

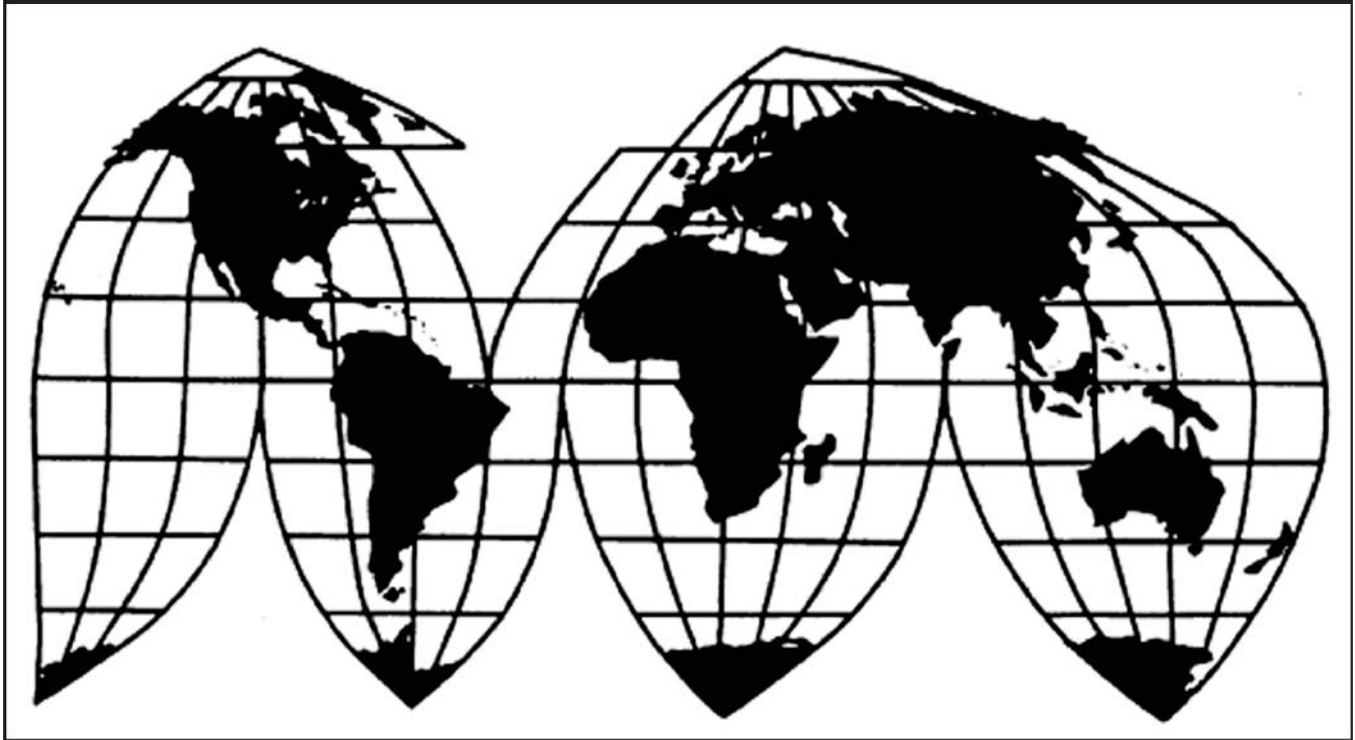
In the Matter of
**Certain Computer Forensic
Devices and Products
Containing Same**

Investigation No. 337-TA-799

Publication 4408

July 2013

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Irving A. Williamson, Chairman
Daniel R. Pearson, Commissioner
Shara L. Aranoff, Commissioner
Dean A. Pinkert, Commissioner
David S. Johanson, Commissioner
Meredith Broadbent, Commissioner

**Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436**

U.S. International Trade Commission

Washington, DC 20436
www.usitc.gov

In the Matter of

**Certain Computer Forensic
Devices and Products
Containing Same**

Investigation No. 337-TA-799



UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN COMPUTER FORENSIC
DEVICES AND PRODUCTS
CONTAINING SAME**

Inv. No. 337-TA-799

**NOTICE OF COMMISSION DETERMINATION NOT TO REVIEW
THE FINAL INITIAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE;
TERMINATION OF THE INVESTIGATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the final initial determination (“final ID” or “ID”) of the presiding administrative law judge in the above-identified investigation.

FOR FURTHER INFORMATION: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3065. Copies of non-confidential 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. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission’s electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission’s TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 29, 2011, based on a complaint filed by MyKey Technology Inc. (“MyKey”) of Gaithersburg, Maryland. 76 *Fed. Reg.* 53695 (Aug. 29, 2011). The complaint alleges 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 computer forensic devices and products containing the same by reason of infringement of claims 1-8, 11-13, 16-38 and 40-45 of U.S. Patent No. 6,813,682 (the “682 patent”), claims 1-9, 13-18 and 20-21 of U.S. Patent No. 7,159,086 and claims 1 and 2 of U.S. Patent No. 7,228,379 (the “379 patent”). The notice of investigation named as respondents Data Protection Solutions by Arco of Hollywood, Florida; CRU Acquisitions Group LLC of Vancouver, Washington d/b/a CRU-DataPort LLC of Vancouver, Washington (“CRU”); Digital Intelligence, Inc. of New Berlin, Wisconsin (“Digital Intelligence”); Diskology, Inc. of Chatsworth,

California; Guidance Software, Inc. of Pasadena, California and Guidance Tableau LLC of Pasadena, California (collectively, "Guidance"); Ji2, Inc. of Cypress, California; MultiMedia Effects, Inc. of Markham, Ontario; Voom Technologies, Inc. of South Lakeland, Minnesota; and YEC Co. Ltd. of Tokyo, Japan.

Only respondents Guidance, CRU, and Digital Intelligence remain in the investigation. The complainant has also narrowed the claims asserted to claims 1-8, 11-13, 16-21, 24-36, and 40-45 of the '682 patent and claim 2 of the '379 patent.

An evidentiary hearing was held from August 6 to August 10, 2012.

On October 26, 2012, the ALJ issued the final ID, finding no violation of Section 337. The ALJ found that MyKey had failed to satisfy the economic prong of the domestic industry requirement. No petitions for review of the ID were filed.

The Commission would ordinarily remand this investigation to the ALJ to address in the final ID all material issues presented because a hearing has concluded and all issues have been fully briefed before the ALJ. 19 CFR 210.42(d); *see also Certain Video Game Systems and Wireless Controllers and Components Thereof*, Inv. 337-TA-770, Comm'n Op. at n.1 (Nov. 6, 2012). However, the Commission has determined not to review the ID in this investigation based upon the extraordinary factual situation and the parties' failure to file petitions for review. This investigation is hereby terminated

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 Part 210 of the Commission's Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.



Lisa R. Barton
Acting Secretary to the Commission

Corrected
Issued: December 21, 2012

**CERTAIN COMPUTER FORENSIC DEVICES AND
PRODUCTS CONTAINING THE SAME**

337-TA-799

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **CORRECTED NOTICE** has been served by hand upon the Commission Investigative Attorney, **Daniel E. Valencia**, Esq., and the following parties as indicated, on **January 4, 2013**.



