

*In the Matter of*

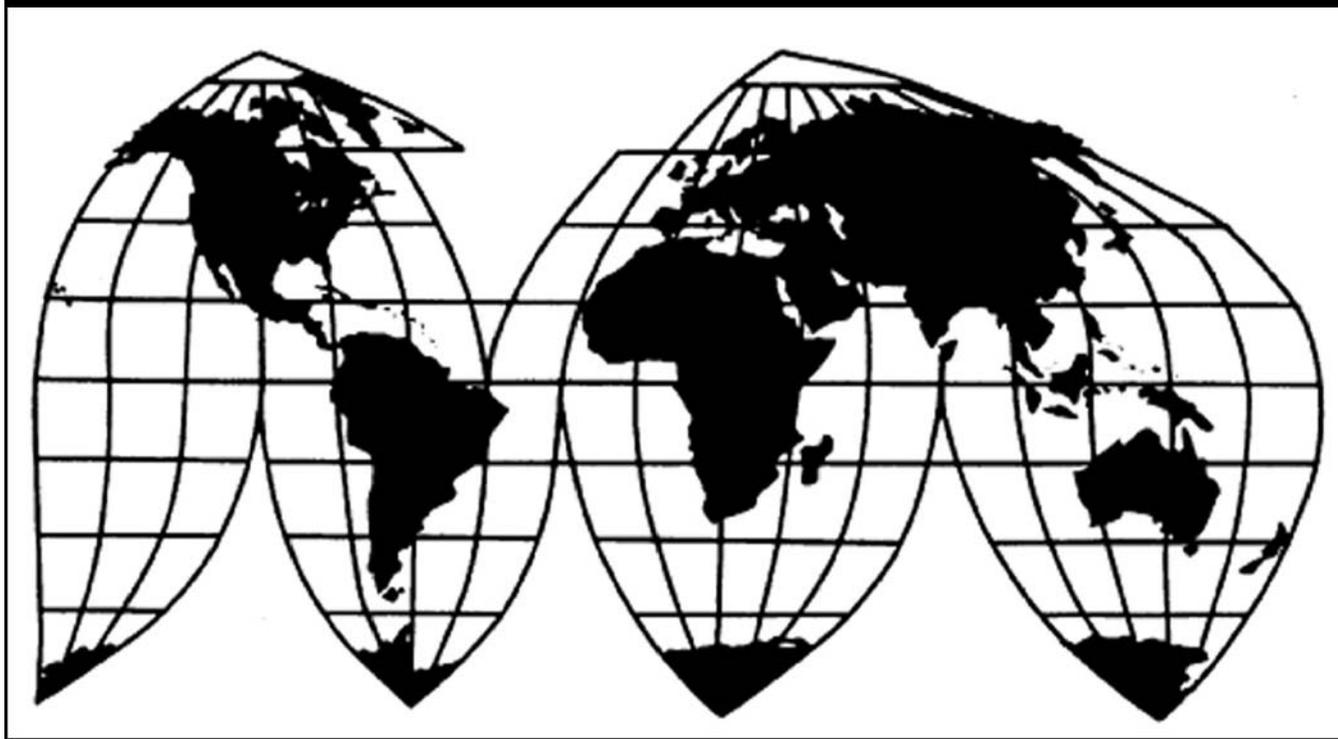
**Certain Stringed Musical Instruments and  
Components Thereof**

Investigation No. 337-TA-586

Publication 4120

December 2009

**U.S. International Trade Commission**



Washington, DC 20436

# **U.S. International Trade Commission**

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# **U.S. International Trade Commission**

Washington, DC 20436  
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*In the Matter of*

## **Certain Stringed Musical Instruments and Components Thereof**

Investigation No. 337-TA-586





UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C. 20436

**In the Matter of**

**CERTAIN STRINGED MUSICAL  
INSTRUMENTS AND COMPONENTS  
THEREOF**

**Investigation No. 337-TA-586**

**NOTICE OF COMMISSION DETERMINATION OF  
NO VIOLATION OF SECTION 337; TERMINATION OF INVESTIGATION**

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

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to terminate the above-captioned investigation with a finding of no violation of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337").

**FOR FURTHER INFORMATION CONTACT:** 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:** On November 3, 2006, the Commission instituted an investigation titled *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, based upon a complaint filed October 3, 2006, and supplemented October 24, 2006, by Geoffrey McCabe (Los Angeles, California) ("McCabe"). 71 Fed. Reg. 64738 (Nov. 3, 2006). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stringed musical instruments and components thereof by reason of infringement of one or more of claims 1-6, 8, 9, and 11 of U.S. Patent No. 6,175,066 ("the '066 patent"); claims 1-6 of U.S. Patent No. 5,965,831; claims 1 and 14-22 of U.S. Patent No. 6,891,094 ("the '094 patent"); and claims 1-3, 6-10, 14, 15, 23, 27, 28, and 32 of U.S. Patent No. 5,986,191. The complaint named as respondents Floyd Rose Guitars (Redmond, Washington), Ibanez, Inc. (Hoshino) US (Bensalem, Pennsylvania) ("Hoshino"),

Vigier, Inc. (Grigny, France) (“Vigier”), and Schaller Electronic (Postbauer-Heng, Germany). Hoshino and Vigier have been terminated from the investigation on the basis of settlement agreements. Only claims 8, 9, and 11 of the ‘066 patent and claims 1 and 14-22 of the ‘094 patent remained in the case as of the date of the final ID.

On December 3, 2007, the administrative law judge (“ALJ”) issued a final initial determination (“ID”) finding no violation of section 337, on the ground that the economic prong of the domestic industry requirement was not met as required by section 337(a)(2), (3)(C). McCabe and the Commission investigative attorney filed petitions for review. On December 21, 2007, the Commission issued a notice extending the deadline for determining whether to review the subject ID by fifteen (15) days until February 1, 2008. On February 1, 2008, the Commission issued a notice extending the deadline for determining whether to review the ID to February 8, 2008, and extending the target date for completion of the investigation to April 10, 2008. On February 7, 2008, the Commission issued a notice of a determination to review the subject ID in its entirety, requesting briefing on the issues on review, including certain specific questions. On April 10, 2008, the Commission issued a notice extending the target date to April 24, 2008.

Having considered the submissions on review and the relevant portions of the record, the Commission has determined to terminate the investigation with a finding of no violation for failure to meet the domestic industry requirement.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.41 and 210.45(c) of the Commission’s Rules of Practice and Procedure (19 CFR §§ 210.41, 210.45(c)).

By order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

Issued: April 24, 2008

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C. 20436**

**In the Matter of**

**CERTAIN STRINGED MUSICAL  
INSTRUMENTS AND COMPONENTS  
THEREOF**

**Investigation No. 337-TA-586**

**ORDER**

This investigation was instituted on November 3, 2006, based upon a complaint filed October 3, 2006, and supplemented October 24, 2006, by Geoffrey McCabe (Los Angeles, California) (“McCabe”). 71 Fed. Reg. 64738 (Nov. 3, 2006). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stringed musical instruments and components thereof by reason of infringement of one or more of claims 1-6, 8, 9, and 11 of U.S. Patent No. 6,175,066 (“the ‘066 patent”); claims 1-6 of U.S. Patent No. 5,965,831; claims 1 and 14-22 of U.S. Patent No. 6,891,094 (“the ‘094 patent”); and claims 1-3, 6-10, 14, 15, 23, 27, 28, and 32 of U.S. Patent No. 5,986,191. The complaint named as respondents Floyd Rose Guitars (Redmond, Washington), Ibanez, Inc. (Hoshino) US (Bensalem, Pennsylvania) (“Hoshino”), Vigier, Inc. (Grigny, France) (“Vigier”), and Schaller Electronic (Postbauer-Heng, Germany). Hoshino and Vigier have been terminated from the investigation on the basis of settlement agreements. Only claims 8, 9, and 11 of the ‘066 patent and claims 1 and 14-22 of the ‘094 patent remained in the case as of the date of the final ID.

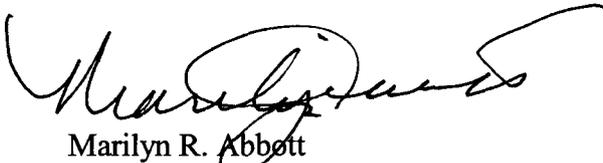
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Having considered the submissions on review and the relevant portions of the record,

**It is hereby Ordered that:**

- (1) This investigation is terminated with a finding of no violation for failure to meet the domestic industry requirement.
- (2) The Secretary to the Commission shall serve a copy of this Order on all parties to the investigation.

By order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

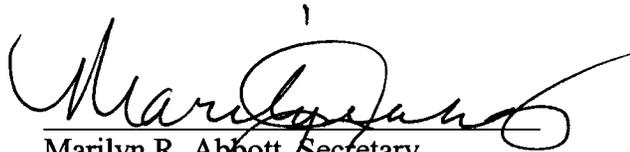
Issued: April 24, 2008

**CERTAIN STRINGED MUSICAL INSTRUMENTS AND  
COMPONENTS THEREOF**

337-TA-586

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION OF NO VIOLATION OF SECTION 337; TERMINATION OF INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, Rett Snotherly, Esq., and the following parties as indicated, on April 25, 2008.



Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
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**PUBLIC VERSION**

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

**In the Matter of**

**CERTAIN STRINGED MUSICAL  
INSTRUMENTS AND COMPONENTS  
THEREOF**

**Investigation No. 337-TA-586**

**COMMISSION OPINION**

On December 3, 2007, the presiding administrative law judge (“ALJ”) (Judge Bullock) issued a final initial determination (“final ID”) finding no violation of section 337 in the above-identified patent-based investigation. The patents at issue are directed toward stringed musical instruments designed for pitch tuning and harmonic tuning of stringed instruments (guitars). U.S. Patent No. 6,175,066 claims a stringed instrument (guitar) with strings that stretch between the neck (of the guitar) and the tailpiece/bridge, with a “fulcrum tremolo” mounted on the tailpiece/bridge to vary the tension and length of the strings between the critical attachment points on the neck and tailpiece/bridge. U.S. Patent No. 6,891,094 claims a similar apparatus which has a tuning adjustment device on the fulcrum tremolo for fine tuning. The ALJ did not reach the questions of infringement, validity, enforceability, standing, or the technical prong of domestic industry requirement,<sup>1</sup> but rather found no violation of section 337 of the Tariff Act of

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<sup>1</sup> The Commission’s rules of practice and procedure provide that the initial determination of the ALJ shall include “...conclusions and the reasons or bases therefor necessary for the disposition of all material issues of fact, law, or discretion presented in the record...” 19 C.F.R. § 210.42(d). Thus, although the Commission may elect in a final determination of no violation not to take a position on other issues, *Beloit Corp. v. Valmet Oy*, 742F.2d 1421, 1423 (Fed. Cir. 1984), the Commission generally anticipates that the ALJs will adjudicate all issues presented in the record.

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1930 on the ground that the complainant's activities did not satisfy the economic prong of the domestic industry requirement. He also issued a recommended determination ("RD") on remedy and bonding.

Complainant Geoffrey McCabe ("McCabe") and the Commission investigative attorney ("IA") filed petitions for review of the ALJ's final ID. Upon consideration of the petitions and responses thereto, the Commission determined to review the subject ID in its entirety.

On review, the Commission has determined to terminate the investigation with a finding of no violation for failure to meet the domestic industry requirement of section 337(a)(2), (3). The following opinion sets forth the reasons for the Commission's determination.

### I. BACKGROUND

The Commission hereby adopts the administrative law judge's findings of fact set out in the final initial determination.

#### A. Procedural History

##### 1. *The Complaint and the Proceedings Before the ALJ*

On November 3, 2006, the Commission instituted this investigation based upon a complaint filed October 3, 2006, and supplemented October 24, 2006, by Geoffrey McCabe (Los Angeles, California) ("McCabe"). 71 *Fed. Reg.* 64738 (Nov. 3, 2006). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stringed musical instruments and components thereof by reason of infringement of one or more of claims 1-6, 8, 9, and 11 of U.S. Patent No. 6,175,066 ("the '066 patent"); claims 1-6 of U.S. Patent No. 5,965,831; claims 1 and 14-22 of U.S. Patent

**PUBLIC VERSION**

No. 6,891,094 (“the ‘094 patent”); and claims 1-3, 6-10, 14, 15, 23, 27, 28, and 32 of U.S. Patent No. 5,986,191. The complaint named as respondents Floyd Rose Guitars (Redmond, Washington) (“Rose”), Ibanez, Inc. (Hoshino) US (Bensalem, Pennsylvania) (“Hoshino”), Vigier, Inc. (Grigny, France) (“Vigier”), and Schaller Electronic (Postbauer-Heng, Germany) (“Schaller”).

McCabe is both the inventor on the asserted patents and the complainant. Hoshino and Vigier have both settled with McCabe, and the investigation has been terminated with respect to these respondents. *See* Notice, June 6, 2007 and July 30, 2007. Both settlements involved license agreements. The only respondents remaining are Rose and Schaller. Rose and Schaller did not participate in the hearing and did not file post-hearing briefs. At the hearing, counsel for complainant represented that McCabe would only be asserting claims 8, 9, and 11 of the ‘066 patent and claims 1, and 14-22 of the ‘094 patent, but not the other patents asserted in the complaint. Tr. at 44-45.

***2. The ALJ’s Final Initial Determination***

On December 3, 2007, the administrative law judge (“ALJ”) issued a final initial determination (“ID”) finding no violation of section 337 for failure to meet the domestic industry requirement. The ALJ found that subject matter jurisdiction was established by the admission of Rose and Schaller that they imported the accused Speedloader products into the United States. ID at 7-8. The ALJ found personal jurisdiction was established by the respondents’ response to the complaint and participation in discovery and pre-hearing briefing. The ALJ denied McCabe’s motion to draw any adverse inferences against Rose under Commission Rule 210.17(d) for failure to appear at the hearing, stating that Rose had filed a pre-hearing brief, and

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that when Rose gave notice to the other parties that it would not participate in the hearing, McCabe had not objected at that time or made any representation that he would be prejudiced. ID at 4.<sup>2</sup>

On the merits, the ALJ found that the complainant had failed to show that his alleged research and development and licensing activities meet the economic prong of the domestic industry requirement as required by section 337(a)(2), (3)(C). The ALJ did not address the other issues raised in this case. With regard to research and development, the ALJ held that McCabe's \$8,500 expenditures on prototypes were significantly less than those of previous complainants for which the Commission found a domestic industry existed, and did not constitute a substantial investment. ID at 23-24. With regard to licensing, the ALJ held that the complainant must receive revenue from his licensing activities, ID at 11, and that even counting the licenses arising from settlement with two Commission respondents after the filing of the complaint (Hoshino and Vigier), McCabe's revenue was significantly less than the complainant in *Certain Digital Processors* who received "millions of dollars in royalties due to the successful licensing of its patent portfolio." ID at 24 (quoting *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same* ("Certain Digital Processors"), Inv. No. 337-TA-559, Initial Determination at 94 (May 11, 2007)). The ALJ issued a recommended determination (RD) on remedy and bonding in the event that the Commission should find a violation, recommending a limited exclusion order, a cease and desist order against Rose, and a bond in the amount of \$3 per infringing article to permit temporary importation during the

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<sup>2</sup> McCabe did not petition for review of the denial of his motion.

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Presidential review period.

### *3. Petitions for Review*

McCabe and the Commission investigative attorney (“the IA”) filed petitions for review of the ALJ’s final ID. McCabe argued that the ALJ erred as a matter of law in comparing the investments made by McCabe to those of high technology companies, without considering the nature of the musical instrument marketplace. McCabe Petition for Review at 14-15. McCabe stated that the Commission has recently held that “there is no mathematical threshold test” for the economic prong of the domestic industry requirement, which is based instead on “an examination of the facts in each investigation, the articles of commerce, and the realities of the marketplace.” McCabe Petition for Review at 11-12 (citing *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546, Commission Op. at 39 (June 22, 2007) (citing *Certain Double-Sided Floppy Disk Drives and Components Thereof* (TEO), Inv. No. 337-TA-215 (May 1986))).

