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**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN WIRELESS CONSUMER
ELECTRONICS DEVICES AND
COMPONENTS THEREOF**

Investigation No. 337-TA-853

**BRIEF OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS
ON ISSUES UNDER REVIEW AND REMEDY**

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I. INTRODUCTION

The Office of Unfair Import Investigations (“OUII”) respectfully submits this response to the Commission’s request for written submissions on certain issues under review, and on remedy, the public interest, and bonding. *See* 78 Fed. Reg. 71643-45 (November 29, 2013) (“Notice”). By this Notice, the Commission has determined to review the Judge’s determination that Complainants have satisfied the domestic industry requirement and that none of the Accused Products infringe claims 6 and 13 of U.S. Patent No. 5,809,336 (“the ‘336 patent”). (Notice at 3-4). The Commission has further determined not to review the remaining issues decided in the ID, including the Judge’s determination that Respondents have not infringed claims 1, 7, 9-11, and 14-16 of the ‘336 patent, and that Complainants have failed to satisfy their burden of proving infringement with respect to the Accused Products using those chips identified on page 88 of the ID. (*Id.*). The Commission has posed four questions regarding the issues under review, and has requested briefing from the parties concerning remedy, the public interest, and bonding. (*Id.* at 4-5).¹

For the reasons set forth below, OUII is of the view that the Judge’s finding of no violation of Section 337 with respect to claims 6 and 13 of the ‘336 patent should be affirmed by the Commission. In this regard, the evidence fails to show that any of the Accused Products meets the “entire oscillator” limitation of claims 6 and 13 under any of the proposed constructions. (*See infra* at § 4.A). Furthermore, OUII is of the view that Complainants have made substantial investments in a licensing program relating to the ‘336 patent, and the Judge’s

¹ OUII’s proposed limited exclusion order is attached hereto as Exhibit B. OUII has provided a copy of its proposed exclusion order to the Intellectual Property Rights Branch of U.S. Customs and Border Protection (“Customs”). Customs has indicated that they have no comments regarding such proposed order.

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findings regarding this issue should be affirmed. (*See infra* at §§ IV.B-D). However, Complainants did not prove that any of their licensees' products practice the '336 patent.

Should the Commission find a violation of Section 337, OUII is of the view that the appropriate remedy in this investigation will include a limited exclusion order directed at the infringing products of the remaining named Respondents, with the exception of Nintendo.² (*See infra* at § V.A). Furthermore, the public interest does not weigh against these remedies. (*See infra* at § V.B). And, finally, OUII submits that the appropriate Presidential review period bond is [REDACTED] of the entered value of the imported products. (*See infra* at § V.C).

II. BACKGROUND

A. Procedural History

On July 24, 2012, Complainants Technology Properties Limited LLC, Phoenix Digital Solutions LLC, and Patriot Scientific Corporation (collectively, "Complainants") filed a Complaint with the Commission pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. Complainants alleged violations of Section 337 based on infringement of claims 1, 6, 7, 9-11, and 13-16 of the '336 patent. The Commission instituted an investigation pursuant to Commission Rule 210.10(b) by publication in the Federal Register on August 24, 2012. *See* 77 Fed. Reg. 51572-73 (Aug. 24, 2012) ("Notice of Investigation").

During the course of the investigation, the Complaint and Notice of Investigation were amended to remove Huawei North America as a respondent and to add Huawei Device Co., Ltd.,

² With respect to Nintendo, Complainants only assert claims 1 and 11. (*See* Compl. Post-Hearing Br. at 161-167 (June 28, 2013)). However, the Commission has only determined to review the ID's infringement findings with respect to claims 6 and 13. (Notice at 3). Because the Commission has determined not to review the ID's finding that the accused Nintendo products do not infringe claims 1 and 11, it does not appear that a remedy would be proper as to Nintendo.

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Huawei Device USA Inc., and Futurewei Technologies, Inc. as respondents. Notice (Feb. 15, 2013); 78 Fed. Reg. 12354 (Feb. 22, 2013). In addition, the Commission terminated the investigation as to Sierra Wireless, Inc. and Sierra Wireless America, Inc. (Notice (Feb. 4, 2013)), Kyocera Corporation and Kyocera Communications, Inc. (Notice (Sept. 20, 2013)), Amazon.com, Inc. (Notice (Nov. 25, 2013)), and Acer, Inc. and Acer America Corporation (Notice (Nov. 25, 2013)) based on settlements.

