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Subcommittee on Courts, Intellectual Property and the Internet

*"Abusive Patent Litigation: The Issues Impacting American Competitiveness and Job Creation at
the International Trade Commission and Beyond"*

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I. Introduction and Executive Summary

Chairman Coble, Ranking Member Watt, and distinguished members of the Subcommittee: thank you for the opportunity to testify. It is an honor to engage in this important discussion with you today.

I have been privileged to be part of the international trade and intellectual property community for a number of years. I spent a good portion of my early career on Capitol Hill and served on the U.S. International Trade Commission for twelve years, including two terms as Chairman. I am now with Adduci, Mastriani & Schaumberg, LLP, an international trade law firm based in Washington, DC, but appear today in my individual capacity, and not on behalf of the firm or any of its clients.

As you know, the ITC is a small, independent, nonpartisan administrative agency that was established by Congress in 1916. The ITC administers U.S. trade remedy laws in a fair and objective manner, provides Congress, the President, and the U.S. Trade Representative with information and support on matters relating to tariffs and international trade and competitiveness, and maintains the Harmonized Tariff Schedule of the United States.

The trade remedy law we are discussing today is 19 U.S.C. § 1337, commonly known as Section 337. This statute authorizes the ITC to investigate unfair methods of competition and unfair acts, including infringement of intellectual property rights ("IPR"), in the importation of articles into the United States. In other words, the purpose of this law is to assure that competition from overseas goods respects U.S. property rights, especially those protected by statute.

The number of Section 337 cases has increased in recent years. Perhaps as a result of that increase, some commentators have argued that the statute is inappropriately, and disproportionately, serving the interests of so-called non-practicing entities ("NPEs") and patent assertion entities ("PAEs"). Respectfully, I disagree with such contentions.

In my capacity as a former member and Chairman of the ITC, I offer a few key points for consideration by the Subcommittee. First, the ITC is an expert trade agency that, in administering Section 337, provides an effective remedy to combat the pervasive problem of infringing imports, thereby providing essential protection to U.S. IPR owners and fostering U.S. competitiveness and innovation. Second, through its decisions and administrative actions, the ITC has sent a strong message that only entities with substantial domestic ties will succeed under Section 337. The data demonstrate that PAEs are not succeeding at the ITC. Finally, the ITC has pursued rules changes to reduce the cost and burden of discovery.

II. Importance of Protecting Intellectual Property to the U.S. Economy

There is a direct link between the protection of U.S. IPR and American competitiveness and job creation. I respectfully submit to the Committee that Section 337, by serving as a

mechanism for protecting U.S. IPR, promotes American competitiveness and domestic job creation.

Innovation is a primary driver of U.S. economic growth and competitiveness. IP-intensive industries accounted for more than \$5 trillion in value added, or 35 percent of U.S. gross domestic product, in 2010.¹ In the same year, IP-intensive jobs accounted for 19 percent of total U.S. employment.² IP licensing, it should be noted, is one of the few industries in which the United States enjoys a significant trade surplus, delivering billions to the U.S. economy every year.³

Acknowledging that development of IPR had become an increasingly critical source of value for the U.S. economy, and that some manufacturing had moved overseas, Congress amended Section 337 in 1988 to explicitly authorize NPEs to bring complaints. Congress modified the statute so that companies making a "substantial investment in [a patent's] exploitation, including engineering, research and development, or licensing," could establish the existence of a domestic industry and obtain relief under this statute. Congress expressly recognized that large and small U.S. companies, developing and utilizing IPR that is being infringed by unfair imports, should be afforded protection under Section 337.

Infringement of IPR is a pervasive problem that harms companies, consumers, and all levels of government.⁴ The purpose of Section 337 is to combat infringing imports. China is the number one source of infringing products seized at the border. More than half of Section 337 investigations instituted since 2006 have involved Chinese imports; in 2012, the figure was 90 percent. Section 337, by helping to combat this infringement, strengthens U.S. competitiveness.

Equally important, the ITC administers Section 337 in a prudent and judicious manner. Through its decisions and administrative actions, the ITC has sent a clear message that it is not a friendly forum for complainants whose U.S. activities do not merit the protection of this statute as intended by Congress.

