

No. 12-1352

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IN THE  
**Supreme Court of the United States**

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NOKIA INC., ET AL.,  
*Petitioners,*

v.

INTERNATIONAL TRADE COMMISSION, ET AL.,  
*Respondents.*

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

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**MOTION FOR LEAVE TO FILE AND  
BRIEF OF *AMICI CURIAE*  
ZTE CORPORATION AND ZTE (USA) INC.  
IN SUPPORT OF PETITIONERS**

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June 13, 2013

**MOTION FOR LEAVE TO FILE BRIEF OF  
AMICI CURIAE ZTE CORPORATION  
AND ZTE (USA) INC.**

*Amici curiae* ZTE Corporation and ZTE (USA) Inc. sought consent\* from the parties to file this brief. Petitioners Nokia Inc. and Nokia Corporation and Respondents InterDigital Communications, LLC, and InterDigital Technology Corporation have consented to the filing of ZTE's *amici curiae* brief. Respondent International Trade Commission has not responded to ZTE's request for consent. ZTE therefore moves, pursuant to Supreme Court Rule 37.2(b), for leave to file this *amici curiae* brief in support of Petitioners in the above captioned matter.

ZTE requests the opportunity to present this *amici curiae* brief because, as the fourth-largest manufacturer of cellular handsets in the world, ZTE has a strong interest in the correct interpretation of the domestic industry requirement of Section 337 of the Tariff Act of 1930. The Federal Circuit has affirmed an interpretation of the statute that exempts licensing entities seeking Section 337 relief from having to show that a domestic industry exists with respect to articles protected by the asserted U.S. intellectual property right. This interpretation is not only contrary to the plain language of the statute, but also is inconsistent with the legislative intent behind the 1988 amendments that added "licensing" as a type of qualifying domestic activity.

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\* ZTE notified the parties of its intent to file this brief nine days before the date on which the brief was due, requesting consent and a waiver of the ten-day notice requirement.

The Federal Circuit's holding creates a distinction between licensing and other types of domestic activity that finds no support in the statute or the legislative history. By making the ITC accessible to licensing complainants that cannot identify an article protected by the patent, copyright or trademark asserted, with its ruling the Federal Circuit has altered the ITC's role as a forum for adjudicating intellectual property disputes related to international trade, and has expanded the ITC's reach beyond what Congress envisioned. ZTE agrees with the Petitioners' arguments, and offers in the attached *amici curiae* brief additional reasons why the judgment below is in error and review must be granted.

THEREFORE, ZTE respectfully requests that this Court grant its Motion for Leave and accept the attached Brief as *Amici Curiae* in support of Petitioners Nokia Inc. and Nokia Corporation.

Respectfully submitted,

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**BRIEF OF *AMICI CURIAE***  
**ZTE CORPORATION AND ZTE (USA) INC.**  
**IN SUPPORT OF PETITIONERS**  
**NOKIA INC. AND NOKIA CORPORATION**

Pursuant to Supreme Court Rule 37, ZTE Corporation and ZTE (USA) Inc. (collectively, “ZTE”) respectfully submit this brief as *amici curiae* in support of Petitioners Nokia Inc. and Nokia Corporation (collectively, “Nokia”).<sup>1</sup>

**INTERESTS OF *AMICI CURIAE***

This case presents the important question of whether the “domestic industry” requirement of Section 337 of the Tariff Act of 1930 (“Section 337”) requires proof of the existence of articles protected by a U.S. registered intellectual property right when the alleged industry is based on domestic licensing activity alone.<sup>2</sup> ZTE agrees with Petitioners’ arguments in their Petition for Writ of Certiorari and offers the following additional reasons why it is important for the Court to hear this case.

ZTE (USA) Inc. is the U.S. subsidiary of ZTE Corporation, a multinational telecommunications com-

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<sup>1</sup> Pursuant to Rule 37.6 of the Rules of the Supreme Court, no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. ZTE notified the parties of its intent to file this brief nine days before the date on which the brief was due, requesting consent and a waiver of the ten-day notice requirement. Counsel for Petitioners and Respondent InterDigital granted consent. Counsel for the ITC has not responded, and *amici* have accordingly submitted a motion for leave to file.

