

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of

CERTAIN PRODUCTS CONTAINING
INTERACTIVE PROGRAM GUIDE AND
PARENTAL CONTROL TECHNOLOGY

Investigation No. 337-TA-845

COMPLAINANTS' INITIAL SUBMISSION IN RESPONSE TO COMMISSION'S
DETERMINATION TO REVIEW THE FINAL INITIAL DETERMINATION

TABLE OF CONTENTS

INTRODUCTION 1

ISSUE 1. Whether Direct Infringement Being Carried Out By Non-Imported Netflix Servers And Netflix User Interfaces Affects Whether The Netflix SDK Induces Infringement At The Time Of Importation. Additionally, Explain How The Commission Opinion In *Certain Electronic Devices With Image Processing Systems, Components Thereof, And Associated Software*, Inv. No. 337-TA-724, Applies To The Accused Netflix SDK For Each Of The Asserted Patents..... 1

A. Use Of Non-Imported Netflix Servers And User Interfaces To Implement And Complete The Direct Infringement Does Not Shield Inducement By Netflix SDKs As Integrated In Netflix Ready Devices At The Time Of Importation..... 1

B. *Electronic Devices* Is Satisfied Here: The SDK Integrated In The Netflix Ready Devices (NRDs) As Imported Induces Infringement Of Each Of The Asserted Patents..... 2

1. The '906 Patent..... 2

2. The '709 Patent..... 4

3. The '762 Patent..... 5

ISSUE 2. Whether Complainants' Licensing Of The Netflix Ready Devices Pursuant To The LGE And Vizio Licenses Affects Whether The Accused Netflix Software Infringes 7

ISSUE 3. Whether Netflix's Provision Of Its SDK Pursuant To Its Agreements With LGE And Vizio Constitutes A "Sale" Within The Meaning Of Section 337(A)(1)(B) . 9

ISSUE 4. Identify The Specific Software That Allegedly Induces Infringement Of Each Of The Asserted Patents, And Explain Where Such Software Is Present In Both The Netflix Software Allegedly "Sold For Importation" And In The Netflix Ready Devices Imported Into The United States. Or Explain Why No Such Software Exists..... 15

A. The [REDACTED] Protocol And [REDACTED] Client Of The SDK Is The Specific Software That Induces Infringement 15

B. The [REDACTED] Protocol And [REDACTED] Client Are Present In The SDK Sold For Importation And The Imported NRDs..... 16

ISSUE 5. Explain Specifically How the Netflix SDK Itself Induces Infringement of Each of the Asserted Patents. Or Explain Why the Netflix SDK Itself Does Not Induce Infringement Of Each Of The Asserted Patents 17

PUBLIC VERSION

ISSUE 6. Whether Netflix May Induce Infringement Where The Direct Infringement Is Carried Out By Netflix Servers And Netflix User Interfaces 17

ISSUE 7. For Each Claim That Netflix Is Accused Of Inducing Infringement, Explain Who Or What Carries Out The Direct Infringement For Each Claim Limitation..... 19

A. The '906 Patent 19

1. Claims 1-3..... 19

2. Dependent Claim 2 21

3. Dependent Claim 3 21

4. Claims 10-11 21

5. Dependent Claim 11 22

B. The '709 Patent 23

1. Claim 13..... 24

2. Claims 14-16..... 27

3. Claim 17..... 28

4. Claims 18-20..... 30

C. The '762 Patent 30

1. Claim 1 30

2. Claim 6..... 36

3. Claim 13..... 36

4. Claim 15..... 38

5. Claim 17..... 38

ROVI'S SUBMISSION ON THE FORM OF REMEDY THAT SHOULD BE ORDERED, THE REMEDY'S EFFECT AS TO THE PUBLIC INTEREST, AND THE AMOUNT OF THE BOND THAT SHOULD BE IMPOSED..... 39

