

NPE Power Reversal: Amending ITC Standing Under Section 337 and Domestic Industry

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The International Trade Commission (ITC or Commission) is an adjudicative agency that safeguards intellectual property (IP) rights among patent litigants. Notably, when an import infringes a U.S. patent, the ITC investigates the unlawful act under Section 1337 of the Tariff Act of 1930 (Section 337) rather than the Patent Act of 1952 (Patent Act). Today, the ITC and the federal courts comprise a parallel patent system but support varying standing rules. Section 337 proceedings only require that one ITC complainant demonstrate standing; the federal courts require all plaintiffs. This difference favors non-practicing entities (NPEs)—a term encompassing patent trolls. Section 337’s broader standing interpretation, supplemented with the ITC’s domestic industry requirement, helps NPEs exploit the Commission’s purpose. Even though the ITC does not award monetary damages, trolls litigating before the Commission may threaten respondents with exclusion orders—nevertheless forcing settlements and achieving financial relief. Therefore, to reverse NPE power at the ITC, amendments to Section 337’s current standing and domestic industry requirements merit consideration.

I.	INTRODUCTION: THE PARALLEL PATENT SYSTEM.....	224
II.	NPEs PREFER THE ITC OVER THE FEDERAL COURTS	225
III.	INTERPRETING THE VARIED STANDING RULES	227
	A. <i>Patent Act Standing in Federal Court</i>	227
	B. <i>Section 337 Standing at the ITC</i>	228
IV.	ITC DOMESTIC INDUSTRY.....	229
	A. <i>An Open Interpretation Regarding Substantial Licensing Activity</i>	229
V.	NPE CONTROL AND INFLUENCE	231
	A. <i>NPE Complainants Hold Immense Leveraging Power</i>	231
VI.	PROPOSALS TO CHANGE ITC STANDING UNDER SECTION 337	233
	A. <i>Adopt the Federal Courts’ Position on Standing</i>	233
	B. <i>Raise the Domestic Injury Requirement Further</i>	235
VII.	CONCLUSION	237

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I. INTRODUCTION: THE PARALLEL PATENT SYSTEM

The United States patent system distributes power to several significant institutions.¹ Administrative agencies like the United States Patent & Trademark Office examine patent applications and grant patents.² Judicial courts like the federal district courts and the United States Court of Appeals for the Federal Circuit adjudicate infringement, validity, and enforceability issues.³ Within these institutions, the legal process of the patent system runs parallel.⁴

The parallel system further includes the International Trade Commission, which is a “quasi-judicial federal agency” and “an expert court in patent law.”⁵ Congress created this forum to “gain protectionist support for trade reform.”⁶ The Commission protects domestic IP rights and conducts investigations of unfair imports and trade practices.⁷ These investigations penalize “companies that . . . exploit US IP rights and those who import allegedly infringing products.”⁸ But unlike federal courts, which interpret patent infringement under the Patent Act, the ITC derives jurisdiction and investigatory powers from Section 337.⁹ In part, Section 337 prohibits the importation of an article that “infringes a valid and enforceable United States patent.”¹⁰

The fora often adjudicate patent actions concurrently.¹¹ However, the ITC’s standing interpretation is broader than the federal courts.¹² Notably, Section 337 only requires a showing “that at least one complainant is the

1. ROBERT PATRICK MERGES & JOHN FITZGERALD DUFFY, *PATENT LAW AND POLICY* 897 (7th ed. 2017).

2. JANICE M. MUELLER, *PATENT LAW* 45 (6th ed. 2020).

3. *Id.* at 47.

4. *Id.*; MERGES & DUFFY, *supra* note 1, at 898-99.

5. *About the USITC*, U.S. INT’L TRADE COMM’N, http://www.usitc.gov/press_room/about_usitc.htm (last visited Aug. 26, 2021); Linda Sun, *The ITC Is Here to Stay: A Defense of the International Trade Commission’s Role in Patent Law*, 17 NW. J. TECH. & INTELL. PROP. 137, 138 (2019) (internal citations omitted).

6. Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 540 (2009); *see also* Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756.

7. *See About Section 337*, U.S. INT’L TRADE COMM’N, http://www.usitc.gov/intellectual_property/about_section_337.htm.

8. H. Mark Lyon & Sarah E. Piepmeier, *ITC Section 337 Investigations: Overview*, PRAC. L. 6 (2022), <http://www.gibsondunn.com/wp-content/uploads/2021/02/Lyon-ITC-Section-337-Patent-Investigations-Overview-Thomson-Reuters-Practical-Law-02-2021.pdf>.

9. 19 U.S.C. § 1337 (2004); 35 U.S.C. § 271.

10. 19 U.S.C. § 1337(a)(1)(B).

11. *See* Charles L. Gholz, *Parallel District Court and ITC Patent Infringement Actions and PTO Interferences*, 83 J. PAT. & TRADEMARK OFF. SOC’Y 607, 608 (2001).

