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

In the Matter of

**CERTAIN INKJET INK CARTRIDGES
WITH PRINTHEADS AND COMPONENTS
THEREOF**

Investigation No. 337-TA-723

COMMISSION OPINION

This investigation is before the Commission for a final determination on the issue under review, remedy, the public interest, and bonding. The Commission has determined to affirm the presiding administrative law judge's ("ALJ") determination that respondents violated section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in connection with claims 1-10 of United States Patent No. 6,234,598 ("the '598 patent"); claims 1-6 and 8-17 of United States Patent No. 6,309,053 ("the '053 patent"); claims 1-6 and 8-12 of United States Patent No. 6,398,347 ("the '347 patent"); claims 1-15 of United States Patent No. 6,481,817 ("the '817 patent"); and claims 9-16 of United States Patent No. 6,402,279 ("the '279 patent"). *See 76 Fed. Reg. 51055* (Aug. 17, 2011). The ALJ found that each respondent, including Asia Pacific Microsystems, Inc. of Hsinchu City, Taiwan ("APM"), violated section 337. The Commission reverses the ALJ's finding that Complainants Hewlett-Packard Company of Palo Alto, California and Hewlett-Packard Development Company, L.P., of Houston, Texas (collectively "HP") failed to establish that APM induced infringement of the asserted patents. The Commission adopts the ALJ's findings in all other respects.

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The Commission issues herewith a general exclusion order prohibiting the entry of unlicensed infringing inkjet ink cartridges with printheads and components thereof for consumption in the United States. The Commission finds that the public interest factors set out in section 337(d) do not preclude issuance of the general exclusion order, and sets a bond of 100 percent of entered value to permit temporary importation of infringing products during the period of Presidential review.

I. BACKGROUND

A. Procedural History

The Commission instituted this investigation on June 25, 2010, based on a complaint filed by HP. 75 *Fed. Reg.* 36442 (June 25, 2010). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, (19 U.S.C. § 1337) in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain inkjet ink cartridges with printheads and components thereof by reason of infringement of various claims of the '598 patent, '053 patent, '347 patent, '817 patent, '279 patent, and United States Patent No. 6,412,917 ("the '917 patent"). The complaint named the following entities as respondents: MicroJet Technology Co., Ltd. of Hsinchu City, Taiwan ("MicroJet"); APM; Mipo Technology Limited of Kowloon, Hong Kong ("Mipo Tech."); Mipo Science & Technology Co., Ltd. of Guangzhou, China ("Mipo"); Mextec d/b/a Mipo America Ltd. of Miami, Florida ("Mextec"); SinoTime Technologies, Inc. d/b/a All Colors of Miami, Florida ("SinoTime"); and PTC Holdings Limited of Kowloon, Hong Kong ("PTC").

On September 20, 2010, the ALJ issued an ID finding respondent MicroJet in default

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pursuant to 19 C.F.R. § 210.16(a)(1) for failure to respond to the Complaint and Notice of Investigation. *See* Order No. 9. The Commission determined not to review the ID. *See* Notice of Commission Decision Not to Review an Initial Determination Finding Respondent MicroJet Technology Co., Ltd. in Default (Oct. 19, 2010).

On October 28, 2010, the ALJ issued an ID terminating the investigation as to respondents Mipo and Mipo Tech. on the basis of a consent order. *See* Order No. 16. On November 10, 2010, the ALJ issued IDs terminating the investigation as to respondents SinoTime and Mextec on the basis of settlement agreements. *See* Order Nos. 17, 18. The Commission determined not to review any of those IDs. *See* Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation With Respect to Respondents Mipo Science & Technology Co., Ltd. and Mipo Technology Limited Based on a Consent Order (Nov. 18, 2010); Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation in Part Based on a Settlement Agreement (Nov. 29, 2010); Notice of Commission Decision Not to Review an Initial Determination Terminating the Investigation in Part Based on a Settlement Agreement (Nov. 29, 2010).

On January 11, 2011, the ALJ issued IDs granting HP's motions for summary determination that it satisfied the economic prong of the domestic industry requirement and that the '053; '347; '917; '817; and '279 patents are not invalid. *See* Order Nos. 30, 31. The Commission determined not to review those IDs. *See* Notice of Decision Not to Review an Initial Determination Granting a Motion for Summary Determination that Complainants have Established the Economic Prong of the Domestic Industry Requirement (Jan. 31, 2011); Notice

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of Decision Not to Review an Initial Determination Granting a Motion for Summary Determination that Complainants' Asserted Patents Are Not Invalid (Feb. 7, 2011).

On January 27, 2011, the ALJ issued an ID terminating the investigation in part based on withdrawal of the '917 patent. *See* Order No. 36. The Commission determined not to review the ID. *See* Notice of Commission Decision Not to Review the Administrative Law Judge's Initial Determination Granting Complainants' Unopposed Motion to Terminate the Investigation as to U.S. Patent No. 6,412,917 (Feb. 10, 2011).