<sup>2</sup> Petitioners also present a second question for review that is not addressed here.



pany headquartered in China. ZTE is the world's fourth-largest mobile phone manufacturer and the world's fifth-largest telecoms equipment maker. Like Petitioners and countless others similarly situated, ZTE stands to suffer from the erroneous interpretation of the domestic industry requirement adopted by the U.S. International Trade Commission ("ITC") and affirmed by the Court of Appeals for the Federal Circuit. Literally hundreds of millions of dollars can be at stake in each of these matters and millions of United States consumers can be affected by a single outcome.

The Federal Circuit's holding, which permits an entity to obtain injunctive relief at the ITC based on "licensing alone," turns the statutory domestic industry requirement on its head and goes against Congress' intent and this Court's precedent. Indeed, the Federal Circuit's holding makes it easier for patent-holding entities that do *not* manufacture articles in the United States to obtain injunctive relief against importers of consumer goods, than it is for entities that manufacture products in this country to do so. As a result, licensing entities have an increased incentive to continue to use the ITC rather than federal district courts to resolve patent disputes.

Because the question presented affects the availability to licensing companies of injunctive remedies, ZTE has a strong interest in this Court granting review and correcting the erroneous judgment of the court below. ZTE imports mobile phones and other telecommunications equipment into the United States and is a named respondent in multiple pending Section 337 investigations brought by licensing entities, including two investigations initiated by Respondents

InterDigital Communications, LLC and InterDigital Technology Corporation.

### **SUMMARY OF ARGUMENT**

This case involves a critical question regarding the scope of Section 337 and the role of the ITC as a forum for adjudicating intellectual property disputes. The Federal Circuit held that “licensing alone” may suffice to prove the existence of a domestic industry that exploits the intellectual property right asserted. Unlike complainants who rely on other forms of domestic activity and must identify an article protected by the registered intellectual property to satisfy the domestic industry requirement, licensing complainants are exempt, according to the holding below, from identifying “articles protected” by the registered patent, copyright or trademark. The distinction drawn by the Federal Circuit between licensing and all other types of domestic investment finds no support in the language of the statute or the legislative history. The Federal Circuit’s erroneous interpretation of Section 337 opens the door for licensing entities to obtain injunctive relief based on patent infringement under a lower standard than the one applied by the ITC to domestic industries that manufacture products in the United States or who can identify articles protected by their patent, and much lower than the standard applied by district courts following *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). The question presented has far-reaching and adverse implications for the future of the ITC, domestic importers and U.S. consumers, and therefore warrants the Court’s review.

**ARGUMENT****I. THE FEDERAL CIRCUIT AFFIRMED AN UNREASONABLE INTERPRETATION THAT IS CONTRARY TO THE PLAIN LANGUAGE OF THE STATUTE AND LEGISLATIVE INTENT**

Protecting domestic industries from unfair foreign trade is the focus of the ITC and Section 337 investigations. The ITC is the federal agency tasked with investigating violations of Section 337, which prohibits unfair methods of competition and unfair acts in the importation of articles into the United States. 19 U.S.C. § 1337(a)(1)(A). Although the ITC does not have authority to impose monetary sanctions if a violation of Section 337 is found, it has the extraordinary power to exclude goods at the border or before they enter U.S. commerce if those goods would injure a domestic industry or infringe a valid registered intellectual property right. *See* 19 U.S.C. § 1337(d)-(f).

The Federal Circuit's decision has affirmed an erroneous interpretation of Section 337's domestic industry requirement as it applies to industries based solely on licensing activity. Not only is the holding below contrary to the statutory language, but it also contravenes Congress' intent in establishing the requirement that Section 337 remedial orders be available only where there exist articles protected by a registered patent, copyright or trademark.

**A. The Statute Unambiguously Requires That Complainants' Domestic Activity Relate to Articles Protected By The Asserted Intellectual Property Right**

The domestic industry requirement has historically played a central role in Section 337 investigations.

