

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

In the Matter of

**CERTAIN CONSUMER ELECTRONICS
WITH DISPLAY AND PROCESSING
CAPABILITIES**

Investigation No. 337-TA-884

**NOTICE OF COMMISSION DECISION TO REVIEW IN PART A FINAL INITIAL
DETERMINATION FINDING A VIOLATION OF SECTION 337;
REQUEST FOR WRITTEN SUBMISSIONS;
EXTENSION OF TARGET DATE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's ("ALJ") final initial determination ("final ID") issued on August 29, 2014, finding a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), and to extend the target date in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 25, 2013, based on a complaint filed by Graphics Properties Holdings, Inc. of New Rochelle, New York ("GPH"). 78 *Fed. Reg.* 38072-73 (June 25, 2013). The complaint alleged 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 consumer electronics with display and processing capabilities by reason of infringement of

certain claims of United States Patent Nos. 6,650,327 (“the ’327 patent”); 8,144,158 (“the ’158 patent”); and 5,717,881 (“the ’881 patent”). The notice of investigation named as respondents Panasonic Corporation of Osaka, Japan and Panasonic Corporation of North America of Secaucus, New Jersey (collectively “Panasonic”); Toshiba Corporation of Tokyo, Japan and Toshiba America Information Systems, Inc. of Irvine, California (collectively “Toshiba”); Toshiba America, Inc. of New York, New York (“Toshiba America”); Vizio, Inc. of Irvine, California (“Vizio”); AmTran Logistics, Inc. of Irvine, California and AmTran Technology Co., Ltd. of New Taipei City, Taiwan (collectively “AmTran”); and ZTE Corporation of Shenzhen, China, ZTE (USA) Inc. of Richardson, Texas, and ZTE Solutions of Richardson, Texas (collectively, “ZTE”). The Office of Unfair Import Investigations (“OUII”) is a party to the investigation. The Commission later terminated the investigation with respect to Panasonic, Vizio, AmTran, and ZTE.

On March 31, 2014, the Commission determined not to review an ID granting respondents’ motion for summary determination that claim 1 of the ’881 patent is invalid for indefiniteness, thus terminating the ’881 patent from the investigation. Notice (Mar. 31, 2014); Order Nos. 53 (Feb. 27, 2014), 60 (Mar. 11, 2014, correcting Order No. 53).

On August 29, 2014, the ALJ issued his final ID, finding a violation of section 337 with respect to Toshiba. Specifically, the ALJ found that all of the accused products literally infringe claims 2, 3, 7, 25, and 26 of the ’327 patent and claims 1, 4, 7, and 10 of the ’158 patent (“the asserted claims”). The ALJ also found that none of the asserted claims of the ’327 patent are invalid as anticipated under 35 U.S.C. § 102 or as obvious under 35 U.S.C. § 103. The ALJ further found that none of the asserted claims of the ’158 patent are invalid as anticipated under 35 U.S.C. § 102, as obvious under 35 U.S.C. § 103, or for lack of written description under 35 U.S.C. § 112. The ALJ also found that the respondents did not establish that any of the asserted patents are unenforceable due to estoppel based on GPH’s obligation to license the asserted patents under reasonable and nondiscriminatory (“RAND”) terms or that license exhaustion applies with respect to any of the asserted patents. The ALJ further found that a domestic industry exists with respect to the ’327 and ’158 patents.

The ALJ found, however, that no violation of section 337 exists as to respondent Toshiba America with respect to the asserted claims of the ’327 and ’158 patents because GPH failed to satisfy the importation or sale requirement of section 337 establishing subject matter jurisdiction as to Toshiba America. No party petitioned for review of this finding.

The final ID also includes the ALJ’s recommended determination (“RD”) on remedy and bonding. The ALJ recommends that the Commission issue a limited exclusion order barring entry of Toshiba’s consumer electronics with display and processing capabilities that infringe the asserted claims of the ’327 and ’158 patents in the event it finds a violation of section 337. The ALJ also recommends issuance of a cease and desist order against Toshiba, and recommends the imposition of a zero percent bond during the period of Presidential review because GPH failed to support its bond proposals.