III. Responses to Criticisms of Section 337

Advantages of asserting IPR under Section 337 include expeditious adjudication, expert ITC judges, *in rem* jurisdiction, and effective remedies. While the spectrum of products,

¹ Economics and Statistics Administration and U.S. Patent and Trademark Office joint report, "Intellectual Property and the U.S. Economy: Industries in Focus," at 45 (Mar. 2012).

² *Id.*

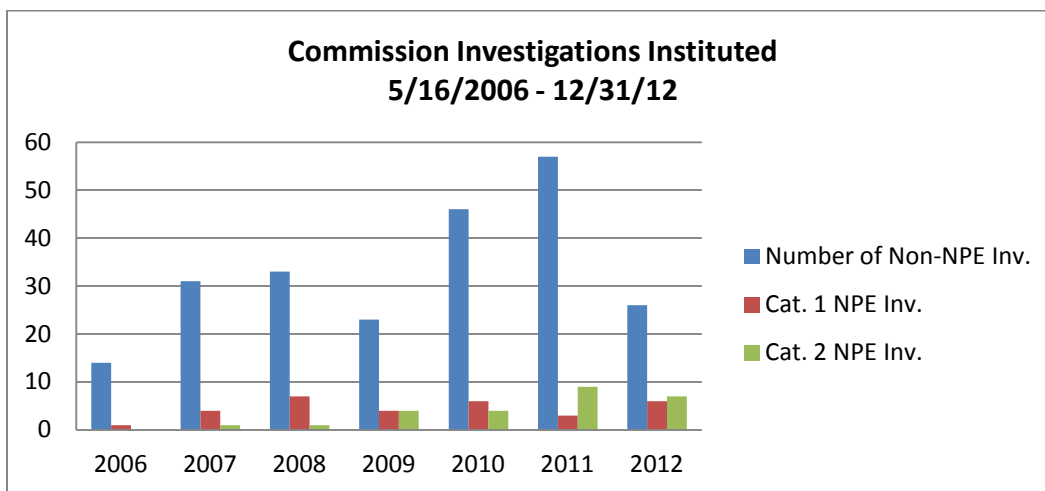
³ *Id.* at 56-59. *See also id.* at 2 (stating that IP licensing helps drive the U.S. economy forward by "[c]reating a platform for financial investments in innovation" and "[e]nabling a more efficient market for technology transfer and trading in technology and ideas".)

⁴ *See* U.S. Congress Joint Economic Committee, "The Impact of Intellectual Property Theft on the Economy," at 1, 4 (Aug. 2012).

industries, and types of IPR considered by the Commission is broad, the prevalence of high-technology products with shorter life cycles underscores why these attributes make the ITC an attractive venue for domestic industries battling infringing imports.

Against a backdrop of increased filings in the last decade, including a number of high-profile cases involving smartphone and tablet technology, a few companies have sought to diminish the powers of the ITC. The foundational argument of such critics is that the Section 337 docket has been flooded by an exponential increase in NPE and PAE filings. Data, however, suggest otherwise.

- According to an ITC factsheet, from May 2006 through June 2012, "Category 1" NPEs—entities defined as manufacturers whose products do not practice the asserted IP, research institutions, start-ups, and individual inventors—accounted for just 10 percent of Section 337 investigations. Over the same period, "Category 2" NPEs—entities whose business model focuses on purchasing and asserting patents (essentially PAEs)—accounted for just 8 percent of investigations.⁵
- New Section 337 complaints decreased from 69 in 2011 to 40 in 2012 (a 30 percent drop), while the number of filings by NPEs remained the same. Thus, there was an increase in the *percentage* of NPE-based cases in 2012, but no change in the *actual number* of NPE cases. Of the 40 investigations instituted during 2012, six were based on a complaint filed by a Category 1 NPE and seven from a complaint filed by a Category 2 NPE. Notably, there was a decline, from nine to seven, in the number of Category 2 (PAE) investigations from 2011 to 2012.⁶



⁵ *Facts and Trends Regarding USITC Section 337 Investigations* (Published on the Commission's website, June 18, 2012).