Section 337 was created in 1930 to empower the Tariff Commission (predecessor of the ITC) to investigate and report unfair competition and unfair acts in the importation of articles into the United States. Tariff Act of 1930, ch. 497, Title III, § 337, 46 Stat. 590, 703 (1930) (codified as amended in 19 U.S.C. § 1337). Although Section 337 was designed to cover a broad range of unfair acts, investigations based on infringement of U.S. intellectual property rights became the most popular type of investigation over time, and patent infringement actions predominate over all others. However, consistent with the ITC's role as a forum for adjudication of international trade disputes, complainants seeking Section 337 relief have to meet certain statutory criteria. Central among those criteria is the "domestic industry" requirement, which has been part of Section 337 since its enactment. Prior to 1988, a complainant alleging unfair acts based on infringement of an intellectual property right had to establish not only that its right had been infringed, but also that importation of the infringing articles injured an "efficiently and economically operated" U.S. industry that exploited the intellectual property right. *Id.* at § 337(a).

Although the legal test for meeting the domestic industry requirement evolved over time, Congress has confirmed that finding a domestic industry to protect is a prerequisite for obtaining Section 337 relief. In 1988, recognizing that proof of infringement of a valid registered U.S. intellectual property right constituted sufficient proof of injury, Congress amended Section 337 to remove the injury requirement and the need to demonstrate that a domestic industry is "efficiently and economically operated" in cases involving registered patents, copyrights or

trademarks. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1342, 102 Stat. 1107, 1212 (1988). *See also* S. Rep. No. 100-71 at 128-29 (1987); H.R. Rep. No. 100-40 at 155-56 (1987) (explaining reasons for amendment). Congress, however, retained the core domestic industry requirement and added an explicit definition:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, ***with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned—***

(A) significant investment in plant and equipment;

(B) significant employment of labor or capital;  
or

(C) substantial investment in its exploitation, including engineering, research and development, or licensing.

19 U.S.C. § 1337(a)(3) (emphasis added).

That a domestic industry must be measured with respect to “articles protected” by the asserted intellectual property right is confirmed by subsection 337(a)(2), which contains the same language. Yet, the ITC and the Federal Circuit have adopted an interpretation that departs from this clear language. The decision below holds that a complainant can meet the domestic industry requirement by “licensing alone,” without proof that there are articles protected by the registered intellectual property right. *See* App. 23, 54.

This interpretation finds no justification in the text of the statute. Nothing in section 337(a)(3) sets licensing apart from the other enumerated economic activities, or otherwise supports the adoption of a lower standard for licensing-based domestic industries. Licensing is only one of the examples listed in subparagraph (C) as a type of “exploitation” that may qualify as domestic activity under the “economic prong” of the domestic industry inquiry. These types of “exploitation,” along with the investments codified in paragraphs (A) and (B), are subsumed within section (a)(3), which clearly requires that the domestic industry exist “with respect to articles protected” by the intellectual property right. 19 U.S.C. § 1337(a)(3). This requirement, known as the “technical prong” of the domestic industry test, applies to all actions brought under Section 337, regardless of the type of economic activity a complainant may rely upon to meet the “economic prong.”

The holding below renders the language of the statute (“articles protected by”) a nullity. While the Federal Circuit acknowledged in its opinion denying rehearing that licensing investments must be “with respect to articles protected by the patent,” the court would consider the requirement automatically satisfied “[a]s long as the patent covers the article that is the subject of the exclusion proceeding” (*i.e.*, the imported article accused of infringement). App. 54-55. The statutory language makes clear, however, that the technical prong is the link between the *complainant’s* domestic investments and the asserted intellectual property right. The accused imported articles cannot possibly show that licensing activities constitute a domestic industry relating to “articles protected” by the asserted patent, copyright or trademark, because there is no connection whatsoever

between the accused imported articles and the complainant's licensing investments incurred prior to the filing of the complaint.<sup>3</sup> In addition, it is well-established that "litigation expenses for an underlying section 337 investigation may not establish a domestic industry under section 337(a)(3)(C)." *Certain Liquid Crystal Display Devices, Including Monitors, Televisions, and Modules, and Components Thereof*, Inv. Nos. 337-TA-741 and 337-TA-749, USITC Pub. 4383, Vol. 1, Comm'n Op. at 113 (Mar. 2013) ("*Liquid Crystal Display Devices*"). As the ITC has explained:

Holding to the contrary would essentially eliminate the domestic industry requirement. Every complainant that comes before the Commission invests resources when bringing a section 337 complaint and supporting its allegations during the investigation. Permitting complainants to rely on these activities and investments to establish a domestic industry, would be inconsistent with the statute and legislative history which imposes an affirmative requirement of demonstrating the domestic industry, one which cannot be automatically fulfilled by the filing of a section 337 complaint to support the very allegations a complainant must prove, even when the investment is intended to further a licensing agenda.