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

**ON BEHALF OF COMPLAINANT MYKEY
TECHNOLOGY INC.:**

James H. Lin
FREITAS TSENG BAIK & KAUFMAN LLP
100 Marine Parkway, Suite 200
Redwood City, CA 94065

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

**ON BEHALF OF RESPONDENTS CRU
ACQUISITIONS GROUP LLC AND CRU-DATA
PORT LLC:**

David P. Cooper
KOLISCH HARTWELL, P.C.
520 S.W. Yamhill Street, Suite 200
Portland, OR 92704

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

**ON BEHALF OF RESPONDENT DIGITAL
INTELLIGENCE, INC.:**

Alejandro Menchaca, Esq.
MCANDREWS, HELD & MALLOY, LTD.
500 West Madison Street, 34th Floor
Chicago, IL 60661

() Via Hand Delivery
() Via Overnight Mail
() Via First Class Mail
() Other: _____

**ON BEHALF OF RESPONDENTS GUIDANCE
SOFTWARE, INC. & GUIDANCE TABLEAU LLC:**

William C. Bergmann
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
Washington, DC 20036

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

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN COMPUTER FORENSIC DEVICES
AND PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-799

**INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND**

Chief Administrative Law Judge Charles E. Bullock

(October 26, 2012)

Appearances:

For Complainant MyKey Technology, Inc.

Robert E. Freitas, Esq.; Kai Tseng, Esq.; James Lin, Esq.; and Qudus B. Olaniran, Esq. of Freitas Tseng & Kaufman LLP from Redwood Shores, CA

James Altman, Esq. of Foster Murphy Altman & Nickel from Washington, DC

For Respondent Digital Intelligence, Inc.

Alejandro Menchaca, Esq.; and Sarah Kofflin-Biggs, Esq. of McAndrews, Held & Malloy, Ltd. from Chicago, IL

For Respondent CRU Acquisition Group, LLC d/b/a CRU Data-Port, LLC

Gary M. Hnath, Esq. of Mayer Brown LLP from Washington, DC

Emily A. Nash, Esq. of Mayer Brown LLP from New York, NY

David P. Cooper, Esq.; and Owen W. Dukelow, Esq. of Kolisch Hartwell, P.C. from Portland, OR

For Respondents Guidance Software, Inc. and Guidance Tableau, LLC

William C. Bergmann, Esq.; and A. Neal Seth, Esq. of Baker & Hostetler LLP from Washington, DC

Kevin W. Kirsch, Esq.; David A. Mancino, Esq.; Scott R. Stanley, Esq.; and Jared A. Brandyberry, Esq. of Baker & Hostetler LLP from Cincinnati, OH

For the Commission Investigative Staff

Daniel E. Valencia, Esq., Investigative Attorney of the Office of Unfair Import Investigations,
U.S. International Trade Commission from Washington, DC

TABLE OF CONTENTS

I.	INTRODUCTION	1
A.	Procedural History	1
B.	The Parties	3
1.	MyKey	3
2.	Respondents	3
a)	Guidance Software, Inc. and Guidance Tableau LLC (collectively, “Guidance”)	3
b)	CRU Acquisition Group, LLC d/b/a CRU Data-port, LLC (“CRU”)	3
c)	Digital Intelligence, Inc. (“Digital Intelligence”)	3
C.	Overview of the Technology	4
D.	The Patents at Issue	4
1.	U.S. Patent No. 6,813,682	4
2.	U.S. Patent No. 7,228,379	4
E.	The Products at Issue	5
II.	JURISDICTION	5
III.	DOMESTIC INDUSTRY	5
A.	Relevant Law	5
1.	Economic Prong	6
2.	Technical Prong	6
B.	Economic Prong	7
1.	Plant and Equipment	7
2.	Labor and Capital	14
3.	Engineering, Research and Development, and Licensing	20
4.	Conclusion	21
C.	Technical Prong	21
IV.	CONCLUSION	21
V.	CONCLUSIONS OF LAW	22
VI.	INITIAL DETERMINATION	22
	RECOMMENDED DETERMINATION ON REMEDY AND BOND	24
I.	REMEDY AND BONDING	24
A.	Limited Exclusion Order	24
B.	Cease and Desist Order	25
C.	Bond During Presidential Review Period	26

LIST OF ABBREVIATIONS

The following abbreviations may be used in this Initial Determination:

CDX	Complainant's demonstrative exhibit
CPX	Complainant's physical exhibit
CX	Complainant's exhibit
CIB	Complainant's initial post-hearing brief
CRB	Complainant's reply post-hearing brief
Dep.	Deposition
JX	Joint Exhibit
PHB	Pre-hearing brief
RDX	Respondents' demonstrative exhibit
RPX	Respondents' physical exhibit
RX	Respondents' exhibit
RIB	Respondents' initial post-hearing brief
RRB	Respondents' reply post-hearing brief
SDX	Staff's demonstrative exhibit
SX	Staff's exhibit
SIB	Staff's initial post-hearing brief
SRB	Staff's reply post-hearing brief
Tr.	Transcript

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN COMPUTER FORENSIC DEVICES
AND PRODUCTS CONTAINING THE SAME**

Inv. No. 337-TA-799

**INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND
RECOMMENDED DETERMINATION ON REMEDY AND BOND**

Chief Administrative Law Judge Charles E. Bullock

(October 26, 2012)

Pursuant to the Notice of Investigation, this is the Initial Determination in the matter of Certain Computer Forensic Devices and Products Containing Same, Investigation No. 337-TA-799.

For the reasons stated herein, the undersigned has determined that no violation of section 337 of the Tariff Act of 1930, as amended, has been found in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain computer forensic devices and products containing same with respect to U.S. Patent Nos. 6,813,682 and 7,228,379.

I. INTRODUCTION

A. Procedural History

On July 22, 2011, Complainant MyKey Technology Inc. (“MyKey”) filed a complaint alleging violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain computer forensic devices and products containing the same. *See* 76 Fed. Reg. 53,695-696 (Aug. 29, 2011).

Supplements were filed on August 9 and 10, 2011. *Id.*

On August 29, 2011, the Commission instituted this Investigation. *Id.* Specifically, the Commission instituted this Investigation to determine:

Whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain computer forensic devices and products containing same that infringe one or more of claims 1–8, 11–13, 16–38, and 40–45 of the ’682 patent; claims 1–9, 13–18, 20, and 21 of the ’086 patent; and claims 1 and 2 of the ’379 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

Id.

The Notice of Investigation named the following entities as respondents: Data Protection Solutions by Arco; CRU Acquisition Group, LLC d/b/a CRU Data-port, LLC; Digital Intelligence, Inc.; Diskology, Inc.; Guidance Software, Inc.; Guidance Tableau LLC; Ji2, Inc.; MultiMedia Effects, Inc.; Voom Technologies, Inc.; and YEC Co. Ltd. *Id.* During the course of

the Investigation, a number of the respondents were terminated on the basis of settlement¹ or due to withdrawal of the Complaint².

The Commission Investigative Staff (“Staff”) is also a party to the Investigation.

On July 24, 2012, the undersigned issued an initial determination extending the target date by approximately four months to April 29, 2013. (*See* Order No. 51 (July 24, 2012); *see also* Notice of Comm’n Determination Not to Review an Initial Determination Extending the Target Date for Completion of the Investigation (Aug. 21, 2012).)

On August 1, 2012, the undersigned issued an initial determination granting MyKey’s motion for partial termination of the Investigation as to all asserted claims of U.S. Patent No. 7,159,086 and claim 1 of U.S. Patent No. 7,228,379. (*See* Order No. 53 (Aug. 1, 2012).) The Commission determined not to review this initial determination. (*See* Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation With Respect to Certain Patent Claims (Aug. 21, 2012).)

The evidentiary hearing was held August 6 – 10, 2012.

¹ YEC Co. Ltd. was terminated on the basis of a license agreement between MyKey and YEC. (*See* Order No. 28 (Mar. 1, 2012).) The Commission determined not to review this termination. (*See* Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent YEC Co. Ltd. (Mar. 20, 2012).)

