PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

CERTAIN DIGITAL TELEVISIONS AND CERTAIN PRODUCTS CONTAINING SAME AND METHODS OF USING SAME

Inv. No. 337-TA-617

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COMMISSION OPINION

This investigation is before the Commission for a final disposition of the above-captioned investigation. The Commission has found a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. §1337, by reason of infringement of U.S. Patent No. 6,115,074 ("the '074 patent") by respondents. The Commission has determined to affirm the presiding administrative law judge's ("ALJ") finding of induced infringement of claim 23 of the '074 patent by all respondents. The Commission has also determined to reverse the ALJ's finding that two respondents infringe claim 23 of the '074 patent by testing their digital televisions ("DTVs") in the United States. This opinion sets forth the Commission's reasoning underlying its violation determinations as well as its determinations on the issues of remedy, the public interest and bonding.

I. BACKGROUND

A. Procedural History

This investigation was instituted on November 15, 2007, based on a complaint filed by Funai Electric Co., Ltd. of Japan; and Funai Corporation of Rutherford, New Jersey (collectively "Funai"). 72 Fed. Reg. 64240 (2007). The complaint alleged violations of section 337 in the

importation into the United States, the sale for importation, or the sale within the United States after importation of certain digital televisions, certain products containing the same, and methods of using the same by reason of infringement of claims 1, 4, 5, 8, 9, and 23 of the '074 patent and claims 1-3, 5, 7, 10-13, 15, and 19-29 of the '369 patent. The Notice of Investigation named 14 respondents:

1. Vizio, Inc. of Irvine, California ("Vizio") and AmTran Technology Co., Ltd. of Taiwan ("AmTran") (collectively, "the Vizio respondents");

2. Polaroid Corporation of Waltham, Massachusetts and Petters Group Worldwide, LLC of Minnetonka, Minnesota (collectively, "the Polaroid respondents");

3. Syntax-Brillian Corporation of Tempe, Arizona ("SBC") and Taiwan Kolin Co., Ltd. of Taiwan ("Taiwan Kolin") (collectively, "the SBC respondents");

4. Proview International Holdings, Ltd. of Hong Kong ("Proview International"), Proview Technology (Shenzhen) Co., Ltd. of China ("Proview Shenzhen"), Proview Technology, Ltd. of Garden Grove, California ("Proview Technology") (collectively, "the Proview respondents");

5. TPV Technology, Ltd. of Hong Kong ("TPV Technology"), TPV International (USA), Inc. of Austin, Texas ("TPV USA"), Top Victory Electronics (Taiwan) Co., Ltd. of Taiwan ("Top Victory"), Envision Peripherals, Inc. of Fremont, California ("Envision") (collectively, "the TPV respondents"); and

6. International Reliance Corp. of San Dimas, California ("IRC").

IRC and the Polaroid respondents were terminated from the investigation based on settlements, and Funai withdrew claims 4, 8, and 9 of the '074 patent and claims 2, 5, 10-13, 15, 20, and 22-29 of the '369 patent from the investigation. Based upon a motion presented by Funai, the ALJ drew adverse inferences against the SBC respondents because they failed to appear at the hearing.

On November 17, 2008, the ALJ issued his final initial determination ("ID"), and on November 25, 2008, he issued his recommended determination on remedy and bonding ("RD").

The ALJ found a violation of section 337 by reason of infringement of claims 1, 5, and 23 of the '074 patent by all the accused products. The ALJ found no violation of section 337 with respect to the '369 patent. On December 1, 2008, the participating respondents (Respondents), Funai, and the Commission investigative attorney ("IA") each petitioned for review of the ALJ's ID. On December 9, 2008, the IA, Funai, and Respondents filed responses to the petitions for review. On February 11, 2009, the Commission determined to review the final ID in part and requested briefing on the issues that it determined to review, remedy, the public interest, and bonding. The Commission determined to review: (1) the finding that Respondents directly infringe claim 23 of the '074 patent through testing activities in the United States and (2) the finding that respondents have induced infringement of claim 23 of the '074 patent. The Commission asked the parties to address specific questions regarding evidence of direct infringement by testing and induced infringement in light of the design changes in Respondents' "work around" products. All other determinations made in the ID became the Commission determination by operation of Commission rule 210.42(h)(2). 19 C.F.R. § 210.42(h)(2).

