

**INTERNATIONAL TRADE  
COMMISSION**

[Inv. No. 337-TA-396]

**Certain Removable Electronic Cards and Electronic Card Reader Devices and Products Containing Same and Components Thereof; Notice of Commission Decision To Review Portions of an Initial Determination and Schedule for the Filing of Written Submissions on the Issues Under Review and on Remedy, the Public Interest, and Bonding**

**AGENCY:** U.S. International Trade Commission.

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to review certain portions of the initial determination (ID) issued by the presiding administrative law judge (ALJ) on March 24, 1998, in the above-captioned investigation.

**FOR FURTHER INFORMATION CONTACT:**

Michael Diehl, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3095.

**SUPPLEMENTARY INFORMATION:** The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.43 of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.43).

The Commission instituted this investigation on April 2, 1997, based on a complaint by Innovatron S.A. ("Innovatron") of Paris, France. The complaint, as subsequently amended, named two respondents—Thomson Multimedia, S.A. of Paris, France; and Thomson Consumer Electronics, Inc. of Indianapolis, Indiana.

In its complaint, Innovatron alleged that respondents violated section 337 by importing into the United States and selling in the United States after importation television receivers and receiver access cards that infringe claim 8 of Innovatron's U.S. Letters Patent 4,404,464 (the "464 patent").

The presiding ALJ held an evidentiary hearing from September 29 to October 7, 1997. On March 24, 1998, the ALJ issued his final ID, in which he concluded that there was violation of section 337, based on the following findings: (a) There have been importations and sales after importation of the accused devices; (b) claim 8 is not invalid due to anticipation or

obviousness; (c) the accused devices directly infringe claim 8 of the '464 patent; (d) respondents actively induced infringement of and contributorily infringed claim 8 of the '464 patent; and (e) there is a domestic industry that practices claim 8 of the '464 patent.

On April 6, 1998, respondents filed a petition for review of the ID, arguing that the ALJ erred in all of his adverse findings relating to claim construction, validity, infringement, and domestic industry. Respondents also alleged that the ALJ committed abuses of discretion in his denial of several motions filed by them. The Commission investigative attorney ('IA') also filed a petition for review, alleging that the ALJ's construction of claim 8 was erroneous.

Complainant Innovatron filed on April 13, 1998, a response in opposition to the petitions filed by respondents and the IA. The IA also filed a response to respondents' petition on that date, supporting the respondents' petition.

On April 1, 1998, the ALJ issued his Recommended Determination ("RD") on Remedy and Bonding, in the event the Commission concludes there is a violation of section 337.

Having reviewed the record in this investigation, including the parties' written submissions, the Commission determined not to review the ALJ's finding that 35 U.S.C. section 112, paragraph 6 does not apply to claim 8 of the '464 patent, and his denials of certain motions filed by respondents. The Commission determined to review the remainder of the ID.

On review, the Commission is particularly interested in receiving answers to the following questions:

(1) Regarding step (c) of claim 8, what evidence of record bears on the issue of the meaning of "tangential" in the phrase "in a direction tangential to said corresponding contact surfaces \* \* \*." Does tangential mean only in the direction parallel to the direction of elongation of the contact surfaces, or can it include any direction in the plane of the area of contact between the corresponding contact surfaces, including directions transverse and oblique to the direction of elongation of the contact surfaces? Please comment on whether dependent claim 7 indicates by implication that "tangential," as used in independent claim 1, from which claim 7 depends, can include a direction "transverse" to the direction of elongation of the contact surfaces.

(2) Does the manual removal and reinsertion of the DSS access card in response to an on-screen message constitute a repetition of steps (a) and (b) of claim 8? If the "displacing" of step (c) is construed to mean manual

removal and reinsertion, then is step (c) rendered superfluous? Would such a construction be disfavored under *Wright Medical Technology, Inc. v. Osteonics Corp.*, 122 F.3d 1440, 1444 (Fed. Cir. 1997)?

(3) Do the three paragraphs of the specification of the '464 patent at column 8, lines 12-37 describe the various aspects of a manual version of the preferred embodiment, or does each paragraph describe different alternative arrangements in the preferred embodiment, indicating in turn: (i) That displacing can be motorized or manual, (ii) that receipt of the portable electronic card can be by a translationally movable drawer or jointed shutter, and (iii) that stopping can be performed by halting the motor or by immobilizing the card and the connection cross bar with respect to one another? Is the latter construction (i.e., the construction involving three different alternative arrangements in the preferred embodiment) supported by the fact that the paragraph describing the alternative stopping arrangement applies regardless of whether displacement is motorized or manual? What significance, if any, is there to the fact that the three paragraphs expressly indicate that displacing can be performed manually, but do not indicate that stopping can be performed manually?