The ALJ held an evidentiary hearing from March 14, 2011 to March 16, 2011, and thereafter received post-hearing briefing from the parties. Only Respondent APM appeared. Respondent PTC neither appeared at the hearing, nor filed post-hearing briefs. ID at 29. The ALJ therefore drew an adverse inference against PTC, stating that "it is appropriate to draw the adverse inferences that PTC imported accused products into the United States, that those products were manufactured by MicroJet, and that those products contain ICs made by APM." *Id.* (citing 19 C.F.R. §§ 210.17(d), (e)). The ALJ added that "by failing to file a post-hearing brief, PTC waived any arguments that it may have had concerning any issue in this investigation." *Id.* (citing Order No. 2, Ground Rule 11.1).

On June 10, 2011, the ALJ issued his final ID, finding a violation of section 337 by Respondents APM, MicroJet, and PTC. Specifically, the ALJ found that the Commission has subject matter jurisdiction: *in rem* jurisdiction over the accused products and *in personam* jurisdiction over APM. ID at 32-34. The ALJ also found that there has been an importation into the United States, sale for importation, or sale within the United States after importation of the

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accused inkjet ink cartridges with printheads and components thereof. *Id.* at 17-32. Regarding infringement, the ALJ found that MicroJet and PTC directly infringe claims 1-6 and 8-10 of the '598 patent; claims 1-6 and 8-17 of the '053 patent; claims 1, 3-5, and 8-12 of the '347 patent; claims 1-14 of the '817 patent; and claims 9-15 of the '279 patent. *Id.* at 66-70, 92-96. The ALJ also found that MicroJet induces infringement of those claims. *Id.* The ALJ further found that APM does not directly infringe claims 1-5 of the '598 and does not induce infringement of the asserted patents. *Id.* The ALJ, however, found APM liable for contributory infringement of claims 1-6 and 8-10 of the '598 patent. *Id.* With respect to invalidity, the ALJ found that the asserted patents were not invalid. *Id.* at 59-66. Finally, the ALJ concluded that an industry exists within the United States that practices the '598, '053, '347, '817, and '279 patents as required by 19 U.S.C. § 1337(a)(2). *Id.* at 98-104.

The ID included the ALJ's recommended determination ("RD") on remedy and bonding. The ALJ recommended that in the event the Commission finds a violation of section 337, the Commission should issue a general exclusion order directed to inkjet ink cartridges with printheads and components thereof that infringe any of the asserted patents. *Id.* at 111. The ALJ found that HP offered evidence to establish that the named respondents would likely circumvent a limited exclusion order and recommended a general exclusion order under 19 U.S.C. § 1337(d)(2)(A). *Id.* at 113. The ALJ, however, found that HP failed to demonstrate that it is entitled to a general exclusion order under section 337(d)(2)(B) because although HP accused five respondents of violation, "only one of those five respondents actually manufactures the

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infringing cartridges and, therefore, the record evidence does not show ‘a pattern of violation’ of Section 337 that warrants a general exclusion order under Section 337(d)(2)(B).” *Id.* at 115.

Even though the ALJ recommended a general exclusion order, he noted that he did not address the “‘*Spray Pumps* factors,’ and instead focused on the language of the statute.” *Id.* at 112, n.22 (citing *Certain Ground Fault Circuit Interrupters & Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25 (Mar. 26, 2009)). With respect to the amount of bond that should be posted during the period of presidential review, the ALJ recommended that if the Commission finds a violation of section 337, it should set a bond of 100 percent of the entered value of the imported infringing products.

On June 24, 2011, HP filed a contingent petition for review.¹ *See* Complainants Hewlett-Packard Company and Hewlett-Packard Development Company, L.P.’s Contingent Petition for Review. In the event that the Commission decided to review any part of the ID, HP requested that the Commission review “two narrow issues.” *Id.* at 1. Specifically, HP argued that the ALJ erred in finding that the claim term “printhead” recited in the preamble of asserted claim 1 of the ’598 patent recites a limitation of the claim. *Id.* at 2. Secondly, HP contended that the ALJ’s finding that Respondent APM’s products do not directly infringe asserted claims 1-5 of the ’598 patent based on his construction of “printhead” is in error. *Id.*

On June 27, 2011, APM filed a petition for review of the ID, challenging the ALJ’s finding of contributory infringement and importation into the United States. *See* Asia Pacific

¹ Under the Commission’s Rules, contingent petitions for review are treated as petitions for review. 19 C.F.R. § 210.42(b)(3).

