September 13, 2021

Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: The Innovation Alliance's Response to the Commission's Request for Submissions on the Public Interest in *Certain Audio Players and Controllers, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-1191

Dear Secretary Barton:

The Innovation Alliance respectfully submits these comments in response to the Notice of Request for Submissions on the Public Interest issued by the Commission in the matter of Certain Audio Players and Controllers, Components Thereof, and Products Containing Same, Inv. No. 337-TA-1191, on August 19, 2021.

Introduction to the Innovation Alliance

The Innovation Alliance is a coalition of research and development-based technology companies representing innovators, patent owners, and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system that supports innovative enterprises of all sizes. The Innovation Alliance is committed to strengthening the U.S. patent system to promote innovation, economic growth, and job creation, and we support legislation and policies to help achieve those goals. American companies and innovators need protections from intellectual property infringement to safeguard against threats from domestic and international competitors.

Importance of Section 337 in Protecting American Innovators

Vigorous enforcement and protection of intellectual property rights are essential to the competitive viability of innovative companies within the United States. That is particularly so where those rights are being infringed by products that are manufactured abroad and imported into the United States. Accordingly, the primary objective of 19 U.S.C. § 1337 ("Section 337") is to remedy acts of unfair competition related to the importation of infringing goods. Denying exclusionary relief in the face of valid and infringed intellectual property rights will have the effect of deterring future investments in research and development in the United States, stifling innovation, encouraging infringing imports, and depriving U.S. consumers of the rapid advancement in technology they have come to expect.

Innovation Alliance Response

Last year, the Judiciary Antitrust Subcommittee of the House of Representatives held a field hearing in Colorado on the abuse of market power by large online tech companies that highlighted the growing problem of "efficient infringement," also known as "predatory infringement."[1] Efficient/predatory infringement occurs when large corporate interests choose to infringe the patents of smaller inventors, knowing that it is cheaper to fight off any legal challenge in court than it is to pay a fair licensing fee for the use of an invention. At that hearing, Sonos CEO Patrick Spence summed up the problem:

> These dominant companies disregard inventor's patents because they are so powerful and they are doing the cost-benefit analysis of infringing now and paying later once they have achieved dominance and moved past the point where they have to worry about competition in that market. They are exploiting today's system of enforcement to extend their dominance from one market to the next.

[1] Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, *available at* https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=2386.

Much has been written about the problem of efficient infringement.[2] This strategy became popular after two seminal events: (1) the Supreme Court's 2006 decision in *eBay v. MercExchange* that made it much more difficult for patent holders to stop ongoing infringement; and (2) the creation of the Patent Trial and Appeal Board in the America Invents Act in 2011, which gave patent infringers a new forum in which to challenge the validity of patents they have been accused of infringing. With these new tools available to companies with the wherewithal to avail themselves of them, one commentator noted that, "Companies like Sonos have virtually no leverage to stop bigger companies with deep pockets from infringing their patents."[3]

The Commission has previously served as a critical venue for protecting U.S. intellectual property rights and has not offered a forum susceptible to efficient infringement strategies. Press reports indicate that the Administrative Law Judge ("ALJ") in this investigation, however, has determined that theoretical new designs for the articles at issue in the Section 337 investigation do not infringe any of the five patents the ALJ found to have been valid and infringed. Allowing the Respondent in this case to evade exclusion of its infringing articles on the basis of a theoretical new design without an actual article that is truly "fixed in design" and intended for commercial sale would amount to allowing efficient infringement at the Commission for the first time.

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[2] *See, e.g.*, Joe Nocera, "Why Sonos has already lost its patent suit against Google," (Jan. 18, 2020), *available at* https://www.post-gazette.com/opinion/Op-Ed/2020/01/18/Joe-Nocera-Why-Sonos-has-already-lost-its-patent-suit-against-Google/stories/202001180004 (hereinafter "Nocera"). *See also* Paul Michel, "Big Tech is Overwhelming Our Political System," (Nov. 20, 2020), *available at* https://www.realclearpolicy.com/articles/2020/11/20/big_tech_is_overwhelming_our_political_system_650331.html ; Rana Foroohar, "Tech innovation needs a level playing field," Financial Times (Jan. 19, 2020); The Economist, "The trouble with patent-troll hunting," (Dec. 14, 2019), *available at* https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting; Adam Mossoff, "Testimony on the STRONGER Patents Act before the Senate Judiciary Committee, Intellectual Property Subcommittee," (Sept. 11, 2019). George Mason Law & Economics Research Paper No. 19-32, available at SSRN: https://ssrn.com/abstract=3457804 or http://dx.doi.org/10.2139/ssrn.3457804.

