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The Public Interest Inquiry for Permanent Injunctions or Exclusion Orders: Shedding the Myopic Lens

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The Public Interest Inquiry for Permanent Injunctions or Exclusion Orders: Shedding the Myopic Lens

*P. Andrew Riley**

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ABSTRACT

President Obama's 2013 veto of a US International Trade Commission (ITC) exclusion order, issued to address Apple Inc.'s infringement of a patent owned by Samsung, thrust the ITC's public interest inquiry into the spotlight. Historically, however, these factors rarely weighed against a remedy at the ITC. Likewise, US district courts have rarely declined to issue a permanent injunction after finding a patent valid and infringed due solely to the public interest factor—the last of the four factors that the Supreme Court put in place in eBay Inc. v. MercExchange, L.L.C. More recent decisions addressing the public interest in both forums, however, show a willingness by the adjudicators to weigh both traditional public interest issues, such as health and well-being, and non-traditional arguments, such as public reliance and environmental concerns, against a patent owner's right to exclude. In this Article, we examine some of the successful traditional and non-traditional public interest arguments, both at the ITC and in US district courts. From this analysis, the Article outlines how parties involved in high-stakes patent litigation in either forum can craft public interest arguments to combat the threat of a permanent injunction or an ITC exclusion order.

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I. INTRODUCTION

After years of keeping a relatively low profile in patent law, public interest considerations are now poised to take on a more prominent role in patent litigation. Developments in this area of patent law have mostly percolated in the background. Despite brief coverage of President Obama’s 2013 veto of an exclusion order from the US International Trade Commission (ITC)¹ involving Apple Inc.

1. See Letter from Ambassador Michael B.G. Froman, US Trade Representative, to Hon. Irving A. Williamson, Chairman, US Int’l Trade Comm’n (Aug. 3, 2013), available at http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF [hereinafter Froman Letter]; Ian Sherr & Brent Kendall, *Apple Veto Likely to Upend Key Patent Battles: Ruling Promises to Alter Strategies Some Tech Giants Use to Defend Inventions*, WALL ST. J. (Aug. 5, 2013, 8:20 AM), <http://www.wsj.com/articles/SB10001424127887323420604578648272862276836> (discussing “[t]he Obama administration’s decision to overturn an international trade ruling against Apple Inc.—the first such veto in more than 25 years . . .” and reporting that the veto could ultimately “change the strategies some of the world’s biggest technology companies use to defend their inventions”); see also 19 U.S.C. § 1337(d)(1) (2012) (“If the Commission determines . . . that there is a violation of [the] section, it shall direct that the articles concerned . . . be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public

that, according to some, may have been “designed as a signal to the ITC to stop issuing injunctive relief without full consideration of the public interest at stake,”² public interest considerations have received little attention. Indeed, that news aside, from a historical perspective the public interest rarely affects the issuance of exclusion orders at the ITC,³ notwithstanding a statutory mandate to consider such public interest.⁴ Correspondingly, while the “public interest” is one of the four factors used by federal district courts when determining whether to issue injunctive relief in patent cases under the Supreme Court’s decision in *eBay Inc. v. MercExchange, L.L.C.*,⁵ it has typically existed as one of the least explored and least utilized of the *eBay* factors.⁶

Following the ruling in *eBay*, however, federal district courts have quietly released several noteworthy decisions concerning the public interest.⁷ And despite an appellate decision from the US Court of Appeals for the Federal Circuit—the court with exclusive subject matter jurisdiction over patent and ITC cases⁸—suggesting that the public interest factors in the two respective forums do not inform one another,⁹ it is clear that developments in one forum can and do provide guidance for the other. Indeed, common sense dictates that

health and welfare . . . it finds that such articles should not be excluded from entry.”); *id.* § 1337(j)(2) (“If . . . the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), (f), (g), or (i) of this section with respect thereto shall have no force or effect.”); Administration of the Trade Agreements Program, Exec. Order No. 11,846, 40 Fed. Reg. 14,291 (Mar. 27, 1975) (delegating the President’s authority to veto exclusion order to a “United States Trade Representative”).

2. Dennis Crouch, *Is It Time to End the USITC’s Jurisdiction Over Patent Cases?*, PATENTLYO (Aug. 5, 2013), <http://www.patentlyo.com/patent/2013/08/is-it-time-to-end-the-usitcs-jurisdiction-over-patent-cases.html> (predicting also that “some interesting development of the law and theory of public-interest in enforcing patent rights” may be in store).

3. Only four ITC decisions have used public interest to deny an otherwise proper exclusion order. *See infra* Part II.B.

4. 19 U.S.C. § 1337(d)(1) (2012).

5. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

6. *E.g.*, Crouch, *supra* note 2 (“In the *eBay* line of cases, the public interest is typically the least-explored factor.”).

7. *See infra* Part IV.B.

8. *See* 28 U.S.C. § 1295(a)(4) (2012).

9. *Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1357, 1359 (Fed. Cir. 2010) (“Given the different statutory underpinnings for relief before the Commission . . . and before the district courts in suits for patent infringement, this court holds that *eBay* does not apply to Commission remedy determinations under Section 337. The Commission is not required to apply the traditional four-factor test for injunctive relief used by district courts when deciding whether to issue the equitable remedy of a permanent injunction. Unlike the equitable concerns at issue in *eBay*, the Commission’s issuance of an exclusion order is based on the statutory criteria set forth in Section 337.”). *But see* Colleen Chien & Mark Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 14 (2013); Mike Heins, *Selling Congress on eBay: Should Congress Force the ITC to Apply the eBay Standard?*, 22 FED. CIR. B.J. 589, 609 (2013).

the increased prominence of “public interest” considerations in one forum would logically carry with it increased prominence in the other. Thus, while the Federal Circuit resolved the question of whether the “public interest inquiry in [the ITC] context is similar to the traditional test for injunctive relief that district courts apply under [eBay],” in *Spansion, Inc. v. International Trade Commission*, the opportunity to argue and win on “public interest” considerations may be ripening in both forums.¹⁰

Exploiting these opportunities may be particularly fruitful at the ITC, where the lack of access to traditional damages remedies could very well make a “public interest” victory a total and complete victory. Litigants before the ITC may be especially well advised to critically evaluate and deploy the use of public interest positions. This is due to the implementation of new procedural rules that place the public interest analysis at the very beginning of an ITC investigation and the arguably changing tide reflected in the Executive Office’s recent exclusion order veto.¹¹ Because there are a limited number of opinions addressing public interest considerations at either the ITC or the district courts, alleged infringers can and should use both sets of precedent to help shape public interest arguments, notwithstanding the Federal Circuit’s dicta in *Spansion*.¹²

With that goal in mind, this Article briefly explains in Part II the historical context of the “public interest” in patent litigation before federal district courts and the ITC. Part III then outlines the new rules that govern consideration of the public interest at the ITC. Next, using exemplary cases from the federal district courts and the ITC, Part IV digests the current landscape of public interest

10. *Spansion*, 629 F.3d at 1357; see also *id.* at 1359 (“The difference between exclusion orders granted under Section 337 and injunctions granted under the Patent Act . . . follows ‘the long-standing principle that importation is treated differently than domestic activity.’”). *But see* Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 530, 533 (2009) (proposing that “Congress amend § 337 to harmonize ITC patent law with the Patent Act”).

11. See Froman Letter, *supra* note 1; see also Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Processing Devices, and Tablet Computers, Inv. No. 337-TA-794, Comm’n Op. (July 5, 2013) (Commissioner Aranoff noting that “[t]he Commission is not a policy-making body and is not empowered to make [policy decisions on SEPs]. The President may, should he so choose, weigh the relative risks of hold-up and reverse hold-up in deciding whether to disapprove the remedy the Commission is issuing today.”). *But see* Press Release, Office of the US Trade Representative, Ambassador Froman’s Decision on the USITC’s Investigation of Certain Electronic Digital Media Devices (Oct. 8, 2013), available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2013/October/Froman-decision-USITC-investigation> (allowing “the Commission’s determination in Certain Electronic Digital Media Devices and Components Thereof, Investigation No. 337-TA-796, to become final” in the parallel investigation instituted by Apple against Samsung, which ordered exclusion of Samsung products).

12. *Spansion*, 629 F.3d at 1357.

arguments. Finally, Part V discusses where public interest arguments may be headed in the future and recommends aspects of the public interest that parties should keep in mind going forward when arguing before the ITC or the district courts. Compelling appeals to the oft-neglected public interest considerations could transform a potentially devastating outcome into a manageable hurdle.

II. PUBLIC INTEREST IN PATENT LITIGATION HISTORICALLY

The public interest played a negligible role in patent litigation historically. The Patent Act, which provides a statutory cause of action for patent infringement, makes no mention of public interest considerations and, until recently, federal district courts rarely considered the public interest when fashioning equitable remedies, typically in the form of injunctions. The other major forum for patent litigation in the United States, the ITC, is a quasi-judicial independent federal agency governed by the Smoot-Hawley Tariff Act of 1930.¹³ But, while its guiding statutory provisions include specific mandates for public interest considerations, they have historically been seldom explored. An understanding of this historical dearth of precedent helps illuminate why even subtle changes in precedent today may provide some insight into successful litigation opportunities.

