

**PUBLIC VERSION**

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

In the Matter of

**CERTAIN VIDEO GAME SYSTEMS  
AND CONTROLLERS**

**Inv. No. 337-TA-743**

**COMMISSION OPINION**

The Commission instituted this investigation on November 5, 2010, based on a complaint filed by Motiva, LLC of Dublin, Ohio (“Motiva”). *75 Fed. Reg.* 68379 (Nov. 5, 2010). The complaint alleges 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 video game systems and controllers by reason of infringement of claims 16, 27-32, 44, 57, 68, 81, and 84 of U.S. Patent No. 7,292,151 and claims 1-6 and 8-15 of U.S. Patent No. 7,492,268. The complaint named Nintendo Co., Ltd. of Kyoto, Japan and Nintendo of America, Inc. of Redmond, Washington (collectively, “Nintendo”) as the only proposed respondents.

On November 2, 2011, the presiding administrative law judge (“ALJ”) issued a final initial determination (“ID”) in this investigation finding no violation of section 337. Specifically, the ALJ determined that the accused products, which are the Nintendo Wii video game system and associated video game controllers, do not infringe the asserted patents. The ALJ further found that Motiva had not proven that a domestic industry exists or is in the process of being established with respect to the two asserted patents.

## PUBLIC VERSION

On November 15, 2011, complainant Motiva and the Commission investigative attorney (“IA”) filed petitions for review of the ID. Motiva challenges the ALJ’s determinations that no domestic industry is in the process of being established and that the Nintendo Wii does not infringe the asserted patents. The IA challenges the ALJ’s conclusion that Motiva was not in the process of establishing a domestic industry. Nintendo does not petition for review of the ID.

### I. ANALYSIS

The Commission will grant a petition for review, in whole or in part, where it appears:

- (i) that a finding or conclusion of material fact is clearly erroneous;
- (ii) that a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
- (iii) that the determination is one affecting Commission policy.

19 C.F.R. §§ 210.43(b)(1) & (d)(2).

The Commission has determined that the petitions for review filed by Motiva and the IA do not demonstrate that the ID contains clearly erroneous findings or conclusions, that the ID is without governing precedent, rule, or law, or constitutes an abuse of discretion, or that the ID raises significant policy issues that warrant review. Accordingly, the Commission has determined to deny the petitions for review.

The Commission has, however, determined to review certain portions of the ID on its own initiative (*see* 19 C.F.R. § 210.44) to address two issues not raised by the parties: (1) a statement in the ID connecting the relevant level of skill in the art to the skill of the inventors, and (2) the relevant time frame for considering whether a domestic industry exists or is in the process of being established. Upon review, the Commission provides this opinion relating to those two issues. The Commission’s opinion does not alter the ALJ’s conclusion that Motiva has

## PUBLIC VERSION

not proven a violation of section 337, and the Commission declines to review the portions of the ID not discussed in this opinion.

### A. The Relevant Level of Skill in the Art

The first point we address arises in the ALJ's analysis of the validity of the asserted patent claims. Nintendo argued at the hearing that the claimed inventions are obvious in view of certain prior art and therefore the asserted patent claims are invalid. When considering Nintendo's obviousness argument, the ALJ evaluated what experience one of ordinary skill in the art would have had at the time of the relevant inventions. Nintendo's expert Dr. Colgate testified that he believed such an artisan would have at least a master's degree in engineering and, additionally, five years of relevant experience in a number of highly specialized subjects. See ID at 56. The ALJ noted that Dr. Colgate's standard would exclude both of the named inventors:

In fact, neither Mr. Ferguson nor Mr. Gronachan would have qualified as one of ordinary skill in the art under Dr. Colgate's definition. (See CX-5065C at Q. 7; CX-5066C at Q. 9.) I find that a definition of one of ordinary skill in the art that excludes both inventors cannot be correct.

ID at 57. The ALJ ultimately concluded a person of ordinary skill in the art at the time of the inventions would have a bachelor's degree in computer science or electrical/computer engineering and 3 to 5 years of work experience in the fields of application of sensors and embedded computing systems to motion tracking. ID at 56.

Upon review of the ALJ's analysis, we note that a patent claim is invalid for obviousness if the differences between the subject matter of the claim and the prior art would have been obvious to a person of ordinary skill in the art at the time the invention was made. 35 U.S.C. § 103(a). "Obviousness is a question of law based on underlying questions of fact." *Scanner Techs. Corp. v. ICOS Vision Sys. Corp.*, 528 F.3d 1365, 1379 (Fed. Cir. 2008). The underlying

## PUBLIC VERSION

factual determinations include: “(1) the scope and content of the prior art, (2) the level of ordinary skill in the art, (3) the differences between the claimed invention and the prior art, and (4) objective indicia of non-obviousness.” *Id.* (citing *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966)).

