



Antoinette M. Tease, P.L.L.C.

**WRITTEN COMMENTS OF ANTOINETTE M. TEASE
U.S. SENATE COMMITTEE ON FINANCE
Hearing on S. 1919, the Trade Enforcement Act of 2007**

May 22, 2008

I. INTRODUCTION

Thank you for the opportunity to provide written comments on S. 1919 as it relates to intellectual property law. The purpose of these comments is to provide my perspective as an intellectual property attorney in Billings, Montana.

Based on my review of the proposed legislation, it appears there are three aspects of the bill that impact intellectual property rights directly: (i) the establishment of the WTO Dispute Settlement Review Commission; (ii) the creation of the position of Chief Trade Enforcement Officer; and (iii) the appointment of hearing officers to preside at the taking of evidence at hearings conducted under Section 337 of the Tariff Act of 1930. I address each of these points below.

II. WTO DISPUTE SETTLEMENT REVIEW COMMISSION

S. 1919 calls for the establishment of a WTO Dispute Settlement Review Commission to be comprised of five members, all of whom will either be retired judges of the Federal judicial circuits or have substantial expertise in international trade law. The purpose of the Commission is to review all reports of dispute settlement panels or the Appellate Body that contain adverse findings and that are adopted by the Dispute

Settlement Body and, upon request, any other report of a dispute settlement panel or Appellate Body that is adopted by the Dispute Settlement Body.¹

The WTO plays a critical role in enforcing the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which sets minimum standards for intellectual property rights protection and enforcement for all WT member states. The current WTO dispute resolution process has been widely criticized within the United States for various reasons, including the perception that dispute settlement reports are adopted quasi-automatically and without proper review, the belief that some WTO awards are arbitrary, and the impression that those authoring the dispute settlement reports fail to exhibit a grasp of sophisticated legal concepts.

Despite these criticisms, the WTO system for resolving trade disputes is generally and universally supported, and it is universally acknowledged that the participation of the United States in this system is necessary if it is to succeed. To the extent that the WTO Dispute Settlement Review Commission will bolster the confidence of U.S. players in the WTO dispute resolution system, I believe it is an important step toward maintaining the integrity of the overall system—a system that is critical to the enforcement of intellectual property rights on a global basis.

Specifically, the requirement that the members of the Commission be retired judges of the Federal judicial circuits or possess expertise in international trade law is intended to address criticisms that WTO rulings lack legal rigor. For that reason, I support this requirement.

III. CHIEF TRADE ENFORCEMENT OFFICER

S. 1919 would create the position of Chief Trade Enforcement Officer. The person serving in this position would assist the United States Trade Representative in investigating and prosecuting disputes pursuant to trade agreements to which the United States is a party, including making recommendations regarding the administration of U.S. trade laws relating to intellectual property. The Chief Trade Enforcement Officer would also serve as chair of an interagency Trade Enforcement Working Group, which would include representatives from the Departments of State, Treasury, Commerce and Agriculture.

¹ The term “Appellate Body” means the Appellate Body established by the Dispute Settlement Body pursuant to Article 17.1 of the Dispute Settlement Understanding. The term “Dispute Settlement Body” means the Dispute Settlement Body established pursuant to the Dispute Settlement Understanding. The term “Dispute Settlement Understanding” means the Understanding on Rules and Procedures Governing the Settlement of Disputes referred to in section 101(d)(16) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(16)).

As I testified before the Senate Finance Committee on March 13, 2008, at the hearing on Customs Reauthorization, intellectual property rights have taken on such a degree of importance in our present economy that enhanced governmental action to preserve and enforce these rights is essential. In this regard, it is important that we place greater emphasis on coordinating the IPR enforcement efforts of various governmental agencies. I also testified that intellectual property rights enforcement must go hand-in-hand with a strategy to work with our international trading partners—both on a public and on a private level—to share knowledge and instill a recognition that the protection of intellectual property rights is mutually beneficial. I advocated that the United States take a vigorous and engaged role in encouraging other nations to develop reciprocal methods of IPR enforcement.

To this end, I support the creation of the position of Chief Trade Enforcement Officer because I believe it would provide added resources and emphasis to the enforcement of intellectual property rights worldwide. It will be important, however, to ensure that the person serving in this position works collaboratively with the National Intellectual Property Law Enforcement Coordinating Council (“NIPLECC”) or a different or successor entity and/or position so as to avoid further turf wars over intellectual property rights enforcement.