On September 15, 2014, Toshiba filed a petition for review of the final ID’s finding of

violation. In particular, Toshiba requested review of the final ID's findings concerning claim construction, invalidity, infringement, the economic prong of the domestic industry, Toshiba's license defense, and Toshiba's RAND defense. Also on September 15, 2014, GPH filed a contingent petition for review concerning the ALJ's lack of findings with respect to whether GPH additionally satisfied the economic prong of the domestic industry requirement based on the domestic activities of its licensees pursuant to 19 U.S.C. § 1337(a)(3) (A) and (B).

On September 23, 2014, GPH filed a response to Toshiba's petition for review, and Toshiba filed a response to GPH's contingent petition for review. Also on September 23, 2014, the Commission investigative attorney filed a joint response to the private parties' petitions.

On September 30, 2014, Toshiba filed a post-RD statement on the public interest pursuant to Commission Rule 210.50(a)(4). On October 1, 2014, GPH filed its post-RD public interest statement pursuant to the Commission Rule 210.50(a)(4). No responses were filed by the public in response to the post-RD Commission Notice issued on September 3, 2014. *See* Notice of Request for Statements on the Public Interest (Sept. 3, 2014).

Having examined the record of this investigation, including the ALJ's final ID, the petitions for review, and the responses thereto, the Commission has determined to review the final ID in part.

Specifically, the Commission has determined to review the ALJ's construction of the limitation "frame buffer" in claims 2, 3, and 7 of the '327 patent and claims 1, 7, and 8 of the '158 patents, and the claim limitations "scan converter" and "scan convert data" recited in claim 1 of the '158 patent. In addition, the Commission has determined to review the final ID's finding that claim 1 of the '158 patent is not invalid under 35 U.S.C. § 112 for failure to satisfy the written description requirement.

The Commission has also determined to review the final ID's finding that the reference Martin, P. et al., "Turbo VRX: A High-Performance Graphics Workstation Architecture" ("the Martin publication") does not anticipate claim 2 of the '327 patent and claims 1, 4, 7, and 10 of the '158 patent. The Commission has further determined to review the final ID's finding that Toshiba failed to show by clear and convincing evidence that the asserted claims of the '327 and '158 patents are obvious in view of Martin, U.S. Patent No. 5,977,983 to Einkauf ("Einkauf"), and AT&T's Pixel Machine ("Pixel Machine"), alone or in combination with other asserted prior art.

Because the Commission has determined to review the ALJ's constructions of the limitations "frame buffer," "scan converter," and "scan convert data," the Commission has also determined to review the final ID's finding of infringement with respect to all of the accused graphics processing units, including those for which Toshiba did not petition for review.

The Commission has determined to review the final ID's finding that GPH has satisfied the economic prong of the domestic industry requirement. Accordingly, the Commission has determined to review the final ID's finding that GPH's motion for summary determination that it

satisfied the economic prong of the domestic industry requirement through its licensees' activities under 337(a)(3)(A) and (B) for expenditures in labor, capital, plant, and equipment with respect to its licensees' research and development activities is moot. Furthermore, because the Commission has determined to review the ALJ's constructions of the limitations "frame buffer," "scan converter," and "scan convert data," the Commission has determined to review the final ID's finding that GPH satisfied the technical prong of the domestic industry requirement.

The Commission has further determined to review the final ID's finding that the defense of license exhaustion does not apply to certain of Toshiba's accused products by virtue of a license agreement concerning Toshiba's display panel manufacturers. The Commission has also determined to review the final ID's finding that the '327 patent is not subject to RAND encumbrances.

The Commission has determined not to review the remaining issues decided in the final ID.

The parties are requested to brief their positions on the issues under review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

1. Does the correct construction of the "frame buffer" limitation require that the claimed "frame buffer" must store "floating point color values" but need not store a "full frame of fragment or pixel data after rasterization is complete but immediately prior to the values being scanned out to the display?" Please discuss the correct construction of these terms in reference to the intrinsic evidence and *Silicon Graphics, Inc. v. ATI Technologies, Inc.*, 607 F.3d 784, 792 (Fed. Cir. 2010).
2. Please discuss whether the claimed "scan converter" is capable of operating on an entirely floating point basis while receiving and outputting data that is not in floating point format. Please address how this affects the proper construction of the claim limitations "scan converter" and "scan convert data" and whether claim 1 of the '158 patent is invalid under 35 U.S.C. § 112 for failure to satisfy the written description requirement.
3. Please discuss whether the Martin publication by itself is enabling prior art. In addition, please address whether GPH's reliance on the reference "High Speed High Quality Antialiased Vector Generation" by A. Barkans to discredit the Martin publication is legally permissible in the context of assessing whether the Martin publication is enabled.
4. Please discuss whether, if the Martin publication is enabled, the Martin publication itself reads on every limitation of claim 2 of the '327 patent and claims 1, 4, 7, and 10 of the '158 patent.
5. Please discuss whether, if the Martin publication is enabled, Martin alone or in combination with other prior art renders obvious the asserted claims of the '327 and '158 patents with respect to the claim limitations "frame buffer," "s10e5 format," "scan