[3] Nocera, *supra* note 2.

Section 337 outlaws the importation into the United States of articles that infringe a valid and enforceable U.S. patent, copyright, or trademark.[4] Section 337 also outlaws unfair methods of competition and unfair acts in the importation of articles into the United States.[5] If the Commission determines there is a violation of Section 337, it can exclude the subject articles from entry into the United States.[6] The Federal Circuit has made clear that the availability of Section 337 relief is dependent on the existence of an actual "article" being imported into the United States.[7]

As the Petition must show the existences of a concrete, physical "article" that infringes the asserted patents for Section 337 relief to be available, it follows logically that the Respondent must show the existence of a concrete, physical "article" that does not infringe the asserted patents before the Commission can make a ruling that the redesigned article no longer infringes the asserted patents. Commission precedent recognizes this obvious parallelism by requiring that before the Commission will make a judgment on a redesign, the Respondent must prove, among other things, that the redesigned product is "sufficiently fixed in design."[8]

To make this requirement meaningful, the Innovation Alliance submits that before the Commission allows a Respondent to evade an exclusion order on the basis of a redesign, the Respondent must prove that there is a concrete, physical product that is sufficiently final such that the Respondent intends to offer it for commercial sale without change. The Commission should not allow a Respondent to make theoretical arguments about how it could design around

[4] 19 U.S.C. § 1337(a)(1)(B), (C).

[5] 19 U.S.C. § 1337(a)(1)(A).

[6] 19 U.S.C. § 1337(d)(1).

[7] *ClearCorrect Operating, LLC v. Int'l Trade Comm'n*, 810 F.3d 1283, 1289-90 (Fed. Cir. 2015) ("The Commission's jurisdiction to remedy unfair international trade practices is limited to 'unfair acts' involving the importation of 'articles.'").

[8] *Certain Human Milk Oligosaccharides & Methods of Producing the Same*, Inv. No. 337-TA-1120, Comm'n Op. at 18, 2020 WL 3073788, at 11 (June 8, 2020).

the asserted patents, nor should it allow a Respondent to cobble together a jerry-rigged product it claims is a redesigned product without any proof the article is that which the Respondent intends to offer for commercial sale without change. That is especially true where the asserted patents are software patents, not requiring the Respondent to risk the building of a new production facility for the manufacture of a redesigned article that has not yet been approved by the Commission.

If Commission precedent is interpreted otherwise, it would permit the exact gamesmanship that the Respondent appears to have undertaken in this investigation – proffering a redesigned product that has not been tested to demonstrate full functionality, commercial-scale manufacturing viability, large-scale rollout, or sufficient consumer appeal. In other words, it would permit the Respondent to evade an exclusion order by creating a redesigned product for the sole purpose of evading the exclusion order, rather than by creating a truly redesigned product that will be the very product the Respondent intends to import and sell to consumers in the United States. That would allow the Section 337 version of "efficient infringement," severely undermining the utility of the Section 337 remedy.

Conclusion

For the reasons articulated above, the Innovation Alliance respectively submits that the public interest would be served by requiring a Respondent who seeks to evade an exclusion order by redesigning the subject articles to prove there is a concrete, physical product that is sufficiently final such that the Respondent intends to offer it for commercial sale without change. Any lesser requirement for a redesign adjudication would undermine the Section 337 remedy and allow "efficient infringement" at the Commission.

Filed on behalf of the Innovation Alliance
September 13, 2021

/s/ Brian Pomper
Brian Pomper
Executive Director
Innovation Alliance