

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**

**REPLY BRIEF OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS  
ON THE ISSUES UNDER REVIEW AND ON REMEDY,  
THE PUBLIC INTEREST, AND BONDING**

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**I. INTRODUCTION**

The Office of Unfair Import Investigations (“OUII”) respectfully submits this reply to: (1) Complainants’ Opening Brief on Commission Review of Initial Determination (“Compl. Br.”); (2) Respondents’ Joint Submission in Response to the Commission’s Notice of Partial Review (“Resp. Br.”); (3) Respondents’ Joint Brief on Remedy, Bonding, and the Public Interest (“Resp. Remedy Br.”); and (4) public interest comments submitted by non-parties CTIA - The Wireless Association (“CTIA”), Spring Spectrum, L.P. (“Sprint”), and United States Cellular Corporation (“U.S. Cellular”).

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”). (*See* 78 Fed. Reg. 71643, 71644 (November 29, 2013) (“Notice”). The Commission has 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 71644-45).

As discussed in OUII’s initial submission (“OUII Br.”), 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. Furthermore, OUII is of the view that Complainants have made substantial investments in a licensing program relating to the ‘336 patent, and that the Judge’s factual findings regarding domestic industry should be affirmed. Should the

Commission, however, find a violation of Section 337, OUII is of the view that the appropriate remedy in this investigation will be a limited exclusion order, and that the appropriate Presidential review period bond is 0.058% of the entered value of the imported products. Finally, OUII is of the view that the public interest has not been shown to weigh against the issuance of a limited exclusion order. For the reasons set forth below, the private parties' arguments to the contrary should be rejected.

## II. ISSUES UNDER REVIEW

### A. OUII's Reply Regarding 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.*

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 71644). As discussed below, the evidence shows that: (1) [REDACTED] ("Accused Products") use current-starved technology; and (2) none of those products satisfies the "entire oscillator" limitation of claims 6 and 13 of the '336 patent. (See OUII Br. at 6-12).

With respect to the Accused Products, the parties agree that [REDACTED]

[REDACTED] to determine the frequency of oscillation.<sup>1</sup> (See Compl. Br. at 3 [REDACTED])

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<sup>1</sup> In their brief, Complainants identify significantly more remaining accused Garmin products than OUII. (See Compl. Br. at 6; OUII Br., Exh. A, at 1). In this regard, OUII only included products that were accused of infringing the claims at issue for purposes of the Commission's review (*i.e.*, claims 6 and 13 of the '336 patent). (OUII Br. at 8). Complainants, however, have identified the following additional Garmin products: (i) GMR 404xHD; (ii) GMR

[REDACTED] Resp. Br.  
at 12 [REDACTED]

[REDACTED]. The parties, however, disagree as to whether the Accused Products satisfy the “entire oscillator” limitation of claims 6 and 13. (Compl. Br. at 22-32; Resp. Br. at 4-15; OUII Br. at 6-12).

In this regard, Complainants contend that the Accused Products meet the “entire oscillator” limitation by providing a ring oscillator in a phase-locked loop (“PLL”) to generate a clock signal to clock the central processing unit (“CPU”). (Compl. Br. at 24). According to Complainants, the ring oscillator alone generates the clock signal without relying on an external crystal, although other PLL circuitry may regulate frequency with respect to a reference signal from an external crystal. (*Id.* at 24-25). In presenting this theory, however, Complainants advance a position that is inconsistent with the specification of the '336 patent and its prosecution history, and thus with the claims.

