NOTE: PATENT TROLL OR PROPERTY DEFENDER? A DEFENSE OF LITIGATION AS A DOMESTIC INDUSTRY

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I. INTRODUCTION

Imagine that Alpha, Inc. is a small business with a patent on some newly invented product. Despite an optimistic view of the patent’s revenue potential, Alpha is unable to secure immediate licensing agreements with others. A peer corporation, Beta, Inc., has a recognized licensing scheme for its own patented product. Then a foreign company begins importing products into the United States that infringe upon the patents of both Alpha and Beta. Currently, only Beta would be eligible for relief under the jurisdiction of the United States International Trade Commission (“ITC”), despite both patent holders having taken steps to protect their inventions. This is how intellectual property rights enforcement is currently handled under 19 U.S.C. § 1337 (“§ 1337”) and is unsurprisingly the source of some frustration.¹

Section 1337 provides a relatively quick resolution compared to the lengthy litigation process in U.S. district court, and is particularly effective given its in rem jurisdiction and the ability for intellectual property holders to prevent the importation of infringing products.² This makes it a valuable tool for domestic producers to protect their products and investments through the enforcement of intellectual property rights. All one needs is an intellectual property right in a given product and a “domestic industry” involving that right in order to utilize the protections of § 1337.³ However, as the previous example illustrated, its current use can lead to both divergent and unfair outcomes for differently situated intellectual property right holders depending upon their maintenance of a “domestic industry.”

In 1988 Congress expanded the definition of a “domestic industry” to include the licensing and exploitation of an intellectual property right in the United States.⁴ Since this amendment, non-practicing entities (“NPEs”), or organizations that hold patents but do not use them in production, have increased their usage of the ITC, due to their newfound qualification as intellectual property right holders.⁵ The introduction of the new requirement for a domestic industry and the increased presence of “patent trolls” have led to some interesting

questions surrounding the use, purpose, and future of § 1337. While many are quick to decry “patent trolls” no matter the circumstances, there may be some merit in adopting a more modern and equitable approach to the usage of § 1337 and the ITC.

This note will address the usage of § 1337 and the domestic industry requirement, as well as where utilization of the statute and the ITC’s jurisdiction could or should go in the future. Part II will look at the inspiration and history of both § 1337 and the Tariff Act as a whole, paying particular attention to the changing domestic industry requirement. Additionally, Part II will look at the emergence and prominence of NPEs. Part III will examine how the Tariff Act and intellectual property rights function in today’s business environment, paying particular attention to the issue of patents as property. Part IV will then address the issue of how § 1337—in particular the domestic industry requirement—should be employed to best suit the needs of both the United States and businesses, arguing for the inclusion of intellectual property litigation in the definition of a domestic industry.

II. BACKGROUND

A. History of § 1337

A precursor of § 1337 first appeared in Section 316 of the Tariff Act of 1922, which made it illegal for importers to engage in methods of unfair competition. As part of a broader protectionist act, this particular section empowered the President to use a variety of tools to prevent unfair competition by those importing into the United States. The President could impose duties or tariffs on importers who violated the provisions of the act. Additionally, in “extreme cases,” the President could altogether ban any imports that violated the provisions. In its inception, § 1337 was a very strong “sword” of both protectionism and competitive practices, despite the inherent conflict between the two.

In 1930, the protections found in § 316 of the Tariff Act of 1922 were relocated into § 337 of the Smoot-Hawley Tariff Act. This new section tracked the language of the old section. The Smoot-Hawley Tariff Act was protectionist in nature and failed to provide a formal

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7 Id.
8 Id.
9 Id.
process for resolving issues of intellectual property infringement. Instead, one would have to complete a difficult multi-step process for relief. First, a complainant would have to prove their case to the ITC predecessor: the Tariff Commission. Then, if successful, the complainant would then have to take that result to the President and convince the President to either block the infringing import or place a duty on it.

