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Patent Rights and Imported Goods

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EXECUTIVE SUMMARY

The United States government has granted patents almost from the founding of the country. The First Congress acted in 1790 to provide exclusive—but temporary—intellectual property rights so that authors and inventors could enjoy the financial benefits flowing from their ideas. This legislation was enacted to encourage innovation, which has helped to undergird the success of creative U.S. firms and individuals.

Patent infringement also has been part of U.S. history. In response, Congress has passed laws that enable patent holders to enforce their rights. Federal courts offer a venue for addressing infringement that occurs within U.S. borders, whereas the United States International Trade Commission (USITC) investigates allegations of infringement by imports. Section 337 of the Tariff Act of 1930 provides the statutory framework for the USITC's patent adjudications.

Concerns have been raised that section 337 may be in conflict with U.S. international obligations. Because section 337 focuses only on imported goods, some have argued that it may not be consistent with the concept of “national treatment,” one of the basic principles of the

General Agreement on Tariffs and Trade (GATT). This concept requires that imported goods be treated no less favorably by law and regulation than domestically produced goods. Dispute settlement cases under the auspices of the GATT tested this proposition in 1981—when no violation was found—and again in 1988. The second GATT ruling found that section 337 did not conform to national treatment requirements, so Congress modified the law in 1994. The World Trade Organization (WTO), which replaced the GATT in 1995, has not been asked to render a decision on section 337. Nonetheless, some have argued for section 337 to be modified or eliminated.

This paper will provide an overview of the section 337 process. It uses as an example the section 337 investigation initiated in February 2015 by the Danish company Lego regarding alleged infringement of patents supporting its “Friends” line of figurines. Trade policy issues are considered in some detail. The paper wraps up with a discussion of possible revisions to section 337 that may address trade policy concerns. It concludes that such changes currently do not appear to be worth the time, effort, and political costs that would be entailed.

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INTRODUCTION

Article I, Section 8, of the U.S. Constitution states that Congress shall have the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”¹ That language laid the groundwork for intellectual property (IP) rights—primarily patents and copyrights—that have become so important to today’s highly creative and inventive U.S. economy. This paper will focus on patents.

The First Congress did not wait long to begin promoting the progress of science and the useful arts. The Patent Act of 1790 established a patent term of 14 years during which the patent holder would have exclusive rights to benefit from his or her invention.² Patent laws have been revised a number of times since then, most recently by the America Invents Act of 2011. Patents now are granted for a period of 20 years from the date the application is filed. Once the application has been submitted, it takes close to three years, on average, for a patent to be issued. That leaves about 17 years during which the patent holder has a monopoly on use of the discovery.

Clarifying a patent’s scope and applicability often requires litigation. Obtaining a patent involves publicly disclosing details of the invention that make it new and “nonobvious.” (Patent law requires an invention to be sufficiently different from what has existed previously, not just a modest change that would be obvious to a person skilled in the “prior art.”) Because the invention must be described in some depth, information is available that may allow an unscrupulous person to copy the invention. However, not all patent infringement is intentional. It is fairly common for one inventor to develop a solution to a problem that is similar to an approach already patented by someone else. Furthermore, it may not be at all obvious whether the new solution infringes the existing patent, so this question is frequently adjudicated.

When a patent holder seeks to enforce his or her patent against an alleged infringer, the defendant may have several grounds on which to claim that the patent is not valid. A 2012 analysis

of patents that had been reexamined after they had been issued found only 22 percent were fully valid.³ Another 67 percent were found to be partially valid, so they were allowed to remain in effect after the claims defining the patent scope had been modified.⁴ Given the significant share of patents that later are determined not to have been completely correct when issued, legal action regarding patents is relatively common. This paper offers a different perspective on section 337 of the Tariff Act of 1930 than the one presented by a colleague in a 2012 Cato analysis. Together the two papers give a reasonably comprehensive overview of policy issues and alternatives relating to section 337.⁵

PROTECTING IP RIGHTS

Just as Congress has provided courts and other institutions to protect people’s rights to own and enjoy tangible property—homes, cars, money, and so forth—Congress also has provided processes for protecting people’s ideas. Federal district courts play a crucial role in adjudicating IP disputes that fall primarily within U.S. borders. If a court finds that a patent has been infringed, it can require the infringer to provide financial compensation to the patent holder.

