

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN VIDEO GAME SYSTEMS
AND WIRELESS CONTROLLERS AND
COMPONENTS THEREOF**

Investigation No. 337-TA-770

**NOTICE OF COMMISSION DETERMINATION FINDING NO VIOLATION OF
SECTION 337**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to affirm, with modifications, the ALJ's finding of no violation of Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 ("Section 337") in the above-referenced 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: On April 27, 2011, the Commission instituted the subject investigation based on a complaint filed by Creative Kingdoms, LLC of Wakefield, Rhode Island and New Kingdoms, LLC of Nehalem, Oregon (collectively, "CK"). 76 *Fed. Reg.* 23624 (Apr. 27, 2011). The complaint alleged violations of Section 337 by reason of infringement of certain claims of U.S. Patent Nos. 7,500,917 ("the '917 patent"), 7,896,742 ("the '742 patent"), 7,850,527 ("the '527 patent"), and 6,761,637 (the '637 patent). The named respondents are Nintendo Co., Ltd., of Kyoto, Japan and Nintendo America, Inc. of Redmond, Washington (collectively, "Nintendo"). The '637 patent was subsequently terminated from the investigation. On August 31, 2012, the ALJ issued a final ID finding no violation of section 337 by Nintendo. The ALJ found that the accused products infringe sole asserted claim 24 of the '742 patent, but that the claim is invalid for failing to satisfy the enablement requirement and the

written description requirement under 35 U.S.C. § 112. The ALJ found that no accused products infringe the asserted claims of the '917 patent and the '527 patent. The ALJ also found that the asserted claims of the '917 and '527 patents are invalid for failing to satisfy the enablement requirement and the written description requirement. The ALJ concluded that complainant has failed to show that a domestic industry exists in the United States that exploits the asserted patents as required by 19 U.S.C. § 1337(a)(2). The ALJ did not make a finding regarding the technical prong of the domestic industry requirement with respect to the asserted patents. The ALJ also did not making a finding with respect to anticipation and obviousness of the asserted patents.

On November 6, 2012, the Commission determined to review the following issues: (1) claim construction of the limitation "toy wand" of the asserted claim of the '917 patent; (2) non-infringement of the asserted claim of the '917 patent; (3) infringement of the asserted claim of the '742 patent; (4) validity of the asserted claims of the '917 and '742 patent under the enablement requirement; (5) validity of the asserted claims of the '917 and '742 patent under the written description requirement; and (6) whether the domestic industry requirement is met with respect to the '917 and '742 patents. On the same day, the Commission issued an opinion with respect to the proper claim construction of the term "toy wand" of the asserted claim of the '917 patent. The Commission determined to remand this case to the ALJ to determine the following issues: (a) direct infringement of the asserted claim of the '917 patent in light of the proper construction of the term "wand" as set forth in the Commission opinion; (b) whether the independently sold Wii MotionPlus and Nunchuck accessories contributorily infringe the asserted claim of the '917 and '742 patents; (c) anticipation and obviousness with respect to the asserted claim of the '917 patent; (d) obviousness with respect to the asserted claim of the '742 patent; and (e) whether CK has satisfied the technical prong of the domestic industry requirement with respect to the '917 and '742 patents, and if necessary, whether CK has satisfied the economic prong of the domestic industry requirement with respect to the '917 and 742 patent in light of the ALJ's technical prong determination.

On May 7, 2013, the ALJ issued a remand ID finding no violation of section 337. The ALJ found that (i) respondents do not infringe claim 7 of the '917 patent; (ii) respondents do not contribute to the infringement of claim 24 of the '742 patent; (iii) the asserted claim of the '917 patent is not invalid for anticipation; (iv) the asserted claim of the '917 patent is not invalid for obviousness; (v) the asserted claim of the '742 patent is not invalid for obviousness; (vi) complainant has satisfied the technical prong of the domestic industry requirement for the '917 patent; and (vii) complainant has satisfied the technical prong of the domestic industry requirement for the '742 patent. The ALJ determined that it was unnecessary to revisit his previous finding in his final ID that complainant has not satisfied the economic prong of the domestic industry requirement for the '742 and '917 patents.

On July 8, 2013, the Commission determined to review the following issues from the remand ID: (1) whether the accused products directly infringe the asserted claim of the '917 patent; (2) whether the independently sold Wii MotionPlus and Nunchuck accessories contributorily infringe the asserted claim of the '742 patent; (3) non-obviousness of the asserted claim of the '742 patent; and (4) whether the technical prong of the domestic industry requirement is met with respect to the '917 and '742 patents. The Commission noted that the

following issues from the final ID are currently under review: (a) whether the accused products directly infringe the asserted claim of the '742 patent; (b) validity of the asserted claims of the '917 and '742 patent under the enablement requirement; (c) validity of the asserted claims of the '917 and '742 patent under the written description requirement; and (d) whether the economic prong of the domestic industry requirement is met with respect to the '917 and '742 patents.

Having examined the record of this investigation, including the ALJ's final ID, remand ID, and the submissions of the parties, the Commission has determined to affirm, with modifications, the ALJ's finding of no violation of Section 337. Specifically, the Commission has determined to affirm, with modifications, the ALJ's finding that claim 7 of the '917 patent and claim 24 of the '742 patent are invalid for lack of enablement and for lack of written description, and that complainant has not shown that the domestic industry requirement is met with respect to the '917 and '742 patents. The Commission has determined that complainant has not shown that the accused products directly infringe claim 7 of the '917 patent because they do not meet the limitation "command," and that complainant has not shown that the accused products directly infringe claim 24 of the '742 patent because they do not meet the limitation "activate or control." The Commission has also determined that complainant has not shown that the independently sold Wii MotionPlus and Nunchuck accessories contributorily infringe claim 24 of the '742 patent. Lastly, the Commission has determined that respondent has not shown that claim 24 of the '742 patent is obvious.

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.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', with a stylized flourish at the end.

Lisa R. Barton
Acting Secretary to the Commission

Issued: September 12, 2013