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AM&S TRADE SERVICES LLC
CARLOS MOORE, PRESIDENT

February 10, 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 reply 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,

/s/ Jonathan J. Engler

Tom M. Schaumberg
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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 Secretary Barton:

On behalf of the Motion Picture Association of America, Inc. ("MPAA"), I respectfully submit these comments in reply to certain responses 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) ("Notice"). As with the MPAA's initial submission, filed on February 3, 2014, this reply submission is addressed to question #1 from the Notice. The MPAA notes that some submissions also addressed the interplay of Section 337 and substantive patent law. The MPAA takes no position on these issues, but notes that patent infringement in its various forms is but one category of unfair act covered by Section 337. It is critical that the Commission, in construing the term "article" as it relates to the ITC's authority and jurisdiction, keep in mind the statute as a whole. The MPAA further submits that considerations specific to patent law should not influence the Commission's determination on the broader question posed by the Notice.

As explained in the MPAA's initial submission, digital distribution of articles such as movies and television shows, music, e-books, and software is a rapidly growing mode of domestic and international commerce, both legitimate and illegitimate. International trade in

works protected by intellectual property rights has become very substantial. In many industries, such as the motion picture and music industries, electronic transmissions of content are growing rapidly and there is movement away from shipments using older modes such as DVDs and CDs. To effectuate Congressional intent to protect domestic industries, the Commission can and must construe the term "articles" to include imported electronic transmissions, consistent with its own precedent and decisions from other administrative agencies and courts.

This reply submission addresses arguments in the submission from Google against the treatment of electronic transmissions as "articles" under Section 337.

I. NEITHER THE LANGUAGE OF THE STATUTE NOR THE LEGISLATIVE HISTORY LIMITS SECTION 337'S SCOPE TO PHYSICAL ARTICLES

The guiding principle of statutory construction is that a statute should be read as a whole, with its various parts interpreted within their broader statutory context to support the underlying purpose of the statute. As Justice Scalia has explained,

> Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd., 484 U.S. 365, 371 (1988) (citations omitted).

Here, Google's analysis focuses on the term "articles" in a vacuum while ignoring the broader statutory scheme of Section 337 and its purpose. Google's submission asserts, but does not demonstrate, that the language of Section 337 "limits 'articles' to physical objects." Google Submission at 2. For the reasons set forth below, this assertion is incorrect. The term "articles" is broad enough to encompass electronic transmissions, and neither the "plain language" of the statute nor the legislative history provides a rationale for construing the term more narrowly. The better approach, as the Supreme Court explained in *Cunard*, is to consider the term "articles" in a way that "comports with the object to be attained," here, the protection of U.S. industries from unfair acts in international trade. *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 121 (1923). That statutory purpose, to provide a remedy to domestic industries against unfair acts relating to importation, can be gleaned from the plain language of Section 337.

A. The "Plain Language" of Section 337 Does Not Limit "Articles" to Physical Objects

As explained in the MPAA's initial submission, the broad scope of the Commission's jurisdiction over unfair acts related to importation – whatever the mode of importation or the

form of the imported article – can be discerned from the plain language of the statute. The term "articles" has, accordingly, been consistently interpreted by the ITC, U.S. Customs and Border Protection, the HTSUS and the U.S. Court of International Trade to encompass the importation of electronic transmissions.[1] Google, in asserting that the "plain language" of Section 337 "demonstrates that 'articles' are physical objects, not electronic transmissions," points to nothing in the statutory scheme to suggest that Congress intended such a restrictive meaning. Google Submission at 3. Google emphasizes the presence of the word "article" in sections 337(a)(1)(B) and 337(a)(2)-(3). *Id.* at 5-6. Self-evidently, however, the use of the term "article" sheds no light on whether that term can encompass electronic transmissions. Moreover, by citing to the legislative history in virtually every paragraph in this section of its submission, Google makes clear it is not relying on the plain meaning of the words used in the statute.

A closer look at the underlying structure and purpose of the statute argues against the rigid, de-contextualized construction of the term "articles" proposed by Google. The statutory context of Section 337, as discussed in the MPAA's initial brief, makes clear that Congress intended the statute to provide a flexible remedy to all manner of unfair acts related to importation, whatever the form or mode of importation into the United States. *See Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) ("[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.")