12. *Cf.* 19 C.F.R. § 210.12, with 35 U.S.C. § 281 (indicating the requirements to sue for patent infringement).

owner or exclusive licensee” of an asserted patent.¹³ This variance opens the ITC to more litigants and advantages those who abuse the patent system for financial gain.¹⁴

The Commission’s standing rule also interacts with its domestic industry requirement. Suppose a complainant seeks relief in a patent-based complaint. In that case, the rule demands that a United States industry “relating to the articles protected by the patent . . . exists or is in the process of being established.”¹⁵ Evidence of this occurs when the complainant shows it undertook a substantial investment in the asserted patent through “engineering, research and development, or licensing.”¹⁶

In practice, these requirements confer undue power to non-practicing entities (NPEs)— “patent trolls” who purchase patents covering widely-used technology and seek to assert and license the rights.¹⁷ With legal strategy and aggressive litigation tactics, this type of NPE often avoids lawsuits in federal court. Instead, they turn to the ITC and leverage threats of exclusion orders—the primary remedy available under Section 337—to force out of court settlements.¹⁸ Thus, to reverse NPE power at the ITC, a proposed amendment to Section 337 standing and domestic industry merits consideration.

This Comment analyzes pathways to curb NPE power at the ITC. Part II explains why NPEs prefer the ITC over the federal courts. Part III identifies the parallel patent system’s varied standing rules. Part IV highlights the ITC’s domestic industry requirement. Part V explores the influential power NPEs hold. Finally, Part VI supports current proposals to reign in NPE power and evaluates the implications of amending Section 337’ standing or domestic industry. This Comment concludes that an amendment best serves the parallel system.

II. NPEs PREFER THE ITC OVER THE FEDERAL COURTS.

NPE’s interest in the ITC flows from the 2006 Supreme Court decision in *eBay, Inc. v. MercExchange, L.L.C.*¹⁹ There, the Court

13. 19 C.F.R. § 210.12(a)(7).

14. See generally Matthew Duescher, *Controlling the Patent Trolls: A Proposed Approach for Curbing Abusive Section 337 Claims in the ITC*, 96 J. PAT. & TRADEMARK OFF. SOC’Y 614 (2014).

15. 19 U.S.C. § 1337(a)(2).

16. *Id.* § 1337(a)(3)(C).

17. This Comment presumes the patent troll definition of NPEs throughout. See MUELLER, *supra* note 2, at 960.

18. See 19 U.S.C. § 1337 (d), (e); Sun, *supra* note 5, at 146-47.

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

weakened the ability of patent owners to obtain injunctive relief in federal court cases and overturned longstanding practice.²⁰ Now, courts in Patent Act proceedings must apply a “traditional four-factor test” to determine the appropriateness of injunctive relief.²¹ A controlling factor of this test requires a demonstration that a plaintiff “suffered an irreparable injury” to obtain an exclusion order.²² One result of this decision “decoupled a patent owner’s right” of exclusion.²³ Another outcome provided incentives to enforce rights at the ITC because the *eBay* decision did not extend to Section 337 investigations.²⁴

Unlike the federal courts, the ITC does not require a “showing of irreparable harm . . . to obtain” an exclusion order.²⁵ The Commission will grant this remedy to complainants after it finds infringement.²⁶ Since NPEs use exclusion orders as a primary instrument of exploitation against respondents, “companies and commentators [over the years] have expressed concerns that the ITC could become a haven for nonpracticing entities.”²⁷ Especially in instances where “legal independence continually causes disruption within the patent system, . . . [and] the Supreme Court makes changes to U.S. patent law . . . that do not apply at the ITC.”²⁸ Until the parallel system addresses this legal independence, the ITC will remain favorable.²⁹

20. *See id.*

21. *Id.* at 394.

22. *Id.* at 391.

23. Eric J. Fues, *Implications of eBay v. MercExchange*, PAT. WORLD (2007), <http://www.finnegan.com/en/insights/articles/implications-of-ebay-v-mercexchange.html>; 35 U.S.C. § 283.

24. Since NPEs do not practice the patents they own, NPEs cannot satisfy the four factor test or make a showing of harm. *eBay*, 547 U.S. at 391; *See generally* 19 U.S.C. § 1337 *et seq.*

25. Brian Seal & Thomas Southard, *Non-Practicing Entities Face an Uphill Battle in Proving the Domestic Industry Requirement at the ITC*, RATNERPRESTIA, <http://www.ratnerprestia.com/2013/07/26/non-practicing-entities-face-an-uphill-battle-in-proving-the-domestic-industry-requirement-at-the-itc/>.

26. 19 U.S.C. § 1337(d)(1).

27. Matt Rizzolo & Brendan McLaughlin, *Bill Curtailing NPE Suits at the ITC Could Restructure Licensing*, LAW360 (Sept. 16, 2020, 6:12 PM EDT), <http://www.law360.com/articles/1310081/bill-curtailing-npe-suits-at-itc-could-restructure-licensing>; *see, e.g.*, Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1 (2012).

28. Bill Watson, *Preserving the Role of the Courts Through ITC Patent Reform*, R STREET (Mar. 2018), <http://www.rstreet.org/wp-content/uploads/2018/04/Final-Short-57.pdf>.