On February 24, 2009, Funai, Respondents, and the IA filed written submissions addressing the issues on review as well as the issues of remedy, the public interest and bonding. Also on February 24, 2009, submissions were filed by non-parties MediaTek, Inc. ("MediaTek") addressing the issue of bond amount during the period of Presidential Review, the Taipei Economic and Cultural Representative Office ("TECRO") addressing public interest concerns, and Congressman Adam Schiff of California addressing the public interest. On March 3, 2009, the parties filed response submissions on the violation issues as well as on the issues of remedy, the public interest, and bonding. The non-parties did not file response submissions.

B. The '074 Patent

The '074 patent, entitled "System for Forming and Processing Program Map Information Suitable for Terrestrial, Cable or Satellite Broadcast," issued on September 5, 2000, to Mehmet Ozkan, Chia-Yuan Teng and Edwin Heredia. The asserted claims are directed to an apparatus and a method for decoding a datastream of MPEG compatible packetized program information to provide decoded program data for use in changing the channel on a digital television. At the time of invention, the named inventors worked for Thomson Consumer Electronics, Inc. All rights in the '074 patent were assigned to Funai through an agreement effective September 30, 2007. ID at 13. Claims 1, 5, and 23 of the '074 patent were asserted in this investigation.

C. Products at Issue

The products at issue in this investigation are DTVs made or imported by Respondents. The accused DTVs contain semiconductor chipsets called System-on-a-Chip ("SoC") that process information received in the ATSC-compliant broadcast signal and infringe the '074 patent.[1] The ATSC-compliant broadcast signals are received by DTVs via an antenna. The SoCs at issue are primarily made by non-respondents [ ]

II. VIOLATION OF SECTION 337

A. Direct Infringement of Claim 23 of the '074 Patent by Testing

Under 35 U.S.C. §271(a), direct infringement consists of making, using, offering to sell, or selling a patented invention without consent of the patent owner. Direct infringement of a method claim requires a party to perform each and every step of a claimed method. *Joy Techs.,*

[1] ATSC, which stands for Advanced Television Systems Committee, is a standard for transmission of digital television signals.

Inc. v. Flakt, Inc., 6 F.3d 770, 773 (Fed. Cir. 1993). In a section 337 investigation, the complainant bears the burden of proving infringement of the asserted patent claims by a "preponderance of the evidence." *Enercon GmbH v. Int'l Trade Comm'n,* 151 F.3d 1376 (Fed. Cir. 1998).

The Commission determined to review the ALJ's finding that all Respondents infringe claim 23 of the '074 patent by testing their DTVs in the United States, a finding that he based upon joint stipulations, ID at 61, citing JX-11 at ¶¶8-9; JX-13C at ¶9; JX-14C at ¶2. Respondents take issue with the sufficiency of the evidence underlying the ALJ's finding that testing is performed in the United States by each respondent group.[2] In particular, Respondents note that there is no record evidence of testing by the Proview respondents. *Id.* Moreover, although the TPV respondents[ ], JX-14C, the TPV respondents assert that they did not stipulate that they test in the United States. *Id.*

Both the IA and Funai acknowledge this evidentiary deficiency.[3] Nevertheless, Funai contends that the ALJ's conclusion that the Proview and TPV respondents conduct infringing tests is reasonably based on common sense inferences that testing must occur in the United States, in light of the fact that ATSC compliant broadcasts are received in the United States and the other respondents, along with Funai, all test their DTVs in the United States. Funai Br. at 7-8.

