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The U.S. International Trade Commission’s Statutory “Domestic Industry Requirement” Would Need to be Amended by Congress in Order to Bar Patent Trolls

STEVEN F. MEYER*

Abstract

With increasing frequency, so-called “patent trolls,” patent owners that do not manufacture products embodying its patent (i.e., non-practicing entities or NPEs), are pursuing patent infringement before the United States International Trade Commission. Currently, the only impediment to a NPE to do so is the ITC’s statutory domestic industry requirement under 19 U.S.C. § 1337(a)(3)(A)–(C). Currently, a successful NPE, which has already licensed its asserted patent, may be able to satisfy the domestic industry requirement through its licensee’s domestic activities related to an embodying product or by its own domestic licensing activity. In order to protect American industry from the costs of NPE infringement suits before the ITC, Congress would need to amend § 1337(a)(3)(A)–(C) to add an explicit “manufacturing in the United States” requirement.

Provided that there is a domestic industry and that the accused infringing product is imported into the United States, a patent owner may pursue an infringement proceeding before the United States International Trade Commission (ITC or Commission) in addition to,¹ or even instead of, a federal district court.² Unlike a federal district court, the ITC is not empowered to award monetary damages to a prevailing patent owner. Rather, the ITC may issue an exclusion order prohibiting the importation of the infringing products into the United States, which is enforced by U.S. Customs and Border Protection.³ Notwithstanding the unavailability of monetary damages awards, so-called “patent trolls,”

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1. In the event that the patentee brings co-pending infringement proceedings before both the ITC and a federal district court, the district court action will be stayed until the completion of the ITC action upon the defendant’s timely request filed in the district court. 28 U.S.C.A. § 1659(a) (2013).

2. 19 U.S.C.A § 1337(a)(1)(B) (2013). The statutory provisions of 19 U.S.C. § 1337 are also referred to as “section 337 of the Tariff Act.” This paper uses the term “section 337.”

3. See *id.* § 1337(d).

patent owners that do not manufacture products embodying the patent (i.e., non-practicing entities or NPEs), have increasingly turned to the ITC to pursue infringement proceedings.⁴

A number of rationales have been postulated to explain the increasing allure of the ITC to NPEs. First, there is the common perception that, after the Supreme Court's *eBay* decision, it would be easier for a NPE to obtain an exclusion order from the ITC than a permanent injunction against continued infringement from a district court. Prior to the Supreme Court's *eBay* decision, as a general rule, the district court would issue a permanent injunction once infringement and patent validity had been adjudicated.⁵ In *eBay*, the Supreme Court held that in order to obtain a permanent injunction, the prevailing patentee had to demonstrate that

- (1) it suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for the injury; (3) considering the balance of hardships between the patent owner and infringer, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.⁶

The Federal Circuit has squarely held that "*eBay* does not apply to Commission remedy determinations under Section 337."⁷ By statute, the ITC is required to issue an exclusion order upon finding the infringement of a valid patent, absent a finding that the effects of one of the statutorily-enumerated public interest factors dictate otherwise.⁸ With an ITC-issued exclusion order in hand, the NPE would have greater leverage over the infringer with respect to negotiating the financial terms of an ongoing license. Indeed, even the mere threat of an exclusion order presented by the filing of a complaint with the ITC may give the NPE some degree of leverage over the accused infringer.

Second, prior experience, especially in the Eastern District of Texas, indicates that NPEs consider it advantageous to include multiple unrelated co-defendants in a single patent infringement proceeding. The new 35 U.S.C. § 299, entitled "Joinder of Parties," prevents different defendants with different products from being joined to the same *civil action* based solely on the fact that they have been accused of infringing the same patent.⁹ Section 299 applies to all civil actions filed on or after September 16, 2011—the date of enactment of the America Invents Act (AIA).¹⁰ But new 35 U.S.C. § 299 should not apply to a patent infringement *investigation* before the ITC under 19 U.S.C. § 1337(b) because such an investigation is not considered a civil action within the meaning of the Patent Statute, 35 U.S.C. § 1 et seq.¹¹ Indeed, in 2012, after the enactment of 35 U.S.C. § 299, NPEs filed complaints before the ITC naming from two to forty-five accused infringers.¹²

4. JULIANA COFRANCESCO, U.S. INT'L TRADE COMM'N, FACTS AND TRENDS REGARDING USITC SECTION 337 INVESTIGATIONS 2 (Apr. 15, 2013), available at http://www.usitc.gov/press_room/documents/featured_news/sec337factsupdate.pdf.

5. See *MercExchange, LLC v. eBay, Inc.*, 401 F.3d 1323, 1338 (Fed. Cir. 2005) vacated by 547 U.S. 388 (2006).

6. See *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006).

7. See *Spanion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1358 (Fed. Cir. 2010).

8. 19 U.S.C.A. § 1337(d)(1) (2013).

9. 35 U.S.C.A. § 299(a) (2013).

10. See *Leahy-Smith America Invents Act*, Pub. L. No. 112-29, § 19(e), 125 Stat. 284, 333 (2011).

11. See, e.g., *Int'l Trade Comm'n v. Jaffe*, 433 B.R. 538, 546 (E.D. Va. 2010).

12. Cofrancesco, *supra* note 4, at 4.

Congress is currently considering a proposed bill intended to reduce the number of patent infringement suits filed by certain specifically defined NPEs.¹³ The core of the proposed new 35 U.S.C. § 285A would require such NPEs that lose in court to pay the legal costs, including reasonable attorney's fees, of the accused infringer.¹⁴ Also, the NPE may be required to post a bond early in the case to cover the recovery of those legal costs.¹⁵ Because the current wording of proposed new section 285A states "the Court shall award the recovery of full costs to any prevailing party," section 285A would not apply to the ITC, which is an administrative agency,¹⁶ not a court. Moreover, 19 U.S.C. § 1337(h) provides that the ITC "may by rule prescribe sanctions for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure."¹⁷ As currently written, the ITC's sanctions rules, 19 C.F.R. § 210.4(d) and § 210.25, do not treat NPEs differently from other patent owners and do not require a NPE to pay attorney's fees merely if the NPE loses before the ITC.

