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A redundant patent tribunal

The ITC serves no legitimate purpose, disrupts the U.S. patent system and violates international law.

By: Bill Watson - October 8, 2012

The global smartphone patent war is setting records as Apple vies to prevent competition from Google's Android in dozens of court cases across four continents. The United States is in a unique position during this conflict, not just because we are the largest consumer market for smartphones, but because we are the only country that allows patent holders to sue twice — once in regular court and simultaneously before a federal administrative agency.

Close observers of recent patent battles may have noticed and been confused by the role of the U.S. International Trade Commission. The ITC earns its place in the patent system by virtue of Section 337 of the Tariff Act of 1930, which gives the agency the authority to exclude imports it determines infringe a U.S. patent. Under Section 337, the ITC operates a specialized patent court for imports that is purely redundant, violates our trade obligations and disrupts the integrity of the U.S. patent system. Patent litigation at the ITC is a protectionist relic that needs to go.

Section 337 was originally designed to fit into a scheme of ad hoc trade maintenance by enabling the ITC to exclude products found to be imported pursuant to "unfair methods of competition." This broad mandate was intentionally ill-defined and has enabled the ITC to investigate a host of antitrust and intellectual property claims with patent infringement being by far the most common.

The law has been around since the Depression, but its use has exploded in recent years. The number of new cases filed per year skyrocketed from 17 in 2002 to 69 in 2011. The sudden rise in its use derives from multiple causes, including amendments to the law to make it more accessible to a broader range of patent owners and the overall increase in patent litigation generally.

A 2006 U.S. Supreme Court decision making it more difficult to gain injunctive relief in district courts has significantly increased the value of litigating at the ITC, where injunctive relief is automatic. That decision was lauded by many who worried about the excessive power of "patent trolls" to scare companies into huge settlements. But it also contributed to a growing schism in the law applied in the different venues. Applying different standards for liability in court and the ITC is completely unjustifiable.

But Section 337 isn't just a bad patent law, it's also a bad trade law. One argument made in its favor is that district courts may lack jurisdiction to stop foreign patent thieves from flooding the market with counterfeit goods. A quick glance at the parties of any recent ITC investigation shows just how unrealistic that concern is. Respondents in currently ongoing investigations include many big-name American companies such as Apple, Motorola and Intel as well as reputable foreign brands such as Nintendo, Nokia and Sony. Section 337 is a solution to a nonexistent problem.

Treating imports differently just because they're imports is the essence of protectionism. Section 337 violates the rules of the World Trade Organization because there is no justification for that different treatment, potentially exposing the United States to embarrassing sanctions and diminishing our ability to provide global leadership in international trade policy.

The ITC's role in the smartphone patent wars offers an excellent demonstration of how Section 337 is both unnecessary and excessive. Recently, Apple was awarded just above a billion dollars by a district court in California after a jury found that Samsung infringed a variety of the company's patents. The judge will decide in December whether to issue an injunction banning sales of some Samsung phones in the United States, but the ITC will make its own determination before then, this month. The ITC could decide that Samsung did not infringe or even that Apple's patents are invalid.

If this outcome seems far-fetched, take note that Apple and Samsung have sued each other over the same technology in courts all over the world. While the United States, Germany and Australia have initially sided with Apple, Samsung has earned decisive victories in Japan, Korea and the United Kingdom. Clearly, Apple and Samsung, both global megacompanies, are not hard to sue in the national courts of any developed country.

The ITC serves no legitimate purpose, disrupts the U.S. patent system and violates international law. Let's allow the courts to do their job and keep the ITC out of the patent business.

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