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[2] *See* Respondents' Initial Written Submission In Response to the Commission Determination to Review In Part Judge Charneski's Initial Determination ("Resp. Br.") at 3.

[3] Brief of OUII on the Issues Under Review and On Remedy, the Public Interest, and Bonding ("IA Br.") at 9-10; Written Submission of Complainants Funai Electric Co., Ltd. and Funai Corporation in Response to Notice to Review In-Part the Final Initial Determination On Violation of Section 337 ("Funai Br.") at 6.

We find that Funai failed to prove, by a preponderance of the evidence, that the TPV and Proview respondents directly infringe claim 23 of the '074 patent through testing in the United States. Although the ALJ is entitled to draw inferences based on circumstantial evidence, we find substantial evidence does not support the inference that the TPV and Proview respondents test their DTVs in the United States. On the contrary, the TPV respondents stipulated that they [ ]. JX-14C, ¶2. The Proview respondents simply did not stipulate as to where their products are tested. *See* JX-16C. Moreover, there is no evidence in the record that the accused DTVs can be effectively tested with an ATSC compliant signal only in the United States. If anything, the TPV respondents' stipulation suggests [ ]. *See* JX-14C, ¶2.

As to the Vizio and SBC respondents, we find that the joint stipulations JX-11C at ¶¶ 7-9 and JX-13C at ¶ 9 [ ] constitute substantial evidence to support the ALJ's finding of direct infringement by these Respondents of claim 23 of the '074 patent. Accordingly, we reverse the ALJ's finding of direct infringement of claim 23 of the '074 patent by the Proview and TPV respondents and affirm his finding that the Vizio and SBC respondents directly infringe claim 23 of the '074 patent by testing their DTVs in the United States.

B. Induced Infringement of Claim 23 of the '074 Patent

Under 35 U.S.C. §271(b), "[w]hoever actively induces infringement of a patent shall be liable as an infringer." To establish liability, a patentee must prove direct infringement for each instance of indirect, *i.e.*, induced or contributory, infringement. *DSU Med. Corp. v. JMS Co.*,

471 F.3d 1293, 1303 (Fed. Cir. 2006). In order to prove induced infringement, "[t]he plaintiff has the burden of showing that the alleged infringer's actions induced infringing acts and that he knew or should have known his actions would induce actual infringements." *DSU*, 471 F.3d at 1306 (quoting *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553 (Fed. Cir. 1990)).

The requisite intent to induce infringement may be established through circumstantial evidence. *DSU*, 471 F.3d at 1306. The trier of fact should evaluate all the circumstances in reaching a conclusion concerning intent to induce infringement. *Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683, 700 (Fed. Cir. 2008). Investigating infringement and taking remedial steps to avoid infringement may be evidence of good faith. *Id.* Likewise, failure to investigate after learning of possible patent infringement may be circumstantial evidence of intent to induce infringement. *Id.* at 699-700.

The ALJ found that Respondents induced their customers to infringe claim 23 of the '074 patent. ID at 62-63. Specifically, the ALJ found that Respondents have been aware of the '074 patent since Funai filed parallel district court actions in March 2007, at least seven months before this investigation was initiated. ID at 62. He also found that Respondents should have known that their DTVs would infringe claim 23 of the '074 patent when used by their customers, and that Respondents teach and actively encourage, via their advertising materials and instruction manuals, their customers to use their DTVs to acquire ATSC compliant signals in an infringing manner. ID at 62-63.

Respondents argue that they do not make the chipsets that perform the infringing method (the chipsets are designed and supplied by [ ] and therefore they cannot possess the requisite intent to induce infringement. Resp. Br. at 12. We find this argument

unpersuasive because Respondents select and combine these chipsets with other components in designing their DTVs, and they market their DTVs for the specific purpose of receiving ATSC-compliant signals. *See* RX-899C; RX-2417C; JX-16C, Ex. A. In fact, the evidence shows that [

]. *See* RX-905C; Wu Tr. at 1393-99, 2560-61.

