

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

In the Matter of

**CERTAIN COURSE MANAGEMENT
SYSTEM SOFTWARE PRODUCTS**

Inv. No. 337-TA-677

NOTICE OF INVESTIGATION

AGENCY: U.S. International Trade Commission

ACTION: Institution of investigation pursuant to 19 U.S.C. § 1337

SUMMARY: Notice is hereby given that a complaint was filed with the U.S. International Trade Commission on April 17, 2009, under section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337, on behalf of Blackboard Inc. of Washington, D.C. Supplements to the complaint were filed on May 6 and May 14, 2009. The complaint, as supplemented, alleges violations of section 337 based upon the importation into the United States, the sale for importation, and the sale within the United States after importation of certain course management system software products that infringe certain claims of U.S. Patent No. 6,988,138. The complaint, as supplemented, further alleges that an industry in the United States exists as required by subsection (a)(2) of section 337.

The complainant requests that the Commission institute an investigation and, after the investigation, issue exclusion orders and cease and desist orders.

ADDRESSES: The complaint and supplements, except for any confidential information contained therein, are 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., Room 112, Washington, D.C. 20436, telephone 202-205-2000. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000. General information concerning the Commission may also be obtained by accessing its internet server at <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>.

FOR FURTHER INFORMATION CONTACT: Maresa A. Frederick, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, telephone (202) 205-2055.

AUTHORITY: The authority for institution of this investigation is contained in section 337 of the Tariff Act of 1930, as amended, and in section 210.10 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.10 (2008).

SCOPE OF INVESTIGATION: Having considered the complaint, the U.S. International Trade Commission, on June 3, 2009, ORDERED THAT –

(1) Pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, an investigation be instituted to determine whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain course management system software products that infringe one or more of claims 36-44 of U.S. Patent No. 6,988,138, and whether an industry in the United States exists as required by subsection (a)(2) of section 337¹;

(2) For the purpose of the investigation so instituted, the following is hereby named as a party upon which this notice of investigation shall be served:

(a) The complainant is –

Blackboard Inc.
650 Massachusetts Avenue, N.W.
Washington, DC 20001

(b) The respondent is the following entity alleged to be in violation of section 337, and is the party upon which the complaint is to be served:

Desire2Learn Incorporated
305 King Street West, Suite 200
Kitchener, Ontario, Canada N2G 1B9

(c) The Commission investigative attorney, party to this investigation, is Mareesa A. Frederick, Esq., Office of Unfair Import Investigations, U.S. International Trade Commission, 500 E Street, S.W., Room 401, Washington, D.C. 20436; and

(3) For the investigation so instituted, Paul J. Luckern, Chief Administrative Law Judge, U.S. International Trade Commission, shall designate the presiding Administrative Law Judge.

¹ The Commission has determined not to institute an investigation with respect to claims 1-35 as these claims are the subject of a valid and final judgment of invalidity issued by the district court for the Eastern District of Texas.

The Commission notes that the asserted patent is currently involved in a reexamination proceeding at the U.S. Patent and Trademark Office and an appellate proceeding before the Court of Appeals for the Federal Circuit. In instituting this investigation the Commission has not made any determination as to whether a stay is warranted. However, the presiding administrative law judge may wish to consider whether a stay is warranted at an early date in this proceeding. Any such decision regarding the motion to stay the investigation should be issued in the form of an initial determination (ID). The ID will become the Commission's final determination 45 days after the date of service of the ID unless the Commission determines to review the ID. Any petitions for review of the ID must be filed within ten (10) days after service thereof. Any review will be conducted in accordance with Commission Rules 210.43, 210.44 and 210.45, 19 C.F.R. §§ 210.43, 210.44, and 210.45.

The instant complaint also raises questions relating to, *inter alia*, (1) the scope of coverage under Section 337, and (2) possible claim preclusion with respect to claims 36-44 of the asserted '138 patent in light of prior district court contempt proceeding and a pending appeal before the Federal Circuit. As with other investigations commenced pursuant to Section 337, the institution of the requested investigation by the Commission does not constitute a determination on the merits of these or other issues that may arise in the investigation.

Responses to the complaint and the notice of investigation must be submitted by the named respondent in accordance with section 210.13 of the Commission's Rules of Practice and Procedure, 19 C.F.R. § 210.13. Pursuant to 19 C.F.R. §§ 201.16(d) and 210.13(a), such responses will be considered by the Commission if received not later than 20 days after the date of service by the Commission of the complaint and the notice of investigation. Extensions of time for submitting a response to the complaint and the notice of investigation will not be granted unless good cause therefor is shown.

Failure of a respondent to file a timely response to each allegation in the complaint and in this notice may be deemed to constitute a waiver of the right to appear and contest the allegations of the complaint and this notice, and to authorize the administrative law judge and the Commission, without further notice to the respondent, to find the facts to be as alleged in the complaint and this notice and to enter an initial determination and a final determination containing such findings, and may result in the issuance of an exclusion order or a cease and desist order or both directed against the respondent.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: June 3, 2009