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Microsystems, Inc.'s Petition for Commission Review of the Initial Determination Issued by Hon. ALJ Robert K. Rogers Pursuant to Commission Rule 210.43(a). Specifically, APM argued that "[t]he ALJ erroneously held that even though APM gained the knowledge of HP's patents-in-suit only after the acts of direct infringement had occurred, APM is nonetheless liable for contributory infringement." *Id.* at 3. APM further argued that the ALJ's finding that the accused products do not have substantial non-infringing uses is in error, contending that "the ALJ erred in concluding that the non-infringing uses of the accused inkjet cartridges were irrelevant to the inquiry and that only the non-infringing uses of the accused ICs were relevant." *Id.* at 4. APM also challenged the ALJ's finding that APM sold infringing products for importation into the United States. *Id.* APM stated that the ALJ "erred in concluding that the cartridges imported on HP's direction constituted unauthorized imports for the purposes of providing the Commission with the subject matter jurisdiction over APM's ICs." *Id.*

Also on June 27, 2011, the Commission investigative attorney ("IA") (Rett Snotherly) filed a petition for review of the ID. *See* Petition for Review by the Office of Unfair Import Investigations of the Final Initial Determination. The IA challenged the ALJ's finding that APM did not induce infringement of the asserted patents and stated that "OUII does petition for one nondispositive issue that was decided contrary to recent precedent." *Id.* at 1.

On July 5, 2011, the parties filed responses to the petitions and contingent petition for review. *See* Complainants Hewlett-Packard Company and Hewlett-Packard Development Company, L.P.'s Response to Asia Pacific Microsystems, Inc.'s Petition for Review; Asia Pacific

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Microsystems, Inc.'s Opposition to OUII's Petition for Commission Review of the Initial Determination, Pursuant to Commission on the Issue of Induced Infringement; Asia Pacific Microsystems, Inc.'s Response to Hewlett-Packard Company and Hewlett-Packard Development Company, L.P.'s Contingent Petition for Review; Response of the Office of Unfair Import Investigation to the Petitions for Review Filed by the Private Parties.

On August 11, 2011, the Commission determined to review a single issue in the final ID and requested briefing on the issue it determined to review, and on remedy, the public interest and bonding. *76 Fed. Reg.* 51055 (Aug. 17, 2011). Specifically, the Commission determined to review the finding that HP failed to establish by a preponderance of the evidence that Respondent APM induced infringement of the asserted patents. In its notice of review, the Commission asked the parties the following question:

1. Does the record evidence demonstrate that APM's conduct meets the "specific intent" requirement for inducement in light of the ALJ's finding that "APM certainly had knowledge of the asserted patents and the infringement at issue once it was served with HP's Complaint. And APM continued to sell its components to MicroJet even after receiving HP's Complaint"? ID at 91; RX-69C. *See DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1305 (Fed. Cir. 2006).

On August 25, 2011, the parties filed written submissions on the issue under review, remedy, the public interest, and bonding. *See* Complainants Hewlett-Packard Company and Hewlett-Packard Development Company's Written Submission on the Issues of Inducement, Remedy, the Public Interest, and Bonding ("HP Br."); Brief of the Office of Unfair Import

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Investigations on the Issue Under Review, Remedy, the Public Interest and Bonding (“IA Br.”); Respondent Asia Pacific Microsystems, Inc.’s Submission in Response to Commission’s Decision to Review the Initial Determination in Part and Request for Additional Briefing on Issues of Induced Infringement and Remedy (“APM Br.”).² On September 1, 2011, the parties filed reply briefs.

B. Patents and Technology at Issue

The technology at issue in this investigation is directed to a semiconductor design for inkjet ink cartridges with printheads and associated components. ID at 4-5; HP Pet. at 3. Specifically, the asserted claims are drawn to terminal ground returns and ground buses for the printheads, drive circuitry, and ink ejectors. *Id.*

The ’598 patent, entitled “Shared Multiple Terminal Ground Returns for an Inkjet Printhead,” resulted from an application filed on August 30, 1999. The patent issued on May 22, 2001 and names Joseph M. Torgerson, Rama Prasad, Todd A. Cleland, and Dale R. Oughton as the inventors. JX-1 (’598 patent). The ’598 patent describes an inkjet printing apparatus that has a large number of ink ejectors, and teaches that for such apparatus it is desirable to have as few as possible interconnections to the ink ejectors. ’598 patent, Abstract. In that regard, the patent states that sharing electrical ground returns between related ink ejector primitive groups with

² Although Respondent PTC failed to appear at the hearing and failed to file post-hearing briefs, resulting in the ALJ drawing an adverse inference against PTC (ID at 29), PTC filed a letter dated August 24, 2011, responding to the issue under review. By failing to file a post-hearing brief, PTC waived its arguments about any issue in this investigation. *See* Order No. 2, Ground Rule 11.1. The Commission therefore does not consider PTC’s submission. *See also* 19 C.F.R. § 210.17.

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spaced apart terminals provides a reduction in interconnections while offering redundancy in the interconnection. *Id.* HP owns the patent and has asserted independent claims 1 and 10 together with dependent claims 2-9 in this investigation.

The '053 patent, entitled "Ink Jet Printhead Having a Ground Bus that Overlaps Transistor Active Regions," resulted from an application filed on July 24, 2000. The patent issued on October 30, 2001 and names Joseph M. Torgerson and David M. Hurst as the inventors: JX-2 ('053 patent). The '053 patent describes an inkjet printhead that has a ground bus which partially overlies active regions of FET (field-effect transistors) drive circuits. '053 patent, Abstract. HP owns the patent and has asserted independent claims 1, 8, and 14 together with dependent claims 2-6, 8-13, and 15-17 in this investigation.