² The following respondents were terminated based on withdrawal of the Complaint: Voom Technologies, Inc. (*see* Order No. 14 (Oct. 13, 2011)); Data Protection Solutions by Arco (*see* Order No. 23 (Feb. 21, 2012)); Diskology, Inc. (*see* Order No. 30 (Mar. 14, 2012)); Ji2, Inc. (*see* Order No. 34 (Apr. 5, 2012)); and MultiMedia Effects, Inc. (*id.*). The Commission determined not to review these terminations. (*See* Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Voom Technologies, Inc. (Nov. 7, 2011); Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Data Protection Solutions by Arco (Mar. 7, 2012); Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondent Diskology, Inc. (Apr. 11, 2012); Notice of Comm’n Determination Not to Review an Initial Determination Terminating the Investigation as to Respondents Ji2, Inc. and MultiMedia Effects, Inc. (Apr. 19, 2012).)

B. The Parties

1. MyKey

MyKey is a Delaware corporation having a principal place of business in Gaithersburg, Maryland. (CIB at 1; Compl. ¶ 3.)

2. Respondents

**a) Guidance Software, Inc. and Guidance Tableau LLC
(collectively, “Guidance”)**

Guidance Software, Inc. is a Delaware corporation located in Pasadena, California. (RIB at 2; SIB at 2.) Guidance Tableau LLC, a wholly owned subsidiary of Guidance Software, is located in Waukesha, Wisconsin. (RIB at 2.) Guidance Tableau develops and manufactures computer forensic devices such as forensic bridges, drive duplicators, and drive wipers. (*Id.* at 3-4.)

**b) CRU Acquisition Group, LLC d/b/a CRU Data-port, LLC
(“CRU”)**

CRU is a Washington corporation with offices in Vancouver, Washington and Wichita, Kansas. (*Id.* at 4.) CRU sells its line of computer forensic devices including the Forensic UltraDock v4 and Drive eRazer products. (*Id.*)

c) Digital Intelligence, Inc. (“Digital Intelligence”)

Digital Intelligence is a Wisconsin corporation with its principal place of business located in New Berlin, Wisconsin. (*Id.*) Digital Intelligence sells, among other things, some of the accused products in this Investigation. (*Id.*)

C. Overview of the Technology

The technology at issue generally relates to devices capable of performing forensic operations relating to the collection, preservation, retention, and/or removal of evidence for law enforcement purposes. (JX-1; JX-3; SIB at 3.)

D. The Patents at Issue

1. U.S. Patent No. 6,813,682

The '682 patent is entitled "Write Protection For Computer Long-Term Memory Devices." (JX-1.) The '682 patent issued on November 2, 2004 to inventors Steven Bress and Mark Menz. (*Id.*) The patent is assigned to MyKey. (JX-7.)

The '682 patent relates to a blocking device that provides read and write protection for computer long-term storage devices. (JX-1 at Abstract.) The '682 patent has 45 claims. Claims 1–8, 11–13, 16–21, 24–36, and 40–45 are asserted against Respondents.

2. U.S. Patent No. 7,228,379

The '379 patent is entitled "Systems And Methods For Removing Data Stored On Long-Term Memory Devices." (JX-3.) The '379 patent issued on June 5, 2007 to named inventors Steven Bress, Dan Bress, Mike Menz, and Mark Menz. (*Id.*) The patent is assigned to MyKey. (JX-9.)

The '379 patent describes an application-specific device for erasing data from a long-term storage device. (JX-3 at Abstract.) The '379 patent has 3 claims. Claim 2 is asserted against Respondents.

E. The Products at Issue

MyKey accuses the following Guidance and CRU products of infringing the '682 and '379 patents:

'682 patent

- Guidance products: T3458is Forensic SATA/SCSI/IDE/USB Combo Bridge, T35e, T35es-R2, T35es-R2-RW, T4es, T6es, T335, T35is, T3458is, T34589is, T8-R2, and T9.
- CRU products: Forensic UltraDock v4, FastBloc II, FastBloc III, Forensic Lab Dock PN/31320-0409-0000, Forensic Lab Dock PN/31320-2209-0000, Forensic RTX, Forensic Combo Dock, Forensic Notebook Dock, and USB Write Blocker.

(CIB at 4-5.)

'379 patent

- Guidance products: TD1, TD2 and TDW1.
- CRU products: Drive eRazer Pro MP, Drive eRazer Ultra, Drive eRazer Pro SE, and Drive eRazer.

(*Id.* at 5.)

II. JURISDICTION

Respondents do not contest that the Commission has subject matter jurisdiction. (RIB at 6-7.) Respondents also do not contest that the Commission has *in personam* and *in rem* jurisdiction. (*Id.* at 8.)

III. DOMESTIC INDUSTRY

A. Relevant Law

In a patent-based complaint, a violation of section 337 can be found “*only if* an industry in the United States, relating to the articles protected by the patent . . . concerned, exists or is in the process of being established.” 19 U.S.C. §1337(a)(2) (emphasis added). Under Commission precedent, this “domestic industry requirement” of section 337 consists of an economic prong

and a technical prong. *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm'n Op. at 12-14, 2009 WL 5134139 (U.S.I.T.C. Dec. 2009). The complainant bears the burden of establishing that the domestic industry requirement is satisfied. See *Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, Final Initial Determination at 294, 2002 WL 31556392 (U.S.I.T.C. June 21, 2002) (unreviewed by Commission in relevant part).

1. Economic Prong

Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

(3) For purposes of paragraph (2), an industry in the United States shall be considered to exist if there is in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned –

- (A) significant investment in plant and equipment;
- (B) significant employment of labor or capital; or
- (C) substantial investment in its exploitation, including engineering, research and development, or licensing.

Given that these criteria are listed in the disjunctive, satisfaction of any one of them will be sufficient to meet the economic prong of the domestic industry requirement. *Certain Integrated Circuit Chipsets and Prods. Containing Same*, Inv. No. 337-TA-428, Order No. 10, Initial Determination (unreviewed) (May 4, 2000).

2. Technical Prong

The technical prong of the domestic industry requirement is satisfied when the complainant in a patent-based section 337 investigation establishes that it is practicing or exploiting the patents at issue. See 19 U.S.C. §1337 (a)(2) and (3); *Certain Microsphere*

Adhesives, Process for Making Same and Prods. Containing Same, Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, Comm'n Op. at 8, 1996 WL 1056095 (U.S.I.T.C. Jan. 16, 1996). "The test for satisfying the 'technical prong' of the industry requirement is essentially [the] same as that for infringement, i.e., a comparison of domestic products to the asserted claims." *Alloc, Inc. v. Int'l Trade Comm'n*, 342 F.3d 1361, 1375 (Fed. Cir. 2003). To prevail, the patentee must establish by a preponderance of the evidence that the domestic product practices one or more claims of the patent, either literally or under the doctrine of equivalents. *Bayer*, 212 F.3d at 1247. It is sufficient to show that the products practice any claim of that patent, not necessarily an asserted claim of that patent. *Certain Microsphere Adhesives*, Comm'n Op. at 7-16.

B. Economic Prong

1. Plant and Equipment

MyKey claims it has a made significant investment in plant and equipment. In support thereof, MyKey cites to its investments in facilities, components, and equipment totaling at least []³ (CIB at 89-92.) MyKey insists that in the context of its size and resources, an investment of this magnitude qualifies as a "significant" investment in the domestic industry products.^{4,5} (*Id.* at 91.)

³ MyKey argues that Mr. Bress's contribution of [] as well as Mr. Menz's contribution of [] qualify as investments in plant or equipment. (CIB at 91.) MyKey, however, does not cite any evidence that corroborates these investments nor does MyKey include these alleged investments in its total investment in plant and equipment. The undersigned notes that start-up capital and patent prosecution costs do not qualify as investments under §1337(a)(3)(A) because subsection (A) only relates to specific investments in plant and equipment.

