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## Listen to the Factual Record on the ITC, Not the Broken One | Commentary

*By Deanna Tanner Okun*

The International Trade Commission, an independent federal agency that I was fortunate to serve for 12 years, has been much maligned as of late, even derogatorily referred to by some as the “International Trolling Commission” as the patent debates have heated up. These hyperbolic claims by the critics have little relation to the reality of the ITC’s important work as a trade enforcement agency and I feel a sense of duty to my former agency to help sort fact from fiction.

Lost in the countless stories taking aim at the constitutional right of an intellectual property owner to protect his patent are the stories about the important role of giving leading-edge companies an effective tool in combating rampant foreign infringement of U.S. patents. In 2010, IP-intensive industries accounted for more than \$5 trillion in value added, or 35 percent of U.S. gross domestic product, and 28 percent of total U.S. employment. In 2011 alone, IP licensing revenue delivered a net \$64.9 billion to the U.S. economy, making it one of the few industries in which the United States enjoys a significant trade surplus.

Given all this, why would we want Congress to weaken trade enforcement laws? Why would we alter Section 337, which authorizes the ITC to investigate unfair methods of competition and unfair acts, including infringement of intellectual property rights by imported goods?

Amid a lobbying campaign that has filled the papers with unsubstantiated claims that patent trolls have flocked to the ITC, it might surprise many to learn which companies have actually succeeded in obtaining ITC exclusion orders: Apple Inc., Chrysler, Georgia-Pacific, Hewlett-Packard Co., Lutron, Lexmark, Microsoft Corp. and OtterBox, to name a few.

Unfortunately, the loose definition of a “troll” has swept in non-practicing entities (NPEs) such as inventors, universities, startups and other important contributors to our increasingly knowledge-based economy, all of which, according to Congress, have a legitimate right to relief from foreign copycats and infringers. Furthermore, overall filings at the ITC are down, not up, over the past two years.

Instead of seeking changes to the ITC’s statute, we should applaud what is already happening there: careful adjudication of cases for NPEs to establish a domestic industry; administrative actions that force complainants with a weak domestic industry claim into a 100-day proceeding to prove their domestic industry or have the case terminated; and rules changes aimed at reducing discovery and other litigation costs.

Some on Capitol Hill argue that the ITC should simply shut the door on companies with business models that contribute to our economy, not directly through production, but through engineering, research and development, and licensing activities. Others would have the ITC shut the door on patent holders who contribute to the standard-essential patents that let your Android talk to my iPhone across countries and continents, among the other innovative products that benefit from worldwide agreements on standards.

Critics also claim that the commission is ignoring public interest factors that would prevent a company from obtaining an injunction in district court even where there is a valid and infringed patent. To the contrary, the commission is statutorily required to conduct a careful analysis of the effects of a potential exclusion order on public health and welfare, competitive conditions in the U.S. economy, U.S. consumers, and the production of like or directly competitive articles. Companies accused of importing infringing products are given several opportunities to provide evidence of such harm.

The long history of the ITC as an adjudicator of the trade laws demonstrates the wisdom of the Congress in establishing the ITC as an expert trade agency that focuses on building an evidentiary record to fairly adjudicate cases under laws aimed at giving domestic industries effective remedies against unfair trade. With science and technical backgrounds, economists and trade analysts are all dedicated to the mission of the commission. Wisely, the commission also has established rules and procedures to prevent lobbying by companies on cases before it. I call on Congress to leave intact an agency and a statute that have long-served the U.S. national interest. The Founding Fathers were prescient in including the protection of intellectual property rights in the Constitution — a protection as relevant in the knowledge-based economy we live in as in the industrial revolution they witnessed.

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