

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN LIQUID CRYSTAL DISPLAY
DEVICES, INCLUDING MONITORS,
TELEVISIONS, MODULES, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-741/749

**NOTICE OF COMMISSION DETERMINATION TO REVIEW-IN-PART A FINAL
DETERMINATION; SCHEDULE FOR FILING WRITTEN SUBMISSIONS**

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 final initial determination (“ID”) issued by the presiding administrative law judge (“ALJ”) on January 12, 2012 in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-4737. 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 at <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 Inv. No. 337-TA-741 on October 18, 2010, based on a complaint filed by Thomson Licensing SAS of France and Thomson Licensing LLC of Princeton, New Jersey (collectively “Thomson”). *75 Fed. Reg.* 63856 (Oct. 18, 2010). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended 19 U.S.C. § 1337, by reason of infringement of various claims of United States Patent Nos. 6,121,941 (“the ‘941 patent”); 5,978,063 (“the ’063 patent”); 5,648,674 (“the ‘674 patent”); 5,621,556 (“the ’556 patent”); and 5,375,006 (“the ’006 patent”). The Commission instituted Inv. No. 337-TA-749 on November 30, 2010, based on a complaint filed

by Thomson. 75 *Fed. Reg.* 74080 (Nov. 30, 2010). The complaint alleged violations of section 337 of the Tariff Act of 1930 by reason of infringement of various claims of the '063, '556, and '006 patents. On January 5, 2011, the Commission consolidated the two investigations. The respondents are Chimei InnoLux Corporation of Miaoli County, Taiwan and InnoLux Corporation of Austin, Texas (collectively, "CMI"); MStar Semiconductor Inc. of Chupei, Taiwan ("MStar"); Qisda Corporation of Taoyuan, Taiwan and Qisda America Corporation of Irvine, California (collectively, "Qisda"); BenQ Corporation of Taipei, Taiwan, BenQ America Corporation of Irvine, California, and BenQ Latin America Corporation of Miami, Florida (collectively "BenQ"); Realtek Semiconductor Corp. of Hsinchu, Taiwan ("Realtek"); and AU Optronics Corp. of Hsinchu, Taiwan and AU Optronics Corp. America of Houston, Texas (collectively "AUO").

On January 12, 2012, the ALJ issued the subject ID finding a violation of Section 337 with respect to the '674 patent. The ALJ found that the CMI accused products including the Type 2 Array Circuitry and any Qisda or BenQ accused products incorporating these CMI accused products infringe the asserted claims of the '674 patent. The ALJ found that no other accused products infringe the '674 patent. The ALJ also found that no accused products infringe the asserted claims of the '063 patent, the '006 patent, the '556 patent, or the '941 patent. The ALJ also found that claims 1, 2, 3, 4, 8, 11, 12, 14, and 18 of the '063 patent are invalid for obviousness under 35 U.S.C. § 103, and that claims 4 and 14 of the '006 patent are invalid as anticipated under 35 U.S.C. § 102. The ALJ further found that claim 17 of the '063 patent, claim 7 of the '006 patent, and the asserted claims of the '556 patent, the '674 patent, and the '941 patent are not invalid. The ALJ concluded that a domestic industry exists in the United States that exploits the asserted patents as required by 19 U.S.C. § 1337(a)(2). On January 25, 2011, Thomson, CMI, MStar, Realtek, and AUO each filed a petition for review of the ID. BenQ and Qisda filed a joint petition for review incorporating the other respondents' arguments by reference.

Having examined the record of this investigation, including the ALJ's final ID and the submissions of the parties, the Commission has determined to review (1) claim construction of the limitation "layer" of the asserted claims of the '006 patent; (2) infringement of the asserted claims of the '006 patent; (3) anticipation of claims 4 and 7 of the '006 patent by Scheuble; (4) the claim construction of the limitations "mechanically rubbing" / "mechanically rubbed," "a plurality of spacing elements," and "an affixing layer" of the asserted claims of the '063 patent; (5) infringement of the asserted claims of the '063 patent; (6) obviousness of the asserted claims of the '063 patent in view of Sugata and Tsuboyama; (7) whether Lowe and Miyazaki are prior art to the asserted claims of the '063 patent; (8) anticipation of the asserted claims of the '063 patent by Lowe; (9) anticipation of the asserted claims of the '063 patent by Miyazaki; (10) obviousness of the asserted claim of the '556 patent in view of Takizawa and Possin; (11) anticipation and obviousness of the asserted claims of the '674 patent in view of Fujitsu; (12) claim construction of the "second rate" "determined by" limitation of the asserted claims of the '941 patent and the "input video signal" limitation of claim 4 of the '941 patent; (13) infringement of the asserted claims of the '941 patent; (14) anticipation of the asserted claims of the '941 patent by Baba; (15) exclusion of evidence of the ViewFrame II+2 LCD Panel; and (16) economic prong of the domestic industry requirement.