⁴ MyKey contends that its NoWrite products (*i.e.*, the NoWrite IDE, NoWrite FPU, NoWrite FlashBlock and NoWrite RW) practice the invention of the '682 patent. MyKey contends that its DriveCleaner product practices the invention of the '379 patent. (CIB at 5.)

⁵ MyKey does not allocate the investments between the '682 and '379 patents, arguing that allocation is unnecessary because the domestic industry products use common components. (CIB at 92.)

According to MyKey, three different facilities house its operations: [1] a warehouse owned by Mr. Bress's mother; [2] Mr. Bress's home office; and [3] Mr. Menz's home office.⁶ (*Id.* at 89.) MyKey admits it has not invested any money in these facilities. (*Id.*) Nevertheless, MyKey argues that its use of the warehouse is quantifiable and should therefore be considered a [] investment in the domestic industry products. (*Id.* at 89-90; CX-0003C at Q/A 89 (calculating the investment based on 1/3 use of the warehouse, the acquisition cost of the warehouse (\$210,000) and 10 years of property taxes (\$43,794)).)

In addition, MyKey estimates that [] was invested in the equipment and components used to make MyKey's domestic industry products. (CIB at 90.) MyKey argues that, although some of these investments occurred before MyKey existed or were not paid for by MyKey, they are relevant because "the investments were for the ultimate benefit of MyKey, *i.e.*, equipment for, or components of what would become, MyKey products." (*Id.*)

In Respondents' view, the economic prong of the domestic industry requirement is not satisfied because MyKey failed to allocate expenditures between the '682 and '379 patents. (RIB at 77 ("MyKey cannot simply lump together all of the alleged investments and activities in attempting to prove a domestic industry as to each patent.")) Respondents further assert that even if the domestic industry investment has been properly aggregated, MyKey's estimate is still improper because it includes a non-domestic industry product and is not supported by sufficient evidence. (*Id.* at 77-78 (noting that MyKey's estimate includes the DriveCopy product, which was originally, but is no longer part of this Investigation).)⁷

⁶ MyKey does not include the alleged investments in Mr. Bress's and Mr. Menz's home offices in its domestic industry calculation. (*See* CIB at 89-90.)

⁷ *See* Order No. 53, Initial Determination Granting Complainant's Unopposed Motion for Partial Termination of the Investigation as to U.S. Patent No. 7,159,086 and Claim 1 of U.S. Patent No. 7,228,379 (Aug. 1, 2012) (terminating the Investigation as to the '086 patent and DriveCopy product); *see also* Notice of Commission Determination Not to Review an Initial Determination Terminating the Investigation with Respect to Certain Patent Claims (Aug. 21, 2012).

More specifically, Respondents argue that MyKey has not made a cognizable investment in the warehouse because MyKey does not own the warehouse and has never paid any rent or other compensation to the owner, Mr. Bress's mother, Helene Bress. (*Id.* at 73.) Respondents dispute that Helene Bress's investment in the warehouse can be attributed to MyKey because the warehouse was acquired before MyKey's formation and there is no corporate relationship between Helene Bress and MyKey. (RIB at 73; RRB at 38.) Even if the use of the warehouse is considered an investment in the domestic industry, Respondents argue that MyKey's only employees, Mr. Bress and Mr. Menz, do not spend any time at the warehouse. (RIB at 73-74 (noting that the space is shared among several entities and arguing that "Steven Bress's estimate that MyKey uses 'a third' of the warehouse . . . is nothing more than a self-serving uncorroborated guess, without even an attempt to evaluate the actual uses at various points in time which inevitably have changed."))

Regarding MyKey's investment in equipment and components, Respondents submit that many of the invoices offered by MyKey do not identify MyKey as the purchaser. (*Id.* at 75.) Respondents argue that "[t]here is no evidence that these invoices relate to products that were actually used for MyKey business, no evidence as to who paid the expenses for these products, and no evidence that the expenses didn't relate to other aspects of MyKey's business beyond the domestic industry products." (*Id.* at 76 ("any allocation of equipment expense to MyKey would be based solely on conjecture")) Respondents further contend that a total investment of [] in equipment and components for both domestic industry products is not significant under any reasonable metric.⁸ (*Id.* at 82-83.)

According to Respondents, despite the fact that the computer forensics industry has exploded in the past decade, "MyKey's alleged sales have been dwindling to the point that at the time the complaint was filed, [] (RIB at 86-87 []

In Staff's view, MyKey has failed to show that it made a significant investment in plant and equipment with respect to the articles protected by the '682 and '379 patents. (SIB at 53, 57.) Staff submits that any investment in the warehouse is negligible because Mr. Menz and Mr. Bress have spent a minimal amount of time at the warehouse since 2008 and MyKey has never paid any compensation to Mr. Bress's mother for its use. (*Id.* at 53.) Staff further contends that even if MyKey's limited use of the warehouse is considered an investment, the \$38,925 amount attributed to that use is too generous because it fails to account for MyKey's non-domestic industry products. (*Id.*) Staff also argues that the amount of MyKey's alleged investment in equipment and components [] is questionable because the evidence shows that the equipment was shared with Entropy Engineering and was likely used for MyKey's non-domestic industry products. (*Id.* at 54.)

As an initial matter, MyKey's assertion that expenditures and investments related to the NoWrite products and DriveCleaner products can be aggregated is wrong. The NoWrite products are allegedly covered by the '682 patent and the DriveCleaner product is allegedly covered by the '379 patent. (CIB at 5.) MyKey argues that "[t]he case law does not require allocation among asserted patents where there is overlap among the patents and products," **but admits that there is no overlap** among its domestic industry products and patents. (*See* CIB at 92; *see also* Bress, Tr. at 306:1-10 (admitting that the NoWrite products do not practice the '379 patent and the DriveCleaner product does not practice the '682 patent).) As Staff and Respondents correctly note, Commission precedent requires that expenses be allocated to each of the products covered by the asserted patents. *See Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 30 (Feb. 17, 2011). Here, MyKey

digital forensic services industry in the United States grew at an annual rate of 13.7% from 2007 to 2012 and generated \$878 million in revenue in 2011").)

has wholly failed to do so, and accordingly, has not proven a significant investment in products and equipment with regard to each of the asserted patents and corresponding products. *Id.* (finding that the economic prong was not satisfied because “complainant submitted no evidence to show how its activities were important to the articles protected by the asserted patents . . . or whether [the] complainant’s undertakings had a direct bearing on the practice of the patent”). Moreover, MyKey’s estimated investment in plant and equipment was calculated before the ’086 patent and DriveCopy product were withdrawn from this Investigation. (See Napper, Tr. at 757:4-12.) Thus, MyKey’s estimates are necessarily improper because they include expenses of non-domestic industry products.