A. The Public Interest, the Patent Act, and Injunctions

It is only a common law construct that mandates consideration of the “public interest” values at stake before a federal district court issues a permanent injunction. The Patent Act does not even mention, let alone require, consideration of the public interest before granting equitable relief, which in district courts typically complements or supplements traditional monetary damages remedies. In fact, for much of US legal history, and certainly for most of the last three decades, not even the common law allowed much equitable discretion over the grant of injunctions. The Federal Circuit, chartered in 1982, established a historical precedent of essentially granting injunctions automatically after a finding of patent infringement. The Federal Circuit’s historical preference to grant permanent injunctions “stems from a belief that once infringement has been established denying a patentee the right to exclude is contrary to the laws of property.”¹⁴

13. Tariff (Smoot-Hawley) Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590.

14. Richard B. Klar, *Ebay Inc. v. MercExchange, L.L.C.: The Right to Exclude Under U.S. Patent Law and the Public Interest*, 88 J. PAT. & TRADEMARK OFF. SOC’Y 852, 855 (2006)

Under that traditional precedent, the Federal Circuit only denied permanent injunctions in “rare instances” where a patentee’s decision not to practice the patent “frustrate[d] an important public need for the invention.”¹⁵ In other words, there was a presumption of irreparable harm once infringement of a patent was established.

The few exceptions to this presumption appear in medicine or public sanitation cases.¹⁶ In *City of Milwaukee v. Activated Sludge, Inc.*, a case arising prior to the creation of the Federal Circuit, the US Court of Appeals for the Seventh Circuit refused to issue an injunction for patent infringement where it would have left “the entire community without any means for disposal of raw sewage.”¹⁷ After first acknowledging that “[o]rdinarily courts will protect [a] patent right by injunctive process” and finding that “both parties have strong equities,” the court was only swayed after acknowledging that no alternative existed “other than running it into Lake Michigan, thereby polluting its waters and endangering the health and lives of that and other adjoining communities.”¹⁸ Similarly, the Federal Circuit in a 1988 decision, *Hybritech, Inc. v. Abbott Laboratories*, weighed the factors for granting an injunction and found that the district court did not err “by specifically excluding Abbott cancer test kits and Abbott hepatitis kits from the preliminary injunction order” and not excluding others.¹⁹ The district court explained that “[w]hatever else

(citing 35 U.S.C. § 154 (2012) and *Honeywell Int’l, Inc. v. Universal Avionic Sys. Corp.*, 347 F. Supp. 2d 114 (D. Del. 2004)); see also *id.* at 858 (“The constitution provides for the framework for a patent owner to have exclusive rights within the system. The right to exclude is of primary importance in order to encourage inventors to share their technology with the public in exchange for a limited (by time) monopoly.”); *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1246–47 (Fed. Cir. 1989) (“Infringement having been established, it is contrary to the laws of property, of which the patent law partakes, to deny the patentee’s right to exclude others from use of his property.”).

15. *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995).

16. See, e.g., *Hybritech, Inc. v. Abbott Labs.*, No. 86-7461/AK (PX), 1987 WL 123997, at *22 (C.D. Cal. July 14, 1987) (finding public interest required that injunction not stop supply of medical test kits that the patentee itself was not marketing), *aff’d*, 849 F.2d 1446 (Fed. Cir. 1988); *Vitamin Technologists, Inc. v. Wisconsin Alumni Research Found.*, 146 F.2d 941, 956 (9th Cir. 1945) (finding public interest warranted refusal of injunction on irradiation of oleomargarine); *City of Milwaukee v. Activated Sludge, Inc.*, 69 F.2d 577, 593 (7th Cir. 1934) (refusing injunction against city operation of sewage disposal plant because of public health danger). *But see, e.g.*, *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 459 (1940) (“The patent monopoly of one invention may no more be enlarged for the exploitation of a monopoly of another, than for the exploitation of an unpatented article, or for the exploitation or promotion of a business not embraced within the patent.”); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458, 463 (1938) (“[E]very use of a patent as a means of obtaining a limited monopoly on unpatented material is prohibited. . . . [W]hatever the nature of the device by which the owner of the patent seeks to effect unauthorized extension of the monopoly.”).

17. 69 F.2d at 593.

18. *Id.*

19. 849 F.2d at 1458.

the court does, it will not cut off the supply of monoclonal test kits for cancer patients who are now using the Abbott product” and that “the court is reluctant to cut off that supply [of hepatitis kits] when neither Hybritech nor its licensees have an alternative.”²⁰ A handful of other district courts followed a similar line of reasoning regarding other preliminary injunctions for medical-related devices²¹—and once, somewhat humorously, for aerial footage of the Super Bowl.²² There is no evidence, however, that the public interest was ever a significant consideration in other fields of invention or in granting permanent injunctive relief. To the contrary, most district courts that even considered the public interest while analyzing a motion for injunctive relief gave it only a mere cursory examination.

In 2006, however, the Supreme Court fundamentally changed the equation for determining whether to grant equitable relief in the form of permanent injunctions following a finding of patent infringement in *eBay Inc. v. MercExchange, L.L.C.*²³ The Court chastised the Federal Circuit for its rigid application of injunctions upon a showing of liability—its “automatic rule”—and instead imposed “the traditional four-factor test for injunctions.”²⁴ One of the four factors—the “public interest”²⁵—requires a court to affirmatively address the public interest before issuing a permanent injunction in all cases considering an injunction. While the Supreme Court signaled a shift of emphasis toward public interest considerations, the scope of what it meant remains relatively untested.²⁶

20. *Hybritech*, 1987 WL 123997, at *21.

21. *E.g.*, *Neuromedical Sys., Inc. v. Neopath, Inc.*, No. 96 CIV. 5245 (JFK), 1998 WL 264845, at *16 (S.D.N.Y. May 26, 1998); *Ethicon Endo-Surgery v. U.S. Surgical Corp.*, 855 F. Supp. 1500, 1517 (S.D. Ohio 1994); *Ethicon, Inc. v. U.S. Surgical Corp.*, 762 F. Supp. 480, 509 (D. Conn. 1991).

22. *CF Inflight, Ltd. v. Cablecam Sys., Ltd.*, No. CIV.A. 03-CV-5374, 2004 WL 234372, at *9 (E.D. Pa. Jan. 30, 2004) (“While there may not exist a compelling concern for public health, there is most certainly a public demand and interest in experiencing this visual perspective.”).

23. 547 U.S. 388 (2006).

24. *Id.*

25. *Id.* (“[A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.”).

26. *See* SUZANNE MICHEL ET AL., FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 253, 255 (2011) (“After enumerating the four equitable factors in the *eBay* decision, the opinion of the full Court gave little guidance on their application.”).

B. Public Interest, the Tariff Act, and Exclusion Orders

Unlike the federal district courts, which are required to apply the Patent Act and may also fashion equitable remedies, the ITC is strictly governed by Section 337(d)(1) of the Tariff Act. That statute provides that “[i]f the Commission determines . . . that there is a violation of [the] section, it shall direct that the articles concerned . . . be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare . . . it finds that such articles should not be excluded from entry.”²⁷ In contrast to federal district court litigation, monetary damages are not awarded by the ITC, so an exclusion order is often the only remedy at issue. And, unlike litigation under the Patent Act, Section 337 directs the ITC to begin with the premise that any goods found to be infringing intellectual property rights are to be excluded from importation into the United States.²⁸ A respondent at the ITC bears the burden of showing that an exception exists; the opposite party carries the burden in the district court after the Supreme Court’s decision in *eBay*.

In addition to “public welfare,” the ITC governing statute enumerates three other, more specific, public interest considerations: (1) “competitive conditions in the United States economy,” (2) “the production of like or directly competitive articles in the United States,” and (3) the “United States consumers.” Since the implementation of Section 337 in 1974,²⁹ the Commission has only denied exclusion orders in the name of the “public interest” a handful of times. Despite the significance Congress intended the public interest to play, public interest considerations have been given minimal, ancillary analysis in comparison to the violation, i.e., liability, phase of an investigation at the ITC.³⁰ Only four ITC decisions have used the public interest exception as a means to deny

27. 19 U.S.C. § 1337(d)(1) (2012).

28. See Kumar, *supra* note 10, at 567 (stating that “[i]f the ITC finds that an imported article infringes a patent, then the default presumption under § 337 is that it will award an exclusion order” and that “denials of injunctive relief after a finding of infringement are extremely uncommon”).

29. Compare Tariff (Smoot-Hawley) Act of 1930, Pub. L. No. 71-361, § 337, 46 Stat. 590, 703, with Trade Act of 1974, Pub. L. No. 93-618, § 341, 88 Stat. 1978, 2053 (1975) and 19 U.S.C. § 1337(d) (Supp. 1975); see also Harvey Kaye & Paul Plaia, Jr., *Developments in Unfair Trade Practices in International Trade: A Review of the Third and Fourth Years Under Section 337 as Amended by the Trade Act of 1974*, 61 J. PAT. OFF. SOC’Y 115, 156 (1979).