⁶ The data for full year 2012 is based on the author's individual assessment of Section 337 filings. As of April 12, 2013, the ITC had not yet issued a new factsheet providing data on NPE filings through December 2012.

Some have also criticized the Commission's handling of Section 337 investigations, particularly as to the issues of domestic industry, remedies, and public interest. An analysis of ITC data, including recent decisions, demonstrates that the Commission is, in fact, appropriately analyzing these issues and making reasoned determinations on a case-by-case basis.

A. Domestic Industry

- Critics claim that NPEs are easily satisfying the domestic industry requirement through dubious investments in licensing activities. To the contrary, the ITC is thoughtfully interpreting the statute's "substantial investment" standard where an alleged domestic industry is based on licensing. Since August 2011, only one NPE has proved the existence of a licensing-based domestic industry (and that complainant did not succeed in obtaining an exclusion order).⁷ In 2012, two NPEs *which had in previous investigations satisfied the domestic industry requirement* failed to prove that their licensing investments were sufficient to meet the test as currently applied.⁸ Already in 2013, another NPE has failed to establish a domestic industry based on its licensing investments.⁹
- In the seminal case involving a complainant attempting to establish a domestic industry based on licensing, the Commission held that such a complainant must meet three threshold requirements: (1) the investments must constitute an exploitation of the individual asserted patent; (2) the investments must relate to licensing; and (3) the investments must be domestic, i.e., occur in the United States.¹⁰ If these requirements are satisfied, the complainant must then prove that its investments are substantial. Factors assessed in the substantiality analysis include the number of licensees, the amount of revenue generated from license agreements, and the number of U.S. employees involved in the relevant licensing efforts.¹¹ Litigation expenses, alone, are insufficient to satisfy the test.

⁷ *Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-741/749, Comm'n Op. (Pub. Version) (Jul. 6, 2012).

⁸ *Certain Semiconductor Chips*, Inv. No. 337-TA-753, Comm'n Op. (Pub. Version) (Aug. 17, 2012); *Certain Integrated Circuits*, Inv. No. 337-TA-786, Comm'n Op. (Pub. Version) (Oct. 10, 2012).

⁹ *Certain Microprocessors*, Inv. No. 337-TA-781, Initial Determination (Pub. Version) (Dec. 14, 2012) (domestic industry finding vacated by the Commission in a Feb. 15, 2013, notice, without reaching the merits, because the finding was nondispositive in view of the Commission's adopted claim constructions).

¹⁰ *Certain Multimedia Display & Navigation Devices & Systems*, Inv. No. 337-TA-694, Comm'n Op. (Pub. Version) (Aug. 8, 2011).

¹¹ *Id.* See also *Certain Short-Wavelength Light-Emitting Diodes*, Inv. No. 337-TA-640, Initial Determination (Pub. Version) (June 10, 2009).

- The Commission has, through its application of these carefully crafted standards, denied relief to multiple complainants based on their failure to establish the required domestic industry. And in an attempt to remain faithful to the legislative history of Section 337, the ITC has concluded that "revenue-driven licensing"—as opposed to "industry-creating, production-driven licensing"—is entitled to less weight in the domestic industry analysis.¹²
- The U.S. Court of Appeals for the Federal Circuit has reviewed the Commission's approach under the statute and affirmed its correctness—both where licensing activities were deemed sufficient to establish a domestic industry, and where such allegations failed to establish a domestic industry.¹³
- The Commission recently instituted an important new procedural mechanism regarding the question of domestic industry. In *Certain Products Having Laminated Packaging*, the complainant, a PAE, accused 15 respondents of patent infringement. The Commission, for the first time, ordered the presiding Administrative Law Judge ("ALJ") to hold an early evidentiary hearing, find facts, and issue an expedited decision as to whether the complainant has established a domestic industry.¹⁴ The ALJ was given just 100 days to issue his decision. A finding that the complainant's U.S. activities are insufficient to meet the test will effectively end the litigation, unless the Commission orders otherwise.
- The Commission's action in *Laminated Packaging* shows that NPEs must be prepared to prove their domestic industry before addressing other aspects of the case. This puts significant pressure on the NPE and reduces its leverage to extract a settlement. Moreover, the expense to respondents is potentially reduced, as the case could be dismissed on domestic industry grounds early on.