29. *See* Eric Miller, *End Weaponization of ‘Exclusion Orders’ and Restore the ITC’s Original Intent*, HILL (Jan. 15, 2020, 7:00 AM EST), <http://thehill.com/opinion/technology/477793-end-weaponization-of-exclusion-orders-and-restore-the-itcs-original-intent?rl=1>.

Today, sophisticated NPEs “have become adept at using the ITC as part of a legal strategy.”³⁰ They’ll file federal court actions against a defendant with little intention to litigate, but will “simultaneously [ask] the ITC to investigate a claim of IP infringement” against the same respondent to increase settlement pressure.³¹ Their hope? Obtain an exclusion order on the patent from the ITC—fully aware that the Commission cannot award monetary damages—and force the respondent to settle before the federal court decides on damages. Thus, in a parallel system offering multiple venues of varied standing, little stands to combat NPEs using “the threat of an injunction” for their financial gain.³²

III. INTERPRETING THE VARIED STANDING RULES

Beyond *eBay’s* effect, the ITC has legal independence from the federal courts under “procedures and remedies . . . governed by a separate statute.”³³ While statutory standing under the Patent Act provides that “[a] patentee shall have remedy by civil action for infringement of his patent,” Section 337 standing allows an independent exclusive licensee to bring a Section 337 claim.³⁴ Thus, “the question of standing to assert a patent claim is [not only] jurisdictional,” but further dependent on the parties involved.³⁵

A. Patent Act Standing in Federal Court

Standing applies to a “patentee” within the Patent Act and extends to any “successors in title.”³⁶ Specifically, a statutory cause of action under the Patent Act requires that any complaint alleging patent infringement “be

30. Bruce Gjovig, *Government Must Reform the ITC to Keep Pace with Innovation and Curb Trolls*, IPWATCHDOG (Aug. 9, 2021), <http://www.ipwatchdog.com/2021/08/09/government-must-reform-itc-keep-pace-innovation-curb-trolls/id=136599/>.

31. *Id.*

32. *The ITC in 2019: Non-Practicing Entities*, ITC POL’Y PROJECT (May 11, 2020), <http://www.itcpolicy.com/blog/2020/5/11/the-itc-in-2019-non-practicing-entities>.

33. Watson, *supra* note 28.

34. 35 U.S.C. § 281; *cf.* 19 C.F.R. § 210.12(a)(7). A plaintiff who is an independent exclusive licensee does not possess statutory standing to bring a claim in federal court.

35. *SiRF Tech., Inc. v. Int’l Trade Comm’n*, 601 F.3d 1319, 1325 (Fed. Cir. 2010).

36. 35 U.S.C. § 100(d). This general principle operates independently of the presumption that a sole patentee alleging infringement satisfies constitutional standing. Constitutional standing under Article III, Section 2, in a cause of action involving patent infringement, is established when a third party “performs at least one prohibited action with respect to the patent invention that violates [its] exclusionary rights.” *Morrow v. Microsoft Corp.*, 499 F.3d 1332, 1339 (Fed. Cir. 2007); *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d, 1234 (Fed. Cir. 2019).

brought by a party holding legal title to the patent.”³⁷ Therefore, every co-plaintiff in a patent infringement action “must have the right to exclude others from making, using or selling the invention in the US.”³⁸ By contrast, if a party “lacks exclusionary rights . . . [they have] no authority to assert a patent (even along with the patentee).”³⁹ Thus, under the Patent Act, an independent non-exclusive licensee cannot bring suit or join a patent owner in federal court.⁴⁰

B. Section 337 Standing at the ITC

Commission opinions generally acknowledge that the ITC does not infer “a different standing requirement under Section 337 than the federal courts . . . established in patent infringement cases.”⁴¹ However, separate from plaintiffs in federal court, complainants before the Commission face a weakened threshold.⁴² The Commission only requires a showing that “*at least one* complainant is the owner or exclusive licensee of the subject intellectual property.”⁴³ But the complainant must still prove “it has a ‘domestic industry’ because the ITC is designed to protect the interests of companies actively . . . operating . . . ” within the United States.⁴⁴

To initiate an ITC action, a patentee files a complaint under Section 337.⁴⁵ The ITC’s Office of Unfair Import Investigations (OUII) takes the complaint’s initial service and reviews the merits.⁴⁶ An Administrative Law Judge then issues an initial determination on (1) evidentiary issues

37. *Abbott Labs. V. Diamedix Corp.*, 47 F.3d 1128, 1130 (Fed. Cir. 1995); *Luminara Worldwide, LLC v. Liown Elects. Co.*, 814 F.3d 1343, 1347 (Fed. Cir. 2016) (indicating “only parties with exclusionary rights to a patent” or ownership may establish standing and “bring suit for patent infringement”).

38. *Morrow*, 499 F.3d at 1430. Statutory standing concerns which parties must participate in litigation. *See generally* 35 U.S.C. § 281.

