



September 26, 2024

Mr. Brock Snyder
Clerk
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Snyder:

Please find enclosed the Alliance for Automotive Innovation's ("Auto Innovators") responses to the questions for the record from Chairman Issa and Congressman Cline for the July 23, 2024, hearing entitled "IP Litigation and the U.S. International Trade Commission."

Thank you again to the Committee for inviting Auto Innovators to participate in the hearing. Please feel free to reach out if there are any questions or a need for additional information.

Regards,

A handwritten signature in cursive script that reads "Tara Hairston".

Tara Hairston
Senior Director, Technology Policy

Chairman Issa QFRs 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?*

The Alliance for Automotive Innovation (“Auto Innovators”) supports several reforms that can improve Section 337 and the U.S. International Trade Commission (“USITC”). They include:

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

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?*

The reforms suggested above will restore the USITC to its intended purpose, and therefore, will be helpful to hold overseas actors 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?*

Most of the reforms listed above would seem to require statutory changes. However, the USITC could take administrative action to issue an order requiring the disclosure of real parties in interest.

Chairman Issa QFRs for Auto Innovators

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?*

Over the years, automotive companies have periodically found themselves respondents in Section 337 matters at the USITC. These matters are extremely costly and resource-intensive given the statutory deadlines by which the USITC conducts its investigations.

- a. *Follow on question: What approximate proportion of the cases involving your members involve patent assertion entities?*

Automotive Section 337 complaints often involve patent assertion entities. Some automakers report that 100 percent of their 337 complaints involve such entities.

- b. *Follow on question: Were there also cases filed in district court by those same entities?*

Patent assertion entities often file concurrent district court litigation. Some automakers report that 100 percent of their 337 complaints had concurrent district court litigation.

2. *Follow on question: How do you respond to those who say companies simply need to on-shore their manufacturing to avoid the risk of being sued at the USITC?*

Modern vehicles are incredibly sophisticated and incorporate increasingly advanced technologies that are constantly improving and evolving. The automotive supply chain that has developed to support these advances is one of the world's largest and most complex. Supplier choice allows automotive companies to select the best parts for a vehicle, and competition among suppliers helps ensure that consumers get good quality at a good price. Furthermore, U.S.-based entities are not the only parties that file complaints at the USITC; actors from outside the U.S. file USITC complaints as well.

- a. *Follow on question: Would it be economically or technically feasible to onshore the entire supply chain that the automotive industry relies upon?*

The existing automotive supply chain consists of multiple tiers of suppliers that service automotive manufacturing operations in the United States and other markets around the world. Efforts to reimagine and restructure supply chains, while underway, cannot happen overnight. Disruptions to established supply chains may have unintended safety, economic, and environmental impacts and risk undercutting the competitiveness of the automotive industry in the United States. The global distribution of resources and certain suppliers and manufacturing centers for certain parts makes it economically and technically infeasible to onshore the entire automotive supply chain.

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?*

Yes, the more complex an item is, the more likely it is for a part to be the subject of a patent claim. The USITC's remedy, an exclusion order, is improper in these cases as they can prevent the importation of a vehicle over a part that represents a tiny fraction of the vehicle's value.

Here's one example: At the height of the global semiconductor shortage, a hedge fund-backed patent licensing company and serial petitioner based in Ireland filed an USITC complaint to prevent imports of electric vehicles produced by several automakers over a \$3 electronic component. The Irish complainant did not develop the patented technology at issue; it just came to hold the patent via a license agreement. The USITC is attractive in cases like this because of the severity of the remedy, an exclusion order, as compared to the cost of the part. The threat of an exclusion order creates leverage and drives up prices that get passed on to consumers.

- 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?*

Auto Innovators recommends that Congress enact statutory changes to prohibit the issuance of an exclusion order when an allegedly infringing component is less than or equal to 10 percent of the value of the overall product containing the component. The USITC is not the only venue to settle patent claims, and in almost all cases, the complainant can seek relief in Article III courts. The USITC remains best suited for use against foreign companies where jurisdiction would make it difficult to pursue remedies through traditional means.

Congressman Cline QFRs for all witnesses

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?*

Auto Innovators contends that several complainants at the USITC in recent years have been patent assertion entities. USITC classifies entities that do not manufacture products that practice the asserted patents and whose business model primarily focuses on purchasing and asserting patents as "Category 2 NPEs."

- a. *Can you provide more detail on the prevalence of PAEs before the ITC in Section 337 cases?*

In the past 15 years, USITC has designated 65 complainants as Category 2 NPEs. See here:

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

2. *Can you give an example of an NPE that has received an exclusion order and subsequently introduced a product into the US market?*

Auto Innovators is not aware of an NPE that has received an exclusion order and subsequently introduced a product into the U.S. market.

