Stopping Infringement at the Border: Rebalancing Import Exclusion Authority Among the ITC, CBP and the Courts

Jorge Contreras
University of Utah College of Law
Jonas Anderson (University of Utah S.J. Quinney College of Law), Sapna Kumar (University of Minnesota Law School) (co-authors)

In the early twentieth century, the U.S. International Trade Commission (ITC) was granted the statutory power to investigate "unfair methods of competition and unfair acts" pertaining to U.S. imports. Section 337 of the ITC Act has been broadly interpreted to extend to acts of IP infringement, and the ITC has broad authority to grant exclusion orders prohibiting the importation of articles that infringe U.S. patents. Today, however, most of the original rationales that supported the ITC's broad jurisdiction over infringing articles have fallen by the wayside, as federal district courts now have jurisdiction to hear almost all patent disputes that are currently brought before the ITC. Nevertheless, ITC litigation remains attractive to patent enforcers because of the ITC's speed, its tendency to issue broad exclusion orders, and the reputed expertise of its administrative law judges and staff. But despite these tactical advantages for patent enforcers, the duplicative patent litigation system enabled by Section 337 is costly for domestic businesses and the public.

In view of the Supreme Court's recent decisions shifting power from agencies to Article III courts, we propose a set of legislative reforms that would amend Section 337 to revoke the ITC's jurisdiction over IP infringement cases and grant the U.S. District Court for the Eastern District of Virginia in rem jurisdiction over infringing articles imported into the United States (only slightly expanding its existing jurisdiction over non-resident infringers conferred by Section 293 of the Patent Act).