39. *Lone Star Silicon Innovations*, 925 F.3d at 1228.

40. *See Ortho Pharm. Corp. v. Genetics Inst., Inc.*, 52 F.3d 1026, 1031 (Fed. Cir. 1995).

41. *Certain Catalyst Components and Catalysts for the Polymerization of Olefins (Catalyst Components)*, Inv. No. 337-TA-307, Comm’n Op., 1990 WL 710614, at *15 (June 7, 1990); *but see Certain Rd. Constr. Machs. & Components Thereof*, Inv. No. 337-TA-1088, Order No. 22, (June 5, 2018) (ALJ Lord highlighting the variance among standing rules).

42. 19 C.F.R. § 210.12(a)(7).

43. *Id.* (emphasis added).

44. Joseph A. Saltiel & Jennifer K. Gregory, *Will the ITC Become a Regular Forum for Non Practicing Entities to Enforce Their Patents?*, ABA (2010), http://jenner.com/system/assets/publications/262/original/Saltiel_Gregory_itc.pdf?1313171384.

45. 19 U.S.C. § 1337 *et seq.*; Lyon & Piepmeier, *supra* note 8 (“To begin an investigation, a complainant must prepare and file a detailed complaint, which the ITC must in turn accept through a process known as ‘instituting an investigation.’”).

46. 19 C.F.R. § 210.7; *see Office of Unfair Import Investigations (OUII)*, U.S. INT’L TRADE COMM’N, <http://www.usitc.gov/offices/ouii> (explaining the mission and function of the OUII).

and (2) the sufficiency of a Section 337 violation, including the existence of a domestic injury.⁴⁷ Therefore, the OUII determines whether a complainant satisfies the domestic injury requirement for proper standing during pre-institution proceedings.⁴⁸

IV. ITC DOMESTIC INDUSTRY

While Section 337 standing helps determine which complainants may litigate before the Commission, the domestic industry requirement serves to gatekeep the forum's excessive use because it demands a showing that a complainant's actions related to its asserted patent in the United States warrants protection.⁴⁹ Moreover, it "ensures that the protections offered by the ITC [only] benefit companies with significant investments in exploiting the relevant IP"⁵⁰ Since NPE trolls often acquire patent rights and then license those rights under revenue-driven models, the ITC's domestic industry requirement proves relevant.⁵¹

A. *An Open Interpretation Regarding Substantial Licensing Activity*

Before the OUII decides to institute a Section 337 investigation, a patentee must establish the existence of a domestic industry "relating to the articles protected by the patent . . . [that] exists or is in the process of being established."⁵² This inquiry is two-fold and requires proof of certain activities related to an asserted patent.⁵³

The "first prong, or 'the technical prong' of the test, measures [a patent holder's investment] in the United States by exploiting the patent."⁵⁴ The second prong, or the "economic prong" of that test, requires proof of certain activities to establish the industry.⁵⁵ Satisfactory evidence includes: "(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in [an asserted patent's] exploitation, including engineering, research and

47. 19 C.F.R. § 210.43(d) (noting the Commission thereafter reviews the record and issues a final determination, either affirming or altering the ALJ's initial determination).

48. *See id.* § 210.11.

49. Seal & Southard, *supra* note 25.

50. Lyon & Piepmeier, *supra* note 8.

51. *See* Seal & Southard, *supra* note 25.

52. 19 U.S.C. § 1337(a)(2).

53. *Id.* § 1337(a)(1)(B), (a)(2-3); *see, e.g.*, Certain Child Carriers and Components Thereof, Inv. No. 337-TA-115, Pub. No. 5264 (Feb. 1, 2022).

54. Saltiel & Gregory, *supra* note 44; *see also* 19 U.S.C. § 1337(a)(2).

55. 19 U.S.C. § 1337(a)(3).

development, or licensing.”⁵⁶ A failure of proof provides the OUII with the necessary grounds for dismissal.⁵⁷

The ITC’s reliance on a domestic industry supports the rationale behind Section 337 standing.⁵⁸ The “domestic industry requirement exists because Congress wanted the ITC ‘to adjudicate trade disputes . . . on behalf of an industry in the United States.’”⁵⁹ Applying “this requirement . . . [during a standing determination helps] preclude holders of U.S. intellectual property rights [from using Section 337] who have no contact with the United States other than owning such intellectual property.”⁶⁰

The domestic industry requirement obliges the Commission to “consider all licensing activities.”⁶¹ When a complainant attempts to demonstrate domestic industry based on those activities, the Commission uses a flexible approach.

On one end of the spectrum, the Federal Circuit and Commission have historically agreed that “ordinary patent litigation expenses should not be automatically considered a ‘substantial investment in . . . licensing.’”⁶² However, situations involving revenue-driven licensing, where a complainant demonstrates its licensing expenditures comprise “a substantial investment” with “a sufficient nexus between the patent at issue and the alleged domestic licensing industry,” are dispositive.⁶³ The predictability of what exploitive activities satisfy the “substantial investment” inquiry under the economic prong is complex because the Commission weighs licensing activities differently regardless of whether

56. *Id.*

57. *See* 19 C.F.R. § 210.21.