Respondents further argue that Funai did not prove the requisite intent to induce infringement in light of Respondents' efforts to "design around" the asserted claims of the '074 patent.[4] After the investigation was instituted, Respondents made a design change in their products, which they asserted made their products non-infringing. ID at 54-55. The Commission, however, adopted the ALJ's findings that both their so-called "work around" products as well as their older "legacy" products infringe the asserted claims of the '074 patent.

Respondents argue that the introduction of their "work-around" products demonstrates a good faith effort to avoid infringement of claim 23 of the '074 patent. Resp. Br. at 13-15. Respondents' position that its design change leads to non-infringement, however, relied

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[4] Claim 23 of the '074 patent is reproduced as follows. The claim limitation relating to Respondents' design changes is emphasized for clarity.

A method for decoding MPEG compatible packetized program information containing program map information to provide decoded program data, comprising the steps of:

> identifying channel map information conveyed within said packetized program information; and
>
> assembling said identified information to form ***a channel map suitable for use in identifying*** said individual packetized datastreams constituting said program, wherein said channel map information replicates information conveyed in said MPEG compatible program map information and said replicated information associates packet identifiers with individual packetized datastreams that constitute a program transmitted on a broadcast channel.

primarily on a claim construction of "suitable for use" that is clearly incorrect.[5] Before the ALJ, Respondents advanced a construction of "suitable for use" to require actual use of the "channel map." This construction is contrary to the well-known and ordinary meaning of the disputed language, and we find no merit in Respondents' position that claim 23 requires use of the "channel map." Respondents also advanced the argument that their DTVs do not infringe claim 23 of the '074 patent because [ ] as was done in the prior art. Resp. Br. at 17. We find this argument to be meritless because merely practicing some elements that are in the prior art is not a defense to infringement. *See Kinetic Concepts, Inc. v. Blue Sky Med. Group, Inc.*, 554 F.3d 1010, 1024-25 (Fed. Cir. 2009). In light of the above, we find that Respondents could not have had a reasonable basis to believe the changes made to the "work-around" products would lead to non-infringement of claim 23 of the '074 patent.

Furthermore, the Commission makes the following additional findings that support the ALJ's conclusion that Respondents knew or should have known that their acts would cause their customers to infringe claim 23 of the '074 patent:

(1) Prior to filing its complaint with the Commission, Funai contacted each of the Respondents to offer licenses. JX-11C, ¶ 22; JX-13C, ¶ 7; JX-16C, ¶ 26; Alexander Tr. at 82-83, 121-22.

(2) Respondents were aware that the '074 patent had been designated as essential to practice the ATSC standard since before this investigation. *See* Alexander Tr. at 112-13.

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[5] *See Id.*; *see also* Respondents' Petition For Review Of Judge Charneski's Initial Determination ("Resp. Pet.") at 8. Respondents also argued that the VCT and SLD stored by the accused DTVs are not "suitable" for use because they were not in the proper format, an argument that was properly rejected by the ALJ. ID at 61-62.

(3) Respondents continued to sell the older "legacy" DTVs after the investigation began. ID at 59; *see also* JX-11C ¶ 17.

(4) Respondents have control over [

]. *See* RX-905C; *see also* Wu Tr. at 1393-99, 2560-61.

In addition to our findings made above, we adopt on review all of the ALJ's factual findings relating to Respondents' intent to induce infringement. Accordingly, we affirm the ALJ's conclusion that Respondents induce infringement of claim 23 of the '074 patent.

III. REMEDY

Section 337 provides that, "[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 . . . ." 19 U.S.C. § 1337(d)(1). This statutorily mandated exclusion is achieved, as appropriate, through either a "limited exclusion order" or a "general exclusion order." *See Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1356 (Fed. Cir. 2008). Generally, a limited exclusion order is appropriate unless either of the statutory criteria in section 337(d)(2) for issuance of a general exclusion order are met, that is, unless "(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing goods."

