2024-1285

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

APPLE, INC.,
Appellant

v.

INTERNATIONAL TRADE COMMISSION,
Appellee

MASIMO CORPORATION, CERCACOR LABORATORIES, INC.,
Intervenors

Appeal from the United States International Trade Commission
In Investigation No. 337-TA-1276

BRIEF OF UNIFIED PATENTS, LLC AS *AMICUS CURIAE* IN SUPPORT OF APPLE INC.'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Jennifer Bisk
Kelly Hughes
Unified Patents, LLC
1015 15th Street NW,
Suite 629
Washington, DC 20005
(202)379-6470

Counsel for Amicus Unified Patents, LLC

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 24-1285

Short Case Caption Apple v. ITC

Filing Party/Entity Unified Patents, LLC

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 05/18/2026

Signature: /s/ Jennifer Bisk

Name: Jennifer Bisk

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
Unified Patents, LLC		UP HOLDCO INC.
		Unified Patent Holdings, LLC
		Unified Patents Acquisition, LLC
		Unified Patents Management, LLC

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☐ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

Table of Contents

Table of Authorities

Federal Cases

Statutes

Other Authorities

INTEREST OF *AMICUS CURIAE* [1]

Unified Patents, LLC is a membership organization dedicated to deterring non-practicing entities ("NPEs"), particularly patent assertion entities ("PAEs"), from extracting nuisance settlements from operating companies based on patents that are likely invalid.[2] Unified's 3,000-plus members are Fortune 500 companies, start-ups, automakers, retailers, cable companies, banks, financial services companies, technology companies, open source software developers, manufacturers, and others dedicated to reducing the drain on the U.S. economy of now-routine, baseless litigations asserting infringement of patents of dubious validity.

Unified and its counsel study the ever-evolving business models, financial backings, and practices of PAEs. *See, e.g.*, Jonathan Stroud, *Patent Assertion Finance Is Big Business*, 15.3 Landslide 34 (Mar./Apr. 2023); Sean Keller & Jonathan Stroud, *Litigation Funding Disclosure and Patent Litigation*, 33 Fed. Cir. B.J. 77

---

[1] This brief accompanies a motion for leave. *See* Fed. R. App. P. 29(b)(2). No parties' counsel authored this brief in whole or in part; neither party nor party counsel contributed money that was intended to fund preparing or submitting the brief; no person other than the *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4).

[2] The ITC classifies universities, start-ups, and other potentially productive NPEs as "category-1" NPEs and classifies PAEs—companies whose "business model primarily focuses on purchasing and asserting patents"—as "category-2" NPEs. *See* International Trade Commission, *Section 337 Statistics: Number of Section 337 Investigations Brought by NPEs*, https://www.usitc.gov/intellectual_property/337_statistics_number_section_337_investigations.htm ("ITC Tracking Stats").

(2024); Jonathan Stroud, *Pulling Back the Curtain on Complex Funding of Patent Assertion Entities*, 12.2 Landslide 20 (Nov./Dec. 2019).

Unified conducts research monitoring ownership data, secondary-market patent sales, demand letters, post-issuance proceedings, and patent litigation to track PAE activity. *See, e.g.*, Unified Patents, *Litigation Annual Report*, https://portal.unifiedpatents.com/litigation/annual-report.

Unified also files post-issuance administrative challenges against PAE patents it believes are unpatentable or invalid. Thus, Unified seeks to deter the assertion of poor-quality patents. Unified acts and litigates independently from its members. *See, e.g.*, *Unified Patents, LLC v. Uniloc USA, Inc.*, No. IPR2018-00199, Paper 33, at 10 (P.T.A.B. May 31, 2019) (Unified members not real parties in interest to petitions filed by Unified); *id.* (collecting PTAB decisions). Since 2020, Unified Patents has had the highest success rate among top-volume *ex parte* reexam requestors with at least 20 decisions against utility patents, with success defined as at least one claim being canceled. Unified Patents, *Q1 2026 Patent Dispute Report*, https://www.unifiedpatents.com/insights/2026/4/14/patent-dispute-report-q1-2026.

