

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

IP Litigation and the U.S. International Trade Commission
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Response to Questions for the Record

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Chairman Issa and Representative Cline,

Thank you again for the opportunity to provide testimony on IP Litigation and the U.S. International Trade Commission. My answers to your follow-up questions are below.

Q1. 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?

A1. Section 337 is often used by foreign companies, and foreign-backed investors, to target American innovators that design and make products in the United States. Focusing the ITC on its core mission to protect American domestic industry, through reforms to the existing public interest and domestic industry requirements of Section 337, would return the ITC to its statutory mandate and better protect the intellectual property of Americans.

Section 337 currently requires the ITC to consider the effect of its exclusion orders on public health, U.S. competition, the production of comparable products in the U.S., and U.S. consumers. However, this language has proven toothless, allowing foreign patent holders to easily disrupt the operation of American companies. Amending Section 337 to require a robust analysis of the impact on American industry versus the benefit to foreign interests would refocus the ITC on its mission to protect American intellectual property.

Similarly, clarifying the language regarding domestic industry—such as by requiring a patent owner to show that they have directly contributed to *bringing* a product to market in the United States before filing a complaint with the ITC, even through licensing in advance of manufacturing—would ensure that Section 337 is not misapplied by foreign interests with limited ties to the

United States. Currently, a patent holder can satisfy the domestic industry requirement of Section 337 through *ex post facto* licensing of its patents for trivial amounts, even if done years after others independently brought products to market.

Q2. 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?

A2. Yes. Today, the ITC often expends its limited resources by investigating complaints from foreign companies against American companies rather than by American companies against foreign companies. Garmin recently spent millions of dollars successfully defending itself from an ITC investigation brought by a Dutch electronics conglomerate that does not compete with Garmin or even have comparable products in the marketplace¹. And today the ITC is investigating the American semiconductor industry at the request of a non-practicing entity apparently backed by foreign resources². Ensuring that ITC actions are in the American public interest, rather than the financial interests of foreign companies and governments³, would protect American industry. This would also enable the ITC to direct its efforts against unfair imports from China.

Q3. 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?

A3. The ITC takes an expansive view of its powers under Section 337, which has transformed the ITC from its specialized roots into a super-powered court capable of hearing any IP dispute. In the post-*Chevron* world, the courts may eventually rein in the ITC's interpretation of the law, but that effort may take years. Swift action from Congress is the most immediate and deliberate solution to refocus the ITC on its core mission—protecting American industry from unfair foreign competition.

¹ *In the Matter of Certain Wearable Monitoring Devices, Systems, and Components Thereof*, Inv. No. 337-TA-1190.

² 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.

³ The Committee addressed litigation funding from China in its June 12, 2024, hearing on “The U.S. Intellectual Property System and the Impact of Litigation Financed by Third-Party Investors and Foreign Entities.”

Q4A. 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?

A4A. ITC investigations often target companies with an American manufacturing base, such as Garmin and its factories in Kansas, Florida, and Oregon. Manufacturers rely on components sourced globally, making their supply chains vulnerable to those who seek to deliberately abuse the ITC's authority. By blocking the import of essential components, the ITC can effectively shut down American factories⁴. Garmin has faced this risk in the past through challenges to the computer memory and microprocessors used in our products. In those cases, we successfully defended our operations—at great expense. Other companies have not been as fortunate⁵.

Q4B. Follow on question: Would it be economically or technically feasible to on-shore the entire supply chain that Garmin relies upon?

A4B. No major consumer electronics manufacturer can fully on-shore its supply chain because many components are only available from companies in other countries. While we support efforts to bolster American manufacturing, critical raw materials and specialized manufacturing capabilities remain concentrated abroad, which demands a global supply chain. Walling off Garmin's American factories from the rest of the world would deprive the company of the expertise of its talented global team, built over decades of investment.

Q5A. 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?

A5A. Yes. In Garmin's experience, small and medium sized businesses do not use the ITC to protect their intellectual property. Even Garmin, which faces floods of knockoff imports from China that infringe our intellectual property, does not use the ITC to defend its rights. The ITC is simply too expensive and does not provide effective resolutions compared to federal court. Well-funded patent owners, often foreign multinationals or shell companies backed by sovereign wealth funds or litigation

⁴ A 2021 exclusion order would have eventually shuttered a battery factory in the United States. [In Praising Settlement, President Biden Recognizes Harm Posed by Import Ban in ITC Battery Case - R Street Institute.](#)

⁵ In 2022, Siemens laid off almost 200 workers in Kansas and Iowa due to a 337 Investigation. [Siemens Gamesa Renewable Energy lays off 190 workers in Iowa, Kansas \(desmoinesregister.com\)](#)

funding companies⁶, have found the ITC to be an excellent venue for extorting ransom from American companies⁷.

Q5B. 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?

A5B. Yes. In Garmin's experience, that's the reason behind most ITC filings today. The cost of defending an ITC investigation and proactively changing products (even for minor modifications) dwarfs the cost of defending lawsuits in federal court. The ITC's obligation to evaluate the public interest under Section 337 should be revised to require it to weigh the impact of its orders on U.S. companies against the benefit of the exclusion order to the patent owner and its domestic industry.

⁶ The chief of the Foreign Agents Registration Act (FARA) Unit at the Department of Justice (DOJ) recently raised concerns that litigation funding from foreign sources is being used to weaponize the American legal system. U.S. Chamber of Commerce, [Tackling Foreign Manipulation: The Urgent Need for Reform in Third Party Litigation Funding - ILR \(institutelegalreform.com\)](#).

⁷ The research paper of my fellow witness, Professor Contreras, includes recent data. Contreras, Jorge L., [Reconsidering the Patent Jurisdiction of the International Trade Commission by Jorge L. Contreras :: SSRN](#).