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February 3, 2014

VIA ELECTRONIC FILING

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

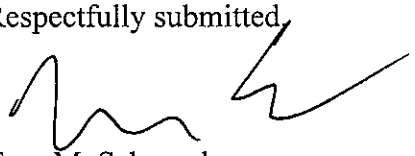
Re: *In the Matter of Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, and Methods of Making the Same*, Inv. No. 337-TA-833

Dear Acting Secretary Barton:

On behalf of the Motion Picture Association of America, Inc. attached please find a submission in response to the Commission's solicitation of comments as to whether "electronic transmissions" are "articles" within the meaning of Section 337 of the Tariff Act of 1930, as amended.

Please do not hesitate to contact us if you have any questions.

Respectfully submitted,



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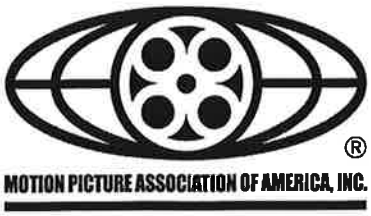

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Dear Secretary Barton:

On behalf of the Motion Picture Association of America, Inc. ("MPAA"), I respectfully submit these comments in response to the U.S. International Trade Commission's ("ITC" or "Commission") solicitation of views as to whether "electronic transmissions" are "articles" within the meaning of Section 337 of the Tariff Act of 1930, as amended ("Section 337"). Inv. No. 337-TA-833, Comm'n Notice, at 2 (Jan. 17, 2014). The MPAA is grateful for the opportunity to submit its perspective on this important question, which is of great significance for all U.S. industries engaged in the production of electronically-transmitted products.

The U.S. Customs and Border Protection ("CBP"), the U.S. Department of Labor ("DOL"), and the U.S. Court of International Trade ("CIT"), in interpreting different sections of the Tariff Act of 1930, as amended ("Tariff Act"), have consistently construed the term "articles" to extend to the importation of electronic transmissions. In construing the term "articles," each of these agencies and the court has relied on binding Supreme Court precedent and, in significant part, on the Commission's consistent and longstanding interpretation of Section 337 as giving the ITC jurisdiction over imported electronic transmissions. That construction is reasonable, consistent with the legislative history, and finds support in numerous Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") decisions finding that the ITC has broad

discretion to define and remedy unfair acts in international trade. Accordingly, the Commission can and must construe the term "articles" to include imported electronic transmissions in harmony with the Commission's own practice, governing Supreme Court and CIT case law, and longstanding CBP and DOL practice.

I. THE APPLICATION OF SECTION 337 TO THE IMPORTATION OF ELECTRONICALLY TRANSMITTED ARTICLES IS NECESSARY TO PROTECT IMPORTANT DOMESTIC INDUSTRIES

A. Brief Background on MPAA

The MPAA is a not-for-profit trade association that serves as the voice and advocate of the American motion picture industry. The MPAA's members are the six major U.S. motion picture studios: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLC, Walt Disney Studios Motion Pictures, and Warner Bros. Entertainment Inc. These companies are the leading producers and distributors of filmed entertainment in the domestic theatrical, television, and home entertainment markets; they also are among the leading distributors of motion pictures internationally. Their movies and television shows are widely distributed over the Internet via hundreds of licensed sources such as Netflix, Hulu, Apple iTunes, and Amazon. Founded in 1922, the MPAA continues to be a proud champion of intellectual property rights, free and fair trade, innovative consumer choices, and freedom of expression.

The motion picture and film industry is made up of media and technology companies that invest billions of dollars per year in creative talent, skilled workers, and innovative technologies. It produces movies and television programs that inspire, thrill, and educate audiences around the world, while supporting 1.9 million jobs in the United States. It is responsible for 108,000 businesses across all 50 states, 85 percent of which employ fewer than 10 people. In 2011, the industry supported $104 billion in wages; $16.7 billion in sales tax, state income tax, and federal taxes; and a $12.2 billion trade surplus. In fact, the motion picture and television services sector realizes a 7-to-1 export to import ratio – the highest of all American industries, other than cotton, corn, and coal.

For the motion picture industry to continue to play such an important role in the U.S. economy, the protection of intellectual property ("IP") rights is critical. The MPAA's members depend upon effective enforcement of IP rights to sustain the vitality of the U.S. motion picture industry, which annually invests billions of dollars in research and development involving cutting-edge technologies, builds and maintains myriad production facilities across the United States, and employs millions of Americans in the creation, production, and development of its products. Thus, the MPAA's members, and their employees, have a substantial interest in the proper interpretation and application of key enforcement measures such as Section 337.

