

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the Matter of

**CERTAIN LIQUID CRYSTAL DISPLAY
MODULES, PRODUCTS CONTAINING
SAME, AND METHODS USING THE
SAME**

Investigation No. 337-TA-634

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COMMISSION OPINION

I. INTRODUCTION

On June 12, 2009, the presiding administrative law judge (“ALJ”) issued his final initial determination (“ID”) in the above-captioned investigation, finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, as amended (“section 337”). The ID included his recommended determination (RD) on the issues of remedy and bonding during the period of Presidential review. The Commission determined not to review the ALJ’s finding of violation on September 9, 2009. *74 Fed. Reg.* 47616-17 (Sept. 16, 2009). The investigation is now before the Commission to consider the issues of remedy, the public interest, and bonding.

II. BACKGROUND

The Commission instituted this investigation on March 4, 2008, based on a complaint filed by Sharp Corporation (“Sharp”) of Japan. *73 Fed. Reg.* 11678. The complaint, as amended and supplemented, alleges violations of section 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain liquid crystal display devices, products containing same, and methods for using the same by reason of infringement of certain claims of U.S. Patent Nos. 6,879,364 (“the ‘364 patent”); 6,952,192 (“the

'192 patent"); 7,304,703 ("the '703 patent"); and 7,304,626 ("the '626 patent"). The complaint further alleges the existence of a domestic industry. The Commission's notice of investigation named the following respondents: Samsung Electronics Co., Ltd. of Korea; Samsung Electronics America, Inc. of Ridgefield Park, New Jersey; and Samsung Semiconductor, Inc. of San Jose, California (collectively "Samsung").

On June 12, 2009, the ALJ issued his final ID finding a violation of section 337 by Samsung. On June 29, 2009, Samsung and the Commission investigative attorney ("IA") filed petitions for review of the final ID. On July 7, 2009, Sharp and the IA filed responses to the petitions.

On September 9, 2009, the Commission issued notice of its determination not to review the ALJ's final ID and requested written submissions on the issues of remedy, the public interest, and bonding from the parties and interested non parties. *74 Fed. Reg.* 47616-17 (Sept. 16, 2009). On September 16 and 23, 2009, respectively, complainant Sharp, the Samsung respondents, and the IA filed briefs and reply briefs on the issues for which the Commission requested written submissions. On September 21, 2009, Samsung filed a petition for reconsideration of the Commission's determination not to review certain portions of the final ID. On October 19, 2009, the Commission issued an order denying the petition for reconsideration.

On October 30, 2009, Samsung filed a supplemental submission on the issues of remedy, the public interest, and bonding. On November 2 and 3, 2009, respectively, Sharp and the IA filed a response to Samsung's supplemental submission.

III. DISCUSSION

A. REMEDY

The Commission is authorized to issue relief when it determines that there is a violation of section 337. 19 U.S.C. § 1337(d) and (f). The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *See Fuji Photo Film v. United States Int'l Trade Comm'n*, 386 F.3d 1095, 1106-1107 (Fed. Cir. 2004). For the reasons set forth below, we have determined to adopt the ALJ's recommendations on remedy. *See* ID/ RD at 169-88.

The ALJ recommended that the Commission issue a limited exclusion order and cease and desist orders that cover not just specifically-identified products, but all infringing products, regardless of brand-name, "that are manufactured abroad or imported by or on behalf of respondents, or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns." RD at 173. He also determined that the orders should extend to certain downstream products, *i.e.*, Samsung televisions, computer monitors, and professional displays - imported by, or on behalf of, Samsung and containing infringing LCD devices manufactured by Samsung. *Id.* The ALJ also recommended cease and desist orders directed to the domestic respondents in view of evidence demonstrating that Samsung Electronics America and Samsung Semiconductor maintain a substantial inventory of the infringing products in the United States. *Id.* at 184, *citing* CX-92C, 93C, 98C, 104C, 344C.

Samsung argues that computer monitors should not be denied entry under the exclusion order or subject to the cease and desist orders because Sharp did not carry its burden in

establishing that these downstream products should be covered by remedial orders. The IA and Sharp support the ALJ's recommendation that the remedial orders should extend to computer monitors.