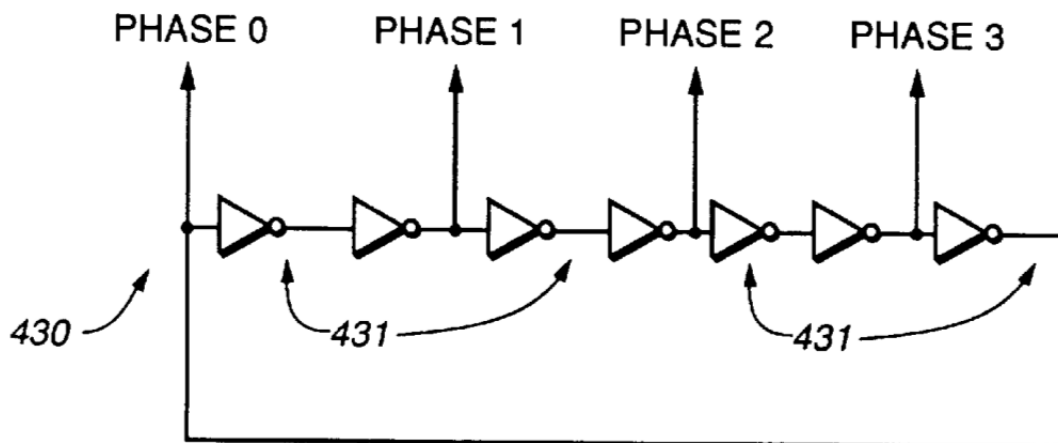
The '336 patent, titled “High Performance Microprocessor Having Variable Speed System Clock,” discloses a microprocessor system using a variable speed system clock employing an optimal CPU clock scheme. (JXM-0001, '336 patent, Abstract, Figs. 17-19, col. 16:43-17:10). According to the patent, conventional CPU designs “must be clocked a factor of two slower than their maximum theoretical performance, so they will operate properly in wors[t] case conditions.” (*Id.* at col. 16:50-53). “Temperature, voltage, and process [variations] all

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406 xHD; (iii) GMR 604 xHD; (iv) GMR 606 xHD; (v) GMR 1204 xHD; (vi) GMR 1206 xHD; (vii) GPSMAP 720; (viii) GPSMAP 720s; (ix) GPSMAP 740; and (x) GPSMAP 740s. (Compl. Br. at 6). But, these additional products are not accused of infringing claims 6 and 13 of the '336 patent. (*See* Compl. Pre-Hearing Statement, Exh. 4; Compl. Post-Hearing Br., Exh. B, at B-20). Thus, with respect to claims 6 and 13 of the '336 patent, only four [REDACTED] products remain at issue: [REDACTED]. (*See id.*; OUII Br. at 9, Exh. 1).

affect transistor propagation delays,” and thus maximum CPU clock speed. (*See id.* at col. 16:47-48). However, by implementing the system clock entirely on-chip using a ring oscillator, variations in temperature, voltage, and process will affect the ring oscillator in the same manner as they affect the processor. (*See id.* at col. 16:59-17:10). Thus, “CPU 70 (as shown below in Fig. 17) will always execute at the maximum frequency possible, but never too fast.” (*Id.* at 17:1-2).

According to the '336 patent, the ring oscillator variable speed clock 430 can be implemented using the type of ring oscillator shown in Fig. 18:



(*Id.*, Fig. 18). This bi-stable loop of seven inverters generates a clock signal at a speed that depends on the propagation delay through those inverters. (*See id.* at col. 16:63-17:2). “At room temperature, the frequency will be in the neighborhood of 100 MHz. At 70 degrees Centigrade, the speed will be 50 MHz.” (*Id.* at col. 16:60-63). Because the clock is implemented on-chip using the same transistors as the CPU, its performance varies with the CPU’s performance, thus compensating for temperature, voltage, and process variations and allowing the CPU to operate at the highest possible speed. (*See id.* at col. 16:59-17:10). The clock speed is determined solely

by its operating parameters (*i.e.*, temperature, voltage, and process), as there are no mechanisms provided to otherwise vary or control its operating frequency. In this manner, the clock can sometimes be operated at speeds higher than worst case conditions would permit.