58. *See* Bill Watson, *What Does the ITC’s Domestic Industry Test Really Do?*, ITC POL’Y PROJECT (Mar. 11, 2019), <http://www.itcpolicy.com/blog/2019/3/11/what-does-the-itcs-domestic-industry-test-really-do>.

59. *Id.*

60. Omnibus Trade Act, S. Rep. No. 100-71, at 129 (1987) (amending Section 337 to consider licensing as a form of industry).

61. *Certain Multimedia Display and Navigation Devices and Systems*, Inv. No. 337-TA-694, Comm’n Op. at 25 n.20 (Aug. 8, 2011) [hereinafter *Multimedia Display*]; *Certain Coaxial Cable Connectors and Components Thereof and Products Containing the Same (Coaxial Cable)*, Inv. No. 337-TA-650, 2010 WL 9943673, at *29 (Apr. 14, 2010), *rev’d on other grounds, sub nom*; *John Mezzalingua Assocs., Inc. v. Int’l Trade Comm’n*, 660 F.3d 1322 (Fed. Cir. 2011).

62. *John Mezzalingua*, 660 F.3d at 1328 (“Expenditures on patent litigation alone do not constitute evidence of the existence of an industry in the United States established by a substantial investment in the exploitation of a patent.”).

63. *Certain Filament Light-Emitting Diodes (Light Emitting Diodes)*, Inv. No. 337-TA-1220, ID, 2021 WL 6102808, at *115-16 (Nov. 19, 2021) (discussing factors to find requisite nexus); *Multimedia Display*, Inv. No. 337-TA-694, 2011 Comm’n Opinion at 5, 9-12; *Certain Short-Wavelength Light Emitting Diodes, Laser Diodes and Products Containing Same (Short-Wavelength Light)*, Inv. No. 337-TA-640, Order No. 72 (May 8, 2009).

the domestic industry requirement is met.⁶⁴ In some clarity, the Commission's held that "[a] complainant relying upon a domestic industry founded upon [S]ection 337(a)(3)(C) [the relevant licensing provision] must demonstrate the existence of articles that practice the asserted patent."⁶⁵ But this nexus of uncertainty leaves standing room for NPE exploitation because NPEs can sue patent infringers, settle out of court, license the patented technology to the infringers, and then rely on the existence of the license to satisfy Section 337 domestic industry.⁶⁶

V. NPE CONTROL AND INFLUENCE

Recent Commission and congressional efforts attempted to rein in NPE control.⁶⁷ However, subsequent court decisions reinforce the windfall *eBay* gave to ITC complainants.⁶⁸ Since non-manufacturing activities like licensing may qualify as "substantial investments" under the economic prong for domestic industry, and domestic industry does not apply to Patent Act standing, the OUII readily institutes investigations today with NPE complainants.⁶⁹

A. NPE Complainants Hold Immense Leveraging Power

NPEs have significant leverage in ITC proceedings over respondents because Section 337 standing and domestic injury are related.⁷⁰ Under the Commission's standing rule, NPEs may join third parties to satisfy domestic industry or use their licensing activity—evinced above as a case-dependent threshold—to "bypass [the] courts in pursuit of a remedy that

64. See *Multimedia Display*, Inv. No. 337-TA-694, Comm'n Op., at 7, 12.

65. Certain Integrated Circuit Chips and Products Containing the Same (*Integrated Circuit*), Inv. No. 337-TA-859, Comm'n Op. at 14 (Jan. 9, 2014) (citing Certain Computers and Computer Peripheral Devices, Inv. No. 337-TA-841, Comm'n Op. at 40. (Jan. 9, 2014)).

66. The nexus for licensing investments must relate to the asserted patent, the licensing activity, and the United States. See *Integrated Circuit*, Inv. No. 337-TA-859, Comm'n Op. (Jan. 9, 2014); See *Multimedia Display*, Inv. No. 337-TA-694, Comm'n Opinion, at 7, 12.

67. See, e.g., Trade Protection Not Troll Act, H.R. 2189, 115th Cong. (2017-2018); Protecting American Talent and Entrepreneurship Act of 2015, S. 1137, 114th Cong. (2015); Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, H.R. 845, 113th Cong. at § 285A (2013).

68. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017).

69. *Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs (Updated Annually)*, U.S. INT'L TRADE COMM'N (updated Jan. 31, 2022), http://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm (indicating 10 of the 52 total Section 337 investigations in 2021 were brought by NPEs).