In determining whether an exclusion order should extend to downstream products, the Commission applies a test first articulated in *Certain Erasable Programmable Read-Only Memories, Components Thereof, Products Containing Such Memories, and Processes for Making Such Memories* ("EPROMs"), Inv. No. 337-TA-276, Comm'n Opn. at 125-126 (May 16, 1989).¹ The ALJ set out a detailed analysis of how the EPROMs factors support inclusion in the relief of downstream Samsung products, including computer monitors, that contain infringing LCD devices. We adopt this analysis as our own. The basic facts regarding the infringing LCD articles are largely undisputed and Samsung's own expert admitted that many of the EPROMs factors weigh in favor of exclusion of computer monitors.²

¹Nine factors are weighed as part of the EPROMs downstream analysis: (1) the value of the infringing articles compared to the value of the downstream products in which they are incorporated; (2) identity of the manufacturer of the downstream products, (*i.e.*, are the downstream products manufactured by the party found to have committed the unfair act, or by third parties); (3) the incremental value of complainant of the exclusion of downstream products; (4) the incremental detriment to respondents of the exclusion of downstream products; (5) the burdens imposed on third parties resulting from the exclusion of the downstream products; (6) the availability of alternative downstream products which do not contain the infringing articles; (7) the likelihood that the downstream products actually contain the infringing articles and are thereby subject to the exclusion; (8) the opportunity for evasion of an exclusion order which does not include downstream products; (9) the enforceability of an order by U.S. Customs. *Id.*

² See Sharp's Br. at 10, 11, 15, 17; citing *Kyocera v. United States Int'l Trade Comm'n*, 545 F.3d 1340, 1345; RD at 178, 181-83; Napper, Tr. at 1695-96, 1722, 1756-58, 1770, 1776; Hansen, Tr. at 609-10, 616-17, 639-40, 649-51; CX-469C at 26; CDX-1106, 1114, 1118, 1135-36, 1144, 1197; Hansen, Tr. at 609-10; Order No. 6; JX-48C, Weiss, Dep. Tr. at 53, 59 (Sept. 24, 2008); Samsung Remedy Br., Exh. B, Decl. of Jang at 2.

The Commission also adopts the ALJ's recommendation that the appropriate relief includes cease and desist orders directed to Samsung's infringing LCD devices that are manufactured abroad or imported by or on behalf of Samsung, including downstream relief directed to Samsung televisions, computer monitors, or professional displays containing the infringing LCD devices.³

B. Bonding

Section 337(j) provides for entry of infringing articles during the sixty (60) day period of Presidential review upon posting of a bond and states that the bond is to be set at a level "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 ALJ recommended a bond of 100 percent of the entered value of the covered products. We adopt this recommendation for the reasons stated below.

The ALJ recommended a 100 percent bond because he found that the documents produced by Sharp established that it would be difficult to conduct a reliable price comparison between Samsung and Sharp products or a reasonable royalty rate due to the number of products sold by the parties and the variety of features in the products in the investigation. RD at 184-87, *citing Certain Digital Satellite System (DSS) Receivers and Components Thereof*, Inv. No. 337-TA-392, (*DSS Receivers*) Initial Determination at 244 (Oct. 20, 1997) (reasonable royalty rates are often

³ Because our remedial orders apply only to the downstream products of named respondent Samsung they do not run afoul of the Federal Circuit's holding in *Kyocera*, 545 F.3d at 1357-58 ("Thus, in approving such an LEO, this court did not address the Commission's authority to exclude downstream products of third parties. The only downstream products affected by the ITC's LEO were those of the sole adjudged violator of section 337, namely, Hyundai.") (*citing Hyundai Electronics Industries Co. v. United States Int'l Trade Comm'n*, 899 F.2d 1204, 1206-09 (Fed. Cir. 1990))

used to determine the bond amount during the Presidential period of review); *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, (“*Wind Turbines I*”) Comm’n Opn. at 27 (Sept. 23, 1996) (when there is insufficient evidence in the record to determine a reasonable royalty rate, or the record indicates that the calculation of a price differential is impractical, a bond of 100 percent is appropriate). Particularly, the ALJ found that Samsung’s expert (Mr. Napper) focused on only U.S. patent licenses when analyzing the Sharp patent license agreements to determine a reasonable royalty, and accordingly, made no account as to the value of the patent licenses in other countries besides the United States. *Id.* In addition, the ALJ found that Samsung’s royalty rate analysis was of limited probative value because it specifically excluded three of the four patents-in-suit in this investigation. *Id.* The ALJ also found that the documents produced by Sharp demonstrated that it would be difficult to conduct a reliable price comparison between Samsung and Sharp products this investigation due to the number of products sold and the variety of features in the products.

Samsung contends that the Commission should impose no bond or a bond no greater than [] of the entered value during the period of Presidential review. *Id.* at 23-24. The IA and Sharp support the ALJ’s recommended bond of 100 percent.

We agree with the ALJ that a 100 percent bond is appropriate here because the pricing data of record demonstrates that no meaningful price comparison can be performed. Samsung’s attempt at calculating a reasonable royalty rate suffered from important flaws noted by the ALJ. Accordingly, this case is significantly different from *Digital Televisions*, where a reasonable royalty rate could be calculated. We see no reason to deviate from our practice of imposing a 100 percent bond where there is insufficient evidence in the record to determine a reasonable royalty

rate, and the record indicates that the calculation of a price differential is impractical. See *DSS Receivers*, Initial Determination at 244 ; *Wind Turbines I*, Comm'n Opn. at 27.

