

PUBLIC VERSION**In the Matter of****CERTAIN DIGITAL VIDEO
RECEIVERS AND HARDWARE
AND SOFTWARE COMPONENTS
THEREOF****Inv. No. 337-TA-1001****RECOMMENDED DETERMINATION ON REMEDY AND BONDING
Administrative Law Judge David P. Shaw**

Pursuant to the notice of investigation, 81 Fed. Reg. 33548 (May 26, 2016), this is the Recommended Determination on remedy and bonding in *Certain Digital Video Receivers and Hardware and Software Components Thereof*, U.S. International Trade Commission Investigation No. 337-TA-1001.

For the reasons stated herein, it is recommended that, subject to any public interest determination of the Commission, the Commission should: (1) issue a limited exclusion order covering products that infringe one or more of the claims as to which a violation of section 337 has been found; (2) issue cease and desist orders; and (3) require no bond during the Presidential review period.

I. Procedural Background

On April 6, 2016, Rovi Corporation and Rovi Guides, Inc. filed a complaint alleging that respondents unlawfully import “certain digital video receivers and hardware and software components thereof” into the United States. Compl., ¶ 1. On April 25, 2016, Rovi filed an amended complaint. The amended complaint alleged, *inter alia*, that respondents directly and/or indirectly infringe Rovi’s patents through the importation, and/or manufacture, use, sale or lease,

and/or offer for sale or lease within the United States after importation of the Accused Products. Am. Compl., ¶¶ 6-7 and 110-200. The amended complaint asserted the following seven patents: U.S. Patent No. 6,418,556 (the “556 patent”); U.S. Patent No. 8,006,263 (the “263 patent”); U.S. Patent No. 8,046,801 (the “801 patent”); U.S. Patent No. 8,566,871 (the “871 patent”); U.S. Patent No. 8,578,413 (the “413 patent”); U.S. Patent No. 8,621,512 (the “512 patent”); and U.S. Patent No. 8,768,147 (the “147 patent”).

By publication of a notice in the Federal Register on May 26, 2016, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the Commission instituted this investigation to determine:

[W]hether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain digital video receivers and hardware and software components thereof by reason of infringement of one or more of claims 1, 2, 5, 6, 8, 9, 11, 12, 14, 15, 17, and 18 of the ‘263 Patent; claims 1, 3, 5–10, 12, and 14–18 of the ‘413 patent; claims 1–54 of the ‘801 patent; claims 1, 2–4, 8–16, and 20–24 of the ‘512 patent; claims 1, 5, 6, 8, 10, 11, 15, 16, 18, and 20–24 of the ‘147 patent; claims 1, 2, 6–13, 17–24, 28–33 of the ‘871 patent; and claims 2–4, 7, 10–14, 16, 18–22, 24, 26, 28, 30, 33, 35, 36, 39, and 40 of the ‘556 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

81 Fed. Reg. 33548 (May 26, 2016). The Commission named as complainants Rovi Corporation and Rovi Guides, Inc. (collectively, “Rovi”). *Id.* The Commission named sixteen respondents that constitute three respondent groups, the Comcast, ARRIS, and Technicolor respondents, as follows:

- The “Comcast” respondents are: Comcast Corporation; Comcast Cable Communications, LLC; Comcast Cable Communications Management, LLC; Comcast Business Communications, LLC; Comcast Holdings Corporation; and Comcast Shared Services, LLC.
- The “ARRIS” respondents are: ARRIS International plc; ARRIS Group Inc.; ARRIS Technology, Inc.; ARRIS Enterprises Inc.; ARRIS Solutions, Inc.; Pace Ltd.; and

Pace Americas LLC.

- The “Technicolor” respondents are: Technicolor SA; Technicolor USA, Inc.; and Technicolor Connected Home USA LLC.

Id. The Office of Unfair Import Investigations was not named as a party in the investigation. *Id.*

During the pre-hearing phase of this investigation, the administrative law judge issued unreviewed initial determinations granting Rovi motions to terminate the investigation as to certain claims and patents so that by the time post-hearing briefs were filed, only claims of the following six patents remained at issue: the ‘556 patent; the ‘263 patent; the ‘801 patent; the ‘871 patent; the ‘413 patent; and the ‘512 patent. *See* Final Initial Determination, Section I.B (Procedural History Synopsis).