What about patent infringement by manufacturers of imported goods? Those situations can be more complicated. The United States is the world’s wealthiest economy and its largest importer. Thus this country is a highly attractive destination for goods produced overseas. Many foreign manufacturers are deeply committed to gaining a meaningful share of the American marketplace. They understand that success requires meeting the quality, design, technical, and price requirements of U.S. consumers.

Not every country has intellectual property standards equal to those of the United States, however. Even countries that enshrine high standards in their laws and regulations may not enforce them consistently. It’s only fair to note that a substantial percentage of goods moving in global commerce originates in countries with weak reputations for enforcing IP rules. Goods that infringe IP rights of-

ten are exported from such countries and then enter the United States. How do U.S. intellectual property owners defend themselves from infringing imports?

If the infringing foreign producer has a business presence and assets in the United States, then a case brought in federal district court may succeed in obtaining a monetary award that benefits the IP holder. But what if the infringing producer has no U.S. presence, and the importer of record has few assets other than a website and a post office box? The situation becomes even trickier if the product can be easily copied and is entering the United States from many different factories in numerous countries. Seeking monetary damages from foreign firms that sell infringing products in the U.S. market one day and are gone the next is not feasible, generally. Patent litigation in federal court is relatively slow—often taking three or more years for a case to reach trial. As a practical matter, if the alleged foreign infringer has no U.S. assets, or if many overseas firms are involved in the infringement, then an IP holder may have no meaningful access to relief in federal district court.

ROLE OF THE U.S. INTERNATIONAL TRADE COMMISSION

Section 337 of the Tariff Act of 1930 provides the framework for addressing IP challenges posed by imports. Its origins are in section 316 of the Tariff Act of 1922, which was incorporated with relatively few changes into the 1930 Act. Responsibility for administering section 337 was given to the U.S. Tariff Commission, which was renamed the U.S. International Trade Commission in the Trade Act of 1974. The USITC is a quasi-judicial agency that uses administrative law judges (ALJs) to investigate alleged infringement. Initial determinations by the ALJs are reviewed by the six-member commission. Appeals of the USITC's section 337 decisions are relatively common and are heard by the U.S. Court of Appeals for the Federal Circuit, the same court that hears appeals of patent cases originating in federal district courts.

Section 337 provides a remedy against infringing imports for holders of U.S. patents, assuming the holders can meet the “domestic industry” requirement. (More on domestic industry later.) Although most patents are held by firms that have headquarters in the United States, many foreign firms obtain U.S. patents to protect their ability to market products successfully in this country. A significant percentage of section 337 investigations (including the example cited in this paper involving Lego, headquartered in Denmark) are initiated by companies that have headquarters overseas.

Section 337 does not allow for monetary damages. Rather, relief is granted by issuing exclusion orders that prevent importation of the infringing products. The basic remedy is a “limited” exclusion order, which pertains only to infringing items produced by specific foreign companies. If easily infringed products are entering the country from multiple foreign producers, a “general” exclusion order that prevents importation from any source may be implemented. Most section 337 investigations are completed in 12–18 months, so the process tends to be faster than in federal court.

Another difference between section 337 at the USITC and a patent case in federal district court is that the USITC has a team of patent lawyers on staff to provide expertise. The investigative attorneys of the Office of Unfair Import Investigations (OUII) ensure that key issues are appropriately briefed and argued before the ALJ. They serve as a third party in the litigation, in addition to the complainant and respondent. Commonly, litigants present a one-sided view of the law and of the facts that supports their preferred outcome. The job of the OUII investigative attorneys is to provide the ALJ with well-informed and independent analysis of often-complicated patent issues. By performing this function, OUII can help to improve the quality and consistency of the USITC's legal determinations.

