

July 19, 2013

The Honorable Victoria A. Espinel
United States Intellectual Property Enforcement Coordinator
Executive Office of the President
The White House
Washington, DC 20500

Submitted via www.regulations.gov

**RE: Request for Public Comments: “Interagency
Review of Exclusion Order Enforcement Process”
78 Fed. Reg. 37242 (June 20, 2013)**

Dear Ms. Espinel:

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the Office of the U.S. Intellectual Property Enforcement Coordinator’s (IPEC) Request for Public Comments: “Interagency Review of Exclusion Order Enforcement Process,” as set forth in the June 20, 2013, issue of the Federal Register, 78 Fed. Reg. 37242.

AIPLA is a national bar association with approximately 15,000 members who are primarily intellectual property lawyers in private and corporate practice, government service, and the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property.

We consider these and other issues related to USITC practice to be extremely important. Changing the process of IP enforcement under USITC exclusion orders at the U.S. Customs and Border Patrol (CBP) will necessarily be a complex undertaking that must balance many interests. We note that the Federal Register notice poses some questions on the timeliness of CBP procedures (question 4), collaborative steps for improvements (question 5), level of detail in exclusion orders (question 6), and other areas for improvements (question 7). These are matters on which we would like to survey our members and provide supplementary comments. In that respect, AIPLA hopes to be given further opportunities to develop comments that provide thorough and detailed examination of alternatives to improve the process.

We do, however, appreciate the opportunity to participate in the start of this review and provide here the following responses to a selection of the questions raised in the Federal Register Notice.

Question 2. Are the procedures, criteria, and regulations utilized by CBP when enforcing exclusion orders clear, accessible, and understood?

AIPLA thinks that the current procedures, while reasonably clear, lack transparency especially with respect to design-arounds and new products. Parties may meet with CBP officials to present information they believe would help CBP enforce exclusion orders or to disclose design-arounds and new products that a respondent or third-party believes may not be subject to the exclusion order. While CBP has historically been very receptive to these meetings, they are conducted ex parte. As a result, affected parties generally are not even aware of the meetings and are deprived of the information provided to CBP that may influence its decision. Indeed, in many instances, the affected parties may not even be aware of the specifics of CBP's decision and the details of how an enforcement order is being implemented.

a. Please provide recommendations for enhancements to procedures, criteria, and regulations used during enforcement of exclusion orders.

AIPLA recommends that CBP create procedures to notify interested parties of exclusion order enforcement proceedings and to allow them to access related information. For example, this might be done under the protective order issued in the underlying USITC proceeding. AIPLA further recommends these procedures be implemented in ways that maintain and ensure the quick and efficient resolution of enforcement proceedings.

Question 3. Are the procedures and criteria used by CBP to evaluate the scope of an exclusion order effective and clearly understood?

a. If not, please provide a description of the problem experienced?

The CBP's procedures and criteria for evaluating the scope of an exclusion order lack transparency and are thus not clearly understood. Of utmost concern is the lack of notice to affected parties and CBP's lack of staff resources.

In AIPLA's view, the CBP does not have sufficient expert staff dedicated to reviewing exclusion orders and meeting with interested parties. Current CBP attorneys work very hard to do their best at these tasks and have gained considerable knowledge on these subjects throughout recent years. But they are vastly overworked and have no formal training in this area.

USITC Administrative Law Judges, devoted to Section 337 cases, are aided by one or two attorney-advisors, but they take several months following a full hearing to decide these cases. The CBP does not have the luxury of a year to spend with the investigation or listening to evidence during a hearing, let alone months of time necessary to "catch up" on the issues in the matter. This problem will become more pronounced if the CBP introduces new procedures to provide notice to all interested parties.

One way to address these issues is to have the USITC notify parties of the scope of the exclusion order when its determinations are made, as opposed to putting that task on the already over-worked CBP. It is AIPLA's belief that the USITC is in a much better position to define at the outset the scope of its own exclusion orders.

- c. **Under CBP's current ruling request process, 19 CFR part 177, an importer may seek a prospective ruling on whether a redesigned or new product falls within the scope of an exclusion order. Determinations of this kind are often initiated at the request of the importer (typically the product manufacturer) and are conducted through *ex parte* proceeding. Would development of an *inter partes* proceeding involving relevant parties to the ITC investigation enhance the efficiency, transparency and efficacy of the exclusion order enforcement process with respect to determining the scope of the exclusion order?**

AIPLA recommends that an inter partes procedure be developed to assist the CBP and increase the transparency of exclusion order enforcement. This would ensure that interested parties (particularly parties to the USITC investigation and/or their affiliates) be notified and given an opportunity to respond regarding the scope of the exclusion order. AIPLA believes this would provide a benefit for both the party enforcing the exclusion order as well as the party against whom the exclusion order is being enforced.

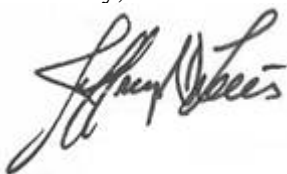
Currently, one of the problems experienced is that interested parties (often times the patent holder) are not aware of the breach of exclusion order, even though the breach could have major impact on the protection of their IP. Furthermore, their market share could be negatively impacted if a quick resolution is not reached. The alleged violator of the exclusion order also has an interest in knowing the interpreted scope of the exclusion order, so they can make sure they are in compliance. Moreover, if the scope of the exclusion order is interpreted more broadly than the USITC intended, the improper exclusion of the company's products could also have a very negative impact on their market share.

One remedy to this problem is to provide interested parties an opportunity to be a part of the enforcement proceedings—both in defining the scope of the exclusion order as well as in determining whether the exclusion order is being violated. This would ensure that all interested parties would be informed of any rulings related to the scope of the exclusion order, which should be automatic at least for the relevant parties to the USITC proceeding.

* * * * *

We appreciate the opportunity to provide these comments on the exclusion order enforcement process and would be happy to answer any questions that our comments may raise. We look forward to participating in the continuing development of these rules and procedures.

Sincerely,



Jeffrey I.D. Lewis
President
American Intellectual Property Law Association