On May 26, 2016, the administrative law judge issued the final initial determination (“ID”) in this investigation, finding that a violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain digital video receivers and hardware and software components thereof, with respect to certain claims of the ‘263 patent and the ‘413 patent, but not the four other asserted patents.

The Commission Rules provide that subsequent to issuing an initial determination on the question of violation of section 337, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of section 337; and (2) the amount of the bond to be posted by the respondents during Presidential review of Commission action under section 337(j).¹ 19 C.F.R. § 210.42(a)(1)(ii).

¹ The recommended determination should also address the public interest under sections 337(d)(1) and (f)(1) in investigations in which the Commission has ordered the administrative law judge, under 19 C.F.R. § 210.50(b)(1), to take evidence with respect to the public interest.

II. Limited Exclusion Order

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order (or “LEO”) directed to respondents’ infringing products is among the remedies that the Commission may impose. Indeed, upon finding a violation of section 337, the statute provides that the Commission “shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.” 19 U.S.C. § 1337(d)(1); see *Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-972, Comm’n Op. at 28 (May 19, 2017) (“*Automated Teller Machines*”); *Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359-60 (Fed. Cir. 2010).

Rovi argues that if a violation of section 337 is found, a limited exclusion order must be recommended as to all infringing products of all respondents, especially in view of the fact that the Commission will consider the public interest factors and has not delegated the public interest issue to the administration law judge. Rovi Br. at 367; Rovi Reply at 146-47. Further, it is argued, ARRIS and Technicolor are the importers of record, and import the accused products at Comcast’s direction and control (and Comcast thus should also be deemed to import the accused products). Consequently, Rovi argues, any exclusion order that issues should extend to all respondents and to all infringing products of respondents imported by, on behalf of, or intended

In this case, the notice of investigation did not order the administrative law judge to take such evidence.

to be sold to, Comcast. *Id.*

Respondents argue that only accused products manufactured by ARRIS and Technicolor for sale to Comcast (if found to infringe) should be excluded, and products manufactured by ARRIS and Technicolor for sale to entities other than Comcast should not be excluded. Resps. Br. at 393-94 (citing *Kyocera Wireless Corp. v. Int'l Trade Comm'n*, 545 F.3d 1340, 1358 (Fed. Cir. 2008) (“The statute permits LEOs to exclude only the violating products of named respondents”)). It is also argued that products imported by non-respondents, and subsequently purchased by Comcast in the United States should not be excluded. Furthermore, respondents argue that any LEO should not cover the X1 STBs (*i.e.*, set-top boxes) as they do not contain the allegedly infringing features at the time of importation. *Id.* at 393; Resps. Reply at 139.

In addition, respondents argue that, given the vast number of products and software versions (including new, non-infringing designs), any LEO should contain a certification provision for particular imported models that do not, or no longer, operate in an infringing manner. It is argued that a certification provision would assist Customs by identifying any non-accused ARRIS and Technicolor products, as well as design-around products, that are not covered by a limited exclusion order, especially in view of the fact that physical examination of products alone will not permit Customs to determine their operation.² *Id.* at 393-94.

The administrative law judge recommends, in the event the Commission determines that a violation of section 337 has occurred, and subject to the Commission’s public interest determination, that the Commission issue a limited exclusion order covering all of the infringing

² In the introductory portion of their posthearing brief, respondents argue, “any remedy must be narrowly tailored to minimize adverse impact upon existing Comcast subscribers and should be deferred until the STB suppliers can ramp up deliveries of non-infringing models to Comcast.” Resps. Br. at 8. Rovi argues that such a deferral was not suggested in respondents’ pre-hearing brief, and is thus waived. *See* Rovi Reply at 150. In any event, the request for deferral of remedy is not developed and supported in the remedy portion of respondents’ brief.

articles imported, sold for importation, or sold after importation by respondents, and that the order should apply to respondents' affiliated companies, parents, subsidiaries or other related business entities, or their successors or assigns. Such an order would comply with the statutory requirement to remedy a violation of section 337 (discussed above), and would conform to Commission practice in the issuance of limited exclusion orders. *See, e.g., Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-972, Limited Exclusion Order at 2 (May 19, 2017) (containing certification provision); *Certain Network Devices, Related Software and Components Thereof (II)*, Inv. No. 337-TA-945, Limited Exclusion Order at 2 (May 4, 2017) (containing certification provision).