In addition to, or instead of, an exclusion order, the Commission may issue cease and desist orders to respondents violating section 337. *Id.* § 1337(f)(1). The Commission generally issues a cease and desist order only when a respondent maintains a commercially significant

inventory of infringing products in the United States. *Certain GPS Devices and Products Containing Same*, Inv. No. 337-TA-602, Commission Opinion at 20 (January 15, 2009).

A. Exclusion Order

The ALJ, in his RD, recommended that the Commission issue a limited exclusion order directed to Respondents' DTVs with a certification provision to assist U.S. Customs and Border Protection ("CBP") in administering the order. RD at 8. The IA and Funai agree that a limited exclusion order is an appropriate remedy should the Commission find a violation of section 337.[6] Funai, however, contends that there is no need for a certification provision because Respondents failed to prove that any of their imported models are not infringing. Funai Rem. Br. at 4. We agree with the ALJ that a limited exclusion order with a certification provision directed to the infringing products of Respondents is an appropriate remedy for the violation of section 337 that has occurred. *See* 19 U.S.C. § 1337(d).

Certification provisions are necessary to minimize the possibility that non-infringing products will be excluded from entry into the United States when CBP is unable to easily determine by inspection whether an imported product violates a particular exclusion order. *Certain GPS Devices and Products Containing Same*, Inv. No. 337-TA-602, Commission Opinion at 19-20 (January 15, 2009). In this case, the absence of a certification provision would make it difficult for CBP to determine whether the imported DTVs of Respondents contain SoCs that cause them to infringe the asserted claims of the '074 patent. Respondents have never been required to prove that they import non-infringing models to support the inclusion of a

[6] IA Br. at 28; Written Submission of Complainants Funai Electric Co., Ltd. and Funai Corporation on Remedy, the Public Interest, and Bonding ("Funai Rem. Br.") at 4.

certification provision in a limited exclusion order. Accordingly, a certification provision is included in the limited exclusion order.

B. Cease And Desist Orders

The ALJ recommended the issuance of cease and desist orders against the domestic respondents which he found to have commercially significant inventories of accused DTVs, including Vizio, Proview Technology, TPV USA, Envision and SBC. RD at 9. The IA and Funai both agree that this additional remedy is appropriate. IA Br. at 30; Funai Rem. Br. at 6.

Respondents contend that cease and desist orders are not appropriate because most of the Respondents in this investigation are foreign entities who do not have inventories in the United States.[7] Respondents also argue that because there are many alternative suppliers of DTVs in the United States, including Funai's licensees under the '074 patent, Respondents' continued sales would not necessarily be made at Funai's expense. *Id.* at 21. Respondents, however, conclude that if the Commission determines to issue cease and desist orders, these orders should be directed to the named domestic respondents only and should not include the domestic respondents' customers. *Id.*

We find that cease and desist orders directed to the domestic respondents are appropriate. We find Respondents' contention that their continued sales would not injure Funai to be irrelevant because section 337(f)(1) does not require proof that Respondents' continued sales would be at Funai's expense. *See* 19 U.S.C. § 1337(f). The Commission's purpose in issuing cease and desist orders in patent cases has been to afford complete relief to complainants when infringing goods are already present in the United States, and thus cannot be reached by issuance

[7] Respondents' Joint Brief On Remedy, the Public Interest, and Bond ("Resp. Rem. Br.") at 20.

of an exclusion order. *Certain Hardware Logic Emulation Systems and Components Thereof,* Inv. No. 337-TA-383, Commission Opinion at 25 n.121, USITC Pub. 3089 (March 1998). Here, the domestic respondents were found to have [ ] inventory in the United States. RD at 8-9; *see also* CX-1475C at 4-13; CX-1479C at 5-13; CX-694C at 11-17; CX-817C. Accordingly, we adopt the ALJ's recommendation to issue cease and desist orders against the domestic respondents: Vizio, Proview Technology, TPV USA, Envision and SBC.