Currently, the only impediment to a NPE pursuing a patent infringement proceeding before the ITC, where the allegedly infringing product is imported into the United States, is the ITC's statutory domestic industry requirement.¹⁸ But the ITC's domestic industry requirement should not pose a formidable impediment to a successful NPE. Indeed, in denying a petition for rehearing in *InterDigital Communications*, the Federal Circuit recently held that a NPE's domestic licensing activity alone could satisfy the domestic industry requirement under section 337(a)(3)(C) even though the licensee manufactured "the articles protected by the patent" outside of the United States.¹⁹

I. Overview of ITC's Domestic Industry Requirement

The ITC investigates complaints that articles are being imported into the United States in violation of U.S. intellectual property rights or through other methods of unfair competition, encompassing federal statutory intellectual property—patents, trademarks, and copyrights (including boat hulls and mask works)—as well as state and common law trademarks, trade secrets, and unfair competition.²⁰ Approximately 90 percent of the ITC's section 337 investigations have involved allegations of patent infringement.²¹ With respect to patent-based investigations, section 337(a)(1)(B) in pertinent part provides:

(1) Subject to paragraph (2), the following are unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section: . . .

13. Saving High-Tech Innovators from Egregious Legal Disputes Act of 2013, H.R. 845, 113th Cong. § 285A (2013).

14. *See id.* § 285A(a)(4).

15. *See id.* § 285A(b).

16. 19 U.S.C.A. § 1330(a) (2013).

17. 19 U.S.C.A. § 1337(h) (2013).

18. *See id.* § 1337 (a)(2)–(3).

19. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1303–04 (Fed. Cir. 2013).

20. 19 U.S.C.A. § 1337(a)(1)(A)–(E).

21. *See V. James Adduci II & William C. Sjoberg, Everybody Comes To The ITC*, IP MAG. (Legal Times, The Nat'l Law Journal, Washington D.C.), July 11, 2005, available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=900005433613>.

(B) The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles that-

- (i) infringe a valid and enforceable United States patent . . . ; or
- (ii) are made, produced, processed, or mined under, or by means of, a process covered by the claims of a valid and enforceable United States patent.²²

Sections 337(a)(2) and (3) set forth the domestic industry requirement in its entirety where the alleged violation is based on patent infringement pursuant to section 337(a)(1)(B). These sections read as follows:

- (2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.
- (3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned-
 - (A) significant investment in plant and equipment;
 - (B) significant employment of labor or capital; or
 - (C) substantial investment in its exploitation, including engineering, research and development, or licensing.²³

Because the three criteria of section 337(a)(3) are listed using the disjunctive term “or,” satisfaction of any one of them will be sufficient to meet the domestic industry requirement.²⁴ The burden is on the complainant patent owner to show by a preponderance of the evidence that the domestic industry requirement is satisfied.²⁵

The domestic industry requirement consists of “an ‘economic prong’ (which requires a threshold level of domestic activities or investments with respect to protected articles) and a ‘technical prong’ (which requires that these activities relate to the patent at issue).”²⁶ “The ‘economic prong’ of the domestic industry requirement is satisfied when it is determined that the economic activities and investments set forth in subsections (A), (B), and/or (C) of subsection 337(a)(3) have taken place or are taking place.”²⁷

In the words of the ITC, “[w]ith respect to Section 337(a)(3)(A) and (B), the technical prong is the requirement that the investments in plant or equipment and employment in labor or capital are actually related to ‘articles protected by’ the intellectual property right which forms the basis of the complaint.”²⁸ “It is sufficient to show that the domestic

22. 19 U.S.C.A. § 1337(a)(1)(B).

23. 19 U.S.C.A. § 1337(a)(2)-(3) (2013).

24. *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. 3003, Comm’n Op., at 15 (Nov. 1996) (Final).

25. *Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-694, USITC Pub. 4292, Comm’n Op. (Corrected Pub. Version), at 5 (Nov. 2011) (Final).

26. *Certain Video Games Sys. and Controllers*, Inv. No. 337-TA-743, USITC Pub. 4377, Comm’n Op., at 6 (Feb. 2013) (Final).

27. *Certain Microprocessors, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-781, Comm’n Op., at 17 (Mar. 4, 2013) (Final) [hereinafter *Certain Microprocessors*, Comm’n Op.].

28. *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, USITC Pub. 4120, Comm’n Op., at 13 (Dec. 2009) (Final).

industry practices any claim of [the patent-at-issue], not necessarily an asserted claim of that patent.”²⁹ “With respect to section 337(a)(3)(C), the ‘technical prong’ is the requirement that the activities of engineering, research and development, and licensing are actually related to the asserted intellectual property right.”³⁰

II. NPEs and the 1988 Amendment to the Domestic Industry Requirement

According to the ITC,

[t]he statute [19 U.S.C. 1337] was amended in 1988 to allow IP rights-holders that do not manufacture products (i.e., non-practicing entities or NPEs) to obtain remedies at the USITC. Congress made note in amending the statute that inventors, universities, start-ups, and other entities that conduct research and development, engineering, or licensing activities are equally entitled to Section 337 relief as are manufacturing industries.³¹

The domestic industry requirement appeared in the original Tariff Act of 1930 at section 337(a), which read as follows:

[u]nfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, *the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry*, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the President to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.³²

The above-quoted original section 337(a) required a complainant patent owner to show that the alleged patent infringement “caused injury to the domestic industry and that the domestic industry was efficiently run.”³³ The original version of section 337(a) did not, however, expressly describe how the complainant patent owner could go about establishing the existence of a domestic industry.