By the 1970s, proponents of free trade had made inroads against the historical protectionism of the United States, creating a tension with domestic unions. As a result of this tension Congress passed the Trade Act of 1974. In addition to removing many trade constraints, the Trade Act of 1974 formally replaced the Tariff Commission with the ITC. Congress granted the ITC broad powers for protecting U.S. interests against unfair trade practices, including intellectual property right infringement. The ITC was also brought under the Administrative Procedures Act, giving its procedures more formality and authority. This change made the ITC a more popular destination for intellectual property right holders to protect their property, given the greater legitimacy of the ITC’s procedures. Among the most important provisions of the Trade Act of 1974 was the creation of 12-month deadlines on investigations and 18-month deadlines for exceptionally complicated deadlines. In juxtaposition to the typical length of proceedings in federal district court, these deadlines helped facilitate much speedier trials.

Despite this new forum available to intellectual property holders in their fight against infringement, intellectual property holders still found some barriers to success. In particular, the domestic industry requirement—a vestige of the earlier protectionist laws passed during more industrial times—was sometimes difficult to satisfy. In reality, the domestic industry requirement necessitated proof of operations and sales that was often difficult to produce or involved sensitive

11 Allison, supra note 2, at 875.
12 Id.
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 Id.
19 Id. at 876.
20 Id.
21 Id.
22 Id.
In 1988 Congress passed the Omnibus Trade and Competitiveness Act of 1988 ("Omnibus") to help address this issue. The first change that Omnibus made was to remove the requirement of a complainant showing that the importation of infringing products would be a substantial cause of serious injury to their industry. The second change that Omnibus made was to expand the definition of a domestic industry to include: "(A) significant investment in plant and equipment; (B) significant employment of labor or capital; or (C) substantial investment in [a patent's] exploitation, including engineering, research and development, or licensing." Besides its protectionist roots, this would prove to be the most contested provision of § 1337.

Section 1337 would not undergo any more significant changes after Congress passed Omnibus in 1988. In 1994 Congress passed the Uruguay Round Agreements Act ("URA") in order to harmonize its existing ITC law with the requirements of the General Agreement on Tariffs and Trade. This law was primarily passed to rectify issues of bias against foreign respondents under ITC jurisdiction. The URA required that imports be treated "no less favorably than domestic products." The "aggressive schedules, absence of counterclaims for respondents, and potential for concurrent district court litigation" were among some of the examples of bias against foreign respondents. The URA eliminated the old statutory limits on investigations, which were then replaced with adjustable time limits by the ITC. Respondents can now file counterclaims, which will promptly be removed to federal district court. Lastly, under the URA, respondents can order a stay on any litigation in federal district court while awaiting the resolution of similar issues in ITC proceedings.

NPEs, commonly referred to as patent trolls, are patent owning entities that "do not actively innovate, develop or manufacture patented material but instead seek to profit from patent ownership through licensing agreements and litigation." Within the last decade,
there have been significant developments in the number and sophistication of non-practicing entities . . . . These entities typically do not practice their patents, but rather, base patent ownership on collecting licensing fees or pursuing litigation based on infringement.”

Typically, NPEs do not file for any of the patents that they hold. Rather, they will purchase unused patents from firms that are not actively using them or they will purchase patents at a bankruptcy auction. The use of financial leverage by NPEs against smaller and/or struggling firms helps lend to their poor public image. It is argued that once NPEs have patents, they will then wait for someone in the market to infringe upon those patents. Then the NPE will swoop in to either negotiate a licensing scheme, or, if that fails, initiate litigation against the infringing party. Since NPEs do not actively use their patents or otherwise produce goods, they are virtually never subject to the threat of litigation. Given the costs of patent litigation defense and the unknown of jury awards, it is no surprise that “infringers” are often willing to settle with NPEs. These incentives and costs create a system where organizations will try to collect as many patents as possible in order to convert their newfound intellectual property rights into a moneymaking machine, or as some might refer to it, a tool to extort money from the real producers.