As indicated above, respondents argue, "Only Accused Products manufactured by Co-Respondents ARRIS and Technicolor for sale to Comcast found to infringe should be excluded." Resps. Br. at 393. The administrative law judge notes that the only articles accused and adjudicated to infringe in this investigation are articles made for Comcast, despite the fact that certain respondents make set-top boxes used by other companies.³ Furthermore, the record shows that respondents make and import a large number of products, and have been developing new designs. *See, e.g.,* ID at 102-03, 295, 353, 399, 489-90.

Consequently, in the event the Commission issues a limited exclusion order in this investigation, it is recommended that the exclusion order include a provision that allows the respondents to certify, pursuant to procedures to be specified by U.S. Customs and Border Protection, that they are familiar with the terms of the order, that they have made appropriate inquiry, and that, to the best of their knowledge and belief, the products being imported are not

³ For example, in its domestic industry arguments in this investigation, Rovi relies on certain ARRIS set-top boxes used by non-party Verizon to argue that a domestic industry practices claims of asserted patents. *See, e.g.,* ID at 116, 251.

excluded from entry under the order.

III. Cease and Desist Order

A. General Law Relating to Cease and Desist Orders

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for a violation of section 337. 19 U.S.C. § 1337(f)(1). The Commission generally issues cease and desist orders “when, with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order.” *Automated Teller Machines*, Inv. No. 337-TA-972, Comm’n Op. at 28; *see, e.g., Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Comm’n Op. at 4-6 (Feb. 1, 2017); *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm’n Op. at 28 (Nov. 19, 2012) (citing *Certain Laser Bar Code Scanners and Scan Engines, Components Thereof and Products Containing Same*, Inv. No. 337-TA-551, Comm’n Op. at 22 (June 14, 2007)).⁴

B. Summary of the Arguments of the Parties

Rovi argues that in addition to a limited exclusion order, cease and desist orders are warranted in this investigation, as there is no dispute that each of the respondents maintains commercially significant inventories of the accused products in the United States. Rovi Br. at 368; Rovi Reply at 147-49.

⁴ Some commissioners have adopted different approaches to analyzing when it is appropriate to issue cease and desist orders, particularly with respect to the question of whether a commercially significant inventory is a prerequisite for obtaining a cease and desist order. *See Certain Network Devices, Related Software and Components Thereof (II)*, Inv. No. 337-TA-945, Comm’n Op. at 126 n.74 (June 1, 2017) (“*Network Devices (II)*”); *Automated Teller Machines*, Inv. No. 337-TA-972, Comm’n Op. at 28 n.19.

With respect to Comcast, Rovi argues that there is no serious dispute that Comcast's inventory of accused products in the United States is commercially significant, comprising units currently leased to customers for use in their homes or businesses and massive quantities of accused set-top boxes at warehouses and facilities in the United States. It is argued that as of August 1, 2016, Comcast had a total of [] units in inventory in the United States, with an average price of approximately [] and total value of [] (including those units located within consumer residences). Rovi argues that when Comcast receives the accused products from Comcast's suppliers, including Technicolor and ARRIS, Comcast stores them at either a National Warehouse or a Regional Hub, and that there are at least [] Regional Hubs within Comcast's supply chain. It is argued, *inter alia*, that [] Warehouses" within Comcast's supply chain are located in various regions throughout the United States, and may store inventory for an extended period before being shipped to Comcast technicians, Comcast stores, or a Regional Hub, and that as of August 2016, Comcast Cable Communication Management, LLC maintained an inventory of [] units at its [] Warehouses. Rovi Br. at 369-70.

Rovi argues that a cease and desist order against Comcast should extend to inventory held at customer sites, in addition to inventories held at its warehouses, and the order should preclude Comcast from renting, leasing, or other domestic distribution of all infringing products. Rovi argues that Comcast inventory amassed during the period of its license is immaterial, with Comcast unable to cite any authority that would allow the distribution of imported, infringing products after a license has expired. *Id.* at 372.

