

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN DIGITAL VIDEO RECEIVERS  
AND RELATED HARDWARE AND  
SOFTWARE COMPONENTS

Inv. No. 337-TA-1103

**ORDER NO. 34: DENYING COMCAST'S MOTION TO ENFORCE ORDER  
NO. 13 [MOTION DOCKET NO. 1103-019]**

(August 29, 2018)

On July 27, 2018, Respondents Comcast Corporation, Comcast Cable Communications, LLC, Comcast Cable Communications Management, LLC, Comcast Business Communications, LLC, Comcast Holdings Corporation, and Comcast Shared Services, LLC (collectively, "Comcast") filed a motion to enforce Order No. 13 ("Motion"). (Motion Docket No. 1103-019 (July 27, 2018); Mot. at 1.). On August 8, 2018, Complainants Rovi Corporation, Rovi Guides, Inc., Rovi Technologies Corporation, and Veveo, Inc. (collectively, "Rovi," and with Comcast, the "Private Parties") filed their opposition to Comcast's Motion ("Opposition"). (Doc. ID No. 652447 (Aug. 8, 2018)).<sup>1</sup> Commission Investigative Staff ("Staff") did not file a response.

Order No. 13 denied Rovi's motion to amend its list of expert witnesses to add Dr. Elliot Schwartz ("Motion to Amend"). (Order No. 13 (July 6, 2018); Motion Docket No. 1103-004 (June 6, 2018)). Rovi's Motion to Amend was filed more than a month after the May 2, 2018 deadline for identifying expert witnesses **expected** to testify during the evidentiary hearing. (Order No. 4 (Apr. 16, 2018)). Order No. 13 reasoned **that**:

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<sup>1</sup> Rovi filed a public version of its Opposition on August 15, 2018. (Doc. ID No. 653033 (Aug. 15, 2018)).

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[N]othing prevented Rovi from tentatively identifying Dr. Schwartz as an expert on or before the May 2, 2018 expert disclosure deadline. Rovi could easily have removed Dr. Schwartz later if after reviewing Comcast's entire discovery production, Rovi determined that Dr. Schwartz might not be a necessary witness. While Rovi contends it acted timely, it could have filed its Motion at least one month sooner which would have given everyone, including Comcast, something of a discovery cushion, and possibly, time for Dr. Schwartz to conduct his research.

(Order No. 13 at 8.).

As an initial matter, Rovi made clear that it has no intention of presenting Dr. Schwartz as a testifying witness. (Opp'n at 1.). Moreover, neither Rovi nor Comcast mentioned in their papers that lead to Order No. 13 that the Private Parties had their own discovery Stipulation, or that Dr. Schwartz had already conducted consumer/focus group research, or that other of its witnesses would be relying upon Dr. Schwartz's research and expert report(s). If Comcast had intended for all of that information to be precluded, it could have included that in its Motion that lead to Order No. 13.

Nevertheless, according to Comcast, Rovi intends to "circumvent" Order No. 13 by "incorporat[ing] Dr. Schwartz's expert report and analysis into the testimony of its expert reports." (Mot. at 1.). While Order No. 13 prohibits Rovi from presenting Dr. Schwartz as a testifying witness, the Order does not prohibit Rovi's testifying experts from relying on timely disclosed materials that allegedly reflect that Comcast's customers impermissibly use the accused functionalities, including materials created by non-testifying experts like Dr. Schwartz.

As Rovi points out, the Private Parties entered into a procedural stipulation ("Procedural Stipulation") that distinguishes **testifying experts** from **non-testifying experts** and *permits* a non-testifying expert to provide "information, opinions, or other materials to a testifying expert, who

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relies upon such information, opinions, or other materials in forming his or her final report, or any opinion in this investigation.”<sup>2</sup> (Opp’n, Ex. 1 (Procedural Stipulation) at ¶ 19.).

Dr. Schwartz apparently performed his surveys and focus groups and also apparently provided his results to Rovi’s testifying experts, who relied on that evidence in accordance with the Procedural Stipulation. It also appears that Rovi’s other experts who planned to rely on Dr. Schwartz’s information/opinion *timely* disclosed, by July 2, 2018, their opinions in their initial expert reports (“Expert Reports”). (Opp’n at 1; Mot. at Exs. A, B, C, D, E; Order No. 4 at 3.).