ARGUMENT

The International Trade Commission's ("ITC's") increasingly relaxed application of the economic domestic industry requirement has allowed patent holders

who do not produce products to obtain powerful injunctions they could not otherwise acquire in district courts. By contrast, the federal district courts have general jurisdiction over patent infringement disputes. 28 U.S.C. § 1338. When appropriate, the district courts have the power to grant a successful patent holder "injunctions in accordance with the principles of equity" or "damages adequate to compensate for the infringement." 35 U.S.C. §§ 283, 284.

Since a landmark Supreme Court case in 2006 changed the standards for equitable relief, district courts typically limit NPEs, and particularly PAEs, from obtaining injunctions, limiting remedies to damages following a finding of infringement. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 394 (2006). However, even when an NPE successfully argues infringement, it still receives only "reasonable royalty" damages. 35 U.S.C. § 284. Those damages may be further subject to apportionment when the patent covers only part of the infringing product. *Garretson v. Clark*, 111 U.S. 120, 121 (1884).

These limits in district courts have driven patent holders who don't produce products—in particular, those financed by shell companies—to seek remedies elsewhere, such as the ITC. There, they may obtain powerful injunctions—not to stop unfair trade, but to extort unreasonable settlements.

I. An Overly Broad Reading of the Domestic Industry Requirement Poses a Threat to American Industry

A. Congress granted the ITC its Section 337 power to protect American industry from unfair trade practices

The ITC's patent enforcement power is codified in 19 U.S.C. § 1337, entitled "Unfair practices in import trade." The ITC has limited jurisdiction over patent infringement disputes involving imports. *See* 19 U.S.C. § 1337(b)(1). The agency's primary remedy is an exclusion order that bars respondents from importing infringing goods. 19 U.S.C. § 1337(d)(1). The focus of that power should be preventing the damage caused to domestic industries by unfair trade practices.

The domestic industry requirement was enacted to prevent the ITC from becoming a general patent enforcement forum, or worse, to be used against the U.S. industries it was founded to protect. The ITC may exclude the imports of an accused product "only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established." 19 U.S.C. § 1337(a)(2).

Relevant here, an industry exists in the United States under paragraph 1337(a)(3)(C) if, with respect to the "articles protected by the patent," there is "substantial investment in its exploitation, including engineering, research and development, or licensing" within the United States. 19 U.S.C. § 1337(a)(3)(C).

Congress enacted the present form of the domestic industry requirement, adding paragraph (C), in 1988. At that time, it understood that:

> The purpose of the Commission is to adjudicate trade disputes between U.S. industries and those who seek to import goods from abroad. Retention of the requirement that the statute be utilized on behalf of an industry in the United States retains that essential nexus.

H.R. Rep. No. 100-40, at 157 (1987). Congress expressed a concern that at the time, occasionally the "Commission [had] interpreted the domestic industry requirement in an inconsistent and unduly narrow manner." *Id.* In the decades since, however, the domestic industry requirement has been inconsistently applied and overly relaxed. Indeed, a former commissioner noted that application of the domestic industry requirement "by the Commission has become overly complicated, inconsistently applied, and far afield from the inquiry Congress has instructed the Commission to undertake." *Certain Toner Supply Containers and Components Thereof (II)*, Inv. No. 337-TA-1260, Comm'n Op. at 24 (Aug. 3, 2022) (Commissioner Stayin).

B. The agency's relaxed enforcement of the domestic industry requirement has caused NPEs to flock to the ITC

The domestic industry requirement, as relaxed in recent years by the ITC, has not barred NPEs from flocking to the ITC. Prior to *eBay*, most district courts granted near-automatic injunctions against infringers. *See eBay*, 547 U.S. at 393–94. At that time, NPEs and PAEs were not particularly active at the ITC. After *eBay* limited

the ability of NPEs and PAEs to receive injunctions, they recognized that the ITC's nearly automatic exclusion orders could benefit them greatly, not to mention the high cost of defending these complex investigations. NPEs choose the ITC not to remedy unfair trade or benefit from a market free from infringing imports—most NPEs and all PAEs don't care about the marketplace—but to leverage larger settlements than they could get in a district court action. *See* Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 Cornell L. Rev. 1 (2012).

The threat of an exclusion order, coupled with the high cost of defense and broad-ranging discovery, creates an incentive for an accused infringer to pay to avoid the order regardless of the merits of the case. An accused infringer that relies on imports may prefer settlement over risking its entire business, even when the settlement exceeds what a district court could award in damages.