An additional feature of section 337 is that the statute requires the USITC to consider whether granting an exclusion order would harm the public interest. If the commission determines that an

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exclusion order would have negative effects on “public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles, and United States consumers,”⁶ the exclusion order either would not be issued or would be modified to ameliorate those concerns. Considerations of public interest only rarely influence the issuance of an exclusion order. However, the responsibility to weigh the benefits of protecting IP rights against any potential damage to others in society provides an important safeguard against abuse of the temporary monopoly granted by a patent.

In light of the potential sensitivities that may accompany a decision to exclude any item from the U.S. market, the statute further provides for presidential review of all section 337 determinations. The president has 60 days to disapprove a commission determination for “policy reasons,”⁷ which provides broad authority to reject any section 337 remedy that the administration finds troubling. This authority also has been used only sparingly; the two most recent presidential disapprovals were in 2013 and 1988.

Many section 337 investigations involve arcane patents important to the operation of smartphones and other high-tech devices. Speedy adjudication is especially important for products with short life cycles. Electronic gadgets often are outdated within a couple years and then replaced by newer models. An infringing smartphone may quickly gain a significant share of the U.S. market. The IP holder then may have difficulty achieving the anticipated financial benefit of the patent before the device becomes obsolete. In such cases, “justice delayed is justice denied.”⁸

Patent disputes—whether in district court or at the USITC—often are settled by mutual agreement among the parties. At their heart, most patent cases involve commercial disputes between two or more firms. Early in a section 337 investigation, litigants go through the process of discovery, in which each firm is required to turn over relevant documents to the other parties. Once this information is available, the strength of the legal arguments of each side becomes clearer. At that point it may make good

business sense for the parties to settle and put the dispute behind them. Most firms are not eager to pay unnecessary legal fees to continue litigation that has a low chance of success.

A settlement agreement might simply confirm that the alleged infringer will no longer import the specified merchandise. Settlement agreements also may include licensing arrangements in which one party agrees to pay fees to the other in exchange for being allowed to sell patented products. (Although section 337 provides relief through an exclusion order rather than through monetary awards, the parties themselves may include financial terms as part of a settlement.) Both parties will seek to assure that the terms and conditions for use of the patent will meet their commercial objectives. The USITC has a formal mediation program to encourage settlements. In a normal year, somewhere between one-quarter and one-half of section 337 cases are settled before formal adjudication is completed.

Because the section 337 process is comparatively fast and the IP issues are addressed by experienced specialists, some litigants prefer bringing patent cases to the USITC rather than to district court. If there is a parallel case in federal court, generally that litigation will be stayed pending completion of the section 337 investigation. Even though the USITC only deals with imported products, it has become one of the most highly specialized and prolific patent courts in the country. In recent years, some 15–20 percent of all U.S. patent trials have taken place in the commission’s three courtrooms.

THE EXAMPLE OF LEGO FRIENDS FIGURINES

Patents covering software or electronic devices can seem a bit abstract for those who are not electrical engineers. Perhaps easier to relate to is the section 337 complaint filed in February 2015 by Lego, maker of plastic snap-together blocks and figurines that are a familiar fixture in many households around the world.⁹

This case involves “Lego Friends” figurines that were launched in the U.S. market in 2012. The figurines are female characters designed to

encourage girls to play with Lego bricks. These toys are protected by four U.S. design patents and by four copyrights. (This commentary will address only the patent issues.) The Friends figurines have become sufficiently popular that they are alleged to have inspired copying by three firms named as respondents in the case. Those companies manufacture in China or Canada and recently have begun selling in the United States.