Even assuming arguendo that the investment in plant and equipment had been properly allocated, the evidence MyKey offers is insufficient to prove a significant investment in plant and equipment. While MyKey insists that [] was invested “in the use” of a warehouse in Gaithersburg, Maryland, MyKey has made *no investment* in that warehouse. The warehouse is owned by Mr. Bress’s mother, Helene Bress, and was acquired in 1993 for a completely separate business, Flower Valley Press, *not MyKey*. (CX-0005C at Q/A 106, 109.) [

] ⁹ (CX-0005C at Q/A 107-109; Bress, Tr. at 254:19-255:14, 311:23-312:14.) Furthermore, the existence of a domestic industry is determined as of the filing date of

⁹ MyKey contends that third party investment is relevant if the investment was directed toward the articles protected by the patents. The undersigned finds this argument unconvincing. First, MyKey only cites cases involving a defined business relationship (*i.e.*, contractor/licensee, parent/subsidiary). (See CRB at 48 (citing *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Order No. 22, 2006 WL 855798, at *4 (U.S.I.T.C. Mar. 15, 2006); *Certain Display Controllers and Prods. Containing Same*, Inv. No. 337-TA-491, Int. Det., 2004 WL 1184745, at *29 (U.S.I.T.C. Apr. 14, 2004).) Here, there is no business relationship between MyKey and Helene Bress. Second, even assuming a relationship existed that was not solely biological, there is no evidence Helene Bress was acting on behalf of MyKey when she invested in the warehouse, let alone directing investment toward the articles

the complaint and the record shows MyKey stopped making regular use of the warehouse long before this Investigation was instituted. *See Certain CD-Rom Controllers and Prods. Containing Same II*, Inv. No. 337-TA-409, Comm'n Op. at 37, USITC Pub. No. 3251 (Oct. 1999). Mr. Menz lives in California and has only visited the warehouse twice. (Bress, Tr. at 264:9-16.) Mr. Bress stopped working from the warehouse in 2003.¹⁰ (*Id.* at 262:18-23; *see also* RX-1186C (“MyKey principals spent 97.5 percent of their total MyKey time elsewhere.”).)

The evidence MyKey offers to support its contention that its investment in equipment and components establishes a domestic industry is also flawed. MyKey asserts that [] was invested in the domestic industry products. In support thereof, MyKey offers close to 400 invoices that span a 12-year period from 1999 to 2011.¹¹ (*See* CX-0114C-CX-0499C.) Although MyKey maintains that all of the invoices relate to the DriveCleaner and NoWrite products, the evidence offered in support of this assertion is muddled and unconvincing.¹² First, MyKey ignores the fact that a domestic industry must currently exist or be in the process of being established as of the filing date of the complaint, *i.e.*, July 22, 2011. *See CD-Rom Controllers*, Comm'n Op at 37; *see also* 76 Fed. Reg. 45,293 (July 28, 2011). Invoices from a decade ago are not persuasive evidence of MyKey's existing domestic industry. Second, of the invoices that are dated 2009 and after, [] is

protected by the patents. In fact, the warehouse was purchased 8 years before MyKey existed, 9 years before the first NoWrite product was completed, and 18 years before a prototype of the DriveCleaner was created.

¹⁰ Both Mr. Bress and Mr. Menz work from home. MyKey does not argue that significant investment in plant and equipment is established by Mr. Bress's and Mr. Menz's home offices.

¹¹ MyKey's expert, Mr. Napper, divided the invoices into two groups. The first group totals \$20,324 and allegedly relates to components of research prototypes. (CX-0003C at Q/A 92-101.) This group is cited as establishing a domestic industry under §1337(a)(3)(A). The second group of invoices totals approximately \$62,000 and relates to components used in product manufacturing. MyKey cites to the second group as evidence of a domestic industry under §1337(a)(3)(B).

¹² Notably, the only person with personal knowledge of the invoices, Mr. Bress, did not testify as to their contents or to which products they pertained. Instead, the invoices were sponsored by MyKey's expert, Mr. Napper, who was simply told by Mr. Bress that these invoices relate to the '682 and '379 patents. (CX-0003 at Q/A 96; Napper, Tr. at 737:14-743:6, 767:22-768:13.)

questionable, at best.¹³ (Compare CX-0261C (invoice for [], with CX-0114C-0128C; CX-0258C.) In the [] invoice, [

] (CX-0261C.) Despite the fact that MyKey bears the burden of proof, MyKey does not offer any evidence to prove that the invoice relates to an investment by MyKey and not []¹⁴ Even assuming the [] invoice could be attributed solely to MyKey, MyKey has not offered any evidence that these components were used in relation to either the NoWrite or DriveCleaner products and not MyKey's non-domestic industry products, *i.e.*, DriveCopy, Spuma, Notes the Ripper, NoWrite FlashBlock II, or MFT Ripper products. Moreover, spending [] on components and equipment does not constitute a significant investment for a corporation operating with no overhead in an industry that generated approximately \$878 million in revenue in 2011.¹⁵ (RX-1186C at Q/A 78.)

Accordingly, the undersigned finds that MyKey has not proven by a preponderance of the evidence that it has made a significant investment in plant and equipment pertaining to articles covered by the '682 and '379 patents.

¹³ [

] (CX-0114C-0128C; CX-0258C.) The only identifying information listed on the confirmation emails is Mr. Bress's email address. There is no way to tell from the face of the emails whether they relate to orders for MyKey's domestic industry products, non-domestic industry products, or Mr. Bress's other companies. Absent any corroboratory evidence, the undersigned refuses to attribute invoices to MyKey that do not identify MyKey.

¹⁴ MyKey argues that [] invoices relate to MyKey's domestic industry investment because Mr. Bress purchased components and equipment for MyKey under [] while MyKey was being established. (Bress, Tr. at 405:10-19.) The evidentiary record, however, contradicts MyKey's assertion. MyKey was incorporated in 2001 and the [] invoice is from [] years later. (See CX-0261C.) Mr. Bress also explained that if he was in a hurry to get parts from a national distributor, he may not have filled in the company box on the order form. (*Id.* at 406:1-7.) Neither of these statements explains why this invoice lists both [] and MyKey.

¹⁵ In fact, according to Mr. Bress, this "investment" represents a little more than half the sale price of a single NoWrite product. (Bress, Tr. at 372:16-18 (testifying that the NoWrite product sells for "basically" [].))

2. Labor and Capital

MyKey argues that the “sweat equity” contributed by Mr. Bress and Mr. Menz is sufficient to establish the existence of a domestic industry by way of employment of labor or capital.¹⁶ (CIB at 93-94.) MyKey asserts that it is “unquestionable” that substantial sweat equity has been invested in the company. (*Id.* at 94-95 (arguing that for both Mr. Bress and Mr. Menz, MyKey “is the focus of his business life . . . [and] his primary occupation.”).) According to MyKey, in a given year, Mr. Bress and Mr. Menz each spend as many as [] hours on MyKey’s domestic industry products. (*Id.* at 95.) MyKey further submits that the efforts of its principals were concentrated and sufficiently focused because [1] MyKey has been formally incorporated for ten years; [2] MyKey files taxes annually; [3] MyKey has maintained a website for 10 years; [4] MyKey has sold more than [] NoWrite Products; and [5] MyKey has sales revenue of [] (*Id.* at 94; CRB at 37 (citing CX-0603-CX-0611; Bress, Tr. at 424-14-425:3).) MyKey also argues that it has employed significant capital—[] for contract manufacturing services and [] for components and PC boards—in designing, assembling, and manufacturing its domestic industry products. (CIB at 96-97.)

Respondents argue that MyKey has not offered sufficient evidence of sweat equity because MyKey’s estimates of the time spent on the domestic industry products are neither credible nor corroborated. (RIB at 88-91 (“Since a full American work week is typically 40 hours, MyKey simply alleges that its principals work that many hours without any corroboration or support. Nor is there any evidence as to how that time was supposedly spent.”).)

Respondents dispute that MyKey is a full-time pursuit for Mr. Bress, noting that Mr. Bress also

¹⁶ MyKey includes its discussion of “sweat equity” under §1337(a)(3)(B). Traditionally, sweat equity arguments are advanced under §1337(a)(3)(C), which provides that a domestic industry can be established by substantial investment in engineering, research and development or licensing. *See Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, Comm’n Op. at 25-26 (May 16, 2008).

works for Flower Valley Press, runs Entropy Engineering, has filed and prosecuted twelve patent applications, and has designed and marketed MyKey's Spuma, Notes the Ripper, NoWrite FlashBlock II, and MFT Ripper products. (*Id.* at 90.) Even if MyKey's estimates were reliable, Respondents argue that the estimates are insufficient because they relate to MyKey's business as a whole and are not tailored to the time spent on the domestic industry products. (*Id.* at 95.)