The Commission has also determined to review and to take no position on the claim construction of the terms “drain electrodes” and “source electrodes” of the ‘556 patent.

The parties should brief their positions on the issues on review with reference to the applicable law and the evidentiary record. In connection with its review, the Commission is particularly interested in responses to the following questions:

Question 1: The ALJ construed the term “a plurality of spacing elements” of claims 1 and 11 of the ‘063 patent as “two or more structures, not physically connected to one another, which structures serve to substantially uniformly separate two substrates, said structures formed on one of said two substrates and contacting the second substrate.” ID at 43. Does the proper construction require that the “spacing elements” contact the “second substrate?” Does certain language from claim 1 (“the two substrates remaining substantially uniformly separated from each other by said spacing elements”) and from claim 11 (“said second substrate being kept at a substantially uniform distance from said first substrate by said spacing elements”) require that the spacing elements physically separate the two substrates? Please cite to evidence in the record showing the understanding of person of ordinary skill in the art at the time of the ‘063 patent invention.

Question 2: The ALJ construed “an affixing layer” of claim 1 of the ‘063 patent as “a stratum of material that attaches the spacing elements to a substrate, and which is separate and distinct from said spacing elements.” ID at 34. Is this construction supported by the intrinsic evidence? In particular, does the preferred embodiment of the ‘063 patent specification disclose forming spacers directly from the affixing layer?

Question 3: The ALJ construed the term “a plurality of spacing elements separate from one another” as “two or more structures, not physically connected to one another, which structures serve to substantially uniformly separate two substrates, said structures formed on one of said two substrates and contacting the second substrate.” ID at 43. Do the main photospacers in the accused CMI modules meet the limitation under the ALJ’s construction? Please cite to the evidence in the record.

Question 4: With respect to the ‘063 patent, the ALJ stated in the ID that [[

]] ID at 334. He also stated that [[

Id. Are these accurate statements? Please provide citations to the record as support. In addition, please identify [[

Question 5: At the time of the invention of the '063 patent, would it have been obvious to combine the teachings of Sugata and Tsuboyama, such that the substrate on which the spacers are formed in Sugata would be rubbed *after* the spacers are formed? Is the combination of the teachings of Sugata and Tsuboyama a combination of known elements that yield predictable results? Are there any secondary considerations such as commercial success that would be probative of non-obviousness? Please cite evidence in the record as support.

Question 6: Has Thomson produced sufficient independent corroborating evidence showing that the inventions of each of the asserted claims of the '063 patent have been reduced to practice before the filing dates of Lowe and Miyazaki? In particular, please discuss whether the evidence shows that display cells embodying the inventions have been tested and shown to work for their intended purposes.

Question 7: Does the intrinsic evidence support the construction of the term "plate" recited in claim 3 of the '006 patent to require a solid and not liquid material? ID at 220. Can the term "plate" include a liquid compensation layer sealed between two glass substrates? *See* CMI Petition at 31. Please cite to the evidence of the record as support. Under the proper construction of the term "plate," does Scheuble anticipate claims 4 and 7 of the '006 patent?

Question 8: With respect to infringement of the asserted claims of the '006 patent, what is an acceptable range of variance in the measurement of n_2 and n_3 , given the probability of errors in any real-world measurement of the index of refraction? What are the values and measurement errors of n_2 and n_3 for the entire layer in the accused devices? How close does the real-world measurement of n_2 have to be compared to n_3 for the layer to be considered "uniaxial" as construed by the ALJ? How close would n_2 have to be to n_3 for the layer to be equivalent to a "uniaxial" layer under the ALJ's construction? Please limit your response to the evidence in the record.

