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Trade Agency ‘Patent Troll’ Bill Seen as Harmful for IP Owners

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- Bill would limit patent-licensing operations’ access to ITC
- Critics call it unnecessary, detrimental to US inventors

A bipartisan bill to prevent what sponsors call “abuse” of a US trade agency by patent-licensing entities has the potential to prevent other US entities from enforcing their intellectual property, some attorneys warned.

The “[Advancing America’s Interests Act](#),” introduced last month by Reps. David Schweikert (R-Ariz.) and Don Beyer (D-Va.), would impose [new restrictions](#) on “non-practicing entities” that generate revenue through patent licensing and litigation. The measure would limit their access to the International Trade Commission to block imports that infringe US patents.

The commission’s role in protecting IP was originally intended as a platform for US companies to protect their goods and services from foreign infringement. The bill’s proponents say current statutory language allowing companies that license their IP within the US to bring complaints also opens the door to abuse by NPEs—sometimes derisively labeled “patent trolls.”

Successful infringement complaints at the trade agency can block US imports of widely used goods, such as smartphones and tablets. Ongoing trade disputes have resulted in initial ITC determinations within the past year that could lead to import restrictions on certain Apple Inc. [smart watches](#) and Peloton Interactive Inc. [exercise bikes](#).

ITC complaints filed by NPEs are on the rise, according to the most recent commission data. Attorneys who spoke to Bloomberg Law, however, couldn’t recall an instance of an NPE winning an exclusion order. The threat of that outcome can nevertheless serve as leverage to secure licensing deals to settle proceedings, they said.

In 2020, an Ireland-based NPE known as Neodrón brought a complaint seeking to [block imports](#) of touch-controlled mobile devices by several technology giants including Amazon.com Inc., Apple, Microsoft Corp., Samsung Electronics Co., Sony Corp., and others. That case settled.

In most cases, even an exclusion order itself is often “a means to an end” for parties looking to obtain settlements, according to [Matthew Rizzolo](#), an attorney at Ropes & Gray LLP who leads the firm’s practice before the ITC.

Under the proposed legislation, patent-licensing companies would have to show their patent has been used to adopt or develop an actual product before the ITC proceeds with an investigation. [Previous bills](#) that attempted to tackle the issue stalled in Congress.

“The way that the bill would have an effect is if somebody brings a case to ITC and they don’t use any products in the United States,” said [Charles Duan](#), an assistant professor of IP law at American University. “Because if the ITC blocks a product from coming into the United States, there’s no replacement for American consumers in a sense.”

Duan said the bill would ensure “that the ITC doesn’t go to the point of blocking products, where there isn’t essentially some other product that could fill that market that the patent holder is making.”

But other attorneys say the bill is unnecessary and unfairly targets what is often a legitimate business model for investing in technology.

“There are certainly abusive litigation tactics and people can and should target those,” said McKool Smith P.C. attorney [Nicholas Matich](#). “But targeting patent licensing as a business model is not good.”

Advent of ITC Actions

The trade agency “was basically meant as a remedy for US patent holders, who otherwise would be unable to reach foreign infringers because the US courts don’t have jurisdiction over foreign companies,” Duan said.

“The idea was, if you aren’t able to bring it to court, then you could use the ITC as a means for stopping the company from importing products into the United States,” he said.

The commission, however, isn’t limited to enforcement actions against foreign companies, and American companies are now regularly subject to patent-related complaints before it. A 1988 [amendment](#) to section 337 of the Tariff Act expanded access to the tribunal to permit companies licensing patents in the US—not just those selling products domestically—to bring actions to block infringing imports.

“The ITC is a critical forum that was created to shield U.S. businesses from unfair foreign competition,” Beyer said in a statement. “It is a powerful tool but unfortunately it has been misused by patent licensing entities who target American companies with needless and unjustified litigation.”

That’s led to an increase in new cases in recent years, attorneys said.

“There’s been just a huge influx in ITC filings across the board—and particularly non practicing-entities have started taking advantage of it,” said [Kenneth Parker](#), a partner at Haynes and Boone LLP.

The commission declined to comment.