IV. THE PUBLIC INTEREST

When determining whether to issue remedial orders when there is a violation of section 337, the Commission weighs the effect of the orders on four public interest factors: (1) the public health and welfare, (2) competitive conditions in the United States economy, (3) the production of like or directly competitive articles in the United States, and (4) United States consumers. 19 U.S.C. § 1337(d), (f).

There have been only three investigations in which consideration of the public interest factors has prevented issuance of a remedy. In *Certain Automatic Crankpin Grinders*, Inv. No. 337-TA-60, Commission Opinion, USITC Pub. 1022 (1979), relief was denied because of an overriding national policy in maintaining and increasing the supply of fuel efficient automobiles and the domestic industry was unable to meet domestic demand. In *Certain Inclined Field Acceleration Tubes*, Inv. No. 337-TA-67, Commission Opinion, USITC Pub. 1119 (1980), the Commission denied relief because of the overriding public interest in continuing basic atomic research with the imported acceleration tubes, which were deemed to be of higher quality than the domestic industry's product. In *Certain Fluidized Supporting Apparatus*, Inv. No. 337-TA-182, Commission Opinion, USITC Pub. 1667 (1984), relief was denied because the domestic

producer could not supply demand for hospital beds for burn patients within a reasonable time, and there were no therapeutically comparable substitutes available.

The IA and Funai assert that there are no public interest concerns that would preclude issuance of a limited exclusion order in this case. Respondents, however, argue that relief should not be afforded to Funai based on public interest concerns associated with the Government-mandated switch from analog to digital television broadcast, which is currently scheduled for June 12, 2009. Resp. Rem. Br. at 13. More specifically, Respondents assert that the Government-sponsored converter box coupon program ran out of funding in early January 2009, and it is possible that retailers may run out of converter boxes, thus requiring consumers to purchase DTVs in order to receive and display television broadcasts. *Id.* at 15-16, Exs. 3, 4, 6. Respondents also argue that an exclusion order may contribute to a shortage in DTVs, in turn causing prices for DTVs to increase. *Id.* at 17. Respondents conclude that an increase in the price of DTVs, especially during the current economic times, would be detrimental to United States consumers. *Id.* Finally, Respondents argue that an exclusion order would harm American business interests in favor of foreign business interests by reducing the share of the DTV market held by American companies. *Id.* at 18-19.

The Commission received several comments from non-parties concerning the public interest. MediaTek argues that the public interest supports a bond that is substantially less than 100%. MediaTek Br. at 10. We address this argument below in our section on bonding. TECRO contends that an exclusion order will harm Taiwanese exports and United States trade interests, and a Congressional letter urges the Commission to ensure the presence and availability

of low-cost digital televisions in the United States market when considering any potential actions that may be taken in this investigation.

When considering the statutory public interest factors in 19 U.S.C. §§ 1337(d) and (f) in the context of this case, we conclude that concerns of public health and welfare are not implicated here because DTVs are not the type of products that affect public health and welfare. Furthermore, we find that consideration of the production of like or directly competitive articles in the United States does not weigh against the contemplated orders because (1) there are a variety of other DTVs from other producers including Funai[7] and its licensees[8] available in the United States. (*See e.g.*, CX-2760; *see also* JX-12C, ¶¶ 5-6) and (2) most DTVs are manufactured in foreign countries (*See* Funai Rem. Rep. Br. at 11, Ex. 2). In other words, the issuance of the subject orders will not adversely affect domestic production of DTVs to the extent that there are any businesses that produce DTVs in manufacturing facilities located here in the United States.