30. See S. REP. NO. 93-1298 (1974), as reprinted in 1974 U.S.C.C.A.N. 7186, 7197; *id.* at 7326 (“The Committee feels that the public interest must be paramount in the administration of this statute.”); see also Will E. Leonard & F. David Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT’L L. 719, 754–55 (1976) (noting that the addition was “[p]erhaps the most novel amendment”).

an exclusion order where it was otherwise appropriate.³¹ As discussed below, those four public interest opinions are helpful waypoints, but each analysis is fact specific, and provides frustratingly little specific guidance as to the contours of the exception.

The first of the four decisions involved the importation of proprietary automotive crankpin grinding machines.³² In *Certain Automatic Crankpin Grinders*, the Commission announced that, for “the first time,” it had “determined that the public interest factors preclude[d] imposition of a remedy [sic].”³³ After reciting portions of the relevant legislative history, the Commission discussed how “the availability of crankpin grinders to Ford is a critical element in Ford’s program to meet the fuel economy standards mandated by Congress.”³⁴ It ultimately found “that the public interest considerations . . . are stronger than complainant’s rights to enforcement of its patent monopoly.”³⁵ Significantly, however, this investigation was filed during the energy crisis of 1979—a result of the Iranian Revolution.³⁶ Oil production in the Middle East had been disrupted, and US consumers, with fresh memories of the energy crisis of 1973,³⁷ began to buy gasoline in a panic to prepare for

31. The Federal Circuit, in *Spansion*, explained that the common thread throughout these investigations is an “inadequate supply within the United States—by both the patentee and domestic licensees—[such] that an exclusion order would deprive the public of products necessary for some important health or welfare need: energy efficient automobiles, basic scientific research, or hospital equipment.” *Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1360 (Fed. Cir. 2010).

32. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022 (Dec. 1, 1979) (Final).

33. *Id.* at 10.

34. *Id.* at 11. Congress had mandated higher efficiency cars under the Corporate Average Fuel Economy (CAFE) standards of 1975, and it was the first time fuel economy regulations were imposed on passenger cars—for example, 18.0 miles per gallon by 1978. See Energy Policy and Conservation Act of 1975, Pub. L. 94-163, 89 Stat. 871 (establishing the CAFE standards); see also, e.g., Roger H. Bezdek & Robert M. Wendling, *Fuel Efficiency and the Economy*, 93 AM. SCIENTIST 132, 132 (2005).

35. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022 at 20–21 (Dec. 1, 1979) (Final).

36. See JOHN D. STEMPEL, *INSIDE THE IRANIAN REVOLUTION* 165–94, 317–18 (1981); HEATHER LEHR WAGNER, *MILESTONES IN MODERN WORLD HISTORY: THE IRANIAN REVOLUTION* 63–75 (2010) (“By December 1978, the violence in Iran seemed out of control.”).

37. ENERGY INFO. ADMIN., *25TH ANNIVERSARY OF THE 1973 OIL EMBARGO: ENERGY TRENDS SINCE THE FIRST MAJOR U.S. ENERGY CRISIS* 1 (1998) (stating that “[t]he 1973 Arab Oil Embargo was the first oil supply disruption to cause major price increases and a worldwide energy crisis” and that “[v]irtually all spare oil production capacity was in the Middle East when the Arab Oil Embargo began in October 1973”); see also ROBERT E. HUNTER, *THE ENERGY ‘CRISIS’ AND U.S. FOREIGN POLICY* 3 (1973) (“Since 1972, concern has been growing . . . about an impending energy ‘crisis.’ This concern was dramatized by the shortage of fuel oil in the Eastern and Middle Western states during the winter of 1972–73 . . .”).

anticipated gasoline rationing.³⁸ “[T]he fact that Congress and the President . . . established a policy requiring automotive companies to increase . . . fuel economy . . . and that some of these companies [were] encountering difficulties in obtaining automatic crankpin grinders on a timely basis,” swayed the Commission.³⁹ Due to the unique facts surrounding this investigation, the opinion provides only limited guidance and applicability to today’s patent infringement litigations.

One year after *Certain Automatic Crankpin Grinders*, in 1980, the Commission once again found that public interest factors trumped the property rights of a patent holder in *Certain Inclined-Field Acceleration Tubes*.⁴⁰ Several universities used the infringing accelerator tubes, which were allegedly “greatly superior in performance” to others in the market, to study nuclear structures.⁴¹ The Commission found “that basic scientific research, such as . . . nuclear structure research . . . is precisely the kind of activity intended by Congress to be included when it required the Commission to consider . . . the public health and welfare.”⁴² Moreover, it stated that its determination “denies part of the rewards of having conducted that research in the past, but broadens the benefit to the public now by permitting research with a wider range of devices.”⁴³ Like the investigation involving crankpin grinders, this case arose against a unique political backdrop: the Cold War⁴⁴ and the Soviet Union’s invasion of Afghanistan.⁴⁵ Thus, it must be taken in its appropriate context, recognizing the sensitivities surrounding nuclear research during that time period.

The Commission again denied exclusionary relief in light of the public interest in *Certain Fluidized Supporting Apparatus*.⁴⁶ The Commission determined it was not in the public interest to exclude

38. See, e.g., DAVID T. HARTGEN ET AL., CHANGES IN TRAVEL IN RESPONSE TO THE 1979 ENERGY CRISIS (1979); LESTER A. SOBEL, ENERGY CRISIS: 1977–1979, at 3 (1980) (“The President of the United States went on nationwide television to inform the people that ‘the energy crisis is real.’”).

39. *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, USITC Pub. 1022 at 20 (Dec. 1, 1979) (Final).

40. *Certain Inclined-Field Acceleration Tubes and Components Thereof*, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 1980) (Final).

41. *Id.* at 14.

42. *Id.* at 12.

43. *Id.*

44. See generally MATTHEW FARISH, THE CONTOURS OF AMERICA’S COLD WAR (2010); RICHARD SMOKE, NATIONAL SECURITY AND THE NUCLEAR DILEMMA: AN INTRODUCTION TO THE AMERICAN EXPERIENCE IN THE COLD WAR (3d ed. 1993).

45. See M. HASSAN KAKAR, AFGHANISTAN: THE SOVIET INVASION AND THE AFGHAN RESPONSE, 1979–1982, at 1–17 (1995).

46. *Certain Fluidized Supporting Apparatus and Components Thereof*, Inv. No. 337-TA-182/188, USITC Pub. 1667 (Oct. 1984) (Final).

the importation of specialized hospital beds for burn patients where the complainant could not meet the existing market demand and where no comparable substitute burn bed existed.⁴⁷ In a very brief opinion, the Commission focused on the ability of the complainant to meet the production and distribution needs of the public in the “expanding market” for specialized burn beds—a market it had apparently created itself. Without a clear articulation of a factual basis or in-depth legal reasoning, the Commission concluded that “if a temporary exclusion order were issued some patients might not have access to burn beds at all in the interim period.”⁴⁸

After years of silence, the Commission, in 2011, issued a fourth opinion in which it found that the public interest demanded that certain infringing 3G handheld wireless communication devices, such as mobile phones and PDAs, that were “previously imported” were exempt from an exclusion order.⁴⁹ In *Certain Baseband Processor Chips*, Broadcom filed a complaint against Qualcomm for importing patent-infringing wireless communication devices that had implications for the 3G networks throughout the entire country.⁵⁰ In an unusual step, “first responders”⁵¹ throughout the nation testified to the adverse effect that exclusion would have on their ability to protect the public in case of an emergency. First responders argued that they heavily relied on GPS positioning systems and the ED-VO infrastructure generally.⁵² In a show of measured restraint, the Commission stated: “[W]e do not accept the general proposition that, if the infringing activity is great enough, the public interest forbids a remedy.”⁵³ Accordingly, it structured relief that “ha[d] a much more limited impact on availability of 3G-capable handsets, and thus a lesser impact on the public interest.”⁵⁴ In other words, unlike the earlier three public interest opinions, the Commission developed a detailed opinion that provided limited exceptions to the exclusion

47. *Id.* at 23.

48. *Id.*

49. *Certain Baseband Processor Chips and Chipsets, Transmitter and Receiver (Radio) Chips, Power Control Chips, and Prods. Containing Same, Including Cellular Telephone Handsets*, Inv. No. 337-TA-543, USITC Pub. 4258 at 3 (Oct. 2011) (Final) [hereinafter *Certain Baseband Processor Chips*].

50. *Id.* at 2.

51. *Id.* at 10–12, 30, 140. “First responders” refers to emergency personnel who arrive first at the scene of an accident and those in the first response chain of information, such as dispatchers.