Respondents also object to MyKey's use of the total cost of contract manufacturing, arguing that the cost of contract manufacturing does not facilitate a determination of what labor or resources are represented in the [] price tag. (*Id.* at 92.) In addition, Respondents argue that no contract manufacturing has occurred since [] and that the only contract manufacturing that did occur between [] was related to the NoWrite IDE, [] (*Id.*) Respondents also dispute that the invoices for components are properly classified as capital expenditure. Even if the invoices are properly classified, Respondents maintain that there is no evidence or testimony as to what components were purchased or whether those components were used in the domestic industry products. (*Id.* at 92-93.)

Respondents emphasize that the [] in total sales between [] includes domestic and non-domestic industry products. (*Id.* at 84 (submitting that Notes the Ripper, MFT Ripper, and Spuma were sold during this time period).) According to Respondents, while MyKey's interrogatory responses purportedly provide the actual number of NoWrite products sold, there is no indication as to the source of these totals and no evidence to corroborate them. (*Id.* at 85; RRB at 34 ("MyKey's interrogatory responses do not cite any documents in support of the claimed sales and so are just that—bare assertions by MyKey's principals without any evidentiary support.")) Respondents argue that the []

[] (RRB at 34,
39 []
].)

In Staff's view, MyKey has not proven domestic industry by way of investment of labor and capital. Staff contends that MyKey's sweat equity estimates are necessarily inaccurate because they include efforts related to the DriveCopy product, which is no longer asserted in this Investigation. (SIB at 59.) Staff notes that there is no documentary evidence to corroborate the accounting provided by Mr. Menz and Mr. Bress. (*Id.* at 60.) While Staff agrees with MyKey that component purchases are evidence of the employment of capital, Staff characterizes the evidence MyKey offers as "questionable." (*Id.* at 58.) Staff submits that it is unclear whether MyKey's components invoices relate to components that originate in the United States and whether the components were, in fact, incorporated into domestic industry products. (*Id.*) As to contract manufacturing, Staff contends that the invoices were improperly sponsored and should have been offered by Mr. Bress or Mr. Menz, instead of Mr. Napper. (*Id.*) Staff agrees with Respondents that MyKey has not presented any evidence that would allow for a determination of the amount of revenue attributable to the domestic industry products. (*Id.* at 44-46.)

For the reasons set forth *infra*, the undersigned finds that MyKey has failed to prove a domestic industry under 19 U.S.C. § 1337(a)(3)(B). As proof of sweat equity expenditures, MyKey offered Mr. Bress's and Mr. Menz's annual estimates of the hours they worked at MyKey, as well as the number of hours spent on both domestic industry products. As noted above, all of MyKey's estimates include the DriveCopy product, which is no longer asserted in this Investigation. (*See* Order No. 53, Initial Determination Granting Complainant's Unopposed Motion for Partial Termination of the Investigation as to U.S. Patent No. 7,159,086 and Claim 1

of U.S. Patent No. 7,228,379 (Aug. 1, 2012); *see also* Notice of Commission Determination Not to Review An Initial Determination Terminating the Investigation with Respect to Certain Patent Claims (Aug. 21, 2012).) MyKey's estimate of sweat equity invested in the domestic industry products is therefore inaccurate because it includes a non-domestic industry product. The sweat equity estimate is also insufficient because MyKey has not allocated the estimated investment to each of the products covered by the asserted patents. *See Printing and Imaging Devices*, Comm'n Op. at 30.

Moreover, the undersigned finds the evidence of sweat equity offered by MyKey unconvincing as it is neither credible nor corroborated. While the Commission has stated that "a precise accounting of [daily affairs] is not necessary," this does not mean that a domestic industry can be established *without any evidence*. *See Stringed Instruments*, Comm'n Op. at 26 (May 16, 2008) (finding that sweat equity did not establish a domestic industry where the documentation thereof lacked sufficient detail).¹⁷ MyKey claims that Mr. Bress and Mr. Menz invested [] hours a week of sweat equity in the domestic industry products for the past [] Given the complete lack of corroboration of these estimates by documentary evidence or uninterested testimony, the undersigned is not convinced that Mr. Bress's or Mr. Menz's estimates are credible, particularly in light of all of their other responsibilities. For example, Mr. Bress testified that while working fulltime at MyKey, he also [1] []

¹⁷ MyKey attempts to distinguish *Stringed Instruments* on the grounds that the complainant in that case "did not demonstrate the existence of a formal entity or structure by which the rights in question were protected or exploited." (CIB at 94.) The existence of a "formal entity" or corporate structure is not relevant. In *Stringed Instruments*, the Commission found that complainant's sweat equity did not establish a domestic industry because the complainant's licensing efforts were not substantial, not because the complainant was an individual. *See Stringed Instruments*, Comm'n Op. at 26-27; *see also* Int. Det. at 25 ("Short collaborations and prototypes do not qualify as a 'substantial investment' in research and development. Two license agreements that have generated only \$39,080 does not lead to the creation of a 'licensing' industry.").

[] [2] ran his consulting business, Entropy Engineering;¹⁸ [3] worked for his family's business Flower Valley Press; [4] [] [5] [] [6] [] [7] [] [8] prosecuted 12 patent applications. (CX-0005C at Q/A 11-16; RX-1186C at Q/A 54-55; Bress, Tr. at 226:1-247:15.) Similarly, Mr. Menz—in addition to working [] at MyKey—works 40 hours a week as a computer forensics consultant, teaches digital forensics classes, and is involved in at least four professional organizations. (CX-0004C at Q/A 12, 28, 32; SX-0001C at 44-45.)

The undersigned is also not persuaded [] by MyKey's argument that the annual sales of the NoWrite products prove that MyKey invested sweat equity in the domestic industry. First, MyKey relies on an interrogatory response for the total products sold and—despite bearing the burden of proof—has not offered any evidence to corroborate its purported sales. Second, MyKey has not presented any evidence that allows for a determination of the revenue attributable to the domestic industry products. Instead, MyKey cites to tax returns which report the total sales for the company and include sales revenue from non-domestic industry products. (See CX-0603-CX-0611; see also Napper, Tr. at 713:10-714:1.) In addition, the product sales totals offered by MyKey undercut the credibility of Mr. Bress's and Mr. Menz's sweat equity estimates. MyKey operates on a build-to-order business model, but the hours invested by its

¹⁸ Mr. Bress testified that in 2011 he was awarded a [] SBIR grant from NASA under the Entropy Engineering name. (CX-0005C at Q/A 11.) To be eligible for an SBIR grant, the primary employment of the principal investigator, *i.e.*, Mr. Bress, must be with the small business concern awarded the grant, *i.e.*, [] Engineering. The rules governing SBIR grants state that “[p]rimary employment means that more than one-half of the principal investigator's time is spent in the employ of the [small business concern]. This precludes full-time employment with another organization.” See Small Business Innovation Research (SBIR) Program, Policy Directive at p.13, available at <http://www.sbir.gov/about/about-sbir>. Thus, it seems that Mr. Bress is “primarily employed” wherever it presents a strategic advantage. If the representations made by Mr. Bress in this Investigation and in his application for the SBIR grant are true, it means that, in 2011, Mr. Bress must have worked at least [] To find Mr. Bress credible would require believing that for every day in 2011, on top of being the [] and working on other businesses, he devoted nearly 11 hours to the domestic industry products and Entropy Engineering.

only employees do not fluctuate in response to the number of products sold as one would expect. (See Bress, Tr. at 399:17-404:5.) For example, Mr. Bress claims that he worked [] on the domestic industry products in [] when MyKey allegedly sold [] and [] when MyKey allegedly sold [] (See CX-0003C at Q/A 147; RX-1250; RX-1251.)