The '347 patent, entitled "Energy Balanced Ink Jet Printhead" resulted from an application filed on July 24, 2000. The patent issued on June 4, 2002 and names Joseph M. Torgerson and David M. Hurst as the inventors. JX-3 ('347 patent). The '347 patent describes an inkjet printhead with FET drive circuits that are configured to compensate for power trace parasitic resistances. '347 patent, Abstract. HP owns the patent and has asserted independent claims 1, 3, 5, 8, 10, and 11 together with dependent claims 2, 4, 6, 7, 9, and 12 in this investigation.

The '817 patent, entitled "Method and Apparatus for Ejecting Ink" resulted from an application filed on October 30, 2000. The patent issued on November 19, 2002 and names Joseph M. Torgerson, Bruce Cowger, David M. Hurst, and Mark H. MacKenzie as the inventors. JX-5 ('817 patent). The '817 patent describes an inkjet printhead that has a plurality of drop

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generators responsive to drive current, and address signals for dispensing ink. '817 patent, Abstract. The inkjet printhead includes first and second drop generators disposed on the printhead with each of the first and second drop generators configured to receive drive current from a drive current source. *Id.* Each of the first and second drop generators is configured to receive address signals from a common address source. *Id.* The inkjet printhead further includes a switching device connected between the common address source and each of the first and second drop generators. *Id.* The switching device is responsive to enable signals for selectively providing the address signal to only one of the first and second drop generators. *Id.* HP owns the patent and has asserted independent claims 1, 10, and 14 together with dependent claims 2-9, 11-13, and 15 in this investigation.

The '279 patent, entitled "Inkjet Printhead and Method for the Same" resulted from an application filed on October 30, 2000. The patent issued on June 11, 2002 and names Joseph M. Torgerson, Bruce Cowger, David M. Hurst, and Mark H. MacKenzie as the inventors. JX-6 ('279 patent). The '279 patent describes an inkjet printhead with a plurality of drop generators that selectively eject ink in response to activation. '279 patent, Abstract. The inkjet printhead includes first and second drop generators disposed on the printhead. *Id.* Each of the first and second drop generators are configured for connection to a source of drive current. *Id.* The inkjet printhead also includes a control device configured for connection to a periodic address signal and first and second periodic enable signals. *Id.* The control device is responsive to the first periodic enable signal and periodic address signal for enabling the first drop generator for

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activation in response to drive current. *Id.* The control device is responsive to the second periodic enable signal and periodic address signal for enabling the second drop generator for activation in response to drive current. *Id.* HP owns the patent and has asserted independent claims 9, 13, and 14 together with dependent claims 10-12, 15, and 16 in this investigation.

C. Products at Issue

The accused products include inkjet ink cartridges manufactured and sold by MicroJet, Mipo, Mipo Tech., and PTC, designed to work on HP printers that require a cartridge belonging to the HP 56/57 Family of products. *Id.* at 6. HP refers to such products as “clones” or “HP-compatible” inkjet ink cartridges. *Id.* In addition to the inkjet cartridges, HP accuses APM’s integrated circuits of infringement. *Id.* APM manufactures and sells integrated circuits (“ICs”) that HP alleges are used in the manufacture of the inkjet cartridges. *Id.* HP asserts that the APM ICs are found in the inkjet cartridges manufactured by MicroJet and sold by the Mipo, Mipo Tech., and PTC respondents. *Id.* at 6-7.

II. VIOLATION ISSUE UNDER REVIEW

A. Induced Infringement

The Commission determined to review the ALJ’s finding that HP failed to establish by a preponderance of the evidence that APM induced infringement of the asserted claims.

1. Applicable Law

Section 271(b) of the Patent Act prohibits inducement, stating: “[w]hoever actively induces infringement of a patent shall be liable as an infringer.” 35 U.S.C. § 271(b) (2008). The

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Supreme Court recently stated that “induced infringement under §271(b) requires knowledge that the induced acts constitute patent infringement.” *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S.Ct. 2060, 2068 (2011). The Court, however, explained that actual knowledge of the patent is not required but that a willful blindness to the patent and infringing activity would suffice and described the standard as follows:

While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.

Id. at 2070-71. The Supreme Court further stated that “[t]he addition of the adverb ‘actively’ suggests that the inducement must involve the taking of affirmative steps to bring about the desired result.” *Id.* at 2065. As the Federal Circuit explained:

To establish liability under section 271(b), a patent holder must prove that once the defendants knew of the patent, they “actively and knowingly aid[ed] and abett[ed] another’s direct infringement.” However, “knowledge of the acts alleged to constitute infringement” is not enough. The “mere knowledge of possible infringement by others does not amount to inducement; specific intent and action to induce infringement must be proven.”