The following respondents remain in this investigation: (i) Barnes & Noble, Inc. (“Barnes & Noble”); (ii) Garmin Ltd., Garmin International, Inc., and Garmin USA, Inc. (collectively, “Garmin”); (iii) HTC Corporation and HTC America (collectively, “HTC”); (iv) Huawei Technologies Co., Ltd., Huawei Device Co., Ltd., Huawei Device USA, Inc., and Futurewei Technologies, Inc. d/b/a Huawei Technologies (USA) (collectively, “Huawei”); (v) LG Electronics, Inc. and LG Electronics U.S.A., Inc. (collectively, “LG”); (vi) Nintendo Co., Ltd. and Nintendo of America, Inc. (“Nintendo”); (vii) Novatel Wireless, Inc. (“Novatel Wireless”); (viii) Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (collectively, “Samsung”); and (ix) ZTE Corporation and ZTE (USA) Inc. (collectively, “ZTE”).

The evidentiary hearing was held from June 3-11, 2013. On September 6, 2013, the Judge issued his final initial determination (“ID”), finding no violation of Section 337 with respect to any of the respondents. On September 23, 2013, the private parties petitioned for review of portions of the ID. On November 25, 2013, the Commission issued its Notice, determining to review the ID in part with respect to following: (i) “the ID’s findings concerning claim construction and infringement of claims 6 and 13 of the '336 patent” (Notice at 3); (ii) “to consider the question of whether the alleged industry still exists in light of TPL’s relinquishing its right to license the '336 patent” (*id.* at 4); (iii) “the ID’s domestic industry finding to consider

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whether Complainants have satisfied the economic prong of the domestic industry requirement” (*id.*); and (iv) “the ID’s statement that Complainants need not show that at least one of their licensees practices the patent(s)-in-suit to demonstrate a license-based domestic industry” (*id.*). The Commission determined not to review the remainder of the ID. (*id.*). The Commission also requested briefing on remedy, the public interest, and bonding. (*Id.* at 5).

B. The Final Initial Determination

In the ID, the Judge found: (1) that none of the accused products directly or indirectly infringe any of the asserted claims; (2) that none of the asserted claims have been shown to be invalid; and (3) that Complainants have satisfied the domestic industry requirement with respect to the asserted patent. (ID at 327-328). The Judge therefore found no violation of Section 337 with respect to any Respondent. (*Id.* at 328-329).

C. The Recommended Determination on Remedy and Bonding

As part of the ID, the Judge also issued a recommended determination on remedy and bonding (“RD”). In the RD, the Judge recommends that any remedy include a limited exclusion order directed at the infringing products of the named Respondents. (RD at 7). However, in light of the Judge’s finding that Complainants failed to adduce evidence that any of the Respondents’ inventories were commercially significant, the RD does not recommend that any remedy include a cease and desist order. (*Id.* at 9). Finally, with respect to bonding, the Judge found that there was insufficient evidence to justify imposing a bond during the Presidential review period. (*Id.* at 12).

III. STANDARD OF REVIEW

When reviewing an initial determination, “the Commission may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, the initial determination of the

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administrative law judge.... The Commission may also make any findings or conclusions that in its judgment are proper based on the record in the proceeding.” 19 C.F.R. § 210.45(c). In this respect, “the Commission is not an appellate court, but is the body responsible for making the final agency decision. On appeal, only the Commission’s final decision is at issue.” *Certain Bearings and Packaging Thereof*, Inv. No. 337-TA-469, Comm’n Op. at 6 (Dec. 2004). Commission practice in this regard is consistent with the Administrative Procedure Act. *See, e.g., Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Comm’n Op. at 5 (Aug. 1, 2007).

IV. ISSUES UNDER REVIEW

As discussed above, the Commission has determined to review the ID’s findings concerning claim construction and infringement with respect to claims 6 and 13 of the '336 patent. (Notice at 3). The Commission has also determined to review the ID’s findings regarding whether a domestic industry still exists in light of TPL relinquishing its right to license the '336 patent, whether Complainants have satisfied the economic prong of the domestic industry requirement, and the ID’s statement that Complainants do not need to show that at least one of their licensees practices the patent-in-suit to demonstrate a licensing-based domestic industry. (*Id.* at 4). The Commission has posed four specific questions with respect to those issues. OUII’s responses to those questions are set forth below.

A. OUII’s Response to Commission Question No. 1

With respect to the Accused Products using so-called “current-starved technology,” specifically identify which accused chips are implicated, cite to the relevant evidence of record, and discuss whether those products satisfy the “entire oscillator” limitation of claims 6 and 13 of the '336 patent.

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The Commission's first question asks which accused products use current-starved technology, and whether such products satisfy the "entire oscillator" limitation of claims 6 and 13 of the '336 patent. (Notice at 3). For the reasons set forth below, OUII is of the view that the evidence shows that all of the remaining accused products, which are identified in Exhibit A hereto, use current-starved technology, and none of those products satisfy the "entire oscillator" limitation of claims 6 and 13 of the '336 patent.