With respect to ARRIS, Rovi argues that ARRIS has commercially significant inventory of infringing products in the United States, with the declared import value of inventory over

[] for over [] units. It is argued that Pace Americas, ARRIS Technology, Inc. and/or ARRIS Solutions, Inc. maintain inventory of the products accused of infringement for ARRIS at domestic warehouses, which is distributed to Comcast Cable Communications Management, LLC. Rovi argues that ARRIS intended to sell Comcast [] of additional accused products through the end of 2016, resulting in [] of additional revenue to ARRIS (and [] worth of additional products being stored in inventory), and even assuming that ARRIS sold a large number of imports before the end of the year, the amount of set-top boxes in inventory would increase substantially. *Id.* at 372-73.

With respect to Technicolor, Rovi argues that Technicolor has commercially significant inventory in the United States. In particular, it is argued that [] maintains its inventory of the products accused of infringement at [] in the United States, [] and that []. Rovi argues that [] maintains [] of accused products at the warehouse. Rovi argues that the inventory is commercially significant because it represents a significant revenue opportunity for Technicolor with projected sales of [] units between 3Q 2016 and 2Q 2017, equivalent to sales of [] *Id.* It is argued that Technicolor intends to continue to import set-top boxes for Comcast, and has [] of infringing set-top boxes in the United States, which Technicolor should not be allowed to distribute. *Id.* at 373-74.

Respondents argue that cease and desist orders “are to prevent stockpiling prior to the issuance of a LEO for the purpose of evading the LEO” and that “Rovi cannot demonstrate such stockpiling.” Resps. Br. at 394; Resps. Reply at 138-41.

With respect to Comcast, respondents argue that Rovi's allegations are directed to features of the X1 that only operate after the X1 STBs transmit digital data with domestically developed Comcast software resident in Comcast's U.S.-based servers. Further, it is argued that section 337 does not cover the electronic transmission of data, and moreover the imported X1 STBs are not infringing at the time of importation. Resps. Br. at 394-95 (citing *ClearCorrect Operating, LLC. v. Int'l Trade Comm'n*, 810 F.3d 1283, 1297 (Fed. Cir. 2015)). In addition, it is argued, Rovi cannot show commercially significant inventories or stockpiling of accused products because Comcast rents its units, and Rovi has not shown inventories of products purchased after the expiration of the license Comcast had with Rovi. Resps. Br. at 395-96.

Respondents also argue that a cease and desist order is not appropriate if it would cover products provided to users before the issuance of any limited exclusion order. In particular, it is argued, "Comcast should continue to provide software maintenance releases, updates, services or replacement parts, etc., without which the products issued to customers would be ineffective." *Id.* at 396. It is argued, "Finally, no CDO should prevent Comcast from domestic activity involving products manufactured and imported by non-Respondent entities and subsequently purchased by Comcast in the U.S. See *Kyocera*, 545 F.3d 1340, 1358. And, no CDO should issue preventing ARRIS or Technicolor from engaging in domestic activity involving products manufactured and imported into the U.S. for sale to entities besides Comcast." *Id.* at 397.

With respect to ARRIS, respondents argue that Rovi has not shown ARRIS has commercially significant inventory for purposes of stockpiling and evading any LEO, and has only speculated that ARRIS would continue to import STBs for Comcast and to expand its inventory. *Id.* at 397; Resps. Reply at 140-41. It is also argued that any cease and desist order should exempt ARRIS's service and repair of products sold to Comcast before the issuance of a

limited exclusion order, so that the utility of products purchased before a finding of violation is not impaired. Resps. Br. at 397.

With respect to Technicolor, respondents argue that Technicolor's inventory consists of STBs that do not infringe and, and even if Technicolor's STBs did infringe, there is insufficient evidence supporting a cease and desist order. *Id.* at 398. Further, it is argued that even if a cease and desist order were to issue against Technicolor, such an order must be expressly limited to products imported for sale to Comcast so as not to conflict with the scope of this investigation. Resps. Reply at 141.