B. The Remedy Provisions of Section 337 Do Not Dictate That "Articles" Be Limited to Physical Objects

The heart of Google's argument appears to be that "articles" must not encompass electronic transmissions because the remedy of an exclusion order would not be effective against such transmissions. *See* Google Submission at 6. Google acknowledges that Section 337 also gives the Commission authority to issue cease and desist orders, which can and do effectively remedy unfair conduct in the form of electronic transmission, but quotes an incomplete fragment of the legislative history of the 1988 amendments to Section 337 to misleadingly suggest that

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[1] Customs has concluded that software entering via electronic transmission "is an importation of merchandise into the customs territory of the United States." HQ 114459 (Sept. 17, 1998). Customs nevertheless has chosen to not require "entry" of electronic transmissions – the formal process of identifying and logging articles that cross the border into the United States – because there would be no point to such a requirement. As the Customs Ruling explained, "telecommunications transmissions" are exempt from duties under the Harmonized Tariff Schedule of the United States and are excepted from the general rule requiring formal "entry" for all goods. Customs, in other words, has concluded that, while the law authorizes Customs to subject electronic transmissions to the entry requirement, it does not compel Customs to do so. Customs has simply *chosen* not to do so at present, even though it asserts authority over such imports. *See* HQ 114459.

Congress intended the cease and desist order remedy to apply only to physical articles. *Id.* at 6-7. Elsewhere in its submission, Google asserts, based on the same 1988 legislative history, that cease and desist orders "were intended to aid the enforcement of exclusion orders." *Id.* at 14. Both assertions are incorrect.

As Google itself states, but later ignores, Commission authority to issue cease and desist orders for violations of Section 337 dates not from 1988 but from 1974. *See* Google Submission at 4. The purpose of this remedy was to "add needed flexibility" to Section 337. S. Rep. No. 93-1298 at 198 (1974). The 1988 amendments modified the cease and desist order provisions of the statute solely to increase the penalties for violating such orders and to clarify that the Commission has the authority to issue **both** an exclusion order and a cease and desist order to remedy the same unfair act (it being already clear that the Commission could issue a cease and desist order **in lieu** of an exclusion order). Explaining this amendment, the Senate Report states:

> There are circumstances . . . where it is in the public interest to issue both [forms of remedy]. **For example**, a cease and desist order prohibiting a domestic respondent from selling the imported infringing products in the United States may be appropriate when the product has been stockpiled during the pendency of an investigation and an exclusion order may be appropriate to prevent future shipments of the infringing product.

S. Rep. No. 100-71 at 131 (emphasis added).

In short, the legislative history merely gives one example of a circumstance that might warrant issuance of both forms of remedy available to the Commission, but neither states nor implies that cease and desist orders can only be addressed to physical articles, nor that cease and desist orders were intended solely to aid in the enforcement of exclusion orders. Indeed, even prior to 1988, cease and desist orders could be issued "in lieu of" an exclusion order. Thus, the remedial scheme of Section 337 does not limit the scope of the statute to conduct against which an exclusion order would be effective, but instead is intentionally designed to provide the ITC sufficient flexibility to remedy unfair acts through cease and desist orders. *See Viscofan, SA v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986) (upon determining a violation of Section 337, "the Commission has broad discretion in selecting the form, scope and extent of the remedy").

C. The Legislative History of Section 337 Does Not Support Limiting "Articles" to Physical Objects

In support of its assertion that "articles" should be interpreted to exclude electronic transmissions, Google argues that "articles" has been "used interchangeably with goods, products, and merchandise" in the legislative history. Google Submission at 3. At best, this argument merely rephrases the question posed by the Commission from "Are electronic transmissions 'articles'?" to "Are electronic transmissions 'goods, products, or merchandise'?".

Google fails to explain, moreover, why these terms -- "goods," "products," or "merchandise" -- should be viewed as encompassing only physical objects and excluding non-physical products such as software or digital entertainment. *See, e.g., Cunard*, at 121-122 (words such as 'transportation' and 'importation' "are to be taken in their ordinary sense, for it better comports with the object to be attained"). Indeed, Google itself uses the word "product" to describe its software offerings: "We build **products** that we hope will make the web better—and therefore your experience on the web better. With **products** like Chrome and Android, we want to make it simpler and faster for people to do what they want to online." *See* Google Company Overview, "What we do," *available at* https://www.google.com/about/company/products/ (last visited Feb. 10, 2014) (emphasis added).

