IEEE-USA

POSITION STATEMENT

Availability of Exclusion Orders at the U.S. International Trade Commission

Adopted by the IEEE-USA
Board of Directors (3 Jan. 2020)

The U.S. International Trade Commission ("ITC" or the "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 (injunctions) against the importation of goods that infringe on U.S. intellectual property ("IP"). In so doing, the ITC enforces laws that prevent unfair competition against the *entire* domestic industry *chain* involved in inventing, creating, developing, supporting and supplying the articles protected by the IP. Therefore, ITC enforcement actions against infringers-importers protect domestic jobs, including those of IEEE's U.S. members.

Upon finding a violation of Section 337, the law provides that the ITC "shall" issue an exclusion order, halting imports to protect the domestic industry. However, the statute provides that the Commission is to apply *an exception* in special circumstances (withholding, or limiting, the exclusion order and allowing imports) if four public interest factors have sufficient countervailing weight: (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. The structure of Section 337 also permits the President to disapprove an exclusion order within sixty days of the Commission's decision, a power that has rarely been used.

Several recent ITC proceedings could potentially have erosive effects on Section 337's protections of domestic industries. These include a recent ITC case wherein the Administrative Law Judge recommended invoking the public interest exception on several grounds inconsistent with law to deny an exclusion order despite finding Section 337 violations. Such grounds included shifting the burden of proof to the patent owner on the public interest exception; 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. 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 ("FRAND") terms, President Obama disapproved (in August 2013) the Commission's exclusion order despite the Commission finding a Section 337 violation and determining that none of the public interest exceptions should prevent an exclusion order from issuing. The President took such action despite the fact that as part of its public interest analysis, the Commission found *no evidence* that the patent owner either breached its FRAND obligation or engaged in "patent-holdup." In so doing, the Obama Administration invoked the patent-holdup *conjecture,* a theoretical academic scenario lacking evidentiary basis -- particularly in the underlying ITC investigation.

IEEE-USA believes that in the ITC's enforcement of Section 337 and related 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. Respondent should bear the burden of proving that public interest factors justify the exception and the 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 ("FRAND") terms should not *per se* trigger the public interest exception to deny issuance of an exclusion order, nor its disapproval, thereby permitting the 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 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 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.

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 180,000 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.