DSU Med. Corp. v. JMS Co., 471 F.3d 1293, 1305 (Fed. Cir. 2006) (en banc in relevant part) (citations omitted). The Court reiterated its position on this point when it stated:

In *DSU Med. Corp. v. JMS Co.*, this court clarified en banc that the specific intent necessary to induce infringement “requires more than just intent to cause the acts that produce direct infringement.

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Beyond that threshold knowledge, the inducer must have an affirmative intent to cause direct infringement.”

Kyocera Wireless Corp. v. Int’l Trade Comm’n, 545 F.3d 1340, 1354 (Fed. Cir. 2008) (citation omitted). The required specific intent may be proven through circumstantial evidence.

Broadcom Corp. v. Qualcomm Inc., 543 F.3d 683, 699 (Fed. Cir. 2008).

2. The ALJ’s Finding that APM Is Not Liable for Induced Infringement

The ALJ found the evidence insufficient to prove that APM induced infringement of the asserted patents. ID at 77. The ALJ noted his previous finding that the prerequisite direct infringement existed but found that HP failed to offer sufficient evidence of the specific intent needed to establish inducement. *Id.* at 79-80. Regarding an e-mail exchange between two APM employees, [], that HP relied on, the ALJ found that although the emails [], the emails do not identify any specific patents. *Id.* at 80. According to the ALJ, “[t]he only reference to any details [] and that “HP has not shown that this vague reference demonstrates APM’s knowledge of the asserted patents.” *Id.* The ALJ also found unpersuasive, HP’s argument that APM knew of the asserted patents through its interaction with MicroJet, finding the evidence insufficient to support the argument.

The ALJ further stated that “[e]ven assuming that HP demonstrated that APM had knowledge of the asserted patents prior to this investigation, proof of mere knowledge of the patents is not enough to prove inducement.” *Id.* at 81. The ALJ observed that “HP has shown

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(1) that APM employees discussed amongst themselves HP's patent infringement lawsuit against MicroJet, and how that would affect APM's business; and (2) that MicroJet shared its knowledge of patents other than the asserted HP patents with APM." *Id.* at 81. The ALJ, however, concluded that "HP has not explained how this evidence demonstrates a specific intent on the part of APM to encourage MicroJet's infringement of the patents-in-suit" and that "HP's evidence is insufficient to meet the high level of proof needed to show specific intent required for inducement." *Id.* at 81-82.

3. The Commission's Determination Regarding Whether APM Induced Infringement of the Asserted Patents

The Commission determined to review the ALJ's finding on inducement. Given the ALJ's finding that "APM certainly had knowledge of the asserted patents and the infringement at issue once it was served with HP's Complaint . . . [a]nd APM continued to sell its components to MicroJet even after receiving HP's Complaint" (ID at 91), the Commission asked the parties to brief whether APM satisfied the specific intent prong of induced infringement. The record evidence shows that prior to obtaining actual knowledge of the asserted patents, APM willfully blinded itself to the asserted patent and to the infringing conduct, and that even after obtaining actual knowledge of the asserted patents, APM continued to induce infringement of the patents [

] *See, e.g.,* CX-242C at APM811412; CX-243C at APM811424; RX-69C.

APM's conduct satisfies the willful blindness test enunciated by the Supreme Court in *Global-*

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Tech. as well as the Federal Circuit's induced infringement case law. The Commission therefore reverses the ALJ's finding that APM did not induce infringement of the asserted patents.

Under *Global-Tech*, "a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts." *Global-Tech*, 131 S. Ct. at 2070-71. In other words, "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Id.* at 2070. The record evidence shows that [

] CX-242C at APM811412; CX-243C at APM811424. For instance, prior to this investigation, HP filed a complaint with the Commission that culminated in Inv. No. 337-TA-711. 75 *Fed. Reg.* 17435 (April 6, 2010). That complaint named MicroJet, but not APM, as a respondent. *Id.* All of the patents asserted in the 711 investigation were also asserted in this investigation. [

] CX-242C at APM811412. In another exchange related to the present investigation,

] CX-243C at APM811424.

³ [

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These email exchanges reveal that [

]. The email exchanges also show that

[

].⁴ Instead, APM actively

avoided knowing about its infringing conduct [

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By deliberately declining to take reasonable measures to confirm noninfringement when faced with the knowledge of the HP lawsuit and awareness that the HP patents in the suit had not expired, APM willfully blinded itself to the likelihood that [

] were themselves infringing. *See Global-Tech*, 131 S.

Ct. at 2071. APM's conduct therefore satisfies the test for induced infringement enunciated by the Court in *Global-Tech*.

Moreover, after being served with the complaint in this investigation, any doubt as to APM's knowledge that [

⁴ We note that although APM retained an infringement expert, [

]. Clark Tr. at 652:2-19; ID at 21.

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] evaporated. Instead of investigating HP's allegations of infringement after having been named as a respondent in this investigation, APM continued to engage in acts of inducement [

]. APM claims that immediately after it received the complaint in this investigation, [

]. However, the email exchanges set forth above demonstrate that APM knew that [

]. Notwithstanding, [

].