52. *Id.* ED-VO is a complex telecommunications standard for wireless data transmissions through radio signals that involves multiplexing techniques to optimize data throughput.

53. *Id.* at 153.

54. *Id.*

order, including a sunset provision that allowed respondents time to phase products off of the market.

The *Certain Baseband Processor Chips* investigation provides perhaps the most insight into consideration of the public interest at the ITC, until President Obama's August 2013 exclusion order veto of Apple's infringing devices.⁵⁵ In that investigation, the Commission issued an exclusion order banning importation of certain Apple iPhones, iPods, and iPads found to be incorporating infringing technology covered by patents owned by Samsung. Interestingly, in fashioning its order, the ITC noted that "[t]he Commission is not a policy-making body and is not empowered to make [policy decisions on Standard Essential Patents]. The President may, should he so choose, weigh the relative risks of hold-up and reverse hold-up in deciding whether to disapprove the remedy the Commission is issuing today."⁵⁶ The President accepted the invitation to weigh in on the policy implications of banning devices that use technology covered in Standard Essential Patents (SEPs). In a letter from the Executive Office of the President to the Commission, Ambassador Michael B.G. Froman explained the President's veto and added that "in any future cases involving SEPs that are subject to voluntary FRAND [fair, reasonable, and non-discriminatory] commitments, the Commission should be certain to . . . examine thoroughly and carefully on its own initiative the public interest issues presented both at the onset of its proceeding and when determining whether a particular remedy is in the public interest."⁵⁷ This letter adds gloss to how the Commission may interpret Section 337's "public interest" considerations going forward.

III. NEW RULES AT THE ITC CREATE NEW OPPORTUNITIES

The language of the Trade Act has changed very little since the amendments in 1974 that added the public interest factors, but the Commission recently approved new regulations that affect the application of those factors enshrined under Section 337. Under the new regulations, consideration of the public interest has transitioned from a final, secondary step in Section 337 investigations to a prominent requirement at the very commencement of an investigation. The new regulations specify that complainants must

55. See Froman Letter, *supra* note 1.

56. Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Processing Devices, and Tablet Computers, Inv. No. 337-TA-794, Comm'n Op. (July 5, 2013).

57. Froman Letter, *supra* note 1.

file, “concurrently with the complaint, a separate statement of public interest.”⁵⁸ The purpose of the statement is to address “how issuance of the requested relief . . . in th[e] investigation could affect the public health and welfare in the United States, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, or United States consumers.”⁵⁹ The regulations also provide that the submission address: (1) how the articles are used; (2) any public health, safety, or welfare concerns; (3) directly competitive articles that could replace the subject articles; (4) the capacity to replace the volume of articles subject to the requested remedial orders; and (5) the impact of exclusion on US consumers.⁶⁰ Respondents and interested third parties may file a response to the patentee’s public interest statement within eight days.⁶¹

Importantly, the new rules allow the Commission to delegate fact-finding on the public interest to an Administrative Law Judge (ALJ).⁶² This is significant because it indicates that greater and more dedicated resources may be assigned the task of examining the public interest considerations. More resources may result in a more detailed record, more thorough fact-finding, and well-reasoned opinions. It also means that parties on the receiving end of an ITC complaint have new opportunities to present creative and persuasive public interest arguments that could lessen the otherwise devastating effect of an exclusion order. Complainants will need to develop a coherent strategy for addressing all public interest angles before placing a case into the fast-paced world of the ITC docket. Conversely, respondents need to anticipate such arguments and develop robust public interest defenses.

While the ITC only delegated fact-finding on the public interest to the presiding ALJ in 14 percent of investigations instituted from the time the new rules took effect on November 18, 2011, to the end of 2012,⁶³ that number appears to be on the rise. For example, in the

58. See 19 C.F.R. § 210.8(b) (2012); see also Rules of Adjudication and Enforcement, 76 Fed. Reg. 64,803 (Oct. 19, 2011) (to be codified at 19 C.F.R. pt. 210).

59. 19 C.F.R. § 210.8(b).

60. *Id.*

61. *Id.*

62. *Id.*; 19 C.F.R. § 210.10(b).

63. See Certain Optoelectronic Devices for Fiber Optic Comm’n, Inv. No. 337-TA-860, 77 Fed. Reg. 65,713 (Oct. 30, 2012); Certain Sintered Rare Earth Magnets, Inv. No. 337-TA-855, 77 Fed. Reg. 58,578 (Sept. 21, 2012); Certain Two-Way Global Satellite Comm’n Devices, Sys. and Components, Inv. No. 337-TA-854, 77 Fed. Reg. 58,579 (Sept. 21, 2012); Certain Wireless Consumer Elec. Devices and Components, Inv. No. 337-TA-853, 77 Fed. Reg. 51,572 (Aug. 24, 2012); Certain CMOS Image Sensors and Prods., Inv. No. 337-TA-846, 77 Fed. Reg. 33,488 (June 6, 2012); Certain CMOS Image Sensors and Prods., Inv. No. 337-TA-846, 77 Fed. Reg. 33,488

first quarter of 2013, the ITC delegated fact-finding in 40 percent of the investigations instituted.⁶⁴ So far, only a handful of investigations have proceeded far enough to result in an initial determination from an ITC ALJ on the public interest. But, based on those few data points, there is reason to believe that the public interest factors are taken seriously and can significantly alter the course of litigation.

For example, in an investigation instituted by X2Y Attenuators, LLC against Intel Corporation, Apple Inc., Hewlett-Packard Company, and entities affiliated with Intel, the ITC delegated fact-finding on the public interest to an ALJ.⁶⁵ Although that investigation was eventually terminated by the ITC, the ALJ did address the “public interest” in his initial determination and found the “unique circumstances of this investigation” justified “tailoring” the remedy.⁶⁶ Specifically, the ALJ found that the evidence submitted during the hearing supported the conclusion that “there [is] a lack of substitutes for the accused Intel microprocessors[;] there are also no adequate substitutes for the accused HP servers, HP computers, and Apple computers.”⁶⁷ The ALJ explained that, in his view, “it is not clear that the Commission should necessarily issue an exclusion order barring from importation all Intel microprocessors, as well as any Apple and HP products, if they are found to infringe the asserted

(June 6, 2012); Certain Consumer Elec. and Display Devices and Prods., Inv. No. 337-TA-836, 77 Fed. Reg. 21,584 (Apr. 10, 2012); Certain Commc’n Equip., Components, and Prods., Including Power Over Ethernet Telephones, Switches, Wireless Access Points, Routers and Other Devices Used in LANs, and Cameras, Inv. No. 337-TA-817, 76 Fed. Reg. 76,436 (Dec. 7, 2011); Certain Automotive GPS Navigation Sys., Components, and Prods., Inv. No. 337-TA-814, 76 Fed. Reg. 72,442 (Nov. 23, 2011); Certain Integrated Solar Power Sys. and Components, Inv. No. 337-TA-811, 76 Fed. Reg. 69,284 (Nov. 8, 2011); Certain Dynamic Random Access Memory and Nand Flash Memory Devices and Prods., Inv. No. 337-TA-803, 76 Fed. Reg. 55,417 (Sept. 7, 2011); Certain Microprocessors and Prods, Inv. No. 337-TA-781, 76 Fed. Reg. 39,895 (July 7, 2011); Certain Flip-Top Vials and Prods., Inv. No. 337-TA-779, 76 Fed. Reg. 36,576 (June 22, 2011); Certain Vaginal Ring Birth Control Devices, Inv. No. 337-TA-768, 76 Fed. Reg. 17,444 (Mar. 29, 2011); Certain Gemcitabine and Prods., Inv. No. 337-TA-766, 76 Fed. Reg. 16,445 (Mar. 23, 2011); Certain Reduced Ignition Proclivity Cigarette Paper Wrappers and Prods., Inv. No. 337-TA-756, 76 Fed. Reg. 4935 (Jan. 27, 2011) (all ITC Notices of Investigation).

64. See Certain Integrated Circuit Devices and Prods. Containing the Same, Inv. No. 337-TA-873, 78 Fed. Reg. 16,533 (Mar. 15, 2013); Certain Wireless Commc’ns Base Stations and Components Thereof, Inv. No. 337-TA-871, 78 Fed. Reg. 13,895 (Mar. 1, 2013); Certain Balloon Dissection Devices & Prods. Containing Same, Inv. No. 337-TA-866, 78 Fed. Reg. 6838 (Jan. 31, 2013); Certain Elec. Devices, Including Wireless Commc’n Devices, Tablet Computers, Media Players, & Televisions, & Components Thereof, Inv. No. 337-TA-862, 78 Fed. Reg. 1247 (Jan. 8, 2013) (all ITC Notices of Investigation).

65. Certain Microprocessors, Components Thereof and Prods. Containing Same, Inv. No. 337-TA-781, 2012 WL 6883205, *3–*4 (Dec. 14, 2012) (Initial Determination) [hereinafter *Certain Microprocessors*]; see also Andrew Riley, *Examining the Evolving Role the Public Interest Plays at the ITC*, 6 LANDSLIDE 40, 41 (2013).