Contrary to the '336 patent, the clocks in the Accused Products are crystal-based, relying on external crystals to generate fixed-frequency clock signals. (Hearing Tr. (Subramanian) at 1213:5-14 (“We use PLLs so that the oscillation output...is very precisely controlled and fixed, and it does not vary due to, as a function of, or relative to PVT.”). The Accused Products thus exhibit the very problems that the '336 patent purports to solve — because they are fixed-frequency, they must be clocked at suboptimal frequencies so as to operate under worst-case conditions. (*Id.* at 1213:24-25). Moreover, the patentee explicitly distinguished such fixed-frequency designs during prosecution. (JXM-0016 at TPL853-02954560-61 (“The Magar teaching is well known in the art as a conventional crystal controlled oscillator. It is specifically distinguished from the instant case in that it is both fixed-frequency (being crystal based) and requires an external crystal or external frequency generator.”). The Accused Products thus do not use variable-speed oscillators as contemplated by the '336 patent, and therefore do not satisfy the “entire oscillator” limitation of claims 6 and 13.

Accordingly, the evidence shows that: (1) [REDACTED] use current-starved technology; and (2) none of those products satisfies the “entire oscillator” limitation of claims 6 and 13 of the '336 patent.

**B. OUII’s Reply Regarding 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: (1) whether there is a continuing revenue stream from Complainants' existing licenses; and (2) whether Complainants' licensing program is ongoing. (Notice at 5). With respect to their existing licensees, Complainants state that

[REDACTED]

[REDACTED].<sup>2</sup> (See Compl. Br. at 33).

[REDACTED]

[REDACTED] (*Id.*). Nonetheless, OUII submits that Complainants have shown that there licensing program is ongoing. (OUII Br. at 12-13; Hearing Tr. (D. E. Leckrone) at 131:8-14; Hearing Tr. (D. M. Leckrone) at 1568:25-1569:4; JX-0253C; Compl. Br. at 32-34).

The evidence thus shows that Complainants have an on-going licensing program, [REDACTED]

[REDACTED]

**C. OUII's Reply Regarding 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 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 71645). In this regard, Respondents argue that it is not possible to extract expenditures for patent prosecution and litigation activities from TPL's overall claimed domestic industry expenses, and that there is insufficient evidence to establish a nexus between those patent prosecution and litigation expenses and TPL's alleged licensing domestic industry. (Resp. Br. at 18-19, 23). However, to

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<sup>2</sup> [REDACTED]

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the contrary, OUII is of the view that the evidence shows that patent prosecution and litigation expenditures represent a relatively small portion of Complainants' total claimed investment in their domestic industry licensing the '336 patent. (*See* OUII Br. at 14-15).

Complainants claim [REDACTED] in domestic industry expenditures for salaries and benefits paid to employees engaged in activities in support of their licensing program [REDACTED] [REDACTED] (Hearing Tr. (Hannah) at 1751:24-1752:12; CX-0705C; Hearing Tr. (M. Leckrone) at 1542:8-1544:24, 1546:10-1547:1, 1548:19-1549:20, 1551:2-18, 1552:10-1555:9, 1564:9-1566:22). [REDACTED] [REDACTED] (Hearing Tr. (Hannah) at 1765:21-1767:4). [REDACTED] [REDACTED] [REDACTED] (*Id.* at 1783:4-6). [REDACTED] [REDACTED] (*Id.* at 1765:21-1767:4). [REDACTED] [REDACTED] [REDACTED] (Hearing Tr. (D. E. Leckrone) 132:5-16).

Through their MMP licensing program, Complainants have contacted over 400 potential licensees, and have entered [REDACTED] license agreements. (Hearing Tr. (D. M. Leckrone) at 1541:5-9; CX-708C). As part of this process, they prepare claim charts for prospective licensees. (*Id.* at 1549:13-1550:7). The claimed domestic industry expenditures include salary and benefits paid to employees engaged in these licensing activities. (Tr. (Hannah) at 1751:24-1752:12; CX-0705C; Hearing Tr. (M. Leckrone) at 1542:8-1544:24, 1546:10-1547:1, 1548:19-1549:20, 1551:2-18, 1552:10-1555:9, 1564:9-1566:22). [REDACTED]

[REDACTED]