Question 9: Would a person of ordinary skill in the art be motivated to modify Takizawa to use only one mask to form the plurality of etch stoppers recited in claim 3 of the '556 patent? Does Takizawa teach away from using a single mask to form the plurality of etch stoppers? Please cite to the evidence in the record. Please discuss any Federal Circuit case law regarding obviousness of a patent claim that requires a single structure or process, in light of prior art that discloses one or more such structures or processes.

Question 10: What is the proper construction of the limitation "a second rate" "determined by" of the asserted claims of the '941 patent? Please provide all relevant intrinsic and extrinsic evidence of record, including expert testimony.

Question 11: Do the respondents' accused products infringe claims 1 and 4 of the '941 patent under Thomson's construction of "determined by." Please cite any record evidence, including expert testimony, to support your response.

Question 12: Discuss any Federal Circuit case law relevant to whether or not claim 4 of the '941 patent requires an input video signal for a finding of infringement. Please discuss any basis, other than the language of the claims, (*e.g.*, prosecution history) that provides guidance on whether or not claim 4 requires an input video signal.

Question 13: For claims 1 and 4 of the '941 patent, what is the proper construction of the term "za" in the ratio f_t/za "required for a cathode ray tube." For an interlaced signal associated with a CRT display, does za refer to the number of lines updated in a given field period? Please cite to the intrinsic evidence of the '941 patent as support.

Question 14: Is Mr. Vogeley's testimony regarding the prior art status of the ViewFrame II+2 with respect to the '941 patent sufficiently corroborated under a "rule of reason" analysis? Assuming that the ViewFrame II+2 is prior art to the asserted claims of the '941 patent, does the ViewFrame II+2 anticipate each of the asserted claims? Please cite to the evidence in the record.

Question 15: With respect to respondents' arguments that Thomson's investments in licensing its LCD patent portfolio cannot be completely allocated to the asserted patents, what portion of the investments should be allocated to the asserted patents? Please provide the legal and factual basis for such allocations.

Question 16: Based on the factors outlined below, please discuss the legal and factual bases for your position as to whether Thomson's investment in licensing for the asserted patents is substantial. Please consider at least the following factors: (1) the industry and size and scope of complainant's operations; (2) the existence of other types of "exploitation" of the asserted patents such as research, development, or engineering; (3) the existence of license-related ancillary activities such as ensuring compliance with the license agreement and providing training or technical support to its licensees; (4) whether complainant's licensing activities are continuing; (5) whether complainant's licensing activities are those referenced favorably in the legislative history of section 337(1)(3)(C); (6) complainant's return on investment; and (7) the extent to which complainant's LCD portfolio licenses are worldwide licenses.

Question 17: What should the Commission compare complainants' investments to in analyzing whether the complainants' investments are substantial? Please cite any relevant legal basis and evidence of record to support your position.

Question 18: Should Thomson's expenses related to the acquisition of the Xerox patent portfolio be [[

]]? Is the purchase of a patent considered an exploitation of that patent under section 337(a)(3)(C)? Can investments in [[]] for purposes of establishing domestic industry under section 337 (a)(3)(C)? With respect to any argument that the Commission should [[

]]?
Further, how should the [[]] support for your position.]]? Please provide legal and factual

Question 19: Should the Commission consider litigation expenses for the particular Section 337 investigation at issue? Should the Commission consider litigation expenses for parallel district court actions? Should it matter if the district court actions are stayed or ongoing?

Question 20: Should the Commission consider reexamination expenses when determining if a domestic industry exists and if so should they be treated in the same manner as litigation expenses in determining whether or not the expenses are investments in licensing?

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue one or more cease and desist orders that could result in a respondent 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 likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n Op. at 9 (December 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 United States Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action.

See Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount 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 if a remedy is ordered.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainant is also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the date that the patent expires and the HTSUS subheadings under which the accused products are imported. The written submissions and proposed remedial orders must be filed no later than close of business on Monday, April 9, 2012. Reply submissions must be filed no later than the close of business on Monday, April 16, 2012. The written submissions must be no longer than 75 pages and the reply submissions must be no longer than 35 pages. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must do so in accordance with Commission rule 210.4(f), 19 C.F.R. § 210.4(f), which requires electronic filing. The original document and 8 true copies thereof must also be filed on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document 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. § 210.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

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 sections 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42-46 and 210.50).

By order of the Commission.



James R. Holbein
Secretary to the Commission

Issued: March 26, 2012