¹² *Certain Multimedia Display & Navigation Devices & Systems*, Inv. No. 337-TA-694, Comm'n Op. (Pub. Version), at 25 (Aug. 8, 2011).

¹³ See *InterDigital Communications, LLC v. Int'l Trade Comm'n*, 690 F.3d 1318 (Fed. Cir. 2012) (affirming Comm'n Op. in *Certain 3G Mobile Handsets*, Inv. No. 337-TA-613); *John Mezzalingua Assocs., Inc. v. Int'l Trade Comm'n*, 660 F.3d 1322 (Fed. Cir. 2011) (affirming Comm'n Op. in *Certain Coaxial Cable Connectors*, Inv. No. 337-TA-650).

¹⁴ *Certain Prods. Having Laminated Packaging, Laminated Packaging, & Components Thereof*, Inv. No. 337-TA-874, Notice of Institution of Investigation (Mar. 22, 2013).

B. Remedies

- Critics claim that, prior to issuing a remedial order, the Commission should be required to conduct an *eBay* injunction analysis.¹⁵ Such arguments do not make policy sense.
- As the Federal Circuit has noted, "[t]he difference between exclusion orders granted under Section 337 and injunctions granted under the Patent Act, 35 U.S.C. § 283, follows 'the long-standing principle that importation is treated differently than domestic activity.'"¹⁶ Moreover, unlike the patent laws, Section 337 is a trade statute that does not provide monetary damages and whose effectiveness relies entirely on its power to exclude unfair imports. Applying the four-factor *eBay* test would thus impose unnecessary hurdles and expenses for all U.S. IPR owners—operating companies and NPEs alike—seeking to protect their rights against foreign infringers.¹⁷
- Additionally, the Commission's examination of statutory public interest factors (*see infra*), and the required Presidential review on national economic and policy grounds, provide a safeguard equal to, if not greater than, the *eBay* injunctive factors.
- Critics also claim that NPEs are disproportionately benefiting from ITC remedial orders compared to manufacturing companies. This is false. The Commission has issued over 50 exclusion orders since 2006, only four of them on behalf of NPEs (and each of those four NPEs, or their affiliated companies, actually developed the patented technology).¹⁸

¹⁵ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006). The *eBay* decision held that patent holders must satisfy the traditional four-part test for equitable relief before being granted an injunction against an infringer. The test requires a plaintiff to demonstrate that: (1) it has suffered an irreparable injury; (2) remedies available at law are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

¹⁶ *Spansion, Inc. v. United States Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010).

¹⁷ In addition, the *eBay* factors simply do not translate to the Section 337 context. The ITC only offers equitable relief, so the second and third *eBay* factors have no relevance to Section 337. The fourth factor is superfluous, as Section 337 already requires the Commission to examine public interest considerations. As to the first factor—the requirement to show irreparable injury—in 1988 Congress removed the injury requirement of Section 337 because it viewed the importation of an infringing product as *per se* harmful in the patent, trademark, and copyright context.

¹⁸ *Facts and Trends Regarding USITC Section 337 Investigations* (Published on the Commission's website, June 18, 2012).

