

# ITC Comcast Patent Ruling Shouldn't Be Overturned

By **David Balto** (May 14, 2020)

On April 23, the U.S. International Trade Commission issued a final order ruling that Comcast stole the intellectual property of TiVo, a Rovi subsidiary, for use in its cable boxes.[1] This is the second straight ruling in which the ITC decided against Comcast, and there is still one more judgment to go.



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Furthermore, the U.S. Court of Appeals for the Federal Circuit upheld the ITC's first ruling in March. While Comcast is appealing that decision to the U.S. Supreme Court, the strong uniformity between the lower courts and ITC regarding Comcast's IP theft makes a reversal unlikely.

Comcast is now seemingly hoping its lobbyists can convince President Donald Trump to throw aside the ruling; however, the weakness of Comcast's legal and policy case, mixed with the president's general antipathy for the company, makes this a remote possibility.[3]

By way of background, Section 337 of the Tariff Act gives the ITC power to block the "importation into the United States the sale for importation, or the sale within the United States after importation" of any items which "infringe a valid and enforceable United States patent." [2]

Yet even after the determination, an infringer can attempt to exercise two potential loopholes. First, the commission may consider a public interest exception, which considers factors including "public health and welfare," and "competitive conditions" from a smaller competitor. Then, the president also has 60 days to overrule the commission "for policy reasons."

It is unlikely that Comcast will succeed on either of these fronts. The ITC made its decision after a long and careful review process that began when Rovi Corp. launched a complaint to the commission in March 2018.

Rovi has patents for technology to make more efficient cable searches. Comcast initially licensed this technology, but then decided to create its X1 cable box, using IP from its former licensor. After an exhaustive investigation, an administrative law judge found that Comcast infringed on TiVo's patents. In the April 23 ruling, the bipartisan commission upheld this finding and "determined that the public interest factors ... do not preclude the issuance of the limited exclusion order or the cease and desist orders."

The competition argument is by far the weakest. In many municipalities, Comcast has a monopoly on cable, and then uses this power to sell its X1 boxes to its captive consumers, which is only made possible by violating the IP rights of a smaller company.[4]

The case for the public health and welfare exemption isn't much better. While lobbyists will likely argue that restricting Comcast's set-top boxes will keep people from getting relevant information on public health, the abundance of other sources of information consumers have at their fingertips makes this an incredibly weak argument. Moreover, consumers can still record television through TiVo and other technology that does not rely on pirated goods.

So, now Comcast may be hoping that President Trump will bail them out by vetoing the ITC. However, the president, who has historically been no friend to the cable giant, is unlikely to be swayed by the weak competition arguments. He has repeatedly called out Comcast's anti-competitive conduct.

During his campaign in 2016, he called for reversing the Comcast-NBCUniversal merger. Then in 2018, he favorably summarized a letter from the American Cable Association that "Comcast routinely violates Antitrust Laws" and quoted Fox Business Network correspondent Charlie Gasparino that Comcast is "acting much worse, and have much more potential for damage to consumers, than anything AT&T-Time Warner would do" in a tweet.[4] [5]

Finally, fair or not, President Trump has expressed antipathy for Comcast for its ownership of NBC and MSNBC. The fact that Democratic presidential candidate Joe Biden hosted his inaugural fundraiser in then-Comcast executive David Cohen's home and that NBC refuses to air Trump press conferences on the coronavirus has only exacerbated his hostility toward the cable giant.[6]

At the same time, the president does not need a personal vendetta to uphold the ITC's ruling. The carefully determined finding by the ITC that Comcast violated TiVo's intellectual property rights, along with the lack of any plausible policy justification to overturn it, is reason enough.

Hopefully, this order will stand and deter other monopolistic companies from stealing from their smaller competitors in the future.

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[1] UNITED STATES INTERNATIONAL TRADE COMMISSION, Investigation No. 337-TA-1103, (April 23, 2020) [https://www.usitc.gov/secretary/fed\\_reg\\_notices/337/337\\_1103\\_notice\\_04232020sgl.pdf](https://www.usitc.gov/secretary/fed_reg_notices/337/337_1103_notice_04232020sgl.pdf)

[2] USITC Tariff Act of 1930, Section 337, April 1930 [https://www.usitc.gov/press\\_room/us337.htm](https://www.usitc.gov/press_room/us337.htm)

[3] Comcast Lobbying Contributions, OpenSecrets.org, May 14, 2020 <https://www.opensecrets.org/orgs/summary?id=D000000461>

[4] Richard Greenfield, "How the Cable Industry Became a Monopoly", Fortune, May 19, 2015 <https://fortune.com/2015/05/19/cable-industry-becomes-a-monopoly/>

[5] Fabiola Cineas, "Could President Trump Really Breakup Comcast?", Philadelphia Magazine, October 25, 2016 <https://www.phillymag.com/business/2016/10/25/trump-president-comcast-breakup/>

[6] Donald J Trump, Twitter, November 12, 2018 <https://twitter.com/realDonaldTrump/status/1062045654711713792>

[7] Kevin Robillard, "Joe Biden holding kickoff Fundraiser at Comcast Exec's Home", Huffington Post, April 24, 2019 [https://www.huffpost.com/entry/joe-biden-2020-campaign-lobbyist-money\\_n\\_5cc111dce4b0764d31dc8586](https://www.huffpost.com/entry/joe-biden-2020-campaign-lobbyist-money_n_5cc111dce4b0764d31dc8586)