B. The Challenges of Cross-Border Digital Distribution

U.S. IP is worth over $5 trillion—greater in value than the entire GDP of any other nation besides China.[1] IP-intensive industries, including but not limited to the U.S. film and television, software, pharmaceutical, and electronics industries, account for over a third of U.S. GDP and support over 40 million U.S. jobs.[2] IP-intensive industries are large contributors to U.S. foreign trade, accounting for 61 percent of total merchandise exports and 19 percent of services exports.[3]

The motion picture industry, like many other IP-intensive industries, has transitioned rapidly to a digital distribution business characterized by electronic transmissions. Sales of DVDs have been falling for years. They have been replaced by various forms of cloud-based services like Netflix, Hulu, and UltraViolet, as well as myriad download services like Apple's iTunes. These services allow users to download or stream movies and television shows to multiple devices via electronic transmissions. The same transition has also occurred at movie theaters. Physical film reels have been almost entirely replaced in the last decade by digital cinema files, which are increasingly sent via electronic transmissions to theaters in the U.S. and internationally. The same is true in other IP industries, as CDs, prepackaged software, and paper books are losing market share to iTunes, downloadable software, and e-books. This trend is accelerating in the motion picture business, both domestically and in the rapidly growing international market. With an increasing share of its revenues coming from international distribution, and with the ease of cross-border digital distribution, it is critical that the law remain robust as applied to the importation of electronic transmissions as it has with respect to the importation of tangible goods.

Just as the industry is quickly shifting to digital distribution models for legitimate commerce, most illegitimate distributions occur in the same way. Most infringement losses to U.S. motion picture studios today come from illegal downloads and illegal streaming, accounting for the biggest threat to the motion picture and television industry as well as to other industries that depend on copyright protection, including, music, books, video games, and software. A comprehensive study found that $58 billion is lost to the U.S. economy annually due to content infringement, including more than 373,000 jobs, $16 billion in lost employee earnings, and $3 billion in badly needed federal, state, and local governments' tax revenue.[4]

A September 2013 report by the group NetNames highlights the alarming increase in internet-based infringement. Relying, in part, on an extensive examination of global bandwidth data, the report concludes that the distribution of infringing films, television, music, and software

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[1] U.S. Economics & Statistics Administration and U.S. Patent & Trademark Office Joint Report, *Intellectual Property and the U.S. Economy: Industries in Focus*, at 3 (Mar. 2012).

[2] *Id.* at 3, 39, 43.

[3] *Id.* at 3.

[4] Siwek, Stephen E., *The True Cost of Piracy to the U.S. Economy,* a report for the Institute for Policy Innovation (Oct. 2007).

grew significantly between 2010 and 2013.[5] The report attributes this increase to the growing availability of copyrighted content through hundreds of popular websites and cyberlockers accessed by hundreds of millions of internet users worldwide. A large number of the users are located in North America and a large number of the websites offering infringing content are operated overseas.[6] In fact, a 2011 study by the same group found that 17.5 percent of internet traffic in the United States was infringing.[7]

IP infringement, therefore, has a direct and deleterious impact on the U.S. economy. Indeed, according to a recent Congressional report, such infringement harms the U.S. economy in at least the following ways: (a) companies are harmed through lost revenue, damage to brand, and decreased incentives to innovate because of potential infringement or a lack of return on investment; (b) consumers are harmed when they purchase counterfeit products of lower quality; and (c) governments lose tax revenue from infringement and must bear enormous enforcement costs.[8] Unfortunately, infringement of U.S. IP has increased significantly in recent years, particularly in the cross-border context.[9]

Given these data and trends, it is important that Section 337 remains a viable tool to protect against infringement occurring in the cross-border context, and that it be applied in accordance with the realities of the marketplace. For the MPAA's members, the marketplace reality, as noted above, is that a significant amount of infringement occurs through electronic transmissions entering the United States over the internet.

II. THE COMMISSION SHOULD CONSTRUE THE TERM "ARTICLES" TO ENCOMPASS THE IMPORTATION OF ELECTRONIC TRANSMISSIONS IN ACCORDANCE WITH GOVERNING LAW

A. Overview

The Commission's authority to construe "articles" to include electronic transmissions finds support in governing Supreme Court precedent, the text, structure, and legislative history of Section 337, and the Tariff Act as a whole. As the Supreme Court explained almost a century ago, "[i]mportation . . . consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected." *Cunard*

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[5] "Sizing the Piracy Universe," authored by David Price, Director of Piracy Analysis at NetNames, at 2 (Sept. 2013).

[6] *See id.* at 91-100.

[7] "Technical Report: An Estimate of Infringing Use of the Internet," published by Envisional [predecessor to NetNames, *see supra* note 5], at 3 (Jan. 2011).

[8] U.S. Congress Joint Economic Committee (Chairman's Staff), *The Impact of Intellectual Property Theft on the Economy*, at 1 (Aug. 2012).

[9] *See id.* at 2-4.

S.S. Co. v. Mellon, 262 U.S. 100, 122 (1923); *see also Canton Railroad Co. v. Rogan*, 340 U.S. 511, 515 (1951) ("to import means to bring into the country"). The Commission's longstanding practice that it has jurisdiction over electronically-imported articles is therefore not only lawful, but required under governing precedent. The primary inquiry, in accordance with *Cunard* and *Canton,* is whether this has been an importation into the United States, not the particular mode or form of that importation.

The Commission's treatment of imported electronic transmissions as "articles" for purposes of the Tariff Act finds strong support in the text, structure, and legislative history of the statute, including Section 337 (19 U.S.C. § 1337), the Harmonized Tariff Schedule of the United States ("HTSUS") (19 U.S.C. § 1202) – both administered by the ITC – and the Trade Adjustment Assistance provisions of the Trade Act of 1974 (the "Trade Act"), 19 U.S.C. § 2271 *et seq.* (administered by the DOL).[10] CBP, the DOL, and the CIT, relying on ITC precedent and the HTSUS, have consistently and uniformly construed the term "articles" as used in the Tariff Act to include imports of electronic transmissions.[11] It is well established that where Congress has used a term repeatedly, as the term "articles" is used throughout the Tariff Act, it is considered to have the same meaning in each reference, and Section 337 is no exception.[12] The Commission, consistent with its established practice, governing case law, and the consistent construction of other agencies charged with the administration of the Tariff Act, should construe the term "articles" to include electronic transmissions for purposes of Section 337.

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[10] The Commission is responsible for drafting and amending the HTSUS, which has the force of law in the United States. *See* 19 U.S.C. § 3005. CBP is responsible for administering the HTSUS, and its determinations are reviewed by the CIT and the Federal Circuit. *See* 28 U.S.C. §§ 1295, 1581.

[11] The proper construction of the term "articles" extends to at least three distinct, albeit related, legal inquiries under Section 337: the Commission's jurisdiction, the ultimate existence of a violation, and the Commission's discretion to order particular remedies upon finding a violation. The objective of the MPAA's comments is not to provide an exhaustive treatment of these legal inquiries, but rather to respond to the Commission's specific question on the correct construction of the term "articles" in light of the "text, structure, and legislative history of Section 337," other "potentially relevant judicial precedent" and "other potentially informative decisions by other government agencies." Inv. No. 337-TA-833, Comm'n Notice, at 2 (Jan. 17, 2014).

Whether the accused product is an "article" within the meaning of Section 337 is a substantive inquiry that will generally be enmeshed both with "the jurisdictional requirements of section 1337 . . . [and] the factual requirements necessary to prevail on the merits." *Amgen Inc. v. Int'l Trade Comm'n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990) (citing *Bell v. Hood*, 327 U.S. 678, 682 (1946); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 21 (1982)) (footnotes omitted). For this reason, whatever construction of the term "articles" the Commission adopts, it should, as the Court explained in *Amgen*, in all cases "assume[] jurisdiction and, if the facts indicate that [complainant] cannot obtain relief" dismiss on the merits. *Id.*

[12] *SKF USA Inc. v. United States*, 263 F.3d 1369, 1382-83 (Fed. Cir. 2001).

The Commission's assertion of broad jurisdiction over imported goods, in whatever form, is consistent with Congressional intent. With Section 337, Congress delegated to the ITC authority to assert jurisdiction to all manner of unfair acts in the importation of goods. This delegation, and the mandate to prevent unfair acts in their incipiency, compels the Commission to recognize the threat to domestic industries from the importation of infringing electronic transmissions by treating these importations as "articles." To do otherwise would frustrate Congressional intent and ignore the realities of the marketplace, rendering Section 337 a nullity for important domestic industries.

B. The Commission Consistently Has Asserted Jurisdiction and Authority over the Importation of Electronic Transmissions, in Accordance with Governing Supreme Court Precedent

Section 337 of the Tariff Act of 1930 prohibits, in relevant part, "[u]nfair methods of competition and unfair acts in the importation of articles" or "in the sale of such articles by the owner, importer, or consignee," the threat or effect of which is to injure a domestic industry, and "[t]he importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of articles" that infringe statutory intellectual property rights, including copyrights. 19 U.S.C. §§ 1337(a)(1)(A); (a)(1)(B) (emphasis added). Section 337, however, does not define the term "articles."

Notwithstanding the absence of such a statutory definition, the Commission has consistently found that "it has jurisdiction and authority to reach digital data that are electronically transmitted to a recipient in the United States." *Certain Machine Vision Software, Machine Vision Sys., & Prods. Containing Same*, Inv. No. 337-TA-860, Initial Determination at 4 n.2 (July 16, 2010) ("It is not disputed that the importation requirement may be satisfied by the electronic transmission of products") (citing *Certain Hardware Logic Emulation Sys. & Components Thereof ("Hardware Logic")*, Inv. No. 337-TA-383, Comm'n Op. at 20, 28, 1998 WL 307240 (Apr. 1, 1998) (Commission has authority over "electronic importations," and can issue remedies directed at electronic transmission)); *see also Certain Incremental Dental Positioning Adjustment Appliances & Methods of Producing Same ("Dental Appliances")*, Inv. No. 337-TA-562 (Enforcement Proceeding), Comm'n Op. at 7 (Feb. 19, 2013). As the Commission explained in *Hardware Logic*, the mode by which an infringing good is imported into the United States is not dispositive of the Commission's authority to prevent and remedy the importation of unfairly traded goods:

> [T]he Commission clearly could and should reach software if it were sought to be transferred on a CD-ROM or diskette. We agree with Quickturn that it would be anomalous for the Commission to be able to stop the transfer of a CD-ROM or diskette containing respondents' software, but not be able to stop the transfer of that very same software when transmitted in machine readable form by electronic means.

Inv. No. 337-TA-383, Comm'n Op. at 25-29 (Mar. 1998) (issuing permanent cease and desist order prohibiting importation of electronically-transmitted software); *see also Certain Machine Vision Software* at 4 n.2; *Certain Sys. for Detecting & Removing Computer Viruses or Worms, Components Thereof*, Inv. No. 337-TA-510, Comm'n Determination at 16 (Aug. 2007) (holding that a cease and desist order covering electronically transmitted data is appropriate where the failure to cover such would result in the circumvention of the cease and desist order); *Dental Appliances*, Inv. No. 337-TA-562, Comm'n Op. at 7 (stating that the Commission has "jurisdiction and authority to reach digital data that are electronically transmitted to a recipient in the United States.") (citing *Hardware Logic*, Inv. No. 337-TA-383, Comm'n Op. at 20, 29 (Apr. 1, 1998)).

The Commission's consistent application of its jurisdiction to imported electronic transmissions finds support in governing Supreme Court law that the relevant jurisdictional inquiry is whether an importation has occurred, not the mode of that importation, electronic or otherwise: "[i]mportation . . . consists in bringing an article into a country from the outside. If there be an actual bringing in it is importation regardless of the mode in which it is effected." *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923). As discussed in greater detail below, CBP, the DOL, and the CIT have consistently relied on *Cunard* to support a construction of the term "articles" to include the importation of electronic transmissions.

C. The Commission's Treatment of Electronic Transmissions as Within Its Jurisdiction for Purposes of Section 337 of the Tariff Act Is Consistent with Uniform Holdings by CBP, DOL, and the CIT That Electronic Transmissions Are "Articles " for Purposes of the Tariff Act of 1930

A construction of the term "articles" to include electronic transmissions is also required to conform ITC law to established CBP and DOL practice and governing holdings of the CIT. The Tariff Act of 1930, includes, *inter alia*, 19 U.S.C. § 1337, 19 U.S.C. § 1202, which is the HTSUS,[13] and 19 U.S.C. § 2271 *et seq.*, which relates to trade adjustment assistance ("TAA") to workers whose jobs were lost by reason of the importation of competing "articles." Section 337 and the HTSUS are administered by the ITC, and TAA by the DOL. CBP is responsible for administering the customs laws of the United States and interpreting the HTSUS. These agencies and the CIT, expressly relying on the Commission's past application of jurisdiction to the importation of electronic transmissions under both Section 337 and the HTSUS, have uniformly and expressly found that the term "articles" as used in the Tariff Act applies to the importation of electronic transmissions. None of these sections of the statute expressly defines the term "articles." CBP, the DOL, and the CIT (which reviews determinations by both agencies), however, have consistently and uniformly construed the term "articles" to include electronic transmissions, without regard to the mode of importation, in express reliance on the Supreme Court's decision in *Cunard* and ITC Section 337 precedent.

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[13] CBP is responsible for interpreting and administering the HTSUS, and its determinations are reviewed by the CIT and the Federal Circuit. *See* 28 U.S.C. §§ 1295, 1581.

CBP, in interpreting the HTSUS, considered whether software modules and products imported into the United States via the internet were subject to a duty. HQ 114459, 1998 U.S. CUSTOM HQ LEXIS 640 (Sept. 17, 1998). Customs, applying *Cunard*, concluded that the sending of software modules and products into the United States via the Internet constitutes the importation of merchandise:

> We find that the transmission of software modules and products to the United States from a foreign country via the Internet is an importation of merchandise into the customs territory of the United States in that the software modules and products are brought into the United States from a foreign country. The fact that the importation of the merchandise via the Internet is not effected by a more "traditional vehicle" (e.g., transported on a vessel) does not influence our determination. The essential facts are that merchandise in a foreign country is brought into the United States.

Id. at *1-2.

Similarly, the DOL, which administers trade adjustment assistance to U.S. workers displaced by imported products under the TAA, has also relied on CBP's interpretation of "articles" as including electronic transmissions, ruling that as a matter of policy, "[s]oftware and similar intangible goods that would have been considered articles . . . if embodied in a physical medium will now be considered to be articles regardless of their method of transfer. 71 Fed. Reg. at 18355, 18357 (Apr. 11, 2006).

In reviewing DOL determinations, and thereby construing the term "articles" as used in the Trade Act, the CIT has consistently and uniformly affirmed that electronic transmissions can constitute imported "articles" for purposes of the Tariff Act:

> The Trade Act does not define the term articles within the statutory language, and specifically absent is a tangibility requirement. See 19 U.S.C. §§ 2101-2495 (2000).
>
> . . .
>
> General Note 3(e) [of 2004 HTSUS] supports the conclusion that telecommunications transmissions, which would include transmissions of software code via the Internet, are exempt from duty while acknowledging that they are goods entering into the customs boundaries of the United States. See General Note 3(e), HTSUS. The mode of importation, via tangible compact discs versus the Internet, is not the material analysis.

Former Emps. of Computer Scis. Corp. v. U.S. Sec. of Labor, 414 F. Supp. 2d 1334, 1340-41 (Ct. Int'l Trade 2006) (citing *Cunard*, 262 U.S. at 122); *see also Former Emps. of Merrill Corp. v. United States,* 483 F. Supp. 2d 1256, 1267-68 (Ct. Int'l Trade 2007). The CIT rejected an earlier

effort by the Department of Labor to restrict trade assistance to instances involving the importation of tangible articles, explaining:

> The distinction between tangible and intangible articles is contrary to the purpose of the Trade Act, which is to provide assistance to workers who are displaced from their jobs due to increases in imports of articles like or directly competitive with articles produced by the displaced workers or due to a shift of production outside the United States. 19 U.S.C. § 2272(a) (emphasis added) . . . [the] distinction between tangible and intangible articles is inconsistent with . . . statutory mandate [and] . . . frustrate[s] congressional policy underlying [the] statute.

Former Emps. of Merrill Corp., 483 F. Supp. 2d at 1267-68.

Of particular significance, the CIT, in holding that imported electronic transmissions constitute "articles" for purposes of the Trade Act, relied on the Commission's exclusive responsibility to monitor the HTSUS and classify "article[s]," and the ITC's Section 337 determination in *Hardware Logic* that the Commission had authority over imported electronic transmissions:

> While Customs interprets the HTSUS, the ITC is responsible for continually reviewing and recommending modifications to the HTSUS as it considers them necessary or appropriate. *See* 19 U.S.C. §§ 1332 & 3005. Congress has delegated broad authority to the ITC to determine what constitutes an "article" for purposes of Title 19 of the United States Code. *See id.; Former Employees of Electronic Data Systems, Corp. v. United States* ("*EDS II*"), 408 F.Supp.2d 1338, 1345, 29 CIT ___, ___, (2005) ("Congress mandated that the ITC develop HTSUS to resolve all questions relative to the classification of articles in the several sections of the Customs law." (citations omitted)).
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> . . .
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> The ITC in interpreting section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, has treated software as an article of importation regardless of its mode of importation. *See* Commission Opinion on Remedy, the Public Interest, and Bonding at 28-29 in *In the Matter of Certain Hardware Logic Emulation Systems and Components Thereof,* Inv. No. 337-TA-383, Publication No. 3089 (ITC, Mar. 30, 1998) ; *see also EDS II*, 29 CIT at ——, 408 F.Supp.2d at 1344–46.
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> . . .

> Given the ITC's role in updating the HTSUS, its interpretation of software code is highly probative to the Court.

Former Emps. of Computer Scis. Corp., 414 F. Supp. 2d at 1342-43.

In sum, CBP, the DOL, and the CIT have consistently construed the term "articles" to include the importation of electronic transmissions, relying on binding Supreme Court precedent, the Commission's practice under Section 337, and the Commission's responsibility, pursuant to 19 U.S.C. § 3005, to maintain and revise the HTSUS. It is well established "that when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended the text to have the same meaning in both statutes." *Smith v. City of Jackson,* 544 U.S. 228, 233 (2005). The same must surely apply when Congress uses the term "articles" in three sections of one statute, the Tariff Act. The Commission's treatment of electronically-transmitted importations as articles is required under established law and the Commission's mandate under the Tariff Act of 1930 "to ensure that the Harmonized Tariff Schedule is kept up-to-date in light of changes in technology or in patterns of international trade." 19 U.S.C. § 3005(a)(3). The Commission, accordingly, should clarify its existing practice under Section 337 by construing the term "articles" to include electronic transmissions, without regard to the mode of importation

III. THE ITC'S ASSERTION OF JURISDICTION AND AUTHORITY OVER THE IMPORTATION OF ELECTRONIC GOODS, AND A CONSTRUCTION OF THE TERM "ARTICLES" AS EXTENDING TO ELECTRONIC TRANSMISSIONS, ARE CONSISTENT WITH THE INTENT OF CONGRESS AND ENTITLED TO DEFERENCE

The Commission, by construing the term "articles" to include the importation of electronic transmissions under Section 337, would make explicit its existing practice, and would harmonize the ITC's construction with that of other agencies that share responsibility for administering and interpreting the Tariff Act. Such a construction, moreover, would be entitled to *Chevron* deference by the courts, given the ITC's Congressional mandate under Section 337 to define and regulate unfair acts in international trade, and the broad discretion Congress and the courts have given the ITC to exercise jurisdiction over unfair acts in international trade. The CAFC and its predecessor courts, relying on the legislative history, have consistently recognized the Commission's broad discretion under Section 337 to define and remedy unfair acts in international trade, based on the evolving realities of the marketplace. The underlying purpose of Section 337 is to protect domestic industries, such as the motion picture industry, from unfair acts in international trade. Were the Commission to depart from its established practice of construing the term "articles" to apply to infringing electronic transmissions, this would deprive critical U.S. industries of the relief intended by Congress.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the Supreme Court set out a two-step analysis for reviewing an "agency's construction of the statute which it administers." 467 U.S. 837, 842 (1984). At step one, a court must determine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress." *Id.* at 842-843. Where, as here, Congress's construction of a statutory term is not clearly defined, the court must determine "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

The legislative history of Section 337 demonstrates that Congress intended for the Commission to have very broad jurisdiction over unfair acts in international trade. Congress first enacted a prohibition against "unfair methods of competition" in the Federal Trade Commission Act of 1914, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (now codified as amended at 15 U.S.C. §§ 41-58 (2010)). Congress then incorporated the same language into the predecessor to Section 337, Section 316 of the Tariff Act of 1922, Pub. L. No. 67-318, § 316(a), 42 Stat. 858, 943 (1922). The Senate report on the 1922 Act explained that "[t]he provision relating to unfair methods of competition in the importation of goods is broad enough to prevent every type and form of unfair practice and is, therefore, a more adequate protection to American industry than any antidumping statute the country has ever had." S. Rep. No. 67-595, 67th Cong., 2d Sess., pt. 1, at 3 (1922). The Commission's broad discretion to define and remedy "unfair methods of competition" in the importation of goods carried forward unchanged into the Tariff Act of 1930, as amended. In 1988, Congress again amended the statute "to strengthen the effectiveness of section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. intellectual property rights." S. Rep. No. 100-71, 100th Cong., 1st Sess., at 128 (1987).

Accordingly, the Commission's longstanding practice with respect to undefined terms in the statute, affirmed by the CAFC, has been to take a flexible approach to its jurisdiction and authority, reflecting the "realities of the marketplace." *See, e.g.*, *Certain Apparatus for the Continuous Prod. of Copper Rod*, Inv. No. 337-TA-52, USITC Pub. 1017, at 53-55, 58 (Comm'n Mem. Op.) (Nov. 1979) (rejecting a narrow definition of "domestic industry" based on intellectual property and instead looking to the "realities of the marketplace"); *see also Certain Floppy Disk Drives & Components Thereof*, Inv. No. 337-TA-203, USITC Pub. 1756, at 44-45 (Initial Determination) (Sept. 1985) ("The Commission does not adhere to any rigid formula in determining the scope of the domestic industry as it is not precisely defined in the statute, but will examine each case in light of the realities of the marketplace.").

As the U.S. Court of Customs and Patent Appeals ("CCPA"), the predecessor court to the CAFC, explained:

> [H]aving in mind that one of the express objects of the Tariff Act of 1922, as stated in its title, was to 'encourage the industries of the United States,' it is very obvious that it was the purpose of the law to give to industries in the United States, not only the benefit of favorable laws and conditions to be found in this country, but also to protect such industries from being unfairly deprived of the advantage of the same and permit them to grow and develop.

Frischer & Co. v. Bakelite Corp., 39 F.2d 247, 259 (C.C.P.A. 1930).

It has long been clear to reviewing courts that the intent of Congress in drafting Section 337 was to provide the Commission with broad and flexible relief in defining and remedying unfair acts in international trade, eschewing a rigid approach to the statute:

> [Section 337] provides broadly for action by the Tariff Commission [now the ITC] in cases involving 'unfair methods of competition and unfair acts in the importation of articles,' but does not define those terms nor set up a definite standard. . . . [This] language is broad and inclusive and should not be held to be limited to acts coming within the technical definition of unfair methods of competition as applied in some decisions. The importation of articles may involve questions which differ materially from any arising in purely domestic competition, and it is evident from the language used that Congress intended to allow wide discretion in determining what practices are to be regarded as unfair.

In re Von Clemm, 229 F.2d 441, 443-444 (C.C.P.A. 1955).

The CAFC recently reaffirmed its view that Congress intended the ITC's jurisdiction under Section 337 to be interpreted very broadly. In a case involving trade secret misappropriation where all the unfair acts and actors were located overseas, the CAFC found that the Commission's application of its authority to unfair acts taking place outside the jurisdiction of the United States was appropriate, where this led to the importation of and domestic competition by "products . . . related to" the unfair acts:

> In light of the legislative background, and in particular in view of the close working relationship between the Commission and the relevant congressional committees, it is fair to conclude that Congress contemplated that, in exercising its new authority over unfair competition, the Commission would consider conduct abroad in determining whether imports that were the products of, or otherwise related to, that conduct were unfairly competing in the domestic market.
>
> Thus, even if we were to conclude that section 337 is ambiguous with respect to its application to trade secret misappropriation occurring abroad, we would uphold the Commission's interpretation of the scope of the statute. As it is, we conclude that the Commission's longstanding interpretation is consistent with the purpose and the legislative background of the statute, and we therefore hold that it was proper for the Commission to find a section 337 violation based in part on acts of trade secret misappropriation occurring overseas.

TianRui Grp. Co. v. Int'l Trade Comm'n, 661 F.3d 1322, 1331 (Fed. Cir. 2011).

In sum, when Congress has not spoken to an interstitial issue, such as by not defining the term "articles" in Section 337 or anywhere else in the Tariff Act, *Chevron* protects the agency's gap-filling authority. Here, it is clear from the legislative history that Congress intended to give the ITC extremely broad jurisdiction and authority to regulate unfair acts in international trade in order to assist domestic industries by preventing and remedying unfair acts in the importation of goods. A reviewing court, in light of the legislative purpose of Section 337, would almost certainly affirm a Commission construction of the term "articles" to cover the importation of electronic transmissions, given the realities of the marketplace and previous agency practice. ITC adoption of an excessively narrow construction of the term "articles," on the other hand, would frustrate clear Congressional intent to provide domestic industries with a flexible and effective remedy against unfairly traded imports in all their forms, and would be much less likely to survive appellate review.

IV. THE FEDERAL CIRCUIT'S DECISIONS IN *SUPREMA* AND *BAYER* DO NOT BEAR ON WHETHER IMPORTED ELECTRONIC TRANSMISSIONS CAN CONSTITUTE "ARTICLES" FOR PURPOSES OF SECTION 337

The Commission in its Notice also asked the parties to address any "potentially relevant judicial precedent" such as *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367 (Fed. Cir. 2003) ("*Bayer*") and *Suprema Inc. v. Int'l Trade Comm'n*, Nos. 2012-1170, -1026, -1124, 2013 WL 6510929 (Fed. Cir. Dec. 13, 2013) ("*Suprema*")[14]. Inv. No. 337-TA-833, Comm'n Notice, at 2 (Jan. 17, 2014). *Bayer* and *Suprema* addressed very narrow patent issues. Neither decision addressed the use of the term 'articles' in the context of the general scope of Section 337's coverage, including in cases of infringements of copyrights, trademarks, trade secrets, other patent issues, or other unfair methods of competition or unfair acts.

The Federal Circuit's recent opinion in *Suprema* has no bearing on whether the term "articles" can be construed to include imported electronic transmissions. In that case, the CAFC held that "the statutory grant of authority in § 337 cannot extend to the conduct proscribed in § 271(b) where the acts of underlying direct infringement occur post-importation." *Suprema*, 2013 WL 6510929, at *9. The court explained that § 271(b) "focus[es] on the conduct of the inducer" whereas under Section 337 "[t]he focus is on the infringing nature of the articles at the time of importation, not on the intent of the parties with respect to the imported goods." *Id.* at *7-8. On its face, the court's decision in *Suprema* therefore addresses the underlying merits of the Commission's finding of violation based on induced infringement, not the ITC's jurisdiction over the case based on the importation of articles. The CAFC, in fact, went out of its way to emphasize that its "ruling is not a jurisdictional one." *Id.* at *5 n.2. The importation of electronic transmissions could help to provide the jurisdictional basis for any number of theories

[14] The CAFC has granted the ITC's motion to extend the deadline for filing a petition for panel rehearing/rehearing en banc in the *Suprema* case until February 19, 2014. As a result, the final legal status of this case is pending.