Complainants contend that the accused products satisfy the "entire oscillator" limitation of claims 6 and 13 of the '336 patent by employing ring oscillators within phase-locked loops ("PLL") to generate clock signals. (See Compl. Post-Hearing Br. at 13 (June 28, 2013)). These PLLs generate clock signals using an external reference frequency. (Hearing Tr. (Oklobdzija) at 375:6-12) ("This is a reference that I rely on and a reference that I relied stable, or it's a reference that I want to be – I want this clock to run with respect to that reference.[] Now, that reference comes from outside."). Dr. Oklobdzija thus testified:

The system clock -- and I said it many times here, also. The system clock is supplied by the on-chip ring oscillator. In other words, the ring oscillator generates the clock, and that is the timing signal that goes and clocks the CPU.

The PLL, the purpose of the PLL is to set that VCO into a desired range, as we have seen also here, through the formulas, which says, "Okay, we want it to be here; no, we want it to shift over there." And that is done. How do you do it? Because you cannot multiply. You use the second reference and say, "Okay, with respect to that reference, I want to be 20 yards away, or with respect to this reference I want to be 5 yards away from it, or with respect to this reference I want to be 100 yards away."

So you need the reference in order to set it where you want to set it. This is why reference is needed. So what PLL does, it needs the reference to put it where it doesn't want to put it, because PLL doesn't know. PLL can only say, "Okay, where do you want me to put it?" "I'll put it to be double of that or twice or four-thirds or something like that," and this is where PLL will set it.

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(Hearing Tr. (Oklobdzija) at 1051:23-1052:24).

Dr. Oklobdzija further testified that the alleged ring oscillators rely solely on inverter delay to generate clock signals:

Q. The ring oscillator generates a clock signal, but does it rely on an external clock generator to generate a clock signal?

A. As I explained in my explanation of how ring oscillators oscillate, everyone in this courtroom can conclude that it does not rely on anything else but on delay between -- delays that inverters introduce in the loop.

(Hearing Tr. (Oklobdzija) at 414:7-14). He explained that a PLL functions like a water faucet.

(Hearing Tr. (Oklobdzija) at 1058:19-24). With a water faucet, “you are controlling how much water goes through, and that affects how fast or how slow it’s going to oscillate.” (Hearing Tr. (Oklobdzija) at 1058:19-24). Just as a water faucet controls the flow of water, delay elements in the alleged ring oscillators control the frequency of oscillation. (*Id.*). But these delay elements are controlled by PLLs based on external references using a comparator to set the delay so as to generate a clock signal at the desired frequency. (Hearing Tr. (Oklobdzija) at 385:17-386:22).

In other words, the PLL controls the delay that Dr. Oklobdzija admits is relied on by the alleged oscillator/clock to generate a clock signal:

Q. Now, changing the off-chip crystal frequency FIN in this equation will result in a change of the PLL's output frequency. Correct?

A. Because the phase comparator will see the difference and will try to adjust the VCO closer so that they match.

Q. So the answer to my question is yes?

A. It would be changed – the output frequency would be changed if the input frequency changes. That's what PLL does.

(Hearing Tr. (Oklobdzija) at 967:12-21). The PLL thus controls clock frequency by current-starving the delay elements. (Hearing Tr. (Oklobdzija) at 386:14-22) (“So the current source

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does adjust the frequency, the frequency of oscillations – or the frequency of the generated clock signal is being adjusted by current-starving”). As discussed below, all of the remaining accused products use current-starved technology so as to generate a clock signal at the desired frequency.

Exhibit A lists the remaining accused products. (Exh. A). This list is a subset of the accused products identified in the ID, because the ID identifies some products that are no longer at issue for purposes of the Commission’s review. (*See* ID at 11, App. A). For example, Appendix A of the ID lists Acer, Amazon, and Kyocera products that are no longer part of this investigation because the Commission has terminated the investigation as to those parties. (*See* Notice (Sept. 20, 2013); Notice (Nov. 25, 2013)). Additionally, the ID lists Nintendo products that are not accused of infringing claims 6 and 13 of the '336 patent, and thus are not relevant to the Commission’s review of infringement with respect to those claims. (*See* ID at 11, App. A; Complainants’ Initial Post-Hearing Brief at 161-167 (June 28, 2013)). Finally, the ID lists products incorporating those processors listed on page 88 of the ID as to which the Commission has determined not to review the ID’s finding that Complainants failed to satisfy their burden of proof. (*See* Notice at 3-4; ID at 88, 119). Accordingly, the remaining accused products, set forth in Exhibit A, include those Barnes & Noble, Garmin, HTC, Huawei, LG, Novatel Wireless, Samsung, and ZTE products that do not use those processors identified on page 88 of the ID.