(4) What evidence of record bears on whether a human being can stop manual displacement rapidly enough to prevent the contact surfaces from moving back out of alignment and electrical contact? If the evidence of record indicates that a human being cannot stop manual displacement rapidly enough to prevent the contact surfaces from moving back out of alignment and electrical contact, then is manual stopping consistent with the claim language "stopping \* \* \* when," considering that the specification indicates that the purpose of the patented method is to facilitate "rapid" contact and to limit the wearing down of contact surfaces to that which is "absolutely necessary."

(5) For purposes of determining whether there is contributory infringement, is it more appropriate to define the use of the accused devices in terms of a general end use (such as to view television programming) or in terms of more specific uses (such as testing for the direct or inverse communications convention, testing for proper alignment and electrical contact, and decrypting television programming)?

(a) If the first alternative (general end use) is more appropriate, then do the accused devices have a substantial non-infringing use? Specifically, must the

accused devices have a use that is different from the infringing use, or is it sufficient that the accused devices have a single use that is employed in a non-infringing manner a substantial portion of the time?

(b) If the second alternative (specific uses) is more appropriate, then do the accused devices have a substantial non-infringing use or uses?

(6) Is Gemplus' manufacture of smart cards alone sufficient to satisfy the technical prong of the domestic industry requirement of section 337? Why or why not? In answering this question, the private parties are requested to comment on the Commission investigative attorney's argument that Gemplus' manufacture of cards alone sufficiently exploits the patent for the purpose of the domestic industry requirement.

(7) Discuss whether the following is an appropriate construction of the disputed terms of claim 8 of the '464 patent:

The claim terms are construed as in the ID, except that:

(a) In the phrase "a predetermined expected response":

(i) "[P]redetermined" means "to determine, decide, or establish in advance" and is not limited to "established at the time of the design of the system;"

(ii) "[E]xpected" means "predicted," and is not limited to "not changing over time."

(b) "[D]isplacing \* \* \* in a direction tangential to said corresponding contact surfaces" means that the corresponding contact surfaces are moved in any direction in the plane of the area of contact between the corresponding contact surfaces of the removable article and the electric device, including directions parallel, transverse, and oblique to the direction of elongation of the contact surfaces, and the phrase does not encompass the removal and reinsertion of the removable article.

(c) "[S]topping \* \* \* when" means the instantaneous or near instantaneous cessation of displacing such that movement of the removable article relative to the electric device is halted before the corresponding contact surfaces are moved from a position of proper alignment and electrical contact to a position out of such alignment and electrical contact.

(8) Assuming that the disputed claim terms are construed as set forth in question 7 above, would claim 8 be invalid as anticipated or obvious? Would the accused devices directly infringe claim 8? Would respondents be actively inducing infringement? Would respondents be contributorily

infringing? Would Gemplus' domestic activities utilizing the smart card manufacturing and testing equipment discussed at pages 123–131 of the ID satisfy the technical prong of the domestic industry requirement of section 337?

In connection with the final disposition of this investigation, the Commission may issue: (1) An order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) cease and desist orders that could result in respondents being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or are likely to do so. For background information, see the Commission Opinion, *Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Publication 2843 (Dec. 1994).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the President has 60 days to approve or disapprove the Commission's action. During this period, the subject articles would be entitled to enter the United States under a bond, in an amount to be determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed.

#### **Written Submissions**

The parties to the investigation are requested to file written submissions on the issues under review. The

submissions should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. Additionally, the parties to the investigation, interested government agencies, and any other interested persons are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the April 1, 1998 recommended determination of the ALJ. Complainant and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. The written submissions and proposed remedial orders must be filed no later than the close of business on June 11, 1998. Reply submissions must be filed no later than June 18, 1998. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 14 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. See 19 C.F.R. 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) and §§ 210.42–45 of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.42–45).

Copies of the public version of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202–205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>).

Issued: May 29, 1998.  
By order of the Commission.

**Donna R. Koehnke,**  
*Secretary.*  
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#### INTERNATIONAL TRADE COMMISSION

[Investigation 332-343]

##### Annual Statistical Report on U.S. Imports of Textiles and Apparel

**AGENCY:** United States International Trade Commission.

**ACTION:** Discontinuation of reports and termination of investigation.

**EFFECTIVE DATE:** May 26, 1998.

**SUMMARY:** In June 1993, the Commission initiated investigation No. 332-343 for the purpose of compiling and publishing three annual statistical reports on U.S. imports of textiles and apparel covered by the Multifiber Arrangement (MFA). Pursuant to this investigation, the notice of which was published in the **Federal Register** of June 23, 1993 (58 F.R. 34064), the Commission published annual reports on U.S. imports of textiles and apparel for the years 1992, 1993, and 1994. In July 1996, after receiving numerous requests from the public for the report, the Commission decided to continue publishing the reports for three additional years, the notice of which was published in the **Federal Register** of July 24, 1996 (61 F.R. 38472), after which it would review the question of whether to continue issuing such reports. The Commission published the last of these reports in April 1998.