McCabe pointed to the Commission’s statement that “small businesses in this country can become larger ones, and there is a public interest in protecting them against unfair theft of their property rights.” McCabe Petition for Review at 12 (citing *Certain Static Random Access Memories and Integrated Circuit Devices Containing Same, Processes for Making Same, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-325, Order No. 9 at 4 (May 14, 1991). He also referred to *Certain Audible Alarm Devices*, Inv. No. 337-TA-365, Initial Determination at 50 (Feb. 2, 1995), non-reviewed by Notice of Mar. 21, 1995 (“there is no requirement under Section 337 that an industry be a certain size”). In the context of licensing, McCabe explained that the unit price and sale volume of musical instruments is lower than that of the products at issue in *Digital Processors*, cited by the ALJ in the subject ID, making

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comparison to *Digital Processors* arbitrary and unfair. McCabe Petition for Review at 17 (discussing ID at 24). McCabe stated that the Commission has moved towards a simpler test to determine the existence of a domestic industry under section 337(a)(3)(C). McCabe Petition for Review at 13, 15 (citing *Certain Microlithographic Machines and Components Thereof*, Inv. No. 337-TA-468, ID at 346 (Jan. 29, 2003)(noting that the Commission no longer compares what percent of an article is manufactured in the United States versus what percent of that article was manufactured abroad), as modified by Commission Notice (Mar. 17, 2003) (deciding not to review analysis in ID of section 337(a)(3)(C), but taking no position on analysis of section 337(a)(3)(A) and (B)).

McCabe argued that the licensing revenue he received from Hoshino and Vigier after the filing of the complaint should count toward satisfaction of the domestic industry requirement. McCabe Petition for Review at 13, 18 (citing *Certain Concealed Cabinet Hinges and Mounting Plates*, Inv. No. 337-TA-289, Commission Op. at 21 (Jan. 8, 1990) (declining to adopt the ALJ's finding that the date of the last supplement to the complaint was the critical date); *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, Commission Op. at 15-18 (Nov. 1996) (Commission takes into account that complainant filed for bankruptcy after the filing of the complaint).

The IA stated that there is no absolute threshold for "substantial investment" and agreed with McCabe that *Digital Processors* is the wrong benchmark because the musical instruments industry is a smaller industry than the parallel processing semiconductor industry. IA Petition for Review at 11. In addition, the IA pointed to McCabe's out of pocket costs, presentation of designs at trade shows, and incorporation of a now defunct company. *Id.* at 11-12.

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The IA agreed that McCabe’s research and development activities and licensing activities should satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(C). Moreover, the IA stated that the ALJ ignored McCabe’s “sweat equity,” pointing out that McCabe put in a substantial effort over many years to license his patents, noting his licensing to Hoshino and Vigier (which occurred after the filing of the complaint), and arguing that this activity meets the economic prong of the domestic industry requirement under section 337(a)(3)(C). IA Petition for Review at 11-14.

Rose responded that McCabe does not meet the criteria for the economic prong of domestic industry under research and development or licensing. Rose pointed to legislative history that the domestic industry requirement is supposed to serve a gatekeeping function. Rose Response at 4 (citing 132 Cong. Rec. H9965 (Oct. 14, 1996)). Rose stated that McCabe has never had facilities outside his personal residence, does not engage in the relied-on business full-time, and has no formal record keeping. *Id.* at 6. Rose stated that the ALJ was correct in finding that McCabe’s research and development total \$8,500 rather than \$12,500, and that over 17 years this would amount to \$500 a year, which Rose argued is a *de minimis* investment and not the substantial exploitation of intellectual property required by section 337(a)(3)(C). *Id.* at 6-7. With respect to licensing, Rose argued that McCabe’s activities are not substantial, that the license agreements agreed to as part of the settlement with various respondents did not include U.S. Patent No. 6,891,094, and that, in any case, it would be against public policy to allow complainants to meet the domestic industry requirement after the fact as a result of settlements by respondents who would otherwise be immune from suit from a complainant who did not meet the domestic industry requirement before settlement.

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### *4. Commission Review*

On December 21, 2007, the Commission issued a notice extending the deadline for determining whether to review the subject ID by fifteen (15) days until February 1, 2008. On February 1, 2008, the Commission issued a notice extending the deadline for determining whether to review the ID to February 8, 2008, and extending the target date for completion of the investigation to April 10, 2008.

On February 7, 2008, the Commission determined to review the subject ID in its entirety, and issued a notice requesting briefing on the issues on review, including the following three groups of questions:

(1) What type and level of research and development is necessary to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(C)? Should it differ depending upon the size of the relevant marketplace or whether the patent holder is an individual versus some other entity? What is the appropriate industry market in which we should examine the economic prong of the domestic industry requirement: the market for certain guitars, all guitars, certain musical instruments, or all musical instruments or some other industry market? How do these criteria apply in this case? How is your argument supported by the record in this case? Does research and development prior to the issuance of a patent count towards the domestic industry requirement?

(2) What type and level of licensing activity is necessary to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(C)? Is the relevant time period for licensing activity before or after the filing of the complaint, or both? How do these criteria apply in this case? How is your argument supported by the record in this case? For the purposes of this question, consider whether licensing negotiations would qualify if they did not result in an actual license during a relevant period of time.

(3) Is the relevant industry in this case “in the process of being established” pursuant to section 337(a)(2)? Was this issue properly raised before the ALJ and in the petitions for review? How is your argument supported by the record in this case? How do the criteria for an industry in the process of being established differ from the criteria for an industry that already exists?

McCabe, Rose, and the IA submitted responses to the questions on review, and replies thereto.

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On April 10, 2008, the Commission issued a notice extending the target date to April 24, 2008.

**B. The Complainant's Domestic Activities**

***1. Alleged Research and Development Activities***

In 1988, McCabe had a prototype of his fulcrum tremolo tuning device manufactured at a cost of \$3,500. ID at 13. Then in 1990, McCabe had a second prototype developed at a cost of \$4,000. In 1998, McCabe developed a third prototype that could be used on a Fender Stratocaster style guitar. ID at 13. In 2000, McCabe developed a fourth prototype, and between 2002 and 2003 developed a fifth prototype as part of a collaboration with Sonic Sales. ID at 14.

***2. Alleged Licensing Activities***

McCabe attended the National Association of Music Merchants ("NAMM") shows and entered into talks with potential manufacturers. Drawings of McCabe's design were included in Kahler International Inc.'s catalog at the 2006 NAMM show which were compatible with the Fender standard. ID at 14-15.

McCabe did not consummate any licenses before the filing of the complaint. However, he negotiated with several companies, as discussed below. After the filing of the complaint, he did settle with and enter into licenses with Hoshino and Vigier. ID at 18-19.

McCabe asserts that in 2001 he received a licensing offer from Seymour Duncan Company. ID at 15. He states that the deal fell through because of a deteriorating business relationship. ID at 16. The ALJ found that McCabe did not receive an offer to license his product but rather that Seymour Duncan was assisting McCabe in licensing Rose's patent. ID at 23.

McCabe also asserts that he received a licensing offer from Kahler. This deal fell through

## **PUBLIC VERSION**

due to concerns on Kahler's part. ID at 16. The ALJ found no evidence that there was an agreement between these parties at any time. ID at 23.

In 2002-2003, Sonic Sales and Jack Westheimer expressed interest in licensing and manufacturing McCabe's design. The companies decided not to manufacture McCabe's guitars for fear of infringing Rose's "Speedloader" patent. ID at 16-17. McCabe entered into talks with Rose at this time, including licensing discussions. McCabe also discussed licensing with respondent Hoshino, and after this investigation commenced, licensed respondents Hoshino and Vigier.

Later, Kahler again considered licensing from McCabe but told McCabe that he must eliminate the possibility that Rose might sue a manufacturer on the basis of its Speedloader patent. ID at 18.

### **C. The Patented Instruments**

The invention relates to improved stringed instruments (guitars) which contain components which allow a musician to optimally tune the strings. Generally, when a musician tunes a stringed instrument, he or she turns a peg which tightens the strings. This not only increases the tension of the strings, but also changes the length of the strings. This is a problem because the pitch of the string depends on the tension but the harmonic properties depend on the length. '094 patent, col. 1, lines 50-60. Thus, the usual method of pitch tuning may affect the harmonic tuning of the instrument. The present invention allows the musician to do both pitch tuning and harmonic tuning without one disturbing the other.

U.S. Patent No. 6,175,066 (the '066 patent) issued on January 16, 2001. JX-1. The patent issued from an application no. 08/027,729, filed January 14, 1993, which was a divisional

## PUBLIC VERSION

of application no. 07/607,458, filed October 31, 1990 (issued as non-asserted U.S. Patent No. 5,198,601). The '066 patent features a "fulcrum tremolo" which sits between the strings' critical attachment points on the neck and the tailpiece/bridge and allows the musician to adjust the length and tension of the strings. Claims 8, 9, and 11 are asserted. Independent claim 8 recites:

8. A stringed musical instrument comprising an elongated neck and a body attached to one end of said neck, a bridge-tailpiece assembly mounted on said body, a plurality of elongated strings, means on said neck for supporting and forming a first critical point for each of said strings, said bridge-tailpiece having a plurality of bridge elements, said plurality of bridge elements each having a surface forming a second critical point for each of said strings, said bridge-tailpiece assembly comprising a fulcrum tremolo having a fulcrum axis, said bridge elements being pivotably displaceable by an essentially constant radius about said fulcrum axis, wherein at least one of said bridge elements has an enlarged curved surface and said enlarged curved surface extending generally in the direction of said strings, said second critical point travels a critical distance along the surface of said enlarged curved surface and displaces the second critical point from said essentially constant radius during the pivoting of said fulcrum tremolo about said fulcrum axis.

U.S. Patent No. 6,891,094 (the '094 patent) issued on May 10, 2005. JX-3. The patent is a continuation of application no. 08/027,729, filed January 14, 1993 (issued as the '066 patent), which itself is a divisional of the application that issued as non-asserted U.S. Patent No. 5,198,601. *Id.* The '094 patent teaches a fulcrum tremolo with a tuning adjustment device for fine tuning. Claims 1, and 14-22 are asserted. Independent claim 1 recites:

1. A stringed musical instrument comprising: a body, a neck extending outwardly from said body, a head located opposite said body on said neck, at least one string extending from said body to said head, said at least one string having a first end and a second end, a first mechanism on said head for supporting and forming a first critical point for said at least one string, a second mechanism on said body for supporting and forming a second critical point for said at least one string, said first end secured to said head and said second end secured to said body, and a tuning adjustment device comprising: a first portion to tension said at least one string to playing pitch from an untensioned condition to at least one pitch tuning quickly, and a second portion to further tension said at least one string at playing pitch,

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wherein said second portion is in close proximity to said first portion, wherein said tuning adjustment device is located on said body, and said tuning adjustment device further comprising: at least one anchor connected with said second end, and at least one third portion for pivoting said at least one anchor about an axis that is transverse to the axis of said at least one string in a first direction to tension said at least one string to said at least one pitch tuning.

## II. ANALYSIS

### A. Standard of Review

Under the Administrative Procedure Act, upon review of the initial determination of the ALJ, “the agency has all of the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.” 5 U.S.C. § 557(b) (*quoted in Certain Acid-Washed Garments and Accessories*, Inv. No. 337-TA-324 (U.S.I.T.C. Aug. 6, 1992)); 19 C.F.R. § 210.45(c). In other words, once the Commission decides to review the decision of the ALJ, the Commission may conduct a review of the findings of fact and conclusions of law presented by the record under a *de novo* standard.

### B. The Domestic Industry Requirement

#### 1. Section 337(a)(2) and (a)(3)

The domestic industry requirement of section 337 is set out at section 337(a)(2) and (a)(3).

Section 337(a)(2) provides:

(2) Subparagraphs (B), (C), (D), and (E) of paragraph (1) apply only if an industry in the United States, with respect to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established.

Section 337(a)(3) provides:

(3) [A]n industry in the United States shall be considered to exist if there is in

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the United States, with respect to articles protected by the patent . . . concerned

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- (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.

The Commission has divided the domestic industry requirement into an economic prong (which requires certain activities) and a technical prong (which requires that these activities relate to the intellectual property being protected), such that an industry must exist or be in the process of being established. Section 337(a)(2), (a)(3); *see, e.g., Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376 (“*Wind Turbines*”), USITC Pub. 3003 (Nov. 1996), Comm’n Op. at 14-17. Under the definitions of section 337(a), an industry exists if there is “significant investment in plant and equipment,” “significant employment of labor or capital,” or “substantial investment in [the patent’s] exploitation, including engineering, research and development, or licensing.” Section 337(a)(3)(A),(B),(C). An industry is “in the process of being established” if the patent owner “can demonstrate that he is taking the necessary tangible steps to establish such an industry in the United States,” S. Rep. 100-71 at 130, and there is a “significant likelihood that the industry requirement will be satisfied in the future.” H. Rep. 100-40 at 157.

With respect to section 337(a)(3)(A) and (B), the technical prong is the requirement that the investments in plant or equipment and employment in labor or capital are actually related to “articles protected by” the intellectual property right which forms the basis of the complaint.

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Section 337(a)(3); *see Wind Turbines* at 14-17. With respect to section 337(a)(3)(C), the technical prong is the requirement that the activities of engineering, research and development, and licensing are actually related to the asserted intellectual property right.

Section 337(a)(2) and (a)(3) were added to section 337 in the Omnibus Trade and Competitiveness Act of 1988, 102 Stat. 1107, Pub. L. 100-418 (August 23, 1988) (“OTCA”).<sup>3</sup> Here, complainant McCabe relies on section 337(a)(3)(C), specifically its provisions relating to research and development and licensing. He also relies on that part of section 337(a)(2) which refers to an industry “in the process of being established.”

Whether an investment in domestic industry is “substantial” is a fact-dependent inquiry for which the complainant bears the burden of proof.

### *2. The Legislative History*

The legislative history of section 337(a)(3)(C) states that:

an industry exists in the United States with respect to a particular article involving an intellectual property right if there is, in the United States,--

1. significant investment in plant and equipment;
2. significant employment of labor or capital; or
3. substantial investment in the exploitation of the intellectual property right including engineering, research and development or licensing.

The first two factors in this definition have been relied on in some Commission decisions finding that an industry does exist in the United States. The third factor, however, goes beyond ITC’s recent decisions in this area. The definition does not require actual production of the article in the United States if it can be demonstrated that significant investment and activities of the type enumerated are taking place in the United States. Marketing and sales in the

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<sup>3</sup> The OTCA also eliminated the requirement that a domestic industry be “economically and efficiently operated” as well as the requirement of proving injury to a domestic industry where unfair competition based on violation of federal statutory rights is alleged, *e.g.*, patent, trademark, and copyright infringement, as opposed to unfair competition based on violation of common law rights, *e.g.*, trade dress infringement.

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United States alone would not, however, be sufficient to meet this test. The definition could, however, encompass universities and other intellectual property owners who engage in extensive licensing of their rights to manufacturers.

H. Rep. 100-40 at 157 (1987). Legislative debates in the previous Congress also contain the following remarks by Representative Kastenmeier<sup>4</sup>:

For those who make substantial investments in research, there should be a remedy. For those who make substantial investments in the creation of intellectual property and then license creations, there should be a remedy. Let me give one example, there's a start-up biotech firm in my state. Its product is its patents. It hasn't reached the stage of manufacture. It doesn't have the money. But it will reach that point, by licensing its patents to others. Should we deny that firm the right to exclude the work of pirates? Our legislation would say no. A party could get relief if it has made significant investment in R & D, engineering, or licensing.

132 Cong. R. H1782 (Apr. 10, 1986).

The legislative process seems to have begun in response to the Commission's investigation in the *Gremlins* case, in which Warner Brothers alleged injury to its business in merchandise bearing registered Gremlins copyrights. *Certain Products with Gremlin Character Descriptions*, Inv. No. 337-TA-201. In the *Gremlins* case, the Commission, *inter alia*, reversed that part of the ALJ's final ID that Warner Brothers, Inc.'s licensing division constituted a domestic industry, because at that time licensing could not constitute a domestic industry. *See* Commission Opinion at 9-11.<sup>5</sup> Warner Brother's licensing division, the Licensing Company of America, included market research, sales, sales promotion, graphics services, financial control,

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<sup>4</sup> Then-Chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary.

<sup>5</sup> In the *Gremlins* case, there was a domestic industry based on domestic manufacture by Warner Brothers' licensees, but Warner Brothers could not meet the then-existing injury requirement. Commission Opinion at 11-21.

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and business affairs departments. Shortly after the *Gremlins* investigation, Representative Kastenmeier called for amendment to section 337 to “avoid unfortunate results which have occurred in some recent cases, such as Gremlins.” 132 Cong. R. H1782 (Apr. 10, 1986) (discussed in *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-559, Initial Determination at 89 (May 11, 2007), *nonreviewed in relevant part* by Commission Notice (August 6, 2007)); *Trade Reform Legislation, Hearings Before the Subcommittee on Trade of the Committee on Ways and Means, Part II.*, 99<sup>th</sup> Cong. 8 (1986) (testimony of Rep. Robert W. Kastenmeier, Chairman, Subcommittee on Courts, Civil Liberties and the Administration of Justice). The 1988 amendments to section 337 avoided such an outcome with respect to licensing by adding section 337(a)(3)(C), allowing licensing and other non-manufacturing activities, such as research and development, to qualify as a domestic industry. The legislative history of the OTCA also indicates that “[m]arketing and sales in the United States alone would not, however, be sufficient to meet this test.” S. Rep. 100-71 at 129 (1987).