In 1983, the Federal Circuit, in *Schaper Mfg. Co. v. Int’l Trade Comm’n*, affirmed that under the then-existing version of section 337(a), the domestic industry requirement could only be satisfied by “the domestic manufacture or production of the patented product by the patentee or his licensee.”³⁴ More specifically, the Federal Circuit held the licensing of the miniature, battery-operated, all-terrain wheeled toy vehicle products covered by the

29. Certain Ammonium Octamolybdate Isomers, Inv. No. 337-TA-477, USITC Pub. 3668, Comm’n Op., at 55 (Jan. 2004) (Final).

30. Certain Stringed Musical Instruments and Components Thereof, *supra* note 28, at 14.

31. COFRANCESCO, *supra* note 4, at 2.

32. *See Schaper Mfg. Co. v. Int’l Trade Comm’n*, 717 F.2d 1368, 1369 n.1 (Fed. Cir. 1983) (emphasis added).

33. *John Mezzalingua Assocs. v. Int’l Trade Comm’n*, 660 F.3d 1322, 1327 (Fed. Cir. 2011).

34. *Schaper Mfg. Co.*, 717 F.2d at 1372; *see also InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295, 1300 (Fed. Cir. 2013) (“The Commission interpreted that language to require proof of the existence (or prospect) of a domestic industry that was manufacturing the articles protected by intellectual property before the Commission could bar the import of infringing products.”).

patents cannot be considered part of any domestic industry.³⁵ The Federal Circuit concluded that “[i]f . . . present-day ‘economic realities’ call for a broader definition [of the domestic industry requirement] to protect American interests (apparently including many of today’s importers) it is for Congress, not the courts or the Commission, to legislate that policy.”³⁶

Congress did not immediately amend section 337(a) in response to the Federal Circuit’s *Schaper* decision. “The 1988 amendments arose from an ITC copyright decision in 1986, *Certain Products with Gremlin Character Depictions*.”³⁷ The complainant Warner Brothers sought exclusion of products that infringed its copyrighted Gremlins characters from the “Gremlins” motion picture.³⁸ In the Initial Determination, the Administrative Law Judge (ALJ) held that the licensing program with respect to the copyrighted Gremlins characters constitutes a domestic industry.³⁹ Relying upon the Federal Circuit’s *Schaper* decision, the Commission reversed the ALJ, holding that the licensing activities of Warner with respect to the Gremlins copyrights do not constitute a domestic industry under section 337.⁴⁰

In 1988, Congress deleted the requirements of an injury to the domestic industry and that the industry was efficiently run and added what is now 19 U.S.C. § 1337(a)(3), which lists three different ways that a complainant can satisfy the domestic industry requirement.⁴¹ Subparagraphs (A) and (B) of section 337(a)(3) were added to now expressly list those factors that had been “relied on in prior Commission decisions finding that an industry exists in the United States.”⁴² Furthermore, “Congress, believing the Commission’s application of the domestic industry requirement had been too rigid, liberalized the domestic industry requirement to be satisfied by proof of non-manufacturing activity, such as licensing and research.”⁴³ That is, “Congress added subparagraph (C) to section 337(a)(3) in 1988 to overrule earlier Commission decisions that had found that licensing alone did not constitute a domestic industry.”⁴⁴

The legislative history provides guidance as to the type of licensing activities that Congress contemplated would satisfy the “third factor,” which was enacted as section 337(a)(3)(C).⁴⁵ For instance, in its final legislative reports, Congress contemplated that the domestic industry would cover entities such as patent owners who engage in extensive

35. See *Schaper Mfg. Co.*, 717 F.2d at 1371.

36. *Id.* at 1373.

37. *InterDigital Commc’ns, LLC.*, 707 F.3d at 1306 (J. Newman, dissenting from denial of pet. for rehearing); see also *Certain Coaxial Cable Connectors and Components Thereof and Prods. Containing Same*, Inv. No. 337-TA-650, USITC Pub. No. 4283, Comm’n Op., at 48 (Nov. 2011) (Final) (“Shortly after the *Gremlins* investigation, Representative Kastenmeier called for an amendment to section 337 to ‘avoid unfortunate results which have occurred in some recent cases, such as *Gremlins*.’”) (quoting 132 Cong. Rec. H1782 (Apr. 10, 1986)).

38. *Id.*

39. See *Certain Prods. with Gremlin Character Depictions*, Inv. No. 337-TA-201, USITC Pub. No. 1815, Comm’n Op., at 15 (Sept. 12, 1985) (Initial Determination).

40. See *Certain Prods. with Gremlin Character Depictions*, Inv. No. 337-TA-201, USITC Pub. No. 1815, Comm’n Op., at 3 – 4 (Mar. 1986) (Final Determination).

41. *John Mezzalingua Assocs. v. Int’l Trade Comm’n.*, 660 F.3d 1322, 1327 (Fed. Cir. 2011).

42. S. REP. NO. 100-71, at 129 (1987); H.R. REP. NO. 100-40, at 157 (1987).

43. *John Mezzalingua Assocs., Inc.*, 660 F.3d at 1327 (citing H.R. REP. NO. 100-40, at 157).