The undersigned further finds that MyKey has failed to prove the existence of a domestic industry by virtue of significant employment of capital. While MyKey claims that [] was spent on contract manufacturing services, this estimate includes all contract manufacturing expenses since MyKey was formed. (CX-0003C at Q/A 113-119.) MyKey, yet again, fails to allocate expenses between the '682 patent and '379 patent. The evidence shows that only [] was spent on contract manufacturing the two years before the complaint was filed. (See CX-0291C; CX-0292; CX-0307C.) MyKey also alleges that [] was invested in components for product manufacturing from [] (CX-0003C at Q/A 123, 128.) Again, MyKey offers a decade's worth of invoices, ignoring the fact that the domestic industry requirement is written in the present tense, and as such, must exist at the time the complaint is filed or be in the process of being established. See *CD-Rom Controllers*, Comm'n Op. at 37. No matter how many invoices MyKey offers from components purchases in 2007, it is not probative evidence of the existence of a domestic industry in 2011. According to the relevant evidence offered by MyKey, in the [] before the Complaint in this Investigation was filed, [] was spent on components. (See CX-0451; CX-322C.) The components invoices, as discussed above, are insufficient because they have not been allocated to the '682 patent and '379 patent individually and MyKey has not proven that the invoices relate to the domestic industry products. (See Section III.B.1, *supra*.) In short, spending [] on components for []

[] on contract manufacturing for []¹⁹[] does not constitute a significant employment of labor or capital.

Accordingly, the undersigned finds that MyKey has not proven by a preponderance of the evidence that it has made a significant employment of labor or capital pertaining to articles covered by the '682 and '379 patents.

3. Engineering, Research and Development, and Licensing

According to MyKey, §1337(a)(3)(C) allows a complainant to establish the domestic industry requirement through proof of investment in a patent's exploitation. (CIB at 97.) MyKey argues that the evidence it offered regarding investments in plant and components under subsection (A), and regarding the employment of labor or capital under subsection (B), is sufficient to prove the substantial exploitation of the asserted patents under subsection (C). (CIB at 97; CRB at 49.)

Respondents and Staff argue that MyKey waived reliance on §1337(a)(3)(C) under Ground Rule 8.2 because §1337(a)(3)(C) was not asserted in MyKey's Pre-Hearing Brief. (SIB at 66 (noting that this provision of §1337 is not cited anywhere in MyKey's Pre-Hearing Brief); RRB at 48 (submitting that in its Post-Hearing Briefs MyKey also ignores prong (C) and conflates it with investments in plant and equipment under prong (A) and labor or capital under prong (B)).)

The undersigned finds that MyKey has waived any argument related to domestic industry under §1337(a)(3)(C). Ground Rule 8.2 provides that "[a]ny contentions not set forth in detail" in the pre-trial brief "shall be deemed abandoned or withdrawn." *See* Order No. 2 (Aug. 29, 2011). Subsection (C) of §1337(a)(3) is not mentioned in MyKey's Pre-Hearing Brief and has

¹⁹ Although MyKey's overall contract manufacturing expenses are not allocated between the '682 and '379 patents, the contract manufacturing invoices from the [] before the complaint was filed each state that they pertain to MyKey's [] (*See* CX-0291C; CX-0292C; CX-0307C.)

therefore been waived. (*See generally* MyKey PHB at 379-391 (arguing that MyKey's investment in labor, research and development, and engineering satisfied subsection (B)), 391-396 (asserting that MyKey made significant investment in plant and equipment pursuant to subsection (A)).)

4. Conclusion

For the reasons set forth above, the undersigned finds that MyKey has not established a domestic industry under 19 U.S.C. § 1337(a)(3).

C. Technical Prong

The undersigned has found hereinabove that MyKey has failed to satisfy the economic prong of the domestic industry requirement with respect to the asserted patents. MyKey therefore **cannot** satisfy the domestic industry requirement as a matter of law irrespective of whether or not its products practice the '682 and '379 patents. Thus, in the interest of judicial economy, the undersigned need not consider the parties' technical prong arguments.

IV. CONCLUSION

As noted *supra*, as a prerequisite to finding a violation of section 337, MyKey must establish that an industry relating to the articles protected by the patent exists or is in the process of being established in the United States. *Certain Printing and Imaging Devices and Components Thereof*, Inv. No. 337-TA-690, Comm'n Op. at 25 (Feb. 17, 2011); 19 U.S.C. § 1337(a)(2). Having found that MyKey has failed to satisfy the domestic industry requirement, the undersigned finds that the disposition of this material issue satisfies Commission Rule 210.42(d) and, consequently, that no violation of section 337 has occurred in this Investigation with respect to the '682 and '379 patents. In light of the foregoing finding and in the interests of

judicial economy and efficiency – particularly in light of the Commission’s heavy section 337 caseload – the undersigned need not address infringement, importation, or validity.

V. CONCLUSIONS OF LAW

1. The Commission has personal jurisdiction over the parties, and subject-matter jurisdiction over the accused products.
2. The domestic industry requirement for U.S. Patent Nos. 6,813,682 and 7,228,379 has not been satisfied.
3. There is no violation of 19 U.S.C. § 1337(a)(1) with respect to U.S. Patent Nos. 6,813,682 and 7,228,379.

VI. INITIAL DETERMINATION

Based on the foregoing, it is the Initial Determination of the undersigned that a violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, has not been found in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain computer forensic devices and products containing same with respect to U.S. Patent Nos. 6,813,682 and 7,228,379.²⁰

The undersigned hereby CERTIFIES to the Commission this Initial Determination, together with the record of the hearing in this investigation consisting of the following: the transcript of the evidentiary hearing, with appropriate corrections as may hereafter be ordered; and the exhibits accepted into evidence in this investigation as listed in the attached exhibit lists.²¹

²⁰ Arguments made on brief which were otherwise unsupported by record evidence or legal precedent have been accorded no weight. Additionally, any arguments from the parties’ pre-hearing briefs incorporated by reference into the parties’ post-hearing briefs are stricken, unless otherwise discussed herein, as an improper attempt to circumvent the page limits imposed for post-hearing briefing.

²¹ The pleadings of the parties filed with the Secretary are not certified as they are already in the Commission’s possession in accordance with Commission rules.

The Secretary shall serve a public version of this Initial Determination upon all parties of record and the confidential version upon counsel who are signatories to the Protective Order (Order No. 1) issued in this Investigation, and upon the Commission Investigative Attorney.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review pursuant to 19 C.F.R. § 210.43(a) or the Commission, pursuant to 19 C.F.R. § 210.44, orders on its own motion a review of the Initial Determination or certain issues therein.

RECOMMENDED DETERMINATION ON REMEDY AND BOND

I. REMEDY AND BONDING

The Commission's Rules provide that subsequent to an initial determination on the question of violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, the administrative law judge shall issue a recommended determination concerning the appropriate remedy in the event that the Commission finds a violation of section 337, and the amount of bond to be posted by respondent during Presidential review of the Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii).

A. Limited Exclusion Order

Under section 337(d), the Commission may issue a limited exclusion order directed to a respondent's infringing products. 19 U.S.C. § 1337(d). A limited exclusion order instructs the U.S. Customs Service to exclude from entry all articles that are covered by the patent at issue that originate from a named respondent in the investigation. *Fuji Photo Film Co. Ltd. v. Int'l Trade Comm'n*, 474 F.3d 1281, 1286 (Fed. Cir. 2007.)