*Id.* at 113-14. By this same reasoning, the accused imported products cannot satisfy the domestic industry requirement. *Infringing* articles are not

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<sup>3</sup> As a general matter, the only activities that are relevant to the determination of whether a domestic industry exists or is in the process of being established are those that occurred before the complaint was filed. *E.g.*, *Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, USITC Pub. 4377, Comm'n Op. at 5 (Feb. 2013).

“protected” by the intellectual property right they infringe. The focus of the requirement of the statute must be instead on the articles protected by the registered patent, copyright or trademark (including licensed articles), as the statute requires.

The Federal Circuit’s error appears to be premised on misunderstanding the technical prong as requiring proof of *domestic manufacture*. See App. 23, 54. The Federal Circuit refused to demand such proof because the statute “does not require that the articles that are the objects of the licensing activities (*i.e.* the ‘the articles protected by the patent’) be made in this country.” App. 23. While this observation is accurate, the statute *does* require that the licensing activity exist “with respect to articles protected by the [intellectual property right].” 19 U.S.C. § 1337(a)(3). Such proof does not necessarily have to involve domestic manufacture, but it does require a direct link between the article protected and the licensing activity.

Intellectual property “protection” comes in many forms, and thus there are a number of ways in which the “technical prong” can be met within the licensing context. For example, in patent-based investigations, a licensing complainant could meet the technical prong by showing that articles are covered by the patent and are licensed for use, sale or importation into the United States. See 35 U.S.C. § 271(a). In the case of copyrights, the technical prong could be met by a licensing complainant through copyrighted works that are licensed for domestic reproduction, distribution, performance or display. See 17 U.S.C. § 106. For trademarks, acceptable proof for a licensing complainant could come in the form of third-party goods licensed to use the trademark in



connection with sales, distribution or advertising in the United States, regardless of where the goods are manufactured. *See* 15 U.S.C. § 1114(1). What matters is that there exist articles that are protected by the intellectual property right.

In sum, the Federal Circuit misunderstood the purpose of the technical prong and failed to consider the full scope of acceptable proof when it refused to require licensing complainants to show that licensing activities relate to “articles protected” by the asserted intellectual property right. The holding below not only perpetuates the ITC’s erroneous application of the statute, but completely eviscerates the domestic industry requirement.

**B. The Legislative History Confirms That Licensing Is Not Exempt From The Requirement That The Domestic Industry Relate To Articles Protected By The Intellectual Property Right Asserted**

The Federal Circuit’s decision finds no support in the legislative history of the 1988 amendments, and is inconsistent with Congress’ reasons for enacting a definition of domestic industry. The first reason was to codify, in paragraphs 337(a)(3)(A)-(B), the definition of domestic industry adopted by the ITC in prior decisions. *See* S. Rep. No. 100-71 at 129; H.R. Rep. No. 100-40 at 157. Before 1988, the ITC had consistently defined domestic industry in patent-based investigations “as the domestic operations of the patent owner and his licensees devoted to the exploitation of the patent.” *Certain Methods for Extruding Plastic Tubing*, Inv. No. 337-TA-110, USITC Pub. 1287, Comm’n Op. at 9 (Sep. 1982). Under this definition, the ITC had found domestic industries to

exist based on facility and labor expenses related to production, distribution and sales in the United States of articles protected by the intellectual property right. *See, e.g., Certain Plastic Food Storage Containers*, Inv. No. 337-TA-152, USITC Pub. 1563, Initial Determination at 76 (Aug. 1984); *Certain Personal Computers and Components Thereof*, Inv. No. 337-TA-140, USITC Pub. 504, Comm'n Op. at 41-43 (Mar. 1984). Accordingly, Congress included in the definition of domestic industry "investments in plant and equipment" and "employment of labor and capital" as qualifying activity under the statute. 19 U.S.C. § 1337(a)(3)(A)-(B).