44. See *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n.*, 707 F.3d 1295, 1329 (Fed. Cir. 2013).

45. See H.R. REP. NO. 100-40, at 157.

licensing of their patent rights to manufacturers.⁴⁶ This can be seen in the following Senate Report text:

The third factor, however, goes beyond the ITC's recent decisions in this area. This definition does not require actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States. Marketing and sales in the United States alone would not, however, be sufficient to meet this test. The definition could, however, encompass universities and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.⁴⁷

The Federal Circuit has recently observed that the reference to "manufacturers" in the above-quoted final legislative reports of Congress "merely acknowledge that a sufficiently substantial domestic licensing industry will need to license its technology to a manufacturer somewhere; they do not say that the manufacturer must be domestic."⁴⁸

Nevertheless, the domestic industry requirement of section 337(a)(2)–(3) would still "preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337."⁴⁹ "[M]ere ownership of the patent is insufficient to satisfy the domestic industry requirement."⁵⁰

III. A Successful NPE Should Be Able to Satisfy the Domestic Industry Requirement

A successful NPE that has already licensed its asserted patent may be able to satisfy the ITC's domestic industry requirement under any of the three subparagraphs of section 337(a)(3). That is, the NPE may rely upon its licensee's domestic activities to satisfy subparagraph (A) or (B) of section 337(a)(3) or its domestic engineering or research and development to satisfy subparagraph (C). The NPE may also rely upon its own domestic licensing activity to satisfy the domestic industry requirement under subparagraph (C). In short, the NPE may satisfy the domestic industry requirement without any "articles protected by the patent" being manufactured in the United States.

A. THE COMPLAINT NPE CAN RELY UPON THE DOMESTIC ACTIVITY OF ITS LICENSEES TO SATISFY THE DOMESTIC INDUSTRY REQUIREMENT

"[O]nly activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established

46. See *InterDigital Commc'ns*, 690 F.3d at 1329.

47. S. REP. NO. 100-71, at 129 (1987); H.R. REP. NO. 100-40 at 157 (1987).

48. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1303, n.4 (Fed. Cir. 2013) (denying petition for panel rehearing and rehearing en banc).

49. S. REP. NO. 100-71, at 129; H.R. REP. NO. 100-40, at 157.

50. *Certain Stringed Musical Instruments and Components Thereof*, *supra* note 28, at 16; *see also* 17 C.F.R. § 210.42(h)(2).

under sections 337(a)(2)–(3).⁵¹ Under current ITC caselaw, a complainant NPE can rely upon the pre-complaint and domestic activities performed by earlier licensees under the asserted patent to satisfy the domestic industry requirement of section 337(a)(3)(A)–(C).

The ITC has consistently held that the domestic industry inquiry under section 337 is not only limited to the activities of the patent owner, but also involves the activities of any licensees.⁵² The patent owner complainant may also rely upon any “investments” made by its licensee.⁵³ “Indeed, the economic prong of the domestic industry requirement can be established where a complainant bases its claim *exclusively* on the activities of a contractor/licensee.”⁵⁴ In *Certain Microprocessors*, the Administrative Law Judge allowed the patent owner to rely upon the activities of its licensee to satisfy the economic prong under any of sections 337(a)(3)(A) – (C), even though that licensee had “disclaimed any interest in the [ITC’s] Investigation and admits that it stands to gain nothing from it.”⁵⁵ Thus, it would seem that the pre-complaint, domestic activities performed by other accused infringers who had earlier entered into a license with the NPE, for whatever reason, must be considered as part of the domestic industry inquiry.

The Administrative Law Judge’s Initial Determination in *Certain Electronic Devices* shows how far removed a licensee may be from the patent owner complainant when relying upon that licensee’s activities to satisfy the economic prong.⁵⁶ The two asserted patents were originally assigned to Advanced Micro Devices, Inc. (AMD) upon issuance.⁵⁷ Motorola, Inc. (Motorola) entered into a license with AMD and had been a licensee under the two asserted patents for more than ten years.⁵⁸ About ten years after their issuance, the two asserted patents were ultimately assigned to the complainant, Saxon Innovations, LLC (Saxon), which is a patent-holding company.⁵⁹ The Administrative Law Judge held that Motorola’s engineering and research and development activities satisfied the economic prong under section 337(a)(3)(C).⁶⁰ In so doing, the Administrative Law Judge

51. *Certain Coaxial Cable Connectors and Components Thereof and Prods. Containing Same*, *supra* note 37, at 51, n.17 (citing *Bally/Midway Mfg. Co. v. Int’l Trade Comm’n*, 714 F.2d 1117, 1121 (Fed. Cir. 1983)).

52. *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. 3072 (Nov. 1997) (Remand); *Certain Dynamic Random Access Memories, Components Thereof and Prods. Containing Same*, Inv. No. 337-TA-242, USITC Pub. 2034 (Nov. 1987) (Final); *Certain Auto. Parts*, Inv. No. 337-TA-651, Order No. 21, at 3 (Mar. 6, 2009), *not reviewed*, Notice of Comm’n Decision (Mar. 26, 2009).

53. *Certain Elec. Devices, Including Handheld Wireless Commc’n Devices*, Inv. Nos. 337-TA-673, 337-TA-667, Order No. 49C, at 4 (Oct. 15, 2009), *not reviewed*, Notice of Comm’n Determination (Nov. 17, 2009).

54. *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Order No. 22, 7 (Mar. 15, 2006) (emphasis added).

55. *Certain Microprocessors, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-781, Initial Determination, 173 n.25 (Dec. 14, 2012), *aff’d on other grounds*, Comm’n Op., at 20–21 (Mar. 4, 2013) [hereinafter *Certain Microprocessors*, Initial Determination]. Commission vacated the ALJ’s determinations under Section 337(a)(3)(C) without reaching the merits but adopted the ALJ’s determinations under Section 337(a)(3)(A)–(B).

56. *Certain Elec. Devices, Including Handheld Wireless Commc’n Devices*, *supra* note 53.

57. *Id.* at 3.

58. *Id.* at 5.

59. *See Assignments on the Web*, U.S. PAT. AND TRADEMARK OFF., <http://assignments.uspto.gov> (last visited Oct. 9, 2013).