Lego is seeking a general exclusion order, which would prevent infringing figurines from being imported into the United States regardless of the manufacturer or country of origin. The request for a general exclusion order may be driven by the concern that it would be relatively easy for plastic molding factories in many countries to produce copies of these toys.

Will Lego prevail and obtain an exclusion order? At this point, it's too early to tell. Several hurdles must be overcome, perhaps all of

which may be contested by the respondents.

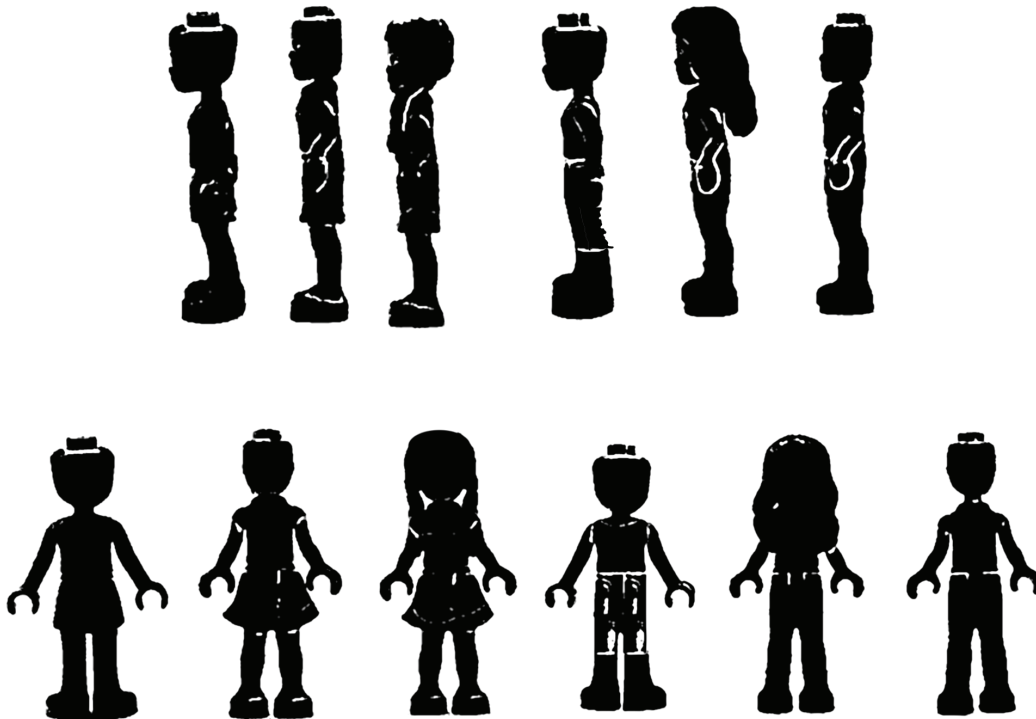
First, Lego must prove that it qualifies as a “domestic industry” of the United States, as defined by section 337. Lego asserts that it conducts extensive activities in this country relating to patent licensing, research and development, and other technical activities. Lego likely will be asked to show that some of those activities relate specifically to the relevant patents.

Second, Lego will be expected to demonstrate that the respondents’ figurines actually infringe Lego’s patents. Although the respondents’ products are little plastic people similar to Lego Friends, they are not identical. The ALJ and the USITC commissioners—with input from attorneys on both sides of the issue—will have to decide whether the figurines infringe.

Third, the respondents may try to prove that Lego’s patents are not valid. Do these design patents too closely resemble a patent that

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Figure 1
Lego Friends figurines (left) and MEGA Brands figurines (right)



“Many have raised questions about whether section 337 violates the ‘national treatment’ obligation undertaken by countries that are members of the World Trade Organization.”

previously had been granted? If the new patent is not sufficiently different from the “prior art,” a court will not enforce it. Lego is hardly the first company to produce a doll with some sort of skirt, so there may be questions about whether the Friends figurines actually qualify for their patents. If Lego’s patents are found to be invalid, no exclusion order would be issued.