C. Public Interest

When issuing an exclusion order under section 337(d), the Commission must weigh the remedy sought against the effect such a remedy would have on the following public interest factors: (1) the public health and welfare; (2) the competitive conditions in the United States economy; (3) the production of articles in the United States that are like or directly competitive with those subject to the investigation; and (4) United States consumers. See 19 U.S.C. § 1337(d)(1).

We find that the issuance of a limited exclusion order and cease and desist orders directed to infringing LCD devices produced by Samsung, and certain Samsung downstream products containing these LCD devices, would not be contrary to the public interest. No evidence exists in the record that issuance of the Commission's orders would harm public health, welfare, or safety. Nothing in the evidentiary record indicates that Sharp and others cannot meet the demand for the types of LCDs devices at issue. To the contrary, the ALJ found that there were numerous LCD suppliers who could supply the U.S. market. Both of these circumstances obviate any public interest concerns.

We have included a certification provision in the limited exclusion order allowing importation of Samsung-branded TVs, computer monitors, and professional displays that contain other manufacturers' LCD panels and modules, *e.g.*, those LCD devices not produced by, or on behalf of, Samsung. This provision will ease the burden both on legitimate trade and on U.S. Customs' enforcement of the exclusion order .

We agree with Samsung and the IA that the public interest weighs in favor of an exemption to allow importation of service and replacement parts for Samsung LCD televisions, computer monitors, and professional displays purchased prior to the effective date of any issued remedial order. Such an exemption is in keeping with Commission precedent. *See Certain Systems for Detecting and Removing Viruses and Worms, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-510, Comm'n Op. at 6 (Aug. 23, 2005); *Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337-TA-503, Comm'n Op. at 5-6 (May 9, 2005). Also, we agree with Samsung and the IA that it is appropriate for the repair exemption to be treated consistently in the limited exclusion order and the cease and desist orders.

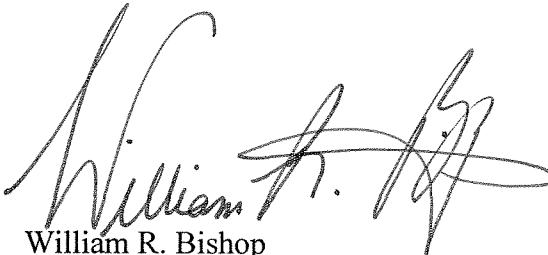
IV. CONCLUSION

The Commission has determined that there has been a violation of section 337, and has further determined that the appropriate form of relief is: (1) a limited exclusion order prohibiting the unlicensed entry of LCD devices, including display panels and modules, and products containing the same, that infringe one or more of (i) claims 5-7 of the '364 patent; (ii) claims 1 and 4 of the '192 patent; (iii) claims 1-2, 6-8, 13-14, and 16-17 of the '703 patent; and (iv) claims 10, 17, and 20 of the '626 patent, that are manufactured abroad by or on behalf of, or are imported by or on behalf of, Samsung, or any of its affiliated companies, parents, subsidiaries, licensees, contractors, or other related business entities, or successors or assigns; and (2) cease and desist orders prohibiting the Samsung respondents located in the United States from conducting any of the following activities in the United States: importing, selling, marketing, advertising, distributing, offering for sale, transferring (except for exportation), and soliciting U.S. agents or

distributors for, LCD devices, including display panels and modules, and products containing the same that infringe one or more of (i) claims 5-7 of the '364 patent; (ii) claims 1 and 4 of the '192 patent; (iii) claims 1-2, 6-8, 13-14, and 16-17 of the '703 patent; and (iv) claims 10, 17, and 20 of the '626 patent.

The Commission further has determined that the public interest factors enumerated in section 337(d)(1) (19 U.S.C. § 1337(d)(1)) do not preclude issuance of the limited exclusion order or the cease and desist orders. Finally, the Commission has determined that a bond of 100 percent bond of the entered value of Samsung's products should be imposed during the period of Presidential review.

By order of the Commission.



William R. Bishop
Acting Secretary to the Commission

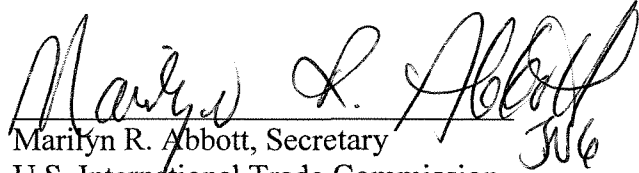
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**CERTAIN LIQUID CRYSTAL DISPLAY MODULES,
PRODUCTS CONTAINING SAME, AND METHODS
FOR USING THE SAME**

337-TA-634

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Brian Moore, Esq., and the following parties as indicated, on November 24, 2009.


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