In concluding that APM did not induce infringement, the ALJ found that HP failed to provide sufficient evidence to demonstrate that APM had knowledge of the asserted patents prior to filing this investigation. ID at 80. However, as noted above, the ALJ found that "APM certainly had knowledge of the asserted patents and the allegations of infringement against its ICs once it was served with HP's Complaint" and that "APM continued to sell its components to

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MicroJet even after receiving HP's Complaint." ID at 91; RX-69C. That is, at a minimum, APM satisfied the knowledge requirement when it received the complaint.

The ALJ also found that "HP has not explained how [the] evidence demonstrates a specific intent on the part of APM to encourage MicroJet's infringement of the patents-in-suit" and that "HP's evidence is insufficient to meet the high level of proof needed to show specific intent required for inducement." ID at 81-82. We disagree. The Federal Circuit has explained that "[t]o establish liability under section 271(b), a patent holder must prove that once the defendants knew of the patent, they 'actively and knowingly aid[ed] and abett[ed] another's direct infringement.'" *DSU Med.*, 471 F.3d at 1305. The evidence shows that after being made aware of the asserted patents, [

]. Moreover, the record evidence establishes that the ICs do not have substantial non-infringing uses. ID at 89. In such instances, the Federal Circuit has indicated that the manufacture and sale of the contributorily infringing component may constitute the purposeful, culpable act sufficient to establish inducement. *See Ricoh Co., Ltd. v. Quanta Computer Inc.*, 550 F.3d 1325, 1343 (Fed. Cir. 2008); *see also, MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 932 (2005) ("In sum, where an article is 'good for nothing else' but infringement [citation omitted], there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe.").

APM's primary argument is that HP failed to show the occurrence of direct infringement after filing its complaint and, absent direct infringement, there can be no indirect infringement. *See* APM Br. at 1. APM waived this argument. Despite arguing throughout its post-trial brief

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that it only knew of the patents-in-suit due to the complaint in this investigation, APM never previously argued that there was insufficient proof of post-complaint direct infringement and thus did not give HP and the IA an opportunity to present evidence to the contrary. *See, e.g.*, APM Post Trial Br. at 39; APM Post Trial Reply Br. at 15, 21. Thus, under the ALJ's ground rules, APM waived the argument. Order No. 2, ALJ's Ground Rule 11.1 at 25. In any event, the record evidence shows post-complaint acts of direct infringement. *See* RX-69C (showing that

[

].

APM also argues that because [], it cannot possess the specific intent required for inducement and likens itself to a photocopy vendor that merely makes copies for a customer. Rather than being a mere photocopy vendor, APM is more like a publisher who aids and abets authors in publishing and selling their books. Specifically,

[

[]. Moreover, whether [] or not is not dispositive. *See VLT Corp. v. Unitrode Corp.*, 130 F. Supp. 2d 178, 200-01 (D. Mass. 2010) (rejecting accused inducing infringer's argument that "it must have some control over the design, manufacture, or marketing of infringing devices in order to be held liable under § 271(b)").

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The record evidence supports a finding that APM induced infringement of the asserted claims. Accordingly, we reverse the ALJ's finding to the contrary.

III. REMEDY

Where a violation of section 337 has been found, the Commission must consider the issues of remedy, the public interest, and bonding. The Commission has "broad discretion in selecting the form, scope, and extent of the remedy." *Viscofan, S.A. v. U.S. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). The Commission may issue an exclusion order excluding the goods of the person(s) found in violation (a limited exclusion order) or, if certain criteria are met, against all infringing goods regardless of the source (a general exclusion order).

The statutory authority of the Commission to issue a general exclusion order is codified in 19 U.S.C. § 1337(d)(2), which provides in relevant part:

(d) Exclusion of articles from entry

* * *

(2) The authority of the Commission to order an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that -

(A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or

(B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

A general exclusion order has far reaching consequences and applies to entities not respondents in the investigation, and even to entities who could not have been respondents, such

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as entities who did not import until after the conclusion of the investigation. Thus, the Commission has stated that “[b]ecause of its considerable impact on international trade, potentially extending beyond the parties and articles involved in the investigation, more than just the interests of the parties is involved. Therefore, the Commission exercises caution in issuing general exclusion orders and requires that certain conditions be met before one is issued.”

Certain Agricultural Tractors Under 50 Power Takeoff Horsepower, Inv. No. 337-TA-380, Comm’n Op. (Mar. 12, 1997).

