

## ITC Declines To Reach Question Of Whether Laches Is An Available Defense In Section 337 Investigations

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In a previous [blog post](#), we reported that the ITC had requested briefing in [Certain Network Devices, Related Software, and Components Thereof, Inv. No. 337-TA-944](#) on whether a laches defense is available in Section 337 investigations in view of the Federal Circuit's recent decision in *SCA Hygiene Prods. v. First Quality Baby Prods.*, 807 F.3d 1311 (Fed. Cir. 2015) (en banc). The ITC's powers are injunctive only, and previous ITC decisions have held that laches could not bar such prospective relief under the rule in *A.C. Aukerman Co. v. R.L. Chaides Construction Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (en banc). However, the Federal Circuit held in *SCA Hygiene* that the *Aukerman* rule that laches is not a defense to injunctive relief could not stand in light of the Supreme Court's decision in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962 (2014).

In an opinion issued on July 26, the ITC writes that it “declines to reach the legal issue of whether laches is an available defense at the Commission given the uncertainty of the law [with *SCA Hygiene* pending in the Supreme Court,]” but that “regardless of whether laches is available as a defense at the Commission,” the burden of proof was not satisfied. Among other reasons, the Commission found there was no “open and notorious” infringement triggering a duty to investigate and that “requiring . . . infringement analyses for every feature that a sales team is aware of, is unreasonable” in view of the complainant’s “extensive patent portfolio.”

Although the Commission’s opinion leaves open for now the question of whether laches is an available defense at all in Section 337 investigations, the reason it gives—the Supreme Court’s recent grant of certiorari in *SCA Hygiene*—is unsatisfying. *SCA Hygiene* determined that laches (1) could bar injunctive relief for patent infringement *and* (2) that it could do so even if the claim was brought within the Patent Act’s six-year statutory limitations period. The issue that divided the en banc Federal Circuit, and the sole issue on which the Supreme Court granted certiorari, is the latter ruling. Therefore, it is doubtful that a ruling by the Supreme Court in *SCA Hygiene* will eliminate any uncertainty relevant to the legal issue that the Commission declined to consider in this investigation, *i.e.*, *whether laches is an available defense in Section 337 investigations*.

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