The remaining accused products use one of the following processors, [REDACTED]
[REDACTED]: (i) Texas Instruments OMAP3530, OMAP3611, OMAP3621, OMAP4430, and OMAP4470 processors (“TI OMAP Processors”); (ii) Qualcomm [REDACTED]
[REDACTED]
[REDACTED] processors (“Qualcomm Processors”); and (iii) Samsung SC54412, S5PC111, S5PC111AAO, S5PC111AAX, and S5PC210 processors (“Samsung Processors”). (*See* Exh. A;

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RX-1024C; RX-1025C; RX-1026C; RX-1027C; RX-1029C; RX-1031C; RX-1032C; RX-1033C; Hearing Tr. 1132-1138). With regard to the TI OMAP Processors, Texas Instruments' witness, Dr. Barhoun, confirmed [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
(Hearing Tr. at 203:18-24). The Samsung Processors [REDACTED]

[REDACTED] (Hearing Tr. (Oklobdzija) at 989:11-15 [REDACTED]
[REDACTED]
[REDACTED]). And

finally, the Qualcomm Processors [REDACTED]. (Hearing Tr. (Subramanian) at 1158:24-1159:7 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]).

The evidence thus shows that the following accused products ("Current-Starved Products") use current-starved technology:

Respondent	Accused Product(s)
Barnes & Noble	[REDACTED]
Garmin	[REDACTED]
HTC	[REDACTED]
Huawei	[REDACTED]

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LG	
Novatel Wireless	
Samsung	
ZTE	

(See Exh. A; RX-1024C; RX-1025C; RX-1026C; RX-1027C; RX-1029C; RX-1031C; RX-1032C; RX-1033C; Hearing Tr. 1132-1138).

With respect to infringement, OUII is of the view that the ID correctly found that the accused products, and specifically, the Current Starved Products, do not meet the “entire oscillator” limitation of claims 6 and 13 of the '336 patent. In this regard, the parties advanced the following proposed constructions for this limitation:

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Term	Proposed Constructions		
	Complainants	Respondents	Staff
“an entire oscillator disposed upon said integrated circuit substrate” (claims 6 and 13)	an oscillator that is located entirely on the same semiconductor substrate as the central processing unit	an oscillator that is located entirely on the same semiconductor substrate as the CPU and does not rely on a control signal or an external crystal/clock generator to generate a clock signal	an oscillator that includes all components that determine oscillator frequency located on the same semiconductor substrate as the CPU

(Order No. 31 (April 18, 2013) at 40). Consistent with the specification and prosecution history of the '336 patent, the Judge’s *Markman* Order construed the phrase “an entire ring oscillator variable speed system clock in said single integrated circuit” to mean “a ring oscillator variable speed system clock that is located entirely on the same semiconductor substrate as the CPU and does not rely on a control signal or an external crystal/clock generator to generate a clock signal.” (*Id.*). For the reasons set forth in the *Markman* Order, the constructions should also be adopted by the Commission. (*Id.* at 20, 40).³

With respect to the Current-Starved Products, each employs [REDACTED] [REDACTED] (Hearing Tr. (Subramanian) at 1295:25-1296:10). [REDACTED] (*Id.* at 1299:16-1301:24). This is not disputed – even Dr. Oklobdzija acknowledged that there is [REDACTED] [REDACTED] (Hearing Tr. (Oklobdzija) at 834:12-24). [REDACTED] [REDACTED] (*Id.* at 836:1-19).

Accordingly, it is axiomatic that the accused clocks rely on external crystals or clock generators

³ The parties arguments with respect to this limitation were essentially the same as the arguments with respect to the corresponding limitations of claims 1 and 11 (*see id.* at 40-41), which the Commission has determined not to review.

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to generate clock signals. Because each alleged oscillator in the accused Current-Starved Products requires [REDACTED], the “entire oscillator” is not disposed upon a single integrated circuit, as claims 6 and 13 require. The Current-Starved Products thus do not meet the claims.

Accordingly, OUII is of the view that the evidence shows that all of the remaining accused products, which are identified in Exhibit A, use current-starved technology, and thus that none of those products satisfy the “entire oscillator” limitation of claims 6 and 13 of the '336 patent.

B. OUII’s Response to Commission Question No. 2

With respect to Complainants’ alleged license[]-based domestic industry, is there a continuing revenue stream from the existing licenses and is the licensing program ongoing? If the licensing program is ongoing, which complainant(s) is/are investing in the program and what is the nature (not amounts) of those investments?

The Commission’s second question asks whether there is a continuing revenue stream from Complainants’ existing licenses, and whether Complainants’ licensing program is ongoing.