As for the legislative history of section 337(a)(2), an industry would be considered “in the process of being established” if the patent owner “can demonstrate that he is taking the necessary tangible steps to establish such an industry in the United States.” S. Rep. 100-71 at 130. “The owner of the intellectual property right must be actively engaged in steps leading to the exploitation of the intellectual property, including application engineering, design work, or other such activities. The Commission should determine whether the steps being taken indicate a significant likelihood that the industry requirement will be satisfied in the future.” H. Rep. 100-40 at 157. Moreover, “the mere ownership of a patent or other form of intellectual property

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rights would not be sufficient to satisfy this test.” S. Rep. 100-71 at 129.

**C. WHETHER A DOMESTIC INDUSTRY EXISTS ON THE BASIS OF  
SUBSTANTIAL INVESTMENT IN THE EXPLOITATION OF THE  
PATENT THROUGH RESEARCH AND DEVELOPMENT OR  
LICENSING**

***1. Submissions of the Parties Regarding Section 337(a)(3)(C)***

In responding to the Commission’s notice of review, McCabe states that section 337(a)(3)(C) covers “activities genuinely designed to exploit their intellectual property” as opposed to those merely standing on ownership of a U.S. patent. McCabe Submission at 18 (citing S. Rep. 100-71 at 130 (1987)). McCabe elaborates that qualifying non-manufacturing activities include initial research and development, engineering, initial designs, creating a prototype, testing, final design, marketing, distribution, sales, and licensing. McCabe Submission at 18-19 (citing *Certain Dynamic Random Access Memories, Components Thereof, and Products Containing Same (“DRAMs”)*, Inv. No. 337-TA-242, U.S.I.T.C. Pub. No. 2034 at 62 (“distribution, research, development, and sales”). McCabe points to a determination that non-manufacturing activities may take the form of the development and marketing of articles practicing the patents. McCabe Submission at 19 (citing *Certain Microcomputer Memory Controllers*, Inv. No. 337-TA-331, Initial Determination (Order No. 6) at 6-7, 1992 WL 811299 (January 8, 1992), *unreviewed by Commission Notice*, 57 *Fed. Reg.* 5170 (February 12, 1992) (research leading to the issuance of a patent, developing, and marketing created genuine issue of material fact regarding existence of domestic industry). In *Diltiazem*, the Commission acknowledged research and development consisting of developing dosage units and seeking FDA approval, whereas in *Integrated Circuits*, the ALJ noted the collaboration between complainant’s

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engineers and prospective customers. McCabe Submission at 19 (citing *Certain Diltiazem Hydrochloride and Diltiazem Preparations*, Inv. No. 337-TA-349, USITC Pub. No. 2902, Initial Determination at 141-45 (June 1995), unreviewed by Commission Notice (March 30, 1995) and *Certain Integrated Circuits, Processes for Making Same, and Products Containing Same*, Inv. No. 337-TA-450, USITC Pub. No. 3624, Initial Determination at 153 (August 2003), unreviewed by Commission Notice (June 21, 2002)). McCabe states that “the level of research and development should differ depending on the “realities of the marketplace” which may differ among different industries. McCabe Submission at 19-20 (citing *Certain Male Prophylactic Devices*, Inv. No. 337-TA-546 (August 1, 2007) at 39). McCabe states that the relevant industry is the guitar hardware manufacturing industry, which uses simple metal parts and has a low cost for developing prototypes. McCabe Submission at 21. Moreover, McCabe argues that the Commission should give weight to the time and “sweat equity” of small business and individuals, because small businesses and individuals are more likely to invest their own time, use free resources, and work under strict budgetary restraints even within a given industry. McCabe Submission at 20-21. McCabe argues that research and development before the issuance of a patent should count towards the domestic industry requirement because a patent only issues after the patentee has already refined the invention to the point where the invention may be practiced without “undue experimentation.” McCabe Submission at 24 (referring to the standard for enablement understood by the courts to be required by 35 U.S.C. § 112).

McCabe argues that, as with research and development, one cannot compare licensing royalties across industries. McCabe Submission at 25-26. Moreover, McCabe states that licensing patents takes time to accomplish and that the amount of royalties earned will increase

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over time, and argues on this basis that it is not appropriate to create an “arbitrary” standard for the domestic industry requirement. McCabe Submission at 26. McCabe states that in cases where the Commission has relied solely on licensing activity to satisfy the domestic industry requirement, it has simply required that the licensing agreements have produced revenue.

McCabe Submission at 26 (citing discussion of requirements in *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-559, Initial Determination at 96 (May 11, 2007), *nonreviewed in relevant part* by Commission Notice (August 6, 2007)). However, McCabe argues based on the language of section 337(a)(3)(C) and its legislative history that licensing negotiations need not result in an actual license where part of the patentee’s activity is “designed to exploit their intellectual property.” McCabe Submission at 28 (quoting S. Rep. 100-71 at 130). McCabe states that while the Commission has often used the filing of the complaint as the cut-off point for satisfaction of the domestic industry requirement that it has used the end of the discovery period as the cut-off point. McCabe Submission at 26 (citing *Certain Concealed Cabinet Hinges*, 337-TA-289, Commission Opinion at 21). McCabe also argues that the relevant time for licensing activity is both before and after filing of the complaint, relying on *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, at Commission Opinion at 22-26, for the proposition that the Commission may even take into account events occurring after the target date for whether domestic industry exists. McCabe Submission at 26. In that investigation, McCabe stated the Commission noted that the complainant continued to exploit the patents at issue.

Rose submits that the domestic industry requirement could differ depending on the

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relevant marketplace, but is not affected by whether the patent holder is an individual or a business entity. Rose Submission at 5. Rose agrees that investments in research and development may be made prior to the issuance of a patent. Rose Response at 5.

Rose cites legislative history for the proposition that licensing must be “extensive” and that “marketing and sales alone” are not sufficient. Rose Submission at 9 (citing 132 Cong. R. H9965). Rose states that the Federal Circuit has determined that the cut-off for determining the existence of an “industry” entitled to protection under section 337 is “the date on which the complaint was filed rather than the date on which the Commission rendered its determination.” Rose Submission at 10 (citing *Bally/Midway Mfg. Co. v. USITC*, 714 F.2d 1117, 1121 (Fed. Cir. 1983)). Rose suggests that such a bright-line rule would prevent complainants who do not already have a legitimate domestic industry from using the Commission to create a domestic industry which would not otherwise exist, by extracting settlements from respondents after the filing of an (unworthy) complaint. Rose Submission at 10. With regard to these settlements from litigation, Rose notes that respondents may choose to take licenses because of a business decision that it is cheaper to settle than to defend infringement suits. Rose Submission at 13 (citing *EWP Corp. v. Reliance Universal, Inc.*, 755 F.2d 898, 907-08 (Fed. Cir. 1985)). Rose argues that the lowest level of licensing activity which the Commission has found substantial was in *Digital Satellite* in which there were four licenses (all executed before the filing of the complaint) and the complainant also had five employees employed in connection with a licensing system and incurred legal fees in litigation unconnected to the ITC complaint. Rose Submission at 11 (discussing *Certain Digital Satellite System Receivers and Components Thereof*, 337-TA-392, Initial Determination at 10-12, for which the Commission took no position on this issue by

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Commission Notice (December 4, 1997)).

The IA submits that it would be contrary to Commission precedent to attempt to quantify a baseline level of research and development that every complainant must meet regardless of the circumstances. IA Submission at 2-3 (citing *DRAMs* at 61-62; *Certain Double-Sided Floppy Disk Drives and Components Thereof* (temporary relief), Inv. No. 337-TA-215, 227 USPQ 982, 989 (USITC 1986) (Commission Opinion)). The IA states that research and development does not have to result in a completed product that is offered for sale in order to count towards the domestic industry requirement. IA Submission at 3 (citing *Certain Dynamic Sequential Gradient Compression Devices and Components Thereof*, Inv. No. 337-TA-335, Initial Determination at 64 (May 18, 1992) (temporary relief), *nonreviewed in relevant part* by Commission Notice (June 15, 1992)). Moreover, the IA agrees that past research and development may count towards the domestic industry requirement, even if performed before the issuance of the patent. IA Submission at 3-4 (citing *Certain Video Graphic Display Controllers and Products Containing Same*, Inv. No. 337-TA-412, Initial Determination at 12-13 (April 30, 1999), *nonreviewed in relevant part* by Commission Notice (July 19, 1999)); IA Submission at 5 (citing *Certain Battery-Powered Ride-On Toy Vehicles and Components Thereof*, Inv. No. 337-TA-314, Order No. 6 at 20, *unreviewed in relevant part* by Commission Notice (January 4, 1991); *Certain Plastic Encapsulated Integrated Circuits*, Inv. No. 337-TA-315, Initial Determination at 85 (December 3, 1991) (research from 1976-1990 was considered in regarding a patent filed in 1973 and issued in 1977)).

The IA submits that activities may count towards the domestic industry requirement even if a complainant cannot reduce all of its domestic activities to dollar amounts. IA Submission at

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4 (citing *Male Prophylactic Devices* at 46 (“PTI is a small player in this market but its size relative to the dominant firms does not operate to preclude requested relief”); IA Reply Submission at 4 (citing *Certain Strip Lights*, Inv. No. 337-TA-287, Initial Determination at 30 (June 27, 1989, *nonreviewed in relevant part by* Commission Notice (August 17, 1989)). The IA states that Rose may not make any comparison to *Certain Motor and Transmission Systems* because the Commission chose not to take a position on the issue of the economic prong of domestic industry in that case. IA Reply Submission at 3. The IA states that the examination of the “realities of the marketplace” as part of the domestic industry analysis should focus on “broad brush” factors. IA Submission at 6. The IA states that “there is no need to undergo the complex analysis of defining the relevant market for the domestic goods in question as may be required in analyzing an antitrust cause of action...or to assess the interchangeability or level of competition between or among certain types of guitars or other musical instruments.” IA Submission at 6.

The IA notes that the Commission has considered licenses concluded after the filing of the complaint in *Certain Strip Lights*, Inv. No. 337-TA-287, Initial Determination at 49 (June 27, 1989), *nonreviewed in relevant part by* Commission Notice (August 17, 1989) (one of the licenses was entered into after the filing of the complaint). The IA suggests that there are policy considerations that may favor so doing, *e.g.*, respondents may not take a license from a small business or individual unless and until the respondents believe that the small business or individual has the resources to bring suit; on this basis, the IA argues that the existence of a domestic industry should not depend on whether a respondent refuses to take a license before being sued. IA Submission at 7-8 (relying on *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-559 at 96 (May

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11, 2007), *nonreviewed in relevant part* by Commission Notice (August 6, 2007) (licenses taken as part of settlement). The IA makes the statutory argument that “substantial investment in [the patent’s] exploitation, including...licensing” does not require that a license exist, and that investment expenditures themselves count towards satisfaction of the requirement. IA Submission at 8 (interpreting section 337(a)(3)(C)). However, the IA concedes that there has not yet been a case in which the Commission relied on licensing for satisfaction of the domestic industry requirement in which no license has been executed. IA Submission at 9.

***2. Did McCabe Demonstrate Substantial Investment in the Exploitation of McCabe’s Patents Through Research and Development or Licensing?***

McCabe argues that he has genuinely exploited his patents and completed all activities to ready the product for market. McCabe Submission at 23. He states he has completed all the necessary non-manufacturing steps for at least one product related to his patents. McCabe Submission at 25. McCabe contends that in addition to the five prototypes (which McCabe states he made for \$12,500),<sup>6</sup> he also possesses drawings, schematics, data sheets, building diagrams, business plans, spread sheets, cost analysis, and a database of models, part numbers, and costs, raw type I and type II base plates with formal details, computer-generated three-dimensional diagrams, formalized drawings, and folder groupings. McCabe Submission at 22; McCabe Reply Submission at 5 (citing CX-23, -13, -7, -58, and -6).

McCabe argues that he has not only received revenue from his licensing agreements with Hoshino and Vigier (resulting from settlements of this investigation) but that he has also “shown

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<sup>6</sup>As discussed above, the ALJ found the investment to have been \$8,500.

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activities designed to exploit his intellectual properties which led to these licensing agreements.” McCabe Submission at 28 (relying on CX-3, -32,- 44,- 50,- 52,- 53, -54, -66, -97.) McCabe asserts that the settlement agreements with Hoshino and Vigier cover both the ‘066 and the ‘094 patent. McCabe Reply Submission at 7-8 (citing Orders No. 9 and 11).

Rose states that McCabe’s activities are *de minimis*, as he has never had employees, has no formal business plan, was unable to provide necessary assurances to prospective licensees, and has incurred no legal fees in connection with licensing prior to initiation of the complaint. Rose Submission at 11. Moreover, Rose argues that McCabe’s pre-complaint attempts to license are unrelated to the settlement agreements with Hoshino and Vigier, that McCabe admits that Hoshino and Vigier were previously uninterested in licensing, and that e-mails and meetings at trade shows should not qualify as investment in licensing. Rose Submission at 12. Rose argues that, because the [[

]], the licenses do not constitute exploitation of the asserted patent, and that, in any event, U.S. Patent No. 6,891,094 is not the subject of a license. Rose concludes that the fact of a license agreement itself cannot be considered in isolation from the activity which produced it.

Rose argues that the \$8,500 which McCabe invested in developing prototypes does not satisfy the domestic industry requirement, citing *Certain Motor and Transmission Systems and Devices Used Therein, and Products Containing Same*, Inv. No. 337-TA-561, where the Commission took no position on this issue. Rose Submission at 5-6. Rose states that McCabe had no formal record keeping,<sup>7</sup> that none of McCabe’s schematics had been formalized, and that

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<sup>7</sup> McCabe and the IA note that Rose’s basis for this assertion was a confidential memorandum in support of summary determination by respondent Schaller which is not in evidence. McCabe Reply

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the \$8,500 investment in prototypes over 17 years amounts to \$500 per year. Rose Submission at 7. Rose argues that McCabe has failed to meet his burden of proof, as there is no record proof of the “sweat equity” which the IA alleges to exist and there is no proof that any “steadfast activities” would be a substantial investment in the relevant marketplace. Rose Submission at 8. Rose submits that these activities are consistent with the desires of patent holders to develop successful businesses but that McCabe’s activity is *de minimis*. Rose Submission at 9.

The IA argues that McCabe’s prototypes constitute a domestic industry, especially given his size in the market and the unquantified effort which McCabe has contributed to his work but which is not included in the \$8,500 value of the prototypes. IA Submission at 4. The IA cites, *inter alia*, 1989 manufacturing/licensing discussions with Gary Kahler and Gibson Guitar Company, 1998 and 2000 discussions with the Seymour Duncan Company, and 2000 and 2004 discussions with Rose, RKS Guitars, and Hoshino, and the ultimate settlement licensing agreements with Hoshino and Vigier, and intervening discussions along the way. IA Submission at 10-17. The IA states that there is no evidence that the settlement agreements were some sort of sham or that the asserted products of the licensed parties are not covered by the asserted patents. IA Reply Submission at 6.

*Discussion*

McCabe relies on section 337(a)(3)(C). We emphasize that there is no minimum monetary expenditure that a complainant must demonstrate to qualify as a domestic industry under the “substantial investment” requirement of this section. We agree with the parties that the

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Submission at 4; IA Reply Submission at 2.

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requirement for showing the existence of a domestic industry will depend on the industry in question, and the complainant's relative size. Moreover, we agree with the parties that there is no need to define or quantify the industry itself in absolute mathematical terms.

McCabe had five prototypes manufactured: (1) McCabe had a first prototype manufactured in 1988 for \$3,500, (2) a second prototype manufactured in 1990 for \$4,000, (3) a third prototype after the 1988 NAMM show, (4) a fourth prototype in 2002-2003 presented at the 2003 NAMM show, and (5) a fifth prototype presented at the 2005 NAMM show. ID at 13-14. McCabe argues that his total expenditures were \$12,500 and the ALJ found that the total expenditures were \$8,500.