In both ordinary usage (as illustrated by Google's own website) and in precedents interpreting statutory language, the terms "goods," "products," or "merchandise" are not confined to physical objects. As noted in the MPAA's initial submission, CBP has found "that the transmission of software modules and products to the United States from a foreign country via the Internet is an importation of **merchandise** . . . ." HQ 114459, 1998 U.S. CUSTOM HQ LEXIS 640 (Sept. 17, 1998) (emphasis added). Similarly, the DOL has determined that "[s]oftware and similar intangible **goods** . . . will now be considered to be articles regardless of their method of transfer." 71 Fed. Reg. 18355, 18357 (Apr. 11, 2006) (emphasis added). *See also Former Emps. of Computer Scis. Corp. v. U.S. Sec. of Labor*, 414 F. Supp. 2d 1334, 1340-41 (Ct. Int'l Trade 2006) (telecommunications transmission [including] transmissions of software code . . . "are **goods** entering . . . the United States.") (emphasis added); *Dealer Mgmt. Sys., Inc. v. Design Auto. Grp., Inc.,* 822 N.E.2d 556, 560 (Ill. App. Ct. 2005) ("A sampling of decisions from various jurisdictions shows that courts have generally recognized that computer software qualifies as a '**good**' for purposes of the UCC.") (emphasis added). Google's argument that "articles" is synonymous with goods, products, or merchandise, therefore, points toward an interpretation of "articles" that encompasses electronic transmissions rather than excludes them.

Unable to point to language in the legislative history indicating Congressional intent to confine Section 337 to physical articles, Google suggests that the absence of a specific discussion of electronic transmissions in the legislative history implies such an intent. *See* Google Submission at 2. But whether or not Congress in 1930 or 1988 contemplated that electronic transmission would one day become a dominant mode of importation, the technological state of affairs at the time the statute was drafted does not lock in historical amber the meaning of a general term such as the word "articles." It is well established that "a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) (ruling that inventions not contemplated when Congress enacted the patent law are still patentable if they fall within the law's general language) (quoting *Barr v. United States*, 324 U.S. 83, 90 (1945)). Absent any indication that Congress intended Section 337 to be construed narrowly, legislative silence as to a particular variety of imported "article" cannot be viewed as indicative of intent to exclude that type of article from the purview of Section 337. To the contrary, "as indicated by the scope of its language, section 337 was designed to cover a broad range of unfair acts." S. Rep. No. 100-71 at 130.

As a matter of statutory interpretation, the Supreme Court has consistently held that a general term such as "articles" should not be construed as "so limited in their application as not to lead to injustice, oppression, or an absurd consequence." *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486 (1869) (prohibition on obstructing mail does not apply to local sheriff's arrest of mail carrier on a murder charge). In rejecting the argument that Congress intended "transported" in the Reed Amendment to exclude transportation by private automobile, the Supreme Court in *United States v. Simpson* explained:

> The statute makes no distinction between different modes of transportation and we think it was intended to include them all, that being the natural import of its words. Had Congress intended to confine it to transportation by railroads and other common carriers it well may be assumed that other words appropriate to the expression of that intention would have been used. And it also may be assumed that Congress foresaw that if the statute were thus confined it could be so readily and extensively evaded by the use of automobiles, auto-trucks and other private vehicles that it would not be of much practical benefit. *See Kirmeyer v. Kansas*, 236 U.S. 568. At all events we perceive no reason for rejecting the natural import of its words and holdings that it was confined to transportation for hire or by public carriers.

252 U.S. 465, 466-67 (1920); *see also Zuber v. Allen*, 396 U.S. 168, 185 (1969) ("Legislative silence is a poor beacon to follow in discerning the proper statutory route").

Similarly here, the Commission should reject Google's contention that the legislative history points in favor of a restrictive definition of "article" that excludes electronic transmissions. As discussed in the following section, the Commission has previously and correctly analyzed that legislative history, concluding: "[w]e do not think that the legislative history of section 337 precludes coverage of electronically transmitted software; in fact, we believe it supports the conclusion that such coverage is proper." *Certain Hardware Logic Emulation Sys. & Components Thereof ("Hardware Logic"),* Inv. No. 337-TA-383, Comm'n Op. at 28, 1998 WL 307240 (Apr. 1, 1998).

D. The Commission's Governing Precedent with <u>Respect to Its Authority Over Imported Articles Is Correct</u>

As explained in the MPAA's initial submission, beginning with *Hardware Logic* 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-680, Initial Determination at 4 n.2 (July 16, 2010) (citing *Hardware Logic*). The MPAA disagrees with Google's argument that *Hardware Logic* was incorrectly decided based on a misreading of the legislative history. *See* Google Submission at 7-9. Without taking a position on whether *Hardware Logic* remains good law in all respects, the MPAA submits that the Commission in

that investigation appropriately considered the legislative history and correctly determined that "articles" as used in Section 337 could encompass electronic transmissions.