Despite the “patent troll” moniker, the emergence of NPEs and their practice of collecting patents have some supporters. Among the benefits of NPEs is the creation of a secondary market for technologies. Currently, if a company engages in research and is unable to incorporate the fruits of their labor into a new product, they are relegated to not receiving adequate, or any, compensation for their investment. However, with a secondary market, they may sell the rights to whatever they have worked on. This secondary market would help create better incentives for research, as organizations would face a reduced risk of “financial bust” as a result of innovative

Recent Judicial Activity on Non-Practicing Entities, 12 U. Pitt. J. Tech. L. & Pol’y, Fall 2011, no. 4, at 1, 1.

34 Id.
36 Id.
37 Id.
38 Id.
39 Id.
40 Id.
41 Id.
research. Additionally, the emergence of such markets would help out the “little guys”—small companies and individuals—by allowing them to focus on research and development, without the specter of futility.

However, the weight of the public falls on the other side of the “patent troll” debate. While the secondary market approach to NPEs and the benefits that some organizations might reap from such a market are undeniable, it is also undeniable that NPEs impose burdensome costs on “true producers” through their litigation and licensing efforts. From an economic standpoint, opponents of NPEs argue that any benefits realized by both legitimate and “illegitimate” NPEs are insufficient to balance out the costs to technological innovators that actually produce goods and are subject to harassing litigation.

Given the importance that innovation and new technology have in our economy, the harassing litigation of NPEs is certainly troublesome. It is no surprise then that patent reform in recent years has focused on the issues facing innovators, in particular the looming threat of patent infringement litigation by NPEs. In fact, Congress passed and signed the Leahy-Smith America Invents Act (“AIA”) into law in 2011. Among the AIA’s changes to intellectual property law was a section governing joinder in intellectual property litigation.

Now, joinder of parties is only proper when both:

(1) any right to relief is asserted against the parties jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences relating to making, using, importing into the United States, offering for sale, or selling of the same accused product or process; and

(2) questions of fact are common to all defendants or counterclaim defendants will arise in the action.

Previously, plaintiffs in an intellectual property lawsuit could join

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42 Id. at 94-95.
43 Id. at 94.
44 Id.
45 Id.
46 Id. at 93-94.
47 Forsberg, supra note 33, at 3.
50 Id.
alleged defendants simply based on their common infringement of the same patent. This change to the procedure of intellectual property litigation aims to reduce the ease with which “patent trolls” are able to employ harassing litigation against organizations that actually use their patents and produce goods.


On October 4, 2011 the United States Court of Appeals for the Federal Circuit decided a case of first impression concerning the potential use of intellectual property litigation as a means of satisfying the domestic industry requirement under § 1337 in John Mezzalingua Associates, Inc. v. International Trade Comm’n ("Mezzalingua"). In Mezzalingua, a cable connector manufacturer, PPC, filed a complaint with the ITC, claiming that certain cable connector imports infringed upon four of PPC’s patents. PPC claimed that “expenses . . . incurred in asserting and defending the validity of that patent constituted a ‘substantial investment in exploitation’ of the ’539 design patent through licensing.” Based on PPC’s expenditures in a series of lawsuits that resulted in a licensing agreement, an administrative law judge held that PPC had satisfied the domestic industry requirement of § 1337. The ITC then reviewed the administrative law judge’s determination and reversed it, holding that PPC had not met the domestic industry requirement of § 1337. While admitting that enforcement-related litigation expenses and licensing might satisfy the domestic industry requirement, the ITC found PPC had not satisfactorily shown that its litigation expenses were related to licensing. The ITC enumerated several factors to consider in the determination of whether or not the domestic industry requirement is satisfied. The nature of the industry and the size of the complaining party should be considered.

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51 Forsberg, supra note 33, at 4.
52 660 F.3d 1322, 1336 (Fed. Cir. 2011).
53 Id. at 1324.
54 Id. at 1324-25.
55 Id. at 1325.
56 Id.
57 Id.
58 Id. at 1326.
59 Id.
invention or bring patented technology to the market.”