McCabe refers to various other activities, *e.g.*, alleged "sweat equity." We acknowledge that McCabe has expended such non-monetary resources in addition to the above expenditures found by the ALJ. While we do not discount the concept of sweat equity, documentation thereof in this case lacked sufficient detail. A precise accounting is not necessary, as most people do not document their daily affairs in contemplation of possible litigation. Nevertheless, evidence or testimony would have to demonstrate a sufficiently focused and concentrated effort to lend support to a finding of a "substantial investment."

With respect to licensing, we do not find that McCabe's pre-complaint efforts to obtain licenses constitute a substantial investment. McCabe attended trade shows and engaged in discussions with various manufacturers. However, his only consummated licenses were acquired as the product of settlements with respondents to this investigation, after the filing of the complaint. While a consummated license achieved prior to filing a complaint is not a prerequisite for us to give weight to pre-complaint efforts to license a patent, the absence of any actual

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licenses prior to a complaint is a factor we consider. Moreover, we find that McCabe's unsuccessful pre-complaint licensing activities in this instance were not substantial under the evidence before us.

The legislative history of the current domestic industry requirement sets forth the examples of bio-tech startups, universities, and the *Gremlins* investigation which provide guidance as to when a domestic industry in research and development, licensing, or both might exist. Even taking into account that McCabe is an individual and that the market for guitar parts, however defined, is relatively small, we determine that McCabe has failed to provide the Commission with sufficient evidence that his efforts fall within the ambit prescribed in the legislative history. In sum, before he filed his complaint, McCabe's efforts were directed mainly at developing prototypes and, unsuccessfully, at finding a firm that would license or begin to make his product. We are mindful that access to section 337 should not be foreclosed to individual inventors simply because their operations or activities are not on the scale of many corporations or universities. Nevertheless, we find that McCabe has not provided sufficient evidence of substantial investment of the type described in section 337(a)(3)(C) to show that an industry in the United States exists.

**D. IS THERE A DOMESTIC INDUSTRY “IN THE PROCESS OF BEING ESTABLISHED”?**

McCabe asserts that there is an existing domestic industry for the asserted patents, but that in the alternative there is at least a domestic industry in the process of being established. McCabe Submission at 29. Both Rose and the IA argue that the issue of whether a domestic industry is in the process of being established was waived.

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McCabe states that this issue was preserved because the relevant evidence was presented to the ALJ, and the issue was included in the discussion of applicable law in section III.D. of McCabe's post-hearing brief and the discussion of the relevant law of domestic industry in section IV of McCabe's petition for review of the subject ID. McCabe Submission at 30.

Rose states that the issue of whether domestic industry is in the process of being established was waived, as it did not surface at the hearing or in the petitions for review.<sup>8</sup> Rose Submission at 15-16. In this connection, Rose contends that it did not have adequate notice of this issue or a full and fair opportunity to litigate this issue. Rose Submission at 16 (citing 19 C.F.R. § 210.36(d); *Trident Seafoods, Inc. v. NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996)).

Under the IA's understanding of the course of the investigation, the issue of whether domestic industry is in the process of being established has been waived, as it was not raised in the post-hearing briefs or the petitions for review. IA Submission at 17.

We agree with Rose and the IA that McCabe waived any argument that he has an industry in the process of being established. In his post-hearing brief and petition for review, McCabe merely mentions this provision in his discussion of the law, rather than making an argument that he satisfies this provision, and the issue was not discussed in the ID. See ALJ Order No. 10 at 29 ("The post-trial brief shall discuss the issues and evidence tried within the framework of the general issues determined by the Commission's Notice of Investigation, the general outline of the briefs as set forth in Appendix B, and those issues that are included in the pretrial brief and any permitted amendments thereto. All other issues shall be deemed waived."); 19 C.F.R. §

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<sup>8</sup>We note that Rose did not attend the hearing or participate in post-hearing briefing.

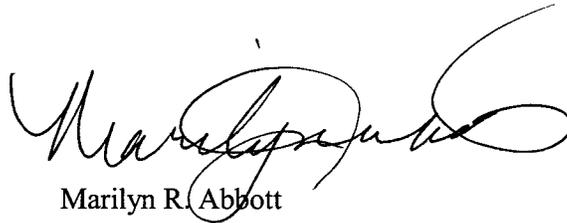
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210.43(b)(2) (“Any issue not raised in a petition for review will be deemed to have been abandoned by the petitioning party and may be disregarded by the Commission in reviewing the initial determination (unless the Commission chooses to review the issue on its own initiative under § 210.44)”).

**III. CONCLUSION**

For the above reasons, the Commission determines that McCabe has failed to show that he meets the domestic industry requirement under the economic prong. The investigation is terminated with a finding of no violation of section 337.

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Marilyn R. Abbott', is written over the typed name and title.

Marilyn R. Abbott  
Secretary to the Commission

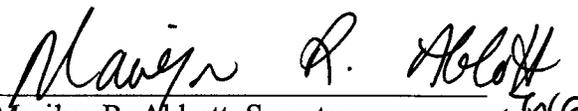
Issued: **MAY 16 2008**

**CERTAIN STRINGED MUSICAL INSTRUMENTS AND  
COMPONENTS THEREOF**

**337-TA-586**

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION** has been served by hand upon the Commission Investigative Attorney, Rett Snotherly, Esq., and the following parties as indicated, on May 16, 2008.

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

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**UNITED STATES INTERNATIONAL TRADE COMMISSION**  
**Washington, D.C. 20436**

**In the Matter of**

**CERTAIN STRINGED MUSICAL  
INSTRUMENTS AND COMPONENTS  
THEREOF**

**Investigation No. 337-TA-586**

**NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL  
DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE**

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

**ACTION:** Notice.

**SUMMARY:** Notice is hereby given that the U.S. International Trade Commission has determined to review the final initial determination (“ID”) of the presiding administrative law judge (“ALJ”) finding no violation of section 337 in the above-captioned investigation under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“section 337”).

**FOR FURTHER INFORMATION CONTACT:** 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:** On November 3, 2006, the Commission instituted an investigation titled *Certain Stringed Musical Instruments and Components Thereof*, Inv. No. 337-TA-586, based upon a complaint filed October 3, 2006, and supplemented October 24, 2006, by Geoffrey McCabe (“McCabe”). 71 Fed. Reg. 64738 (November 3, 2006). The complaint alleged violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain stringed musical instruments and components thereof by reason of infringement of one or more of claims 1-6, 8, 9, and 11 of U.S. Patent No. 6,175,066 (“the ‘066 patent”); claims 1-6 of U.S. Patent No. 5,965,831; claims 1 and 14-22 of U.S. Patent No. 6,891,094 (“the ‘094 patent”); and claims 1-3, 6-10, 14, 15, 23, 27, 28, and 32 of U.S. Patent No.

5,986,191. The complaint named as respondents Floyd Rose Guitars (Redmond, Washington) (“Rose”); Ibanez, Inc. (Hoshino) US (Bensalem, Pennsylvania); Vigier, Inc. (Grigny, France); and Schaller Electronic (Postbauer-Heng, Germany) (“Schaller”). Rose and Schaller are the only remaining respondents.

On December 3, 2007, the ALJ issued a final ID finding no violation of section 337. Only claims 8, 9, and 11 of the ‘066 patent and claims 1 and 14-22 of the ‘094 patent remained in the case as of the date of the final ID. Petitions for review were filed by McCabe and the Commission investigative attorney. A response to the petitions for review was filed by Rose.

On December 21, 2007, the Commission issued a notice extending the deadline for determining whether to review the subject ID by fifteen (15) days, to February 1, 2008.

On February 1, 2008, the Commission issued a notice extending the deadline for determining whether to review the subject ID to February 8, 2008, and extending the target date for completion of the investigation to April 10, 2008.

Having examined the relevant portions of the record in this investigation, including the final ID, the petitions for review, and the response thereto, the Commission has determined to review the final ID in its entirety.

The Commission requests briefing based on the evidentiary record on the issues on review. The Commission is particularly interested in responses to the following questions:

(1) What type and level of research and development is necessary to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(C)? Should it differ depending upon the size of the relevant marketplace or whether the patent holder is an individual versus some other entity? What is the appropriate industry market in which we should examine the economic prong of the domestic industry requirement: the market for certain guitars, all guitars, certain musical instruments, or all musical instruments or some other industry market? How do these criteria apply in this case? How is your argument supported by the record in this case? Does research and development prior to the issuance of a patent count towards the domestic industry requirement?

(2) What type and level of licensing activity is necessary to satisfy the economic prong of the domestic industry requirement under section 337(a)(3)(C)? Is the relevant time period for licensing activity before or after the filing of the complaint, or both? How do these criteria apply in this case? How is your argument supported by the record in this case? For the purposes of this question, consider whether licensing negotiations would qualify if they did not result in an actual license during a relevant period of time.

(3) Is the relevant industry in this case “in the process of being established”

pursuant to section 337(a)(2)? Was this issue properly raised before the ALJ and in the petitions for review? How is your argument supported by the record in this case? How do the criteria for an industry in the process of being established differ from the criteria for an industry that already exists?

**WRITTEN SUBMISSIONS:** The parties to the investigation are requested to file written submissions on the issues under review. The submissions should be concise and thoroughly referenced to the record in this investigation, including references to exhibits and testimony. The written submissions must be filed no later than the close of business on February 22, 2008. Reply submissions must be filed no later than the close of business on February 29, 2008. No further submissions will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file with the Office of the Secretary the original and 12 true copies thereof on or before the deadlines stated above. Any person desiring to submit a document (or portion thereof) to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the proceedings. All such requests should be directed to the Secretary of the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment is granted by the Commission will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.42 - .46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.42 - .46).

By order of the Commission.



Marilyn R. Abbott  
Secretary to the Commission

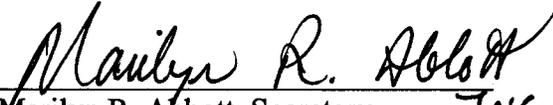
Issued: February 7, 2008

**CERTAIN STRINGED MUSICAL INSTRUMENTS AND  
COMPONENTS THEREOF**

337-TA-586

**CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DETERMINATION TO REVIEW A FINAL INITIAL DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE** has been served by hand upon the Commission Investigative Attorney, Rett Sotherly, Esq., and the following parties as indicated, on February 8, 2008.

  
Marilyn R. Abbott, Secretary *JWC*  
U.S. International Trade Commission  
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**ON BEHALF OF COMPLAINANT GEOFFREY  
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**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

Washington, D.C.

**In the Matter of**

**CERTAIN STRINGED MUSICAL  
INSTRUMENTS AND COMPONENTS  
THEREOF**

**Inv. No. 337-TA-586**

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

Administrative Law Judge Charles E. Bullock

(December 3, 2007)

**Appearances:**

*For the Complainant Geoffrey McCabe:*

Reza Ghafoorian, M.D., Esq.; Stephen D. Huang, Esq.; Robert M. Hansen, Esq.; of Hansen Huang Technology Law Group, LLP of Washington, D.C.

*For the Respondent Floyd Rose Marketing, Inc.:*

John R. Nelson, Esq.; Mitchell J. Mehlman, Esq.; of Lerner, David, Littenberg, Krumholz & Mentlik, LLP of Westfield, New Jersey

*For the Respondent Schaller Electronic:*

Marina F. Cunningham, Esq.; Wm. Tucker Griffith, Esq.; Justin R. Sauer, Esq.; of McCormick, Paulding & Huber LLP of Hartford, Connecticut

*For the Commission Investigative Staff:*

Lynn I. Levine, Esq., Director; T. Spence Chubb, Esq., Supervising Attorney; Rett Snottherly, Esq., Investigative Attorney; of the Office of Unfair Import Investigations, U.S. International Trade Commission, of Washington, D.C.

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## LIST OF ABBREVIATIONS

<b>CDX</b>	Complainant's demonstrative exhibit
<b>CFF</b>	Complainant's proposed findings of fact
<b>CIB</b>	Complainant's initial post-hearing brief
<b>COSFF</b>	Complainant's objections to Staff's proposed findings of fact
<b>CPX</b>	Complainant's physical exhibit
<b>CRB</b>	Complainant's reply post-hearing brief
<b>CX</b>	Complainant's exhibit
<b>JX</b>	Joint Exhibit
<b>SFF</b>	Staff's proposed findings of fact
<b>SIB</b>	Staff's initial post-hearing brief
<b>SOCFF</b>	Staff's objections to Complainant's proposed findings of fact
<b>SRB</b>	Staff's reply post-hearing brief
<b>Tr.</b>	Transcript

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

Washington, D.C.

**In the Matter of**

**CERTAIN STRINGED MUSICAL  
INSTRUMENTS AND COMPONENTS  
THEREOF**

**Inv. No. 337-TA-586**

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

Administrative Law Judge Charles E. Bullock  
(December 3, 2007)

Pursuant to the Notice of Investigation<sup>1</sup> and Rule 210.42(a) of the Rules of Practice and Procedure of the United States International Trade Commission, this is the Administrative Law Judge's Initial Determination in the matter of Certain Stringed Musical Instruments and Components Thereof, Investigation No. 337-TA-586.

The Administrative Law Judge hereby determines that a violation of Section 337 of the Tariff Act of 1930, as amended, 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 stringed musical instruments and components thereof, in connection with claims 8-9 and 11 of U.S. Patent No. 6,175,066 and claims 1 and 14-22 of U.S. Patent No. 6,892,094. Furthermore, the Administrative Law Judge hereby determines that a domestic industry in the United States does not exist that practices U.S. Patent Nos. 6,175,066 and 6,891,094.

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<sup>1</sup> 71 Fed. Reg. 64,738 (November 3, 2006).

## DISCUSSION

### I. Introduction

#### A. Procedural History

On October 3, 2006, Complainant Geoffrey McCabe (“McCabe”) filed a complaint with the Commission pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The complaint was amended on October 24, 2006. The amended complaint alleges a violation of Section 337 in the importation and sale of certain stringed musical instruments (electric guitars) and components thereof (*e.g.*, fulcrum tremolos) that infringe certain claims of U.S. Patent Nos. 5,965,831; 6,175,066; 6,981,094; and 5,986,191. Based on the Complaint, the Commission voted to institute the investigation on October 30, 2006. The Notice of Investigation was published in the Federal Register on November 3, 2006. On November 7, 2006, Judge Barton issued Order No. 2 whereby he set a 15-month target date, or February 3, 2008.

On December 1, 2006, Respondent Vigier SARL (“Vigier”) filed a letter responding to the Complaint and Notice of Investigation. On December 4, 2006, Respondent Hoshino (USA) Inc. (“Hoshino”) responded to the Complaint and Notice of Investigation. On December 12, 2006, Respondent Schaller Electronic (“Schaller”) responded to the Complaint and Notice of Investigation. On January 11, 2007, Respondent Floyd Rose Marketing (“Rose”) responded to the Complaint and Notice of Investigation. On January 12, 2007, Vigier filed a formal response to the Complaint and Notice of Investigation.

On April 18, 2007, McCabe and Hoshino filed a joint motion to terminate based on a settlement agreement. On May 7, 2007, the joint motion to terminate was granted by initial

determination in Order No. 9.<sup>2</sup> On June 6, 2007, the Commission issued a notice determining not to review an initial determination terminating the investigation as to Respondent Hoshino (USA) Inc. based on a settlement agreement.<sup>3</sup>

On June 21, 2007, Vigier and McCabe filed a joint motion to terminate based on a settlement agreement. On July 10, 2007, the joint motion to terminate was granted by initial determination in Order No. 11.<sup>4</sup> On July 30, 2007, the Commission issued a notice determining not to review an initial determination terminating the investigation as to Respondent Vigier SARL based on a settlement agreement.<sup>5</sup>

On July 5, 2007, the Commission reassigned this investigation to the undersigned.

On July 12, 2007, Order No. 12 issued, granting in part and denying in part McCabe's motion to amend the Complaint.<sup>6</sup> On July 24, 2007, Order No. 15 denied Schaller's motion for summary determination as to the domestic industry requirement.<sup>7</sup>

An evidentiary hearing was conducted before the undersigned on August 13, 2007. In support of its case-in-chief, McCabe called himself as a witness.<sup>8</sup> Rose and Schaller did not appear at the hearing, although Rose filed a prehearing brief and a prehearing statement and Schaller filed

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<sup>2</sup> See Order No. 9 (May 7, 2007).

<sup>3</sup> See Notice of Commission Determination Not to Review Initial Determination Granting Joint Motion to Terminate the Investigation with Respect to Respondent Hoshino (USA) Inc. (June 6, 2007).

<sup>4</sup> See Order No. 11 (July 10, 2007).

<sup>5</sup> See Notice of Commission Determination Not to Review Initial Determination Granting Joint Motion to Terminate the Investigation with Respect to Respondent Vigier (July 30, 2007).