C. Public Interest

- Before issuing any remedial orders, the Commission is required by statute to consider the effect of such relief on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the U.S., and U.S. consumers.¹⁹
- The ITC has recently tailored some of its remedial orders based on legitimate public interest concerns. In *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, the Commission provided carve-outs from the exclusion order in view of the then-developing 3G wireless network and the need for first responders to use that network. In *Certain Personal Data & Mobile Communications Devices*, Inv. No. 337-TA-710, the Commission (a) delayed enforcement of the remedial orders by four months to provide network carriers time to replace infringing smartphones, and (b) permitted the respondent to import replacement parts to be provided to customers under warranties and insurance contracts.
- In addition, in 2011 the ITC issued new rules allowing ALJs to develop a factual record on how a complainant's requested relief would affect the public interest. Over 20 new investigations have entailed public interest fact-finding.
- The new rules are resulting in even greater attention being paid to public interest concerns. In *Certain Microprocessors*, for example—an investigation in which the complainant sought relief against Hewlett-Packard, Intel, and Apple—the presiding ALJ found that an exclusion order could result in product shortages, U.S. job losses, and price increases. Accordingly, the ALJ recommended that, if the Commission finds a violation of Section 337, it should tailor any exclusion order to mitigate these potentially adverse effects upon the public interest.²⁰
- The Commission's handling of investigations involving another controversial area, standards essential patents, also demonstrates its sensitivity to matters of public

¹⁹ See 19 U.S.C. § 1337(d)-(f).

²⁰ The Commission ultimately terminated the investigation with a finding of no violation. See *Certain Microprocessors*, Inv. No. 337-TA-781, Notice of Commission Determination (Feb. 15, 2013). ITC staff attorneys have also recently advocated for tailored remedial orders on account of public interest concerns. See, e.g., *Certain Reduced Ignition Proclivity Cigarette Paper Wrappers*, Inv. No. 337-TA-756, Initial Determination (Pub. Version) (Feb. 1, 2012) (arguing for a stay of any exclusion order for a commercially reasonable period of time to allow cigarette manufacturers to obtain the FDA approval and fire-safety recertifications needed to legally sell redesigned cigarettes in the United States); *Certain Microprocessors*, Inv. No. 337-TA-781, Initial Determination (Pub. Version) (Dec. 14, 2012) (arguing, consistent with the ALJ's conclusion, that the public interest factors weigh against issuance of any exclusion order, but that if the Commission determines to issue an exclusion order, the order should be limited to mitigate harmful effects on consumers and the U.S. economy).

policy. In 2012 alone, the Commission received and considered comments from the public on this issue in three high profile cases.²¹ In 2013, the Commission has continued to seek outside input on such issues, and has delayed issuance of a highly anticipated decision in order to consider more carefully viewpoints from diverse interests.²²

- Finally, critics of the ITC fail to appreciate the additional public interest protections built into Section 337. Remedial orders are not final until the conclusion of a 60-day period for Presidential review, and the President can disapprove any remedy "for policy reasons."²³

The facts above demonstrate that the ITC is appropriately adjudicating Section 337 investigations. It has become more difficult to establish a domestic industry, remedies have been tailored based on economic factors, and due consideration is being given to public interest and policy concerns.

The Commission has also instituted creative procedural mechanisms to streamline investigations. In addition to the domestic industry and public interest procedures discussed *supra*, the Commission has issued new rules governing discovery, inspired in part by the efforts of Chief Judge Randall Rader of the Federal Circuit to get courts and the ITC to adopt rules that reduce the cost of litigation.²⁴ The purpose of the adopted changes is "to reduce expensive, inefficient, unjustified, or unnecessary discovery practices."²⁵ The new rules should decrease the expense and burden that parties, particularly respondents, face in Section 337 investigations.

All of these decisions and initiatives will make the ITC an even more challenging forum for complainants who have a questionable basis for utilizing Section 337.

IV. Uniqueness of Section 337 and the ITC

Three additional points help demonstrate the important purposes served by Section 337 and the ITC. First, Section 337 is a trade, not a patent statute, aimed at protecting domestic

²¹ See *Certain Wireless Communication Devices*, Inv. No. 337-TA-745; *Certain Gaming & Entertainment Consoles*, Inv. No. 337-TA-752; *Certain Electronic Devices*, Inv. No. 337-TA-794.

²² See *Certain Electronic Devices*, Inv. No. 337-TA-794, Notice of Comm'n Determination to Extend the Target Date; Requesting Additional Written Submissions on Remedy and the Public Interest (Mar. 13, 2013).

²³ 19 U.S.C. § 1337(j). The President has delegated this authority to the U.S. Trade Representative.

