



Lisa R. Barton
Secretary to the Commission
United States International Trade Commission
500 E Street SW
Washington, DC 20436

July 30, 2018

Subject: Request for Late Filing for Statement on the Public Interest Regarding
Investigation No. 337-TA-1047

Secretary Barton:

On the afternoon of Friday, July 27, 2018, I attempted to file a statement on behalf of the American Consumer Institute on the public interest regarding *Investigation Number 337-TA-1047, Certain Semiconductor Devices and Consumer Audiovisual Products Containing the Same*, and the final initial determination that is under review by the U.S. International Trade Commission Administrative Law Judge.

On morning of Monday, July 30, 2018, following failed attempts to use the EDIS system to create a cover sheet for the paper copies of the submission, I contacted the International Trade Commission, speaking with Case Manager Kristin Burr, at which point I was informed that my electronic filing was not accepted because the document did not include a signature as required under U.S. International Trade Commission rules.

This omission was unintentional, and I respectfully request permission to file the same statement including a signature beyond the deadline for submission.

Thank you for your consideration.

Sincerely,

Steve Pociask
President,
The American Consumer Institute
1701 Pennsylvania Ave., NW, Suite 300
Washington, DC 20006

Attached: ACI Filing with Signature



July 27, 2018

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

Re: 337-1047 – Violation - Certain Semiconductor Devices and Consumer Audiovisual Products Containing Same; Inv. No. 337-TA-1047 - Sec 337

Introduction

The American Consumer Institute (ACI) focuses on economic policy issues that affect society as a whole in order to find pro-consumer public policies. Today, the cost of technology – and its implementation in a broad array of electronic goods ranging from smartphones to televisions and beyond – plays an integral role in the broader public interest of the American consumer.

To that end, the enforcement of intellectual property (IP) rights underpinning these technologies has long been an area of keen interest of ACI. Finding a balance between protecting IP rights and encouraging innovation is not an easy goal. And disputes over these assets brought before the International Trade Commission (ITC) are particularly significant due to the weight of the singular potential remedy – the Exclusion Order (EO). While excluding foreign goods from entering the United States or being sold in the United States may protect innovation and investment when infringement is clear, the remedy can also have a lasting negative effect on economic activity and consumer welfare, particularly in instances when a patent at issue is questionable, weak or when no demonstrable infringement has occurred.

Further, recent years have borne witness to a rapid proliferation of patent filings and subsequent legal proceedings. In turn, the ITC has seen too many cases in which a minor infringement (or even questionable infringement itself) has been used to exclude products to the disservice of our nation's economic activity and the public interest. The ITC should not be used as a nuclear option to extract royalties when infringement is unclear or negligible.

Discussion and Analysis

In evaluating whether to issue an EO, ACI recognizes that the ITC determines whether that remedy would be against the public interest. In this case, the potential for negative impacts to the public interest – and thereby the American consumer – is remarkable. While there are a number of entities involved in this patent case, VIZIO, an American consumer electronics company, was #1 unit share for all TVs AND #1 unit share in Smart TVs in the U.S. in 2016.¹ During the same year, VIZIO had 19 percent of the US TV market share by revenue.² Further, in 2015, VIZIO held the #1 or #2 HDTV shelf share at major retailers such as Wal-Mart, Best Buy, Costco, Sam's Club and Target,³ reaching shelves in over 8,000 retail stores across the U.S.⁴ As of April 2017, VIZIO represented 30 percent of smart TVs by OEM in U.S. Wi-Fi homes.⁵ During the 5-week period ending September 30, 2017 alone, 406,885 VIZIO units were sold to consumers.⁶

Considering VIZIO and the other entities potentially subject to an EO, this case clearly raises high stakes in the U.S. television market with significant impact on consumers. Based on market share, extensive distribution reach and consumer sales, excluding these products from American markets would be detrimental to customers across the country, and could affect the

¹ See: <https://www.vizio.com/news/cat/news/post/vizio-expands-next-generation-smart-entertainment-ecosystem-with-introduction-of-all-new-vizio-smartcast-m-series-ultra-hd-hdr-home-theater-display/>.

² See: <https://www.cnet.com/news/ces-2018-tv-preview-what-to-expect-from-the-big-screens-of-las-vegas/>.

³ See: <https://www.sec.gov/Archives/edgar/data/1648158/000119312515262817/d946612ds1.htm>.

⁴ See: <https://www.sec.gov/Archives/edgar/data/1648158/000119312515262817/d946612ds1.htm>.

⁵ See: <https://www.comscore.com/Insights/Blog/How-Important-is-the-OTT-Device-Market-if-the-Future-of-TV-is-Apps>.

⁶ See: <https://hdguru.com/tcl-reaches-no-2-ranked-u-s-tv-brand-in-september/>.

competitive play of televisions manufacturers in terms of price, features and unique innovations.