C. Recommendation Concerning Cease and Desist Orders

1. Comcast Respondents

The record shows that in order to supply its customers with set-top boxes, Comcast ships and stores [] of imported, accused set-top boxes through an extensive warehousing and distribution network that reaches throughout the United States. *See* CX-1725C (Comcast Interrog. Resp.) at 14-15; JX-0104C (Martin Dep.) Tr. 28-30, 49; CX-0007C (Putnam WS) at Q/A 343-48.

The accused products are manufactured by ARRIS and Technicolor for sale to Comcast. *See* Resps. Br. at 19-20; 393-94; ID at 11-12. Comcast knows that the products are made overseas, requires that the accused products adhere to its specifications, and submits purchase orders and requires the products to be delivered at Comcast delivery sites in the United States. Folk Tr. 464-474, 478-479; Shank Tr. 558, 568-570. Thus, it would uncut a limited exclusion order to permit Comcast to send the adjudicated, infringing products through its warehousing and distribution network for ultimate delivery to end-users. Consequently, it is recommended, if a violation is found, and subject to any public interest determination of the Commission, that the Comcast respondents (including affiliated companies, parents, subsidiaries or other related

business entities, or their successors or assigns) should be subject to a cease and desist order.⁵

Nevertheless, a cease and desist order should refrain from reaching products that were not imported in violation of section 337. Specifically, as indicated above, Rovi has argued that Comcast inventory amassed during the license period is immaterial, and that Comcast should not be able to distribute imported, infringing products after a license has expired. Rovi Br. at 372. Yet, the administrative law judge has determined that, pursuant to an express license between Rovi and Comcast, products imported before April 1, 2016 are not unlawful imports, and there has been no an unfair act that would constitute a violation of section 337. ID at 553-54. The administrative law judge has made no determination of whether a subsequent domestic activity connected to products imported before April 1, 2016 (*e.g.*, any use or sale completed on or after April 1, 2016 of a set-top box imported before April 1, 2016) infringes the asserted patents under the Patent Act. *See id.* In any event, any such activity would not constitute, or be the result of, a violation of section 337.

2. ARRIS Respondents

The record shows that Pace Americas, ARRIS Technology, Inc. and/or ARRIS Solutions, Inc. maintain inventory of the products accused of infringement at warehouses in the United States, and that ARRIS distributes products from the warehouses to Comcast Cable

⁵ As discussed in the summary of the parties' arguments, respondents rely on *ClearCorrect*, 810 F.3d at 1297, to argue that cease and desist orders should not issue with respect to Comcast because section 337 does not cover the electronic transmission of data (especially domestic transmission), and Comcast's X1 set-top boxes are not infringing at the time of importation. *See Resps. Br.* at 394-95. Respondents argue, "the Federal Circuit held that Section 337 authorizes the Commission to remedy only those 'unfair acts' involving the importation of 'articles' and that 'articles' means 'material things,' and therefore does not extend to electronic transmission of digital data." *Id.* at 394 (citing 810 F.3d at 1289-90). Yet, cease and desist orders would not prohibit the transmission of data. Rather, they would cover articles that infringe, such as Comcast's X1 set-top boxes. Furthermore, as discussed in the ID, where infringement was found, the accused set-top boxes were made to use digital data, but the patent was not construed to cover the transmission of digital data or the data themselves. *See, e.g.*, ID at 180-88, 211-230, 239-52 (domestic industry).

Communications Management, LLC. The declared import value of inventory is over [] for over [] units. JX-0100C (Johnson Dep.) Tr. 39, 40, 48-49, 80, 128-131, 165-67; CX-0007C (Putnam WS) at Q/A 343, 345. ARRIS has commercially significant inventory of infringing products in the United States. It is recommended, if a violation is found, and subject to any public interest determination of the Commission, that the ARRIS respondents (including affiliated companies, parents, subsidiaries or other related business entities, or their successors or assigns) should be subject to a cease and desist order.

As indicated above, respondents argue that any cease and desist order should permit ARRIS to service and repair products sold to Comcast before the issuance of a limited exclusion order so that the utility of products purchased before a finding of violation is not impaired. *See* Resps. Br. at 398. The parties have not developed support or opposition to this argument. Nevertheless, such an exception for service and repair finds precedent in Commission orders issued in unrelated investigations. Such an exception should not, however, allow the importation of infringing articles. *See, e.g., Automated Teller Machines*, Inv. No. 337-TA-972, Cease and Desist Order at 3 (May 19, 2017); *Network Devices (II)*, Inv. No. 337-TA-945, Cease and Desist Order at 3 (May 4, 2017).

