U.S. House Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

IP Litigation and the U.S. International Trade Commission
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Written Testimony of
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Chairman Issa, Ranking Member Johnson, and Distinguished Members of the subcommittee:

Good morning and thank you for the opportunity to provide testimony on IP Litigation and the U.S. International Trade Commission. My name is Sam Korte and I am Senior Principal Counsel for Intellectual Property at Garmin. I have been a practicing patent attorney for 19 years, focusing on global intellectual property issues including patent portfolio management, patent licensing, and patent litigation in the U.S. and abroad. During my 17 years at Garmin, I've helped defend multiple cases brought against Garmin at the ITC and have witnessed first hand how the ITC can be weaponized against American manufacturers.

In my testimony, I will address three issues:

- How the ITC has shifted from its roots as a specialized forum for addressing international trade disputes, to a superpowered district court accessible to anyone with a patent.
- How ITC 337 Investigations often target American manufacturers, impacting the design and manufacture of products within the United States.
- How Garmin, as an American manufacturer, has experienced these effects firsthand.

Founded in 1989, Garmin pioneered the GPS industry. We are a global company, employing over 7,000 associates in the United States, including thousands of high-skilled engineers, with three large manufacturing facilities in Kansas, Oregon and Florida as well as numerous engineering, R&D and other facilities across the country. You may already be familiar with our car navigation devices, smartwatches, or fish finders. But we also make products as diverse as aircraft autonomous landing systems

and Doppler radars. We hold thousands of patents on these products and are committed to a robust and enforceable patent system in the US. We face aggressive competitors, big and small, from around the globe. Intellectual Property is very important to Garmin, and we support and depend on a regulatory and legal framework that simultaneously encourages innovation while protecting against bad actors seeking to misuse our courts and administrative agencies.

Although litigation in federal district court is certainly not fun or cheap, Congress and our courts have developed safeguards over the years to protect due process and provide basic fairness. The ITC, which is vested with incredible and unparalleled enforcement powers under Section 337, lacks the statutory, procedural, and common law protections found in federal court. All at mind-boggling expense to the parties involved.

Ironically, the Commission was created to address trade disputes and not be a duplicate federal district court. Section 337 was never intended to involve routine patent lawsuits. The ITC, known initially as the Tariff Commission when it was formed almost 100 years ago, was provided patent enforcement powers to address trade violations that could not be remedied by tariffs alone[1].

Over the years, through statutory changes by Congress and the ITC's own interpretation of the law, the ITC has shifted away from its original mission and has become a forum accessible to almost anyone with a patent. In many ways, the ITC is now no different than any federal district court—with one critical exception. Exclusion orders—barring all imports of products—are virtually automatic if the ITC finds a patent violation. District courts only employ their equivalent nuclear option of an injunction by carefully weighing various factors related to the parties and the public interest. Federal courts do not issue injunctions on trivial functionality and do not issue injunctions to non-practicing entities. The same can not be said for the ITC.

In almost all cases, ITC exclusion orders take effect soon after the ITC issues its final determination. And as appeals to the U.S. Court of Appeals for the Federal Circuit can take years to be heard and resolved, the result is that a losing company at the ITC does not have access to effective appellate review. Assuming it is going to remain in business, the losing company must either pay whatever amount is demanded by a patent holder or go through the expense of changing its products[2]. This effectively becomes a ransom for the defendant.

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[1] S. Alex Lasher, The Evolution of the Domestic Industry Requirement in Section 337 Investigations Before the United States International Trade Commission, 18 U. Balt. Intell. Prop. L.J. 157 (2010).

[2] Colleen V. Chien & Mark A. Lemley, Patent Holdup, the Itc, and the Public Interest, 98 Cornell L. Rev. 1 (2012).

As the patent owner's ransom may be untethered to the actual value of its patent, many companies, including Garmin, now start modifying their products as soon as the ITC begins its investigation—otherwise they risk not having any products to sell if there is an adverse ITC ruling. Even minor tweaks—like the angle of a particular part or the color of an icon—can cause major disruption to years-long supply chain, production and distribution schedules. And, once a change has been made, there's little reason for the targeted company to settle—it has already addressed, at great cost, the only remedy available to patent owners at the ITC. Regardless of the type of resolution reached, millions of dollars are ultimately squandered due to the overwhelming threat of an exclusion order banning a product–or entire family of products–from import and sale.

The Tariff Commission's initial patent investigations involved importers who could not easily be hauled before U.S. courts[3]. Personal jurisdiction, or service, may have been impossible to secure over bulk importers of knockoff goods. In those situations, Section 337 provided an effective process for patent owners faced with an unknowable enemy. In contrast, Section 337 Investigations today almost always have counterpart litigation in federal court and therefore involve disputes that could be—and already are—heard in federal court. This only further increases the cost and complexity of defending patent allegations in the United States, as well as exacerbates the administrative burden on courts and the ITC. This administrative burden is ultimately borne by U.S. taxpayers[4].