The ITC remanded the case to give PPC an opportunity to show that its enforcement-related expenses were related to licensing and that it had substantially invested in licensing.

On remand, the administrative law judge held that PPC had not satisfied either prong of the test for the domestic industry requirement. The judge admitted that the issue was “close,” but emphasized that PPC had only received one license, partially related to ’539 patent design, had no established licensing program, and had not made any other efforts to license the design in question. The ITC adopted the judge’s decision in making its final order.

On appeal, the Federal Circuit affirmed the lower decision. After determining that PPC had standing, the court then addressed the domestic industry requirement issue, using the substantial evidence test.

The court “agree[d] with the Commission that expenditures on patent litigation do not automatically constitute evidence of the existence of an industry in the United States established by substantial investment in the exploitation of a patent.”

In affirming the lower decision the Court of Appeals for the Federal Circuit emphasized the “administrative law judge’s thorough review of the pertinent evidence, adopted in full by the Commission.” The appellate court agreed that PPC, lacking a formal licensing program or scheme, did not have enough licensing related litigation expenditures, despite their extensive litigation of the ’539 design patent.

In dissent, Judge Reyna first looked at the legislative history of § 1337. “The owner of the property right must be actively engaged in steps leading to the exploitation of the intellectual property, including application engineering, design work, or other such activities.” Judge Reyna noted that Congress did not exclude litigation activities as evidence of a substantial investment in domestic industry. He found the majority’s construction of the statute to be “unduly narrow”
and “a departure from the plain meaning of the statutory language.” He then went on to dispute the majority’s contention that the ITC was primarily a forum for trade disputes, rather than intellectual property disputes. Citing the legislative history, Judge Reyna claimed that § 1337 made the ITC a forum for the enforcement of intellectual property rights. Noting the benefits that litigated patents can provide, Judge Reyna argued that patent litigation leads to a substantial investment in the exploitation of an intellectual property right. Judge Reyna concluded:

When faced with a flood of infringing “copy-cat” imports able to undercut their prices, it is unreasonable that entities like PPC be discouraged from first enforcing a patent in litigation in lieu of producing the patented article to compete in the marketplace while at a clear economic disadvantage. Likewise, when an industry is highly reluctant to license patents in the relevant technological field, a patentee should be able to pursue litigation as an alternative or precursor to licensing negotiations without diluting its patent rights. Litigation in these contexts constitutes an investment in exploitation. Entities that are or can become market participants in the field of the patented technology should not be deemed to lack standing for a section 337 action if those entities have substantially staked out their claim to the technology via infringement litigation.

Litigation undertaken to enforce patent rights and enhance the value of a patent or pave the way for a stronger competitive advantage constitutes an investment in exploitation under section 337(a)(3)(C), regardless of that activity's relationship to licensing, engineering, research, or production. Here, the ITC's determination to exclude litigation costs untethered to licensing from consideration has impermissibly and arbitrarily limited the reach of section 337 for patent owners.

72 Id.
73 Id. at 1339.
74 Id.
75 Id. at 1340-41.
76 Id. at 1341.
III. PATENTS AS PROPERTY

A. The Tariff Act

The United States Constitution states that “The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States….” Tariffs were the most used source of revenue for the federal government until the Civil War. In fact, tariffs were a significant contributor to the federal coffers until the passage of the Sixteenth Amendment in 1913 and the introduction of the personal income tax. The first Congress passed tariff legislation for the purpose of the “encouragement and protection of manufactures.”

