



## POSITION STATEMENT

### **Availability of Exclusion Orders at the United States International Trade Commission**

*Approved by IEEE-USA Board of Directors  
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The United States International Trade Commission is an independent Federal agency with broad investigative responsibilities on matters of trade. Those include investigating and adjudicating violations of Section 337 of the Tariff Act by issuing exclusion orders against the importation of goods that infringe on U.S. intellectual property. In doing so, the ITC enforces laws that prevent unfair competition against the *entire* domestic industry *chain* involved in inventing, creating, developing, supporting, and supplying a complainant's or its licensee's articles protected by the IP. Therefore, ITC enforcement actions against infringing imports protect domestic jobs, including those of IEEE's U.S. members.

IEEE-USA believes that in the ITC's enforcement of Section 337 and related US Presidential actions, the U.S. domestic industry is best protected by ensuring the following:

1. After a finding of Section 337 violation (a finding of infringement of valid IP), the public interest exception overriding an ITC exclusion order should apply narrowly, and only in the most compelling circumstances, as historically applied by the Commission. The respondent should bear the burden of proving that public interest factors justify the exception and the continued importation of infringing goods.
2. Availability to the patent holder of other remedies in the Federal courts is irrelevant in balancing the public interest factors following a Section 337 violation determination.
3. The Commission should consider the public interest benefits of designing around patent claims and as a proponent of a factual proposition that such is unavailable, the respondent bears the burden of persuasion that design-around is commercially infeasible for mitigating any alleged harm to the public interest.
4. The Commission should give minimum weight to national security claims unless a U.S. agency having expertise and responsibility in national security makes the determination directly as a public interest factor.
5. The fact that the patent holder has pledged to license patent claims essential for implementing a standard under Fair Reasonable and Non-Discriminatory terms should not per se trigger the public interest exception to deny issuance of an exclusion order, nor its disapproval, thereby permitting the continued importation of infringing devices. However, when such patent holder's pledge expressly waived its right to an exclusion order, standard implementers are entitled to rely on such pledged waiver and the public interest exception precluding an exclusion order should apply during the effective period of that waiver.

6. Evidence of the patent holder's market share dominance, or higher prices, for the patented technology should not in and of itself establish a public interest factor justifying denial of an exclusion order, thereby permitting the continued importation of infringing devices.
7. As long as the IP owner can demonstrate the existence of domestic industry under § 1337(a), the availability of relief under Section 337 should not be per se limited or denied on the basis of the IP owner's practice of the technology, its use, or mode of the IP exploitation or licensing.
8. Only in rare circumstances should the U.S. President disapprove "for policy reasons" under 19 U.S.C. § 1337(j)(2) the Commission's considered determinations to issue an exclusion order. Such action should be limited to policy matters of international investments, trade, or national security that were not considered by the Commission or for which the record before the Commission has not been adequately developed.

## **BACKGROUND**

Upon finding a violation of Section 337, the law provides that the ITC "shall" issue an exclusion order, halting infringing imports to protect the domestic industry. However, the statute provides that the Commission must also assess the impact of exclusion on four public interest factors before issuing a remedy. Specifically, the Commission assesses: (1) public health and welfare, (2) competitive conditions in the U.S. economy, (3) the production of like or directly competitive articles in the United States, and (4) U.S. consumers. 19 U.S.C. § 1337(d)(1). The Commission may provide *an exception* to its statutorily mandated remedies (such as withholding, or limiting, the exclusion order and allowing imports) if the negative impact on those public interest factors have sufficient countervailing weight. The structure of Section 337 also permits the President, through the U.S. Trade Representative, to disapprove an exclusion order within sixty days of the Commission's decision. 19 U.S.C. § 1337 (j). However, that power has rarely been used, last done in 2013.

The ITC has broad discretion in selecting the form and scope of a remedy, and in recent years, has considered the statutory public interest factors only to tailor remedial orders for Section 337 violations. Most recently, in January 2022, the ITC tailored its remedy to delay by one year exclusion of infringing products "in an ongoing and documented project to develop [semiconductor] fabrication processes" to allow for transition to non-infringing products. In January 2020, the ITC tailored its remedy to allow continued importation of infringing "chips" used in gene sequencing by researchers who have been using those "chips" in the United States and provided a "documented need" to use those products in an ongoing research project. A 2018 Initial Determination by one ITC Administrative Law Judge, had the ITC adopted it, could have had erosive effects on Section 337's protections of domestic industries. In that investigation, the ALJ recommended that the ITC decline to issue a remedy in the event it found a Section 337 violation through the public interest exception on several grounds inconsistent with law. The ALJ's grounds included concluding that a dominant market share for the patent holder means it will command "monopoly power;" concluding that other remedies in the Federal courts available to the patent holder are adequate, hence justifying the withholding of an exclusion order; and concluding with no basis in competent evidence from a qualified national security source that an exclusion order will harm the national security. Ironically, in a nearly concurrent investigation involving the same parties, a different ALJ found that the public interest factors did not preclude a remedy in the event the ITC found a Section 337 violation. Ultimately, the ITC did not find a

violation in either of these investigations and did issue a decision analyzing either ALJ's public interest findings.

In another ITC case, involving patent claims which the holder pledged to license as essential for implementing a standard under Fair Reasonable and Non-Discriminatory terms, President Obama disapproved (in August 2013) the ITC's exclusion order despite the ITC finding a Section 337 violation and determining that the public interest factors did not weigh in favor of not issuing an exclusion order. The President took such action even though as part of its public interest analysis, the ITC found *no evidence* that the patent owner either breached its FRAND obligation or engaged in "patent-holdup." In doing so, the Administration invoked the patent-holdup conjecture, a theoretical academic scenario lacking evidentiary basis -- particularly in the underlying investigation. Since that 2013 disapproval, the ITC has not had the occasion to consider whether to issue a remedial order for a Section 337 violation based on a FRAND encumbered patent.

*This statement was developed by the IEEE-USA Intellectual Property Committee and represents the considered judgment of a group of U.S. IEEE members with expertise in the subject field. IEEE-USA advances the public good and promotes the careers and public policy interests of the nearly 150,000 engineering, computing and allied professionals who are U.S. members of the IEEE. The positions taken by IEEE-USA do not necessarily reflect the views of IEEE, or its other organizational units.*