66. *Certain Microprocessors*, 2012 WL 6883205 at *174.

67. *Id.* at *168.

patents.”⁶⁸ The decision shows that evidence on the public interest, such as expected job losses, lack of comparable substitutes, and harm to US manufacturing, can have a meaningful impact at the ITC. Maybe more importantly, it may show the ITC’s increased willingness to weigh public interest concerns against a patent holder’s rights and to recommend a modified exclusion order addressing those concerns.

Taken together, the ITC’s opinion in *Certain Baseband Processor Chips* and the ITC’s new rules governing the public interest analysis show that the Commission was already taking independent steps to ensure the public interest received adequate attention well before the President’s recent veto and Ambassador Froman’s letter.⁶⁹ What remains is a relatively blank slate for attorneys of alleged infringers to extend the once restrictive, or altogether, unclear confines of “public interest” in ways that can benefit and protect their clients. The ALJ’s initial determination in the investigation instituted by X2Y Attenuators shows that potential. Moreover, such developments and determinations will have impacts that will likely spill over and influence district court patent litigation, just as district court litigation can help inform public interest considerations at the ITC.

IV. LEARNING FROM THE DISTRICT COURTS

The ITC has issued only four opinions limiting or denying exclusion orders in light of the “public interest” for products found to be infringing otherwise valid intellectual property. Those four options span a timeframe of over thirty years. Thus, they provide only a small set of data points from which to extrapolate trends. The vast majority of ITC opinions on the “public interest” merely state that it does not alter the decision.⁷⁰ With the expanded opportunities for parties to argue the public interest at the ITC, litigants can draw useful guidance from decisions at the district court level. As of this writing, at least fifteen post-*eBay* permanent injunction opinions⁷¹ address the

68. *Id.*

69. *See* Froman Letter, *supra* note 1.

70. *See, e.g.*, Chien & Lemley, *supra* note 9, at 5 (“To date, the ITC hasn’t given these public interest factors many teeth. We think the ITC should pay more attention to the public interest, using prevailing economic theory and its precedents to assess the impact of patent injunctions on consumers and competitive conditions.”); *see also id.* at 19–20; *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Order No. 25 (Mar. 4, 2011) (“[T]hese so-called ‘public interest’ issues are not normally considered by an administrative law judge in the first instance.”).

71. *Apple Inc. v. Samsung Elecs. Co.*, 909 F. Supp. 2d 1147, 1162–63 (N.D. Cal. 2012), *aff’d in part, vacated in part*, 735 F.3d 1352 (Fed. Cir. 2013); *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 827 F. Supp. 2d 641, 652–53 (E.D. Va. 2011), *aff’d in part, vacated in*

public interest in a meaningful way. And despite the Federal Circuit's suggestion that the ITC and district court opinions regarding the public interest do not inform one another,⁷² it can be valuable to examine those district court cases where parties made successful public interest arguments. Since the public interest consideration at both forums is an equitable decision, weighted at the discretion of judge or Commission, successful strains of argumentation may have universal appeal.

A. Traditional Medical Related Considerations

Whether a legacy from the Federal Circuit's pre-*eBay* line of decisions or something more intrinsic about medicine and injuries, the district courts' perspectives of what constitutes "public interest" tends to somewhat narrowly focus on three medically-related criteria: public health, public welfare, and public safety.⁷³ In fact, some district courts have curtailed their investigation of the public interest simply because the technology "does not implicate public health or safety concerns."⁷⁴ Other district courts have stated that "there are rare and limited circumstances in which an injunction would be contrary to a significant public interest such as health and safety concerns,"⁷⁵ and

part, 694 F.3d 1312 (Fed. Cir. 2012); *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharm. Inc.*, 821 F. Supp. 2d 681, 695–96 (D.N.J. 2011), *aff'd and remanded*, *Sanofi-Aventis Deutschland GmbH v. Glenmark Pharm. Inc.*, 748 F.3d 1354 (Fed. Cir. 2014); *Metso Minerals, Inc. v. Powerscreen Int'l Distrib. Ltd.*, 788 F. Supp. 2d 71, 76–77 (E.D.N.Y. 2011); *B. Braun Melsungen AG v. Terumo Med. Corp.*, 778 F. Supp. 2d 506, 525–26 (D. Del. 2011); *Cordance Corp. v. Amazon.com, Inc.*, 730 F. Supp. 2d 333, 343–44 (D. Del. 2010); *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 712 F. Supp. 2d 1285, 1290–93 (M.D. Fla. 2010); *Judkins v. HT Window Fashions Corp.*, 704 F. Supp. 2d 470, 478 (W.D. Pa. 2010); *Callaway Golf Co. v. Acushnet Co.*, 585 F. Supp. 2d 600, 622 (D. Del. 2008), *aff'd in part, vacated in part*, 576 F.3d 1331 (Fed. Cir. 2009); *MPT, Inc. v. Marathon Labels, Inc.*, 505 F. Supp. 2d 401, 420–21 (N.D. Ohio 2007), *aff'd in part, rev'd in part and remanded*, 258 F. App'x 318 (Fed. Cir. 2007); *Amgen, Inc. v. F. Hoffman-La Roche Ltd.*, 581 F. Supp. 2d 160, 213 (D. Mass. 2008), *aff'd in part, vacated in part and remanded*, 580 F.3d 1340 (Fed. Cir. 2009); *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 590 (E.D. Va. 2007); *Commonwealth Scientific & Indus. Research Org. v. Buffalo Tech. Inc.*, 492 F. Supp. 2d 600, 607 (E.D. Tex. 2007); *Smith & Nephew, Inc. v. Synthes (U.S.A.)*, 466 F. Supp. 2d 978, 985 (W.D. Tenn. 2006); *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 443–44 (E.D. Tex. 2006).

72. *Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359 (Fed. Cir. 2010) ("The [ITC] is not required to apply the traditional four-factor test for injunctive relief used by district courts. . .").

73. *E.g., Judkins*, 704 F. Supp. 2d at 478 ("[W]indow blinds are not of serious importance to the public's health, welfare, or safety.").

74. *Callaway Golf Co.*, 585 F. Supp. 2d at 622 ("Notwithstanding the inevitable disappointment to such golfers, removing the Pro V1® line of balls from commerce after 2008 does not implicate public health or safety concerns.").

75. *Commonwealth Scientific & Indus. Research Org.*, 492 F. Supp. 2d at 607 ("No such interests are implicated here since Buffalo's WLAN products are not essential for the public health or public welfare.").

that the public interest in strong patent protection trumps, “except in cases where an obvious interest such as public health and safety exists.”⁷⁶

These cases suggest that the only criteria district courts are willing to seriously entertain to avoid the exclusionary aspects of the patent right⁷⁷ in the name of the public interest are those that involve sickness, injury, or medicine. While this perspective may be too narrow, it is probably not altogether wrong, and may make sense because such criteria are among the few “public interests” that do not discriminate along socioeconomic, gender, or racial divides; it is a self-reinforcing proposition.

Compounding the issue, case law is not forward looking. It does not reanalyze how new inventions could create different inroads to public interest challenges, but rather relies on precedent. Thus, the health-related perspective may simply be fixed in a closed feedback loop. This is also true at the ITC, where public health-related concerns weighed heavily in *Certain Fluidized Supporting Apparatus* and *Certain Baseband Processor Chips*. And district courts have few incentives to stray too far from the safety of health-related considerations—as long as district courts confine their analyses to health, welfare, and safety, it would be difficult for a court of appeals to hold that there was an abuse of discretion.

B. Anomalous Considerations at the District Courts

Some district courts have signaled a willingness to consider other aspects of the public interest, despite the seemingly small subset of factual scenarios that could traditionally invoke a valid public interest argument under historical precedent. The definition of public interest is fundamentally changing as society becomes more reliant on technology and as economies, both global and local, further develop interdependent webs.⁷⁸

76. *MPT*, 505 F. Supp. 2d at 420–21 (“There is a general public interest in favor of strong patent protection, except in cases where an obvious public interest such as public health and safety exists.”).

77. The right to exclude is statutorily recognized under the Patent Act, 35 U.S.C. § 154(a)(1) (2006). See, e.g., WERNER Z. HIRSCH, *LAW AND ECONOMICS* 18 (1979) (“The right to property is the power to exclude others from or give them access to a benefit or use of the particular object.”); Patricia L. Farnese, *Patently Unreasonable: Reconsidering the Responsibility of Patentees in Today’s Inventive Climate*, 6 TUL. J. TECH. & INTELL. PROP. 1, 4 (2004) (“A patent is a property right. Most people associate property rights with ownership.”); Oliver Hart & John Moore, *Property Rights and the Nature of the Firm*, 98 J. POL. ECON. 1119, 1121 (1990) (defining property as the “right . . . to exclude others from the use of [an] asset”).