Google's argument to the contrary rests on the mistaken notion, discussed above, that Congress' use of terms such as "goods, products, and merchandise" reflects a narrow focus on physical goods based on the state of technology as it existed at the time the statute was written. *See id.* at 9 ("the legislative history analysis of *Hardware Logic* ignores the numerous references to goods, products, and merchandise replete in the discussion of Section 337 in the Congressional record"). Congress' use of these terms supports rather than undermines an interpretation of "articles" that encompasses electronic transmissions.

E. Decisions Addressing the Interplay of Patent Law and Section 337 Do Not Shed Light on the Proper Interpretation of "Articles"

Section 337 covers a wide range of unfair methods of competition and unfair acts (under subsection 337(a)(1)(A)), in addition to patent and copyright infringement (under subsection 337(a)(1)(B)(i)), "product by process" patent infringement (under subsection 337(a)(1)(B)(ii)), trademark infringement (under subsection 337(a)(1)(C)), mask work infringement (under subsection 337(a)(1)(D)), and vessel design infringement (under subsection 337(a)(1)(E)). Ignoring the broad scope of Section 337, Google relies heavily on arguments relating to the application of Section 337 to specific types of patent infringement. *See, e.g.*, Google Submission at 2 ("the ITC is not an appropriate forum for software patent litigation wherein the accused products are non-tangible electronic transmissions"); *id.* at 2-3 (citing *Certain Elec. Devices with Image Processing Sys., Components Thereof, & Associated Software*, Inv. No. 337-TA-724 ("*Electronic Devices*")); *id.* at 9-10 (citing *Bayer*)[2]; *id.* at 11-12 (citing *Suprema*)[3]; *id.* at 10-13 (arguing that "[e]lectronic transmissions alone simply cannot infringe a valid and enforceable United States patent at the time of importation"). While not conceding the merits of these arguments in the context of patent infringement,[4] they fail to show that "articles," with respect to other types of violations of the statute, must be limited to physical objects.

For example, Google argues that under Section 337(a)(1)(B)(ii), relating to product by process patent claims, "articles" must be physical objects because "electronic signals do not constitute patentable subject matter." Google Submission at 5, 12 (citing *In re Nuijten*, 500 F.3d 1346, 1357 (Fed. Cir. 2007)). Assuming this is true, however, this restriction derives from substantive patent law rather than from a restrictive interpretation of the term "articles." As noted above, Section 337 covers many types of unfair acts in addition to infringement of

[2] *Bayer* is addressed in the MPAA's initial submission at pages 14-15.

[3] *Suprema* is addressed in the MPAA's initial submission at pages 13-14.

[4] The question of whether a specific type of electronic transmission might violate a specific provision of Section 337 is beyond the scope of the Commission's Notice and is not addressed herein.

product-by-process patent claims. Even if the Commission finds that one subsection of Section 337 may not reach electronic transmissions, that would not preclude other sections of the statute from doing so. *Electronic Devices*, similarly, involves a narrow issue regarding the intersection of patent law and Section 337. Specifically, in *Electronic Devices* the Commission addressed the "importation" requirement of Section 337, in the context of alleged patent infringement under subsection 337(a)(1)(B)(i). *See Electronic Devices*, Comm'n Op. at 12-20 (Dec. 21, 2011). *Electronic Devices* did not involve electronic transmissions, nor did the Commission construe the term "articles," much less hold or imply that the term is limited to physical objects.

II. THE COMMISSION'S ESTABLISHED PRACTICE REGARDING ITS AUTHORITY OVER ELECTRONIC ARTICLES IS CONSISTENT WITH U.S. GOVERNMENT POLICY

In its initial submission, the MPAA discussed the rapid expansion of the distribution of motion pictures, music and other protected forms of intellectual property through the mode of electronic transmissions, both domestically and internationally. Use of electronic transmissions as a mode of trade, unfortunately, has not been limited to legitimate actors, but has been accompanied by an alarming increase in illegitimate trade, predominantly through illegal downloading and streaming of copyrighted content, often in the cross-border context. The use of electronic means to import into the United States infringing articles threatens important domestic industries, such as the motion picture and software industries, as well as U.S. consumers and the government at all levels.[5]

