



Frank Cullen, Executive Director  
Andrei Iancu, Co-Chair  
David Kappos, Co-Chair  
Judge Paul Michel (Ret.), Board Member  
Judge Kathleen O'Malley (Ret.), Board Member

July 22, 2024

The Honorable Jim Jordan  
Chairman  
House Committee on the Judiciary  
2138 Rayburn House Building  
Washington, DC 20515

The Honorable Jerrold Nadler  
Ranking Member  
House Committee on the Judiciary  
2138 Rayburn House Building  
Washington, DC 20515

The Honorable Darrell Issa  
Chairman, Subcommittee on Courts,  
Intellectual Property, and the Internet  
House Committee on the Judiciary  
2138 Rayburn House Building  
Washington, DC 20515

The Honorable Henry C. "Hank" Johnson, Jr.  
Ranking Member, Subcommittee on Courts,  
Intellectual Property, and the Internet  
House Committee on the Judiciary  
2138 Rayburn House Building  
Washington, DC 20515

Dear Chairmans Jordan and Issa and Ranking Members Nadler and Johnson:

On behalf of the Council for Innovation Promotion (C4IP), I write regarding your upcoming hearing on July 23, 2024, on "IP Litigation and the U.S. International Trade Commission." We appreciate the Subcommittee's attention to the role that the International Trade Commission (ITC) plays in protecting the United States from products manufactured abroad that may infringe U.S. intellectual property rights.

The Council for Innovation Promotion is a bipartisan coalition chaired by two former directors of the U.S. Patent and Trademark Office. Our board also includes two retired judges from the Court of Appeals for the Federal Circuit, former Chief Judge Paul Michel and Judge Kathleen O'Malley. We aim to promote U.S. innovation and economic competitiveness by championing strong intellectual property (IP) rights. Robust patents and other IP protections that are meaningfully enforceable are critical to incentivizing the development of socially beneficial inventions that improve the quality of lives everywhere.

The ITC plays a vital role in providing speedy, meaningful relief to U.S.-rights holders whose innovations are copied abroad with its consistently fast 12-18 month investigative process and resolution.<sup>1</sup> At the investigation's conclusion, the ITC can block imports adjudged to infringe a

[1] See ITC, *Section 337 Statistics: Average Length of Investigations*, [https://www.usitc.gov/intellectual\\_property/337\\_statistics\\_average\\_length\\_investigations.htm](https://www.usitc.gov/intellectual_property/337_statistics_average_length_investigations.htm) (last visited July 22, 2024).

valid U.S. patent — an “exclusion order,” the main remedy the ITC can issue.<sup>2</sup> In granting this relief, the Commission must consider public interest factors and may tailor the order’s scope.<sup>3</sup> The ITC is tasked, accordingly, with balancing competing interests to ensure that U.S.-rights holders operate on a level playing field, free from floods of foreign-manufactured, infringing products. In so doing, the ITC is central to ensuring the continued innovation leadership of the United States by safeguarding innovation in this country from theft abroad.

In contrast, federal district courts, when considering domestic disputes within their jurisdiction, can only issue injunctions according to the four-part test of *eBay v. MercExchange*, even if a patent is found valid and infringed.<sup>4</sup> As a result, some have argued that the ITC’s ability to issue exclusion orders should be limited in some way, such as by prohibiting it from adjudicating disputes between U.S.-based companies (even if one of them is manufacturing items abroad and importing them) or redefining the nature and import of factors that the ITC must consider in the name of the “public interest” such that those factors would routinely outweigh the interests of the patent owner and ensure that far fewer exclusion orders would be entered.

This misses the point. Exclusion orders are critical where the U.S. courts do not, and cannot, have complete jurisdiction over all aspects of the infringing conduct — by definition, the manufacturing must occur abroad for an import ban to be sought in the first place, meaning that a U.S.-rights holder might have to go to foreign courts to get an injunction directly against the manufacturing there or to collect damages. The ITC exists to ensure that U.S.-rights holders can solve any outstanding domestic disputes in U.S. district court if needed, including seeking monetary damages, once foreign-made infringing products are out of the U.S. market.