3. Technicolor Respondents

Technicolor has commercially significant inventory of infringing products in the United States. *See* CX-0007C (Putnam WS) at Q/A 341. [] maintains its inventory of products accused of infringement at a [] [] distributes its products from [] to Comcast. JX-0108C (Mosely Dep.) Tr. 26-28, 31. [] maintains [] of the Accused Products at []. *See* CX-1743C (Technicolor Interrog. Resp.) at 12;

CX-0007C (Putnam WS) at Q/A 340.

It is recommended, if a violation is found, and subject to any public interest determination of the Commission, that the Technicolor respondents (including affiliated companies, parents, subsidiaries or other related business entities, or their successors or assigns) should be subject to a cease and desist order.

IV. Bond

Pursuant to section 337(j)(3), the administrative law judge and the Commission must determine the amount of bond to be required of a respondent, during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury. 19 U.S.C. § 1337(j)(3); 19 C.F.R. §§ 210.42(a)(1)(ii), 210.50(a)(3).

When reliable price information is available, the Commission has often set bond by eliminating the differential between the domestic product and the imported, infringing product.⁶ *Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained.⁷ *Network Devices (II)*, Inv. No. 337-TA-945, Comm'n Op. at 128; *Certain Integrated Circuit Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41

⁶ A single bond rate for all accused products is preferable. See *Certain Curable Fluoroelastomer Compositions and Precursors Thereof*, 337-TA-364, Comm'n. Op. at 14 (May 1995) ("Customs has, in the past, expressed a strong preference for imposing a single bond against all infringing products . . .").

⁷ The Commission may consider industry royalty rate averages in setting a bond. *Network Devices (II)*, Inv. No. 337-TA-945, Comm'n Op. at 128 (citing *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-605, Comm'n Op. at 74 (June 3, 2009)).

(1995). A 100 percent bond has been required when no effective alternative existed. *Automated Teller Machines*, Inv. No. 337-TA-972, Comm'n Op. at 29-30; *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27. (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

Rovi argues that inasmuch as it does not manufacture or sell set-top boxes, calculating a price differential between the accused products and the domestic industry products is not feasible. Rovi Br. at 376. Yet, Rovi argues that issuance of a bond is necessary to prevent injury to Rovi, and as opined by its expert, Dr. Putnam, a reasonable royalty rate would approximately [

] unit. In the alternative, it is argued, a bond of 100% of the value of respondents' infringing products should be entered. *Id.* at 375 (citing CX-0007C (Putnam WS) at Q/A 361-64, 367); Rovi Reply at 149-50.

Respondents argue, "Rovi has not established that a bond is merited." Resps. Br. at 398. It is argued that while the parties agree that any bond set should be based on a reasonable royalty, they disagree as to whether the bond calculated by Rovi's expert is supported by the evidence of record. Resps. Reply at 142; Resps. Br. at 398-99. Further, respondents argue, "Rovi cannot rely on its own failure to meet its burden to assert a need for a 100% bond. Because Rovi's suggested bond is not supported by the evidence of record, any bond should be set at 0%." Resps. Reply at 142 (citing *Certain Network Devices, Related Software and Components Thereof (I)*, Inv. No. 337-TA-944, Comm'n Op. at 56-58 (July 26, 2016) ("*Network Devices (I)*").

It is undisputed that calculating a price differential between the accused products and the domestic industry products is not feasible in this investigation. *See* Rovi Br. at 376; Resps.

Reply at 142. Rovi has, however, set forth evidence and argument, based on the opinion of Dr. Putnam, that a reasonable royalty rate for the accused set-top boxes would be approximately [] per unit.

Rovi's royalty-rate proposal is based on its expert's analysis of licenses to set-top box manufacturers other than respondents. *See* CX-0007C (Putnam WS) at Q/A 361 (citing CX-0834C). The licenses are all [] licenses. Yet, Rovi has not attempted to show, much less has it demonstrated, the role the asserted patents play in the cost of the licenses, if they play any role at all. Additionally, some of the licenses [] *See* RX-0852C (Schoettelkotte RWS) at Q/A 187.