Federal courts narrowly tailor injunctions to ensure they can be easily followed and enforced. The ITC does not narrowly tailor its exclusion orders. It typically bars all infringing products without elaboration. These overboard exclusion orders may be useful for addressing trade disputes like those addressed by the Tariff Commission in its infancy, but they are not suitable for the typical private, commercial dispute between two companies that now comprises the bulk of the ITC's docket. Assuming no ransom is paid to the patent owner once an exclusion order is issued, the losing party and the patent owner must then head to U.S. Customs and Border Protection (CBP) and further litigate with CBP's specialists over the scope of the ITC's exclusion orders.

Again, these observations are based on my personal experience with ITC investigations over my 17 years at Garmin. Our cost to defend an ITC investigation is multiples the cost of defending a case in federal district court—in some cases exceeding $10 million dollars. Anecdotally, we know others have faced litigation costs 2 or 3 times greater. This cost, complexity, and what amounts to a nuclear option through the ITC's exclusion

[3] See, e.g., H.R. REP. NO. 100-40, pt. 1 at 157 (1987) and related history of the 1988 amendments to Section 337.

[4] The ITC requested $132 million for FY 2025. The agency notes it faces a high workload because few 337 Investigations settle.
https://www.usitc.gov/documents/fy_2025_congressional_budget_justification_executive_summary.pdf

order authority is not lost on those looking to harm U.S. manufacturers. Patent trolls, or non-practicing entities if you prefer, have targeted Garmin at the ITC over basic commodities like computer memory and microprocessors. Because these components are central to Garmin's U.S. product manufacturing process, a loss at the ITC could easily shutter our critical American factories—unless Garmin of course paid whatever ransom was demanded[5]. Fortunately, Garmin successfully fought and won these fights. We chose to defend our engineers, the design of our products and our thousands of jobs and numerous operations in the US. But it was an unnecessary exercise completely untethered from the type of disputes the Tariff Commission was created to solve. Even worse, the disputes were duplicative of what we were already fighting at great cost in federal court.

Moreover, Garmin is faced with floods of knockoff products from China that misappropriate our patented technology, but we have not used Section 337 to address these imports. Instead, U.S. District Court has proven to be the most effective way to combat these unfair trade practices as the range of remedies available to patent owners facilitates settlement and resolution.

Positively, Congress has many options to address these problems at the ITC. Section 337's domestic industry language has confused the ITC and the Federal Circuit since it was last revised in 1988. Clarifying the language regarding domestic industry, such as by requiring a patent owner to show that it has assisted in bringing a product to market before filing a complaint with the ITC—even through licensing in advance of manufacturing—would ensure that the ITC is not merely functioning as another federal court while still providing an accessible venue to manufacturers, small inventors, and universities who are establishing an actual domestic industry[6]. Today, a patent owner can fabricate domestic industry by sitting on its patent for years, suing a manufacturer that independently developed its products, cheaply licensing its patent to the manufacturer, and then running to the ITC to file a 337 complaint against the rest of the established industry.

Section 337 could also be revised to address automatic exclusion orders by requiring the ITC to engage in a detailed analysis of the public interest, including weighing the impact on a U.S. company against the benefit of the exclusion order to the patent

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[5] This is not a theoretical risk. In 2022, Siemens laid off 200 workers in Kansas and Iowa due to a 337 Investigation. https://www.desmoinesregister.com/story/business/2022/02/10/siemens-gamesa-renewable-energy-lays-off-190-workers-fort-madison-iowa-hutchinson-kansas/6735971001/

[6] The Federal Trade Commission recommended such an approach in 2011. THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION, March 2011 (ftc.gov).

owner. A full consideration of the actual public interest would deter ransom-seeking at the ITC while still protecting patent owners involved in the market.

The U.S. patent system protects Garmin every day by ensuring that incredible technology created by our thousands of engineers cannot be easily stolen. There's no doubt the ITC can play a critical role in protecting American industry including companies like Garmin. But the ITC has shifted far from its roots of adjudicating trade disputes and now exists as a superpowered district court, but without juries or adequate appellate oversight. Refocusing the ITC on its statutory purpose of protecting U.S. industry will be beneficial to all.

Finally, it's not lost on Garmin that the statutory purpose of the ITC is to protect American domestic industry, like the large factories we operate in the United States. But the ITC is now routinely used by foreign companies, sometimes funded by sovereign wealth funds, to disrupt American innovation and production[7]. Congress is best suited to address this distortion of the ITC's mission.

Thank you again for the opportunity to present testimony on this important issue facing American companies and consumers alike. I look forward to your questions.

[7] As one recent example, see the June 17, 2024, letter regarding the MimirIP ITC investigation sent by Senators Schumer, Crapo, Risch, Kaine, and Warner to Secretary Barton of the ITC.