With the unfortunate reality that foreign theft of U.S. intellectual property is rampant, including by the state-sponsored efforts of countries like China, the ITC is now more important than ever.<sup>5</sup> The ITC operates to block imports of products that infringe U.S. patents and other IP rights. But it could be made even more effective if its jurisdiction were expanded to address the full range of threats of unfair competition that come from non-market economies like China’s, such as the forced technology transfers that have harmed U.S.-rights

[2] ITC, *About Section 337*, [https://www.usitc.gov/intellectual\\_property/about\\_section\\_337.htm](https://www.usitc.gov/intellectual_property/about_section_337.htm) (last visited July 22, 2024); ITC, *Understanding Investigations of Intellectual Property Infringement and Other Unfair Practices in Import Trade* (Section 337), [https://www.usitc.gov/press\\_room/us337.htm](https://www.usitc.gov/press_room/us337.htm) (last visited July 22, 2024).

[3] Horwitz et al., *Intellectual Property Counseling & Litigation*, Part VI, § 106.01.

[4] *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

[5] See, e.g., OECD/EUIPO, *Global Trade in Fakes: A Worrying Threat* (June 2021), <https://www.oecd-ilibrary.org/docserver/74c81154-en.pdf>.

holders.<sup>6</sup> We hope the Subcommittee will consider ways to strengthen and modernize the ITC's role in protecting U.S. innovation, working in conjunction with other relevant committees.

We also urge the Subcommittee to consider the continued propriety of the Supreme Court's decision in *eBay* to limit injunctions in federal court. As a result of *eBay*, entities know that if they lose a patent case in federal court, at most, they will have to pay the equivalent of a licensing royalty. This dynamic makes it perversely rational for entities to infringe, empowering domestic and foreign actors alike to benefit off of others' investment in innovation without permission or compensation. A strong IP system needs to have remedies that effectively deter this kind of infringement, and this is why the restoration of regular injunctive relief in patent cases is so important.

American leadership in innovation depends on maintaining a strong legal system that enforces innovators' intellectual property rights. The ITC's fast process and robust relief play a vital role in our enforcement landscape, sending a signal that the United States takes intellectual property rights seriously. Efforts to weaken the ITC, on the other hand, give a green light to infringers that will foreseeably lead to an increase in imports of infringing products without straightforward recourse for rights-holders; essentially a gift to places such as China where infringement is already a significant concern. Instead of diminishing the ITC, we hope that this hearing will help the Subcommittee determine what steps it can take to ensure that, like the ITC, federal courts are empowered to offer meaningful enforcement in a timely fashion.

Thank you for considering our perspective on the ITC and related issues. We welcome the opportunity to serve as a resource to the Subcommittee as you continue to examine these matters.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank Cullen', is positioned below the text 'Sincerely,'.

Frank Cullen  
Executive Director  
Council for Innovation Promotion (C4IP)

[6] See Nigel Cory and Robert D. Atkinson, *A Reformed Section 337 Is the Tool for USTR to Mitigate China's Unfair Trade Practices*, Information Technology and Innovation Foundation (March 8, 2023), <https://itif.org/publications/2023/03/08/a-reformed-section-337-is-the-tool-for-ustr-to-mitigate-chinas-unfair-trade-practices/>.

cc:

Rep. Thomas Massie, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Scott Fitzgerald, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Cliff Bentz, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Lance Gooden, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Ben Cline, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Kevin Kiley, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Nathaniel Moran, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Laurel Lee, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Russell Fry, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Ted Lieu, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Joe Neguse, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Deborah Ross, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Adam Schiff, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Zoe Lofgren, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Madeleine Dean, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet

Rep. Glenn Ivey, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet