DRAFT

UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C.

In the matter of	**Investigation No. 337-TA-1191**
CERTAIN AUDIO PLAYERS, CONTROLLERS, COMPONENTS THEREOF, AND PRODUCTS CONTAINING SAME	

STATEMENT OF THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION IN THE PUBLIC INTEREST

The Software & Information Industry Association ("SIIA") is the principal U.S. trade association for the software and digital content industries. With over 400 member companies, SIIA is the largest association of software and content publishers in the country. Our members range from start-up firms to some of the largest and most recognizable corporations in the world. The innovative companies that make up SIIA's membership rely on patents to protect their inventions, but also depend on the ability to manufacture, develop, and sell their products free from improper assertions of exclusive rights. Consequently, SIIA's members are involved in patent litigation as both patentees and accused infringers; they cannot be categorized as generally plaintiffs or generally defendants.

SIIA's members have benefited greatly from the patents they own. Yet they also rely on the limits of patent protection, as those limits preserve and protect their ability to innovate. As such, SIIA's collective membership sits at the crossroads of the countervailing interests in many of the ongoing intellectual property debates in recent years. Our members are keenly focused on the health of the patent system, especially as applied to software.

If a defendant infringes a properly valid patent, it is axiomatic that the Commission may exclude the infringing article. It is similarly axiomatic, however, that innovators are free to accomplish the same function through noninfringing means. The foundation of the patent system's health is that the rights of exclusion are limited to the invention claimed.

The reason that SIIA files in this case is because Sonos has directly challenged this bedrock principle: it has asked the Commission to exclude non-infringing articles. Although it infringed Sonos's patents, Google also timely provided redesigns for inspection: specifically, source code and physical product that the ALJ found did not infringe. (See ID at 25, 34, 40). In its petition, Sonos complains that despite the infringement of its initial designs, "Google hit pay dirt on four [redesigns], which it can now spend additional time completing, and then upload on its devices to continue competing with Sonos without missing a beat." (Sonos Petition for Review at 18).

This is exactly the way the patent system is supposed to work and is in the public interest. As the Supreme Court has repeatedly observed, "it has never been pretended, by any one, either in this country or in England, that an inventor has a perpetual right, at common law, to sell the thing invented." *Wheaton v. Peters*, 33 U.S. 591, 660-61

(1834). The Supreme Court has always held that "an inventor has no right of property in his invention, upon which he can maintain a suit, unless he obtains a patent for it, according to the acts of Congress; and that his rights are to be regulated and measured by these laws and cannot go beyond them." *Brown v. Duchesne*, 60 U.S. 183, 195 (1856). The reason is, of course, that the right to compete, to imitate, and to improve is the common law's state of nature: the patent is an *exception* to this general rule. Were it otherwise, the patent serves to "withdraw what already is known into the field of its monopoly" and diminish the resources available to the public. *Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp.*, 340 U.S. 147, 152–53, 1950).

Sonos does not engage with either these principles or related precedent. In fact, it cites no case in which an exclusion order has been granted against a noninfringing, timely and properly presented redesign. Instead, it complains that the nature of software is such that it can be quickly modified and therefore plaintiffs would be "swamped" by potential redesigns. (*See* Sonos Petition at 22). That position is profoundly dangerous to innovation.

Sonos is asking the Commission to deprive the public of the benefits of competition based on infringement that it has not proven and patents that it admits has not alleged. SIIA offers no opinion on the proper number of redesigns that may colorably be offered in an infringement suit, except to say that the Commission has ample authority to deal with dilatory tactics and that its existing rules are designed to prevent them. In any event, in a case of this size and for these stakes, the swamp that Sonos wants to drain is more of a puddle. More specifically, one out of the three redesigns presented at trial for the '258/'953 patents were approved. One of the 2 redesigns presented at trial for the '959 patent was approved, one out of one redesign presented at trial for the '949 patent was approved, and

one of the two redesigns presented at trial for the '896 patent was approved. Sonos vigorously challenged all of them, but not on the grounds that they were dilatory or "overwhelming."

The ability to design around patents is a feature of software, not a bug. A valid patent and its specifications enable those skilled in the art of coding to read it and develop ways to bring a competing, and sometimes less expensive, noninfringing product to market. In a proceeding like this, redesigns also enable a respondent to produce the source code for the patentee's inspection *before* importation so that both the petitioner and the Commission can test its legality. When that redesign is successful, the public benefits as new products are introduced into the market, and the patentee's rights are not harmed. That concern is particularly acute here, where Sonos seeks to broadly exclude general-purpose tablets, smart speakers, hub displays, and certain kinds of dongles, which might play music in multiple rooms (if a given app is downloaded), but also are indisputably used for accessibility purposes as well as shopping, weather, search, and person-to-person communication. And it seeks to do so based on the use of redesigns that do not infringe its patent rights.

Its request for a broad exclusion order should be rejected.

Respectfully submitted,

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