Following *eBay*, the ITC began tracking NPE activity on a per-investigation basis. From 2007 to 2025, nearly 20% of all ITC investigations have been at the behest of self-reported NPEs. *See* ITC Tracking Stats (168 of 903 investigations instituted on behalf of NPEs). Nearly half of those, or 8.4% of all investigations, had been brought by PAEs. *Id*. In 2025, NPEs appeared in large numbers at the ITC. According to the ITC Tracking Stats, NPEs were the complainant in 11 of the 48 (22.9%) investigations. *Id.*

And these numbers likely underestimate the effect of NPEs at the ITC. The America Invents Act of 2011 raised the joinder standard for "any civil action," but not the ITC. *See* 35 U.S.C. § 299. Thus, ITC investigations can be against any number of unrelated respondents. For example, in *Certain Digital Set-Top Boxes and Systems and Services Including the Same*, Inv. No. 337-TA-1315, the PAE complainant, Broadband iTV, Inc., instituted an ITC investigation against 10 American companies and zero foreign entities. It based its domestic industry on a (presumably unwilling) licensee resulting from the settlement of litigation in W.D. Texas.[3]

C. Today, the ITC is close to a general patent enforcement venue; it's just as likely to impair American industry as to protect it from harm

Even among complainants with some domestic activity, the model of protecting American industry from elusive foreign infringers has broken down.

Section 337 cases today are rarely brought against purely foreign defendants. Professor Chien's empirical study of two decades of ITC cases (1995-2007) showed that just 14% of investigations are brought against purely foreign defendants. Colleen V. Chien, *Patently Protectionist? An Empirical Analysis of Patent Cases at the International Trade Commission*, 50 Wm. & Mary L. Rev. 63, 87 (2008). "Thus,

[3] In recent years, "domestic-industry-by-subpoena" has gained significant popularity among NPEs. *See* Linda Sun, *The ITC Is Here to Stay: A Defense of the International Trade Commission's Role in Patent Law*, 17 Nw. J. Tech. & Intell. Prop. 137, 152 (2019).

U.S. companies are just as likely to be named in ITC actions as defendants as are foreigners." *Id.* at 63; *see also* Bill Watson, *Preserving the Role of the Courts Through ITC Patent Reform*, R St. Inst., Short No. 57 (Mar. 2018), https://www.rstreet.org/research/preserving-the-role-of-courts-through-itc-patent-reform/. A case like this between Apple and Masimo—two domestic entities—belongs, if anywhere, in district court. This is especially true where, as here, the alleged domestic industry article includes prototypes that do not practice the patent.

Here, Masimo satisfied the economic domestic industry requirement by showing that certain prototypes were "representative" of the "Masimo Watch," a product that was never sold and was not even produced until after the complaint was filed. *Apple Inc. v. Int'l Trade Comm'n*, 169 F.4th 1363, 1375 (Fed. Cir. 2026). Masimo was *not* required to make a showing of investment into the alleged protected article itself, with the commission instead finding (and the panel affirming) that investments into the development of even *non-practicing* prototypes were investments "directed to significant components, specifically tailored for use" in the Masimo Watch. *Id.* at 1379–80. That is not within the letter or the spirit of the law.

II. This Case Represents a Further Easing of the Domestic Industry Requirement, Contrary to the Statute and the ITC's Purpose

A. The Statute requires analysis of the patent-practicing "articles"

Statutorily, each paragraph of the domestic industry requirement must be analyzed "with respect to the articles protected by the patent." 19 U.S.C. § 1337(a)(3).

Here, the panel's opinion broadens the scope of those protected articles to prototypes that don't themselves practice the patent.

For example, the panel's recitation of the record confirms that Masimo's investments in prototypes—namely the Circle and Wings Sensors—that do not practice the patent were credited as "non-patent practicing precursors" to other models. *Apple*, 169 F.4th at 1378–79. The panel relies on *Motorola* as allowing for "investment directed to a specifically tailored, significant aspect of the article." *Id.* at 1379 (citing *Motorola Mobility, LLC v. Int'l Trade Comm'n*, 737 F.3d 1345, 1351 (Fed. Cir. 2013)). But unlike the operating system at issue in *Motorola*, which was "specifically tailored" to be part of a patent-practicing mobile device, the Circle and Wings Sensors are separate, standalone items. *Motorola*, 737 F.3d at 1351.