<sup>6</sup> See Order No. 12 (July 12, 2007) (denying McCabe's motion to amend the complaint to add three additional respondents and extend the procedural schedule and granting McCabe's motion to withdraw claim 6 of the '191 patent).

<sup>7</sup> See Order No. 15 (July 24, 2007).

<sup>8</sup> See CX-97 (Witness Statement of Complainant Geoffrey McCabe).

a pre-hearing statement. At the hearing, Complainant withdrew his infringement allegations with respect to the '831 and '191 patents.<sup>9</sup>

After the hearing, post-hearing briefs, together with proposed findings of fact and conclusions of law, were filed on August 31, 2007, and reply briefs, together with rebuttals to proposed findings of fact and conclusions of law, were filed on September 13 and 14, 2007. Rose and Schaller did not file post-hearing briefs, reply briefs, proposed findings of fact, or conclusions of law and rebuttals to the same.

On August 13, 2007, McCabe filed a motion (586-013) seeking that adverse inferences be drawn against Rose pursuant to 19 C.F.R. § 210.17(d) for failure to appear at the hearing. On August 23, 2007, the Staff opposed the motion based on the fact that Rose filed a timely response to the complaint, filed a pre-hearing brief, participated in discovery and that McCabe has not alleged that it has been prejudiced by Rose's failure to appear at the hearing. The undersigned finds that the circumstances in this investigation do not warrant finding adverse inferences against Rose. Until the hearing, Rose participated in discovery, timely responded to the complaint, filed a pre-hearing brief and a pre-hearing statement that specifically stated that it would not be participating in the hearing. McCabe was put on notice of Rose's intention not to participate in the hearing, and, if McCabe believed that it would be prejudiced or harmed by Rose's failure to appear at the hearing, then it should have addressed or raised its concerns prior or during the hearing. McCabe failed to do so. Therefore, the undersigned denies Motion No. 586-013.

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<sup>9</sup> See Ghafoorian, Tr. 44.

## **B. The Parties**

### **1. Complainant**

Complainant Geoffrey McCabe (“McCabe”) is an individual residing in West Hollywood, California and is the inventor and owner of the asserted patents.

### **2. Respondents**

#### **a. Floyd Rose Marketing, Inc.**

Respondent Floyd Rose Marketing, Inc. (“Rose”) is a Washington corporation with its principal place of business in Neptune, New Jersey.

#### **b. Schaller Electronic**

Respondent Schaller Electronic (“Schaller”) is a German company with its principal place of business in Postbauer-Heng, Germany.

## **C. Overview of the Technology**

At issue in this investigation are certain stringed musical instruments and components thereof. Specifically, the technology at issue concerns the tuning of stringed musical instruments, primarily electric guitars, from an untensioned to a tensioned playing pitch without the use of conventional tuning pegs. The tuning of stringed instruments requires that two different operations be performed, namely harmonic tuning and pitch tuning. In harmonic tuning, the length of the string between two critical points is adjusted. With pitch tuning, the tension on the string is increased or decreased.

The technology at issue also addresses methods for improving the “tremolo effect” that occurs when a fulcrum tremolo is pivoted through the use of enlarged bridge elements.

**D. The Patents at Issue**

**1. The '066 Patent**

U.S. Patent No. 6,175,066 (“the ‘066 patent”) is entitled “Tuning Means for Stringed Musical Instrument” which was issued on January 16, 2001, based on Application Serial No. 08/027,729, filed on January 14, 1993, which was a divisional of Application Serial No. 07/607,458, filed on October 31, 1990. The named inventor is Geoffrey McCabe, who is the owner of the ‘066 patent. The ‘066 patent has a total of twelve (12) claims. One (1) independent claim, claim 8, is at issue here. Dependent claims 9 and 11 are also at issue here.<sup>10</sup>

**2. The '094 Patent**

U.S. Patent No. 6,981,094 (“the ‘094 patent”) is entitled “Tuning Means for Stringed Musical Instrument” which was issued on May 10, 2005, based on Application Serial No. 09/760,908, filed on January 16, 2001, which was a continuation of Application Serial No. 08/027,729, filed on January 14, 1993, which itself was a division of Application Serial No. 07/607,458 filed on October 31, 1990. The named inventor is Geoffrey McCabe, who is the owner of the ‘094 patent. The ‘094 patent has a total of 25 claims. One (1) independent claim, claim 1, is at issue here. Dependent claims 14-22 are also at issue here.<sup>11</sup>

**E. The Products at Issue**

**1. McCabe’s Products**

McCabe currently does not produce any products that practice the patents at issue.

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<sup>10</sup> See JX-1 (“the ‘066 patent”); JX-5 (“the ‘066 prosecution history”).

<sup>11</sup> See JX-3 (“the ‘094 patent”); JX-7 (“the ‘094 prosecution history”). The assignee listed on the ‘094 patent is Coherent Sound in Light, Inc. of Hollywood, California, the defunct corporation formed by Complainant Geoffrey McCabe. The current owner is Complainant Geoffrey McCabe.

## **2. Rose's Products**

The accused products are Floyd Rose Speedloader bridge systems and guitars containing the same ("the accused Speedloader products").

## **3. Schaller's Products**

The accused products are Floyd Rose Speedloader bridge systems and guitars containing the same. Schaller is the original equipment manufacturer for making certain of the accused Floyd Rose Speedloader bridge systems.<sup>12</sup>

## **II. Jurisdiction and Importation**

Section 337 confers subject matter jurisdiction on the International Trade Commission to investigate, and if appropriate, to provide a remedy for, unfair acts and unfair methods of competition in the importation of articles into the United States. In order to have the power to decide a case, a court or agency must have both subject matter jurisdiction, and jurisdiction over either the parties or the property involved.<sup>13</sup>

### **A. Subject Matter Jurisdiction**

The complaint alleges that Rose and Schaller have violated Subsection 337(a)(1)(A) and (B) in the importation and sale of products that infringe the asserted patents. Rose has admitted that it has imported the accused Speedloader products into the United States.<sup>14</sup> Schaller has admitted that

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<sup>12</sup> SIB 3.

<sup>13</sup> 19 U.S.C. § 1337; also see *Certain Steel Rod Treating Apparatus and Components Thereof*, Inv. No. 337-TA-97, Commission Memorandum Opinion, 215 U.S.P.Q. 229, 231 (1981) ("*Certain Steel Rod*").

<sup>14</sup> Rose Response to the Amended Complaint and Notice of Investigation ¶¶ 11 & 30; CX-41 (Rose's Response to Complainant's First Set of Interrogatories No. 1.1(d)).

it sells for importation into the United States the accused Speedloader products.<sup>15</sup> Accordingly, the Commission has subject matter jurisdiction over Rose and Schaller in this investigation.<sup>16</sup>

### **B. Personal Jurisdiction**

Rose and Schaller have responded to the complaint and notice of investigation, participated in the investigation, including participating in discovery, and submitted pre-hearing briefs, thereby submitting to the personal jurisdiction of the Commission.<sup>17</sup>

### **III. Relevant Law - Domestic Industry**

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.”<sup>18</sup> This “domestic industry requirement” has an “economic” prong and a “technical” prong.

#### **A. Technical Prong**

A complainant in a patent-based Section 337 investigation must demonstrate that it is practicing or exploiting the patents at issue.<sup>19</sup> In order to find the existence of a domestic industry exploiting a patent at issue, it is sufficient to show that the domestic industry practices any claim of

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<sup>15</sup> Schaller’s Response to Amended Complaint and Notice of Investigation ¶ 30; SX-1 (Schaller’s Response to Staff’s First Set of Interrogatories No. 3).

<sup>16</sup> See *Amgen, Inc. v. U.S. Int’l Trade Comm’n*, 902 F.2d 1532, 1536 (Fed. Cir. 1990) (“*Amgen*”).

<sup>17</sup> See *Certain Miniature Hacksaws*, Inv. No. 337-TA-237, U.S.I.T.C. Pub. No. 1948, Initial Determination (unreviewed by Commission in relevant part) at 4, 1986 WL 379287 (U.S.I.T.C., October 15, 1986) (“*Certain Miniature Hacksaws*”).

<sup>18</sup> 19 U.S.C. § 1337(a)(2).

<sup>19</sup> See 19 U.S.C. § 1337(a)(2) and (3); also see *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Commission Opinion at 8, 1996 WL 1056095 (U.S.I.T.C., January 16, 1996) (“*Certain Microsphere Adhesives*”), *aff’d sub nom. Minnesota Mining & Mfg. Co. v. U.S. Int’l Trade Comm’n*, 91 F.3d 171 (Fed. Cir. 1996) (Table); *Certain Encapsulated Circuits*, Commission Opinion at 16.

that patent, not necessarily an asserted claim of that patent.<sup>20</sup> Fulfillment of this so-called “technical prong” of the domestic industry requirement is not determined by a rigid formula, but rather by the articles of commerce and the realities of the marketplace.<sup>21</sup>

The test for claim coverage for the purposes of the technical prong of the domestic industry requirement is the same as that for infringement.<sup>22</sup> “First, the claims of the patent are construed. Second, the complainant’s article or process is examined to determine whether it falls within the scope of the claims.”<sup>23</sup> As with infringement, the first step of claim construction is a question of law, whereas the second step of comparing the article to the claims is a factual determination.<sup>24</sup> 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.<sup>25</sup>

## **B. Economic Prong**

The term “domestic industry” in Section 337 is not defined by the statute, but the Commission has interpreted the intent of Section 337 to be “the protection of domestic manufacture of goods.”<sup>26</sup> The Commission has further stated that “[t]he scope of the domestic industry in patent-

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<sup>20</sup> *Certain Microsphere Adhesives*, Commission Opinion at 7-16.

<sup>21</sup> *Certain Diltiazem Hydrochloride and Diltiazem Preparations*, Inv. No. 337-TA-349, U.S.I.T.C. Pub. No. 2902, Initial Determination at 138, 1995 WL 945191 (U.S.I.T.C., February 1, 1995) (unreviewed in relevant part) (“*Certain Diltiazem*”); *Certain Double-Sided Floppy Disk Drives and Components Thereof*, Inv. No. 337-TA-215, 227 U.S.P.Q. 982, 989 (Commission Opinion 1985) (“*Certain Floppy Disk Drives*”).

<sup>22</sup> *Certain Doxorubicin and Preparations Containing Same*, Inv. No. 337-TA-300, Initial Determination at 109, 1990 WL 710463 (U.S.I.T.C., May 21, 1990) (“*Certain Doxorubicin*”), *aff’d*, Views of the Commission at 22 (October 31, 1990).

<sup>23</sup> *Id.*

<sup>24</sup> *Markman*, 52 F.3d at 976.

<sup>25</sup> *See Bayer*, 212 F.3d at 1247.

<sup>26</sup> *Certain Dynamic Random Access Memories, Components Thereof and Products Containing Same*, Inv. No. 337-TA-242, U.S.I.T.C. Pub. No. 2034 (November 1987), Commission (continued...)

based investigations has been determined on a case by case basis in light of the realities of the marketplace and encompasses not only the manufacturing operations but may include, in addition, distribution, research and development and sales.”<sup>27</sup>

In making this determination, Section 337(a)(2) provides that for investigations based on patent infringement, a violation 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). Section 337(a)(3) sets forth the following economic criteria for determining the existence of a domestic industry in such investigations:

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 . . . 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.<sup>28</sup>

As the statute uses the disjunctive term “or,” a complainant can demonstrate this so-called “economic prong” of the domestic industry requirement by satisfying any one of the three tests set forth in Section 337(a)(3).<sup>29</sup> The complainant bears the burden of establishing that the domestic industry requirement is satisfied.<sup>30</sup>

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<sup>26</sup>(...continued)

Opinion at 61, 1987 WL 450856 (U.S.I.T.C., September 21, 1987) (“*Certain DRAMs*”).

<sup>27</sup> *Id.* at 62 (footnotes omitted).

<sup>28</sup> 19 U.S.C. § 1337(a)(3).

<sup>29</sup> See *Certain Plastic Encapsulated Integrated Circuits*, Inv. No. 337-TA-315, U.S.I.T.C. Pub. No. 2574 (November 1992), Initial Determination at 83, 1992 WL 813952 (U.S.I.T.C., October 15, 1991) (unreviewed by Commission in relevant part) (“*Certain Encapsulated Circuits*”).

<sup>30</sup> See *Certain Set-Top Boxes and Components Thereof*, Inv. No. 337-TA-454, U.S.I.T.C. (continued...)

Section 337(a)(3)(C) provides for domestic industry based on “substantial investment” in the enumerated activities, including licensing of a patent.<sup>31</sup> Mere ownership of the patent is insufficient to satisfy the domestic industry requirement.<sup>32</sup> However, entities that are actively engaged in licensing their patents in the United States can meet the domestic industry requirement.<sup>33</sup> In establishing a domestic industry under Section 337(a)(3)(C), the complainant does not need to show that it or one of its licensees is practicing a patent-in-suit.<sup>34</sup> The complainant must, however, receive revenue, e.g. royalty payments, from its licensing activities.<sup>35</sup>

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<sup>30</sup>(...continued)

Pub. No. 3564 (November 2002), Initial Determination at 294, 2002 WL 31556392 (U.S.I.T.C., June 21, 2002), *unreviewed by Commission in relevant part*, Commission Opinion at 2 (August 29, 2002) (“*Certain Set-Top Boxes*”).

<sup>31</sup> See *Certain Digital Processors and Digital Processing Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-559, Initial Determination at 88 (May 11, 2007) (“*Certain Digital Processors*”).

<sup>32</sup> *Certain Digital Processors* at 93. (Citing the Senate and House Reports on the Omnibus Trade and Competitiveness Act of 1988, S.Rep. No. 71.

<sup>33</sup> *Certain Digital Processors* at 93.

<sup>34</sup> See *Certain Semiconductor Chips with Minimized Chip Package Size and Products Containing Same*, Inv. No. 337-TA-432, Order No. 13, at 11, (Jan. 24, 2001) (“*Certain Semiconductor Chips*”).

<sup>35</sup> *Certain Digital Processors*, at 93-95 (“Commission decisions also reflect the fact that a complainant’s receipt of royalties is an important factor in determining whether the domestic industry requirement is satisfied...[t]here is no Commission precedent for the establishment of a domestic industry based on licensing in which a complainant did not receive any revenue from alleged licensing activities. In fact, in previous investigations in which a complainant successfully relied solely on licensing activities to satisfy section 337(a)(3), the complainant had licenses yielding royalty payments.”) (citations omitted). See also *Certain Video Graphics Display Controllers and Products Containing Same*, Inv. No. 337-TA-412, Initial Determination at 13 (May 14, 1999) (“*Certain Video Graphics Display Controllers*”); *Certain Integrated Circuit Telecommunication Chips and Products Containing Same Including Dialing Apparatus*, Inv. No. 337-TA-337, U.S.I.T.C. Pub. No. 2670, Initial Determination at 98 (March 3, 1993) (“*Certain Integrated Circuit Telecommunication Chips*”); *Certain Zero-Mercury-Added Alkaline Batteries, Parts Thereof and Products Containing Same*, Inv. No. 337-TA-493, Initial Determination at 142 (June 2, 2004) (“*Certain Zero-Mercury-Added Alkaline Batteries*”); *Certain Semiconductor Chips*, Order No. 13 at 6 (Jan. 24, 2001); *Certain Digital Satellite System DSS Receivers and Components Thereof*, Inv. (continued...)

#### **IV. The '066 Patent and '094 Patent**

Based on the evidence presented in this investigation, the undersigned finds that it is unnecessary to perform a complete analysis of the '066 patent and '094 patent because an analysis of McCabe's economic prong for domestic industry will be sufficient to show that there can be no relief for McCabe regarding either the '066 patent or the '094 patent because McCabe's evidence falls significantly below the standard of meeting his "preponderance of the evidence" burden.<sup>36</sup>

While it has been customary for administrative law judges to address all outstanding issues in their initial determination, the undersigned finds that this is an appropriate case where it would be a waste of judicial resources to go through a complete analysis of claim construction, infringement, domestic industry technical prong, validity, and enforceability, when it is clear that the economic prong of domestic industry has not been met.

##### **A. Staff and McCabe's Arguments**

Staff and McCabe argue that McCabe meets the economic prong of the domestic industry requirement under section 337(a)(3)(C) by engineering, research and development, and licensing of McCabe's patents. First, Staff and McCabe argue that McCabe has made substantial investment exploiting the patents through engineering, research and development efforts.<sup>37</sup> Staff and McCabe

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<sup>35</sup>(...continued)

No. 337-TA-392, Initial and Recommended Determinations at 11 (Dec. 4, 1997) ("*Certain Digital Satellite System DSS Receivers*").