of violation, ranging from trade secret misappropriation to copyright infringement, and would not be limited to the allegations of induced patent infringement allegations at issue in *Suprema.*

The Federal Circuit's opinion in *Bayer* is also of very limited relevance to the proper construction of the term "articles." That case involved the interpretation of 35 U.S.C. § 271(g), which makes unlawful the importation or sale in the United States of "a product which is made by a process patented in the United States." 340 F.3d at 1371. The court found that for purposes of 271(g), "Congress was concerned solely with physical goods that had undergone manufacture." *Id.* at 1373. The court then pointed to 19 U.S.C. § 1337(a)(1)(B), which includes as an "unfair method of competition" the importation of "articles that . . . are made, produced, processed or mined under, or by means of, a process covered by a valid and enforceable United States patent," in support of its holding that infringing goods under 271(g) are limited to tangible products. *Id.* The court noted that while Section 337 may be broader in some respects than 271(g), "nothing in Section 1337 suggests coverage of information, in addition to articles, under section 271(g)." *Id.* at 1374 n.9. The court's discussion of the term "articles" as used in 19 U.S.C. § 1337(a)(1)(B) is of limited probative value to the proper construction of the term "articles" elsewhere in Section 337 and the Tariff Act generally, for at least three reasons.

First, the construction of the term "articles" as used 19 U.S.C. § 1337(a)(1)(B)(ii) was not before the court in *Bayer*; the holding in that case was limited to the scope of § 271(g). Consequently, the court's footnote is, at most, dictum. Second, to the extent that the CAFC's footnoted comment in *Bayer* has persuasive value, it is narrowly limited, on its face, to the "articles" subject to the process patent provisions of Section 337. That is, the term "articles" as used in 19 U.S.C. § 1337(a)(1)(B)(ii), by its terms, is limited to articles that are "made, produced, processed or mined under, or by means of, a process covered by a valid and enforceable United States patent." No other use of the term "articles" in 19 U.S.C. § 1337 is limited to the product of a U.S. process patent.

Third, the legal question in *Bayer* was not the proper construction of the term "articles," but rather what constitutes a "product which is *made* by a [patented] process" under § 271(g). *Bayer* at 1371 (emphasis added). The court concluded that the use of the word "made" in § 271(g), in light of the legislative history of the Process Patents Amendments Act, meant that "Congress was concerned solely with physical goods that had undergone manufacture," noting that "each and every reference to the provision that became section 271(g) describes it as directed to manufacturing." In contrast, the legislative history of the 1988 amendments to Section 337 makes clear that Congress was concerned that relief under the statute should *not* be limited solely to manufacturers of physical goods but rather should reach a broader class intellectual property holders including "the California movie studio that licenses the Gremlins character." H. R. Rep. No. 100-40, 100th Cong., 1st Sess., Pt. 1, at 157; 133 CONG. REC. 1795 (Feb. 4, 1987) (statement of Sen. Lautenberg).

This is consistent with the intent of Congress that "the provision relating to unfair methods of competition in the importation of goods [be] broad enough to prevent every type and form of unfair practice." *In re Orion Co.*, 21 U.S.P.Q. 563, 568 (C.C.P.A. 1934). It would be anomalous and inconsistent with Congressional intent if the Commission were to claim a lack of jurisdiction, for example, over the importation of electronically-transmitted, pirated software in a

case brought by the U.S. software industry, clearly the type of IP-intensive industry that Congress intended to protect, due to a narrow construction of its authority over electronically transmitted articles. Consequently, the legislative history relied upon by the court in *Bayer* in its construction of § 271(g) is not probative of the proper scope of Section 337, a different statute with a different purpose and history. The footnote in *Bayer*, questioning whether "information" is a manufactured "product" for purposes of § 271(g), has no bearing on the Commission's broad jurisdiction over imported electronically transmitted "articles" for purposes of Section 337.

V. CONCLUSION

For the foregoing reasons, the Commission should construe the term "articles" as used in Section 337 to cover the importation of electronic transmissions. Such a construction is consistent with governing Supreme Court precedent, the Commission's established practice, and the construction of the term "articles" as applied elsewhere in the Tariff Act by other federal agencies and the CIT. This inclusive construction also finds strong support in the legislative history and CAFC precedent, which consistently stand for the proposition that the Commission is to exercise its jurisdiction and authority broadly, to provide domestic industries with a remedy against unfair acts in international trade, variously defined. If the Commission were to construe the term "articles" under Section 337 narrowly, excluding the coverage of electronic importation of infringing articles from overseas, this would deprive many important U.S. industries of one of the most powerful remedies against international unfair acts available under U.S. law. The MPAA urges the Commission, in accordance with its own practice and governing law, to construe the term "articles" to include the importation of electronic transmissions.

Sincerely,

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DR:tse