70. See Thomas Stiebel, *ITC Proceedings Offer Growing Market Protections*, in *INTELLECTUAL PROPERTY LAW 2015: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR 7* (Cao et al. eds., 2015).

isn't justified by patent policy or trade policy goals."⁷¹ Namely, monetary relief.⁷² Since a substantial investment in licensing increases a complainant's odds that the OUII will institute an investigation, NPEs who own patents or frivolously assert exclusivity rights benefit.⁷³

Moreover, "[t]he ITC favors speed and demands certainty."⁷⁴ To "promote expeditious adjudication, the Commission ... [typically] establish[es] a target date for its final determination" within forty-five days of institution.⁷⁵ Speed, however, comes with a cost. ITC proceedings are approximately "three times [more expensive for respondents than] what they would ... [assume] in a district court case."⁷⁶ Knowledgeable NPEs will then typically leverage the higher costs of this compressed expense window to increase settlement pressure.⁷⁷ This windfall from expeditious adjudication preempts abusive litigation, which many respondents find too risky.⁷⁸

For example, on February 14, 2020, Neodrón Ltd. of Ireland (Neodrón) filed multiple actions against Apple and other consumer electronic suppliers in federal court.⁷⁹ In its complaint, the self-proclaimed NPE—and often referenced patent troll—alleged that Apple infringed its capacitive touchscreen patents, which the company acquired and licensed years before.⁸⁰ To escalate the immediacy of its action, the NPE brought

71. Watson, *supra* note 58; Stephen E. Kabakoff & Andrew G. Strickland, *Leveraging Standing and Domestic Industry Activities of Third Parties in Patent-Based ITC Investigations*, INTELL. PROP. & TECH. L. J. (June 2014), <http://www.finnegan.com/en/insights/articles/leveraging-standing-and-domestic-industry-activities-of-third.html>.

72. See 19 C.F.R. § 210.42(a)(1)(ii) (noting that the ITC cannot award monetary damages or attorney fees).

73. See generally Watson, *supra* note 58; Kabakoff & Strickland, *supra* note 71.

74. Eric J. Fues & Brandon T. Anderson, *The Interplay Between the ITC and the PTAB—More Progress Needed*, BLOOMBERG (Jan. 22, 2019), <http://www.finnegan.com/en/insights/articles/the-interplay-between-the-itc-and-the-ptabmore-progress-needed.html>.

75. 19 U.S.C. § 1337(b)(1).

76. Seal & Southard, *supra* note 25.

77. *Id.*

78. See Eric Schweibenz & Stephen McBride, *SIPCO LLC Files New 337 Complaint Regarding Certain Wireless Mesh Networking Products*, ITC 337 L. BLOG (Aug. 6, 2018), <http://www.itcblog.com/7950-sipco-llc-files-new-337-complaint-regarding-certain-wireless-mesh-networking-products>.

79. Compl. for Pat. Infringement, Neodrón Ltd. v. Apple, Inc., No. 6:20-cv-00116 (W.D. Tex., Feb. 2, 2020).

80. Neodrón made similar allegations of patent infringement against the aforementioned defendants. See *id.*

additional claims before the ITC on February 14, 2020—which the Commission instituted on March 16, 2020.⁸¹

Neodrón sought an exclusion order barring the import of nearly ninety percent of smartphones and tablets into the U.S. consumer marketplace.⁸² A prayer likely grounded on its non-manufacturing licensing activity. If the Commission found merit in its position, the effects would have been detrimental to all consumer electronic suppliers. Neodrón presumably leveraged the potentially daunting exclusion order because all named respondents settled outside of ITC proceedings within the year and the district court actions were dismissed shortly after.⁸³ While the ITC's varied standing rule aims to benefit parties possessing less than all substantial rights to a patent in federal court—examples like Neodrón illustrate the negative trade-off. The ITC's current landscape offers NPE complainants undeserving leveraging power.⁸⁴

VI. PROPOSALS TO CHANGE ITC STANDING UNDER SECTION 337

Even though some Section 337 investigations involve parties that sue each other in federal court, NPEs benefit most under the Commission's current standing rule and domestic industry requirement.⁸⁵ NPE leverage at the ITC poses a threat because “unwilling licensees and other reluctant third parties are [generally] implicated in Section 337”⁸⁶ Amending Section 337's standing rule or domestic industry seeks to rectify this issue.

A. *Adopt the Federal Courts' Position on Standing*

To shift power away from NPEs, the ITC should consider a proposal to adopt the federal courts' position on standing. Its narrower interpretation to prohibit non-exclusive licensees from joining either the patent owner or an exclusive licensee for standing purposes would lessen

81. Certain Capacitive Touch-Controlled Mobile Devices, Computers, and Components Thereof (*Capacitive Touch-Controlled*), Inv. No. 337-TA-1193, 2019 WL 1285152 (Mar. 16, 2020).

82. Charlie Taylor, *Irish Patent Firm in Multimillion Dollar Settlement with Tech Giants*, IRISH TIMES (Jan. 8, 2021, 5:46 PM), <http://www.irishtimes.com/business/technology/irish-patent-firm-in-multimillion-dollar-settlement-with-tech-giants-1.4452627>.

83. *Capacitive Touch-Controlled*, Inv. 337-TA-1193, Order No. 22 (Feb. 19, 2021).

84. See Miller, *supra* note 28.

85. Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 WM. & MARY L. REV. 63, 93 (2008).

