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Bipartisan "Advancing America's Interests Act" Seeks to Curtail Intellectual Property Enforcement at the International Trade Commission

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While Congress has been recently preoccupied with COVID-19 issues and potential U.S. Postal Service legislation, one recently introduced bipartisan bill could, if enacted, significantly affect intellectual property rights and international trade.

On August 14, Representative Suzan DelBene (D-WA) and Representative David Schweikert (R-AZ) introduced H.R. 8037, the "Advancing America's Interests Act" (AAIA). The AAIA would amend Section 337 of the U.S. Tariff Act of 1930, which is the enabling statute of 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 concerning unfair methods of competition or unfair acts in importation, including the importation of products that infringe intellectual property rights (such as patents, trademarks, copyrights, and trade secrets). 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.

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 non-practicing entities (NPEs, also called patent assertion entities, and sometimes derisively referred to as patent trolls)—in fact, bills similar to the AAIA have been introduced before, although none made it out of committee (for example, a similar bill, the Trade Protection Not Troll Protection Act, has been introduced several times over the past seven years).

The AAIA's sponsors' clear goal is to inhibit the ability of NPEs to bring ITC complaints. Representative DelBene stated that "patent licensing entities have abused the ITC process for financial gain. This legislation addresses this problem and helps protect American businesses from unfair and unjustified claims." To protect American businesses from the perceived threat of NPEs, the AAIA proposes amending Section 337 to make it more difficult for NPEs to file complaints, establish a domestic industry, and seek exclusion orders.

Specifically, the AAIA would significantly change how complainants could rely upon licensing activities to establish a domestic industry. First, the AAIA would require a complainant attempting to establish domestic industry through its licensing activities to demonstrate that those activities led to the creation of a product. This amendment aims to prevent NPEs that licensed their patents under threat of a patent infringement suit from establishing a domestic industry, while still allowing independent inventors and universities that license patents that lead to new products to assert their intellectual property rights at the ITC. Second, the bill would no longer permit a complainant to rely upon an "unwilling" licensee for its domestic industry. Under current practice, a third party licensee may be subpoenaed by the ITC for confidential information describing its technology and business—whether it would like to participate in the investigation or not. The AAIA would provide that only if the licensee joins the complaint, under oath, may the patent owner rely upon the licensee's activities to establish a domestic industry.

And going beyond NPE issues, the AAIA would reframe how the ITC considers exclusion orders and the public interest in every single investigation: the ITC would be required to "affirmatively determine that any exclusion serves the public interest"—essentially eliminating the current presumption in favor of exclusionary relief once the ITC determines that a Section 337 violation has occurred. Finally, the AAIA would direct the ITC to consider at the beginning of an investigation whether there are potentially dispositive issues appropriate for an early Initial Determination by the presiding administrative law judge—basically codifying in statute the ITC's existing "100-day early disposition program" set forth in its Rules of Practice & Procedure.

The AAIA was referred to the House Committee on Ways and Means the same day that it was introduced. So far, no other Representatives have cosponsored the bill, and a companion bill has not been introduced in the Senate. While the AAIA has received some initial support from the business community, praising the bill as "modernizing the ITC process to curb its abuse while also protecting legitimate concerns," it remains to be seen whether there is any Congressional will to address NPE issues in the midst of a pandemic and an election year. Ropes & Gray will keep you posted here on Capital Insights with more developments on the IP legislative front.