78. See Scott A. Allen, “Justifying” the Public Interest in Patent Litigation, 88 IND. L.J. 1047, 1085–86 (2013).

Some post-*eBay* district courts have recognized that part of the responsibility inherent in their power to administer equitable relief is to identify “interests” in relation to changing social norms. For example, “the public interest factor may favor an infringer when injunctive relief will result in a socially valuable technology becoming unavailable.”⁷⁹ With regard to the ITC, it will be up to alleged infringers to offer reasonable public interest arguments so that the ITC can redefine the contours of “public interest.” To that end, the following three examples of successful, not directly health-related, public interest arguments before district courts could help identify some winning patterns of argumentation. Practitioners are well advised to study these cases with an eye toward how similar arguments might work at the ITC and how they might apply to different factual scenarios before the district courts.

1. Johnson & Johnson Vision Care

In *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp. (JJVC)*, two of the largest competitors in the contact lens industry squared off against each other.⁸⁰ The district court found CIBA’s patent for a unique silicone hydrogel contact lens valid and infringed by JJVC. Yet, the district court denied CIBA’s motion for a permanent injunction. While the court examined all of the *eBay* factors, as required, its decision turned primarily on public interest considerations.⁸¹

In its brief, the patent holder, CIBA, focused on distinguishing the typical health-related public interest precedent. It asserted that its case fell outside of the scenario in which public interest might trump the grant of a permanent injunction, citing historical precedent that favored public interest in strong patent rights. CIBA argued that the case exclusively involved the non-life-saving technology of contact lenses, which are often worn in lieu of eyeglasses at the prerogative of a patient, contending that “[a]n injunction covering [JJVC’s] Acuvue Oasys does not implicate public health” and that contact lenses are

79. *Metso Minerals, Inc. v. Powerscreen Int’l Distrib. Ltd.*, 788 F. Supp. 2d 71, 76–77 (E.D.N.Y. 2011); *see also MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 586 (E.D. Va. 2007) (“Accordingly, the court considers the type of patent involved, the impact on the market, the impact on the patent system, and *any other factor that may impact the public at large* and concludes that, on these facts, the public interest weighs against the entry of an injunction.”) (emphasis added).

80. 712 F. Supp. 2d 1285 (M.D. Fla. 2010).

81. *Id.* at 1293 (“Here, the consequences of enjoining the ACUVUE®OASYS are not so grave; nevertheless, this Court, sitting in equity, finds those consequences to be sufficiently important and adverse to millions of ACUVUE®OASYS patients that the public interest would be disserved if an injunction were to be entered.”).

“not a medical necessity, only a convenience.”⁸² While deployed in an arguably untactful manner, CIBA correctly pointed out that patients could simply be refitted for a different brand of contact lens if an injunction took JJVC’s popular Acuvue line of lenses off the market. And, if a patient remained unsatisfied with an alternative brand of contact, patients could wear glasses or could elect to have corrective eye surgery.⁸³ On the whole, CIBA’s run-of-the-mill motion for a permanent injunction conveyed an air of presumptive victory—that the motion was a formality in the process of obtaining the injunctive relief that attaches with a patent holder’s right to exclude.⁸⁴

JJVC, however, aggressively opposed the motion and tied the use of contact lenses back into the realm of public health. Employing a successful argument from medical device cases, it argued that patient health is affected by a doctor’s option to choose from a diversity of products depending on patient anatomy.⁸⁵ It also asserted that its contact lenses have special UV protection that is unmatched by the competition and “statistically equivalent to an opaque eye patch.” According to JJVC, this UV protection reduces occurrence of ocular diseases like cataracts, pterygia, macular degeneration, and keratitis.⁸⁶

Interestingly, JJVC did not have scientific proof of its medical assertions at the time. In fact, the Food and Drug Administration required JJVC’s products to include a disclaimer stating that “studies ha[d] not been done to demonstrate that wearing UV-blocking contact lenses reduces the risk of developing cataracts or other disorders.”⁸⁷ Undaunted, JJVC also creatively argued that its Acuvue lenses are the only lenses that dry eye patients could tolerate, even stating that dry eye is a problem of “epidemic” proportions.⁸⁸ JJVC was generally

82. CIBA’s Motion for a Permanent Injunction at 16–17, *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 712 F. Supp. 2d 1285 (M.D. Fla. Oct. 14, 2009) (Nos. 3:05-cv-135-J-32TEM, 3:06-cv-301-J-32TEM), ECF No. 319.

83. *Id.* at 17.

84. *Id.*

85. *B. Braun Melsungen AG v. Terumo Med. Corp.*, 778 F. Supp. 2d 506, 525–26 (D. Del. 2011) (“However, in the overall circumstances presented here, particularly the public interest in access to competing alternatives to safe medical devices . . .”).

86. Opp. Brief for Johnson & Johnson Vision Care at 25, *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 712 F. Supp. 2d 1285 (M.D. Fla. Feb. 23, 2010) (Nos. 3:05-cv-135-J-32TEM, 3:06-cv-301-J-32TEM), ECF No. 347.

87. Reply Brief for CIBA Vision Corp. at 2, 17, *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 712 F. Supp. 2d 1285 (M.D. Fla. Mar. 10, 2010) (Nos. 3:05-cv-135-J-32TEM, 3:06-cv-301-J-32TEM), ECF No. 364 (“The FDA requires contact lens companies promoting UV blocking lenses to include this disclaimer: ‘Clinical studies have not been done to demonstrate that wearing UV-blocking contact lenses reduces the risk of developing cataracts or other disorders.’”).

88. Opp. Brief for Johnson & Johnson Vision Care, *supra* note 86, at 25–26.

successful in making arguments about “comfort” sound more health-related than convenience-related. It also created the appearance that an injunction would immediately force patients into a “deluge” of contact refitting sessions with optometrists,⁸⁹ while common sense suggests that such refittings would be staggered over a long period of time as different patients ran out of their supply of lenses at different intervals.⁹⁰

The court ultimately found JJVC’s arguments persuasive, finding that “millions of innocent contact lens wearers will suffer real adverse consequences if sale of Acuvue®Oasys is enjoined.”⁹¹ In denying the injunction, the court stated its focus was on “not just issues of comfort or cosmetics,” but also on the patients’ “proper vision and eye care.” The court failed, however, to specify any particular vision or eye care issues.⁹² In reality, the court focused mostly on the speculated “significant disruption, confusion and cost” for patients abruptly losing access to JJVC lenses.⁹³ Indeed, the court admitted that contacts were not the sort of “potentially life-saving technologies” usually at issue in public interest arguments. The “practical and economic issues,” however, warranted a denial.⁹⁴

Taking a somewhat bold leap from precedent, the court’s reasoning followed a convenience and economic thread of argument. In medical device and other health-related fields of technology, accused infringers may have leeway to bootstrap tangentially related public interest arguments to core public health rationales. Building from precedents such as *JJVC*, litigants can use subsidiary convenience and economic arguments to ultimately tip the scales in their favor. If nothing else, *JJVC* shows that opportunities to overcome seemingly sure-fire permanent injunctions might be available to litigants who understand how to push the boundaries of what constitutes public interest.

2. z4 Technologies

z4 Technologies, Inc. v. Microsoft Corp. provides another example of a district court denying a motion for a permanent

89. *Id.* at 27–28.

90. Reply Brief for CIBA Vision Corp., *supra* note 87, at 19–20 (“Their visits will therefore take approximately 15 minutes longer than they would otherwise. These refittings would be staggered fairly evenly over the year following the injunction and would be orderly.”).

91. *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 12 F. Supp. 2d 1285, 1292 (M.D. Fla. 2010).

92. *Id.*

93. *Id.*

94. *Id.* at 1293.

injunction in the name of the public interest.⁹⁵ It is difficult to know how Microsoft shaped its arguments because its briefing is sealed and no redacted versions exist, but it is apparent from the court's public opinion that Microsoft argued against the proposed injunction using many of the same arguments espoused by the court in *JJVC*.

z4 alleged that Microsoft's Windows and Office programs infringed its activation software patents. Microsoft's Windows and Office programs had enormous influence and near ubiquity in 2006. They are arguably the two most used computer programs in the world.⁹⁶ But courts do not deny permanent injunctions because of the popularity and familiarity of a product. In fact, public interest arguments focusing on popularity in cases involving enormously popular medicines⁹⁷ and technologies⁹⁸ typically have failed.

In this case, where infringement involved one small feature of the overall Windows and Office programs, the reasons for denial, at first, looked particularly dubious. Indeed, the court recognized that any potential harm to users of Microsoft Windows and Office was "speculative." Yet, it found that implementing any product redesign, however small, would have negative consequences given the "enormous [public] reliance on these products" and the fact that a redesign could result in the products being taken off the market.⁹⁹ The court also balked at enjoining Microsoft in light of Microsoft's assertions that if its servers were deactivated, even for a short time, "the market would be flooded with illegal, pirated copies" of the software—copies that Microsoft would be unable to later detect.¹⁰⁰ The court reasoned that, "[a]s a result [of the pirated copies entering the market], unsuspecting public consumers would undoubtedly suffer some negative consequences."¹⁰¹

Thus, like the *JJVC* decision, considering the scale of the public reliance on the infringing products—i.e., the sheer number of consumers who use the products—coupled with potentially negative economic consequences, confusion among consumers, and

95. 434 F. Supp. 2d 437 (E.D. Tex. 2006).