But the reason for enacting new paragraph 337(a)(3)(C) was very different. Congress intended through this paragraph to override certain precedent in which the ITC had applied the domestic industry requirement too narrowly to deny relief to complainants with no manufacturing operations in the United States. *See* S. Rep. No. 100-71 at 129; H.R. Rep. No. 100-40 at 157. For example, in *Certain Products with Gremlins Character Depictions ("Gremlins")*, the ITC declined to find a domestic industry based on the complainant's licensing activities where there was no evidence that the complainant had any manufacturing operations in the U.S. Inv. No. 337-TA-201, USITC Pub. 1815, Comm'n Op. at 5-11 (Mar. 1986). *See also Certain Miniature, Battery-Operated, All Terrain, Wheeled Vehicles*, Inv. No. 337-TA-122, USITC Pub. 1300, Comm'n Op. at 8 (Oct. 1982) (declining to consider licensing activities of non-manufacturing complainant). To correct this, Congress specifically listed in paragraph 337(a)(3)(C) investments in engineering, research and development, and licensing as acceptable types of "exploitation" for purposes of establishing a domestic industry.

19 U.S.C. § 1337(a)(3)(C). Congress explained that its goal was to open the ITC's doors to "universities and other intellectual property owners who engage in extensive licensing of their *rights to manufacturers*." S. Rep. No. 100-71 at 129; H.R. Rep. No. 100-40 at 157 (emphasis added).

In this light, the Federal Circuit's interpretation of the statute is unsupported by the legislative history and contravenes Congress' goal. The legislative history does not show any intent by Congress to exempt paragraph 337(a)(3)(C) from the historical requirement that the domestic activities be directed to articles protected by the intellectual property right. On the contrary, Congress made clear that it had retained the domestic industry requirement "in order to preclude holders of U.S. intellectual property rights who have no contact with the United States other than owning such intellectual property rights from utilizing section 337." *Id.* If a complainant could rely on paragraph 337(a)(3)(C) to establish a domestic industry based on "licensing alone" as the Federal Circuit held, without proof that there are articles protected by the asserted patent, copyright or trademark, a foreign patent owner could simply open, for example, an office in the U.S. to conduct licensing negotiations, and thus be entitled to Section 337 relief.

The Federal Circuit's holding indeed frustrates Congress' intent in enacting paragraph 337(a)(3)(C). All that Congress wanted to achieve with paragraph (C) was to allow certain non-manufacturing activities to be credited as part of the "economic prong" of the domestic industry analysis, *provided* that those activities related to articles protected by the intellectual property. As concerns licensing, Congress sought to

give access to the ITC to entities “who engage in extensive licensing of their rights *to manufacturers.*” S. Rep. No. 100-71 at 129; H.R. Rep. No. 100-40 at 157 (emphasis added). This statement strongly indicates that Congress did not intend to exempt licensing complainants from showing the existence of articles that were protected by the asserted intellectual property right, but rather, only intended to exempt certain complainants from having to show that they themselves had manufacturing operations in the U.S. Congress enacted paragraph (C) to address the situation in *Gremlins*, where licensees manufactured protected articles in the United States. Comm’n Op. at 12. The Federal Circuit’s decision, however, goes much further and impermissibly eliminates the statutory requirement (“articles protected by”) altogether for licensing industries.

**C. The ITC’s Interpretation Of The Domestic Industry Requirement Under Section 337(a)(3)(C) Is Entitled To No Deference**

Contrary to the Federal Circuit’s ruling (App. 24), the ITC’s interpretation of paragraph 337(a)(3)(C) is not entitled to deference under the principles of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* There is no ambiguity in the statute and no “gap” in the language for the ITC to fill. 467 U.S. 837, 843 (1984). Paragraph (C) is clearly subsumed within subsection 337(a)(3), which unambiguously requires that the alleged domestic investment relate to articles protected by the intellectual property right—the technical prong. 19 U.S.C. § 1337(a)(3). That Congress intended the technical prong to apply to all types of investments is confirmed by the structure of the statute: the economic activities listed in

paragraphs (A), (B) and (C) all fall under the technical prong requirement of section 337(a)(3). *See id.* “If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.” *Chevron*, 467 U.S. at 843, n. 9. Accordingly, the ITC’s interpretation of the statute—effectively exempting licensing industries from identifying articles protected by the intellectual property—must be rejected.