(Notice at 5). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. OUII's Response to Commission Question No. 3

Please describe the claimed expenditures for patent prosecution and litigation and explain how they relate to Complainants' domestic industry in licensing the '336 patent. Please provide an

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estimate of the proportion of the total claimed investments in licensing the '336 patent accounted for by the claimed patent prosecution and litigation expenditures.

The Commission's third question asks the parties to address claimed domestic industry expenditures related to patent prosecution and litigation activities. (Notice at 5). [REDACTED]

[illegible]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] On the

other hand, in 2006 and 2007, Complainants were involved in litigation with Fujitsu, Matsushita, JVC, NEC, and Toshiba. (See Compl. at ¶ 149). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] OUII is of the view that patent prosecution and litigation expenditures (which are not separately accounted for only in 2006 and 2007) represent a relatively small portion of Complainants' total claimed investment in their domestic industry licensing the '336 patent.

D. OUII's Response to Commission Question No. 4

Discuss, in light of the statutory language, legislative history, the Commission's prior decisions, and relevant court decisions, including InterDigital Communications, LLC v. ITC, 690 F.3d 1318 (Fed. Cir. 2012), 707 F.3d 1295 (Fed. Cir. 2013) and

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Microsoft Corp. v. ITC, Nos. 2012-1445 & -1535, 2013 WL 5479876 (Fed. Cir. Oct. 3, 2013), whether establishing a domestic industry based on licensing under 19 U.S.C. § 1337(a)(3)(C) requires proof of “articles protected by the patent” (i.e., a technical prong). Assuming that is so, please identify and describe the evidence in the record that establishes articles protected by the asserted patent.

The Commission’s fourth question asks whether establishing a domestic industry based on licensing requires proof of “articles protective by the patent,” and what evidence in the record establishes articles protected by the asserted patent. (Notice at 5). Under preexisting Commission precedent, Complainants were not required to demonstrate that they or one of their licensees practiced the asserted patent in order to meet the domestic industry requirement with respect to their licensing program. *See, e.g., Certain Semiconductor Chips With Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-432, Unreviewed Initial Determination at 11 (January 24, 2001). However, the Commission appears to have recently found that such a showing is required. *See Certain Computers and Computer Peripheral Devices and Components Thereof and Products Containing Same*, Inv. No. 337-TA-841, Notice at 3 (Dec. 19, 2013).⁴ Should the Commission determine that Complainants must show “articles protected by the patent” for purposes of the domestic industry requirement by demonstrating that they or one of their licensees practices the asserted patent, OUII submits that there is insufficient evidence in the record to do so.

Under Section 337(a)(2), a complainant may show that a domestic industry exists or is in the process of being established under any of the three statutory grounds set forth in Section 337 (a)(3), which provides:

⁴ As of the date of this filing, no public version of the underlying Commission opinion is available.

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(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...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).

Under prior Commission precedent, a complainant could meet the domestic industry requirement simply by showing substantial investments in a licensing program to exploit the asserted patent. *See, e.g., Certain Semiconductor Chips With Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-432, Unreviewed Initial Determination at 11 (January 24, 2001) (“[A]s a matter of law, a complainant is not required to show that it or one of its licensees practices a patent-in-suit in order to find that a domestic industry exists pursuant to 19 U.S.C. § 1337(a)(3)(C), which pertains to licensing.”).

For example, in *3G Mobile Handsets*, Judge Luckern found that “a Section 337 complainant can satisfy the domestic industry requirement solely by demonstrating licensing activities related to the patent or patents asserted in the investigation.” *Certain 3G Mobile Handsets and Components Thereof*, Inv. No. 337-TA-613, Order No. 42 at 4-5 (March 10, 2009) (“*3G Mobile Handsets*”). On appeal, the Federal Circuit rejected challenges to the Commission’s finding that Complainant met the domestic industry requirement based solely on licensing activities:

[T]he Commission has consistently ruled that a domestic industry can be found based on licensing activities alone. *See, e.g., Certain Integrated Circuits, Chipsets, and Products Containing Same Including Televisions, Media Players, and Cameras*, Inv. No. 337-TA-709, Order No. 33 (Jan. 5, 2011); *Certain Semiconductor Chips with Minimized Chip Package Size and Products*

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Containing Same, Inv. No. 337-TA-605, Order, at 118 (Dec. 1, 2008); *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same (III)*, Inv. No. 337-TA-630, Order No. 31 (Sept. 16, 2008); *Certain 3G Wideband Code Division Multiple Access (WDCMA) Handsets and Components Thereof*, Inv. No. 337-TA-601, Order No. 20 (June 24, 2008); *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-559, Order No. 24, at 84 (June 21, 2007). In those cases, the Commission has held that subparagraph (C) requires a showing of substantial licensing activities related to the asserted patent in order to support a finding as to the existence of a domestic industry based on licensing; it has not, however, required that the licensed product be manufactured in this country.