96. *Id.* at 443 ("Microsoft's Windows and Office software products are likely the most popular software products in the world. The vast majority of computers sold, whether to individuals, businesses, governments, or educational institutions, run on the Microsoft Windows operating system and employ the Microsoft Office suite of software.")

97. *Amgen, Inc. v. F. Hoffman-La Roche Ltd.*, 581 F. Supp. 2d 160, 215 (D. Mass. 2008) *aff'd in part, vacated in part and remanded*, 580 F.3d 1340 (Fed. Cir. 2009) (granting an injunction on Roche's MIRCERA drug despite the public interest).

98. *ActiveVideo v. Verizon Commc'ns, Inc.*, 827 F. Supp. 2d 641, 652–53 (E.D. Va. 2011), *aff'd in part, rev'd in part*, 694 F.3d 1312 (Fed. Cir. 2012).

99. *z4 Techs.*, 434 F. Supp. 2d at 443–44.

100. *Id.*

101. *Id.* at 444.

inconveniences, the court found that the “public interest is likely to be disserved if a permanent injunction were entered against Microsoft.”¹⁰² Using similar reasons to those used by the *JJVC* court, the *z4 Technologies* court also made some rather large departures. In *JJVC*, contact lenses had some ties back to health and disease prevention, however tenuous the scientific foundation. In contrast, the Microsoft products were purely technology related.

The *z4 Technologies* decision, therefore, teaches that when technology becomes so fundamental to everyday existence, the public necessity for any one particular invention may start to mimic the traits of life-saving technology. Whether in the form of daily contact lenses or in daily use of a Microsoft program, indiscriminating public reliance may trump a patent owner’s right to exclude.

3. Kohler Co.

In August 2013, a district court denied a motion for permanent injunction based solely on *eBay*’s public interest factor in a case involving low-carbon monoxide (CO) marine gas generators typically used on recreational watercraft.¹⁰³ Despite the jury finding that the defendant, Kohler Co., willfully infringed WBIP’s patent and the court denying a renewed motion for judgment as a matter of law (JMOL), the court refused to enter an injunction.

In an apparent attempt to avoid entanglement with public interest concerns, WBIP’s brief in support of its motion conservatively asked “only to preclude Kohler from selling new generators,” not to “enjoin users of low-CO gas generators already in the field” or to enjoin “users from purchasing replacement parts.”¹⁰⁴ And it stated that it would be amenable to “a reasonable phase out period to minimize market disruptions.”¹⁰⁵ Kohler’s opposition brief was filed under seal with no accompanying redacted version. It is evident from the court’s short, three-page opinion, however, that WBIP’s relatively modest demands were of no moment in the court’s decision. Rather, after first stating that “the [c]ourt finds that a permanent injunction would be contrary to the public interest,” and questionably noting that the “[c]ourt need not address the remaining three [*eBay*] factors,” it swiftly outlined its view of the pivotal public interest issues. In particular, it found that since Kohler had fourteen times the

102. *Id.*

103. *WBIP, LLC v. Kohler Co.*, No. 11-10374-NMG (D. Mass. Aug. 12, 2013), ECF No. 257 (order denying preliminary injunction).

104. Brief for WBIP, LLC *v. Kohler Co.* at 11, No. 11-10374-NMG (D. Mass. June 18, 2013), ECF No. 224.

105. *Id.*

manufacturing capacity as WBIP, an injunction might deprive the “consuming public of access to a potentially life-saving product.”¹⁰⁶

The court in *WBIP, LLC v. Kohler Co.* made that decision despite the fact that Kohler argued in their renewed motion for JMOL that WBIP’s invention was not necessarily saving lives from CO poisoning, since leaking generator exhaust pipes were the true cause of several generator-related fatalities.¹⁰⁷ As such, the court’s decision was unique. It not only eschewed three of the four required *eBay* factors in complete favor of the typically neglected public interest factor, but also denied an injunction for non-medical technology that affects the potential health of only a minimal slice of the consuming population, if any real percentage at all. It did so ostensibly due to manufacturing capacity, yet never actually addressed the manufacturing demand for the products at issue.

While this case may not display a judicial willingness to branch outside the historical norms on public interest, it does show an expansion in the prominence and importance of making creative and savvy public interest arguments. Furthermore, since the court also summarily denied a motion for reconsideration of the denial of a permanent injunction, the *Kohler* case also demonstrates a willingness to stand squarely behind decisions based solely on public interest.¹⁰⁸

V. RELEASING THE PUBLIC INTEREST FROM ITS PREVIOUS CONFINES

With the recent media attention surrounding public interest considerations,¹⁰⁹ combined with changes in public interest regulations at the ITC, it may be that *JJVC*, *z4 Technologies*, and *Kohler* are just a small taste of the public interest decisions yet to come. Whether that potential shift is good or bad for the patent system as a whole may be debatable, but the opportunity for alleged infringers to utilize that shift for their benefit is not. There are several considerations to keep in mind moving forward.

106. *WBIP, LLC*, No. 11-10374-NMG, ECF No. 257 at 2 (order denying preliminary injunction).

107. Kohler’s Memorandum in Support of Motion for New Trial at 13, *WBIP, LLC v. Kohler Co.*, No. 11-10374-NMG (D. Mass. June 18, 2013), ECF No. 226.

108. Mem. Order, *WBIP, LLC v. Kohler Co.*, No. 11-10374-NMG (D. Mass. Feb. 12, 2014), ECF No. 274.

109. See, e.g., Crouch, *supra* note 2; Dennis Crouch, *Injunctive Relief and the Public Interest at the ITC*, PATENTLYO (Dec. 21, 2011), <http://www.patentlyo.com/patent/2011/12/injunctive-relief-and-the-public-interest-at-the-itc.html>; Jacqueline Bell, *ITC Adopts New Public Interest Rule for Patent Cases*, LAW360 (Oct. 19, 2011, 5:22 PM), <http://www.law360.com/articles/279045>; Rossella Brevetti, *ITC Amends Rules to Get More Info on Public Interest in Section 337 Cases*, PAT. TRADEMARK & COPYRIGHT L. DAILY (Oct. 25, 2011) (BNA); Sherr & Kendall, *supra* note 1.

A. *The Public Interest Not Confined Statutorily*

If Congress wanted to confine public interest to the realm of public health, public welfare, and public safety, it easily could have done so. It did not. It is a basic tenet of statutory interpretation that when Congress could craft limitations, but does not, those limitations should not be read into a statute.¹¹⁰ So, when “public welfare” and “public interest” are read, they should be accorded their ordinary meaning.¹¹¹ Likewise, the courts did not limit the equitable *eBay* public interest factor to public health, welfare, and safety concerns.

Broadly speaking, welfare can be read as possibly encapsulating “good fortune, happiness, well-being, or prosperity.”¹¹² While it is doubtful that a judge is willing to trump the public’s interest in maintaining a strong patent system with robust exclusionary rights, in favor of his or her subjective belief of public happiness, it is important to realize that the public interest goes beyond health concerns. The public’s well-being and prosperity reach far beyond medicine.

In fact, at no point in history has technology had more capacity to dynamically change lives than now. Unlike our ancestors of a mere century ago, people, especially in the United States, interact and depend on technology for a daily existence. Gone are purely agrarian economies—even soybean seed has taken on a patentable, high-tech, personality, commanding widespread media attention.¹¹³ The Internet, unavailable to most US citizens just twenty years ago, now plays a prominent role in almost every facet of life. When crafting public interest arguments seeking to avoid exclusion orders or injunctive relief, it is important to communicate that the public

110. See, e.g., *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 176–77 (1994); see also *Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003) (noting that Congress knows how to refer to an “owner” “in other than the formal sense,” and did not do so in the Foreign Sovereign Immunities Act’s definition of foreign state “instrumentality”); *FCC v. NextWave Personal Commc’ns, Inc.*, 537 U.S. 293, 302 (2003) (emphasizing that when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996) (“Congress . . . demonstrated in CERCLA that it knew how to provide for the recovery of cleanup costs, and . . . the language used to define the remedies under RCRA does not provide that remedy”); *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”).

111. *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (“In the absence of [a statutory] definition, we construe a statutory term in accordance with its ordinary or natural meaning.”).

112. *Welfare*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1419 (11th ed. 2009).

113. *Bowman v. Monsanto*, No. 11-796, slip op. 1761 (May 13, 2013); see also, e.g., Adam Liptak, *Supreme Court Supports Monsanto in Seed-Replication Case*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/business/monsanto-victorious-in-genetic-seed-case.html?_r=0.

reliance on the invention at issue is commensurate with the way the public used to rely on the health and safety technologies now taken for granted. A litigant must take seriously the fact that courts may consider “any other factor that may impact the public at large.”¹¹⁴ This is explored further in the discussion below.