86. *Non-Practicing Entities Before the ITC: Notable Investigations and Challenges in Defensive Litigation*, AM. CONF. INST. (June 23, 2020), <http://www.finnegan.com/en/insights/events/non-practicing-entities-before-the-itc-notable-investigations-and-challenges-in-defensive-litigation-062320.html>.

the appeal and preference NPEs have towards filing at the Commission.⁸⁷ Moreover, any legal strategy involving abusive litigation tactics would likely cease.⁸⁸ This is because the ITC only grants two types of remedies: exclusion orders or cease and desist orders.⁸⁹ Applying an aligned standing position amongst the fora forces all complainants to file an action in the forum of their desired remedy and redresses the desirability of obtaining injunctive relief at the ITC after the *eBay* decision.⁹⁰

Further, Section 337 standing determinations do not begin at a complaint's filing; they begin when the OUII institutes the investigation.⁹¹ If the Commission required all co-complainants to possess ownership or an exclusionary right in an asserted patent like the federal courts at the time of filing, then a NPE's reliance on third parties to satisfy the domestic injury requirement fades.⁹² Understandably, this shift would either deny parties standing at the ITC, that would originally satisfy Section 337's requirement, or significantly lessen the number of qualified litigants.⁹³ But this likely simplifies the parallel patent system and prevents the walkaround licensing solution expressed above.

The parallel system is accustomed to the notion of intra-system adoption, especially in instances of fora imbalance.⁹⁴ Adopting the federal courts' position on standing resolves the current variances between Section 337 and Patent Act standing while mitigating NPE exploitation.⁹⁵ It further harmonizes substantive law. Considering the above example, Neodrón could no longer leverage the threat of an exclusion order.⁹⁶ The

87. See *Lone Star Silicon Innovations LLC v. Nanya Tech. Corp.*, 925 F.3d, 1234 (Fed. Cir. 2019).

88. See David A. Hickerson, *Government on its Way to Curbing Abusive Patent Troll Litigation*, HILL (June 12, 2017, 3:00 PM EDT), <http://thehill.com/blogs/pundits-blog/technology/337433-government-is-on-its-way-to-curbing-abusive-patent-troll>.

89. See 19 C.F.R. § 210.75.

90. Lyon & Piepmeier, *supra* note 8; see Fues, *supra* note 20.

91. This variance includes the OUII's pre-institution proceedings, which affords complainants a longer window to cure standing after filing a complaint compared to federal court. 19 C.F.R. §§ 210.9-.12; see Eric W Schweibenz & Alexander B Englehart, *Making a Stand*, INTELL. PROP. MAG. (Apr. 2020).

92. 19 C.F.R § 210.12(a)(7); see Kabakoff & Andrew G. Strickland, *supra* note 71; Schweibenz & Englehart, *supra* note 91.

93. *Id.*

94. In 2018, the USPTO shifted the Patent Trial and Appeals Board's (PTAB) standard of claim construction from the *Broadest Reasonable Interpretation* standard to mirror the federal courts *Phillips* standard. *Changes to the Claim Construction Standard for Interpreting Claims in Trial Proceedings Before the Patent Trial and Appeal Board*, 83 FED. REG. 51340 (Oct. 11, 2018); 37 C.F.R. 42.

95. *Cf.* 19 C.F.R. § 210.12 with 35 U.S.C. § 281.

96. See Compl. for Pat. Infringement, *supra* note 79.

theoretical implications of adopting the federal courts' standing requirement offer respondents recourse from abusive litigation, which dissuades NPE complainants from ITC trials.⁹⁷ Thus, adopting the federal courts' standing rule restores power to respondents and rectifies instances of parallel system imbalance.

B. Raise the Domestic Injury Requirement Further

The ITC does not provide a uniform definition of NPEs.⁹⁸ However, the Commission attempts to categorize them.⁹⁹ Category 1 NPEs include manufacturers, inventors, research and developers, and start-ups, which the ITC weighs more favorably.¹⁰⁰ Alternatively, Category 2 NPEs include those whose business model primarily focuses on purchasing and asserting patents.¹⁰¹ Today, "NPE domestic industry proofs almost always center on 'licensing' of the patent at issue."¹⁰² Yet, the case-specific nature of determining whether the licensing activity is substantial preempts NPE pressure.¹⁰³

NPE power comes from the ITC's broad position on standing, which further relates to its domestic industry requirement. If Section 337 required all complainants "to comprehensively demonstrate substantial linkages to U.S. domestic industry and harm to the U.S. economy before an investigation is launched," then the ITC could reset the NPE power balance and weaken the bluntness of exclusion orders.¹⁰⁴

Congress recognizes this pressing issue. Recent House Bill 5184—the Advancing America's Interests Act (AAIA)—targets NPE abuse and

97. Joe Mullin, *It's Time to Kick Patent Trolls out of the International Trade Commission*, ELEC. FRONTIER FOUND. (Oct. 29, 2020), <http://www EFF.ORG/deeplinks/2020/10/its-time-kick-patent-trolls-out-international-trade-commission>.

98. *Section 337 Statistics*, *supra* note 69.