Comcast argues that it has been “severely prejudiced” by Rovi’s delay in disclosing Dr. Schwartz and by Rovi’s reliance on Dr. Schwartz’s analyses. (Mot. at 1.). Comcast’s arguments are not persuasive. As Rovi notes, Rovi’s testifying experts fully disclosed their reliance on customer usage information from Dr. Schwartz (and their own observations) and his related opinions in their Expert Reports. (Opp’n at 4 (citing Mot. at Exs. A, B, C, D, E)). Comcast deposed Rovi’s testifying experts and was free to question them about the customer usage information disclosed in their respective reports, whether it was theirs alone or Dr. Schwartz’s information. (See Opp’n, Ex. 2C (Shamos Dep. (Aug. 1, 2018)) at 94:4-97:20.). Comcast does not contest Rovi’s assertion on that point. Rovi also notes, fairly, that Comcast had ample opportunity to depose Dr. Schwartz as a non-testifying expert. Rovi asserts that it offered Dr. Schwartz twice for deposition, an assertion that Comcast also does not refute. (Opp’n, Ex. 3 (July 3, 2018, email from Richard Kamprath to Joseph Lee); Ex. 4 (July 31, 2018, email from Kristina Bachr to Joseph Lee)). Finally, according to Rovi, Comcast declined both times, yet **another assertion that Comcast does not refute.** (*Id.*). Comcast will **have** an opportunity to **cross-examine Rovi’s testifying experts during the evidentiary hearing about their reliance on customer**

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<sup>2</sup> The Private Parties did not inform this Court that they had entered into such a stipulation.

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usage information, and specifically on the information that Dr. Schwartz has provided to others of Rovi's witnesses.

Additionally, Comcast's assertion that it has been prejudiced because it has not engaged an expert to generate survey evidence on its customers' use of the accused functionalities is not compelling. According to Rovi, the customer usage evidence that Dr. Schwartz obtained supports its contention that Comcast's customers directly infringe the asserted patents through their use of the accused products, which Rovi has alleged from the inception of this Investigation. (Opp'n at 5; Am. Compl. at ¶¶ 127, 129, 130, 17, 139, 140, 147, 149, 150, 156, 158, 159, 165, 167, 168, 192, 194, 195.). Indeed, Rovi cited to virtually every paragraph in its Complaint in which clearly Rovi identified its allegations with respect to Comcast's alleged infringement that might have implicated the accused functionalities. Rovi clearly also sought information about customer usage of the accused features throughout discovery. (Opp'n, Ex. 7C (May 2, 2018, email from Leah Buratti to Joseph Lee); Ex. 8C (May 16, 2018, email from Leah Buratti to Bradley Hyde; Ex. 9C, June 11, 2018, Joint Discovery Report).). I even extended discovery on that very issue.

Thus, Comcast has had adequate notice of Rovi's allegations of direct infringement through customer usage starting with Rovi's Complaint, in Rovi's discovery responses, and through depositions. Long before discovery ended, and as soon as Comcast was aware of Rovi's contentions, Comcast could have commissioned its own survey notwithstanding Rovi's admittedly late disclosure of Dr. Schwartz as a **testifying** witness, which was remedied in Comcast's favor by Order No. 13. **There were other timely, proactive discovery measures** that Comcast could have taken.

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In sum, the inclusion of Dr. Schwartz's analyses and/or opinions in the Expert Reports of Rovi's other testifying experts does not violate Order No. 13. Moreover, this Order No. 34 is consistent with the Private Parties' own Procedural Stipulation. Order No. 13 never mentioned the Procedural Stipulation, which was not disclosed in the papers that lead to Order No. 13. Therefore, Order No. 13 did not preclude Rovi from using Dr. Schwartz's timely disclosed information and opinions. Comcast has not been prejudiced. The opportunity that Comcast has to cross-examine Rovi's witnesses during the evidentiary hearing is likely to eliminate any other possible prejudice. For the foregoing reasons, Comcast's Motion, Motion Docket No. 1103-019, is hereby *denied*.

Within seven (7) business days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not<sup>3</sup> it seeks to have any confidential portion of this document deleted from the public version. Any party seeking redactions to the public version must submit to this Office two (2) copies of a proposed public version of this document pursuant to Ground Rule 1.10 with red brackets clearly indicating any portion asserted to contain confidential business information.

The Parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. In addition, an electronic courtesy copy is required pursuant to Ground Rule 1.3.2.

**SO ORDERED.**



MaryJoan McNamara  
Administrative Law Judge

<sup>3</sup> This means that the Parties **that do not** seek to have any portion of this Order redacted are still required to submit a statement to this effect.

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**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **ORDER** has been served by hand upon the Commission Investigative Attorney, **John Shin, Esq.** and the following parties as indicated, on **October 5, 2018**.



Lisa R. Barton, Secretary  
U.S. International Trade Commission  
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Washington, DC 20436

**On Behalf of Complainants Rovi Corporation, Rovi Guides,  
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