

Is 2025 the Year that the International Trade Commission Gives Guidance on Standard Essential Patents?

A photograph of a modern building with a curved glass facade, showing multiple floors and windows, set against a light blue sky.

2 MIN READ

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A big question when it comes to fair, reasonable and non-discriminatory (FRAND/RAND) defenses for standard essential patents (SEPs) is whether and when a court should issue an injunction. One jurisdiction that may provide an answer is the International Trade Commission (ITC), a forum that regularly reviews these types of disputes and issues exclusion orders as a primary remedy.

More than four years ago, I wrote that “the [C]ommission has never been tasked with answering a fundamental question: Is an exclusion order appropriate for infringement of an essential patent?” As of this writing, that remains true. But that may change in 2025.

In the final weeks of 2024, the Commission has issued two Initial Determinations finding a violation in investigations involving FRAND defenses.

For instance, in *Certain Video Capable Electronic Devices* (337-TA-1380), ALJ Elliot issued a Notice stating that there is a violation as to four of the five asserted patents. The Initial Determination remains confidential; however, the Office of Unfair Import Investigations Staff outlined a three-step test to succeed in a FRAND defense.

According to Staff, “a Respondent must demonstrate: (1) that a RAND obligation exists with regard to the Asserted Patents; (2) that [Complainant] has failed to satisfy that RAND

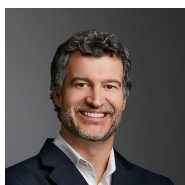
obligation and/or Respondents have not made it impossible for [Complainant] to license the asserted patents on RAND terms by acting as “unwilling licensees”; and (3) that under these circumstances, imposing exclusionary relief would be contrary to the statutory public interest factors.” In this case, the Staff has found that Complainant Nokia has satisfied any obligation that is owed.

Similarly, in *Certain Mobile Phones* (337-TA-1375), ALJ McNamara found a violation as to four asserted patents, according to a public Notice. The public Staff Post-hearing Brief appeared to follow a similar framework to that articulated in the 1380 investigation and concluded that Complainant Ericsson was not acting in bad faith and, as a result, complied with any potential FRAND obligations.

Either of these opinions could give the Commission a first opportunity to describe a framework for FRAND defenses at the ITC. Cheers to an interesting 2025!



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