The need to regulate the burgeoning international trade in digital intellectual property is widely recognized by U.S. policymakers. The U.S. government has consistently recognized that international trade in digital forms of intellectual property is every bit as "real" as trade in traditional manufactured goods. For example, the Office of the U.S. Trade Representative's ("USTR") 2012 Special 301 Report lists, as one of USTR's primary concerns, "the continuing challenges of copyright piracy over the internet," and states that the U.S. Government will continue to work "to ensure that rights holders can protect their rights on the internet."[6] Notably, the Special 301 Report references two World Intellectual Property Organization ("WIPO") treaties: the Performances and Phonograms Treaty and the Copyright Treaty, each concluded in 1996 and entered into force in 2002. The treaties emphasize the importance of protecting rights holders from digital infringement.[7] The Special 301 Report reiterates the U.S. Government's

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[5] *See* ITC Inv. No. 337-TA-833, Submission of the Motion Picture Association of America, Inc., at 3-4 (Feb. 3, 2014).

[6] USTR's 2012 Special 301 Report, at 16-17 (Apr. 2012).

[7] *See* WIPO Performances and Phonograms Treaty, at notes 6, 9, 14 (stating that certain protections "fully apply in the digital environment"); WIPO Copyright Treaty, at note 1 (stating that certain protections "fully apply in the digital environment").

goal of attaining increased ratification and better implementation of these treaties, further demonstrating the national policy objective of enhancing the protection of intellectual property rights in the cross-border, digital environment.[8]

Congress is also engaged on this issue. In 2012, the U.S. Senate Committee on Finance requested the ITC to conduct two Section 332 investigations regarding the role of digital trade in the U.S. and global economies. In its request letter, the Committee noted the emergence of digital trade as "part of the broader transformation in global economic activity associated with the internet," and stated that U.S. policymakers seek to ensure that producers' data remains secure.[9] The Committee's request, and indeed the very phrase "digital trade," shows that Congress views the electronic transmission of works protected by intellectual property rights as a *trade* issue that may be handled by the ITC. (The Commission's ensuing report addressed intellectual property rights enforcement as a key issue for U.S. firms involved in digital trade.[10]) Moreover, pending bicameral trade legislation makes specific reference to digital trade in goods and services. The legislation states that electronically delivered goods and services are to be treated no differently than like products delivered in physical form, and should be afforded strong intellectual property protection.[11]

The ITC is particularly well-suited to address the dramatic increase in the international trade in electronically-transmitted forms of intellectual property. If the Commission were to construe the term "articles" to exclude electronic importation, it would, in effect, sideline the agency from a meaningful role in regulating this fast growing segment of international trade. Such self-inflicted obsolescence would not be consistent with the ITC's broad mandate to provide domestic industries a remedy for unfair acts in international trade. Google, by arguing that the term "articles" under Section 337 is limited to physical objects, is in effect asking the Commission to ignore the realities of the marketplace and to withdraw unilaterally from its Congressionally-mandated role of providing domestic industries with a remedy for unfair acts in international trade. This cannot be reconciled with the high priority that U.S. policymakers have

[8] *See* USTR's 2012 Special 301 Report, at 53. (Apr. 2012).

[9] Letter from Sen. Max Baucus on behalf of the U.S. Senate Committee on Finance to Chairman Irving A. Williamson, Chairman of the U.S. International Trade Commission, requesting two investigations under section 332(g) of the Tariff Act of 1930, at 1 (Dec. 13, 2012).

[10] *See* Digital Trade in the U.S. and Global Economies, Part 1, Inv. No. 332-531, Pub. 4415 at xxi, 5-1, 5-15 - 5-17 (July 2013).

[11] *See* Bipartisan Congressional Trade Priorities Act of 2014, S. 1900 and H.R. 3830 (identical legislation introduced bicamerally on Jan. 9, 2014), at Section 2(b)(5)-(6).

assigned to addressing international trade in electronically-transmitted forms of intellectual property.[12]

III. THE COMMISSION HAS LONG EXERCISED JURISDICTION OVER A BROAD RANGE OF "UNFAIR ACTS" IN IMPORT TRADE, INCLUDING ANTICOMPETITIVE BEHAVIOR, AND SHOULD CONTINUE TO DO SO

In considering the scope of the Commission's jurisdiction in Section 337 investigations, the proper inquiry is whether an unfair act has been alleged that has a nexus to an importation. If the answer is yes, the Commission should take jurisdiction. The mode of importation – whether DVDs imported through a port or motion pictures transmitted electronically – is not dispositive of the Commission's jurisdiction.

