

August 5, 2011

James R. Holbein, Secretary
United States International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

RE: Comments on “Practice and Procedure: Rules of General Application, Safeguards, Antidumping and Countervailing Duty, and Adjudication and Enforcement”
76 FEDERAL REGISTER 39750 (July 6, 2011) Docket No. MISC-036

Comments on “Notice of Proposed Handbook on Filing Procedures”
76 FEDERAL REGISTER 39757 (July 6, 2011) Docket No. MISC-036

Dear Secretary Holbein,

The American Intellectual Property Law Association (“AIPLA”) appreciates the opportunity to comment on the revisions proposed by the United States International Trade Commission (hereinafter “Commission”) to: (a) the Rules of Practice and Procedure, 19 C.F.R. Parts 201, 206, 207 and 210 (“the Rules”), as set forth at 76 FED. REG. 39750 (July 6, 2011), and (b) the Proposed Handbook on Filing Procedures (the “Handbook”), as set forth in 76 FED. REG. 39757 (July 6, 2011). AIPLA applauds the Commission for making these efforts to enhance and modernize the filing procedures before the Commission and to provide improved guidance for parties and practitioners through the revised Handbook.

AIPLA is a national bar association with approximately 16,000 members who are primarily intellectual property lawyers and other patent practitioners in private and corporate practice, in government service, and in the academic community. AIPLA represents a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, and unfair competition law, as well as other fields of law affecting intellectual property. Its members represent both owners and users of intellectual property.

AIPLA submits these comments on the proposed revisions to both the Rules and Handbook in this single submission. AIPLA’s comments are directed to those proposed amendments and revisions that we believe will impact Intellectual Property-Based Import Investigations under Section 337 of the Tariff Act of 1930.

**Comments on Proposed Amendments to the Commission's
Rules of Practice and Procedure (76 FED. REG. 39750)**

Proposed Rule 201.16

The Commission proposes to amend 19 C.F.R. § 201.16 to remove language concerning service on the Secretary of paper documents.

While AIPLA does not disagree with this proposed amendment, the use of “copies” in the proposed rule does not appear to be required in view of the removal of the requirement of service on the Commission. AIPLA proposes that “copies” be changed to “a copy.”

Proposed Rule 210.4(f)

The Commission proposes to amend 19 C.F.R. § 210.4(f) to require electronic filing of certain documents, and to require that all other written submissions, in either electronic or paper form, be filed by noon on the next business day.

AIPLA does not support the entire amendment as written. Specifically, we believe that the Commission should clarify and spell out the procedures for filing confidential documents on the EDIS in Section 337 investigations. The thicket of current and proposed rules makes a reader refer to three separate rules in order to divine the specific procedures. Proposed Rule 210.4(f) indicates that written submissions “shall comply with § 201.8 of this chapter,” but Proposed Rule 201.8(f) refers to Rule 201.6(b), which “shall not apply to adjudicative investigations under Subchapter C, part 210, of the Commission’s rules of practice and procedure.” See 19 C.F.R. § 201.6(b).

Rather, AIPLA believes that Rule 210.4(f) should simply re-state the relevant provisions that are currently contained in Proposed Rule 201.8(f) as they would apply in investigations under Section 337. Clarifying the procedures for filing non-confidential and confidential submissions in Section 337 investigations will avoid ambiguity. It will also confirm that the Commission does not seek to institute a same-day rule in Section 337 investigations for filing non-confidential documents in conjunction with documents filed as confidential.

AIPLA further suggests that the Commission clarify certain terms and phrases in the Proposed Rule 210.4(f). The proposed rule reads, in relevant part, “submissions pursuant to an order of the presiding [ALJ] shall be filed electronically.” However, this language assumes that all submissions would be filed, and fails to take into account those submissions that are to be served and not filed. Therefore, to clarify, AIPLA proposes the following language instead:

“submissions filed with the Secretary pursuant to an order of the presiding ALJ shall be filed electronically.”

The proposed rule also refers to “true” copies. AIPLA proposes that the term “true” be replaced with “as filed” or “as submitted to the Commission or presiding administrative law judge.”

Proposed Rule 210.8(a)

The Commission proposes to amend 19 C.F.R. § 210.8(a) to require paper filing of complaints and filing of exhibits, appendices, and attachments to complaints on certain approved electronic media.

AIPLA does not support the entire amendment as written. As in Proposed Rule 210.4(f), this proposed rule also refers to “true” copies. As discussed *supra*, AIPLA proposes that the term “true” be replaced with “as filed” or “as submitted to the Commission or presiding administrative law judge.”

In addition, the rule, as proposed, appears to do away with the requirements of submitting copies of the complaint for service on parties and embassies. The Commission should clarify whether this omission is intentional.

Comments on Proposed Amendments to the Handbook on Filing Procedures (76 FED. REG. 39757)

Proposed Handbook Section II(c)(4)

The Commission has requested comments on its proposal to replace the “Handbook on Electronic Filing Procedures” with the proposed “Handbook on Filing Procedures.” Among the amended provisions is Section II(c)(4), which states that the Secretary shall deem the EDIS Web site to be subject to a “technical failure” if, on a business day, it is unable to accept electronic filings continuously or intermittently over the course of any period of time greater than one hour after 12 noon, Washington, D.C. local time.