Interdigital Commc'ns, LLC v. Int'l Trade Comm'n, 690 F.3d 1318, 1330 (Fed. Cir. 2012).

In denying a petition for rehearing, the Federal Circuit further stated:

Under the clear intent of Congress and the most natural reading of the 1988 amendment, section 337 makes relief available to a party that has a substantial investment in exploitation of a patent through either engineering, research and development, or licensing. It is not necessary that the party manufacture the product that is protected by the patent, and it is not necessary that any other domestic party manufacture the protected article. As long as the patent covers the article that is the subject of the exclusion proceeding, and as long as the party seeking relief can show that it has a sufficiently substantial investment in the exploitation of the intellectual property to satisfy the domestic industry requirement of the statute, that party is entitled to seek relief under section 337.

Interdigital Commc'ns, LLC v. Int'l Trade Comm'n, 707 F.3d 1295, 1303-1304 (Fed. Cir.

2013).⁵ But although the Federal Circuit affirmed the Commission's practice in this regard, the

Interdigital decisions do not appear to address the issue of how a complainant relying on

licensing may prove that its domestic industry relates to "articles protected by the patent."

It appears that several days ago, however, the Commission for the first time held that a domestic industry based on licensing under 19 U.S.C. § 1337(a)(3)(C) requires proof of a technical prong. Here, Complainants were relying solely on a licensing domestic industry, and

⁵ The other case cited in the Commission question, *Microsoft Corp. v. Int'l Trade Comm'n*, 731 F.3d 1354 (Fed. Cir. 2013), did not deal with a domestic industry based on licensing. *Id.* at 1361-62.

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did not attempt to prove the “technical prong” of the domestic industry requirement. (*See* ID at 296; Compl.’s Initial Post-Hearing Br. at 180-190 (June 28, 2013); Compl.’s Post-Hearing Reply Br. at 76-84 (July 10, 2013)). It appears based on OUII’s review of the record that there is thus insufficient evidence to establish that any licensed product practices any claim of the '336 patent.

V. REMEDY, PUBLIC INTEREST, AND BOND

In addition to requesting briefing on the questions discussed above, the Commission also requested written submissions concerning the form of the remedy issued in this investigation; the effect of any remedy on the public interest; and the amount of bond that should be imposed if a remedy is ordered. (Notice at 5). Each of these issues is discussed below.

A. Remedy

The Commission has “broad discretion in selecting the form, scope and extent of the remedy.” *Viscofan, S.A. v. United States Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). For the reasons set forth herein, OUII is of the view that the appropriate remedy in this investigation will be a limited exclusion order.

1. Limited Exclusion Order

The Judge has recommended issuance of a limited exclusion order if a violation of Section 337 is found in this investigation. (RD at 7). In this respect, a limited exclusion order is normally the appropriate remedy when a violation has occurred. 19 U.S.C. § 1337(d)(1) (“[i]f the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States”); *see also Certain Audio Processing Integrated Circuits and Products Containing Same*, Inv. No. 337-TA-538, Commission Opinion at 7 (Nov. 7, 2006) (“The Commission is authorized to issue a limited

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exclusion order when the Commission determines that there is a violation of section 337.”). A general exclusion order, in contrast, “is an extraordinary trade remedy,” which is available only if specific statutory criteria are met. *Certain Plastic Molding Machines II*, Inv. No. 337-TA-462, Commission Opinion at 22, USITC Pub. 3609 (July 2003); *see generally* 19 U.S.C. § 1337(d)(2). Here, Complainants have not requested a general exclusion order, and OUII therefore believes that the appropriate remedy in this investigation will include a limited exclusion order directed only at the infringing products of the remaining named Respondents, except for Nintendo.⁶

Accordingly, should a violation be found, the Staff recommends that a limited exclusion order issue.

2. Cease and Desist Orders

The Judge did not recommend that any cease and design orders issue. (RD at 9). Under Commission precedent, cease and desist orders are warranted with respect to respondents that maintain commercially significant U.S. inventories of the infringing product. *See, e.g.,* , Comm’n Op. at 73 (June 3, 2009); *Certain Laser Bar Code Scanners & Scan Engines, Components Thereof & Products Containing Same*, Inv. No. 337-TA-551, Comm’n Op. at 22-23. In this regard, Respondents Barnes & Noble, [REDACTED] [REDACTED] stipulated to the existence of inventories in the United States. (RD at 14). However, the Judge found that Complainants have failed to provide any explanation or to adduce any facts to show that these Respondents’

⁶ As noted in § I, *supra*, with respect to Nintendo, Complainants only assert claims 1 and 11. (See Compl. Post-Hearing Br. at 161-167 (June 28, 2013)). However, the Commission has only determined to review the ID’s infringement findings with respect to claims 6 and 13. (Notice at 3). Because the Commission has determined not to review the ID’s finding that the accused Nintendo products do not infringe claims 1 and 11, it does not appear that a remedy would be proper as to Nintendo.

