

Questions for the Record from Rep. Issa for Ms. Hairston, Mr. Korte, Professor Contreras, and  
Professor Doane  
“IP Litigation and the U.S. International Trade Commission”  
July 23, 2024

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**For all witnesses:**

1. 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?
2. To the extent that you call for reforms related to 337 litigation, will these reforms be helpful to better hold China accountable for abuse of intellectual property?
3. To the extent that you call for reforms related to 337 litigation, to what extent could the problems you identified be solved by administrative action by the ITC rather than a statutory change?

**For Mr. Korte:**

1. How do you respond to those who say companies simply need to on-shore their manufacturing to avoid the risk of being a respondent in an investigation at the USITC?
  - a. Follow on question: Would it be economically or technically feasible to on-shore the entire supply chain that Garmin relies upon?
2. You testified that the cost to participants in an ITC investigation is multiples of the cost of a case in federal district court. Does that cast doubt on the claims that the ITC is a better venue than the courts for small and medium sized businesses?
  - a. Follow on question: Do patent assertion entities prefer the ITC due to the leverage created by the ITC exclusion orders even for minor patents that add little or no economic value to a product?

**For Prof Contreras:**

1. What was the original statutory purpose of Section 337?
  - a. Follow on question: Approximately what proportion of the IP cases at the USITC meet this original statutory purpose, as you understand it?
2. It has been suggested that the *eBay* decision has forced companies to rely upon the USITC by preventing patent owners from realistically obtaining injunctions in district court. Do you agree or disagree?

- a. Follow on question: What data is available about whether the *eBay* decision is preventing patent owners from being awarded injunctive relief in district courts?
  - b. Follow on question: How would you explain differences in how district courts are applying the *eBay* decision based on whether the patent owner, for example, is a manufacturer versus a patent assertion entity?
3. Some have suggested that the ITC is an important venue for small businesses to have their claims heard. What proportion of small entities utilizing the ITC are actually small manufacturers or small businesses who have developed their own products, and what proportion are patent assertion entities that have acquired the IP of others solely for the purpose of assertion?

**For Ms. Hairston:**

1. You represent the Alliance for Automotive Innovation, which counts as its members some of the largest and most important manufacturing entities in the United States. As significant domestic industries, how often do your members find themselves appearing at the USITC in Section 337 matters?
  - a. Follow on question: What approximate proportion of the cases involving your members involve patent assertion entities?
  - b. Follow on question: Were there also cases filed in district court by those same entities?
2. Follow on question: How do you respond to those who say companies simply need to onshore their manufacturing to avoid the risk of being sued at the USITC?
  - a. Follow on question: Would it be economically or technically feasible to onshore the entire supply chain that the automotive industry relies upon?
3. Does the possibility of a USITC exclusion order pose unique litigation risks for complex items like automobiles or large automobile subsystems like engines, transmissions, and electronic control units, that contain many small components?
  - a. Follow on question: Do you have a recommendation for how to address these risks for complex items that may contain many small (and potentially low cost and value) items?

**For Prof Doane:**

1. What was the original statutory purpose of Section 337?
  - a. Follow on question: Do you believe that the original purpose of Section 337 is served by granting a foreign entity an exclusion order against a U.S. manufacturer, where the foreign entity's sole claim of a domestic industry is based on U.S. licensees, none of whom are willing to join the case alongside the foreign entity or otherwise express any desire for the ITC's involvement?
  - b. Follow on question: Are there any Section 337 cases that you believe fall outside of the original statutory purpose of Section 337?

- c. Follow on question: Do you believe any changes, whether statutory or administrative, are warranted to address the rise of Section 337 filings by patent assertion entities?
2. It has been suggested that the *eBay* decision has forced companies to rely upon the USITC by preventing patent owners from realistically obtaining injunctions in district court. Do you agree or disagree?
  - a. Follow on question: How do you respond to statistics showing?
  - b. Follow on question: Some have asserted that, based on available data, practicing entities are still able to obtain injunctive relief in district court even after *eBay*, and it is primarily non-practicing entities that were affected by *eBay* and, thus, rely on the USITC as an *eBay* workaround. Are you aware of data that supports or refutes that conclusion?

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1. Isn't it true that a number of the presumably small business complainants in recent decades have been patent assertion entities (PAEs), which are simply shell companies that purchase portfolios of weak patents from other parties solely to assert claims of infringement, whether in district court or under Section 337 at ITC, to extract settlements?
  - a. Can you provide more detail on the prevalence of PAEs before the ITC in Section 337 cases?
2. Can you give an example of an NPE that has received an exclusion order and subsequently introduced a product into the US market?