

Indisputable IP

Sarah R. Wasserman Rajec¹

Intellectual property disputes, like most private causes of action, rely upon the participation of adversarial parties to adjudicate the content and boundaries of asserted rights. Thus in a typical patent case, the court hears arguments from opposing sides from which it can base determinations of patent validity and scope, infringement, and remedies. However, in a tribunal of steadily growing importance for intellectual property disputes—The International Trade Commission (“ITC” or “Commission”)—certain cases proceed without the benefit of participation from “both” sides. This imbalance is particularly notable for its symmetry: potential infringers are left out of ITC claim construction determinations in *in rem* actions while rights holders are left out of subsequent infringement determinations made by United States Customs and Border Protection (“Customs”). This very situation was recently highlighted in the Court of International Trade’s decision in *Corning Gilbert Inc., v. United States*, in which a patent holder was unable to participate in an importer’s challenge to a Customs’ decision refusing entry of certain goods.

Determining rights without the participation of opposing parties raises concerns of justice, efficiency and effectiveness, and the public interest. Excluding parties from determinations that affect them may result in unjust rulings to the relevant parties. In addition, making intellectual property determinations in a vacuum may be futile—it is not always possible to construe the claims of a patent in a useful way without some idea of the accused infringing products. Performing claim construction without context is at best inefficient and at worst ineffective. Perhaps of the most importance, however, is that competitors in patent litigation serve as stand-ins for other potential competitors and for consumer access interests. Removing competitors from judicial processes thus also obscures the public’s interest in limiting intellectual property rights to what was originally claimed.

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¹ Assistant Professor of Law, College of William and Mary, Marshall-Whyte School of Law.
Email: srrajec@wm.edu
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