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

In the Matter of

**CERTAIN LASER IMAGEABLE
LITHOGRAPHIC PRINTING PLATES**

Investigation No. 337-TA-636

COMMISSION OPINION

The Commission has determined that respondents have violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laser imageable lithographic printing plates that infringe one or more of claims 1, 10 and 27 of United States Patent No. 5,339,737 (“the ’737 patent”) and claims 20, 21 and 23 of United States Patent No. 5,487,338 (“the ’338 patent”). 74 *Fed. Reg.* 49890 (Sept. 24, 2009). The Commission issues herewith, a limited exclusion order prohibiting the entry of unlicensed infringing laser imageable lithographic printing plates for consumption in the United States.

BACKGROUND

The Commission instituted this investigation on March 13, 2008, based on a complaint, filed by Presstek, Inc. of Hudson, New Hampshire (“Presstek”), alleging violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain laser imageable lithographic printing plates that infringe one or more of claims 1, 10 and 27 of the ’737 patent and claims 20, 21 and 23 of the ’338 patent, and also by reason of infringing

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United States Trademark Registration No. 1,711,005 (“the ’005 Trademark”). *73 Fed. Reg.* 13567-8 (Mar. 13, 2008). The complaint also alleged the existence of a domestic industry. *Id.* The Commission’s notice of investigation named the following respondents: VIM Technologies, Ltd. of Kibbutz Hanita, Israel (“VIM”); Hanita Coatings RCA, Ltd. of Kibbutz Hanita, Israel (“Hanita”); Guaranteed Service & Supplies, Inc. of West Bend, Wisconsin (“GSS”); AteCe Canada of Toronto, Ontario, Canada (“AteCe”); Ohio Graphco, Inc. of Solon, Ohio (“Ohio Graphco”); and Recognition Systems, Inc. of Port Washington, New York (“RSI”). *Id.* at 13568. The investigation was originally assigned to Administrative Law Judge (“ALJ”) Essex. *Id.*

On May 16, 2008, the ALJ issued an Initial Determination terminating Respondent Ohio Graphco from the Investigation based on a consent order stipulation and settlement agreement. *See* Order No. 6. On June 26, 2008, the ALJ issued an Initial Determination granting Complainant’s motion to amend the Complaint and Notice of Investigation to add Spicers Paper, Inc. of Santa Fe Springs, California (“Spicers”), as a respondent to this investigation. *See* Order No. 24. The Commission determined not to review each of those orders.

On December 8, 2008, the Investigation was permanently reassigned to Judge Gildea. On December 11, 2008, the ALJ issued an Initial Determination extending the investigation target date from June 12, 2009, to November 30, 2009.

On February 5, 2009, the ALJ issued an Initial Determination granting partial termination of the investigation as to Hanita based upon partial withdrawal of the portion of the complaint alleging infringement of the ’005 Trademark. *See* Order No. 23. In that same order, the ALJ denied partial termination with respect to AteCe. *Id.* However, on March 24, 2009, the ALJ

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issued an Initial Determination granting partial termination of the investigation as to AteCe based upon partial withdrawal of the portion of the Complaint alleging infringement of the '005 Trademark. *See* Order No. 24. Also on March 24, 2009, the ALJ issued an Initial Determination granting partial termination of the investigation as to the portion of the complaint alleging infringement of the '005 Trademark against VIM, GSS, RSI and Spicers based upon a consent order stipulation. *Id.* The Initial Determination terminated all assertions of infringement of the '005 Trademark against the respondents in the investigation. *Id.* The Commission determined not to review any of those orders.

The ALJ held a *Markman* hearing on April 22, 2009, and held an evidentiary hearing from April 23, 2009, to April 28, 2009. On July 24, 2009, the ALJ issued his final initial determination (“ID”) finding a violation of section 337 by all of the respondents remaining in the investigation (collectively, “Respondents”). The ID included the ALJ’s recommendation on remedy and bond. The ALJ recommended that, in the event the Commission finds a violation of section 337, the Commission should issue a limited exclusion order directed to all of Respondents’ accused products that were found to infringe the asserted claims of the ’737 and ’338 patents. ID at 101-104. The ALJ further recommended that if the Commission imposes a remedy following a finding of violation, Respondents should be required to post a bond of 100 percent of the entered value of accused products imported during the Presidential review period.

Id.