converter,” and “scan convert data.”

6. Please discuss whether Einkauf, alone or in combination with other prior art, renders obvious the asserted claims of the '327 and '158 patents with respect to the claim limitations “frame buffer,” “s10e5 format,” “scan converter,” and “scan convert data.”
7. Please discuss whether Pixel Machine, alone or in combination with other prior art, renders obvious the asserted claims of the '327 and '158 patents with respect to the claim limitations “frame buffer,” “texture circuit,” “s10e5 format,” “scan converter,” and “scan convert data.” In particular, please address if the question of whether Pixel Machine renders obvious the “texture circuit” limitation in claim 4 of the '158 patent remains at issue.
8. In light of the Commission’s determination to review the ALJ’s construction of the claim limitations “frame buffer,” “scan converter,” and “scan convert data,” please discuss whether any of the accused products infringe the asserted claims of the '327 and '158 patents. Also, please address whether the source code upon which GPH’s expert relied with respect to his opinion that the accused Toshiba products infringe the asserted claims of the '327 and '158 patents accurately reflects the operation of those products.
9. Please discuss, based on record evidence, the extent to which GPH’s purported licensing-based domestic industry will be ongoing following the termination of this investigation.
10. Please discuss whether GPH has satisfied the economic prong of the domestic industry requirement through its licensees’ activities under 337(a)(3)(A) and (B) for expenditures in labor, capital, plant, and equipment with respect to its licensees’ research and development activities.
11. In light of the Commission’s determination to review the ALJ’s construction of the claim limitations “frame buffer,” “scan converter,” and “scan convert data,” please discuss whether GPH has satisfied the technical prong of the domestic industry requirement.
12. Please explain the scope of licensed products recited in the license agreement concerning certain of Toshiba’s display panel manufacturers in accordance with the laws of the state of New York. Please discuss whether Toshiba is a sublicensee pursuant to this license agreement.
13. Please discuss whether GPH incurred a RAND obligation as to the '327 and/or '158 patent by reason of GPH’s or SGI’s conduct (1) before any of the standards committees with which GPH or SGI was involved, or (2) in negotiations with potential licensees. In particular, please address: (1) the legal significance of SGI’s purported statement to the OpenGL Architecture Review Board and the Khronos Group Board of Promoters that, as to the '327 patent, it will discuss licensing on RAND terms; (2) whether the '327 patent is incorporated into an optional extension; (3) if the '327 patent is incorporated into an

optional extension, is it considered part of the Ratified Specification; and (4) whether the asserted claims of the '327 and/or '158 patent are "Necessary Claims" or "Necessary Patent Claims."

14. Please discuss the course of conduct between Toshiba and GPH regarding negotiations on RAND licensing terms.
15. Please discuss whether GPH ever submitted an IP Disclosure Certificate in connection with its participation with the Open GL standard under the Khronos Group Membership Agreement.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in the respondent(s) being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, see *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation, including OUII, are requested to file written submissions on the issues identified in this notice. Parties to the investigation, including OUII, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant is also requested to submit proposed remedial orders for the Commission's

consideration and to provide identification information for all importers of the subject articles. Complainant and OUII are also requested to state the dates that the patents expire and the HTSUS numbers under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on November 21, 2014. Initial submissions are limited to 125 pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business on December 5, 2014. Reply submissions are limited to 75 pages, not including any attachments or exhibits related to discussion of the public interest. The parties may not incorporate by reference their filings before the ALJ. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number ("Inv. No. 337-TA-884") in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The target date for completion of the investigation is extended to January 16, 2015.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.



Lisa R. Barton
Secretary to the Commission

Issued: October 30, 2014