²⁴ See USITC Final Rule, "Rules of General Application and Adjudication and Enforcement," Docket No. MISC-040 (Apr. 11, 2013).

²⁵ 77 FED. REG. 60952-60956 (Oct. 5, 2012).

industries from infringing imports. Although, in conducting investigations under Section 337, the ITC can make a patent-related determination, it is not administering patent statutes. Indeed, Commission findings on infringement and invalidity have no *res judicata* effect.

Because Section 337 is directed at unfair practices in import trade, ITC complainants face evidentiary requirements distinct from, and in addition to, those of a plaintiff in district court. A complainant must prove, *inter alia*, that the infringing articles have been imported into the United States and, as explained above, must establish the existence of a domestic industry relating to the asserted IPR. Further, because the remedies available under Section 337 are directed at the infringing articles themselves, these proceedings involve trade and economic analyses that do not occur in district court patent litigation.

Second, the ITC exercises *in rem* jurisdiction that is different from the *in personam* jurisdiction exercised by federal courts. *In personam* jurisdiction empowers a court to make judgments against a person or an entity that has legal standing, such as a corporation. *In rem* jurisdiction, by contrast, permits a tribunal to rule "against a thing," and therefore against the rights of persons or entities generally with respect to that thing. Section 337 provides the ITC with *in rem* jurisdiction over articles imported into the United States.

These jurisdictional distinctions are manifest in the types of relief afforded by federal courts and the ITC. Plaintiffs asserting IPR in district court typically seek monetary damages. Section 337 complainants, on the other hand, may only obtain remedial orders that direct U.S. Customs and Border Protection to block the importation of infringing goods (an exclusion order), or prohibit the sale of domestic inventories of such goods (a cease and desist order). The U.S. Court of Appeals for the Federal Circuit has explained that the *in rem* relief afforded by Section 337 "follows the long-standing principle that importation is treated differently than domestic activity."²⁶

Third, the relief afforded by the ITC is often essential to ensuring meaningful protection of U.S. IPR. A U.S. company cannot easily obtain relief in district court against an infringing foreign manufacturer. Such a plaintiff must first establish personal jurisdiction over that manufacturer, which is typically accomplished through the company's U.S. affiliate. Where a foreign manufacturer does not have a domestic affiliate, therefore—and many do not—it may be impossible to establish jurisdiction in federal court. Sometimes it is impossible even to identify foreign manufacturers. In such circumstances, the ITC's *in rem* jurisdiction ensures that U.S. companies harmed by infringing imports can obtain effective relief.

Indeed, as the Commission has stated, "Congress enacted Section 337 because in many instances foreign individuals or firms committing unfair acts to the detriment of an American industry are beyond the *in personam* reach of the U.S. courts and not amenable to a suit for

²⁶ *Spanston, Inc. v. U.S. Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010).

money damages or injunctive relief."²⁷ The following examples demonstrate the practical significance of the relief afforded by the ITC.

- In *Certain Electronic Paper Towel Dispensing Devices*, Georgia-Pacific of Atlanta, Georgia, sought relief against imports that infringed its U.S. patents. The Commission found that: (a) there was interchangeability of manufacturers; (b) the products were easy and inexpensive to manufacture; (c) there were many well-established distribution channels and internet retailers actively selling the articles; and (d) many of the infringing products were being sold unlabeled. Accordingly, the Commission concluded it was extremely difficult to identify the sources of the infringing articles. The Commission issued a general exclusion order prohibiting the importation of all electronic paper towel dispensers that infringed the asserted patents.²⁸ Given the nature of the supply chain, Georgia-Pacific could not have obtained any such meaningful relief in district court.
- The pioneering computer company Hewlett-Packard of Palo Alto, California and Houston, Texas, has recently benefitted from the unique remedies available at the ITC. In *Certain Inkjet Ink Cartridges with Printheads*, Hewlett-Packard obtained a general exclusion order against products that infringed its U.S. patents relating to inkjet printers.²⁹ Evidently satisfied with the results it obtained, Hewlett-Packard returned to the ITC in *Certain Inkjet Ink Supplies*, in which it obtained a general exclusion order relating to imports that infringed other patents.³⁰ In each instance the ITC noted that it was difficult to identify the origins of infringing products, in part because the imports were generically packaged and there were numerous, unnamed contract manufacturers—primarily in China—involved in the production of infringing goods.
- Another iconic American company, Caterpillar of Peoria, Illinois, has availed itself of Section 337 protection. In *Certain Hydraulic Excavators*, Caterpillar sought relief against the importation of gray market excavators that infringed its trademarks. A pattern of violation was shown by the identification of thousands of gray market excavators within the United States. Caterpillar proved that it could not establish the sources of these infringing products and that multiple foreign manufacturers were

