

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

In the Matter of:

CERTAIN AUDIO PLAYERS AND
CONTROLLERS, COMPONENTS THEREOF,
AND PRODUCTS CONTAINING THE SAME

85 Fed. Reg. 2147 (Jan. 14, 2020)
Docket No. 3428

**STATEMENT OF THE R STREET INSTITUTE,
PUBLIC KNOWLEDGE, AND INNOVATION DEFENSE FOUNDATION
IN RESPONSE TO THE COMMISSION’S NOTICE OF REQUEST
FOR STATEMENTS ON THE PUBLIC INTEREST**

The R Street Institute respectfully submits the following comments in order to urge the Commission to develop a thorough evidentiary record on the public interest in its investigation and carefully consider the impact of an exclusion order in this matter on the public interest. In particular, we are concerned that competitive conditions in the U.S. economy and general consumer and economic welfare in the United States would be harmed by the exclusion of “mobile phones, tablets, and laptops” as requested in Sonos’ complaint (¶ 39). Furthermore, considering the breadth of the requested exclusion order, the narrow nature of the asserted patent claims, and the availability of full relief under the U.S. patent law, the Commission should recognize that the interest in enforcing complainant’s patent rights is only weakly implicated in this requested investigation.

I. The Requested Exclusion Order is Overbroad

The complainant is asserting patents related to managing multiple wireless speakers through a single software interface. Its domestic industry products are internet-connected smart speakers. Sonos names (¶ 1) “audio players and controllers” as the subject of the requested investigation and states in its initial Statement on the Public Interest that the accused products

“are primarily used in homes or businesses to play and/or control the playing of music or other audio content.”¹

These characterizations grossly understate the breadth of the products Sonos is seeking to exclude from the U.S. market, which include not only internet-connected speakers but also smartphones, tablets, and laptops. The complaint identifies (¶ 39) not just audio-specific devices but also “networked display devices,” “networked hub devices,” “networked node devices,” “mobile phones, tablets, and laptops,” regardless of whether the products actually infringe any patents but so long as, being general-purpose computing devices, they are “capable of” infringing acts. Indeed, Sonos does not allege that these devices are imported with software necessary to perform any infringing acts, merely stating (¶ 101) that they may be “capable of downloading and executing an app or other software.” The accused smartphones, tablets, and laptops can indeed be “used in homes or businesses to play and/or control the playing of music,” but that is certainly not their only function. They can also be used as cash registers, cooking appliances, fishing guides, newspapers, television sets, and anything else that can be done with software on a computer.

These devices are not in any way configured or designed to serve as “audio players” or to practice the technology claimed in the asserted patents except that they are sold with preinstalled music-streaming software through which a consumer can also manage smart speakers on a network. Nor is this software particularly related to the accused products—it is available to anyone to download over the internet for free and can be used on any device running the Android operating system.

II. Domestic Inducement Violations Raise Special Public Interest Concerns

Under the Federal Circuit’s holding in *Suprema v. ITC*,² the Commission exercises authority under section 337 to block imports based on post-importation activity that induces domestic infringement. This has allowed further ITC litigation involving patents like those in

¹ Sonos Public Interest Statement at 3.

² *Suprema, Inc. v. Int’l Trade Comm’n*, 796 F.3d 1338 (Fed. Cir. 2015).

Sonos' complaint, where the respondent's alleged infringement is predicated on the use of a domestically distributed software application. Taken to its logical end, *Suprema* theoretically authorizes exclusion of the most staple of articles with overwhelmingly noninfringing uses, so long as someone in the post-importation distribution chain suggests using the article in an infringing manner and regardless of whether that infringing use is actually performed.

Such cases can pose special problems for the public interest where, as in this case, the remedy of an exclusion order could cover products only tangentially related to the complainant's patent rights or the respondent's involvement in infringement of those rights. Consider, for example, a television set-top box that can be used as part of an infringing computer network system, but where only 1% of set-top boxes are ever used as part of that system. Should an exclusion order be entered, then for every single instance of infringement that is stopped, ninety-nine consumers are prevented from accessing a product in ways that have no impact on the patent owner's rights. That 99-to-1 ratio has obvious negative implications for competitive conditions in the U.S. economy and for U.S. consumers.

