

July 31, 2017

Intellectual Property Legislation Update: The Trade Protection Not Troll Protection Act of 2017

This past June, a group of U.S. Senators introduced the first patent-focused piece of legislation of the 115th Congress: the [STRONGER Patents Act of 2017](#), which proposes a myriad of changes to the United States patent system. But the STRONGER Patents Act was not the first intellectual property-focused legislative proposal introduced during this Congress—that distinction goes to [H.R. 2189, the Trade Protection Not Troll Protection Act of 2017](#) (TPNTPA), which was introduced on April 27, 2017 and sponsored by Reps. Tony Cardenas (D-CA), Blake Farenthold (R-TX), Eric Swalwell (D-CA), and Darrell Issa (R-CA).

Attorneys
[Matthew J. Rizzolo](#)

The TPNTPA focuses on the [U.S. International Trade Commission \(ITC\)](#), a quasi-judicial federal agency in Washington, D.C. with broad investigative powers on matters of trade. Among other responsibilities, the ITC conducts investigations under Section 337 of the U.S. Tariff Act of 1930 concerning unfair methods of competition or unfair acts in importation, including the importation of products that infringe intellectual property rights (such as patents, trademarks and copyrights). The ITC has the ability to issue exclusion orders, powerful remedies similar to injunction but that are enforced by U.S. Customs to stop infringing products at the border from importation into the United States. ITC investigations also proceed very quickly, with a final judgment (and potential exclusion order) often coming within 18 months of the filing of a complaint. As a result, the ITC has become a popular forum for patent owners seeking to enforce their rights, particularly after the Supreme Court's 2006 decision in *eBay Inc. v. MercExchange* made it more difficult to obtain an injunction as a remedy for patent infringement. More than 500 Section 337 complaints have been filed at the ITC over the past decade—the vast majority of which include patent infringement allegations.

Not just anyone can file a complaint in the ITC, though. A complainant, such as a patent owner, must satisfy the ITC's so-called "domestic industry" requirement—*i.e.*, the complainant must show that it makes significant investments in the United States in plant, equipment, labor, or capital relating to products that practice the patent, or that it makes substantial investments in exploiting the patent through research and development, engineering, or licensing. In recent years, some companies and commentators have expressed concerns that the ITC could become a haven for NPEs (also called patent assertion entities (PAEs), and sometimes derisively referred to as patent trolls)—in fact, prior versions of the TPNTPA were introduced by Rep. Cardenas in each of the last two Congresses. ([Statistics released by the ITC](#) show that NPEs have accounted for more than half of Section 337 investigations over the past decade.)

The sponsors of the 2017 version of the TPNTPA make it very clear that NPEs and PAEs are the target of this legislation, alleging that "[PAEs are abusing the ITC's patent function by exploiting the intent of Section 337.](#)" Indeed, the statute would amend the ITC's enabling statute to make it more difficult for NPEs and PAEs to file complaints and seek exclusion orders at the ITC. First, it would limit the type of "licensing" activities that would be sufficient to satisfy the domestic industry requirement—only a substantial investment in "licensing activities that leads to the adoption and development" of patented, trademarked, or copyrighted articles would pass muster. This change in Section 337 would likely prohibit many potential complainants (including NPEs and PAEs) from relying on licensing activities to establish a domestic industry, as licensing campaigns often occur after a technology has been widely adopted. Second, while current law allows an ITC complainant to rely on U.S.-based investments *by its*

licensees to establish a domestic industry, the TPNTPA would largely eliminate that option. This change would place significant constraints on the ability of certain NPEs and PAEs to demonstrate significant or substantial U.S.-based investments that would satisfy the ITC's domestic industry requirement.

Additionally, the TPNTPA would call for the ITC to engage in expedited fact-finding and issue early decisions on potentially dispositive issues that the ITC may be able to identify based on the complaint. Specifically, the TPNTPA calls out domestic industry as an issue that should, if possible, be ruled upon within 100 days after institution of the Section 337 investigation. (These early determination provisions essentially codify a version of an [early disposition pilot program](#) that the ITC has used in a handful of investigations over the last several years.) Furthermore, the TPNTPA would allow the ITC to expedite any rulings on whether an exclusion order in a given investigation would have negative effects on the interest of the public—currently, the ITC's rulings on the so-called “public interest factors” are not issued until the end of an investigation.

The TPNTPA was referred to the House Committee on Ways and Means after its introduction in April, but there has been no movement on the bill since. Time will tell whether the issue of the International Trade Commission becomes something that is incorporated into broader intellectual property-related debate or legislation on Capitol Hill, or whether it might be three strikes and you're out for the TPNTPA. Ropes & Gray will keep you posted here on [Capital Insights](#) with more developments on the IP legislative front.