²⁷ *Certain Steel Rod Treating Apparatus & Components Thereof*, Inv. No. 337-TA-97, Comm'n Act. & Order at 139 (Jan. 1982).

²⁸ See *Certain Electronic Paper Towel Dispensing Devices & Components Thereof*, Inv. No. 337-TA-718, Comm'n Op. on Remedy, the Public Interest, and Bonding (Pub. Version) (Jan. 20, 2012).

²⁹ See *Certain Inkjet Cartridges With Printheads & Components Thereof*, Inv. No. 337-TA-723, Comm'n Op. (Pub. Version) (Dec. 1, 2011).

³⁰ See *Certain Inkjet Ink Supplies & Components Thereof*, Inv. No. 337-TA-730, Comm'n Op. (Pub. Version) (Feb. 24, 2012).

involved in the supply chain. The Commission issued a general exclusion order prohibiting the importation of the infringing excavators.³¹

- In *Certain Hair Irons*, Farouk Systems of Houston, Texas, sought relief against the importation of hair irons that infringed its trademarks. The Commission noted that Farouk had litigated 21 district court actions seeking to stop the importation and sale of infringing products. The Commission also cited findings that the infringing manufacturers were improperly marking the country-of-origin of their products in an effort to increase confusion as to the actual source of the articles. Additionally, the Commission found that the infringing hair irons were primarily distributed over the internet, "a method that lends itself to anonymity and makes it difficult to determine the source of the infringing products."³² The Commission issued a general exclusion order, the type of robust relief Farouk could not obtain from its 21 lawsuits in various federal courts.
- In *Certain Energy Drink Products*, Red Bull Energy Drinks of Santa Monica, California, sought relief against imports that violated its trademark and copyrights. The Commission found that numerous unidentifiable entities were producing and importing gray market energy drinks. The Commission noted that Red Bull had filed multiple cases in federal courts and had identified 250 suspected parties, in 2009 alone, who were engaged in gray market activities across the United States.³³ The Commission issued a general exclusion order, providing Red Bull with relief it could not attain from its district court actions.

These examples demonstrate that the ITC is an indispensable forum for protecting U.S. IPR from infringing imports.

V. Conclusion

The ITC is an expert trade agency that, in administering Section 337, is providing an effective remedy to combat the pervasive problem of infringing imports. This relief is often essential to ensuring meaningful protection of U.S. IPR, an important source of this country's economic growth. Section 337 therefore promotes U.S. competitiveness and innovation.

The ITC is interpreting Section 337 in a judicious manner. It has become more difficult to establish a domestic industry, NPEs are rarely obtaining exclusion orders, the Commission is

³¹ See *Certain Hydraulic Excavators & Components Thereof*, Inv. No. 337-TA-582, Comm'n Op. (Pub. Version) (Feb. 3, 2009).

³² *Certain Hair Irons & Packaging Thereof*, Inv. No. 337-TA-637, Comm'n Op. on Remedy, the Public Interest, and Bonding (Pub. Version), at 4-5 (Jul. 20, 2009).

³³ See *Certain Energy Drink Products*, Inv. No. 337-TA-678, Comm'n Op. on Remedy, the Public Interest, and Bonding (Pub. Version) (Nov. 23, 2010).

tailoring its remedial orders to reflect economic and practical realities, and public interest concerns are being carefully addressed. The ITC's recent decisions and administrative actions have sent a clear message that this is not the forum for patent holders who do not make the investments in the U.S. economy mandated by Congress.