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Why does a trade court get to decide if Apple infringed patents?

By: Timothy B. Lee – June 4, 2013

The International Trade Commission ruled Tuesday that several older Apple products, including the iPhone 4 and the iPad 2, had infringed a patent belonging to Samsung. As a result, sales of those products are now banned in the United States. The news raises an obvious question: Why does a trade court get to decide patent infringement cases?

“I would say we shouldn’t have the ITC involved at all,” says Bill Watson, a trade scholar at the Cato Institute. “If we didn’t have the ITC doing patent cases today, we wouldn’t think this is what we needed. There aren’t any other countries that do this.”

The ITC is officially part of the executive branch, but it plays a quasi-judicial role in enforcing the nation’s trade laws. If the ITC determines that an importer has engaged in “unfair trade practices,” it can issue an “exclusion order” banning its products from the market.

That law has been on the books since 1922, but more recently the phrase “unfair trade practices” has increasingly been construed to include patent infringement. And because modern consumer electronics products are manufactured overseas, virtually all of those products are vulnerable to ITC exclusion orders.

The result has been two parallel systems of patent law. Patent holders can ask a district court to issue an injunction against the sale of a product. Or they can ask the ITC to issue an exclusion order. While the lingo is different, the basic result is the same: If the product is found to be infringing, it gets banned from the market.

Watson believes this two-track system tilts the playing field in favor of patent holders. They can make a strategic decision about which forum is likely to be more favorable, or they can even file cases in both venues (using different patents) simultaneously. The need to litigate in two different venues can drive up the costs of defending against an infringement accusation.

Moreover, the ITC operates with a slightly different, and often more patent-friendly, set of rules than the district courts. Not only does that make patent law more complicated, but Watson says that makes patent law difficult to reform. Changes to the legal principles applied by the ordinary court system don’t necessarily translate into change in the ITC’s rules, and vice versa.

For example, a 2006 Supreme Court decision made it more difficult for a patent holder to get an injunction against a convicted infringer. But while an ITC exclusion order has the same practical effect as an injunction issued by an ordinary court, the Supreme Court’s ruling didn’t apply to the ITC. So today a patent holder has a better chance of getting an infringer’s product banned from the market if he complains to the ITC.

Cato's Watson also argues that the ITC process is inconsistent with U.S. trade obligations. International treaties require the United States to give equal treatment to domestic products and those manufactured overseas. Yet only goods made overseas are subject to ITC exclusion orders for patent infringement. In effect, the law applies different legal standards to domestic and foreign products.

Watson made the case for getting the ITC out of the patent business in a paper he published last year.