



March 13, 2025

Via Electronic Submission

Robert Needham
Office of the General Counsel
U.S. International Trade Commission
500 E Street SW
Washington, DC 20436

Re: Inv. No. 337-TA-1380

Dear Mr. Needham,

The Council for Innovation Promotion (C4IP) submits this response to the Commission's February 27, 2025, request for written submissions on the issues of remedy, the public interest, and bonding 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 specifically regarding whether a complainant is precluded from seeking an exclusion order for a patent subject to a reasonable and non-discriminatory (RAND) licensing commitment.¹ In short, a complainant should unquestionably be able to seek such an order. As a remedy, the exclusion order is vital for providing speedy, meaningful relief to U.S.-based entities whose innovations are copied abroad and imported in violation of a U.S. patent. Whether the Commission will ultimately grant the exclusion order will turn on how a case's facts align with the relevant statutory factors. A RAND commitment may be relevant to this analysis but should not bar a complainant from seeking and potentially being awarded the primary form of relief that the Commission can provide.

[1] In the Matter of Certain Video Capable Electronic Devices, Including Computers, Streaming Devices, Televisions, and Components and Modules Thereof, Investigation No. 337-TA-1380, *Notice of Commission Determination to Ratify the Prior Commission Actions* (Feb. 27, 2025) (Question 5, asking, in part, "When the complainant alleges that an asserted patent is a standard essential patent, subject to reasonable, and non-discriminatory (RAND) licensing terms, is the complainant precluded from seeking an exclusion order and/or cease and desist order based on infringement of that patent?").

Stemming from the wording of the Constitution’s grant of authority to Congress to establish the patent law, the “exclusive” right afforded by a patent has been one of its primary benefits to a patent holder, provided in exchange for the patentee’s disclosure to the public of how to make and use the invention. With the grant of exclusivity, a patentee has an asset that provides the basis for additional investment in research and development and the promise of a potential return on that investment if the invention proves to be commercially successful. Exclusivity not only supports investment, but it also provides the underpinning of a robust secondary market for patent rights, allowing the transfer of assets to entities best positioned to utilize them.² Unfortunately, the basis of this ongoing investment and progress — the exclusivity of the patent right — has been significantly eroded in district courts with the Supreme Court’s decision in *eBay v. MercExchange*.³ Studies since the 2006 court decision have documented the extent to which injunctions are now difficult to obtain in district court litigation and the detectable impact this is already starting to have.⁴ Grants of permanent injunctions have fallen by 66% for companies that manufacture their own products that are covered by patents asserted in litigation and by over 90% for those that do not.⁵ Congress has taken notice and begun the initial steps of stemming the harm with the introduction of a bill to reverse the *eBay* decision and inviting testimony.⁶

There is no need to similarly weaken remedies for patent infringement in the ITC, particularly given that the ITC’s authority stems from a statute that sets forth a process for evaluating the appropriateness of an exclusion order, including factors to consider.⁷ In essence, the construction of the statute already answers the question that the Commission has posed — an exclusion order is available unless the Commission determines that the other statutory factors weigh against its issuance.

[2] Adam Mossoff, *The Injunction Function: How and Why Courts Secure Property Rights in Patents*, 96 NOTRE DAME L. REV. 1581 (2021), <https://scholarship.law.nd.edu/ndlr/vol96/iss4/11>; Jonathan Barnett, *Book Introduction: Innovators, Firms, and Markets: The Organizational Logic of Intellectual Property* (February 23, 2021), <https://ssrn.com/abstract=3791538>.

[3] *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

[4] See, e.g., Kristen Osenga, *The Loss of Injunctions under eBay: Evidence of the Negative Impact on the Innovation Economy*, HUDSON INSTITUTE POLICY MEMO (Feb. 28, 2024) (describing an AUTM survey showing that university higher-value exclusive patent licenses have decreased after *eBay*, in favor of non-exclusive patent licenses), <https://www.hudson.org/regulation/loss-injunctions-under-ebay-evidence-negative-impact-innovation-economy>.

[5] Kristina M.L. Aciri nee Lybecker, *Injunctive Relief in Patent Cases: the Impact of eBay*, ___ HARVARD J.L. & TECH. ___ (forthcoming 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4866108.

[6] Sen. Tom Cotton, *Cotton, Coons Reintroduce Bipartisan, Bicameral Bill to Restore Injunctive Relief for Patent Infringement* (Feb. 25, 2025) (noting that “Current patent law fails to protect inventors and leaves them vulnerable to intellectual property theft from adversaries like China.”), <https://www.cotton.senate.gov/news/press-releases/cotton-coons-reintroduce-bipartisan-bicameral-bill-to-restore-injunctive-relief-for-patent-infringement>; *The RESTORE Patent Rights Act: Restoring America’s Status as the Global IP Leader Hearing Before the Subcomm. on Intellectual Property of the S. Comm. on the Judiciary*, 118th Cong. (2024), <https://www.judiciary.senate.gov/committee-activity/hearings/the-restore-patent-rights-act-restoring-americas-status-as-the-global-ip-leader>.

[7] 19 U.S.C. § 1337(d)(1).

While the Commission must evaluate these factors on a case-by-case basis, it is also worth underscoring that this means that the existence of a RAND commitment should not automatically outweigh the issuance of an exclusion order for RAND-committed patents. As other courts and authorities have opined, the effect of a RAND commitment is typically to consider the reasonableness of the patentee licensor and implementer licensee in any given case.⁸ Where a licensee has exhibited behaviors such as rejecting a reasonable licensing offer, presenting unreasonable offers or counteroffers, or engaging in patterns of non-responsiveness and delay, it is difficult to see how any of the statutory factors weighing against the issuance of an exclusion order could be satisfied based on the RAND commitment alone.

Given the ITC’s mission of protecting the rights of U.S. patent holders and domestic industry, it is critically important that the Commission refrain from unnecessarily undermining its authority to block infringing imports. Concluding that a U.S. patent holder is barred in the first instance from seeking an exclusion order from the Commission because of a RAND commitment would do just that.

Ensuring that complainants are not precluded from seeking exclusion orders for patents subject to RAND licensing commitments is essential to upholding the robust U.S. intellectual property rights that drive American innovation.

Thank you for the opportunity to provide commentary on this issue. C4IP stands ready to provide any additional information that may be requested.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank Cullen', is positioned below the word 'Sincerely,'.

Frank Cullen
Executive Director
Council for Innovation Promotion (C4IP)

[8] *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331-1332 (Fed. Cir. 2014), overruled on other grounds by *Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (en banc) (“To the extent that the district court applied a per se rule that injunctions are unavailable for SEPs, it erred. While Motorola’s FRAND commitments are certainly criteria relevant to its entitlement to an injunction, we see no reason to create, as some amici urge, a separate rule or analytical framework for addressing injunctions for FRAND-committed patents.”); USPTO, NIST, Dept. of Justice, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Dec. 19, 2019) (withdrawn) (“In the Agencies’ view, courts, the U.S. International Trade Commission, and other decision makers in their discretion should continue to consider all relevant facts, including the conduct of the parties, when evaluating the general principles of law applicable to their remedy determinations involving standards-essential patents, such as the factors enumerated in *eBay* or 19 U.S.C. § 1337, as appropriate.”), <https://www.justice.gov/atr/page/file/1228016/dl>.