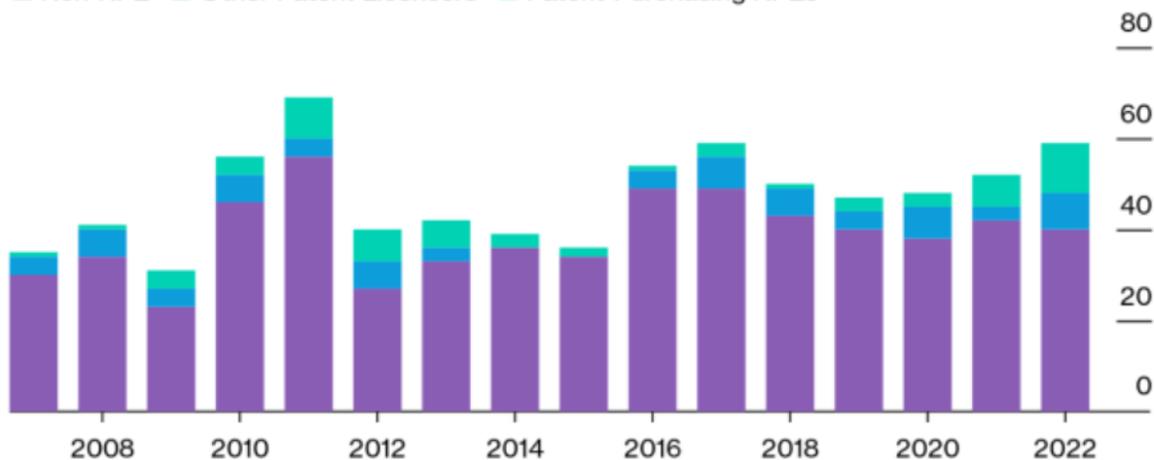
In 2022, 11 patent-enforcement complaints were brought at the ITC by companies whose primary business is purchasing and monetizing patents, an increase from seven the previous year, according to ITC [data](#).

The same year, eight other complaints were brought by inventors, universities, and other entities that license patents but don’t primarily purchase and monetize them, an increase from three in 2021. Both represent the most complaints brought in at least 15 years of ITC data.

Patent-Licensing Companies Are Bringing More ITC Investigations

Investigations brought by entity type, by calendar year

■ Non-NPE ■ Other Patent Licensors ■ Patent-Purchasing NPEs



Source: US International Trade Commission

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Parker said changes in some federal district courts that have been favorites of patent infringement plaintiffs—such as the introduction of [random judge assignments](#) in the Western District of Texas—have pushed patent owners into other enforcement routes that were previously viewed as more difficult, like the ITC.

“It became clear over the last decade that it’s a little more accessible, and perhaps not as difficult—albeit expensive—as people thought,” he said. “And so more and more patent owners started filing things at the ITC. “

The exact extent of the increase and the prevalence of licensing entities remain unclear because the data sample is relatively small, said [Elizabeth Niemeyer](#), a partner at Finnegan, Henderson, Farabow, Garrett & Dunner LLP.

Given the low number of complaints the ITC receives each year, a change of even a few cases would be significant, she said.

“Its kind of hard to tell, like, is it really just something that’s become an NPE haven or if it’s just kind of a small blip over one year,” she said.

‘Fairy Tale’

The bill is unnecessary, said [George Summerfield](#), a partner at K&L Gates LLP and former staff attorney with the ITC’s Office of Unfair Import Investigations.

“Nonpracticing entity is a misnomer and patent troll is like any other fairy tale, it doesn’t really exist,” said Summerfield.

He pushed back on the notion that patent licensing is less legitimate than other business models, comparing it to “anyone who plays the stock market, buys stocks for companies they never worked for, or buys condominiums to flip them.”

“It’s an investment tool effectively, albeit one that involves heavy doses of litigation,” Summerfield said. “But it’s a property right like any other.”

McKool Smith’s Matich said labeling an entity a “patent troll” shouldn’t “deprive them of patent remedies.”

Summerfield added that the ITC has unique expertise which helps them spot and shut down bad-faith complaints.

“I don’t think specific legislation is needed to keep out a whole cast of complaints, some of whom may be truly deserving of access to the commission.”

Nevertheless, the bill’s introduction may be enough to push the agency to consider changes on its own rules.

“Even if the bill itself doesn’t become law, it’s been the case in the past, whenever Congress shows interest in the ITC, the ITC pays attention,” Duan said. He cited to the commission asking for additional briefing in some cases involving standard essential patents after the Senate Judiciary Committee held a hearing at which the Department of Justice and Federal Trade Commission expressed concerns regarding exclusion orders.

The bill “signals to the agency that they need to start being more aware that they’re being watched and that people care about these sorts of issues,” he said.