60. *Certain Elec. Devices, Including Handheld Wireless Commc’n Devices*, *supra* note 53, at 3.

rejected the argument that “there is no economic relationship between Saxon and Motorola.”⁶¹

Where the complainant NPE is exclusively relying upon the domestic activities of its licensee to satisfy the domestic industry requirement under subparagraph (A) and/or (B) of section 337(a)(3), the complainant must still establish that the investment and/or employment activities are “significant.”⁶² Whether the investment and/or employment activities are “significant” with respect to articles covered by the asserted patent is not determined “according to any rigid mathematical formula.”⁶³ According to the ITC’s decision in *Certain Printing and Imaging Devices*, “the Commission’s determination entails an examination of the facts in each investigation, the article of commerce, and the realities of the marketplace,” and “[t]he determination takes into account the nature of the investment and/or employment activities, the industry in question, and the complainant’s relative size.”⁶⁴

Similarly, where the complainant NPE is exclusively relying upon the domestic engineering and/or research and development activities of its licensee to satisfy the domestic industry requirement under subparagraph (C), the complainant must still establish that the investment in those activities is “substantial.”⁶⁵ “There is no minimum monetary expenditure” that must be demonstrated to qualify as a “substantial” investment.⁶⁶ According to the ITC’s decision in *Stringed Musical Instruments*, “the requirement for showing the existence of a domestic industry will depend on the industry in question, and [licensee’s] relative size . . . there is no need to define or quantify the industry itself in absolute mathematical terms.”⁶⁷

B. THE DOMESTIC INDUSTRY REQUIREMENT MAY BE SATISFIED BY POST-MANUFACTURE ACTIVITY ALONE WITHIN THE UNITED STATES

NPEs that merely service “the articles protected by the patent” within the United States may be able to satisfy the domestic industry requirement.⁶⁸ The phrase “with respect to the articles protected by the patent” in section 337(A)(3) refers to the entirety of the commercialized product, not just the specific components that contain the patented technology.⁶⁹ Under current ITC case law, the domestic industry requirement may be satisfied by post-manufacture activities performed on the product in the United States covered by the asserted patent.⁷⁰

61. *Id.*

62. *Certain Microprocessors*, Initial Determination, *supra* note 55, at 81.

63. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, USITC Pub. 4289, Comm’n Op., at 27 (Feb. 17, 2011).

64. *Id.* (citations omitted).

65. *Certain Microprocessors*, Comm’n Op., *supra* note 27, at 25.

66. *Certain Stringed Musical Instruments and Components Thereof*, *supra* note 28, at 25.

67. *Id.* at 24–26.

68. *Certain Unified Commc’n Sys., Prods. Used with Such Sys., and Components Thereof*, Inv. No. 337-TA-598, Order No. 9, at 9–10 (Sept. 5, 2007).

69. *Id.*; *Certain Elec. Devices, Including Handheld Wireless Commc’n Devices*, *supra* note 53, at 10; *Certain NOR and NAND Flash Memory Devices and Prods. Containing Same*, Inv. No. 337-TA-560, Order No. 37, at 6–7 (Nov. 17, 2006), *not reviewed*, Notice of Comm’n Decision (Dec. 13, 2006).

70. *Certain Printing and Imaging Devices and Components Thereof*, *supra* note 63, at 29 (“the Commission has previously recognized that, in appropriate circumstances, a complainant may satisfy the economic

For instance, in *Certain Video Displays*, the Complainant LG Electronics, Inc. (LG) identified representative LCD and plasma television models, which were all assembled in Mexico and imported into the United States, as being “the articles protected by” the asserted patents.⁷¹ Complainant LG’s “wholly owned subsidiary, LG Electronics Alabama, Inc. (LGA) provides service, repair and support for these LCD and plasma televisions in the United States.”⁷² The Commission determined that the economic prong of the domestic industry requirement was satisfied under subparagraphs (B) and (C) based on LGA’s post-sale service operations—including warranty repairs and refurbishments, return merchandise authorizations, customer call center operations, and technician activities—with respect to the LCD and plasma televisions alleged to practice the asserted patents.⁷³

Similarly, in *Certain Liquid Crystal Display Devices*, Complainant Samsung Electronics Co. Ltd. (Samsung) identified representative cellular telephones and televisions having LCD displays as being “the articles protected by” the asserted patents.⁷⁴ Samsung did not allege that these products were manufactured in the United States. Samsung’s wholly-owned U.S. subsidiary Samsung Electronics America, Inc. (SEA) conducted quality control, product testing, and validation, which constituted technical and service support for LCD televisions alleged to be covered by three asserted patents.⁷⁵ Another wholly-owned subsidiary, Samsung Telecommunications America, LLP (STA) conducted technical and warrantee support for Samsung cellular telephones alleged to be covered by an asserted patent.⁷⁶ The economic prong of the domestic industry requirement was held to be satisfied under subparagraph (B) based on the post-manufacturing activities of SEA and STA.⁷⁷ The Commission observed that “activities such as quality control, repair and packing of imported products, domestic repair and installation activities, and domestic product servicing have served as the basis for a domestic industry.”⁷⁸

Where a complainant is relying upon such post-manufacturing activity to satisfy the domestic industry requirement under subparagraph (A) and/or (B) of section 337(a)(3), the complainant must establish that the investment and/or employment activities are “significant.”⁷⁹ Where the complainant is relying upon such post-manufacturing activity to sat-

prong of the domestic industry by demonstrating that its service and repair activities and investments are significant with respect to the articles protected by its intellectual property rights.”)

71. *Certain Video Displays, Components Thereof, and Prods. Containing the Same*, Inv. No. 337-TA-687, Order No. 20, at 1 (May 20, 2010), *not reviewed*, Notice Of Comm’n Decision (June 4, 2010); *see also* Second Amended Complaint, ¶ 9.2, *Certain Video Displays, Components Thereof, and Prods. Containing the Same*, Inv. No. 337-TA-687 (Jan. 13, 2010).

72. *Certain Video Displays, Components Thereof, and Prods. Containing the Same*, *supra* note 71.

73. *Id.* at 10.