<sup>36</sup> See *Certain Encapsulated Integrated Circuit Devices and Products Containing Same*, Inv. No. 337-TA-501 (Remand), Initial Determination at 102 (Nov. 9, 2005) ("*Certain Encapsulated Integrated Circuits*") ("The burden of showing something by a 'preponderance of the evidence'... simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who the burden to persuade the [judge] of the fact's existence.").

<sup>37</sup> CIB 22.

also assert that McCabe has made substantial investments in licensing McCabe's patents.<sup>38</sup>

### **1. Research and Development**

Staff and McCabe assert that McCabe has continuously engaged in research and development since the 1980s. Staff and McCabe assert that McCabe's research efforts began in 1988 when McCabe had his first prototype manufactured for \$3,500 and, while there was some interest in McCabe's designs from Kahler and Gibson Guitar Corporations, both Kahler and Gibson Guitar deferred discussions until after McCabe had obtained patents covering his designs.<sup>39</sup> Staff and McCabe assert that shortly after filing McCabe's initial patent application in 1990, McCabe spent \$4,000 to manufacture a second prototype.<sup>40</sup> Staff and McCabe assert that from that point through 1999, McCabe "continued engineering, research and development."<sup>41</sup>

In 1998, Staff asserts that McCabe attended the annual National Association of Music Merchants ("NAMM") show to find manufacturers willing to manufacture McCabe's designs.<sup>42</sup> Staff asserts that many companies were interested in McCabe's design, including Schaller who offered to manufacture McCabe's tremolo if McCabe could guarantee minimum sales.<sup>43</sup> Staff asserts that shortly after the 1998 NAMM show, McCabe developed a third prototype that could be used on a Fender Stratocaster style guitar.<sup>44</sup> Staff asserts that McCabe also incorporated "Coherent Sounds in Light, Inc." in order to further his attempts at finding manufacturers and venture capitalists to help

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<sup>38</sup> CIB 22.

<sup>39</sup> SIB 38 citing CX-6 ("Claim chart for '066 patent") and CX-97 ("McCabe's Direct"); CIB 22 citing CX-97 ("McCabe's Direct").

<sup>40</sup> SIB 38 citing CX-97 ("McCabe's Direct") and CX-14 ("Claim chart for '094 patent"); CIB 22 citing CX-97 ("McCabe's Direct").

<sup>41</sup> SIB 38 citing CX-97 ("McCabe's Direct"); CIB 22.

<sup>42</sup> SIB 39 citing CX-97 ("McCabe's Direct").

<sup>43</sup> SIB 39 citing CX-97 ("McCabe's Direct").

<sup>44</sup> SIB 39 citing CX-97 ("McCabe's Direct").

in the manufacture of his tremolo designs.<sup>45</sup> However, the business is now defunct.<sup>46</sup>

Staff asserts that in 2000, McCabe developed a fourth prototype, which he presented at the 2001 NAMM, along with his patents and designs, to a variety of manufacturers, including Schaller and Rose.<sup>47</sup>

Staff asserts that during his employment with West L.A. Music in 2002, McCabe was introduced to a guitar parts supplier, Sonic Sales.<sup>48</sup> Staff asserts that their collaboration also led to another prototype, which McCabe presented at the 2003 NAMM show and was well received by the industry.<sup>49</sup>

Staff asserts that in the spring of 2004, McCabe began discussions with RKS Guitars, a new company affiliated with the design house, RKS Design.<sup>50</sup> Staff asserts that RKS and McCabe worked together to produce a new prototype based on McCabe's last few years of research and development that was presented at the 2005 NAMM show.<sup>51</sup> However, a pending deal with RKS fell through when financial improprieties within the company arose.<sup>52</sup>

Staff asserts that in 2005, McCabe rekindled negotiations with Kahler in August 2005 concerning Kahler's possible manufacture and sale of McCabe's designs.<sup>53</sup> Staff and McCabe assert

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<sup>45</sup> SIB 39 citing CX-97 ("McCabe's Direct").

<sup>46</sup> SIB 39 citing CX-97 ("McCabe's Direct").

<sup>47</sup> SIB 39 citing CX-97 ("McCabe's Direct").

<sup>48</sup> SIB 40 citing CX-97 ("McCabe's Direct").

<sup>49</sup> SIB 40 citing CX-97 ("McCabe's Direct").

<sup>50</sup> SIB 41 citing CX-97 ("McCabe's Direct").

<sup>51</sup> SIB 42 citing CX-97 ("McCabe's Direct") and CX-54 ("Email between RKS and McCabe") and CX-55 ("Email between RKS and McCabe"); CIB 24 citing CX-97 ("McCabe's Direct"), CX-33 ("Email between RKS and McCabe"), CX-54 ("Email between RKS and McCabe"), and CX-55 ("Email between RKS and McCabe").

<sup>52</sup> SIB 42 citing CX-97 ("McCabe's Direct").

<sup>53</sup> SIB 42 citing CX-97 ("McCabe's Direct") and CX-45 ("Letter from McCabe to G.  
(continued...)

that McCabe and Kahler produced CAD drawings of the various components parts of McCabe's designs, including what became model 7170, a version that comports with the Fender standard.<sup>54</sup> Staff asserts that the design was included in Kahler's catalog and shown at the 2006 NAMM show.<sup>55</sup>

## 2. Licensing

Staff and McCabe further argue that McCabe has made substantial investments in exploiting his patented inventions through licensing of McCabe's patents. McCabe argues that he promoted his prototypes and patents in "an effort to procure licensing or manufacturing deals" at the 2001 NAMM.<sup>56</sup> McCabe asserts that in May 2001, he received an offer from Seymour Duncan Company to license the technology of the subject patents.<sup>57</sup> Staff asserts that Seymour Duncan Company showed an interest in McCabe's design and presented it to Fender hoping to convince Fender to incorporate McCabe's tremolo on the Fender guitars.<sup>58</sup> Staff and McCabe assert that during McCabe's relationship with Seymour Duncan Company, McCabe was introduced to a metal fabricator, All-New Stamping Company, with whom McCabe worked closely with on design and manufacturing techniques (including costs analysis).<sup>59</sup> However, by August 2001, Staff and McCabe assert that the business relationship between McCabe and Seymour Duncan Company had

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<sup>53</sup>(...continued)  
Kahler"); CIB 24 citing CX-97 ("McCabe's Direct").

<sup>54</sup> SIB 42 citing CX-97 ("McCabe's Direct"); CIB 24 citing CX-97 ("McCabe's Direct") and CX-45 ("Letter from McCabe to G. Kahler").

<sup>55</sup> SIB 42 citing CX-97 ("McCabe's Direct"). Staff also cites CPX-13 to support its argument. However, CPX-13 has not been submitted as an exhibit in this investigation and, therefore, will not be considered in this initial determination.

<sup>56</sup> CIB 22.

<sup>57</sup> CIB 22 citing CX-97 ("McCabe's Direct"); CX-52 ("Email between Seymour Duncan and McCabe") and CX-15 ("OEM Margin Analysis").

<sup>58</sup> SIB 39.

<sup>59</sup> CIB 22 and SIB 40 citing CX-97 ("McCabe's Direct") and CX-16 ("All-New Stamping Quotation").

deteriorated due to differences and, as a result, McCabe and Seymour Duncan Company ended their business relationship.<sup>60</sup>

Staff and McCabe assert that shortly thereafter, McCabe began working with Kahler International, Inc.<sup>61</sup> McCabe asserts that he received an offer from Kahler International, Inc. to license his patents “in order to start manufacturing guitar bridges incorporating [his] technology and designs.”<sup>62</sup> Staff and McCabe assert that no licensing agreement resulted from their collaboration due to “other concerns” by Kahler.<sup>63</sup>

Staff and McCabe assert that from October 2002 through July 2003, McCabe and Sonic Sales worked together on the licensing and manufacturing of McCabe’s designs.<sup>64</sup> Staff asserts that interest was so great that Sonic Sales explored the possibility of manufacturing McCabe’s designs in Asia and distributing it through a retail chain store, the Guitar Center.<sup>65</sup> McCabe further asserts that he received an offer “to license and manufacture [his] invention and technology” from Sonic Sales.<sup>66</sup> Staff and McCabe assert that it was during the 2003 NAMM show that McCabe first learned of the accused Speedloader bridges.<sup>67</sup> Staff and McCabe assert that McCabe met Jack Weistheimer at the same show, who became interested in licensing and manufacturing McCabe’s technology and patents.<sup>68</sup> Staff and McCabe assert that Sonic Sales, concerned over the similarities between the

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<sup>60</sup> CIB 22 citing CX-97 (“McCabe’s Direct”); SIB 40 citing CX-97 (“McCabe’s Direct”).

<sup>61</sup> SIB 40 citing CX-97 (“McCabe’s Direct”); CIB 23.

<sup>62</sup> CIB 23.

<sup>63</sup> SIB 40 citing CX-97 (“McCabe’s Direct”); CIB 23.

<sup>64</sup> SIB 40 citing CX-97 (“McCabe’s Direct”); CIB 23.

<sup>65</sup> SIB 40 citing CX-97 (“McCabe’s Direct”).

<sup>66</sup> CIB 23.

<sup>67</sup> SIB 40 citing CX-97 (“McCabe’s Direct”); CIB 23.

<sup>68</sup> CIB 23 citing CX-97 (“McCabe’s Direct”) and CX-44 (“Letter from McCabe to J. Westheimer”).

Speedloader bridge and McCabe's designs, retained an attorney to analyze whether the Speedloader infringed McCabe's patents.<sup>69</sup> Staff and McCabe assert that since Rose had also patented its Speedloader project, Sonic Sales and Jack Weistheimer's corporation ultimately decided not to pursue their interest in McCabe's patents.<sup>70</sup>

Staff asserts that following McCabe's discovery of the Speedloader, he and his attorneys had ongoing discussions with Rose's counsel regarding potential licensing of McCabe's patents, including a meeting between McCabe's counsel and Rose's counsel at the 2004 NAMM show.<sup>71</sup> Staff asserts that during this period, McCabe continued to contact entities in an effort to bring the manufacturing of his designs to realization and received manufacturing quotes from several machinists while pursuing the idea of manufacturing his design himself.<sup>72</sup> Staff asserts that from this, McCabe produced cost sheets for component parts which were maintained in a database wherein each component was designated a part number and assembly lists created.<sup>73</sup> Staff asserts that at this point, McCabe's "fulcrum tremolo designs had expanded through [R&D] from 2001 to include a version for a Fender standard, two versions for Floyd Rose standards . . . providing broader choices for guitarists and guitar companies to improve their instruments."<sup>74</sup>

Staff asserts that during McCabe and Kahler's collaboration in 2005, Kahler again

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<sup>69</sup> SIB 40-41 citing CX-97 ("McCabe's Direct"); CIB 23.

<sup>70</sup> SIB 41 citing CX-97 ("McCabe's Direct") and CX-44 ("Letter from McCabe to J. Westheimer").

<sup>71</sup> SIB 41 citing CX-97 ("McCabe's Direct").

<sup>72</sup> SIB 41 citing CX-97 ("McCabe's Direct") and CX-17-20 ("Quotations from manufacturers").

<sup>73</sup> SIB 41 citing CX-97 ("McCabe's Direct") and CX-23-26 ("FileMaker Pro database sheets").

<sup>74</sup> SIB 41 citing CX-97 ("McCabe's Direct") and CX-28 ("Tremolo part analysis").

considered the possibility of manufacturing and selling McCabe's designs.<sup>75</sup> Kahler, however, having previously been involved in protracted litigation with Rose, got "cold feet," telling McCabe that it could not go forward until McCabe eliminated the possibility (through, for example, a cross-license) of a countersuit by Rose for infringement of its Speedloader patent portfolio.<sup>76</sup> McCabe asserts, however, that he currently has a conditional verbal agreement with Kahler to manufacture his inventions should McCabe obtain a covenant not to sue from Rose.<sup>77</sup>

Staff and McCabe assert that discussions with Hoshino regarding the potential licensing of the asserted patents began again in the fall of 2004.<sup>78</sup> Staff and McCabe assert that as part of these ongoing negotiations, McCabe met with Hoshino representatives at the 2006 NAMM show.<sup>79</sup> Hoshino finally entered into a licensing agreement with McCabe as part of a settlement that terminated it from this investigation wherein [

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] <sup>81</sup>

Staff asserts that throughout 2004 and 2005, McCabe continued licensing negotiations with Rose.<sup>82</sup> McCabe asserts that in 2005, McCabe approached Rose to negotiate a license agreement for the '094 patent, which Rose refused.<sup>83</sup>

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<sup>75</sup> SIB 42 citing CX-97 ("McCabe's Direct") and CX-45.

<sup>76</sup> SIB 42-43 citing CX-97 ("McCabe's Direct").

<sup>77</sup> CIB 24 citing CX-66 ("Letter from G. Kahler to McCabe").

<sup>78</sup> SIB 42 citing CX-97 ("McCabe's Direct"); CIB 24 citing CX-97 ("McCabe's Direct").

<sup>79</sup> SIB 42 citing CX-97 ("McCabe's Direct"); CIB 24 citing CX-97 ("McCabe's Direct").

<sup>80</sup> SIB 42 citing Order No. 9 and Hoshino Settlement Agreement at ¶ 2(b)-(c), p. 3 (definition of "McCabe Patents") (attachment to Order No. 9); CIB 24 citing CX-97 ("McCabe's Direct").

<sup>81</sup> SIB 42 citing Hoshino Settlement Agreement at ¶ 2(b).

<sup>82</sup> SIB 42 citing CX-97 ("McCabe's Direct").

<sup>83</sup> CIB 24 citing CX-97 ("McCabe's Direct"), CX-70 ("Email from McCabe to Rose"), CX-  
(continued...)

In 2007, McCabe has also [

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] <sup>85</sup>

Based on the foregoing, Staff and McCabe argue that McCabe has met the economic prong of the domestic industry requirement through substantial investment in research and development of the subject matter of the asserted patent and substantial investment in licensing activities, including the Hoshino and Vigier licenses.

### **B. Discussion**

McCabe and Staff argue that McCabe has met the economic prong of the domestic industry requirement based on substantial investment in research and development and licensing activities, *i.e.* that McCabe has met subsection (C) of Section 337(a)(3). According to McCabe and Staff, the substantial investments made by McCabe consist of a few prototypes, discussions and collaborations with various companies and manufacturers in the guitar industry, discussions for potential license agreements and, after the complaint was filed, two license agreements. For the reasons set forth below, the undersigned finds that McCabe's activities fail to establish a domestic industry under Section 337(a)(3)(C).

The Commission has held that subsection (C) requires a "simpler test" for domestic industry

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<sup>83</sup>(...continued)

72 ("Letter from Rose's patent counsel to McCabe"), and CX-73("Email from McCabe to Rose's patent counsel, Mr. Nelson").

<sup>84</sup> SIB 43 citing Order No. 11.

<sup>85</sup> SIB 43 citing Order No. 11 and Vigier Settlement Agreement at p. 2 (definition of "McCabe Patent").

than that of subsections (A) and (B).<sup>86</sup> In relying on licensing activities to satisfy subsection (C), the complainant need not show that it or one of its licensees practices the patent-in-suit in order to establish a domestic industry.<sup>87</sup> However, there must be a “nexus” between the activities upon which it relies and the asserted patents.<sup>88</sup> Moreover, the statute specifically states that there must be a “substantial investment” in the research and development and licensing activities of the patent. “[M]ere ownership of a patent is insufficient to meet the domestic industry requirement.”<sup>89</sup>

Congress created subsection (C) primarily in response to the Commission’s decision in *Certain Products with Gremlin Depictions*, which found that the complainant had failed to establish a domestic industry despite substantial investment in the extensive licensing of its intellectual property.<sup>90</sup> By including the activities enumerated in subsection (C), Congress intended to make Section 337 remedies available to “persons who have made a substantial investment in facilities or activities relating to the exploitation of a patent, copyright, trademark, or mask work, including research and development, [and] licensing.”<sup>91</sup> In doing so, Congress noted that “[t]his adjustment will assure continued access to the ITC by entities, including universities, who have a substantial stake in the United States.”<sup>92</sup>

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<sup>86</sup> *Certain Digital Processors* at 85 (Citing *Certain Microlithographic Machines and Components Thereof*, Inv. No. 337-TA-468, Initial Determination at 346, adopted in relevant part in Notice of Commission Determination Not to Review a Final Initial Determination Finding No Violation of Section 337 [and] Termination of the Investigation (Mar. 17, 2003)).

