September 10, 2012

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, SW – Room 112
Washington, D.C. 20436

via email: james.worth@usitc.gov

Re: U.S. International Trade Commission Docket MISC-040; Comments on Proposed Rules: "Rules of General Application, Adjudication, and Enforcement" 77 Fed. Reg. 41120 (July 12, 2012)

Dear Acting Secretary Barton:

Intellectual Property Owners Association (IPO) appreciates the opportunity to provide comments to the U.S. International Trade Commission in response to the proposed changes to 19 CFR Parts 201 and 210, published in the Federal Register on July 12, 2012.

IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in intellectual property rights. IPO's membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members.

IPO supports rules that will streamline and simplify ITC investigations in Section 337 proceedings, allowing owners of intellectual property to avoid unnecessary costs and delays in protecting their rights. The following comments are organized into two sections: (1) presumptive limits on number of depositions; and (2) presumptive limits on the number of interrogatories.

IPO thanks the ITC for considering these comments and would welcome any further dialogue or opportunity to support the ITC in implementing the proposed rule changes.

Sincerely,

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President

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COMMENTS

1. Presumptive limits on number of depositions

The proposed amendment to 19 CFR § 210.28 provides as follows:

> (a) * * * Without stipulation of the parties, the complainants as a group may take a maximum of five fact depositions per respondent or no more than 20 fact depositions whichever is greater, the respondents as a group may take a maximum of 20 fact depositions total, and if the Commission investigative attorney is a party, he or she may take a maximum of 10 fact depositions and is permitted to participate in all depositions taken by any parties in the investigation. The presiding administrative law judge may increase the number of depositions on written motion for good cause shown.

Although IPO believes this to be a step in the right direction by limiting the total number of depositions that will presumptively occur in an ITC investigation, thereby limiting the litigation cost and business interruption to parties, IPO respectfully submits that certain aspects of this proposed rule change require clarification.

Specifically, investigations often include numerous, un-related entites named as co-respondents. For example, the complainant in ITC Inv. No. 337-TA-841 named 21 respondents, and the complainant in ITC Inv. No. 337-TA-843 named 45 respondents. In such a scenario, the proposed rule would presumptively limit the 21 or 45 respondents to 20 depositions, collectively, whereas the complainant would be entitled to take 105 depositions. The fact that 21 or 45 respondents would be collectively limited to 20 depositions raises concerns about a respondent's ability to appropriately prepare its case and defend against allegations of a § 337 violation.

Similarly, in cases where numerous patents are asserted against the respondents, there may be more than 20 named inventors on the asserted patents, which would again present a concern about whether a respondent is able to adequately prepare its case in view of the presumptive limit of 20 depositions for respondents as a group.

Finally, it is unclear whether the ITC intends that a deposition of a party in which the party designates more than one person to testify on its behalf constitutes a single "deposition" for counting purposes, or whether the deposition of each designated person testifying on behalf of the organization constitutes a separate "deposition" for purposes of the presumptive limit of § 210.28(a).

IPO recognizes that the language of the proposed amendment provides that "the presiding administrative law judge (ALJ) may increase the number of depositions on written motion for good cause shown," presumably in an effort to assuage the concerns noted above. Unfortunately, the lack of guidance as to what may, or may not, constitute "good cause" may lead to differing interpretations of the good cause standard amongst the various ALJs. As

presented in the proposed amendment, each ALJ has significant discretion in determining what constitutes "good cause," thus there may different interpretations of this standard that lead to dramatically different applications of § 210.28(a). The resulting uncertainty, and the risk of inconsistent application of the "good cause" standard, concern IPO. For this reason, IPO suggests that the ITC specifically enumerate factors to consider in evaluating whether "good cause" exists, such as the existence of numerous respondents, inventors, or relevant witnesses, to provide the ALJs with a consistent framework to evaluate the application of this rule.

Moreover, IPO suggests that the ITC clarify the proposed amendment to § 210.28(a) to provide that that any deposition in which a person is designated to testify on behalf of an organization in reference to one or more noticed topics does not constitute a separate deposition for purposes of calculating the number of depositions permitted under the rule.

2. Presumptive limits on number of interrogatories

The proposed amendment to 19 CFR § 210.29 provides as follows:

> (a) * * * Any party may serve upon any other party written interrogatories not exceeding 175 in number including all discrete subparts, unless the parties stipulate otherwise or the presiding administrative law judge increases the number of interrogatories on written motion for good cause shown.

This proposed amendment, which limits the total number of interrogatories, is also a step in the right direction. IPO believes, however, that 175 interrogatories per party still constitutes a significant burden on parties in ITC investigations that is significantly out of line with the presumptive limits imposed by the Federal Rules of Civil Procedure. Responding to interrogatories, and the corresponding motions practice relating to interrogatory responses, represent a significant burden on parties in ITC investigations from a litigation cost and business interruption perspective. IPO respectfully suggests that a presumptive limit of 50 to 100 interrogatories, while still significantly higher than the 25 presumptively permitted by the Federal Rules of Civil Procedure, is sufficient to allow the parties adequate discovery while helping to limit the cost of responding to written discovery. In addition, for an interrogatory containing sub-parts, IPO suggests that each sub-part should be counted as a separate interrogatory for purposes of determining the total number of interrogatories permitted.