IV. INTELLECTUAL PROPERTY ENFORCEMENT PERSONNEL

Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) prohibits the importation of articles that infringe valid U.S. patent, copyrights, trademarks, and mask works. S. 1919 authorizes the appointment of hearing officers to preside at the taking of evidence at hearings required under Section 337 and to make initial and recommended decisions in investigations conducted under Section 337. S. 1919 further provides that the Section 337 hearing officers will have “technical expertise and experience in patent, trademark, copyright, and unfair competition law.”

I am a member of the American Bar Association Section of Intellectual Property Law (ABA-IPL Section), and although these comments are not being submitted on behalf of the ABA-IPL Section, I would like to point out that the ABA-IPL Section has adopted a formal position on this issue. On December 19, 2007, the ABA-IPL Section adopted the following resolution:

RESOLVED, that the Section of Intellectual Property Law favors in principle the ability of the U.S. International Trade Commission (ITC) to properly manage its case load through implementation of procedures for the appointment and retention of hearing officers that are supplemental to the existing procedures for the appointment of Administrative Law Judges; and

NOW THEREFORE, the Section favors the enactment of legislation authorizing the ITC to appoint hearing officers, other than administrative law judges, to preside at the taking of evidence at hearings before it and to make initial and recommended decisions in investigations before it; that such legislation specify qualifications for appointment that may include technical expertise and experience in patent, trademark, copyright and unfair competition law; and that, except as specifically provided in the legislation, all laws, rules and regulations applicable to administrative law judges and to positions in the competitive service apply to ITC appointed hearing officers.

Relevant portions of the report of the ABA-IPL Section on its resolution are reproduced below:

At the request of the U.S. International Trade Commission (ITC), the Chairman and Ranking Minority members of the U.S. Senate Committee on Finance, the relevant committee with authorizing jurisdiction over the bill introduced on July, 2007, S. 1919, which would grant authority to the ITC to hire, in place of or in addition to its currently existing ALJs (“ALJ”), section 337 Judges to be hired by the ITC outside of the selection process for hiring U.S. Administrative Law Judges established by the U.S. Office of Personnel Management (“OPM”) under the provisions of subsection 556(b) of Title 5, United States Code.

The ITC currently has four sitting ALJs appointed through the established OPM hiring process. The four are Judges Luckern (1984), Bullock (2002), Charneski (2007) and Essex (2007). The most recently appointed ALJ, Judge Essex, began his service on October 15, 2007.

Pending legislation (S.1919) proposes amendment to Section 1337 of Title 19, by adding at the end of the current provision a subsection (o). Based upon comments from the ITC Trial Lawyers Association, other Sections of the ABA and additional groups interested in ITC practice, the Commission has proposed adding more specific safeguards and procedures by amendment of the provisions of S.1919 relating to the appointment of such 337 judges....

The Commission also proposes an additional provision that provides for appeal to the Merit Systems Protection Board by an applicant seeking review of the Commission’s selection of a section 337 Judge....

The Section notes the burden currently being faced by the ITC in view of its increasing caseload and limited resources to adjudicate cases involving

patent law and technologically complex matters.... The Section supports the proposed resolution for the following reasons.

The proposed resolution, based on the proposed amendment to Section 1337 of Title 19, represents a pragmatic approach for the ITC to use in hiring qualified personnel to address its caseload. The resolution requires that any person hired under these provisions as a "section 337 judge" have significant legal experience of no less than seven years. The proposed resolution authorizes the ITC to develop regulations for appointing section 337 judges that call for consideration of the candidate's technical expertise and experience in patent, trademark copyright, and unfair competition law. The Section believes that such expertise is important to appropriate handling of matters coming before the ITC. The proposed amendment further contains procedural safeguards referred to in the resolution regarding appointment and evaluation of performance of section 337 judges, including a provision authorizing the Merit System Protection Board to review any contested selection decision of the ITC. These provisions appear to provide adequate safeguards in the appointment of and evaluation of the continued service of section 337 judges under the proposed legislation.

For the reasons set forth above, I agree with the ABA-IPL Section's position in favoring adoption of the provisions similar to those in section 601 of S. 1919 authorizing the appointment of Section 337 hearing officers.

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Please let me know if I can be of further assistance with respect to this or any other matter pending before your Committee. Thank you.