B. Litigation Strategies

1. Relate Technology to Health

While there is room to expand public interest considerations past the realm of health and safety, there is also no reason to avoid the path of least resistance when available. As in *JJVC*, one of the best arguments an infringer can make against an injunction is to tie the non-life-threatening technology back to those favorites: health and safety. The contact lenses at issue in *JJVC* did not raise huge health concerns, but the fact they could potentially stave off certain ocular diseases certainly played a factor in the court’s decision.¹¹⁵ Likewise, in *Kohler*, the judge found persuasive the accused infringer’s argument that low-emission generators could save lives and denied an injunction. Thus, wherever possible, present the infringing technology in a way that highlights for the judge its health-related, life-saving, or safety aspects.

For example, in *Certain Baseband Processor Chips*, where a public interest exception was found, the respondent successfully argued that devices used by EMS personnel incorporated its infringing chips.¹¹⁶ Thus, the respondent argued, its products were vital to emergency response teams. Cloaking non-life-threatening technology in the shrouds of vital health and safety concerns can help turn an otherwise low-percentage, but not impossible, argument into a pivotal win for a client.

114. *MercExchange, L.L.C. v. eBay, Inc.*, 500 F. Supp. 2d 556, 586 (E.D. Va. 2007) (“Accordingly, the court considers the type of patent involved, the impact on the market, the impact on the patent system, and *any other factor that may impact the public at large* and concludes that, on these facts, the public interest weighs against the entry of an injunction.” (emphasis added)).

115. *Johnson & Johnson Vision Care, Inc. v. CIBA Vision Corp.*, 712 F. Supp. 2d 1285, 1292 (M.D. Fla. 2010) (“These are not just issues of comfort or cosmetics, as CIBA argues, but rather deal with the more substantive concerns of proper vision and eye care.”).

116. *Certain Baseband Processor Chips*, Inv. No. 337-TA-543, USITC Pub. 4258 at 105 (Oct. 2011) (Final).

2. Argue Reliance

Microsoft, the accused infringer in the *z4 Technologies* case, demonstrated another strategy—large public reliance on the infringing product. Microsoft argued that a permanent injunction would force it to redesign its product, which would affect the accessibility of its products to the public, even for just a short period of time. Accepting that line of argument, the district court held that “any minor disruption to the distribution of the products in question” would have a negative effect on the public “due to the public’s undisputed and enormous reliance on these products.”¹¹⁷

While Microsoft Windows and Office may be unique examples of publicly relied upon products, our daily lives are becoming increasingly more intertwined with technology. Thus, the possibilities for making such public interest arguments will continue to expand. For instance, in *JJVC*, part of the defendant’s successful argument to avoid an injunction on its contact lenses included appealing to the notion that the lenses were so comfortable that running the risk that “new lenses may not prove as efficacious” for patients would lead to “deleterious effects . . . too great to permit.”¹¹⁸

Professor Robert Merges, of the University of California, Berkeley, has discussed using “reliance” as a means of justifying an exception to the patent holder’s typical right to exclude infringers. Specifically, discussing the scholarship of Wendy Gordon, Merges noted that “[a]n original creator can add something that others come to depend on in an important way” and that “if that creator tries to remove what he or she has added, people may experience an important loss.”¹¹⁹ In other words, Merges posits that it is possible to make the public worse off by exposure to life-changing—but not necessarily life-saving—technology, only to have it removed or altered by patent rights.

For example, *Certain Baseband Processor Chips*, where 3G wireless devices had truly revolutionized communication, presents such a case. While Merges also recognizes that “[m]ost contribution[s] to culture are like isolated drops in a lake” and removing them “would

117. *z4 Techs., Inc. v. Microsoft Corp.*, 434 F. Supp. 2d 437, 443–44 (E.D. Tex. 2006).

118. *Johnson & Johnson Vision Care, Inc.*, 712 F. Supp. 2d at 1292.

119. ROBERT P. MERGES, JUSTIFYING INTELLECTUAL PROPERTY 52–53 (2011) (“The creator’s contribution adds so significantly to what was there that it is wrong to permit the creator to pull back what he or she contributed, to remove it from circulation.”); see also Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1567 (1993) (“[O]nce a creator exposes her intellectual property to the public, and that product influences the stream on culture and events, excluding the public from access to it can harm.”).

barely cause a ripple,”¹²⁰ the opportunity for creative advocacy by utilizing a “reliance” theory is important. In other words, only the rare, canonical invention, like the Internet, may change a cultural baseline from an academic perspective.¹²¹ In real world applications, however, courts or the ITC may be willing to explore this justification when determining whether to issue injunctions and exclusion orders in any given case depending on the facts.

3. The Environment, National Security, and Other Considerations

Successful strategies often require layering. As discussed above, winning arguments in *JJVC* and *Certain Baseband Processor Chips* appealed to traditional health-related concerns while also playing on the notion of public reliance. Even in *Certain Fluidized Supporting Apparatus*, where the decision appeared to turn on health concerns along with a public reliance on the “expanding” market for hospital burn beds, it was difficult to remove the fluidized burn beds from the marketplace once patients experienced the additional comfort.

Other considerations might also be layered to bolster arguments. For example, in *Kohler* and *Certain Automatic Crankpin Grinders*, the low-emissions and fuel-reducing aspects of the technology at issue channeled concerns over the environment. Like health and safety, environmental concerns have universal appeal and do not discriminate along socioeconomic lines. *Certain Inclined-Field Acceleration Tubes* and aspects of *Certain Baseband Processor Chips* unquestionably raised issues of national security: the ability to develop nuclear arms and nuclear energy as well as the ability to effectively communicate during large-scale national disasters, such as the September 11 attacks. Drawing from several previously successful lines of argumentation simultaneously—whether from the ITC or the federal district courts—may ultimately provide the most persuasive public interest defense.

4. Narrow and Tailored Injunctions

A final strategy worth consideration is arguing that the public interest favors a narrower injunction or a sunset provision on the injunction. The district court’s decision on remand in *Presidio Components Inc. v. American Technical Ceramics Corp.*,¹²² for

120. MERGES, *supra* note 119, at 55.

121. *Id.* at 52–53.

122. No. 08-cv-335-IEG-NLS (S.D. Cal. Aug. 10, 2013), ECF No. 432.

example, provides helpful insight into the potential utility of arguing for a narrow injunction. In *Presidio*, the district court originally denied a permanent injunction partly because “enjoining the sale of [infringing] capacitors will hurt important government, military, space, and infrastructure projects, as well as many critical civilian industries.”¹²³ On appeal, the Federal Circuit vacated the district court’s ruling denying the permanent injunction, but did not specifically vacate the public interest portion of the analysis.¹²⁴ Interestingly, on remand, the district court issued a permanent injunction but, partially in light of the public interest, ordered that “the effective date of the injunction will be September 1, 2013, to allow American Technical Ceramics (ATC) to finish shipping those 545L capacitors that had been ordered prior to the date of oral argument.”¹²⁵

Such sunset provisions can be extremely valuable. In *Presidio*, the court order permitted ATC to ship its remaining inventory of a product that it was discontinuing, greatly reducing the economic burden resulting from the permanent injunction.¹²⁶ The ITC, in *Certain Baseband Processor Chips* fashioned a similar remedy. In that investigation, the exclusion order included a sunset provision allowing the respondents time to phase its infringing products off the market, a result “having a much more limited impact on availability of 3G-capable handsets, and thus a lesser impact on the public interest.”¹²⁷ Thus, even when a permanent injunction or an exclusion order seems imminent, it is possible that the “public interest” can still provide an inroad to a less severe outcome.

VI. CONCLUSION

Historically, “public interest” had been relegated to a relatively trivial existence. Over the last decade, however, public interest exceptions to injunctions and exclusion orders have silently crept close to the limelight—both at the district courts and at the ITC. Recently, the public interest has even garnered some media attention. It is no longer the case that district courts are only willing to seriously entertain public interest arguments that involve sickness, injury, or

123. *Presidio Components Inc. v. Am. Technical Ceramics Corp.*, 723 F. Supp. 2d 1284, 1339 (S.D. Cal., 2010).

124. *Presidio Components Inc. v. Am. Technical Ceramics Corp.*, 702 F.3d 1351, 1362–64 (Fed. Cir. 2012).

125. *Presidio*, No. 08-cv-335-IEG-NLS, ECF No. 432.

126. *Id.*

127. *Certain Baseband Processor Chips, Inv. No. 337-TA-543*, USITC Pub. 4258 at 105 (Oct. 2011) (Final).

medicine. Whether this trend is good for the patent system or denigrates patents as property rights is certainly open for debate. But the fact that opportunities exist for creative advocacy is not. Practitioners and litigants alike would be amiss in not considering and formulating public interest offenses and defenses going forward. Implementing strategies discussed in this Article may allow the wary and observant to snatch victory from the proverbial jaws of defeat.