The Commission recently observed that “[w]hile the Commission has in the past considered analysis based on the *Spray Pumps* factors when evaluating whether the statutory criteria are satisfied, we now focus principally on the statutory language itself in light of recent Federal Circuit decisions.” See *Certain Ground Fault Circuit Interrupters and Products Containing Same*, Inv. No. 337-TA-615, Comm’n Op. at 25-26 (Mar. 27, 2009), (citing *Certain Airless Spray Pumps and Components Thereof*, Inv. No. 337-TA-90, Comm’n Op. at 18-19, USITC Pub. 119 (Nov. 1981)). This passage in *Circuit Interrupters* specifically references the Commission’s earlier opinion in *Hydraulic Excavators*, in which the Commission stated that “[c]onsideration of some factual issues or evidence examined in *Spray Pumps* may continue to be useful for determining whether the requirements of Section 337(d)(2) have been met. However, we do not view *Spray Pumps* as imposing additional requirements beyond those identified in Section 337(d)(2).” *Certain Hydraulic Excavators & Components Thereof*, Inv. No. 337-TA-582, Comm’n Op. at 16-18 (Feb. 3, 2009). Thus, in *Circuit Interrupters* and *Hydraulic Excavators*, the Commission did not apply the *Spray Pumps* factors in determining whether a

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general exclusion order should issue.

We agree with the ALJ and the IA that the facts of this investigation support issuance of a general exclusion order under 19 U.S.C. § 1337(d)(2)(A). *See* ID at 21-36; IA Br. at 6. The evidence shows that it is difficult to identify the source of infringing products, making a general exclusion order necessary to prevent circumvention of a limited exclusion order. For instance, the evidence shows that (1) “foreign manufacturers package their products in unmarked, generic or reseller branded packaging that lacks any markings to identify their origin” (CX-800C at 37-39 (Q. 116-18)); (2) [

]; and (4) many manufacturers and distributors create multiple websites and corporate identities allowing them to sell infringing products without revealing their true identities (CX-800C at 36-37 (Q.113-14); CX-787). ID at 112-113.

APM argues that the appropriate remedy is a limited exclusion order and relies heavily on the Commission’s opinion in *Circuit Interrupters*. According to APM, in *Circuit Interrupters*, the Commission rejected the complainant’s assertion that “foreign companies such as the manufacturing respondents frequently change names or corporate structure thereby making them difficult to identify, and that foreign entrepreneurs can easily build facilities capable of producing the patented products.” APM Br. at 13. APM’s reliance on *Circuit Interrupters* is misplaced. In *Circuit Interrupters*, the Complainant requested a general exclusion order because the manufacturing respondents frequently changed their names and corporate structure, making them

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difficult to identify. *Circuit Interrupters*, at * 38. The Commission rejected that reasoning and issued a limited exclusion order covering not only the named respondents but also their affiliates, successors, and assigns. *Id.* There was no allegation that the infringing products themselves were difficult to identify or that their packaging made them difficult to identify.

The evidence in this investigation, however, shows that a general exclusion order is necessary to prevent circumvention of the limited exclusion order. Mr. Barkley, HP's Manager of Intellectual Property and Brand Protections for the Imaging and Printing Group, provided detailed testimony that foreign manufacturers such as MicroJet do not label their products in a way that could reveal their origin and that it is difficult to identify the origin of infringing products. *See* ID at 112-14. No evidence in the record contravenes the testimony of Mr. Barkley. Accordingly the Commission adopts the recommendation of the ALJ and issues a general exclusion order in this investigation.⁵ Inkjet ink cartridges with printheads and components thereof that infringe one or more of claims 1-6 and 8-10 of the '598 patent; claims 1-6 and 8-17 of the '053 patent; claims 1, 3-5, and 8-12 of the '347 patent; claims 1-14 of the '817 patent; and claims 9-15 of the '279 patent are excluded from entry into the United States for consumption, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption, for the remaining terms of the patents, except under license of the patent owner or as provided by law.

⁵ We agree with the ALJ and IA that HP did not establish a pattern of violation of section 337 under Section 337(d)(2)(B). Specifically, HP "failed to identify a single act of importation that is unrelated to one of the Respondents." ID at 114.

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VI. THE PUBLIC INTEREST

Section 337(d) of the Tariff Act of 1930, as amended, directs the Commission to consider certain public interest factors before issuing a remedy. These public interest factors include the effect of any remedial order on 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.” 19 U.S.C. § 1337(d).

The IA and HP argue that the public interest factors are not implicated in this investigation. The IA states that “[t]here is no evidence that U.S. demand for the HP compatible ink cartridges cannot be met by Complainants and legitimate remanufacturers” and adds that inkjet ink cartridges are not the type of products that raise any particular public interest concerns. IA Br. at 8 (citing *Certain Ink Jet Print Cartridges and Components Thereof*, Inv. No. 337-TA-446, Comm’n Op. at 14, USITC Pub. 3549 (Oct. 2002) (noting that relief has been denied in only three investigations due to public interest factors, and that those investigations involved fuel-efficient automobiles, atomic research, and medical supplies). *Id.* The IA and HP point out that the public interest favors the protection of U.S. intellectual property rights by excluding infringing imports. *Id.* (citing *Certain Two-Handle Centerset Faucets and Escutcheons, and Components Thereof*, Inv. No. 337-TA-422, Comm’n Op. at 9 (July 2000)); HP Br. at 15.

