



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

October 6, 2023

The Honorable Kay Granger
2308 Rayburn House Office Building
Washington, DC 20515

The Honorable Rosa DeLauro
2413 Rayburn House Office Building
Washington, DC 20515

Dear Chairwoman Granger and Ranking Member DeLauro,

The Council for Innovation Promotion is a bipartisan coalition dedicated to promoting strong and effective intellectual property rights that drive innovation, boost economic competitiveness, and improve lives everywhere.

We write to express concerns with language that we understand may have been added to the draft report accompanying the House Fiscal Year 2024 Commerce, Justice, Science, and Related Agencies Appropriations Bill. This language would purportedly urge the International Trade Commission (ITC) to consider and report on whether it is using its full resources to develop a factual record for making its public interest determination. This determination could potentially lead the ITC to conclude not to grant an exclusion order against imported products, even if they are found to infringe upon a valid U.S. patent.

Exclusion orders are vital for ensuring that infringing products manufactured abroad do not flood the U.S. market. This incentivizes innovation through a strong patent system, encourages American-made products, and ensures that foreign-made products have proper licenses to utilize U.S. patents. This is critical to ensure U.S. competitiveness and future technological leadership by protecting U.S. rights-holders against unfair competition from abroad. The ITC's governing statute reflects this preference for exclusion orders by requiring the ITC to issue one "absent a finding that the effects of one of the statutorily enumerated public interest factors counsel otherwise."¹

The ITC already has a thorough process for soliciting public input when deciding to issue an exclusion order, including consulting other parts of the Administration and providing opportunity for public feedback.² It is unclear what else the committee envisions that the ITC should do. Without such further clarity or fact-finding of any kind through committee hearings, it seems that the true goal may be to pressure the ITC to reach different conclusions than it does currently -- in particular, to more frequently decide that other interests outweigh the statutory command to grant an exclusion order. This would be a gift to foreign manufacturers, who will be encouraged to ignore U.S. rights-holders, harming innovation.

To the extent that Congress believes that the ITC should change its procedures, that should be done through the authorizing committee, with public notice and

¹ *Spanion, Inc. v. International Trade Com'n*, 629 F. 3d 1331, 1358 (Fed. Cir. 2010) (citing to 19 U.S.C. § 1337(d)(1)).

² 19 C.F.R. § 210.50; *see also* Ryan Davis, *ITC Gets an Earful on Impact of Possible Apple Watch Ban*, Law360 (Feb. 24, 2023) (collecting public interest statements from third parties).

input, and not through a closed-door process during appropriations. Changes to well-established rules should not be ordered without proper congressional consideration.

We therefore urge the subcommittee to remove any such language having this effect from its final report. We would be happy to provide any further assistance the subcommittee may request while assessing this important issue.

Sincerely,

A handwritten signature in black ink, which appears to read 'Frank Cullen'. The signature is fluid and cursive, with a long horizontal stroke at the end.

Frank Cullen
Executive Director
Council for Innovation Promotion