Assuming that Lego makes it through the process and the commission concludes that its patents are valid and have been infringed, the next step would be to determine the most appropriate remedy. Although Lego has asked for a general exclusion order, those are not granted very often because of the concern that they may inadvertently restrict imports of somewhat similar products that don’t infringe. As mentioned above, many plastic manufacturers around the world have the capability to copy Lego’s figurines, which may justify a general exclusion order. If the USITC thinks that a general exclusion order would be too broad, it probably would issue a limited exclusion order focused on preventing the import of specific figurines produced by the three respondent firms. In addition, Lego has made the common request that the USITC issue a “cease and desist order” that would prevent the respondents from selling any infringing figurines that have already entered the United States.

In March 2014, Lego also filed an infringement lawsuit against one of the respondents, LaRose Industries LLC, in the U.S. District Court for the District of Connecticut. Consistent with the generally slower process in federal district courts, the lawsuit remains in its early stages. On January 14, 2015, LaRose responded to Lego’s initial discovery requests. The district court proceedings currently are stayed pending the outcome at the USITC.

TRADE POLICY CONSIDERATIONS

As was noted earlier, section 337 is embedded in the Tariff Act of 1930. This legislation often is known for its Republican authors: Sen. Reed Smoot of Utah who chaired the Finance Committee and Rep. Willis Hawley of Oregon

who chaired the Ways and Means Committee. The Smoot-Hawley bill set tariffs at their highest level in more than 100 years. Those restrictive tariffs played a significant role in curtailing international trade, and generally are given credit for deepening and lengthening the Great Depression.

Because it was part of that same legislation, some observers see section 337 as having an intent that is inherently protectionist. After all, section 337 is to be used to counter “unfair practices in import trade,”¹⁰ which sounds as if it could be an invitation to mischief. However, time has demonstrated that section 337 has developed into an effective means for maintaining IP rights, not a tool for practicing protectionism. (The United States has found plenty of other ways to practice protectionism.)

Many have raised questions about whether section 337 violates the “national treatment” obligation undertaken by countries that are members of the WTO.¹¹ National treatment means that imported goods should not be discriminated against, but rather should be subject to the same policies as domestically produced goods. Two dispute settlement cases under the auspices of the GATT examined the relationship between section 337 and U.S. international obligations.

In the first case, the Canadian government brought a GATT complaint in 1981 against a section 337 general exclusion order that affected U.S. imports of springs used in automobile transmissions.¹² Although the GATT panel found that section 337 was inconsistent with the national treatment principle, it concluded that the exclusion order did not violate GATT commitments because it was a permissible means to secure compliance with patent laws. In specific, GATT Article XX(d), which allows exceptions for measures for “the protection of patents, trade marks and copyrights,”¹³ provided a legitimate basis for not applying national treatment.

Section 337 came before a GATT panel a second time in 1988 when Akzo, a Dutch chemical company, was subject to a limited exclusion order for infringing a U.S. patent held by DuPont.¹⁴ This time the panel reached the op-

posite conclusion, finding that section 337 was inconsistent with U.S. obligations under the GATT. Among the reasons were as follows:

- Complainants could choose to bring a patent infringement case either to the USITC or to federal district court, whereas domestic patent disputes could be brought only to court.
- The tight time frame for adjudicating section 337 investigations (normally 12 months, with 18 months allowed for more complicated cases) posed an undue burden on respondents, because comparable time frames do not apply to domestic patent disputes addressed in district court.
- Respondents in section 337 cases are not able to raise counterclaims, which can be done in district court patent cases.
- No remedy comparable to a general exclusion order exists for domestic patent disputes in which allegedly infringing products are not imported.
- An exclusion order amounts to a form of injunctive relief. On the one hand, section 337 provides a successful complainant with that relief automatically. On the other hand, a patent holder in a domestic case would need to bring a separate enforcement proceeding to obtain injunctive relief.
- Section 337 respondents may have to defend themselves simultaneously at the USITC and in district court proceedings. Such simultaneous litigation would not occur in domestic patent disputes.¹⁵