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respective inventories are commercially significant. (*Id.*). Accordingly, should a violation be found, the Staff recommends that no cease and desist orders issue.

B. Public Interest

In determining the remedy, if any, for a violation of Section 337, the Commission must consider the effect of the remedy on certain public interest considerations: (1) the public health and welfare; (2) competitive conditions in the United States economy; (3) the production of like or directly competitive products in the United States; and (4) United States consumers. 19 U.S.C. §§ 1337(d) and (f). In this investigation, the Commission delegated to the Administrative Law Judge the authority to take evidence, make findings, and issue a recommended determination on the statutory public interest factors. 77 Fed. Reg. 51572 (August 26, 2012). After considering the evidence, the Judge found that the public interest factors do not warrant denying a remedy in this investigation. (RD at 327).

Respondents assert any that remedial orders would negatively impact competitive conditions in the United States economy and adversely affect United States consumers by substantially reducing product availability in the market and preventing consumers from receiving repair or replacement services under existing warranty and/or insurance contract claims. (ID at 321). With respect to product availability, Respondents argue that they account for a significant market share with respect to smartphones and [REDACTED]. (*Id.*). However, in this respect, Respondents did not offer any evidence quantifying the effect that a remedial order would have, especially in light of that Complainants' have already licensed numerous other companies, including Apple, Motorola, RIM, Nokia, Pantech, Toshiba, Sony, Sharp, HP, Fujitsu, ASUSTeK, and NEC. (*See* CX-0706). Respondents also argue that sales lost due to a remedial order may limit Respondents' future market participation. (*Id.*). Finally,

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Respondents argue that an exclusion order would give Complainants significant asymmetric bargaining power. (*Id.*). However, with respect to any exclusion order, it can be argued that the patent holder will have increased bargaining power and that respondents will lose sales. Under these circumstances, OUII does not believe that public interest considerations militate against entry of the proposed remedial order in this investigation.

C. Bond

Finally, if the Commission determines to enter an exclusion order and/or cease and desist orders in this investigation, the affected articles will still be entitled to entry and sale under bond during the 60-day Presidential review period. The amount of such bond must “be sufficient to protect the complainant from any injury.” 19 U.S.C. § 1337(j)(3); *see also* 19 C.F.R. § 210.50(a)(3). The Commission typically sets the Presidential review period bond based on the price differential between the imported and infringing product, or based on a reasonable royalty. *See, e.g., Certain Ink Cartridges and Components Thereof*, Inv. No. 337-TA-565, Comm’n Op. at 63 (November 2007) (setting bond based on price differentials); *Certain Plastic Encapsulated Integrated Circuits*, Inv. No. 337-TA-315, Comm’n Op. on Issues Under Review and on Remedy, the Public Interest, and Bonding, at 45, USITC Pub. 2574 (November 1992) (setting the bond based on a reasonable royalty). However, where the available pricing and royalty information is inadequate, the bond may be set at 100% of the entered value of the accused product. *See, e.g., Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Products Containing Same*, Inv. No. 337-TA-372, Comm’n Op. on Remedy, the Public Interest and Bonding at 15, USITC Pub. 2964 (May 1996).

It is Complainants’ burden to establish support for their requested bonding amount. *See, e.g., Certain Liquid Crystal Display Devices*, Inv. No. 337-TA-631, Comm’n Op. at 28 (July 10,

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2009). Should Complainants fail to meet their burden, the Commission may determine that no bond should be imposed during the Presidential review period. *Id.* Here, the Judge did not recommend the imposition of a bond during the 60-day Presidential review period. (RD at 12).

Complainants argue that a price differential analysis is inappropriate because the investigation concerns a wide variety of products, pricing variations, and distribution models. (RD at 11). Complainants therefore requested that a bond be set at 100 percent of the entered value. In this regard, however, the Judge found that Complainants failed meet there burden to justify imposition of any bond, noting that Complainants did not cite to any evidence in the record in support of their requested bond rate. (*Id.*).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Respectfully submitted,

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December 23, 2013

PUBLIC VERSION

EXHIBIT A

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**EXHIBIT A
REMAINING ACCUSED PRODUCTS**