A likely result of the panel's opinion is a further relaxation of the economic domestic industry requirement, inconsistent with Section 337's purpose. If the panel's ruling here stands, an NPE complainant would appear to be able to show a domestic industry through *generalized* investments into intellectual property, even where: (1) the intellectual property does not practice all limitations of the patent at issue; (2) the investment is solely in the form of research and development; and (3) the complainant has not ever produced a physical item that practices the asserted patent. As Apple correctly points out, this analysis cannot be correct, at least because the investments must be made "with respect to the articles protected by the

patent." Apple Combined Pet. for Reh'g at 37–40. Masimo should have been required to quantify and allocate its investments only to the articles shown to practice the patent, thereby excluding the Wings and Circle devices. *Id.*

Rehearing should be granted to correct an overbroad reading of the statute and clarify how the domestic industry requirement was met here, if at all.

B. Clarifying the current domestic industry requirement is necessary to return the ITC as a venue against unfair trade practices

The ITC is meant to curb unfair trade practices, leading to a unique form of relief: exclusion orders. But the ever-broadening scope of domestic industry has made the ITC an appealing forum for NPE enforcement. *See* Paul Taylor, *How Gremlins Opened the Door for Patent Trolls at the International Trade Commission: The ITC Subverts Its Own Mission by Turning Legal Coercion into a "Domestic Industry" and Punishing Productive American Companies*, 98 Cornell L. Rev. 121, 132–40 (2012).

The effect of the panel's opinion here means granting an injunction against an American company in favor of a complainant that has never sold or produced a viable product that practices the patents. A complainant whose primary purpose for seeking such an injunction is not to restrict unfair trade, but to extract larger monetary relief than they otherwise would be entitled to. This cuts against the purpose of Section 337. Masimo would not even be deprived of relief should the decision be reversed—it would still have standing to seek relief in the district courts.

This case presents an opportunity for the Court to clarify the current state of the domestic industry requirement and restore the ITC as a venue that is not merely an alternative used to leverage larger settlements.

III. Lax Policing of the Domestic Industry Requirement Benefits Unknown Patent Holders and Litigation Funders

There may be a place for NPEs and PAEs in the patent ecosystem, but not at the ITC. The less robustly the ITC enforces the domestic industry requirement, the more it benefits PAEs. The public largely does not know who is behind PAEs operating at the ITC. There is little transparency for entities that hold patents through shell companies, and even less for the funding that drives much of the litigation. *See* Keller & Stroud, *supra,* at 79–80 (noting that third-party litigation funders "enjoy almost complete anonymity, even from the judges hearing their cases, and generally keep funding arrangements, organizational status, and ownership and details of control — or lack thereof — private"); *id.* at 90 (describing the use of shell-company NPEs to obscure ownership and avoid liability). In fact, by recently proposing rules requiring disclosure of information about entities that have an ownership or financial interest in an investigation, the ITC itself recognizes this very issue. *See Section 337 Adjudication and Enforcement*, 91 Fed. Reg. 23,190 (proposed Apr. 30, 2026) (to be codified at 19 C.F.R. pt. 210). What little is publicly known suggests that these companies have no genuine interest in an exclusion order and simply leverage the ITC to secure large settlements.

CONCLUSION

For these reasons, the Court should reconsider this case.

Respectfully submitted,

By: /s/ *Jennifer Bisk*
Jennifer Bisk
jbisk@unifiedpatents.com
1015 15th Street NW,
Suite 629
Washington, DC 20005
(202) 379-6470

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Cir. R. 35(g)(3). It contains **2593** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This amicus brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Jennifer Bisk
Jennifer Bisk

CERTIFICATE OF SERVICE

I hereby certify that, on May 18, 2026, I caused to be electronically filed the foregoing **BRIEF OF UNIFIED PATENTS, LLC AS AMICUS CURIAE IN SUPPORT OF APPLE INC.'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC** using the Court's CM/ECF filing system.

I certify that all counsel of record in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system. *See* Fed. R. App. P. 25(d); Fed. Cir. R. 25(e).

/s/ Jennifer Bisk
Jennifer Bisk