Interestingly, the Akzo panel included the following comment in its conclusions: “The Panel also wishes to state that, although it found that some elements of Section 337 are inconsistent with the GATT obligations of the United States, it found no evidence that these elements had been deliberately introduced so as to discriminate against foreign products.”¹⁶ In other words, section 337 has provisions that do not conform strictly to the GATT, but the

statute does not appear to have a protectionist intent. It isn’t surprising that a law intended to prevent U.S. IP rights from being infringed by imports would include, of necessity, provisions that treat imports somewhat differently from domestic goods.

Having lost a significant GATT dispute, the United States had an obligation to comply with the panel’s ruling. In 1994 Congress responded by amending section 337 as part of the Uruguay Round Agreements Act, which also established U.S. membership in the newly created WTO. Four relevant changes were made:¹⁷

- The standards for issuing general exclusion orders were tightened so that they would be used only in situations where limited exclusion orders would not provide effective relief.
- The strict time limits for completing investigations were eliminated in favor of reaching determinations “at the earliest practicable time.”¹⁸ (Most section 337 cases still are completed within 12–18 months. However, time frames can extend well beyond 20 months. This is particularly true for complicated investigations at times when the overall caseload is heavy. Resource constraints—a shortage of ALJs, skilled attorneys, courtroom space, or conflicts with other work of commissioners—can lead to extended section 337 investigations.)
- The possibility that respondents would need to defend themselves simultaneously at both the USITC and in district court was addressed by requiring a court to stay its proceedings at the request of a party involved in a section 337 investigation.
- Respondents now are allowed to raise counterclaims, which immediately are removed to district court. (As a practical matter, section 337 respondents that have large patent portfolios sometimes achieve the same effect as a counterclaim simply by filing a section 337 case against the complainant for infringement of a patent owned by the original respondent.)

“It isn’t surprising that a law intended to prevent U.S. intellectual property rights from being infringed by imports would include, of necessity, provisions that treat imports somewhat differently from domestic goods.”

“Could section 337 be modified in a way that would reduce any latent concerns about World Trade Organization consistency or that would bring it into closer harmony with intellectual property adjudications in federal courts?”

Have the 1994 amendments brought section 337 fully into compliance with WTO obligations? It's not entirely clear. The European Union (EU) actually started a WTO dispute settlement case in 2000 by making a formal request for consultations.¹⁹ The request asserts the following:

Section 337 was amended by the 1994 US Uruguay Round Agreements Act in an attempt to bring the statute into conformity with the GATT Panel's findings. However, the Uruguay Round Agreements Act has failed to achieve this goal. Section 337, in its present form, does not eliminate the major GATT inconsistencies raised by the 1989 GATT Panel and further violates several provisions of the TRIPS Agreement.

The European Communities and their member States consider that Section 337 is not in conformity with the United States of America's obligations under the GATT 1994, notably its Article III. . . . [Article III of the GATT addresses national treatment.]

Despite this robust statement of the supposed shortcomings of section 337, the dispute settlement case never progressed beyond the consultation phase, which is the initial step in the process. The reasons for not proceeding are uncertain. The 1994 amendments made meaningful changes to the statute that would seem to ameliorate, in part or in the whole, the problems identified by the panel in the Akzo case. Perhaps attorneys for the EU counseled that a successful dispute settlement outcome before a new and unknown WTO panel was by no means assured.

Diplomatic considerations also may argue for restraint. If a country were to bring a successful challenge against section 337, that country might be rewarded by having the United States bring a WTO dispute settlement case against one of its own questionable trade policies. Tit for tat is a familiar concept in the world of trade policy.