[REDACTED] (See Hearing Tr. (Hannah) at 1765:21-1767:4). [REDACTED]

[REDACTED]

[REDACTED] (See Compl. at ¶ 149). In light of the relatively large number of potential licensees and Mr. Leckrone’s testimony regarding the activities of Complainants’ licensing employees (Hearing Tr. (M. Leckrone) at 1542:8-1544:24, 1546:10-1547:1, 1548:19-1549:20, 1551:2-18, 1552:10-1555:9, 1564:9-1566:22), OUII is of the view that patent prosecution and litigation expenditures [REDACTED] represent a relatively small portion of Complainants’ total claimed investment in their domestic industry licensing the '336 patent.

**D. OUII’s Reply Regarding 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 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 protected by the patent,” and what evidence in the record establishes that there are articles protected by the asserted patent. (Notice at 5). In this regard, 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, Init. Determin. at 11 (January 24, 2001) (“[A]s a matter of

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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.”). Here, the ID found that Complainants had made a substantial investment of [REDACTED] in a licensing program related to the '336 patent. (ID at 316).

Through this licensing program, Complainants contacted over 400 potential licensees, resulting in [REDACTED] license agreements, and over \$314 million in licensing revenue. (ID at 296).

According to Complainants, no more was required under prior Commission precedent. (Compl. Br. at 40, citing *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 707 F.3d 1295, 1299 (Fed. Cir. 2013)). Moreover, OUII notes that many of Complainants' licensees clearly manufacture products. (See CX-0706). Thus, OUII agrees that Complainants investments and resulting success in licensing the '336 patent is evidence that Complainants' alleged domestic industry exploits the '336 patent, and at least inferentially, may relate to articles protected by the patent.

However, the Commission appears to have recently held a domestic industry based on licensing under 19 U.S.C. § 1337(a)(3)(C) requires proof of a technical prong. 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). Should a technical prong analysis be required to show that a substantial investment relates to “articles protected by the patent,” OUII submits that there is insufficient evidence in the record to do so. Here, in light of Commission precedent, Complainants were relying solely on a licensing domestic industry, and 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)). Indeed, if the Commission determines that Complainants are now required to demonstrate the existence of an article protected by the asserted patent, Complainants

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request that the record be reopened and that the investigation be remanded to the Judge to take evidence and issue an initial determination. (Compl. Br. at 43). Under these circumstances, and in the absence of a technical prong analysis in the evidentiary record, OUII agrees with Complainants that a limited remand would be appropriate.

### **III. 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 any remedy to be 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 71645). OUII addresses below certain of the arguments raised by the private parties in their briefs, and by CTIA, Sprint, and U.S. Cellular in their public interest comments.

#### **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, if a violation is found, the appropriate remedy in this investigation will be a limited exclusion order (“LEO”).

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-

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538, Commission Opinion at 7 (Nov. 7, 2006) (“The Commission is authorized to issue a limited exclusion order when the Commission determines that there is a violation of section 337.”).

Here, Complainants have requested the issuance of a limited exclusion order. (Compl. Br. at 43-44). Should the Commission determine that a violation of Section 337 has occurred,

Respondents do not appear to challenge Complainants’ request. (*See* Resp. Remedy Br. at 3).

OUII is also of the view that the appropriate remedy would be a limited exclusion order directed at the infringing products of the remaining named Respondents, except for Nintendo.<sup>3</sup>

The parties, however, dispute the appropriate scope of the limited exclusion order, should one issue. (*See* Resp. Remedy Br. at 3-18). More specifically, Respondents contend that an LEO should be limited only to specific products and product categories adjudicated and found to infringe. (Resp. Remedy Br. at 3-9). Furthermore, Respondents request an exemption in the LEO for repair, replacement, warranty and service contracts. (Resp. Remedy Br. at 16-17). Respondents also contend that the LEO should not extend to downstream products under an *EPROMs* analysis. (Resp. Remedy Br. at 9-16). Finally, Respondents request that the LEO include a certification provision and relevant adjustment period. (*Id.* at 17-18). With the exception of a certification provision, OUII submits that Respondents’ requests are contrary Commission precedent.

