

Before the
International Trade Commission
Washington, DC

In re

Practice and Procedure: Rules of General
Application, Safeguards, Antidumping and
Countervailing Duty Investigations, and
Section 337 Adjudication and Enforcement

Docket No. MISC-049

**COMMENTS OF
ITC MODERNIZATION ALLIANCE**

The ITC Modernization Alliance (IMA)¹ is a coalition of leaders in the technology, telecom, and automotive industries dedicated to modernizing the International Trade Commission (ITC) and promoting trade practices that safeguard American industry, workforce, and consumers. IMA advocates for legislative, regulatory, legal, and other policy changes to the Section 337 process at the ITC to maximize US innovation and economic progress. As some of the world's largest patent holders, and with experience as parties to ITC proceedings, IMA members strongly believe in the core purpose of the ITC, and appreciate the opportunity to provide input on targeted ways to support that purpose.

IMA submits these comments in response to the ITC's March 28, 2024 Notice of Proposed Rulemaking, which sets forth proposed amendments to the ITC's Rules of Practice and Procedure.² Among the proposals are changes to 19 C.F.R. Section 210.12, which contains the provisions governing the content, sufficiency, and submission of a complaint alleging a violation of Section 337 of the Tariff Act, and 19 C.F.R. Section 210.13, which sets forth the general provisions for filing a response to a complaint. Absent from the proposed changes is the requirement for parties to disclose the existence of third party litigation funding. IMA recommends that Sections 210.12 and 210.13 include such a disclosure requirement given the importance of this transparency to adequate conflict checks, fairness to the parties, and the public interest.

¹ A list of IMA members is available at <http://itcmalliance.org>.

² Practice and Procedure: Rules of General Application, Safeguards, Antidumping and Countervailing Duty Investigations, and Section 337 Adjudication and Enforcement, 89 F.R. 22012 (Mar. 28, 2024), available at <https://www.govinfo.gov/content/pkg/FR-2024-03-28/pdf/2024-06385.pdf>.

The prevalence of litigation funding in US patent proceedings has steadily increased in recent years. In 2021, 29% of all commitments by third-party litigation funders – or \$812M – was used to fund patent litigation; in 2022, \$672M was put toward patent litigation, comprising 21% of all commitments.³ This significant usage is expected to continue. As a result of these funding commitments, a large percentage of patent litigation is now financed. A recent study found that at least 30% of all patent litigation in 2020 received financing, up from almost nothing just fifteen years before.⁴ But this is just based on data that was pieced together – the lack of transparency means that 30% is the floor, and the percentage could be higher.

This data gap, and the challenge in understanding whether third party litigation funding is involved in a particular case – or the overall extent to which it is being leveraged in US patent proceedings – was recognized in a 2022 study conducted by the United States Government Accountability Office.⁵ That study outlined approaches for bringing greater transparency to the use of third party litigation funding across a number of areas. For federal court proceedings, the experts interviewed in the study recommended the disclosure of such funding in individual cases.⁶

Disclosure, and the transparency it brings about, are important for a number of reasons. At a fundamental level, disclosure allows a court to accurately assess conflicts. Beyond this purpose, disclosure is needed to ensure fairness to the parties in a dispute, which is a fundamental right of American jurisprudence. A party has a right to know who the real opposing party is, and to understand whether the complainant possesses all substantive rights needed to adjudicate the conflict. Issues like proper standing, and whether the respondent may have a license to the patent in question due to another party’s involvement or control of the patents, are critically important for fairness.

An understanding of any third party litigation funding in a dispute is also necessary in order to assess the effect of an exclusion order on “the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” 19 U.S.C. 1337(d)(1). This “public interest” requirement cannot be properly assessed without knowledge of whether the proceeding is being funded by foreign interests, and awareness of potential national security concerns that may arise if a ban is put into place.

The importance of greater transparency in disputes at the ITC was just recently recognized in the appropriations process for Fiscal Year 2024, with the House Appropriations Commerce, Justice, Science, and Related Agencies Subcommittee setting forth in its

³ At least 25% of the last 3 years NPE litigation caused by Litigation Investment Entities (LIEs) (Feb. 21, 2023), available at <https://www.unifiedpatents.com/insights/2023/2/21/litigation-investment-entities-the-investors-behind-the-curtain>.

⁴ Ray, Korok, Third-Party Funding of Patent Litigation: Problems and Solutions (June 1, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4125510.

⁵ THIRD-PARTY LITIGATION FINANCING: Market Characteristics, Data, and Trends (Dec. 2022), available at <https://www.gao.gov/assets/gao-23-105210.pdf>.

⁶ *Id.* at 17.

Appropriations Act a request for the ITC “to brief the Committees ... on investigations undertaken by the ITC regarding real parties in interest, current disclosure requirements, remedial measures available, and any recommendations to address such concerns without overburdening litigants or creating unintended consequences.”⁷

IMA recommends that the ITC take this opportunity to increase transparency and update its Rules of Practice and Procedure to require the disclosure of third party litigation funding. We suggest the following additions:

Amend 19 C.F.R. § 210.12(a)(9) (or another relevant section) to add a new subsection (xii) as follows:

(xii) The identity of any person or entity that provides funding on a non-recourse basis for some or all of the fees and expenses of an investigation instituted based on the complaint. This disclosure includes all persons and entities with a beneficial interest in the investigation, including any ultimate controller of each such entity.

Amend 19 C.F.R. § 210.13(b) (or another relevant section) to add the following:

When the alleged unfair methods of competition and unfair acts are based upon the claims of a valid U.S. patent, the response shall identify any person or entity that provides funding on a non-recourse basis for some or all of the fees and expenses of the investigation. This disclosure includes all persons and entities with a beneficial interest in the investigation, including any ultimate controller of each such entity.

IMA appreciates the opportunity to share this recommendation to further improve the transparency of proceedings before the ITC, and to more broadly bring about increased visibility into the prevalence of third party litigation funding and mitigate its potential impacts on conflicts, fairness, and national security.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Matthew Tanielian', with a long horizontal line extending to the right.

Matthew Tanielian

⁷ FY24 Commerce, Justice, Science, and Related Agencies Appropriations Act, p. 8, available at <https://docs.house.gov/billsthisweek/20240304/FY24%20CJS%20Conference%20JES%20scan%203.3.24.pdf>.

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