While the protection of domestic manufacturing via tariffs is probably the most recognizable purpose of the Tariff Act of 1930, the encouragement of domestic manufacturing and industry is also an established and integral purpose of the Act. Protection and encouragement of domestic manufacturing and industries, while potentially detrimental to international trade and economies, are desirable goals for a nation. While the Constitution explicitly mentions the use of taxes and tariffs for the payment of debts, one must look to the practices of Congress to determine how the implementation of constitutional powers interfaces with the demands of running a nation. As mentioned above, Congress created the original tariff legislation for the purpose of protecting and encouraging domestic manufacturing and industry. While this most obviously may be accomplished through the use of tariffs, additional measures, such as those of § 1337, amplify the federal government’s ability to protect domestic industry, as well as their legal rights. Section 1337 of the Tariff Act of 1930 is a viable and appropriate means of securing the dual purposes of tariffs as originally envisioned by the first Congress, as well as protecting and ensuring individual and organizational property rights. Individuals or organizations will take their business elsewhere if they believe that their patents and products are threatened in the United States.

77 U.S. CONST. art. I, § 8, cl. 1.
79 Id.
80 See Ch. 2, 1 Stat. 24, 24 (1789) (emphasis added).
B. Property Rights in Patents

While seeking a patent is one method of protecting a given invention, patents themselves are not merely the fruits of an invention. Rather, they are a prospective means of ownership rights over the material, process, etc. that has been invented and patented.\textsuperscript{81} A patent grants the owner the right to a limited monopoly of the production, use, and sale of a material, process, etc. in order to benefit the public.\textsuperscript{82} “Protection for progress in the useful arts is through the patent process, and a patent is the grant of a special privilege to promote the progress of science and the useful arts, and is an exception to the general rule against monopolies.”\textsuperscript{83} “The patent system represents a carefully crafted bargain that encourages both the creation and the public disclosure of new and useful advances in technology in return for an exclusive monopoly for a limited period of time.”\textsuperscript{84} “A patentee is generally entitled to determine how it wishes to commercialize its invention in order to optimize its economic benefit from the patent grant.”\textsuperscript{85}

The right to prevent others from using or creating a certain material, process etc. is the same as the “right to exclude” that traditionally defines many forms of property.\textsuperscript{86} Furthermore, inventors are free to assign patents, just like other forms of property, without restriction.\textsuperscript{87} Patent owners are free to contract with others desiring to take advantage of their patent and create licensing or royalty schemes.\textsuperscript{88}

It is true that patents do require innovation and hard work on the part of inventors. One of the main purposes of patents is to encourage and reward innovation by protecting new discoveries. However, once a patent is established, it creates a property right for the establishing party. This property right is quite similar to the various other types of property rights that an individual may hold under the law. The inventor may arrange for a licensing agreement or may prevent anyone else from taking advantage of the subject of the patent. Patents not only reward innovation, but they also protect, as well as create, economic interests. A patentee may decide that a patent’s market

\textsuperscript{81} 69 C.J.S. Patents § 15 (2011).
\textsuperscript{82} See id. at § 12.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Carborundum Co. v. Molten Metal Equip. Innovations, Inc., 72 F.3d 872, 880 (Fed. Cir. 1995).
\textsuperscript{86} 69 C.J.S. Patents § 15 (2011).
\textsuperscript{87} Id. at § 6.
\textsuperscript{88} Id.
value is appropriate or even above the intrinsic value of the patent and sell the patent. The buyer of the patent will have determined that the patent was worth more than the selling price. In this case, the ability of patents to change hands as property will have not only rewarded the inventor’s hard work, but also created the opportunity for economic and innovative development by others. The treatment of patents as property, despite their inception through the innovation of one party, helps to create an efficient system where innovation is stimulated and then directed towards those who find a given material, process, etc., valuable enough to purchase the patent from the original inventor or holder. In the current global economic climate, where innovation and new technologies help to drive society as well as economies, such an established system as that of patents in the United States is integral to continuing economic growth and development.