Turning first to Respondents’ requested limitations and carve-outs (Resp. Remedy Br. at 3-9), OUII is of the view that Respondents have not proffered evidence justifying departure from

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<sup>3</sup> 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. (*See also* Resp. Br. at 2-3).

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the Commission's standard practice of covering all infringing products. *See Certain MEMs Devices & Products Containing the Same*, Inv. No. 337-TA-700, Comm'n Op. at 15 (May 13, 2011). Moreover, OUII's proposed LEO includes a certification provision that could presumably be used with respect to products that are not properly the subject of the Commission's exclusion order.

With respect to repair and replacement under warranty and service contracts, Respondents contend that an LEO exemption is necessary to protect U.S. consumers. (Resp. Remedy at 17). In support, Respondents cite to warranties for 9 different products. (*Id.*). However, these warranties only appear to relate to three products at issue in this investigation: (i) Samsung Galaxy Note (RX-1219); (ii) LG Lucid (RX-926C); and (iii) ZTE Chorus (RX-997C). The remaining warranties appear to relate to the products of terminated respondents (*i.e.*, Acer (RX-1218) and Amazon (RX-959C; RX-960C)) or to products that are not (or are no longer) accused (*i.e.*, Novatel (RX-998; RX-999) and ZTE (RX-996C)). OUII submits that while the Commission has determined in some investigations to grant a limited exception in this regard, such an exemption is not appropriate in this situation. *See Certain Personal Data & Mobile Commc'ns Devices & Related Software*, Inv. No. 337-TA-710, Comm'n Op. at 78-83 (Dec. 29, 2011) ("*Mobile Devices*").

In this regard, the evidence only shows Respondents' warranty obligations with respect to three of the Accused Products. (RX-1219; RX-926C; RC-997C). Thus, it does not appear that there is any evidence regarding Respondents' warranty obligations with respect to the vast majority of the Accused Products. (*See id.*) And, more importantly, it appears that Samsung, LG, and ZTE (*i.e.*, those Respondents for which at least some warranty evidence was provided) each manufacture devices using processors listed on page 88 of the ID. (*See Compl. Pre-Hearing*

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Statement, Exh. 4). These products have not been found to infringe claims 6 and 13 and are not the subject of the Commission's review. (*See* OUII Br. at 8). Accordingly, the LEO should not exclude Respondents' importation of those products. As the warranties at issue do not appear to require the manufacture to replace a phone with the exact same model, those manufactures could presumably offer substitute devices that would not be subject to exclusion under the LEO. Accordingly, it appears that the proposed LEO would not preclude Respondents from satisfying their warranty obligations. OUII therefore submits that a warranty/repair exemption is not necessary.

With respect to downstream products, Respondents contend that an *EPROMs*-factors analysis is therefore required. (Resp. Remedy Br. at 9-16). However, it does not appear that there are any downstream products at issue in this investigation. The putatively infringing devices are not the semiconductor components used in Respondents' products at issue. Instead, Complainants accuse Respondents' products themselves. (Compl. Br. at 5-7). Indeed, each limitation of the asserted claims 6 and 13 of the '336 patent cannot be met by the microprocessors at issue (as Respondents imply) because those claims require "an off-chip external clock." OUII is thus of the view that there are no downstream products at issue and no *EPROMs*-factors analysis is required.

Finally, with respect to certification, a certification provision is now standard in all Commission exclusion orders so as to give U.S. Customs and Border Protection the flexibility to do its job properly. *See, e.g., Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. No. 337-TA-744, Comm'n Op. at 21, USITC Pub. 4384 (Mar. 2013) ("Furthermore, it has been Commission practice for the past several years to include certification



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provisions in its exclusion orders to aid CBP.”). Such a provision is included OUII’s proposed LEO.

Should the Commission determine that there has been a violation of Section 337, OUII therefore submits that the appropriate remedy will be a limited exclusion order as set forth in OUII’s initial brief. (OUII Br., Exh. B).