APM does not make a credible argument regarding the public interest. *See* APM Br at 16-19. The only somewhat relevant argument APM makes is that a limited exclusion order “would serve the public interest properly by punishing the offending Respondents, namely MicroJet and PTC, without affecting the competitive conditions in the U.S.” *Id.* at 19. APM

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adds that a general exclusion order, “on the other hand, would not serve the public interest because it would allow HP to misuse the ITC to reduce the number of choices available to the public without having to prove infringement, validity and importation in a meaningful way.” *Id.* APM provides no evidence to substantiate its assertions, and we find nothing in the record to support them. Moreover, this investigation followed the Commission’s well established process for investigating alleged violations of the section 337. We see no need to treat this investigation any differently from other Commission investigations, and the Commission’s forum is open to all entities that meet the Commission’s statutory requirement. In addition, the Commission’s statutory authority provides a mechanism for modifying or rescinding exclusion orders where appropriate. *See* 19 U.S.C. § 1337(k).

Thus, we agree with the IA and HP that the public interest factors are not implicated in this investigation. In particular, no evidence exists that United States demand for the HP compatible ink cartridges cannot be met by HP and legitimate remanufacturers. Accordingly, we find that the public interest factors set out in section 337(d) do not preclude issuance of the general exclusion order.

VII. BOND

During the 60-day period of Presidential review, imported articles otherwise subject to remedial orders are entitled to conditional entry under bond. 19 U.S.C. § 1337(j)(3). The amount of the bond is specified by the Commission and must be an amount sufficient to protect the complainant from any injury. *Id.*; 19 C.F.R. § 210.50(a)(3). The Commission frequently sets the bond by attempting to eliminate the difference in sales prices between the patented domestic

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product and the infringing product based upon a reasonable royalty. *Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24, USITC Pub. No. 2949 (Jan. 1996). In cases where the Commission does not have sufficient evidence upon which to base a determination of the appropriate amount of the bond, the Commission has set a 100% bond. *See Certain Sortation Systems, Parts Thereof, and Products Containing Same*, Inv. No. 337-TA-460, Comm'n Op. at 21 (Mar. 2003). However, Complainant bears the burden of establishing the need for a bond amount in the first place. *Certain Rubber Antidegradants, Components Thereof, and Prods. Containing Same*, Inv. No. 337-TA-533, Comm'n Op. at 39-40 (July 21, 2006).

The ALJ recommended that if the Commission imposes a remedy following a finding of violation, Respondents should be required to post a bond of 100 percent of the entered value of any infringing products imported during the period of Presidential review. ID at 117. Specifically, because "MicroJet and PTC failed to participate in any way in the hearing process, including discovery," the ALJ determined "that it would be futile for HP to attempt to obtain reliable pricing information from [them] to calculate the price differential between HP's inkjet cartridges and the infringing inkjet cartridges." ID at 117. The ALJ therefore recommended a bond of 100 percent of entered value. *Id.* HP and the IA support the ALJ's recommendation. APM did not comment.

We share the ALJ's view. Given the fact that MicroJet and PTC failed to participate in any meaningful manner, HP could not have obtained the requisite information from them to establish the appropriate bond. In cases where the Commission does not have sufficient evidence


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upon which to base a determination of the appropriate amount of the bond, the Commission has set a 100 percent bond. The Commission therefore sets a bond of 100 percent of entered value for products imported during the period of presidential review.

VIII. CONCLUSION

For the reasons set forth above, the Commission reverses the ALJ's finding that HP failed to establish by a preponderance of the evidence that APM induced infringement of the asserted patents. The Commission determines that the appropriate remedy is a general exclusion order, and finds that the public interest factors set out in section 337(d) do not preclude issuance of the general exclusion order. The Commission sets a bond of 100 percent of entered value for infringing products imported during the period of Presidential review.

By order of the Commission.

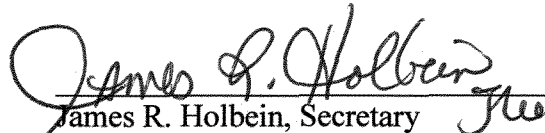

James R. Holbein
Secretary to the Commission

Issued: December 1, 2011

**CERTAIN INKJET INK CARTRIDGES WITH PRINTHEADS 337-TA-723
AND COMPONENTS THEREOF**

CERTIFICATE OF SERVICE

I, James Holbein, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Rett Sotherly, Esq., and the following parties as indicated, on **December 1, 2011**.


James R. Holbein, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

**On Behalf of Complainants Hewlett-Packard Company
and Hewlett-Packard Development Company, L.P.:**

Ahmed J. Davis, Esq.
FISH & RICHARDSON P.C.
1425 K Street, NW, 11th Floor
Washington, DC 20005

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

**On Behalf of Respondent Asia Pacific
Microsystems, Inc.:**

Scott M. Daniels, Esq.
**WESTERMAN, HATTORI, DANIELS & ADRIAN,
LLP**
1250 Connecticut Avenue, NW, Suite 700
Washington, DC 20036

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: _____

PTC HOLDINGS LIMITED
Unit B, 5/F
Block B, Mai Tak Industrial Building
221 Wai Yip Street, Kwun Tong
Kowloon, Hong Kong

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- INTERNATIONAL