No party argues that a reasonable royalty rate cannot be calculated. Yet, it is not clear that Rovi's proposal of [] per unit reflects what a reasonable royalty rate would be relevant to the asserted patents. Consequently, it is recommended that no bond (*i.e.*, 0%) be required during any Presidential review period. *See Network Devices (I)*, Inv. No. 337-TA-944, Comm'n Op. at 57.

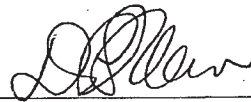
V. Recommended Determination and Order

It is recommended that, subject to any public interest determination of the Commission, the Commission should: (1) issue a limited exclusion order covering products that infringe one or more of the patent claims as to which a violation of section 337 has been found; (2) issue cease and desist orders; and (3) require no bond during the Presidential review period.

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than June 16, 2017, a copy of this recommended determination with brackets to show any portion considered by the party (or its suppliers of information) to be

confidential, accompanied by a list indicating each page on which such a bracket is to be found.⁸

At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in red. If a party (and its suppliers of information) considers nothing in the recommended determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.



David P. Shaw
Administrative Law Judge

Issued: June 9, 2017

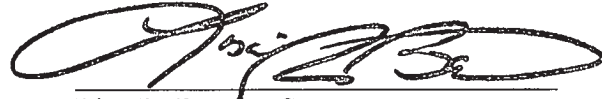
⁸ Confidential business information (“CBI”) is defined in accordance with 19 C.F.R. § 201.6(a) and § 210.5(a). When redacting CBI or bracketing portions of documents to indicate CBI, a high level of care must be exercised in order to ensure that non-CBI portions are not redacted or indicated. Other than in extremely rare circumstances, block-redaction and block-bracketing are prohibited. In most cases, redaction or bracketing of only discrete CBI words and phrases will be permitted.

CERTAIN DIGITAL VIDEO RECEIVERS AND HARDWARE AND SOFTWARE COMPONENTS THEREOF

INV. NO. 337-TA-1001

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **RECOMMENDED DETERMINATION ON REMEDY AND BONDING (PUBLIC VERSION)** has been served upon the following parties as indicated, on JUL 06 2017



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street SW, Room 112A
Washington, DC 20436

FOR COMPLAINANTS ROVI CORPORATION AND ROVI GUIDES, INC.:	
Benjamin Levi, Esq. McKOOL SMITH P.C. 1999 K Street NW, Suite 600 Washington, DC 20006	Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery Via First Class Mail Other: _____
RESPONDENTS COMCAST CORPORATION; COMCAST CABLE COMMUNICATIONS, LLC; COMCAST CABLE COMMUNICATIONS MANAGEMENT, LLC; COMCAST BUSINESS COMMUNICATIONS, LLC; COMCAST HOLDINGS CORPORATION; AND COMCAST SHARED SERVICES, LLC:	
Thomas L. Jarvis, Esq. WINSTON & STRAWN LLP 1700 K Street NW Washington, DC 20006	Via Hand Delivery <input checked="" type="checkbox"/> Express Delivery Via First Class Mail Other: _____

**CERTAIN DIGITAL VIDEO RECEIVERS AND HARDWARE AND SOFTWARE
COMPONENTS THEREOF**

INV. NO. 337-TA-1001

**RESPONDENTS ARRIS INTERNATIONAL PLC; ARRIS GROUP INC.; ARRIS
TECHNOLOGY, INC.; ARRIS ENTERPRISES INC.; ARRIS SOLUTIONS, INC.; PACE
LTD.; AND PACE AMERICAS, LLC.:**Joshua B. Pond, Esq.
KILPATRICK TOWNSEND & STOCKTON LLP
607 14th Street NW, Suite 900
Washington, D.C. 20005Via Hand Delivery
 Express Delivery
Via First Class Mail
Other: _____**RESPONDENTS TECHNICOLOR SA; TECHNICOLOR USA, INC.; AND
TECHNICOLOR CONNECTED HOME USA LLC:**Paul M. Bartkowski, Esq.
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