industry by subpoena,” meaning that patent holders are effectively creating business models around litigation and in turn (as mentioned in Question Three of the “Policy Questions” section) forcing larger, third-party companies to pay litigation costs and settle out of court. This bill would prevent PAEs from pursuing this behavior by allowing such third-party companies to enter cases voluntarily. The bill also expands what qualifies as public interest, including consideration of public health, the economy, the production of like products, and consumers. Overall, the bill expedites the fact-finding and decisionmaking process at the Commission. Under the bill, the Commission would deliver its ruling on domestic industry within 100 days of instituting an investigation. Additionally, the Commission would rule on an exclusion order’s effects to the public interest at the outset, whereas the Commission must currently wait until the end of an investigation to issue such a ruling.

In June 2017, Sen. Chris Coons (D-DE) introduced the STRONGER Patents Act (S.1390), aimed at strengthening the U.S. Patent System by making it easier for patent holders to enforce their patents. In Senator Coons’ view, there have been a number of changes in the past decade that have weakened the patent system. To keep the United States’ advantages in innovation, Senator Coons believes the patent system must be stronger. The bill hopes to restore investor confidence in the patent system by revamping the U.S. Patent and Trademark Office, incentivize parties to reach license agreements without going to court, help universities and small businesses access the patent system, and ensure that the U.S. Patent and Trademark Office has access to the fees it collects in order to modernize and issue patents consistent with modern

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64 Ibid., Section 3, Part 4, Subsection 2A.
standards. One of the key functions of this bill would be to give businesses injunctive relief while fighting in court for their patent rights. This would contrast with the current system, where injunctive relief is granted after the trial has been decided. Many argue that this bill would reverse the Supreme Court decision in *eBay v. MercExchange* and strengthen patent holders right to exclude others from using their patent.

As these pending bills show, there is interest in addressing the issues present in the patent system, including enforcement and digital definitions. In both the House and Senate, Democrats and Republicans recognize the importance of clarifying this crucial policy area.

**Recommendations**

Based on our conversations with stakeholders, former ITC commissioners, and legal practitioners, we believe the following recommendations would improve the functioning of Section 337 and its ability to protect the rights and interests of U.S. patent holders.

1. **Tighten the nexus between patents and domestic industry requirements.**

A solution to the problem of rent-seeking Category-Two NPEs is to allow the ALJ to issue subpoenas in an investigation only if the complainant is a legitimate economic entity and not simply using its patent to extract rents from productive economic enterprises. To accomplish this, the Commission could state that a subpoena would not be in the public interest if the complainant’s request would damage the American economy. Since the Commission issues subpoenas on behalf of the entity, it could effectively block the NPE from compelling another company to participate in the case against its will. In so doing, it would leave the Category-Two NPE without subpoenaed companies to rely on and thus make it more difficult for them to prove domestic industry. Along these lines, another way to address this problem would involve the following: if a subpoena is granted, the subpoenaed party would not be obliged to testify, therefore allowing an uninterested party or a party who claims the entity is extortionary the option to decline.

A third approach would be to directly strengthen the requirement to prove domestic industry, making it more difficult for Category-Two nonpracticing entities to obtain relief. Currently, Category-Two nonpracticing entities can cite litigation expenses to prove domestic industry. This in effect creates a situation where the patent holder can use the Commission to hold hostage an entity using or manufacturing a product or patent. Changing the standard for domestic industry would allow the Commission to devote more resources to Category-One NPEs and to patent holders that are manufacturing.

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2. **Reassess how the Sunshine Act is interpreted or implemented.**

Reassessing the Sunshine Act’s interpretation at the Commission would allow commissioners to interact and discuss cases, to gain more clarity on possible decisions and their potential outcomes before voting. Relaxing Commission procedures to allow for more informal dialogue between commissioners would bring benefits for the Commission as a whole.

3. **Congress should comprehensively clarify the current definition of “article of trade.”**

The decision of the Court of Appeals for the Federal Circuit in Align Technology v. ClearCorrect has brought the issue of the relevance of Section 337 to digital trade front and center. As a legal matter, the court’s decision may well have been correct, but it leaves undecided the question of how best to protect against infringement in a digital context.