74. *Certain Liquid Crystal Display Devices and Prods. Containing the Same*, Inv. No. 337-TA-631, Order No. 18, at 8 (Sept. 23, 2008), *not reviewed*, Notice of Comm’n Determination (Oct. 21, 2008) [hereinafter *Certain Liquid Crystal Display Devices, Order*]; *see also* Complaint, ¶¶ 9.1–9.9 *Certain Liquid Crystal Display Devices and Prods. Containing the Same*, Inv. No. 337-TA-631 (June 24, 2009) [hereinafter *Complaint, Certain Liquid Crystal Display Devices*].

75. *Certain Liquid Crystal Display Devices, Order, supra* note 74, at 8.

76. *Id.*; *see also* Complaint, *Certain Liquid Crystal Display Devices*, ¶¶ 9.5–9.6.

77. *Certain Liquid Crystal Display Devices, Order, supra* note 74, at 12–13.

78. *Id.* at 15.

79. *Id.* at 6–7; *Certain Printing and Imaging Devices and Components Thereof, supra* note 63, at 30–31.

isfy the domestic industry requirement under subparagraph (C), the complainant must show that the investment therein is “substantial.”⁸⁰

C. THE COMPLAINANT NPE’S DOMESTIC LICENSING ACTIVITIES ALONE CAN SATISFY THE DOMESTIC INDUSTRY REQUIREMENT

The ITC has long held that a complainant patent owner may satisfy the domestic industry requirement under subparagraph (C) of section 337(a)(3) based on its licensing activities in the United States.⁸¹ The Federal Circuit has recently held, in *InterDigital*, that under such circumstances, a complainant NPE’s licensee need not manufacture in the United States any products covered by the asserted patent.⁸² Thus, the NPE’s licensing activities alone in the United States can satisfy the domestic industry requirement.

In *InterDigital*, complainants InterDigital Communications, LLC and InterDigital Technology Corporation (collectively, InterDigital) filed a complaint with the ITC alleging that Nokia had violated section 337 by infringing its patents directed to CDMA cellular telephone technology.⁸³ InterDigital’s “technology is incorporated in the communications standards referred to as 3G.”⁸⁴ “InterDigital had 24 revenue-producing licenses to its U.S. patents, including the asserted patents, with major manufacturers of wireless devices, including Samsung, LG, Matsushita, Apple, and RIM.”⁸⁵ “Between 1993 and 2006, the evidence showed, InterDigital invested a total of approximately \$7.6 million in salaries and benefits for employees engaged in its licensing activities, and it received almost \$1 billion in revenues from portfolio licenses (including the patents-in-suit) relating to its cellphone technology, which includes about \$400 million attributable to licenses to its 3G technology.”⁸⁶ There was no evidence that InterDigital or any of its licensees manufactured in the United States any cellphones covered by the asserted patents. The Commission held that InterDigital’s licensing activities in the United States satisfied the domestic industry requirement under subparagraph (C) of section 337(a)(3).⁸⁷

On appeal, before the three-judge panel, “Nokia argues that in order to satisfy section 337(a)(2), InterDigital had to establish that there is a United States industry ‘relating to the articles protected by the patent,’ and that proof of licensing activities alone is not sufficient to satisfy that requirement.”⁸⁸ Nokia’s position, if adopted by the Federal Circuit, would restrict a NPE’s access to the ITC where the licensed patent is directed to a technology for which manufacturing has already been outsourced from the United States

80. Certain Video Displays, Components Thereof, and Prods. Containing the Same, *supra* note 71, at 6.

81. *See, e.g.*, Certain Digital Satellite Sys. (DSS) Receivers and Components Thereof, Inv. No. 337-TA-392, Initial Determination, at 10 (Oct. 20, 1997), *not reviewed*, Notice of Final Commission Determination (Dec. 4, 1997); Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same, Inv. No. 337-TA-432, Order No. 13 (Jan. 24, 2001) (unreviewed); Certain Digital Processors and Digital Processing Sys., Components Thereof, and Prods. Containing Same, Inv. No. 337-TA-559, Initial Determination, (May 11, 2007).

82. *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295, 1303–04 (Fed. Cir. 2013).

83. *Id.* at 1299.

84. *Id.*

85. *Id.*

86. *Id.*

87. Certain 3G Mobile Handsets and Components Thereof, Inv. No. 337-TA-613, Order No. 42 (Mar. 10, 2009), *not reviewed*, Notice of Commission Determination (Apr. 9, 2009).

88. *InterDigital Commc’ns, LLC v. Int’l Trade Comm’n*, 707 F.3d 1295, 1329 (Fed. Cir. 2013).

to lower-manufacturing-cost countries, such as in Asia or Mexico. After briefly referring to the legislative history of section 337(a)(3), the panel majority affirmed the ITC's finding of a domestic industry under subparagraph (C) based on InterDigital's licensing activities.⁸⁹ Judge Newman dissented with respect to claim construction but not domestic industry.⁹⁰

Nokia then filed a petition for a rehearing before the three-judge panel, and alternatively before the entire Federal Circuit *en banc*, on the sole issue of whether InterDigital's patent licensing activities satisfied the domestic industry requirement.⁹¹ This time, Judge Newman, again in dissent, read section 337(a)(3)(C) to require proof that the licensed products are manufactured domestically in the United States.⁹² But in denying Nokia's petition, after reviewing the legislative history in depth, the Federal Circuit majority panel squarely held:

Under the clear intent of Congress and the most natural reading of the 1988 amendment, section 337 makes relief available to a party that has a substantial investment in exploitation of a patent through either engineering, research and development, or licensing. It is not necessary that the party manufacture the product that is protected by the patent, and it is not necessary that any other domestic party manufacture the protected article.⁹³

In short, the Federal Circuit was presented with a prime opportunity to limit NPE's access to the ITC, but the majority found a lack of statutory support for doing so. Nokia has now petitioned the U.S. Supreme Court to review the Federal Circuit's decision finding a domestic industry based on licensing alone without any domestic manufacture of the patent-protected product.