Respondents filed a combined petition for review, and Presstek and the Commission Investigative Attorney (“IA”) filed oppositions thereto. On September 24, 2009, the Commission

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determined to review certain aspects of the ID relating to claim construction and to modify the ID by supplementing the claim construction analysis. 74 *Fed. Reg.* 49890 (Sept. 29, 2009). The Commission also requested written submissions on the issues of remedy, the public interest and bonding, and further requested submissions of proposed remedial orders. *Id.*

On October 5, 2009, Respondents filed a collective brief on the issues for which the Commission requested written submissions. Presstek and the IA filed their briefs on those same issues on October 6, 2009, and on October 13, 2009, Presstek filed a response to Respondents' brief.

DISCUSSION

For the reasons discussed below, the Commission finds that the appropriate remedy is a limited exclusion order, prohibiting the entry of infringing laser imageable lithographic printing plates for consumption in the United States. The Commission also finds that the public interest factors set out in section 337(d) do not preclude issuance of a limited exclusion order. The Commission determines that no bond is required to permit temporary importation during the Presidential review period.

I. REVIEW OF THE ID'S CLAIM CONSTRUCTION ANALYSIS

In his ID, the ALJ concluded that Respondents waived and/or abandoned claim construction arguments with regard to three claim limitations at issue: (1) "the second layer also being partially transmissive to said radiation" and (2) "the substrate comprises a material that reflects imaging infrared radiation" from the '737 patent, and (3) "the substrate comprises means for reflecting imaging radiation" from the '338 patent. The ALJ noted that he substantively

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considered the “partially transmissive” limitation, but did not note the same with respect to the other two limitations, nor did he provide any substantive analysis of the other two limitations.

The Commission reviewed the ID to modify its claim construction analysis and affirmed the ALJ’s determination of no violation of section 337. The Commission adds that it has substantively considered Respondents’ proposed constructions and supplemented the ALJ’s claim construction analysis.

With respect to “the second layer also being partially transmissive to said radiation” limitation, the ALJ’s construction is correct because it applies the ordinary meaning of the words used in the claim, as they would be understood by a person of ordinary skill in the art. Respondents seek to read limitations from the preferred embodiment into the claim term, and argue that the purpose of the partially transmissive layer in combination with a reflective substrate is to allow “a lower power laser that is insufficiently powerful to cause ablation absent reflection” to be “reflected back into the absorptive layer to cause ablation.” Respondents’ Petition for Review at 25. Respondents, however, fail to demonstrate any reason to read limitations from the preferred embodiment into the claim, or any reason why a person of ordinary skill in the art would understand the claim to require them. “[C]ase law is clear that claims are not to be limited in light of ‘the perceived purpose served by the invention.’” *E-Pass Techs., Inc. v. 3COM Corp.*, 343 F.3d 1364, 1370 (Fed. Cir. 2003).

Regarding “the substrate comprises a material that reflects imaging infrared radiation”

limitation, Respondents’ attempt to import a result of the claimed structure into the claim is improper. *See* Respondents’ Petition for Review at 25-26. While it is true that the patentees

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stated during prosecution, and Dr. Magee testified, that the claimed structure indeed provides the advantage the Respondents seek to require, *i.e.*, that the reflected radiation cause additional ablation of the radiation absorbing layer, that perceived advantage of the claimed structure does not limit the claim. Rather, the plain language of the claim merely requires that the substrate includes reflective material that reflects radiation back to the overlying radiation absorbing layer, as the ALJ concluded. *See* ID at 30.

Concerning “the substrate comprises means for reflecting imaging radiation” limitation, Respondents once again argue that the ALJ’s construction of the claim term ignores “the purpose of the invention.” Respondents’ Petition for Review at 31. The perceived purpose of the limitation should not be added to the construction of this claim term. *E-Pass Techs.*, 343 F.3d at 1370. Indeed, the function of the means-plus-function claim, to reflect radiation, is clearly set out in the claim itself and properly part of the ALJ’s construction. Respondents’ argument is particularly unconvincing in light of the specification’s examples of embodiments that would not meet the limitation Respondents seek to add. *See, e.g.*, ’338 patent (JX-6), col. 4, ll. 6-22.

II. REMEDY

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest and bonding. The Commission has “broad discretion in selecting the form, scope, and extent of the remedy.” *Viscofan, S.A. v. U.S. Int’l Trade Comm’n*,

~~787 F.2d 544, 548 (Fed. Cir. 1986). The Commission may issue an exclusion order excluding~~

the goods of the person(s) found in violation (a limited exclusion order) or, if certain criteria are met, against all infringing goods regardless of the source (a general exclusion order). The

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Commission also has authority to issue cease and desist orders in addition to or in lieu of exclusion orders. *See* 19 U.S.C. § 1337(f). The Commission generally issues cease and desist orders to respondents who maintain commercially significant inventories of infringing products in the United States. *See, e.g., Certain Laser Bar Code Scanners and Scan Engines, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-551, Commission Opinion at 22 (June 14, 2007).