We find no error in the ALJ’s conclusion that a person of ordinary skill in the art at the time of the relevant inventions would have had a bachelor’s degree in computer science or electrical/computer engineering and 3 to 5 years of work experience in the fields of application of sensors and embedded computing systems to motion tracking. However, we do not adopt the ALJ’s statement connecting the relevant level of skill in the art to skill of the inventors. As the Federal Circuit has stated, “It is only that hypothetical person who is presumed to be aware of all the pertinent prior art. The actual inventor’s skill is irrelevant to the inquiry.” *Standard Oil Co. v. American Cyanamid Co.*, 774 F.2d 448, 454 (Fed. Cir. 1985). Accordingly, we vacate the ALJ’s conclusion that “a definition of one of ordinary skill in the art that excludes both inventors cannot be correct.” We decline to review the remainder of the ALJ’s validity analysis.

### **B. The Relevant Timeframe for Evaluating Whether a Domestic Industry Exists or Is in the Process of Being Established**

The second point we address concerns the relevant time for evaluating the existence or establishment of a domestic industry.<sup>1</sup> The ID states that the “date for determining whether a domestic industry exists is the filing date of the complaint.” ID at 163 (quoting *Certain CD-ROM Controllers and Products Containing Same – II*, Inv. No. 337-TA-409, Comm’n Op. at 37 (Oct. 18, 1999)). The ID also considers the complainant’s activities and investments at the time of filing of the complaint in evaluating whether an industry is in the process of being established.

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<sup>1</sup> Relief under section 337(a)(1)(B) is available “only if an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.” 19 U.S.C. § 1337(a)(2).

## PUBLIC VERSION

ID at 170-75. In the context of this investigation, we find no error in the ALJ's analysis. *See Certain Stringed Musical Instruments & Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 12-29 (May 16, 2008). *See also Certain Coaxial Cable Connectors, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op. at 51 n.17 (Apr. 14, 2010).

The Commission has held that the appropriate date for determining whether a domestic industry exists or is in the process of being established is the date of filing of the complaint. *See Coaxial Cable Connectors*, Inv. No. 337-TA-650, Comm'n Op. at 51 n.17 ("We note that only activities that occurred before the filing of a complaint with the Commission are relevant to whether a domestic industry exists or is in the process of being established under sections 337(a)(2)-(3)."). In a limited number of investigations, the Commission has evaluated whether a domestic industry exists based on evidence subsequent to the filing of the complaint, for example when a significant and unusual development has occurred after the complaint has been filed. *See, e.g., Certain Semiconductor Integrated Circuits and Products Containing the Same*, Inv. No. 337-TA-665, ID at 229-30 (Oct. 19, 2009) (examining a complainant's domestic industry where the complainant filed for bankruptcy after filing a complaint with the Commission) (unreviewed in relevant part); *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. No. 3003, Comm'n Op. at 22-26 (Nov. 1996) (same); *Certain Laser Imageable Lithographic Printing Plates*, Inv. No. 337-TA-636, ID at 93-94 (July 24, 2009) (examining technical evidence prepared after the filing of the complaint when evaluating domestic industry) (unreviewed in relevant part). Therefore, as a general matter, the only activities that are relevant to the determination of whether a domestic industry exists or is in the process of being established are those that occurred before the complaint was filed. *See Coaxial Cable Connectors*, Inv. No. 337-TA-650, Comm'n Op. at 51 n.17. However, in appropriate

## PUBLIC VERSION

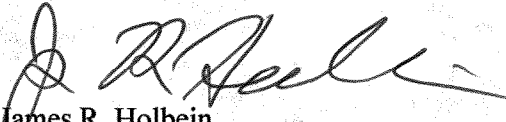
situations based on the specific facts and circumstances of an investigation, the Commission may consider activities and investments beyond the filing of the complaint. *See Certain Electronic Devices, Including Mobile Phones, Portable Music Players, and Computers*, Inv. No. 337-TA-701, Order No. 58, at 6 (Nov. 18, 2010) (unreviewed) (“the International Trade Commission typically looks to the time a complaint is filed, but there have been a number of instances when it has been acceptable to look later in the investigation, either because of the development of new, relevant and timely disclosed evidence or because there is evidence that a complainant’s domestic industry is dwindling.”); *Certain Electronic Imaging Devices*, Inv. No. 337-TA-726, Order No. 18 (Feb. 7, 2011) (unreviewed) (“The Commission . . . has examined the existence of a domestic industry at various points in the investigation timeline, depending on the circumstances of the case.”). Having clarified this point, the Commission declines to review the remainder of the ALJ’s analysis of whether a domestic industry exists or is in the process of being established.

**PUBLIC VERSION**

**II. CONCLUSION**

The Commission has determined to review the ID only with respect to the two issues noted above, and upon review the Commission has provided the clarification herein. The ALJ's conclusion that Motiva has not proven a violation of section 337 is correct and is the Commission's final determination. The investigation is terminated.

By order of the Commission.

  
James R. Holbein  
Secretary to the Commission

Issued: January 20, 2012

**CERTAIN VIDEO GAME SYSTEMS AND CONTROLLERS , 337-TA-743**

**CERTIFICATE OF SERVICE**

I, James R. Holbein, 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 **January 20, 2012**



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