<sup>87</sup> *Certain Digital Processors* at 85 (Citing *Certain Semiconductor Chips* at 11).

<sup>88</sup> *Certain Digital Processors* at 85 (Citing *Certain Microlithographic Machines* at 346).

<sup>89</sup> *Certain Digital Processors* at 85 (Citing S. Rep. No. 71, 100<sup>th</sup> Cong., 1<sup>st</sup> Session at 130 (1987); H.R. Rep. No. 40, 100<sup>th</sup> Cong., 1<sup>st</sup> Session, at 157 (1987)).

<sup>90</sup> *Certain Digital Processors* at 89.

<sup>91</sup> *Certain Digital Processors* at 89.

<sup>92</sup> *Certain Digital Processors* at 89 (citing Rep. Kastenmeier, 132 Cong. Rec. H. 1782, 99<sup>th</sup> Congress, 2<sup>nd</sup> Sess. (Apr. 10, 1986)).

In creating subsection (C), Congress specifically modified the term “investment” using “substantial.” Under the canons of statutory interpretation, the inclusion of the word “substantial” cannot be overlooked and must be given effect.

We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. *Market Co. v. Hoffman*, 101 U.S. 112, 115-116 (U.S. 1879).<sup>93</sup>

Moreover, the legislative history behind subsection (C) shows that both the Senate and the House repeatedly used the word “substantial” or “significant” in describing the investment activity enumerated therein:

Second, modify the domestic industry requirement by allowing complainant to be filed by persons who have made a substantial investment in facilities or activities relating to the exploitation of a patent, copyright, trademark, or mask work, including research and development, licensing...<sup>94</sup>

For those who make substantial investments in research, there should be a remedy. For those who make substantial investments in the creation of intellectual property and then license creations, there should be a remedy. Let me give one example, there is a startup biotech firm in my state. Its product is its patents. It hasn't reached the stage to manufacture...[a] party could get relief if it has made significant investment in R&D, engineering or licensing.<sup>95</sup>

This definition does not require actual production of the article in the United States if it can be demonstrated that substantial investment and activities of the type enumerated are taking place in the United States. Marketing and sales in the United States alone would not, however, be sufficient to meet this test. The definition could,

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<sup>93</sup> See also *Duncan v. Walker*, 533 U.S. 167, 174 (U.S. 2001); *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (U.S. 1971).

<sup>94</sup> *Certain Digital Processors* at 89 (citing Rep. Kastenmeier, 132 Cong. Rec. H. 1782, 99<sup>th</sup> Congress, 2<sup>nd</sup> Sess. (Apr. 10, 1986)) (emphasis added).

<sup>95</sup> *Certain Digital Processor* at 92 (citing Senator Lautenberg, 133 Cong. Rec. S. 1794, 100<sup>th</sup> Cong. 1<sup>st</sup> Sess. (Feb. 4, 1987)) (emphasis added).

however, encompass universities and other intellectual property owners who engage in extensive licensing of their rights to manufacture.<sup>96</sup>

The amendment makes clear that a “domestic industry” can exist through the development of a “licensing” industry. The amendment also makes certain the availability of Section 337 relief to universities who have made substantial investment in engineering, or research and development in connection with the exploitation of an intellectual property right.<sup>97</sup>

Thus, it is evident that Congress intended to provide Section 337 relief to intellectual property holders who have made a substantial investment in research and development, such as those made by “universities” and small businesses like “start up biotech firm[s].” Similarly, Congress sought to provide relief to those who made a substantial investment in licensing activities thereby creating a “licensing” industry and a “larger service industry exploiting the intellectual property right within the United States.”<sup>98</sup> Each of these examples indicates that, in addition to ownership of the intellectual property rights, Congress intended to provide access to the trade remedies available at the ITC to those who have actually made a significant investment into the exploitation of their intellectual property rights.

McCabe has failed to show that he has made a “substantial investment” in research and development and licensing activities. As set forth above, Congress’s intent in adding subsection (C) was to provide relief to those entities such as universities who license out their patents, small start up companies that do not yet have manufacturing capabilities, and larger service industries exploiting intellectual property, e.g. “the licensing of the Gremlin image for products mass marketed to children

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<sup>96</sup> *Certain Digital Processors* at 92-93 (citing Senate Finance Committee Report, S. Rep. No. 71, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 129 (1987)) (emphasis added).

<sup>97</sup> Representative Kastenmeier, 132 Cong Rec H 9965.

<sup>98</sup> Representative Kastenmeier, 132 Cong Rec H 9965.

in the United States.”<sup>99</sup> Up until the filing of McCabe’s complaint, the evidence shows that McCabe’s investment in research and development consists of (1) a few prototypes costing a total of approximately \$8,500; (2) the presentation his prototypes and designs at industry trade shows; (3) the incorporation of a now defunct company;<sup>100</sup> (4) short collaborations with a few manufacturers in the guitar industry and (5) some discussions with a few companies in the guitar industry.

Regarding his licensing activities, McCabe argues that he received bona fide offers to license his designs. However the evidence shows otherwise. For example, while McCabe argues that Seymour Duncan company offered him a license, the evidence shows that Seymour Duncan was actually offering to represent McCabe in trying to procure a license from Rose.<sup>101</sup> Similarly, while McCabe asserts that he has a verbal agreement with Kahler International, the evidence cited by McCabe—a letter—only indicates the reasons for Kahler International Inc.’s refusal to enter into any agreement with McCabe. The letter does not state or indicate that there is any sort of verbal agreement between the two parties.<sup>102</sup> Thus, McCabe’s investment over the span of nearly 20 years was limited to a few prototypes and short collaborations and discussions with various companies and manufacturers in the guitar industry, which failed to produce any commercial products or result in any license agreements.

Furthermore, such activities do not meet the level of “substantial investment” in research and development and engineering as set forth in previous investigations.<sup>103</sup> The \$8,500 in

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<sup>99</sup> *Certain Digital Processors* at 89.

<sup>100</sup> There is no evidence in the record that this company generated any revenues or employed any employees.

<sup>101</sup> CX-52 (“Email between Seymour Duncan and McCabe”).

<sup>102</sup> CX-66 (“Letter from G. Kahler ro McCabe”).

<sup>103</sup> See *Certain Semiconductor Chips* at 7-8 and *Certain Digital Processors* at 96-97. The  
(continued...)

investments made by McCabe in research and development for his prototypes and short collaborations with manufacturers is significantly less than that of previous complainants for which the Commission found that a domestic industry existed, and in the undersigned's view, does not constitute a "substantial investment."

Similarly, the total amount of revenue generated thus far through McCabe's [ ] is far less than the amounts received by other complainants that have relied on licensing activities to establish a domestic industry. The license agreement with Hoshino has produced [ ] in revenue, and the license agreement with Vigier has only produced [ ] Both license agreements provide [ ]

] <sup>104</sup> However, in *Certain Digital Processors*, the complainant received "millions of dollars in royalties due to the successful licensing of its patent portfolio."<sup>105</sup> Thus, regardless of whether the cutoff for activities necessary to establish domestic industry is at the time the complaint was filed or at the discovery cut-off date,<sup>106</sup> McCabe fails to meet the domestic industry requirement

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<sup>103</sup>(...continued)  
undersigned does not cite to the specific amounts enumerated in these two decisions based on the confidential nature of such information.

<sup>104</sup> See *Certain Digital Processors* at 94 ("The existence of a domestic industry is determined with reference to the time that the complaint was filed.") ("There is no Commission precedent for the establishment of a domestic industry based on licensing in which a complainant did not receive any revenue from the alleged licensing activities. In fact, in previous investigations in which a complainant successfully relied solely on licensing activities to satisfy section 337(a)(3), the complainant had licenses yielding royalty payments.").

<sup>105</sup> *Certain Digital Processors* at 98. See also *Semiconductor Chips* at 6. Once again, the undersigned does not cite to specific amounts in this decision based on the confidential nature of the information.

<sup>106</sup> Compare *Certain Digital Processors* at 84 ("The existence of a domestic industry is determined with reference to the time that the complaint was filed.") (citing *Bally/Midway Mfg. v. United States Int'l Trade Comm'n*, 714 F.2d 1117, 1122 (Fed. Cir. 1983) with *Certain Concealed Cabinet Hinges and Mounting Plates*, Inv. No. 337-TA-289, Commission Opinion at 21 (January (continued...))

even taking into consideration the fact that McCabe entered into two license agreements with Hoshino and Vigier after the complaint was filed. The revenue generated from McCabe's licensing agreements is significantly less than that of previous complainants for which the Commission found that a domestic industry existed, and in the undersigned's view, does not constitute a "substantial investment."

In sum, in the undersigned's view, the activities presented by McCabe and Staff do not constitute a substantial investment in research and development and licensing. Short collaborations and prototypes do not qualify as a "substantial investment" in research and development. Two license agreements that have generated [ ] does not lead to the creation of a "licensing" industry. Quite simply, McCabe's activities are not "substantial investment[s]" in research and development or licensing activities as intended by Congress.

"[T]he domestic industry requirement will serve as a gatekeeper to prevent the excessive use of the ITC under Section 337."<sup>107</sup> Such is the case in this investigation. McCabe is the owner of the '066 and the '094 patents, has made a few prototypes, has had discussions with others in the music industry and has entered into two licensing agreements. These activities, however, do not establish a domestic industry under Section 337 as required under the statute. McCabe has failed to meet his burden to establish a domestic industry and, therefore, cannot seek relief under Section 337 at the ITC. While McCabe has been denied relief under Section 337, McCabe is not without recourse as he can also seek relief from district court where there is no domestic industry

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<sup>106</sup>(...continued)

8, 1990) ("As a preliminary point, we assess the existence of the domestic industry as of the discovery cutoff date prior to the evidentiary hearing.").

<sup>107</sup> Representative Kastenmeier, 132 Cong Rec H 9965

requirement.

Therefore, based on the foregoing, the undersigned finds that McCabe has failed to meet his burden in establishing a domestic industry for the asserted patents and, as such, McCabe cannot seek relief under Section 337. Since McCabe failed to meet his burden, the undersigned finds that judicial resources need not be spent on a complete analysis of claim construction, infringement, domestic industry technical prong, validity, and enforceability.

## CONCLUSIONS OF LAW

1. The Commission has subject matter jurisdiction in this investigation.
2. The Commission has personal jurisdiction over Rose and Schaller.
3. An industry in the United States does not exist with respect U.S. Patent Nos. 6,175,066 and 6,891,094, as required by 19 U.S.C. §1337(a)(2) and (3).

## INITIAL DETERMINATION

Based on the foregoing opinion, findings of fact, conclusions of law, the evidence, and the record as a whole, and having considered all pleadings and arguments, including the proposed findings of fact and conclusions of law, it is the Administrative Law Judge's Initial Determination that a domestic industry does not exist with respect to U.S. Patent Nos. 6,175,066 and 6,891,094, and, therefore, a violation of Section 337 of the Tariff Act of 1930, as amended, 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 stringed musical instruments and components thereof, in connection with claims 8-9 and 11 of U.S. Patent No. 6,175,066 and claims 1 and 14-22 of U.S. Patent No. 6,892,094.

The Administrative Law Judge 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 by the Administrative Law Judge; and further the exhibits accepted into evidence in this investigation as listed in the attached exhibit lists.

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

Pursuant to Commission Rules 210.36(a) and 210.42(a)(1)(ii), the Administrative Law Judge is to consider evidence and argument on the issues of remedy and bonding and issue a recommended determination thereon.

### V. Remedy and Bonding

#### A. Limited Exclusion Order

Under Section 337(d), the Commission may issue either a limited or a general exclusion order. A limited exclusion order instructs the U.S. Customs Service to exclude from entry all articles that are covered by the patent at issue and that originate from a named respondent in the investigation. A general exclusion order instructs the U.S. Customs Service to exclude from entry all articles that are covered by the patent at issue, without regard to source. McCabe requested that the Commission issue a general exclusion order.<sup>108</sup> However, McCabe has waived his right to seek a general exclusion order as he failed to raise the issue in his complaint and pre-hearing brief. Staff and McCabe, as an alternative to a general exclusion order, request that a limited exclusion order be issued that prohibits the importation of all infringing guitars containing either the tremolo or fixed bridge Speedloader tremolo and any such Speedloader bridges that are attempted to be imported as component parts.<sup>109</sup> The undersigned finds Staff and McCabe's arguments persuasive and, if the Commission finds a violation, recommends a limited exclusion order that prohibits the importation of all infringing guitars containing either the tremolo or fixed bridge Speedloader tremolo and any such Speedloader bridges that are attempted to be imported as component parts.

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<sup>108</sup> CIB 25.

<sup>109</sup> CRB 6-7; SIB 44-45.

## **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. Cease and desist orders are warranted primarily when the respondent maintains a commercially significant inventory of the accused products in the United States.<sup>110</sup>

Since Rose failed to appear at the hearing and failed to provide any information on its inventory of Speeloder products in the United States, McCabe and Staff assert that the assumption that Rose maintains a substantial inventory is proper.<sup>111</sup> Therefore, the undersigned finds Staff and McCabe's argument persuasive and, if the Commission finds a violation, recommends a cease and desist order against Rose.

## **C. Bond During Presidential Review Period**

If the Commission enters an exclusion order or cease and desist order, parties may continue to import and sell their products during the pendency of the Presidential review under a bond in an amount determined by the Commission to be "sufficient to protect the Complainants from any injury."<sup>112</sup> McCabe requests a bond in the amount of 100% of the entered value of the accused infringing unit.<sup>113</sup>

The Commission frequently sets the bond by attempting to eliminate the difference in sales prices between the patented domestic product and the infringing product.<sup>114</sup> In the absence of

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<sup>110</sup> *Certain Crystalline*, 15 U.S.P.Q.2d at 1277-79.

<sup>111</sup> CIB 25; SIB 44-45. The evidence shows that Schaller does not maintain a significant inventory of the accused products. SIB 44.

<sup>112</sup> 19 U.S.C. § 1337(e); 19 C.F.R. § 210.50(a)(3).

<sup>113</sup> CIB 26.

<sup>114</sup> *See Certain Microsphere Adhesives*, Commission Opinion at 24.

reliable price information, the Commission has used other methods to determine an appropriate bond. For example, where a price comparison is unworkable, the Commission has determined that a bond of 100% is appropriate.<sup>115</sup> In other instances where a direct comparison between a patentee's product and the accused product was not possible, the Commission has set the bond at a reasonable royalty rate.<sup>116</sup>

In this case, the parties did not introduce any evidence of current sales or pricing information that would permit the undersigned to determine a price differential. The parties did, however, introduce evidence of a reasonable royalty rate. The undersigned finds Staff's arguments persuasive and recommends a bond in the amount of \$3.00 per infringing unit.

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<sup>115</sup> See, e.g., *Certain Wind Turbines*, Comm'n Op. at 27-28 and 40.

<sup>116</sup> See, e.g., *Certain Digital Satellite System (DSS) Receivers and Components Thereof*, Inv. No. 337-TA-392, U.S.I.T.C. Pub. No. 3418, Initial and Recommended Determinations at 245, *vacated on other grounds*, Comm'n Determination (May 13, 1999), 2001 WL 535427 (U.S.I.T.C., October 20, 1997) ("*Certain DSS Receivers*").

Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions must be made by hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submission concerning the public version of this document need not be filed with the Commission Secretary.

**SO ORDERED.**

  
Charles E. Bullock  
Administrative Law Judge

**APPENDIX OF EXHIBIT LISTS**

UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.  
Before The Honorable Charles E. Bullock

In the Matter of: )

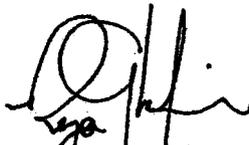
CERTAIN STRINGED MUSICAL )  
INSTRUMENTS AND )  
COMPONENTS THEREOF )  
\_\_\_\_\_ )

Investigation No. 337-TA-586

**COMPLAINANT GEOFFREY MCCABE'S FINAL EXHIBIT LISTS**

The Complainant submits it's final Complainant Documentary Exhibits (CX), Complainant Demonstrative Exhibits (CDX), Complainant Physical Exhibits (CPX) and Joint Exhibits (JX) and Joint Physical Exhibits (JPX) lists.