Even after *InterDigital*,

[c]omplainants who seek to satisfy the domestic industry requirement by their investments in patent licensing must establish that their asserted investment activities satisfy three requirements of section 337(a)(3)(C). First, the statute requires that the investment in licensing relate to "its exploitation," meaning an investment in the exploitation of the asserted patent. Second, the statute requires that the investment relate to "licensing." Third, any alleged investment must be domestic, i.e., it must occur in the United States.⁹⁴

89. *Id.* at 1329-3.

90. *Id.* at 1330-35.

91. *Id.* at 1297.

92. *Id.* at 1304-1318.

93. *Id.* at 1303-04.

94. Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prods. Containing Same, Inv. No. 337-TA-694, Comm'n Op., at 7-8 (July 22, 2011) (citations omitted); see also Certain Liquid Crystal Display Devices, Including Monitors, Televisions, and Modules, and Components Thereof, Inv. Nos. 337-TA-741, 337-TA-749, USITC Pub. 4383 (Mar. 2013) (Comm'n Op., at 109 (July 6, 2012)) [hereinafter Certain Liquid Crystal Display Devices, Comm'n Op.]; Certain Semiconductor Chips and Prods. Containing Same, Inv. No. 337-TA-753, USITC Pub. 4386 (Mar. 2013) (Comm'n Op. at 45 (Aug. 17, 2012)) [hereinafter Certain Semiconductor Chips and Prods. Containing Same, Comm'n Op.].

Once the Commission determines that a complainant's investment satisfies these three requirements, it will then evaluate whether the complainant's qualifying investment is "substantial" as required by subparagraph (C).⁹⁵

The first requirement becomes an issue where the licensing activity is not directed to just the asserted patent, but rather to a patent portfolio including other, non-asserted patents, or to different patent portfolios for different technologies.⁹⁶ Under such circumstances, the burden is on the complainant to show a "nexus" between the asserted patent(s) and the complainant's licensing activities and investments.⁹⁷ The Commission may consider factors such as:

- (1) the number of patents in the portfolio; (2) the relative value contributed by the asserted patent to the portfolio; (3) the prominence of the asserted patent in licensing discussions, negotiations and any resulting license agreement; and (4) the scope of technology covered by the portfolio compared to the scope of the asserted patent.⁹⁸

The second requirement may become an issue where the complainant's investment is directed to the asserted patent, but not necessarily to the "licensing" of that patent. For instance, expenses and activities related to the purchase of patent portfolios or the reexamination of the asserted patents do not fall within section 337(a)(3)(C) as an investment in "licensing."⁹⁹ Whether litigation expenses can be counted under section 337(a)(3)(C) is a very fact-specific inquiry. The Federal Circuit has held that not all expenses incurred during a *prior* infringement suit on the same asserted patent can be counted toward establishing a domestic industry, even where the prior lawsuit culminates in a license.¹⁰⁰ For instance, the ITC need not consider any legal fees other than those expressly billed for "licensing" or "settlement".¹⁰¹ Where the *prior* district court litigation did not culminate in a license, investment in that litigation may be counted toward establishing a domestic industry if the litigation "would encourage adoption and development of articles that incorporated [complainant's] patented technology."¹⁰² Prior litigation targeted at financial gains, and not at encouraging adoption of the patented technology, does not count.¹⁰³ On

95. Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prods. Containing Same, *supra* note 94, at 8; Certain Liquid Crystal Display Devices, Comm'n Op., *supra* note 94, at 109; Certain Semiconductor Chips and Prods. Containing Same, Comm'n Op., *supra* note 94, at 45.

96. Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same, Inv. No. 337-TA-605, USITC Pub. 4284 (Nov. 2011) (Initial Determination), *not reviewed in relevant part*, Comm'n Op., at 4 (June 3, 2009) (complainant asserted two patents from a portfolio of over 150 patents) [hereinafter Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same, Initial Determination]; Certain Semiconductor Chips Having Synchronous Dynamic Random Access Memory Controllers and Prods. Containing Same, Inv. No. 337-TA-661, Initial Determination, at 4 (Oct. 7, 2009), *not reviewed*, Notice of Commission Determination (Nov. 6, 2009) (complainant had different portfolios for different technologies).

97. Certain Semiconductor Chips with Minimized Chip Package Size and Prods. Containing Same, Initial Determination, *supra* note 96, at 112.

98. Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prods. Containing Same, *supra* note 94, at 10.

99. Certain Liquid Crystal Display Devices, Comm'n Op., *supra* note 94, at 110-12, 114-15.

100. *John Mezzalingua Assocs. v. Int'l Trade Comm'n.*, 660 F.3d 1322, 1328 (Fed. Cir. 2011).

101. *Id.* at 1329.

102. *Motiva, LLC v. Int'l Trade Comm'n.*, 2013 WL 1943205, at *4 (Fed. Cir. 2013).

103. *Id.*

the other hand, none of the litigation expenses incurred during the *current*, underlying section 337 investigation, and any parallel, stayed district court action,¹⁰⁴ are to be counted under section 337(a)(3)(C).¹⁰⁵

Albeit somewhat rarely raised, the third requirement may become an issue when the complainant patent owner is a foreigner primarily located outside the United States, and there is a question where the licensing activity was actually performed.¹⁰⁶

Once the ITC determines that the three above-described requirements are satisfied by the complainant's investment, the next inquiry is whether that investment is "substantial" within the meaning of section 337(a)(3)(C). The type of efforts that will be considered "substantial" will vary depending on the nature of the industry and the complainant's resources. Other relevant factors in determining whether a complainant's investment is substantial are:

- (1) the existence of other types of 'exploitation' of the asserted patent such as research, development, or engineering;
- (2) the existence of license-related ancillary activities such as ensuring compliance with license agreements and providing training or technical support to its licensees;
- (3) whether complainant's licensing activities are continuing; and
- (4) whether complainant's licensing activities are those that are referenced favorably in the legislative history of section 337(a)(3)(C).¹⁰⁷

Furthermore, the revenue earned by the complainant under the license, or the lack of such revenue, may be considered by the ITC as "circumstantial evidence of the complainant's investment."¹⁰⁸

IV. Conclusion

Under the current wording of section 337(a)(3)(A)–(C) and the caselaw interpreting that section, a successful NPE that has already licensed its asserted patent should be able to satisfy the ITC's domestic industry requirement. To transpose the Federal Circuit in *Schaper*, if present-day economic realities call for a narrower definition of the domestic industry requirement to protect American industry from the costs of NPE infringement suits, it is for Congress to yet again amend 19 U.S.C. §1337(a)(3)(A)–(C).