99. *Id.*

100. *Id.*

101. *Id.*; Alex Czanik, *Interdigital Communications v. ITC: Wrongly Satisfying the ITC Domestic Industry Requirement*, 82 U. CIN. L. REV. 613, 617 (2018) (The Commission tries to give less weight to Category 2 NPEs who are "commonly known as a patent assertion entity (PAE) or its pejorative, 'patent troll.'").

102. Seal & Southard, *supra* note 25.

103. See *Multimedia Display*, Inv. No. 337-TA-694, 2011 WL 3813121, (July 22, 2011); see also *Certain Carburetors and Products Containing Such Carburetors*, Inv. No. 337-TA-1123, Order No. 77, at 3 (Aug. 12, 2019) (citing *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 25-26 (May 16, 2008) (emphasizing "that there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the 'substantial investment' requirement of [19 U.S.C. § 1337(a)(3)(C)].").

104. Miller, *supra* note 29.

revenue-driven activities at the ITC.¹⁰⁵ Facially, AAIA proposes to amend the relevant provisions of domestic industry and provide clarity as to what qualifies as substantial licensing activity.¹⁰⁶ If enacted, a “complainant [could] not rely upon activities by its licensees unless the license leads to the adoption and development of articles that incorporate the” patent.¹⁰⁷ This elevated position authorizes the Commission to exclude certain entities focused solely on revenue-driven activities—Category 2 NPEs—rather than production-driven entities—Category 1 NPEs—while eliminating unwilling domestic industry partners or unqualified complainants in ITC proceedings.¹⁰⁸

Ensuring that licensing leads to creating an article under a production-driven model has budding implications.¹⁰⁹ Since many NPEs use existing products to satisfy Section 337 before the product’s manufacturer becomes an authorized licensee, the bill’s position aims to stop a NPE’s participation in unfair trade practices.¹¹⁰

Amending domestic industry to reduce the Commission’s reliance on NPE’s licensing activity aligns the ITC with its founding purpose of creating “an objective body to study the impact of . . . trade.”¹¹¹ NPEs who target existing products solely to file ITC investigations do not promote domestic investments in manufacturing, research, and development—which are statutory methods to establish a domestic industry.¹¹² Refining the ITC’s position on which non-manufacturing activities qualify as “substantial investments” specific to licensing—like AAIA does—advances respondents’ interests instead of NPE power.¹¹³ Unless licensing “lead[s] to the development of new patent-practicing products,” those who license for litigation purposes would fail Section 337’s threshold to bring

105. Advancing America’s Interests Act, H.R. 5184, 117th Cong. (2021-22) (introduced originally as H.R. 8037, 116th Cong. (2020)).

106. *Id.* § 3 (proposing to insert “substantial investments in licensing activities that leads to the adoption and development of articles that incorporate the patent.”).

107. *Id.*

108. Rizzolo & McLaughlin, *supra* note 27.

109. *See*, H.R. 5184 § 3.

110. *The Effects of Proposed Legislative Preform at the ITC*, HAUG PARTNERS (Sept. 16, 2021), <http://haugpartners.com/article/the-effect-of-proposed-legislative-reform-at-the-itc/>.

111. JOHN M. DOBSON, TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION 83 (1976).

112. 19 U.S.C. § 1337(a)(3); *see* Jacqueline Tio et al., *ITC Litigation: Domestic Industry Requirement*, FISH & RICHARDSON (July 13, 2020), <http://www.fr.com/itc-litigation-domestic-industry-requirement/>; *see also* Reza Mirzaie & Irfan A. Lateef, *The Heightened Domestic-Industry Standard for NPEs*, ABA (Sept. 12, 2012), <http://www.americanbar.org/groups/litigation/committees/intellectual-property/articles/2012/the-heightened-domestic-industry-standard-npes/>.

113. Miller, *supra* note 29.

an investigation under a heightened domestic industry standard.¹¹⁴ The Commission's past decisions "have raised the bar [for] NPEs to prove domestic industry through their licensing activity."¹¹⁵ If enacted, AAIA will re-raise Section 337's domestic industry. But for now, its blueprint sends notice to NPEs of potential change and the bill will be something to monitor moving forward.

VII. CONCLUSION

The ITC remains an alternative to district court litigation, offering relief against acts of patent infringement. While the Commission operates to safeguard foreign trade, few of the present rules governing Section 337 investigations preempt imbalance within the parallel patent system. Specifically, the ITC's standing and domestic industry requirements enable NPEs to exploit the Commission's purpose. Considering the parallel system's landscape after the *eBay* decision and the recent AAIA proposal, the ITC should consider amendments to adopt the federal courts' narrower standing rule or heighten its domestic industry requirement to deny standing for NPEs that focus solely on revenue-driven activities. Should adoption occur, it will harmonize substantive law amongst the fora, advance the interest of respondents while minimizing NPE power at the ITC, and further simplify the parallel patent system. Now, the only thing standing in the way, are the ITC's standing rules themselves.

114. Mirzaie & Lateef, *supra* note 112.

115. Rizzolo & McLaughlin, *supra* note 27.