



Frank Cullen, Executive Director
Andrei Iancu, Co-Chair
David Kappos, Co-Chair
Judge Paul Michel (Ret.), Board Member
Judge Kathleen O'Malley (Ret.), Board Member

February 23, 2023

Via Electronic Submission

Ronald A Traud, Esq
Office of the General Counsel
U.S. International Trade Commission
500 E Street SW
Washington, DC 20436

Re: Inv. No. 337-TA-1276

Dear Mr. Traud,

The Council for Innovation Promotion (C4IP) submits this response to the Commission's solicitation of comments on public interest issues raised by the recommendations for relief in the investigation cited above.

C4IP is a bipartisan coalition dedicated to promoting strong and effective intellectual property rights that drive innovation, boost economic competitiveness, and improve lives everywhere. C4IP is a non-party in this case and takes no position on the substantive claims of the parties regarding infringement. C4IP has no financial interest related to the relief recommendations.

We write to express our support for the ITC as a forum for fact-finding and relief recommendations to the President in matters pertaining to allegations of patent and trademark infringement in products imported into the United States. We also support in principle the availability of relief in the form of exclusion of such infringing products from entry into the United States -- in popular parlance, an "import ban."

On January 10, 2023, the Administrative Law Judge presiding over this investigation ruled in favor of the American medical device manufacturer Masimo, finding in an initial determination that Apple engaged in unfair trade practices by importing into the United States and selling

Apple Watches with light-based pulse oximetry functionality and components that infringe on certain Masimo patents.

Notably, President Biden recently upheld a USITC determination in a case with a similar fact pattern, *Certain Wearable Electronic Devices with ECG Functionality and Components Thereof*, Inv. 337-TA-1266. USITC found that the Apple Watch infringed patented technology of another American medical device company and issued a limited exclusion order and a cease-and-desist order.

It is critically important to the public interest to provide intellectual property rights-holders a forum to seek relief from infringement and an effective remedy when it has been determined their rights have indeed been infringed. Allowing infringement to continue destabilizes the American innovation economy and serves as a disincentive for disruptive new market entrants and for the investment they need. At a time when we are competing with nations such as China, whose government directly funds innovative enterprises, such a disincentive in the United States results in diminished investment in risky ventures, especially in the high-tech sector.

The Importance of Patent Enforcement to Breakthrough Innovation

The ability of innovators to obtain patents that are meaningfully enforceable is critical to their ability to attract investors, commercialize their products, and compete in the market.

A [recent analysis](#) by PitchBook, a publication that tracks the U.S. venture capital industry, found that “startups seeking patents raise more capital than their non-patent-seeking peers. About 58% of VC went to startups with patents or with patent applications from 2011 to 2020. This capital is concentrated in the late stage and the venture-growth stage, where 63.2% and 80.4% of capital went to patent companies, respectively.”

This is particularly true in critical patent-intensive sectors such as life sciences, medical devices, semiconductors, cyber security, clean energy, and other areas that require tremendous investment and often an exceptionally long time to bring products to market and turn a profit.

The Public Has an Interest in Meaningful Patent Enforcement

We believe that limited exclusion orders serve the public interest in a number of critical ways.

First, the public health and welfare of the United States is best served by the promotion of robust innovation that leads to breakthrough improvements in quality of life, stimulates economic development, and creates jobs. Strong patent protection and enforcement supports this goal. In addition, a system that incentivizes and protects disruptive new technologies also leads to more competition and is a check on monopolistic behavior by large incumbent firms. The U.S. patent system and its enforcement mechanisms, including the ITC's Section 337 authorities with regard to unfair trade practices, have proven themselves the best policy tools ever devised to create opportunities for market entry and expand the range of competitive and affordable products available to U.S. consumers.

Second, we note that money damages are not enough to enforce the exclusive rights promised by the patent system. A patent owner who has a domestic interest in developing and marketing a product needs to be able to exclude infringing products from entering the U.S. market. Otherwise, the ability to compete, recoup their investments, and grow is far diminished.

Finally, we reject the contention that IP infringement somehow becomes more acceptable when practiced on a mass scale to the point of ubiquity by popular products with large market share. The public is better served when enforceable IP laws ensure all competitors -- large or small -- can compete fairly based on their innovation, execution, and delivery of quality products to



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consumers. No single company or product should be immune from facing a remedy such as an exclusion order simply because of popularity.

Without prejudice regarding any particular case, we believe the ITC is upholding the public interest by properly exercising its authorities under Section 337.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank Cullen', with a long horizontal flourish extending to the right.

Frank Cullen

Executive Director

Council for Innovation Promotion (C4IP)