### **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 recommend 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, as well as non-parties CTIA, Sprint, and U.S. Cellular, argue to the contrary. OUII submits that these arguments should be rejected and the Judge’s findings should be adopted.

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; Resp. Remedy Br. at 30-34). With respect to product availability, Respondents argue that they account for a significant market share with respect to smartphones

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and personal navigation devices. (*Id.*). However, in this respect, Respondents did not offer any evidence quantifying the effect that a remedial order would have, especially in light of the fact that [REDACTED]

[REDACTED] (*See* CX-0706).

Respondents also argue that sales lost due to a remedial order may limit Respondents' future market participation. (ID at 321; Resp. Remedy Br. at 30-34). In this regard, Respondents contend that Complainants have not shown that its licensees can replace the articles at issue. (*Id.*). However, conversely, Respondents have not shown that Complainants' licensees *cannot* replace the articles at issue. Finally, Respondents argue that an exclusion order would give Complainants significant asymmetric bargaining power. (*Id.*). However, with respect to any exclusion order, the patent holder will have increased bargaining power and the respondents will lose sales; this is not a basis for denying relief.

Non-party CTIA argues that an exclusion order would adversely affect the American wireless industry, and that the exclusion of Samsung and HTC smartphones would negatively impact the public health, safety, and welfare. (CTIA Comments at 2-7). In addition, CTIA asks the Commission to give weight to the policy goals of the White House and Congress to promote wireless broadband infrastructure. (CTIA Comments at 2-3). Finally, CTIA requests that the start of any exclusion order be delayed, that an exception be provided for repair or replacement devices, and that such an exclusion order be otherwise limited to ameliorate consumer and economic harm. (CTIA Comments at 8).

U.S. Cellular asks that the Commission issue specifically tailored exclusion orders that will provide guidance to U.S. Customs and Border Protection so as to avoid delivery delays.

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(U.S. Cellular Comments at 1). U.S. Cellular also requests that any exclusion order include a transition period and an exception for warranty obligations. (*Id.* at 2-3).

Sprint “takes no position regarding the merits of Complainants’ patent claims or Respondents’ defenses” (Spring Comments at 1), but argues that the Commission should not grant an exclusion order when Complainants are non-practicing entities, or when the accused technology is a small component of a complex system, absent exceptional circumstances. (*Id.* at 1). Spring also requests that any exclusion order include a transition period and an exception for warranty obligations. (*Id.* at 2-3).

OUII is of the view that the non-parties’ arguments are largely repetitive of those made in previous investigations and rejected by the Commission. (*See, e.g., Certain Electronic Digital Media Devices and Components Thereof*, Inv. No. 337-TA-796, Comm’n Op. at 109-121 (Sept. 6, 2013) (finding that the public interest did not bar entry of an exclusion order against certain Samsung phones). 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*

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*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). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] The Staff therefore recommends that the Presidential review period bond should be set at 0.058% of the entered value of the infringing products.

**IV. CONCLUSION**

For the reasons set forth above and in OUII's initial brief, 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. Furthermore, OUII is of the view that Complainants have made substantial investments in a licensing program relating to the '336 patent, and that the Judge's factual findings regarding domestic industry should be affirmed. Should the Commission, however, find a violation of Section 337, OUII is of the view that the appropriate remedy in this investigation will be a limited exclusion order, and that the appropriate Presidential review period bond is 0.058% of the entered value of the imported products. Finally, OUII is of the view that the public interest has not been shown to weigh against the issuance of a limited exclusion order.

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Respectfully submitted,

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**INVESTIGATIONS**

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January 6, 2014

**CERTIFICATE OF SERVICE**

The undersigned certifies that on January 28, 2014, he caused the foregoing public version of the **REPLY BRIEF OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS ON ISSUES UNDER REVIEW AND ON REMEDY, THE PUBLIC INTEREST, and BONDING** to be filed with the Commission and served upon the parties in the manner indicated below:

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