Another possible reason for not moving the section 337 case forward is that WTO mem-

bers often select targets for dispute settlement with considerable care. It simply isn't feasible for countries to challenge every policy of other nations that might be somewhat irritating. The better approach is to focus on issues that are genuinely important to a country's economic interests. Section 337 likely is not seen to be imposing major economic costs on companies headquartered in other WTO members. On the other hand, compiling a list of troublesome U.S. policies that do impose meaningful costs overseas would not be difficult to do. Instead of trying to prod the United States toward reducing its trade-distorting policies, WTO members simply have bigger fish to fry.

Finally, as observed by Rogers and Whitlock,²⁰ some firms with headquarters overseas own large portfolios of U.S. patents and have used section 337 to defend their U.S. businesses against infringing imports. Such companies may discourage their home governments from engaging in dispute settlement against a U.S. policy that serves their commercial interests. In a very real sense, the interests of a number of countries—especially developed ones—may be fundamentally aligned with the interest of the United States in securing IP rights through section 337.

SHOULD SECTION 337 BE REFORMED?

Some in the United States consider section 337 to be a flawed statute. Even if other countries aren't complaining about it, section 337 still integrates imperfectly with the country's main venue for defending IP rights—the federal courts. Could section 337 be modified in a way that would reduce any latent concerns about WTO consistency or that would bring it into closer harmony with IP adjudications in federal courts? Or should section 337 be repealed in its entirety?

Revising section 337 with the intent of bringing it into closer alignment with international obligations is complicated by the reality that any inconsistencies between U.S. law and the WTO can't be known with certainty until they are addressed in dispute settlement. Since Congress adopted the 1994 amendments with the goal of

making section 337 WTO compliant, there is likely little interest on Capitol Hill in delving into it again. Congress will tend to assume that the law conforms to WTO requirements. If some future dispute settlement panel determines otherwise, section 337 can be amended then.

Harmonizing litigation procedures for patent issues between the USITC and federal courts may deserve consideration. Is it fair that patent holders dealing with domestic infringement must wait an average of three years to obtain justice, when the USITC can complete an adjudication in only half that time? Should a patent trial in federal district court be foisted onto a jury? Could a procedure be developed that would allow federal courts to use expert patent attorneys as third parties in order to present an independent view that isn't influenced by a client's interests? Should courts be granted the power to issue exclusion orders in addition to monetary damages? Should the USITC be given the authority to impose monetary damages in addition to exclusion orders? It isn't difficult to envision modifications to the current U.S. system that might create more thoughtful and comprehensive approaches to defending the rights of inventors while still protecting the public interest.

Some have argued for section 337 to be abolished. This action would make sense only in a broad overhaul of U.S. patent adjudication. It is possible to envision a thorough reform of the system for enforcing patent rights that could render the current section 337 process superfluous. Once a reasonable alternative for addressing allegations of infringement by imports is agreed on, the USITC would not need to be involved.

However, ending section 337 and handing responsibility to the federal courts would necessitate substantially revising patent procedures used in those courts. Rather than allowing patent disputes to be filed in any federal district court, it may be preferable to have them filed in one or more courts that would specialize in IP litigation and not handle other cases. This approach should allow judges to develop deep patent expertise. Judges might be asked to provide closer oversight of cases under their jurisdiction to keep

them moving—either toward settlement or toward an evidentiary trial—thus shortening the time for case completion.²¹ And judges should be given authority to impose exclusion orders when infringement by imported products cannot be dealt with effectively by other means.

In theory, section 337 could be replaced with an upgraded commitment from the federal courts. In practice, such changes do not appear on the horizon. Section 337 is likely to remain in use for the foreseeable future.

CONCLUSION

Continued innovation is essential to U.S. success in the dynamic global economy. Assuring inventors that they will be able to benefit financially from their inventions is a key to that success. Patents provide a temporary means for inventors to secure those benefits.