AIPLA does not support the entire amendment as written. Specifically, AIPLA suggests that the Commission clarify how the private parties are to notify the Secretary of a “technical failure,” where the Commission is closed but the EDIS is still operating.

For example, under some ALJ ground rules, parties have until the next business day to file if the Commission is closed for some reason during business hours. However, the proposed rule does not set forth the procedures to address the circumstance where the Commission is closed (e.g., weather or emergency), but the EDIS is working properly. Additionally, the proposed rule does not account for the circumstance where the Commission is closed during normal working hours and the EDIS is not working properly. As such, the Commission should clarify the exact procedure for filing via the EDIS when the Commission closes, whether or not the EDIS is operational. AIPLA proposes that a default filing date of the next business day be set where the Commission closes, but the EDIS may or may not be operating.

Proposed Handbook Section II(J)(3)

Among the amended provisions is Section II(J)(3), which applies to documents to be signed by two or more persons and spells out the procedure for confirming that the content of the document is acceptable to all such persons.

AIPLA does not support this requirement and proposes that it be deleted from the Handbook. The process for verifying multiple signers on a filed document seems unnecessarily onerous. AIPLA does not see these requirements as an improvement on current procedures. The parties are adequately able to police the signing of documents requiring multiple signatures, and can seek relief if a document is submitted without prior approval to sign on behalf of counsel.

Proposed Handbook Section II(K)

Among the amended provisions is Section II(K), which details certain limitations on the service of electronic documents between the parties. Included among the limitations is the rule that, for Section 337 proceedings before an ALJ, the presiding ALJ shall determine whether to permit electronic service of documents between the parties in that proceeding.

AIPLA does not support this requirement as written, particularly the rule that electronic service of documents filed on the EDIS may only occur at the discretion of a presiding ALJ. AIPLA respectfully submits that this proposal should reflect reality in Section 337 investigations—that electronic service is the norm, rather than the exception. As such, AIPLA believes that requiring parties to seek approval of the presiding ALJ to serve other parties electronically simply adds another unnecessary hurdle for parties to clear. Instead, the Commission should have an “opt-out” procedure for parties or individuals who do not wish to serve or be served by electronic means those documents filed via the EDIS.

Proposal for An Additional Rules Amendment

To complement the proposed Rules and Handbook, as well as AIPLA’s comments regarding the proposed Handbook Section II(K), we offer for consideration by the Commission an additional suggested rule change regarding service by email. The rules for Section 337 investigations allow for service on opposing parties and the Staff by first-class mail, overnight delivery, and hand delivery without pre-approval of the administrative law judge or Commission; however, the rules do not similarly provide for service by email without permission. See 37 C.F.R. § 201.16(f). The rules should be amended to better harmonize the proposed changes and the current, common practice for electronic service before the Commission.

AIPLA proposes that 19 C.F.R. §201.16(f) be amended to provide:

§ 201.16 Service of process and other documents.

* * *

(f) *Electronic Service.* With the prior consent of the Secretary, parties may serve documents by electronic means in all matters before the Commission. ~~except for proceedings conducted under section 337 of the Tariff Act of 1930 that are before an administrative law judge.~~ In the case of proceedings under section 337 of the Tariff Act of 1930, the Commission or the parties may effect service on a party represented by an attorney before the Commission of documents by electronic means on the lead attorney for the party or another as designated by the party with the prior consent of the presiding administrative law judge while the proceeding is before an administrative law judge or the Commission. ~~Parties may only effect electronic service on recipients who have provided written consent thereto to the Secretary or the presiding administrative law judge.~~ If electronic service is employed permitted, paragraphs (a), (b) and (d) of this section shall not apply. However, any dispute that arises among parties regarding electronic service must be resolved by the parties themselves, without the Commission's involvement. Service by email is effective on the day the email is sent if email delivery occurs before 5:15 p.m., EST, unless the parties agree on a different deadline.

A party may, upon notice to all parties, withdraw its consent to electronic service and require service under paragraphs (a) and (b) of this section.

Transmittal of confidential business information by email shall be protected by a password provided separately to all parties prior to the time of service, unless the parties agree otherwise.

As a practical matter, service in almost every Section 337 investigation is accomplished via email. Email provides the parties with greater flexibility, convenience, and expedition (i.e., one does not have to wait for the courier to deliver the documents or for next day mail delivery). Because the Commission's Rules do not provide for certain particulars regarding service by email, the parties incur costs and delay each investigation at the outset in negotiating stipulations and agreements regarding the use of email to effect service. This proposed amendment would avoid such costs and delay, and would serve to further harmonize the electronic filing and service practice before the Commission. The proposed amendment is not believed to impact the Commission and its operation.

AIPLA's proposed amendment: (i) makes service by email a default method of service, but only where a party is represented by counsel; (ii) addresses the time when service is effective, where service is by email; and (iii) provides direction to the parties for special treatment of documents containing confidential business information that are served by email.

AIPLA Comments to ITC on
Proposed Revisions to Rules and Handbook
August 5, 2011

We appreciate the opportunity to provide these comments on the proposed changes to the Rules and the new Handbook and would be happy to answer any questions that our comments may raise. We look forward to participating in the continuing development of the Commission's rules and procedures.

Sincerely,

A handwritten signature in black ink, appearing to read "Q. Todd Dickinson", with a long horizontal flourish extending to the right.

Q. Todd Dickinson
Executive Director