The Commission has decided to discontinue this series of reports and to terminate the investigation. The import data published by the Commission in these reports are now readily available on the Internet server of the U.S. Department of Commerce, Office of Textiles and Apparel (OTEXA), at <http://otexa.ita.doc.gov>. OTEXA also provides the data on CD-ROMs, which are prepared on a monthly basis. For information on subscribing to the CD-ROM service, please call OTEXA at 202-482-3400 or write the U.S. Department of Commerce, Office of Textiles and Apparel, Room 3100, 14th and Constitution Avenue NW, Washington, DC 20230.

**FOR FURTHER INFORMATION:** Information on the Commission's most recent report may be obtained from Robert W. Wallace, Office of Industries (202-205-3458). The media should contact

Margaret O'Laughlin, Public Affairs Officer, Office of External Relations (202-205-1819). Hearing impaired individuals are advised that information on this matter can be obtained by contacting the TDD terminal on 202-205-1810.

The Commission's report, Annual Statistical Report on U.S. Imports of Textiles and Apparel: 1997 (USITC publication 3102, April 1998), is available on the Commission's Internet server at <http://www.usitc.gov>. A printed copy may be requested by writing the Office of the Secretary, U.S. International Trade Commission, 500 E Street SW, Washington, DC, 20436, calling them at 202-205-1809, or sending them a fax at 202-205-2104.

Issued: May 27, 1998.  
By order of the Commission.

**Donna R. Koehnke,**

*Secretary.*

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#### INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 332-350 and 332-351]

##### Monitoring of U.S. Imports of Tomatoes; Monitoring of U.S. Imports of Peppers

**AGENCY:** United States International Trade Commission.

**ACTION:** Publication of monitoring reports in 1998.

**EFFECTIVE DATE:** May 22, 1998.

**FOR FURTHER INFORMATION CONTACT:** For general information, Timothy McCarty (202-205-3324) or Lowell Grant (202-205-3312), Agricultural and Forest Products Division, Office of Industries, or for information on legal aspects, William Gearhart (202-205-3091), Office of the General Counsel, U.S. International Trade Commission. Hearing impaired persons can obtain information on these studies by contacting the Commission's TDD terminal on (202) 205-1810.

#### Background

Section 316 of the North American Free-Trade Agreement Implementation Act (NAFTA Implementation Act), 19 U.S.C. 3381, directs the Commission to monitor imports of fresh or chilled tomatoes (HTS heading 0702.00) and fresh or chilled peppers, other than chili peppers (HTS subheading 0709.60.00), until January 1, 2009, as if a request for such monitoring had been made under section 202(d) of the Trade Act of 1974 (19 U.S.C. 2252(d)), for purposes of

expediting an investigation concerning provisional relief under section 202 of the Trade Act of 1974. In response, the Commission instituted investigation No. 332-350, Monitoring of U.S. Imports of Tomatoes (59 F.R. 1763) and investigation No. 332-351, Monitoring of U.S. Imports of Peppers (59 F.R. 1762).

Although section 316 of the NAFTA Implementation Act does not require the Commission to publish reports on the results of its monitoring activities, the Commission has endeavored to do so in those years in which it was not conducting an investigation under other statutory authority with respect to such products. Thus, no monitoring reports were published in 1996 when the Commission conducted investigation No. TA-201-66, Fresh Tomatoes and Bell Peppers (61 F.R. 13875), under section 202(b) of the Trade Act of 1974 (19 U.S.C. 2252(b)); and antidumping investigation No. 731-TA-747 (preliminary), Fresh Tomatoes from Mexico (61 F.R. 15968), under section 733(a) of the Tariff Act of 1930 (19 U.S.C. 1673b(a)). The Commission made a negative injury determination in the section 201 investigation on July 2, 1996; the Commission's antidumping investigation was suspended, effective November 1, 1996, following the signing of a suspension agreement.

The Commission plans to publish both monitoring reports in September 1998.

Issued: May 27, 1998.  
By order of the Commission.

**Donna R. Koehnke,**

*Secretary.*

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#### DEPARTMENT OF LABOR

##### Occupational Safety and Health Administration

[Docket No. H-372]

RIN 1218-AB58

##### Metalworking Fluids Standards Advisory Committee: Notice of Meeting

**AGENCY:** Occupational Safety and Health Administration (OSHA), Labor.

**ACTION:** Metalworking Fluids Standards Advisory Committee: Notice of meeting.

**SUMMARY:** The Metalworking Fluids Standards Advisory Committee (MWFSAAC), established under section 7 of the Occupational Safety and Health Act of 1970 to advise the Secretary of Labor on appropriate actions to protect