The centrality of the "unfair" act to the Commission's jurisdiction, rather than a formalistic, de-contextualized construction of the term "articles," can be seen in the Commission's longstanding practice with respect to "[u]nfair methods of competition and unfair acts" in the importation of articles into the United States. 19 U.S.C. § 1337(a)(1)(A). This language, which addresses all manner of anticompetitive acts, first appeared in Section 316 of the Tariff Act of 1922, and was incorporated into Section 337 of the Tariff Act of 1930. This prong of Section 337 is nearly identical to Section 5 of the Federal Trade Commission Act, which prohibits "unfair methods of competition" and "unfair or deceptive practices or acts." 15 U.S.C. § 45; *see also Certain Elec. Audio & Related Equip.*, Inv. No. 337-TA-7, USITC Pub. 768, Recommended Determination at 30 (Apr. 1976) (finding "Section 337 is clearly a type of antitrust regulation" and that cease and desist orders allowed the Commission to order pro-competitive remedies to address antitrust violations); *Watches, Watch Movements & Watch Parts*, Inv. No. 337-TA-19, USITC Pub. 177, at 3-4 (June 1966) (asserting jurisdiction over cases involving "unreasonable restraints upon trade and commerce in the United States, or monopolized such trade and commerce"); *Chicory Root-Crude & Prepared*, Inv. No. 337-TA-27, Comm'n Op., at 9 (Oct. 1, 1976) ("the antitrust laws and the practice thereunder as a standard for 'unfair methods of competition and unfair acts' in Section 337 proceedings").

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[12] A diverse representation of industry and academia also appear to view content transmitted through digital commerce as articles of trade. In the past few months alone, a number of reports have been issued analyzing the important role of digital commerce in trade logistics, trade policy, IPR protection, and economic policy. *See, e.g.*, Joshua Meltzer, "Supporting the Internet as a Platform for International Trade," Brookings Institution, Global Economy & Development Working Paper 69 (Feb. 2014); "Powering the Digital Economy: A Trade Agenda to Drive Growth," Business Software Alliance (2014); Edward Gresser, "The Internet and the Next Generation's Global Economy," Progressive Economy (Jan. 30, 2014); William Kerr and Dr. Chad Moutray, "Economic Impact of Global Software Theft on U.S. Manufacturing Competitiveness and Innovation," National Association of Manufacturers and National Alliance for Jobs and Innovation (2014).

In such cases, the Commission's jurisdiction does not turn on whether an imported article directly "infringes," but whether there is a "nexus" between imported articles and the alleged unfair methods of competition. *See, e.g., TianRui Grp. Co. v. Int'l Trade Comm'n*, 661 F.3d 1322, 1330 n. 4 (Fed. Cir. 2011). *See also Certain Garment Hangers*, Inv. No. 337-TA-255 Initial Determination, at 109-11 (June 17, 1987) (parties who steal information on market share or client lists may also create a provable nexus if used to substantially injure the domestic industry; likewise, trade secrets that facilitate the production of the good could also qualify.) It is equally irrelevant to the question of jurisdiction whether the Commission could or would issue an exclusion order rather than some other remedy. *See Tractor Parts*, Inv. No. 337-22, USITC Pub. 443, at 9 (1971) (noting that an exclusion order would not serve the public interest in antitrust violations, but cease and desist orders would).

IV. CONCLUSION

For the foregoing reasons, the Commission should construe the term "articles" as used in Section 337 to give the ITC broad jurisdiction over unfair acts in international trade including, but not limited to, electronic transmissions.

Sincerely,

Dan Robbins
Senior Vice President
Associate General Counsel
Motion Picture Association of America, Inc.

DR:tse

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **REPLY SUBMISSION IN RESPONSE TO THE COMMISSION'S SOLICITATION OF COMMENTS** was served to the parties, in the manner indicated below, this 10th day of February 2014**:**

The Honorable Lisa R. Barton Acting Secretary U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, SW, Room 112-A Washington, DC 20436	☒	**VIA HAND DELIVERY - ORG. + 8 COPIES**
The Honorable Charles E. Bullock Administrative Law Judge U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, S.W., Room 317-I Washington, DC 20436	☒	**VIA HAND DELIVERY**
Vu Bui Monica Bhattacharyya Office of Unfair Imports Investigations U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, S.W. Washington, DC 20436	☒	**VIA ELECTRONIC MAIL** (Vu.Bui@usitc.gov, Monica.Bhattacharyya@usitc.gov)

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