Even if the statute and legislative history were silent or ambiguous with respect to the question presented here, the ITC’s interpretation is owed no deference because it is unreasonable and inconsistent. *Id.* at 843. The ITC’s interpretation creates an impermissible distinction between licensing activities and other types of non-manufacturing “exploitation” within the meaning of paragraph 337(a)(3)(C). On the one hand, with respect to licensing-based domestic industries, the ITC has not required complainants to show that licensed articles are protected by the intellectual property right. *See, e.g., Liquid Crystal Display Devices*, Final Initial Determination at 410; *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, USITC Pub. 4282, Vol. 1, Initial Determination at 112 (Nov. 2011). On the other hand, with respect to other types of “exploitation” under paragraph 337(a)(3)(C), such as research and development, the ITC has adopted the opposite approach and required a showing that the activities are directed to “articles protected by the patent.” *See, e.g., Certain Dynamic Sequential Gradient Compression Devices and Component Parts Thereof*, Inv. No. 337-TA-335, USITC Pub. 2575, Initial Determination at 61-65 (Nov. 1992).

There is no justification for treating differently activities that Congress clearly intended to treat similarly under the statutory scheme. Indeed, a few years after the 1988 amendments to Section 337, the ITC rejected the idea that licensing complainants could be treated differently from other types of complainants and be exempted from identifying articles protected by the intellectual property right asserted. *See Certain Integrated Circuit Telecommunication Chips and Products containing Same Including Dialing Apparatus*, Inv. No. 337-TA-337, USITC Pub. 2670, Initial Determination at 99-100, n. 87 (Aug. 1993). But in later decisions, the ITC lowered the standard for licensing industries and did not require a showing that articles were protected by the asserted intellectual property right. *See Certain Digital Satellite System (DSS) Receivers and Components Thereof*, Inv. No. 337-TA-392, USITC Pub. 3418, Initial Determination at 10 (Apr. 2001). Currently, the ITC considers the “exploitation” criteria met as long as the licensing activity relied upon by the complainant pertains to the particular intellectual property right at issue (e.g., by showing that the investments resulted in licenses to the specific patent asserted). *See, e.g., Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-432, Initial Determination (Order No. 13) at 14 (Jan. 24, 2001).<sup>4</sup>

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<sup>4</sup> If the complainant’s activities are only partially related to licensing the asserted intellectual property right (e.g., because it is licensed as part of a portfolio) the ITC examines the strength of the “nexus” between the activities and licensing the asserted intellectual property right in the United States. *Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-

While it is important to establish that the licensing activities are connected to the intellectual property right, it is not enough. Proof that protected articles actually exist takes that connection to the level intended by Congress when it stated that paragraph (C) was meant to encompass activities by “universities and other intellectual property owners who engage in extensive licensing of their rights *to manufacturers.*” S. Rep. No. 100-71 at 129; H.R. Rep. No. 100-40 at 157 (emphasis added). Even though the activities enumerated in paragraph 337(a)(3) are non-manufacturing in nature, they “may constitute a domestic industry only if they are sufficiently related to articles protected by the patent as to constitute an exploitation thereof.” *Dynamic Sequential Gradient Compression Devices*, Initial Determination at 61. In the context of research and development, the ITC has explained:

While it is not necessary that a particular research and development project result in a completed product to be considered part of the relevant domestic industry, it must be clear that the project is devoted to the exploitation of the patent. Absent some evidence [that the project] is devoted towards a product which would fall within the claims of the [] patent, it is not possible to determine whether [the project] constitutes an exploitation of the patent.

*Id.* at 64-65. The same rationale should apply to licensing. The ITC’s inconsistent treatment of licensing industries is unreasonable and entitled to no deference.

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TA-694, USITC Pub. 4292, Comm’n Op. at 8 (Nov. 2011) (“*Navigation Devices*”).