At a minimum, then, the Commission must seek evidence in the present investigation to assess the relative degree to which the accused products are used in an infringing manner post-importation. Given that many of the accused devices are general-purpose computing devices and many consumers do not have or desire the complex speaker system contemplated by the patents at issue, it seems likely that the vast majority of accused devices are never used for infringement at all. If that is the case, the public interest should weigh heavily against any exclusionary remedy.

III. The Public Interest in Enforcement of Patent Rights is Not Strongly Implicated in this Complaint

When Congress gave the ITC the power to issue exclusion orders in section 337 cases, it simultaneously charged the Commission with ensuring that such orders do not harm the public interest. The legislative history indicates Congress intended the public interest to be "paramount in the administration of this statute" and that the public interest factors enumerated in section

337 represent “overriding considerations.”³ Under this mandate, case-by-case evaluation of the public interest factors is a vital part of the Commission’s job in every section 337 investigation.

When addressing public interest concerns, the Commission has articulated a balancing test in which it weighs the harmful effects of an exclusion order under the statutory factors against “the patent holder’s rights and the public interest in enforcing intellectual property rights.”⁴

In order to most effectively promote the public interest in enforcement of patent rights, the Commission should require stronger evidence of harm to the enumerated public interest factors before denying an exclusion order in cases where the complainant lacks a viable avenue for redress in federal district court. By the same token, the obvious availability and propriety of district court litigation in a particular case should reduce any weight the Commission assigns to the complainant’s interest in enforcement through an exclusion order.

The logic of this position has been recognized by various authorities. See, for instance, Letter from Ambassador Michael Froman to Chairman Irving Williamson, Re: Disapproval of the U.S. International Trade Commission’s Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Inv. No. 337-TA-794, Aug. 3, 2013 (“My decision to disapprove this determination does not mean that the patent owner in this case is not entitled to a remedy. On the contrary, the patent owner may continue to pursue its rights through the courts.”); International Trade Commission Patent Litigation: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet, 114th Cong. 53 (2016) (opening statement of Rep. Bob Goodlatte) (calling on the ITC to use the public interest test to “articulat[e] standards that clarify which patent disputes should be adjudicated by the ITC, and those which are more properly addressed by U.S. district courts.”); Initial Determination and Recommended Determination at 194, Mobile Electronic Devices, Inv. No. 337-TA-1065 (2018) (“Another relevant matter that I

³ S. Rep. No. 93-1298, 93d Cong. 2d Sess. 193, 197 (1974).

⁴ Comm’n Op. at 136, *Certain Baseband Processor Chips*, Inv. No. 337-TA-543 (June 19, 2007).

note is that Qualcomm is an established and profitable concern that has an adequate remedy at law for any patent infringement by Apple.”).

Sonos and Google are both American companies that import products designed in the United States and assembled abroad. Sonos filed a lawsuit in district court simultaneously with this section 337 complaint in order to resolve a licensing dispute over whether certain functions in Google’s U.S.-designed music streaming software entitle Sonos to collect patent royalties.⁵ According to news reports, Sonos also hopes to secure royalties from Amazon but has chosen not to include that company in this current stage of its litigation campaign.⁶ This behavior is evidence that complainant’s goal in filing a section 337 complaint is to secure adjudication of its patent rights rather than enforcement. Exclusion of smartphones, tablets, and laptops therefore would not further the complainant’s or the public’s interest in enforcement of patent rights.

IV. Conclusion

We urge the Commission to instruct the administrative law judge in this investigation to develop a complete evidentiary record on public interest issues. We believe full consideration of that record will lead the Commission to realize that any exclusion order issued in this investigation should not include generic consumer computing devices like smartphones, tablets, and laptops. Such exclusion would harm competitive conditions and consumer welfare without furthering any interest in the enforcement of Sonos’ patent rights.

Respectfully submitted,

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⁵ Jack Nicas & Daisuke Wakabayashi, *Sonos, Squeezed by the Tech Giants, Sues Google*, N.Y. TIMES, Jan. 7, 2020, <https://www.nytimes.com/2020/01/07/technology/sonos-sues-google.html>.

⁶ *Id.*