ACI submits this filing in order to draw attention to two concerns regarding this case -- namely, that:

- No clear infringement exists in this case, which suggests, should the Commission find infringement, an EO would be excessive;
- Further, very serious questions regarding the validity of the patents at issue remain outstanding.

As the following analysis details, any alleged harm to Broadcom would be better addressed through seeking monetary damages in separate District Court litigation proceedings.

Ultimately, if the ITC were to reverse its decision and issue an EO, ACI holds that enforcement of the EO should be delayed for a period of six to nine months. This interval would give VIZIO adequate time to craft and implement a work-around solution which leverages non-infringing alternatives. This solution and the pause in EO implementation that would empower it would be critical in the avoidance of a rapid and massive reduction in supply and choice for American consumers, given VIZIO's popularity and proportion of the US TV and Smart TV market.

Excluding televisions from sale would create a significant shortage in the U.S. market, and such an action would have adverse effects on American consumers and therefore is not in the public interest. Any time market supply is reduced, prices go up. Because it will take time for manufacturers to gear up production, a shortage would be significant and not be quickly alleviated. This means that consumers would face higher market prices and some consumers could see potential substitutes as inferior choices.

Removing televisions from the market reduces consumer choice and it will reduce consumer welfare, as has been observed in shortages for other electronic products.⁷ In this case, the decrease in consumer welfare from an EO can be estimated based on the regression in quantity demanded and the resulting increase in prices— both determinants of the price elasticity of demand for television sets.

To illustrate the welfare loss from an exclusion, we note the price elasticity of demand for television sets to be -1.2.⁸ The Consumer Technology Association estimates U.S. television volume to be 44.2 million units and account for \$22.1 billion in 2018.⁹ As noted earlier, while a number of component-suppliers and downstream entities could be affected by an ITC exclusion, for the purpose of simplicity, we consider only VIZIO televisions, which have a market share of approximately 17.5%.¹⁰ For illustration, Our analysis will include a sensitivity test that assumes differing degrees of an EO's impact – from 10% of televisions blocked to 100% of televisions blocked.

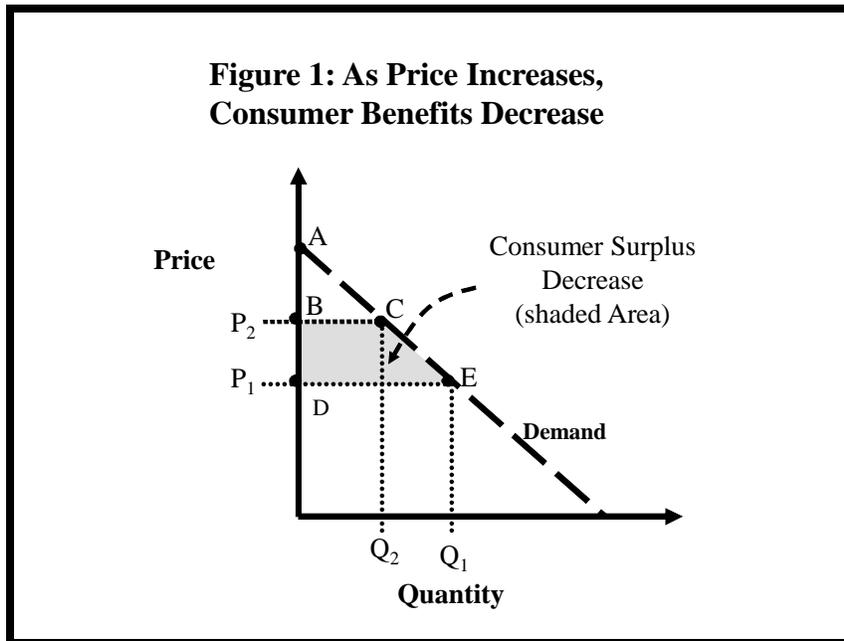
Based on 2016 data, the consumer welfare change resulting from the EO is depicted below in Figure 1. If the initial quantity (Q_1 to Q_2) is assumed to decrease by 30% if VIZIO products were excluded, it will result in 2.3 million fewer television sets into the market or 5.3% fewer units across the entire television market. Based on the price elasticity of demand, this shortage will lead to a 4.4% increase in price from (P_0) to (P_1) or \$22 more per unit sold.

⁷ Ying Fan and Chenyu Yang, "Competition, Product Proliferation and Welfare: A Study of the U.S. Smartphone Market," May 27, 2017, abstract available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506423.

⁸ Patrick L. Anderson, Richard D. McLellan, Joseph P. Overton and Dr. Gary L. Wolfram, published November 13, 1997 and available at http://scholar.harvard.edu/files/alada/files/price_elasticity_of_demand_handout.pdf.

⁹ "2018 Tech Industry Revenue to Reach Record \$351 Billion, Says CTA," News Release citing the Consumer Technology Association report *U.S. Consumer Technology Sales and Forecasts*, January 7, 2018. An average revenue per unit will serve as a proxy for price.