MyKey requests that the Commission enter a permanent limited exclusion order to protect MyKey from imports and subsequent sales of Respondents' infringing products. (CIB at 97.) MyKey asserts the evidence in this Investigation shows that the appropriate remedy is a limited exclusion order. (*Id.*)

Guidance states that, in the event the Commission finds a violation, the limited exclusion order should be limited to the T3458is since MyKey only presented evidence relating to this Guidance accused product. (RIB at 99; RRB at 49-50.) Guidance notes that approximately 75% of its sales of the accused products are to federal government purchasers. (RIB at 99 (citing RX-1184C at Q/A 48-57.)) Guidance therefore asserts that the importation of the accused products,

even if found to be infringing, should not be stopped to the extent that the importation is for the federal government. (*Id.*)

In Staff's view, if the Commission finds a violation of section 337, a limited exclusion order would be appropriate. (SIB at 66.)

Although the undersigned has found no violation of section 337, should the Commission nonetheless find a violation, the undersigned recommends that the Commission issue a limited exclusion order prohibiting the importation of Respondents' computer forensic devices found to infringe the asserted patents.

B. Cease and Desist Order

Under section 337(f)(1), the Commission may issue a cease and desist order in addition to, or instead of, an exclusion order. 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a "commercially significant" amount of infringing, imported product in the United States that could be sold, thereby undercutting the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. 2391, Comm'n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Prods. Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm'n Op. at 26-28, 1997 WL 817767, at *11-12 (U.S.I.T.C. Sept. 10, 1997).

MyKey submits that entry of a cease and desist order is appropriate, arguing that the evidence shows Respondents maintain commercially significant inventory of infringing products in the United States. (CIB at 98; CRB at 50.) MyKey requests that the cease and desist order prohibit the importation, sale, marketing, and distribution of Respondents' infringing products. (CIB at 98.)

Respondents argue that a cease and desist order is not appropriate because MyKey has not offered any evidence as to the volume of the allegedly infringing devices present in the United States. (RIB at 100.) Respondents contend that the deposition excerpts relied on by MyKey to support its request for a cease and desist order “do not concern inventory volume, but rather supply chain.” (RRB at 50.)

Staff asserts there is no evidence that the Respondents have commercially significant inventory of the accused products in the United States. (SIB at 67.) Staff believes that a limited exclusion order would be sufficient to protect against section 337 violations by the Respondents. (*Id.*) Staff is therefore of the view that no cease and desist order should issue. (*Id.*)

The undersigned agrees with Respondents and Staff that MyKey has failed to proffer any evidence that Respondents have *commercially significant* inventory of the accused products in the United States. Thus, if the Commission determines a violation of section 337 has occurred, the undersigned recommends that no cease and desist order issue in this Investigation.

C. Bond During Presidential Review Period

Pursuant to section 337(j)(3), the Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. 19 U.S.C. § 1337(j)(3). The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Microsphere Adhesives, Processes for Making Same, and Prods. Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, USITC Pub. 2949, Comm’n

Op. at 24 (Dec. 8, 1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See, e.g., Certain Integrated Circuit Telecomm. Chips and Prods. Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41, 1993 WL 13033517, at *24 (U.S.I.T.C. June 22, 1993). A 100 percent bond has been required when no effective alternative existed. *See, e.g., Certain Flash Memory Circuits and Prods. Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (imposing a 100% bond when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

While MyKey has licensed its patents to a former respondent in this Investigation, MyKey contends that this royalty rate is “insufficient to use for bonding as it is not based on a true arms-length transaction.” (CIB at 99.) MyKey further claims that because its products are “quite different” from Respondents’ products, a price differential for setting a bond amount cannot be easily determined. (*Id.*) MyKey therefore requests that Respondents post a bond equal to 100 percent of the entered value of any imported infringing products. (*Id.*)

Respondents state that MyKey has licensed the patents at issue to former respondent YEC for a [] royalty rate. (RIB at 100.) Respondents therefore believe that if they are required to post a bond, the bond should be equal to [] of the entered value of the allegedly infringing products. (*Id.*) Respondents further state they agree with Staff that MyKey has never explained why a 100% bond is appropriate, especially in view of the fact that MyKey [

] (RRB at 50.)

In Staff's view, a 100% bond is inappropriate. (SIB at 68.) In support thereof, Staff states that there is insufficient evidence in the record to determine the price differential between MyKey's products and those of Respondents because "(1) [

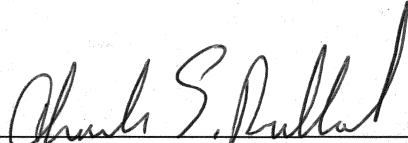
] (2) [] (Id.)

Staff notes that MyKey did license former Respondent YEC at a [] royalty rate. (Id.) Thus, Staff submits that the bond should be set at a reasonable royalty rate of 5%. (Id.)

The undersigned finds that MyKey has failed to justify why a 100% bond rate is appropriate, especially since the evidence shows that MyKey licensed a former respondent at a 5% royalty rate. (See RX-0127C; Menz, Tr. at 802:6-803:21.) The undersigned therefore agrees with Respondents and Staff that if the Commission concludes a bond is appropriate, the bond amount should be set at a reasonable royalty rate of 5%.

Within ten days of the date of this document, the parties shall submit to the Office of Administrative Law Judges a joint statement regarding whether or not they seek to have any portion of this document deleted from the public version. The parties' submission shall be made by hard copy and must include a copy of this Initial Determination with red brackets indicating any portion asserted to contain confidential business information to be deleted from the public version. The parties' submission shall include an index identifying the pages of this document where proposed redactions are located. The parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.



Charles E. Bullock
Chief Administrative Law Judge

**IN THE MATTER OF CERTAIN COMPUTER FORENSIC
DEVICES AND PRODUCTS CONTAINING THE SAME**

337-TA-799

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC VERSION INITIAL DETERMINATION ON VIOLATION OF SECTION 337 AND RECOMMENDED DETERMINATION ON REMEDY AND BOND** has been served upon, **Daniel E. Valencia, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on

NOV 27 2012



Lisa R. Barton, Acting Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANT MyKEY TECHNOLOGY INC.:

James H. Lin, Esq.
FREITAS, TSENG, BAIK & KAUFMAN LLP
100 Marine Parkway
Suite 200
Redwood City, CA 94065

() Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
() Other: _____

FOR RESPONDENTS GUIDANCE SOFTWARE, INC. & GUIDANCE TABLEAU LLC:

William C. Bergmann, Esq.
BAKER & HOSTETLER LLP
1050 Connecticut Avenue NW
Washington, DC 20036

() Via Hand Delivery
 Via Overnight Mail
() Via First Class Mail
() Other: _____

FOR RESPONDENTS DIGITAL INTELLIGENCE, INC.:

Alejandro Menchaca, Esq.
MCANDREWS, HELD & MALLOY, LTD
500 West Madison Street, 34th Floor
Chicago, IL 60661

() Via Hand Delivery
 Via Overnight Mail
() Via First Class Mail
() Other: _____

**IN THE MATTER OF CERTAIN COMPUTER FORENSIC
DEVICES AND PRODUCTS CONTAINING THE SAME**

337-TA-799

FOR RESPONDENTS CRU ACQUISITIONS GROUP LLC & CRU-DATA PORT LLC:

David Cooper
KOLISCH HARTWELL, P.C.
520 S.W. Yamhill Street, Suite 200
Portland, OR 97204

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

PUBLIC MAILING LIST

Heather Hall
LEXIS – NEXIS
9443 Springboro Pike
Miamisburg, OH 45342

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

Kenneth Clair
THOMSON WEST
1100 – 13th Street NW
Suite 200
Washington, DC 20005

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