

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

In the Matter of

Investigation No. 337-TA-943

CERTAIN WIRELESS HEADSETS

**NOTICE OF COMMISSION DETERMINATION TO REVIEW AN INITIAL
DETERMINATION GRANTING RESPONDENTS' MOTION FOR SUMMARY
DETERMINATION OF PATENT INVALIDITY DUE TO INDEFINITENESS**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination (“ID”) (Order No. 17) granting respondents’ motion for summary determination of patent invalidity due to indefiniteness.

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 (<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 January 13, 2015, based on a complaint filed by One-E-Way, Inc. of Pasadena, California (“One-E-Way”). 80 *Fed. Reg.* 1663 (Jan. 13, 2015). 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 wireless headsets by reason of infringement of certain claims of U.S. Patent Nos. 7,865,258 (“the ’258 patent”) and 8,131,391 (“the ’391 patent”). *Id.* The notice of investigation named several respondents, including Sony Corporation of Tokyo, Japan; Sony Corporation of America of New York, New York; and Sony Electronics, Inc. of San Diego, California (collectively, “Sony”); Beats Electronics, LLC of Culver City, California and Beats Electronics International Ltd. of Dublin, Ireland (collectively, “Beats”); Sennheiser Electronic GmbH & Co. KG of Wedemark, Germany and Sennheiser Electronic Corporation of Old Lyme, Connecticut (collectively,

“Sennheiser”); BlueAnt Wireless Pty, Ltd. of Richmond, Australia and BlueAnt Wireless, Inc. of Chicago, Illinois (collectively, “BlueAnt”); Creative Technology Ltd. of Singapore and Creative Labs, Inc. of Milpitas, California (collectively, “Creative Labs”); and GN Netcom A/S d/b/a Jabra of Ballerup, Denmark (“GN Netcom”). *Id.* The Office of Unfair Import Investigations (OUII) also was named as a party to the investigation. *Id.* The Commission previously terminated the investigation with respect to Beats and Sennheiser. *See* Notice (Apr. 29, 2015); Notice (June 11, 2015). The Commission also previously terminated the investigation with respect to certain claims of the ’258 and ’391 patents. *See* Notice (May 26, 2015); Notice (Aug. 26, 2015).

On August 10, 2015, respondents Sony, BlueAnt, Creative Labs, and GN Netcom (collectively, “Respondents”) filed a motion for summary determination that asserted claim 8 of the ’258 patent and asserted claims 1, 3-6, and 10 of the ’391 patent are invalid as indefinite under 35 U.S.C. § 112, ¶ 2. On August 20, 2015, the Commission investigative attorney (“IA”) filed a response in support of the motion. Also on August 20, 2015, One-E-Way filed an opposition to the motion. On August 27, 2015, Respondents moved for leave to file a reply to One-E-Way’s opposition, which the presiding administrative law judge (“ALJ”) granted that same day. *See* Order No. 16 (Aug. 27, 2015).

On September 21, 2015, the ALJ issued the subject initial determination (“ID”), granting Respondents’ motion for summary determination that all of the asserted claims of the ’258 and ’391 patents are invalid as indefinite under 35 U.S.C. § 112, ¶ 2 and terminating the investigation with a finding of no violation of section 337.

On October 2, 2015, One-E-Way filed a petition for review of the subject ID. On October 9, 2015, Respondents and the IA each filed responses to the petition.

Having examined the record of this investigation, including the subject ID, the petitions for review, and the responses thereto, the Commission has determined to review the subject ID.

In connection with its review, the Commission requests responses to the following questions:

1. Please point to the specific areas in the record where the putative indefiniteness of the clause “virtually free from interference” was a significant topic of substantive discussion among the parties and the ALJ.
2. Please explain how the clause “virtually free from interference” is material to a position any party has taken in this Investigation with respect to validity under 35 U.S.C. §§ 102, 103, or 112(a) (formerly 112 ¶1), or infringement under section 271. Please provide citations to specific areas in the record (including document name and page number) in which this materiality was raised or discussed.

3. Please explain how the materiality discussed in Q2 turns on the degree of freedom from interference. Please provide citations to specific areas in the record (including document name and page number) in which this turning was raised or discussed.
4. Please explain in detail what lead to the difference in outcomes on the issue of indefiniteness under 35 U.S.C. § 112(b) (formerly 112 ¶2) of the Federal Circuit decisions in *Interval Licensing LLC v. AOL, Inc.*, 766 F.3d 1364, 1369-74 (Fed. Cir. 2014) and *DDR Holdings LLC v Hotelscom LP*, 773 F.3d 1245, 1260-61 (Fed. Cir. 2014). In these two cases, to what extent did the indefiniteness determinations turn on the materiality of the potentially indefinite clauses to other arguments that had been raised in those cases regarding validity under 35 U.S.C. §§ 102, 103, or 112(a) (formerly 112 ¶1), or infringement under section 271?

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. The written submissions must be filed no later than close of business on **December 11, 2015**. Initial submissions are limited to 30 pages. Reply submissions must be filed no later than the close of business on **December 18, 2015**. Reply submissions are limited to 15 pages. The parties may not incorporate by reference their prior filings before the ALJ or the Commission. 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-943”) 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 any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: December 1, 2015