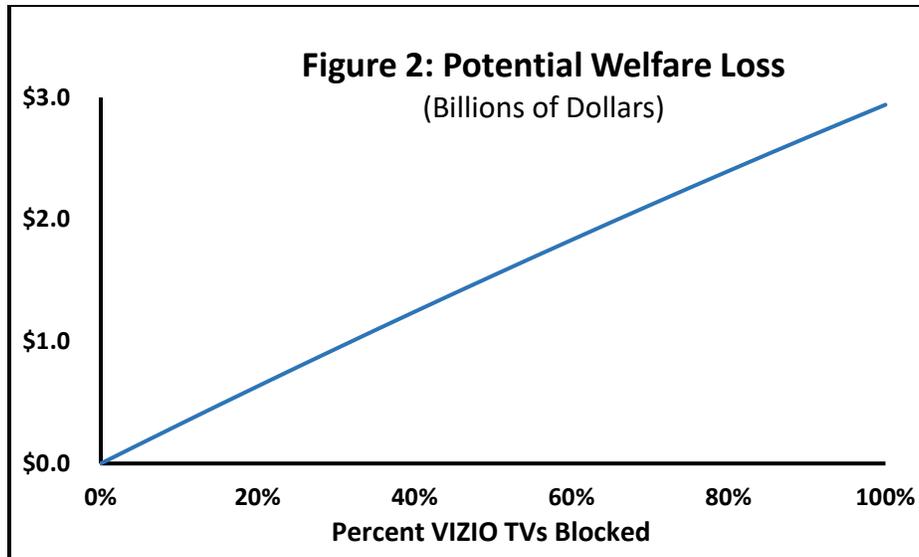
¹⁰ For this illustration, we assume the share to be 17.5% based on an estimate by 1010DATA. See "USA: TV Market Share by Sales Online," Worldwide Tech & Science, November 23, 2016 for data covering January 2016 to September 2016. This estimate is midway between estimates by NDP group for 2016 and 2017 – see <https://www.cnet.com/news/ces-2018-tv-preview-what-to-expect-from-the-big-screens-of-las-vegas/>.



In the case of an OE reducing VIZIO's sales by 30%, the resulting shortage and higher market prices of television sets will lead to a decrease in total consumer welfare of approximately \$941 million, or an area equal to the trapezoid BCED (labeled *consumer surplus decrease*).

While this assumes a shortage lasting one year, the sheer size of the welfare loss – nearly \$1 billion – demonstrates that even a shortage lasting just a few months would produce significant harm to consumers.

To fully illustrate this potential direct impact, Figure 2 shows the results of the sensitivity test and confirm that the potential consumer welfare losses are significant and should be noteworthy to the ITC in considering the public interest. If all of VIZIO's televisions were blocked for one year, the total consumer welfare loss would approach \$3B. Because the ITC decision involves more than VIZIO, our illustration obviously underestimates the full impact of a potential EO.



Moreover, while this figure depicts losses from disruption within the television market, the ramifications of an EO will produce additional losses not estimated here, because of lost indirect economic multiplier effects across various stages of production, as well as lost induced effects.

Summary

While other courts can tailor any remedy to fit the violation, the ITC is limited to an “all or nothing choice.” Based on this analysis, an ITC EO that blocks the sale of televisions would translate into fewer choices and higher prices for consumers. Anyone concerned with consumer welfare should hope such an outcome is avoided.

Broadcom’s complaint against VIZIO lacks sufficient credibility to merit an EO against the company’s products. Broadcom asserted weak patents – which may ultimately be deemed invalid by the ongoing IPR proceedings – against a key manufacturer of televisions. The ALJ’s Final Initial Determination (FID) finding no violation on the part of VIZIO underscores this fact.

ACI has long supported the ITC’s role in protecting IP. EOs are appropriate and essential in some disputes when infringement is clear, but this case is not one of those instances. Rather,

the better course would be to let the parties pursue their dispute in federal court where monetary damages offer a scalable resolution. This approach would ensure that consumer welfare of Americans is not adversely affected by an outsized penalty with major implications on the broader market. Issuing an EO would harm the public interest by immediately decreasing consumer choice, depressing innovation in the U.S. market and unequivocally raise consumer prices.

Should the ITC determine that an EO is appropriate in this case, a case where the validity of the patents and the question of infringement did not clearly favor the complainant, ACI reiterates the public interest benefit of delaying enforcement, which would not harm the complainant (which does not design, manufacture, or sell potential supply substitutions). Allowing VIZIO adequate time to implement non-infringing alternatives would mitigate risk and harm to the public welfare, thereby protecting consumers from hindering innovation in a dynamic industry and a reduction in consumer choices.

ACI believes that the protection of IP rights and the fostering of American innovation are not mutually exclusive goals, and we encourage the ITC to take this analysis into consideration during its review of the FID.

Respectfully Submitted

/S/ Steve Pociask
President / CEO
American Consumer Institute
Center for Citizen Research