

# OBAMA ADMINISTRATION UNSETTLES PATENT BAR

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On August 3, President Obama's administration did the unexpected. In a rare move, a Samsung legal victory was destroyed by the administration's vetoing of a US International Trade Commission (ITC) ban on the import and sale of a number of rival Apple's iPhones and iPads. The veto by US Trade Representative Michael Froman was the first of its kind by a presidential administration since 1987, and was founded upon concerns that there was "undue leverage" being gained by the owners of patents.

The decision was also based upon the view that in the absence of this veto, there would be potential harm to US consumers as well as to competitive conditions in the US economy. Froman has indicated that his decision was reached only after extensive consultation with US governmental trade bodies and agencies. In the view of Samsung and others, the administration's veto will have the effect of upsetting decades of settled expectations on the part of patent holders seeking to stop the importation of infringing products.

Patent litigation attorneys have traditionally relied upon both court and, where appropriate (and where a domestic industry is involved), ITC forums to initiate their infringement actions. The ITC has been favoured by those of us who litigate because of its 'rocket docket' and, until now, its relatively predictable power to award an import ban to the winner.

This move does not prejudice Samsung's rights to continue its patent infringement litigation in the courts, although it has been stripped of a valuable IP weapon that has increasingly gained favour among patent holders faced with infringers. Not all Apple iPhones and iPads would have been affected by the ITC ban. In June, after finding that Apple had infringed Samsung's patent rights, the ITC had ordered the ban as well as an accompanying cease and desist order that covered some older iPad and iPhone models which are still on retailers' shelves. The ban had not covered Apple's most recent and popular iPhone 5.

Critics of the veto are marshalling their forces with a view toward lobbying the administration to change its course. Those who enforce the US antitrust laws are among the parties who are expected to make their objections known. On the other hand, there has been a rising chorus of those who were opposed to the ITC ban. Among the arguments of this latter group is the view that companies should not be able to stop the sale of competitors' products which include patented features deemed to be 'standard essential'. This term is used to describe features comprising technologies which are overseen by industry standards-setting groups.

Prior to the ban's veto, Apple and others had unsuccessfully argued before the ITC that Samsung had committed itself to negotiate in a fair and reasonable manner the terms of a licence under its standard essential

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patents, but had failed to do so. It has been Apple's position that Samsung's actions constitute an abuse of the patent system. Samsung, on the other hand, has consistently countered that it had offered Apple a licence but that Apple had refused to accept reasonable financial terms.

The mobile device market is believed to be approaching half a trillion dollars per year in the US. As a result, the number of patent infringement actions filed has steadily increased. Rulings by the ITC and its role in patent infringement actions have divided those quarters of the technology industry responsible for creating inventions.

On one side of this divide, companies express concern that patent holders should be unrestrained from lawfully seeking licence income on their patents. On the other side, companies continue to worry that courts and trade agencies such as the ITC have the ability to impose import bans on products covered by patents granted on minute improvements in product features.

A significant issue affected by the administration's ITC veto concerns the valuation of patents. Patents have traditionally been considered more valuable where their enforcement will permit their holders to obtain an injunction against infringers. Investors, for example, often seek as their investment candidates those whose products and technology are proprietary and which are covered by patents which may be enforced against rivals at the ITC. The inability to predict ITC import bans will require a different analysis approach on the part of investors. ■

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