IV. PATENT LITIGATION AS LICENSING

A. The Majority Approach in Mezzalingua

One of the strongest arguments of the majority position in Mezzalingua is:

The Commission ruled that to permit litigation costs not shown to be licensing-related to satisfy the domestic industry requirement would effectively render the domestic industry requirement a nullity for patentees who choose to enforce their patent rights in the district courts. The consequence of so doing, the Commission stated, would be to dilute the Commission's role as a forum for resolving trade disputes.89

While it is true that permitting litigation costs related to patent enforcement “would effectively render the domestic industry requirement a nullity,” the outcome is not nearly as dire or drastic as the majority’s language suggests. First, Congress has previously relaxed the standards under § 1337 for the domestic industry requirement.90 By changing the standard from requiring actual domestic production to licensing, Congress shifted the paradigm from the protection of actual goods and production to the protection of legal rights and ideas. To suggest that a further extension of the domestic

90 See supra Part II.A.
industry requirement under § 1337 to patent litigation would completely water down the requirement is extreme. If anything, such an extension would merely serve to fully extend the previous shift in law to its natural conclusion: that patents are a property right and have a place in international trade. Rather than diluting the ITC’s role as a “forum for resolving trade disputes,” allowing patent litigation to qualify as a domestic industry would allow for more resolution of legitimate trade disputes by the ITC.

Under the current requirement, a patent holder that is not actively engaging in the trade of goods or services, such as the hypothetical large company Beta, may nevertheless employ the jurisdiction of the ITC if they are licensing their patent. The only actual trade that would be occurring in that case is the importation of infringing goods. If the domestic industry requirement were expanded, a patent holder that is not actively engaging in the trade of goods or services, such as the hypothetical small company Alpha, could use the jurisdiction of the ITC to enforce its patent so long as Alpha was litigating its patents. In both scenarios neither company is actually producing anything or engaging in trade. Rather, they are both protecting and exploiting their property rights in their respective patents. If an expansion of the domestic industry requirement of § 1337 as described in this Note would completely water down the ITC as a forum for trade disputes, then the ITC is already fully dissolved.

Additionally, the majority in Mezzalingua also stated that “[w]e agree with the Commission that expenditures on patent litigation do not automatically constitute evidence of the existence of an industry in the United States established by substantial investment in the exploitation of a patent.”91 While the original domestic industry requirement actually required physical industry or production, the newer requirement allows for substantial investment in the exploitation of a patent. A licensing scheme in the United States related to a patent clearly satisfies such a requirement and purpose for the revised domestic industry requirement. One of the principal ways in which a patent holder may exploit a patent is by licensing it to others for royalty fees. However, this is not the only way that a patent holder may exploit their patent. In order to exploit a patent, the patent owner must be able to ensure the value of the patent and then extract that value financially from others who wish to employ the patented subject matter. In the absence of a licensing agreement, a patent owner must protect its property rights through litigation. If infringing products enter and remain in the market, then the value of the patent

91 Mezzalingua, 660 F.3d at 1328.
suffers. In this respect, a patent is only valuable to a patent holder if it is properly protected. Furthermore, given that the right to exclude is inherent in the property rights of a patent, a patent holder must be able to extract financial value from any other entity using its patent, with or without its permission. Therefore, patent litigation is a necessary and unavoidable reality for patent holders. This does not, however, detract from its purpose of patent exploitation. Patent licensing and patent litigation both revolve around the economic use of a patent and, despite their differences in timing and implementation, are not easily fully distinguished with respect to the exploitation of a patent.

The majority in Mezzalingua does make some facially valid points in its discussion of the domestic industry requirement and patent litigation. However, upon closer review, their distinctions between patent licensing and patent litigation do not hold up.

B. Using Patent Litigation as a Form of Licensing Under § 1337

First and foremost, it is worth noting that Congress left the list of activities that could qualify as exploitation of a patent “open-ended to provide flexibility for what may be deemed to constitute exploitation, expressing that criteria other than the examples would appropriately qualify for consideration.”92 Therefore, the ITC is not bound to follow only the examples set out in the statute. Rather, the ITC should consider all activities related to the exploitation of an intellectual property right when trying to determine whether or not a significant investment in such exploitation of an intellectual property right has been made in a given case.