Respectfully submitted,



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*Attorneys for Complainant*

Dated: August 31, 2007

**FINAL LIST OF COMPLAINANT DOCUMENTARY EXHIBITS**

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
CX-1	mrrmagazine.com 1/2003 interview with Floyd Rose	Infringement	Geoffrey McCabe	
CX-2	Gear Box Article on FR guitar	Infringement	Geoffrey McCabe	
CX-6	Claim Chart: Claim 1 of '831	Domestic Industry	Geoffrey McCabe	
CX-7	CAD specification of macro-tuner body	Domestic Industry	Geoffrey McCabe	
CX-8	Current macro-tuner design illustration	Domestic Industry	Geoffrey McCabe	
CX-9	Claim Chart: Claim 8 of '066	Domestic Industry	Geoffrey McCabe	
CX-10	2006 Bridge elements with enlarged curved surfaces	Domestic Industry	Geoffrey McCabe	
CX-11	2006 Bridge elements without enlarged curved surfaces	Domestic Industry	Geoffrey McCabe	
CX-12	Claim Chart: Claim 24 of '094	Domestic Industry	Geoffrey McCabe	
CX-13	Exploded view of 7170	Domestic Industry	Geoffrey McCabe	
CX-14	Claim Chart: Claim 1 of '191	Domestic Industry	Geoffrey McCabe	
CX-15	Duncan OEM Margin Analysis	Domestic Industry	Geoffrey McCabe	
CX-16	2001 All-New base plate quote	Domestic Industry	Geoffrey McCabe	
CX-17	Foremost StringClip 2001 quote	Domestic Industry	Geoffrey	

No.	Description/Title	Purpose	Sponsoring Witness	Received
			McCabe	
CX-18	Cornerstone 2001 Quote	Domestic Industry	Geoffrey McCabe	
CX-19	2004 All-New base plate quote	Domestic Industry	Geoffrey McCabe	
CX-20	2004 DeKing machining quote	Domestic Industry	Geoffrey McCabe	
CX-21	2004 Merlin5 Products quote	Domestic Industry	Geoffrey McCabe	
CX-22	2004 Spec sheet revision – Part No. 501	Domestic Industry	Geoffrey McCabe	
CX-23	FileMaker Pro database component list w/ part numbers	Domestic Industry	Geoffrey McCabe	
CX-24	FileMaker Pro database for Base Pate part no.: 112	Domestic Industry	Geoffrey McCabe	
CX-25	FileMaker Pro database Part Tracker	Domestic Industry	Geoffrey McCabe	
CX-26	FileMaker Pro database Contact List sheet	Domestic Industry	Geoffrey McCabe	
CX-27	2004 RKS notes for parts pickup	Domestic Industry	Geoffrey McCabe	
CX-28	Tremolo Part Analysis	Domestic Industry	Geoffrey McCabe	
CX-29	2005 McCabe Tremolo spec sheet	Domestic Industry	Geoffrey McCabe	
CX-30	12/3/2005 Fax to Kahler for 2006 NAMM Prototype	Domestic Industry	Geoffrey McCabe	
CX-31	12/5/05 fax to Walt Jackman with	Domestic Industry	Geoffrey	

No.	Description/Title	Purpose	Sponsoring Witness	Received
	prototype base plate order		McCabe	
CX-32	11/11/04 email from Nelson	Domestic Industry /Infringement	Geoffrey McCabe	
CX-33	April email exchange w/ RKS	Domestic Industry	Geoffrey McCabe	
CX-34	Early email Exchange with Hoshino	Domestic Industry /Infringement	Geoffrey McCabe	
CX-35	Setting range on Speedloader article	Infringement	Geoffrey McCabe	
CX-36	Reliance July 2004 NDA	Domestic Industry /Infringement	Geoffrey McCabe	
CX-37	Nov 06 Letter from Nelson to Kahler	Domestic Industry /Infringement	Geoffrey McCabe	
CX-38	McCabe US Patent No. 6,563,034	Self-authenticating	Geoffrey McCabe	
CX-39	Corrected Specific Responses To Individual Interrogatories (Nos. 1 - 17)	Infringement	Geoffrey McCabe	
CX-41	Response of Respondent Rose to Complainant's First Set of Interrogatories (Nos. 1-24) February 14, 2007	Infringement	Geoffrey McCabe	
CX-42	Response of Respondent Rose to Complainant's Second Set of (e-mail) Interrogatories (Nos. 25-26) April 13, 2007	Infringement	Geoffrey McCabe	
CX-43	Respondent Rose's Response to Complainant's Third Set of Interrogatories (Nos. 27-86) May 25, 2007	Infringement	Geoffrey McCabe	
CX-44	Complaint Exhibit 43 Gary Kahler Letter 82205	Domestic Industry	Geoffrey McCabe	

No.	Description/Title	Purpose	Sponsoring Witness	Received
CX-45	Complaint Exhibit 44 Jun 20 Letter to Jack Westheimer	Domestic Industry	Geoffrey McCabe	
CX-46	Response of Respondent Rose to Complainant McCabe's First Set of Requests for Admission (Nos. 1-65)	Infringement	Geoffrey McCabe	
CX-47	Response of Respondent Rose to Complainant McCabe's Second Set of Requests for Admission (Nos. 66-82) 6/04/07	Infringement	Geoffrey McCabe	
CX-48	Response of Respondent Rose to Complainant's First Set of Requests for Production of Documents and Things (Nos. 1-6)	Infringement	Geoffrey McCabe	
CX-49	Craig's List LA ad for guitar w/ tuning pegs using Speedloader tremolo 5/26/07	Infringement	Geoffrey McCabe	
CX-50	Complaint Exhibit 34 Redacted Nov. '01 Kahler Preliminary Offer	Domestic Industry	Geoffrey McCabe	
CX-51	Complaint Exhibit 35 Invite to Ibanez to cooperate	Domestic Industry /Infringement	Geoffrey McCabe	
CX-52	Complaint Exhibit 38 Seymour Duncan Compensation	Domestic Industry	Geoffrey McCabe	
CX-53	Complaint Exhibit 39 redacted Sonic Sales_KaBlam Lic prop	Domestic Industry	Geoffrey McCabe	
CX-54	Complaint Exhibit 40 RKS Licensing discussion.	Domestic Industry	Geoffrey McCabe	
CX-55	Complaint Exhibit 41 RKS Prototype discussion	Domestic Industry	Geoffrey McCabe	
CX-56	Complaint Exhibit 42	Domestic Industry	Geoffrey	

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
	Attn Smith Inquiry on RKS deal		McCabe	
CX-57	Respondent Schaller's Motion June 29, 2007 for Summary Determination	Domestic Industry /Infringement	Geoffrey McCabe	
CX-58	Complainant's Response to Respondent Schaller's Motion for Summary Determination	Domestic Industry /Infringement	Geoffrey McCabe	
CX-59	Commission Investigative Staff's Response to Respondent Schaller's Motion for Summary Determination	Domestic Industry /Infringement	Geoffrey McCabe	
CX-66	Complaint Exhibit 19 Kahler '06 Letter	Infringement	Geoffrey McCabe	
CX-67	Complaint Exhibit 20 Kahler 7170	Infringement	Geoffrey McCabe	
CX-68	Complaint Exhibit 25 Floyd Rose website	Infringement	Geoffrey McCabe	
CX-69	Complaint Exhibit 26 Floyd Rose website	Domestic Industry /Infringement	Geoffrey McCabe	
CX-70	Complaint Exhibit 27 Email to Rose for cooperation	Domestic Industry /Infringement	Geoffrey McCabe	
CX-71	Complaint Exhibit 28 Rebuttal to Rose on '831	Domestic Industry /Infringement	Geoffrey McCabe	
CX-72	Complaint Exhibit 29 Rose response to rebuttal	Domestic Industry /Infringement	Geoffrey McCabe	
CX-73	Complaint Exhibit 30 Rebuttal to Rose on '094	Domestic Industry /Infringement	Geoffrey McCabe	
CX-74	Complaint Exhibit 31 Lockett fax 11502 to revive	Domestic Industry /Infringement	Geoffrey McCabe	
CX-75	Complaint Exhibit 32 Speeloder Manual	Infringement	Geoffrey McCabe	

No.	Description/Title	Purpose	Sponsoring Witness	Received
CX-76	Speedloader Headstock	Infringement	Geoffrey McCabe	
CX-77	Floyd Rose Guitar	Infringement	Geoffrey McCabe	
CX-78	Rose '693 patent Fig. 7	Infringement	Geoffrey McCabe	
CX-79	Rose '693 patent Fig. 12	Infringement	Geoffrey McCabe	
CX-80	Image of Speedloader tremolo	Infringement	Geoffrey McCabe	
CX-81	Image of Speedloader tremolo with lever up	Infringement	Geoffrey McCabe	
CX-82	'831 patent Figs. 5A & B	Infringement	Geoffrey McCabe	
CX-83	Rose '693 patent Fig. 17	Infringement	Geoffrey McCabe	
CX-84	'066 patent Figs. 6A- 6F	Infringement	Geoffrey McCabe	
CX-85	'066 patent Figs. 6G-6J	Infringement	Geoffrey McCabe	
CX-86	Image of Rose bridge elements	Infringement	Geoffrey McCabe	
CX-87	Rose '236 patent Fig. 3	Infringement	Geoffrey McCabe	
CX-88	Rose '661 patent Fig. 7	Infringement	Geoffrey McCabe	
CX-89	'094 patent Fig. 11A	Infringement	Geoffrey McCabe	

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
CX-90	'094 patent Fig. 11B	Infringement	Geoffrey McCabe	
CX-91	'094 patent Fig. 11C	Infringement	Geoffrey McCabe	
CX-92	'094 patent Fig. 11D	Infringement	Geoffrey McCabe	
CX-93	Image of Speedloader Fixed bridge	Infringement	Geoffrey McCabe	
CX-94	Rose '693 patent Fig. 18	Infringement	Geoffrey McCabe	
CX-95	'191 patent Fig. 3	Infringement	Geoffrey McCabe	
CX-96	Image of Speedloader fulcrum tremolo	Infringement	Geoffrey McCabe	
CX-97	McCabe Witness Statement	Infringement/ Domestic Industry	Geoffrey McCabe	

**FINAL LIST OF COMPLAINANT DEMONSTRATIVE EXHIBITS**

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
CDX-1	Photo of fulcrum tremolo shown in '066, '831 and '094	Domestic Industry /Infringement	Geoffrey McCabe	
CDX-2	Photo of prototype fulcrum tremolo shown in '191	Domestic Industry /Infringement	Geoffrey McCabe	
CDX-3	Photo of nylon prototype of '191 macro-tuner	Domestic Industry /Infringement	Geoffrey McCabe	
CDX-4	Photo of Kahler NAMM 2006 '7170' prototype on Stratocaster	Domestic Industry /Infringement	Geoffrey McCabe	
CDX-5	Photo of 2004-2005 McCabe RKS prototype	Domestic Industry /Infringement	Geoffrey McCabe	
CDX-6	Photo of McCabe 2001 prototype	Domestic Industry /Infringement	Geoffrey McCabe	
CDX-7	Complainant Exhibit 45 McCabe Prototypes	Domestic Industry	Geoffrey McCabe	
CDX-8	Complainant Exhibit 6 '831 and SpeedLoader	Infringement	Geoffrey McCabe	
CDX-9	Complainant Exhibit 7 '831 and SpeedLoader	Infringement	Geoffrey McCabe	
CDX-10	Complainant Exhibit 8 '094 and SpeedLoader	Infringement	Geoffrey McCabe	
CDX-11	Complainant Exhibit 9 '094 and SpeedLoader	Infringement	Geoffrey McCabe	
CDX-12	Complainant Exhibit 10 '191 and SpeedLoader	Infringement	Geoffrey McCabe	
CDX-13	Complainant Exhibit 11 '066 and SpeedLoader	Infringement	Geoffrey McCabe	

**FINAL LIST OF COMPLAINANT PHYSICAL EXHIBITS**

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
CPX-11	Original Floyd Rose fulcrum Tremolo	Infringement	Geoffrey McCabe	
CPX-12	Floyd Rose SpeedLoader Fulcrum Tremolo	Infringement	Geoffrey McCabe	
CPX-14	Floyd Rose Discover Series Guitar with SpeedLoader Fulcrum Tremolo	Domestic Industry /Infringement	Geoffrey McCabe	

**FINAL LIST OF JOINT EXHIBITS**

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
JX-1	U.S. Patent No. 6,175,066	Infringement	Self-authenticating	
JX-2	U.S. Patent No. 6,891,094	Infringement	Self-authenticating	
JX-3	U.S. Patent No. 5,965,831	Infringement	Self-authenticating	
JX-4	U.S. Patent No. 5,986,191	Infringement	Self-authenticating	
JX-5	Copy of Prosecution History for U.S. Patent No. 6,175,066	Infringement	Self-authenticating	
JX-6	Copy of Prosecution History for U.S. Patent No. 5,965,831	Reference	Self-authenticating	
JX-7	Copy of Prosecution History for U.S. Patent No. 6,891,094	Reference	Self-authenticating	
JX-8	Copy of Prosecution History for U.S. Patent No. 5,986,191	Reference	Self-authenticating	
JX-9	U.S. Patent No. 4,192,213	Reference	Self-authenticating	
JX-10	U.S. Patent No. 4,549,461	Reference	Self-authenticating	
JX-11	U.S. Patent No. 4,555,970	Reference	Self-authenticating	
JX-12	U.S. Patent No. 4,608,904	Reference	Self-authenticating	
JX-13	U.S. Patent No. 4,608,905	Reference	Self-authenticating	
JX-14	U.S. Patent No. 4,672,877	Reference	Self-authenticating	
JX-15	U.S. Patent No. 4,742,750	Reference	Self-authenticating	
JX-16	U.S. Patent No. 4,768,415	Reference	Self-authenticating	
JX-17	U.S. Patent No. 4,793,236	Reference	Self-authenticating	
JX-18	U.S. Patent No. 4,882,967	Reference	Self-authenticating	
JX-19	U.S. Patent No. 4,967,631	Reference	Self-authenticating	
JX-20	U.S. Patent No. 5,198,601	Reference	Self-authenticating	
JX-21	U.S. Patent No. 5,277,095	Reference	Self-authenticating	
JX-22	U.S. Patent No. 6,046,397	Reference	Self-authenticating	
JX-23	U.S. Patent No. 7,045,693	Reference	Self-authenticating	

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
JX-24	U.S. Patent No. 4,632,005	Reference	Self-authenticating	

**FINAL LIST OF JOINT PHYSICAL EXHIBITS**

<b>No.</b>	<b>Description/Title</b>	<b>Purpose</b>	<b>Sponsoring Witness</b>	<b>Received</b>
JPX-1	Floyd Rose Original Tremolo	Physical Specimen	Floyd Rose	
JPX-2	Floyd Rose Pro Tremolo	Physical Specimen	Floyd Rose	

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

**Before Charles E. Bullock**  
**Administrative Law Judge**

**In the Matter of**

**CERTAIN STRINGED INSTRUMENTS AND  
COMPONENTS THEREOF**

**Inv. No. 337-TA-586**

**COMMISSION INVESTIGATIVE STAFF'S**  
**FINAL EXHIBIT LIST**  
**(September 14, 2007)**

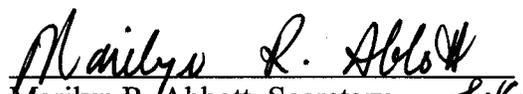
<b>Exh. No.</b>	<b>Exhibit Title</b>	<b>Exhibit Purpose</b>	<b>Sponsoring Witness</b>	<b>Exhibit Status</b>
SX-1C	Respondent Schaller's Response to Commission Investigative Staff's First Set of Interrogatories	Background, remedy, claim construction	By motion	Admitted
SX-2	Respondent Rose's Response to Commission Investigative Staff's First Set of Interrogatories	Background, remedy	By motion	Admitted
SX-3	Complainant's Response to Commission Investigative Staff's First Set of Interrogatories	Background, domestic industry	By motion	Admitted
SX-4C	Sales of Rose Accused Products	Importation, remedy	By motion	Admitted
SX-5C	Price List of Rose Accused Product	Remedy, bonding	By motion	Admitted
SX-6C	Letter from Hanser to Nelson	Domestic Industry	By motion	Admitted
SPX-1	Rose Fixed Bridge Speedloader	Infringement	By motion	Admitted
SPX-2	Package of Speedloader Guitar Strings	Infringement	By motion	Admitted

**CERTAIN STRINGED MUSICAL INSTRUMENTS AND COMPONENTS THEREOF**

**Inv. No. 337-TA-586**

**CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon **Rett Snotherly, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on December 14, 2007.

  
Marilyn R. Abbott, Secretary *Srke*  
U.S. International Trade Commission  
500 E Street, SW, Room 112A  
Washington, DC 20436

**FOR COMPLAINANT GEOFFREY McCABE:**

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**CERTAIN STRINGED MUSICAL INSTRUMENTS AND COMPONENTS THEREOF**

**Inv. No. 337-TA-586**

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