The issue is complex. Changing the law to define digital data as an article of trade would put a significant burden on private-sector service providers inevitably tasked with enforcing the Commission’s exclusion orders. This is not the only issue that raises questions of assigning enforcement responsibilities to digital service providers of digital services. This is a problem best dealt with comprehensively by the Congress, rather than piecemeal per issue or instance. In infringement cases involving digital products, seeking damages in federal court provides a parallel avenue of relief and, in the absence of Congress addressing the issue comprehensively, is the better path for the time being.

4. **Maintain the current definition of “public interest.”**

The Commission should maintain the definition of public interest as is. Although there have been proposals to expand it, the current definition of public interest is broad enough to protect the U.S. economy and consumers, but not so precise as to interfere with the property rights of patent holders.

The proposals contained in the Trade Protection Not Troll Protection Act (expanding the public interest by allowing ALJs to conclude an investigation in the beginning of a trial if public interest would be affected) are misguided. Often, a complainant will bring over 10 claims to the Commission, and these are whittled down to a select few. Applying a public interest test to all initial claims would waste time and resources, as it would require public interest review for many claims that would ultimately be thrown out.\(^{70}\)

Furthermore, because the public interest is applied on a case-by-case basis, it is not practical to rely on a narrow definition of public interest, as what defines the public interest is constantly in flux. In part as a result of that, there is not a sufficient record from Section 337 investigations to give a clear precedent for further defining “public interest.”\(^ {71}\) At the same time, the fact that each public interest consideration is case specific creates a challenging environment where respondents and complainants do not have an agreed-upon standard as to what they must prove or disprove to meet the “public interest” standard. This potentially encourages

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\(^{70}\) Andrew Lepczyk interview with Tom Schaumberg and Deanna Okun, April 25, 2018.

\(^{71}\) Ibid.
politicization of the process. With no clearly established precedent, outside parties may seek to pressure the Commission to accept their interpretations. The Commission should periodically assess the definition of public interest and the process by which it is considered to ensure that both continue to be appropriate and relevant to its case load.

Conclusion

Since the Tariff Act of 1930, the United States International Trade Commission has been empowered by Section 337 to forcefully protect patent holders against the importation of articles that illegally and unfairly use their patent. But as technology has rapidly evolved, Section 337 has not kept pace. It has been 30 years since it was last meaningfully updated. Since then, the U.S. economy and global intellectual property landscape have been transformed by the digital revolution. Using the same laws and procedures written during the height of the Great Depression and last updated during the Reagan administration may be akin to forcing a square peg in a round hole.

Many of the issues addressed in this paper demonstrate the complexities of updating how the Commission operates and applies Section 337 to modern situations. Most notable, Category-Two nonpracticing entities and patent assertion entities pose significant challenges to the patent system and the utility of Section 337 in addressing actual infringement. The definition of an “article of trade” requires further consideration to better match the needs of our digital world. Procedurally, transparency rules slow the Commission’s speedy and effective conclusion of investigations.

Our recommendations for these issues are meant to bring Section 337 up to date and provoke further thought on how digital trade poses new challenges in applying the statute and on how operational challenges at the Commission could be surmounted. A procedural change to the Sunshine Act that balances requirements on transparency and functionality should be made to allow commissioners to effectively discuss cases informally. For Category-Two NPEs and PAEs, increasing the standard a patent holder must meet to establish domestic industry would filter out many of the most egregious abuses of the current system. Lastly, and perhaps most importantly, redefining the term “article” is especially pressing considering the ever-growing digital nature of modern industrial manufacturing and commerce. This, however, will require further research and deliberation, and most likely action by Congress.

Overall, Section 337 is a key tool for protecting the U.S. patent system, and thus the heart of our innovation economy. For this reason, addressing these challenges directly can better prepare the United States International Trade Commission for the economy of the twenty-first century.
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Intellectual Property and the International Trade Commission

An Examination of the Role of the ITC in Protecting IP Rights

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