As previously mentioned, the ITC is primarily a forum for trade disputes, particularly imports.93 However, with the introduction of intellectual property issues in § 1337, the ITC, for better or worse, has become more than just a means of trade dispute resolution. The ITC has become an arbiter of intellectual property issues as they relate to imports and trade. Given that patent rights are useless without enforcement and “[b]y permitting patent rights to be more effectively enforced at the border, Congress [has] advanced the axiom that enforceable patent rights are good for innovation and the economy.”94 Given the importance of technological innovation to the current global economy and the means that Congress has put at the disposal of the ITC, the ITC should embrace its role as an arbiter of issues at the intersection of intellectual property law and trade disputes.

92 Id. at 1338.
93 See supra Part II.C.
94 Mezzalingua, 660 F.3d at 1340.
When considering whether patent litigation qualifies as a substantial investment in the exploitation of a patent, it is appropriate to frame the issue against the majority’s opinion in *Mezzalingua*. As previously discussed in the critique of the majority’s opinion, patent litigation is no less exploitation of a patent than patent licensing is. First, both patent litigation and patent licensing seek to protect the patent at issue and extract financial value from the patent. Just because one method involves activity primarily before the use of the patent and the other involves activity primarily after the use of the patent does not render patent licensing as the only means of exploitation. Rather, this difference shows the varying experiences that a patent holder may have depending upon the circumstances. While a huge corporation might be able to secure licensing for its patents, a small business may be unable to exert itself enough to secure licensing for its patents. Should the small business be punished for its lack of clout? Is the small business less deserving of patent protection? Assuming that the small business is pursuing patent litigation, it is no less of a patent exploiter than a huge corporation or other patent holder who manages to secure a licensing agreement before the use of its patents. Restricting patent exploitation to just licensing potentially creates several scenarios where patent holders are unable to protect their rights through the ITC’s jurisdiction. If the patent holder seeks to establish an actual domestic industry in the face of infringing imports, they risk diluting and losing their patent. If industry competitors to a patent holder are unwilling to agree to a licensing agreement, then the patent holder is left high and dry without the protections of the ITC against infringing imports. From a practical standpoint, patent licensing is not always a viable option for patent holders, particularly smaller businesses or individuals. In light of the realities of the circumstances of our global economy and the rights and incentives concerning patents, the ITC should allow patent litigation to qualify as a form of exploitation of an intellectual property right under § 1337.

V. CONCLUSION

Returning to the hypothetical in the introduction, both Alpha and Beta have worked hard and created something patentable, or they have purchased a patent from an inventor or another patent holder. In either scenario, both companies have made a conscious effort to procure a property right in an invention. Patents are an important component of the increasingly technological domestic and global economy. It is vital that patent holders be able to protect their rights. Without such protection, their patents lose value. When patents lose value,
innovation loses value and the overall economy suffers.

The differing treatment of patent litigation and patent licensing by the ITC under § 1337 is irreconcilable with the purpose of the ITC, the purpose of § 1337, and present business realities. Patent holders should not be penalized for failure to license their patents before infringement. Rather, patent litigation should be viewed as “licensing after the fact.” Patent litigation shares many of the same “exploitative” qualities that patent licensing has. Patent holders should be rewarded for protecting and strengthening their property rights. Whether patents are being actively used or passively held, their intrinsic value is helping to drive the technology-focused economy, as well as innovation. Failing to reward patent litigation would risk the invitation of the devaluation of patents and their function as vital property. Whether the ITC admits it or not, they are now a forum for both trade disputes and intellectual property issues. The ITC should embrace its role at the intersection of international trade and intellectual property and realize its responsibility to domestic patent holders that succeed in licensing their patents, as well as those that “merely” succeed in litigating their patents. If the ITC fails to fully embrace its role, then it risks diminishing the power and value of patents in the United States.