Although the Government-mandated DTV switch and the current economic environment for businesses and consumers are important concerns, we find that they do not preclude granting Funai the relief to which it is entitled under section 337. We find that any adverse effect on United States consumers resulting from issuing relief to Funai would be minimal given the range

[7] Funai manufactures DTVs under the brand names "Sylvania," "Emerson," "Magnavox," and "Symphonic," which are sold stores throughout the U.S. including in value-oriented stores such as Target, Kmart, Wal-Mart, and Best Buy. *See e.g.*, Reply Submission of Complainants Funai Electric Co., Ltd. And Funai Corporation on Remedy, the Public Interest, and Bonding ("Funai Rem. Rep. Br.") at 12 (citing CX-2760; Funai's Complaint Under Section 337).

[8] Some of Funai's major licensees include [ ] *See e.g.*, Funai Rem. Rep. Br. at 12.

of DTVs manufactured by Funai and its licensees, and any such effect would not outweigh the benefit gained by Funai in protecting its intellectual property rights. We reject Respondents' argument that the possibility of a shortage of converter boxes weighs against the issuance of a remedy because that argument is based on mere speculation. Furthermore, Congress has delayed the DTV transition from February 17, 2009 to June 12, 2009 to allow the public more time to obtain converter boxes. Resp. Rem. Br., Exs. 3, 5, 6. In any event, even if there is a converter box shortage, there are a variety of other DTV producers, including Funai and its licensees. Funai maintains that the United States market can be supplied with DTVs by Funai and its many licensees, and there is no evidence to the contrary.

Respondents' argument that an exclusion order will cause DTV prices to rise also misses the mark because it is based on speculation, and because the Commission has consistently held that the benefit of lower prices to consumers does not outweigh the benefit of providing complainants with an effective remedy for an intellectual property-based section 337 violation. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, Commission Opinion at 46-47, USITC Pub. 2391 (June 1991)(issuing exclusion order covering lower priced drugs); *Certain Ink Jet Print Cartridges and Components Thereof*, Inv. No. 337-TA-446, Commission Opinion at 14, USITC Pub. 3549 (Oct. 2002).

Moreover, we find Respondents' concerns that the issuance of remedial orders will harm American business are outweighed by the benefit to competitive conditions in the United States gained by enforcing valid intellectual property rights. *See Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Commission Opinion at 40-41 (June 22, 1993). To be certain, the issuance of the subject remedial orders

would harm the interests of certain domestic respondents who have their DTVs manufactured abroad. However, protection of intellectual property rights in the United States provides foreign and domestic businesses alike with a climate of predictability that fosters investment, innovation, and the exchange of technology and associated intellectual property rights. Denying Funai relief based on the remote possibility of a converter box shortage or a price increase in DTVs would introduce substantial uncertainty to section 337 enforcement, in turn hindering collaborative efforts between foreign and domestic businesses to market products in the United States that are manufactured abroad. Since uncertainty would be detrimental to the competitive conditions in the United States as a whole, consideration of this factor does not weigh against issuance of the subject remedial orders.

TECRO's general concerns about Taiwanese exports and United States trade interests also do not prevent issuing relief to Funai. These concerns, although cognizable in the context of United States trade policy, are not relevant to any of the statutory factors of 19 U.S.C. § 1337(d), (f) with which the Commission is concerned. TECRO's concerns may be more appropriately addressed to, and considered by, the Office of the United States Trade Representative.

Having considered the submissions of the parties on the statutory public interest factors set forth in 19 U.S.C. § 1337(d) and (f), we find that these factors do not preclude issuance of a limited exclusion order and cease and desist orders.