Respondent	Remaining Accused Product	Processor	Cite
Barnes & Noble	[REDACTED]	[REDACTED]	RX-1024C; Tr. 1137:10-24; List at 3
	[REDACTED]	[REDACTED]	RX-1024C; Tr. 1137:10-24; List at 3
	[REDACTED]	[REDACTED]	RX-1024C; Tr. 1137:10-24; List at 3
	[REDACTED]	[REDACTED]	RX-1024C; Tr. 1137:10-24; List at 3
Garmin	[REDACTED]	[REDACTED]	RX-1025C; Tr. 1137:25-1138:15
	[REDACTED]	[REDACTED]	RX-1025C; Tr. 1137:25-1138:15
	[REDACTED]	[REDACTED]	RX-1025C; Tr. 1137:25-1138:15
	[REDACTED]	[REDACTED]	RX-1025C; Tr. 1137:25-1138:15
HTC	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18
	[REDACTED]	[REDACTED]	RX-1026C; Tr. 1132:23-1133:18

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Huawei	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
	[REDACTED]	[REDACTED]	RX-1027C; Tr. 1134:1-12
LG	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
	[REDACTED]	[REDACTED]	RX-1029C; Tr. 1135:7-21
Novatel Wireless	[REDACTED]	[REDACTED]	RX-1031C; Tr. 1136:20-1137:1
Samsung	[REDACTED]	[REDACTED]	RX-1032C; Tr. 1135:22-1136:2
	[REDACTED]	[REDACTED]	RX-1032C; Tr. 1135:22-1136:2
	[REDACTED]	[REDACTED]	RX-1032C; Tr. 1135:22-1136:2
	[REDACTED]	[REDACTED]	RX-1032C; Tr. 1135:22-1136:2

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[illegible]

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			RX-1032C; Tr. 1135:22-1136:2
ZTE			RX-1033C; Tr. 1136:3-19
			RX-1033C; Tr. 1136:3-19
			RX-1033C; Tr. 1136:3-19
			RX-1033C; Tr. 1136:3-19
			RX-1033C; Tr. 1136:3-19
			RX-1033C; Tr. 1136:3-19

PUBLIC VERSION

EXHIBIT B

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN WIRELESS CONSUMER
ELECTRONICS DEVICES AND
COMPONENTS THEREOF**

Investigation No. 337-TA-853

[PROPOSED] LIMITED EXCLUSION ORDER

The Commission has determined that there is a violation of Section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the unlawful importation, sale for importation, and sale after importation by Respondents Barnes and Noble, Inc. (“B&N”); Garmin Ltd., Garmin International, Inc., and Garmin USA, Inc. (“Garmin”); HTC Corporation (“HTC”); Huawei Technologies Co, Ltd. and Huawei North America (“Huawei”); LG Electronics, Inc. and LG Electronics U.S.A., Inc. (“LG”); Novatel Wireless, Inc. (“Novatel”); Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (“Samsung”); and ZTE Corporation and ZTE (USA) Inc. (“ZTE”) of certain wireless consumer electronics devices and components thereof by reason of infringement of claims 6 and 13 of U.S. Patent No. 5,809,336 (“the '336 patent”).

Having reviewed the record of this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that the appropriate form of relief is a limited exclusion order prohibiting the unlicensed entry of covered wireless consumer electronics devices and components thereof manufactured for or on behalf of B&N, Garmin, HTC, Huawei, LG, Novatel, Samsung, and ZTE, or any of their affiliated companies, parents, subsidiaries, licensees, or other related business entities, or their successors or assigns.

The Commission has also determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude the issuance of the limited exclusion order, and that there shall be a bond of 0.058% for all covered products during the Presidential review period.

Accordingly, the Commission hereby **ORDERS** that:

1. Wireless consumer electronics devices and components thereof covered by one or more of claims 6 and 13 of the '336 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of, B&N, Garmin, HTC, Huawei, LG, Novatel, Samsung, or ZTE, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns, are excluded from entry for consumption into the United States, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, for the remaining term of the patent, except under license of the patent owner or as provided by law.
2. Notwithstanding paragraph 1 of this Order, the wireless consumer electronics devices and components thereof are entitled to entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption under bond in the amount of 0.058% of the entered value of such articles pursuant to subsection (j) of Section 337 (19 U.S.C. § 1337(j)) and the Presidential Memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43,251), from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is

approved or disapproved but, in any event, not later than sixty days after the date of receipt of this Order.

3. At the discretion of U.S. Customs and Border Protection (“CBP”) and pursuant to procedures that it establishes, persons seeking to import wireless consumer electronics devices and components thereof that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order. At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.
4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to wireless consumer electronics devices and components thereof imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.
5. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission’s Rules of Practice and Procedure (19 C.F.R. § 210.76).
6. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and CBP.
7. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

Lisa R. Barton
Acting Secretary to the Commission

Issued: _____, 2013

CERTIFICATE OF SERVICE

The undersigned certifies that on 4/4/2016 he caused the foregoing to be filed with the Commission and served upon the parties in the manner indicated below:

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