## II. GRANTING REVIEW IS IMPORTANT TO ENSURE THE ITC FULFILLS ITS INTENDED FUNCTION

The Federal Circuit's holding allows paragraph 337(a)(3)(C) to be used "as a loophole to the industry requirement," precisely the result Congress wanted to avoid. *See* S. Rep. No. 100-71 at 130; H.R. Rep. No. 100-40 at 157. Under the holding below, foreign owners of U.S. intellectual property rights may qualify for Section 337 relief, for example, by simply opening an office or hiring employees to conduct licensing negotiations in this country. While the ITC still requires that the domestic licensing investment be "substantial" and related to the intellectual property right (*see, e.g. Navigation Devices*, Comm'n Op. at 7-8), eliminating any requirement of proof that articles are actually protected by such right opens the ITC's doors to foreign entities "with only limited contact to the United States," in contravention of unambiguous congressional intent. S. Rep. No. 100-71 at 130; H.R. Rep. No. 100-40 at 157.

This Court should grant review and reverse the Federal Circuit's holding. As with all other types of complainants, licensing complainants must be required to show that their domestic operations relate to "articles protected" by U.S. intellectual property rights. 19 U.S.C. § 1337(a)(2)-(3). This would ensure that Section 337 is enforced within the boundaries of its intended mission: to protect domestic industries from foreign unfair competition resulting from the importation of infringing articles. *See* 19 U.S.C. § 1337(a).

If the Federal Circuit's holding stands, licensing complainants would have the ability to obtain extraordinary injunctive relief at the ITC upon a lesser



showing than is required under *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). In *eBay*, this Court unanimously determined that an injunction should not be automatically issued based on a finding of patent infringement, but instead, that the district court must weigh the four traditional factors used to determine whether an injunction is appropriate. *Id.* at 391-92. Under *eBay*, a plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that the remedies available at law 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. *Id.* at 391.

Injunctive relief against infringing imports is available at the ITC under a different standard. Complainants do not have to prove “irreparable injury” to a domestic industry, and no remedies other than injunctive relief are available. *See* 19 U.S.C. § 1337(a), (d)-(f). For that reason, the statutory requirement that a domestic industry exist “with respect to articles protected” by the asserted intellectual property right must be enforced in all cases to prevent licensing complainants from doing an end-run around *eBay* and to ensure that availability of the extraordinary remedies afforded by the ITC is limited to protecting domestic industries from instances of unfair competition by foreign importation.

**CONCLUSION**

This Court should grant Nokia's Petition for Writ of Certiorari to reverse the Federal Circuit's erroneous interpretation of the domestic industry requirement of Section 337 as it pertains to licensing-based domestic industries.

Respectfully submitted,

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No. 12-1352

\_\_\_\_\_  
NOKIA INC., ET AL.,

*Petitioners,*

v.

INTERNATIONAL TRADE COMMISSION, ET AL.,

*Respondents.*

\_\_\_\_\_  
**AFFIDAVIT OF SERVICE**

I HEREBY CERTIFY that on June 13, 2013, three (3) copies of the MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* ZTE CORPORATION AND ZTE (USA) INC. IN SUPPORT OF PETITIONERS in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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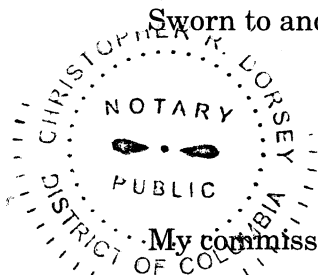
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NOTARY PUBLIC  
District of Columbia

IN THE  
**Supreme Court of the United States**

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v.

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**On Petition for Writ of Certiorari to the  
United States Court of Appeals  
for the Federal Circuit**

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**MOTION FOR LEAVE TO FILE AND  
BRIEF OF *AMICI CURIAE* ZTE  
CORPORATION AND ZTE (USA) INC.  
IN SUPPORT OF PETITIONERS**

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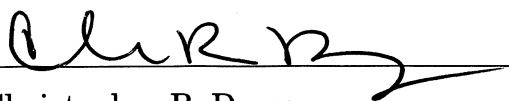
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As required by Supreme Court Rule 33.1(h), I certify that the document contains 4,577 words, excluding the parts of the document that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

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Executed on June 13, 2013



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