V. BOND

When the Commission issues an exclusion order, infringing products are nonetheless entitled to entry under bond during the period of Presidential Review. 19 U.S.C. § 1337(j). The Commission must set the amount of the bond at a level sufficient to protect complainants from

any injury. 19 U.S.C. § 1337(j). When reliable price information is available, the Commission has often set the bond amount as that which would eliminate the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-stick Repositionable Notes,* Inv. No. 337-TA-366, USITC Pub. 2949, Commission Opinion, 1996 ITC LEXIS 280, at *44 (1996). When a pricing comparison is impossible, it is entirely appropriate to set the bond based on a reasonable royalty. *See e.g., Certain Audio Digital-to-Analog Converters and Products Containing Same*, Inv. No. 337-TA-499, Commission Opinion at 25 (March 3, 2005).

Here, the ALJ recommended that a bond of 100% of entered value be set for the period of Presidential Review. RD at 11. In making his recommendation, the ALJ found that "the record cannot support a recommended bond that would eliminate any price differential" "[n]or can the record support a bond . . . based . . . on a reasonable royalty." *Id.* Funai supports the recommended bond of 100%, while the IA and Respondents each argue that the record establishes a reasonable royalty. IA Br. at 33; Resp. Rem. Br. at 9-10. Additionally, non-party MediaTek argues that a 100% bond is excessively high. MediaTek Br. at 10.

We find a bond of $2.50 per infringing product is appropriate because the record establishes royalties ranging between [ ] *See* CX-3018 at Annex 1; CX-1976C at 1777828; CX-1975C at 1777792; CX-1974C at 439685. More specifically, [ ] would not be "sufficient to protect [Funai] from... injury" caused by continued importation and sale of large televisions, because this [ ] is lower than the royalty agreed on by Funai and its licensees for large televisions. *Id.*; *see also* Resp. Rem. Br. at 10; Resp. Rep. Rem. Br. at 2. On the other hand, a 100% bond would be excessive in that it would

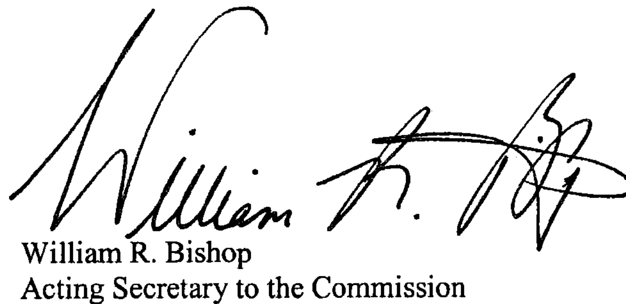
effectively prevent importation during the period of Presidential Review given that Respondents are unlikely to post a 100% bond for each of the accused DTVs, which range in price anywhere from hundreds to thousands of dollars. *See Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Commission Opinion at 42 (June 22, 1993)("The bond should not be set so high so as to effectively prevent importation during the Presidential review period.")

We find it equitable to set the bond amount at a reasonable royalty based on Funai's own licensing agreements. Accordingly, we find that a bond amount of $2.50 per unit, *i.e.*, the royalty rate for large DTVs, is sufficient to protect Funai from any injury during the period of Presidential Review.

VI. CONCLUSION

We concur with the ALJ's finding of violation of section 337, and adopt the ID's findings of fact and legal conclusions that are not inconsistent with this opinion. We find that the appropriate remedy is a limited exclusion order and cease-and-desist orders directed to Respondents, and set a bond amount of $2.50 per article covered by these orders during the period of Presidential review.

By order of the Commission.



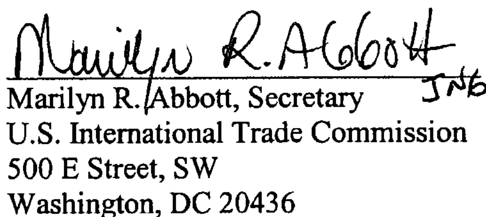
William R. Bishop
Acting Secretary to the Commission

Issued: April 23, 2009

CERTAIN DIGITAL TELEVISIONS AND CERTAIN PRODUCTS CONTAINING SAME AND METHODS OF USING SAME **337-TA-617**

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney David O. Lloyd, Esq., and the following parties as indicated, on APR 2 3 2009.



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