On June 4, 2013, the Obama Administration issued a report along with legislative and executive proposals directed at curbing abusive patent infringement suits brought by "patent trolls."¹⁰⁹ With respect to patent infringement investigations before the ITC, President Obama recommended that Congress "[c]hange the [] standard for obtaining an

104. *See supra* note 1.

105. *Certain Liquid Crystal Display Devices*, Comm'n Op., *supra* note 94, at 112 – 14.

106. *Certain Wireless Commc'ns Equip., Articles Therein, and Prods. Containing Same*, Inv. No. 337-TA-577, Order No. 20, at 5 (Feb. 22, 2007) ("Hence, it is unclear what involvement Samsung's Washington, D.C. office had in the procurement and maintenance of the eight aforementioned cross-license agreements.")

107. *Certain Multimedia Display and Navigation Devices and Sys., Components Thereof, and Prods. Containing Same*, *supra* note 94, at 16.

108. *Id.*; *see also* *Certain Semiconductor Chips and Prods. Containing Same*, Comm'n Op, *supra* note 94, at 48.

109. PRESIDENT'S COUNCIL OF ECON. ADVISERS, THE NAT'L ECON. COUNCIL & THE OFFICE OF SCI. & TECH. POLICY, EXEC. OFFICE OF THE PRESIDENT, PATENT ASSERTION AND U.S. INNOVATION (June 2013).

injunction to better align it with the traditional four-factor test in *eBay Inc. v. MercExchange*, to enhance consistency in the standards applied at the ITC and the district courts.”¹¹⁰ Such an amendment to 19 U.S.C. §1337(d) would impact a complainant NPE only at the end of an ITC investigation when the NPE, after prevailing on the merits, seeks the remedy of an exclusion order. President Obama’s legislative recommendations do not address the domestic industry requirement of 19 U.S.C. §1337(a)(3)(A)–(C), which could be amended so as to bar NPEs from even commencing an ITC investigation by adding a “manufacturing in the United States” requirement.

In short, while President Obama’s recommended amendment to 19 U.S.C. §1337(d) may have a long-term effect of deterring NPEs from pursuing patent infringement investigations before the ITC, President Obama’s legislative recommendations, if enacted, would not have the immediate effect of barring NPEs from the ITC. Additionally, just a few days after the Supreme Court vindicated the Federal Trade Commission’s (FTC) campaign against “reverse payment” settlements of pharmaceutical patent infringement suits under the Hatch-Waxman Act,¹¹¹ the FTC Chairwoman announced that the FTC would launch an investigation into whether the business practices of “patent trolls” harm competition and consumers.¹¹²

Recently, the Commission has bifurcated the typically 16-month-long investigation in order to more quickly address the domestic industry requirement, which may reduce the leverage that a complainant NPE has over the accused infringer with respect to negotiating the financial terms of an ongoing license during the pendency of the ITC investigation. In *Laminated Packaging*, a NPE, Lamina Packaging Innovations LLC, filed a complaint accusing the respondents of patent infringement and alleged a domestic industry under section 337(a)(3)(A)–(C) based on its licensees’ activities and under section 337(a)(3)(C) based on Lamina’s own licensing activities.¹¹³ For the first time, the Commission, when instituting the investigation, ordered the Administrative Law Judge to “hold an early evidentiary hearing, find facts, and issue an early decision, as to whether the complainant has satisfied the economic prong of the domestic industry requirement.”¹¹⁴ According to the Commission, the issuance of an early initial determination by the ALJ “finding that the economic prong of the domestic industry requirement is not satisfied shall stay the investigation unless the Commission orders otherwise.”¹¹⁵ In establishing a schedule for issuing this early initial determination within 100 days, the ALJ expressly noted that “the Commission’s decision to depart from its own rules and regulations without any justification is of questionable legality.”¹¹⁶

110. Press Release, Office of the Press Sec’y, The White House, Fact Sheet: White House Task Force on High-Tech Patent Issues, Legislative Priorities and Executive Actions (June 4, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.

111. *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, at *2227 (2013) (explaining that under a reverse payment settlement, the patentee agrees to pay the accused infringer not to produce the patented product until the patent’s term expires).

112. Ryan Davis, *FTC Head Calls For Broad Probe of ‘Patent Trolls’*, LAW360 (June 20, 2013, 3:15 PM), <http://www.law360.com/articles/451755/ftc-head-calls-for-broad-probe-of-patent-trolls>.

113. *Certain Prods. Having Laminated Packaging, and Components Thereof*, Inv. No. 337-TA-874, USITC Order No. 3, at 1 (Mar. 22, 2013) (Notice).

114. *Id.* at 2.

115. *Id.*

116. *Id.* at 3, n.1.

This bifurcated procedure will result in substantial savings in attorneys' fees and discovery costs by the respondents if the complainant NPE cannot satisfy the economic prong of the domestic industry requirement. But this bifurcation procedure has not changed the ITC's substantive caselaw allowing a complainant NPE to satisfy the domestic industry requirement under section 337(a)(3)(A)–(C) based on the activities of its licensee(s) or under section 337(a)(3)(C) based on its own licensing activities.