However, securing those benefits often requires defending patents against infringement, and some of the most vexing U.S. patent infringement problems originate overseas. To address the special challenges posed by imports that are alleged to infringe U.S. patents, Congress created section 337 and assigned responsibilities for it to the USITC. Many patent holders appreciate section 337 because USITC personnel have developed expertise in patent litigation and because the process moves expeditiously. The reality is that the process works fairly well at curbing infringement by imports.

At times, section 337 has generated controversy. An earlier version of the statute was found to violate U.S. GATT obligations. Today's revised version has not undergone dispute settlement; whether it fully complies with WTO obligations is unclear. Regardless, those who would argue that section 337 should be changed or eliminated have a responsibility to define how the revised system for patent enforcement would operate. How would any changes affect the rights of U.S. patent holders? Would corresponding changes also be required in the patent adjudication procedures used in federal courts? Are such changes worth the time, effort, and political costs that would be required?

“Is it fair that patent holders dealing with domestic infringement must wait an average of three years to obtain justice, when the United States International Trade Commission can complete an adjudication in only half that time?”

Until those questions are answered, section 337 remains a reasonable and effective means to protect U.S. intellectual property rights from infringing imports.

NOTES

1. U.S. Const., art. I, § 8, <http://www.earlyamerica.com/earlyamerica/freedom/constitution/text.html>.
2. “History,” *Wikipedia*, http://en.wikipedia.org/wiki/History_of_United_States_patent_law.
3. Mike Masnick, “Why Do We Assume Patents Are Valid When Patent Office’s Own Numbers Show They Get Things Wrong All the Time?” *Techdirt*, August 20, 2012, <https://www.techdirt.com/articles/20120816/01045920068/why-do-we-assume-patents-are-valid-when-patent-offices-own-numbers-show-they-get-things-wrong-all-time.shtml>.
4. *Ibid.*
5. See K. William Watson, “Still a Protectionist Trade Remedy: The Case for Repealing Section 337,” Cato Institute Policy Analysis no. 708, September 19, 2012, <http://www.cato.org/publications/policy-analysis/still-protectionist-trade-remedy-case-repealing-section-337>.
6. 19 U.S.C. § 1337; Pub. L. No. 71-361, as amended, <https://www.law.cornell.edu/uscode/text/19/1337>.
7. *Ibid.*
8. Generally attributed to former British prime minister William Gladstone (1809–1898), <http://www.quotationspage.com/quote/28904.html>.
9. “Certain Toy Figurines and Toy Sets Containing the Same,” USITC Investigation No. 337-TA-948, <http://itcblog.com/images/legocomplaint.pdf>.
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11. World Trade Organization, “Understanding the WTO: Principles of the Trading System,” https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm.
12. General Agreement on Tariffs and Trade, “United States—Imports of Certain Automotive Spring Assemblies,” report of the panel, adopted May 26, 1983, https://www.wto.org/english/tratop_e/dispu_e/81spring.pdf.
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15. *Ibid.*, pp. 43–44.
16. *Ibid.*, p. 47, 6.2.
17. Joel W. Rogers and Joseph P. Whitlock, “Is Section 337 Consistent with the GATT and the TRIPS Agreement?” *American University International Law Review* 50, no. 3 (2002): 479–80.
18. *Ibid.*
19. World Trade Organization, “United States—Section 337 of the Tariff Act of 1930 and Amendments Thereto,” January 18, 2000, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=8624,6446,1348&CurrentCatalogueIdIndex=2&FullTextSearch=.
20. Rogers and Whitlock, “Is Section 337 Consistent with the GATT,” p. 524.
21. Some of these objectives are incorporated into Pub. L. No. 111-349, which established a 10-year pilot program intended “to encourage enhancement of expertise in patent cases among district judges,” <http://www.gpo.gov/fdsys/pkg/PLAW-111publ349/pdf/PLAW-111publ349.pdf>.

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