The Commission finds that the appropriate remedy is a limited exclusion order directed towards Respondents' products found to infringe the asserted claims of the '737 and '338 patents, and issues, herewith, a limited exclusion order. The Commission does not issue cease and desist orders as requested by Presstek because the record evidence fails to show that Respondents keep sufficient inventories of the accused products in the United States. Thus, issuance of cease and desist orders is not warranted.¹

III. THE PUBLIC INTEREST

Section 337(d) of the Tariff Act of 1930, as amended, directs the Commission to consider certain public interest factors before issuing a remedy. These public interest factors include the effect of any remedial order on the "public health and welfare, competitive conditions

¹ We decline Presstek's invitation to take official notice of an alleged statement on VIM's website that "[o]ur dealers locally stock our products, enabling fast response times to client orders." Complainant Presstek, Inc.'s Submission on the Issues of Remedy, Public Interest, and Bonding at 4. We are unconvinced by Presstek's assertion that because Respondents maintained throughout the investigation that they do not carry such inventories [*i.e.*, inventories of infringing products in the United States], "Presstek could not have possibly presented evidence at the hearing of Respondents' U.S. inventories of infringing plates." *Id.* at 4-5. Nothing prevented Presstek from challenging Respondents' assertion or introducing evidence to disprove Respondents' assertion during the course of the investigation.

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in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.” 19 U.S.C. § 1337(d).

The facts of this investigation do not implicate the public interest factors. The record evidence establishes that demand in the United States for laser imageable lithographic printing plates can be met by Presstek and its legitimate competitors. In addition, the record does not indicate that an exclusion order on this type of product — laser imageable lithographic printing plates — raises any particular public interest concerns. Here, the public interest favors the protection of United States intellectual property rights by excluding infringing imports. *Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof*, Inv. No. 337-TA-422, Commission Opinion at 9 (July 2000).

IV. BOND

During the 60-day period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond. 19 U.S.C. § 1337(j)(3). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.*; 19 C.F.R. § 210.50(a)(3). The Commission frequently sets the bond by attempting to eliminate the difference in sales prices between the patented domestic product and the infringing product based upon a reasonable royalty. *Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick*

~~*Repositionable Notes*, Inv. No. 337-TA-366, Commission Op. at 24, USITC Pub. No. 2949~~

(January 1996). In cases where the Commission does not have sufficient evidence upon which to base a determination of the appropriate amount of the bond, the Commission has set a 100

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percent bond. *See Certain Sortation Systems, Parts Thereof, and Products Containing Same*, Inv. No. 337-TA-460, Commission Opinion at 21 (March 2003). However, Complainant bears the burden of establishing the need for a bond amount in the first place. *Certain Rubber Antidegradants, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-533, Comm'n Op. at 39,40 (July 21, 2006).

Presstek has failed to establish a need for a bond amount. Indeed, Presstek did not present any evidence of its price information, and made no attempt to show that it was impossible to provide price information for its products.² Accordingly, we determine that no bond is required for infringing products imported during the period of Presidential review.

CONCLUSION

For the reasons set forth above, the Commission finds that the appropriate remedy is a limited exclusion order, prohibiting the entry of infringing laser imageable lithographic printing plates for consumption in the United States. The Commission also finds that the public interest factors set out in section 337(d) do not preclude issuance of a limited exclusion order. The Commission determines that no bond is required to permit temporary importation during the Presidential review period of the infringing laser imageable lithographic printing plates.

² Presstek asserted that “[t]here are several models of Respondents’ printing plates that are packaged in different sizes, quantities, and types. These models are sold at varying prices by Respondents. Therefore, it is not possible to accurately calculate a bond on process differentials.” Complainant’s Post Hearing Brief at 120. However, Presstek did not present any evidence to substantiate its assertion.

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By order of the Commission.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott". The signature is fluid and cursive, with a large initial "M" and a long, sweeping underline.

Marilyn R. Abbott
Secretary to the Commission

Issued: December 23, 2009

**CERTAIN LASER IMAGEABLE LITHOGRAPHIC
PRINTING PLATES**

337-TA-636

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **PUBLIC COMMISSION
OPINION** has been served by hand upon the Commission Investigative Attorney, Aarti
J. Shah, Esq., the following parties as indicated, on December 23, 2009.



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