A. The Commission should Issue a Cease and Desist Order..... 39

B. The Four "Public Interest Factors" Do Not Weigh Against a CDO 43

C. Bonding..... 46

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Advent Sys. v. Unisys Corp.</i> , 925 F.2d 670 (3d Cir. 1991).....	12
<i>Akamai Techs., Inc. v. Limelight Networks, Inc.</i> , 692 F.3d 1301 (Fed. Cir. 2012).....	19
<i>Centillion Data Sys., LLC v. Qwest Communs. Int’l</i> , 631 F.3d 1279 (Fed. Cir. 2011).....	passim
<i>Certain Chemiluminescent Compositions, and Components Thereof and Methods of Using, and Products Incorporating, the Same</i> , Inv. No. 337-TA-285, USITC Pub. 2370, Comm’n Op., Order No. 25 (March 1991)	9, 41
<i>Certain Compound Action Metal cutting Snips and Components Thereof</i> , Inv. No. 337-TA-197, Exclusion Order and Cease and Desist Order, 1986 ITC LEXIS 325 (March 1986)	42, 43
<i>Certain Crystalline Cefadroxil Monohydrate</i> , Inv. No. 337-TA-293, Comm’n Op., 1991 ITC LEXIS 736 (June 1991),	42
<i>Certain Digital Televisions and Products Containing Same and Methods of Using Same</i> , Inv. No. 337-TA-617, Comm’n Op., 2009 ITC LEXIS 2465 (Apr. 23, 2009).....	45
<i>Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers</i> , Inv. No. 337-TA-794, Comm’n Op. (July 5, 2013).....	17, 44
<i>Certain Electronic Devices With Image Processing Systems, Components Thereof, And Associated Software</i> , Inv. No. 337-TA-724, Comm’n Op. (Dec. 21, 2011)	1, 2
<i>Certain Flash Memory Circuits and Products Containing Same</i> , Inv. No. 337-TA-382, USITC Pub. 3046, Comm’n Op. (July 1997).....	40
<i>Certain Flash Memory Controllers, Drives, Memory Cards and Media Players and Products Containing Same</i> , Inv. No. 337-TA-619, Comm’n Op. (Nov. 24, 2009).....	48
<i>Certain Hardware Logic Emulation Systems & Components Thereof</i> , Inv., Inv. No. 337-TA-383, Order to Cease and Desist (Dec. 3, 1997)	40

PUBLIC VERSION

Certain Hardware Logic Emulation Systems and Components Thereof,
Inv. No. 337-TA-383, Opinion on Remedy, the Public Interest, and Bonding, 1998
ITC LEXIS 138 (March 1998).....12, 13, 43

Certain Mobile Devices, Associated Software, and Components Thereof,
Inv. No. 337-TA-744, Comm’n Op., 2012 ITC LEXIS 2177 (June 5, 2012)43

Certain Two-Handle Centerset Faucets and Escutcheons and Components Thereof,
Inv. No. 337-TA-422, Comm’n Op. (July 21, 2000).....44

Certain Variable Wind Speed Wind Turbines and Components Thereof,
Inv. No. 337-TA-376, USITC Pub. 3003, Comm’n Op. (Nov. 30, 1996).....41

Certain Welded Stainless Steel Pipe and Tube,
Inv. No. 337-TA-29, 1978 Comm’n Op., (Feb. 22, 1978).....41

Dean v. United States,
556 U.S. 568 (2009).....19

Digital Ally, Inc. v. Z3 Tech., LLC,
Civ. Action No. 09-2292, 2010 WL 3974674 (D. Kansas Sep. 30, 2010)11

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388 (2006).....46

Enercon GmbH v. Int’l Trade Comm’n,
151 F.3d 1376 (Fed. Cir. 1998).....10, 14, 41

Gross v. Symantec Corp.,
Civ. Action No. 12-00154, 2012 WL 3116158 (N.D. Cal. July 31, 2012).....11

In the Matter of Doxycycline,
Inv. No. 337-TA-3, 1979 WL 61161 Comm’n Op. (April 12, 1979).....42

Move Inc. et al. v. Real Estate Alliance Ltd.,
709 F.3d 1117 (Fed. Cir. 2013).....18, 19

NSK Ltd., v. U.S.,
115 F.3d 965 (Fed. Cir. 1997).....13

Rottner v. AVG Tech. USA, Inc.,
Civ. Action No. 12-10920, 2013 U.S. Dist. LEXIS 63595 (D. Mass. May 3, 2013)12

RRX Indus., Inc., v. Lab-Con, Inc.,
772 F.2d 543 (9th Cir. 1985)11, 12

Spancion, Inc. v. Int’l Trade Comm’n,
629 F.3d 1331 (Fed. Cir. 2010).....45, 46

PUBLIC VERSION

TransCore v. Electronic Transaction Consultants Corp.,
563 F. 3d 1271 (Fed. Cir. 2009).....8

Triangle Underwriters, Inc. v. Honeywell, Inc.,
604 F.2d 737 (2d Cir. 1979).....12

STATUTES

19 C.F.R. § 210.43(b)9
19 U.S.C. § 1337(a)40
19 U.S.C. § 1337(f).....41
35 U.S.C. § 27119
35 U.S.C. § 271(b)18, 19
35 U.S.C. § 271(d)19
Cal. Com. Code § 210111
Cal. Com. Code § 210511
Cal. Com. Code § 230413
Cal. Com. Code § 210511, 13
Cal. Civ. Code § 160513
U.C.C. § 2-401(1)13
U.C.C. § 2-401(2)14
U.C.C. § 2-401(3)15

OTHER AUTHORITIES

H. Rep. No. 40, 100th Cong., 1st Sess. (1987)42, 43
S. Rep. No. 71, 100th Cong., 1st Sess. (1987)42, 43, 44

INTRODUCTION

This is the submission by Rovi Corporation, Rovi Technologies Corporation, Rovi Guides, Inc., United Video Properties, Inc., Starsight Telecast, Inc., and Index Systems, Inc. (collectively, Rovi) on the seven issues designated for briefing in the Commission's Notice of Review, as well as Rovi's submission on remedy, public interest, and bonding.

ISSUE 1. WHETHER DIRECT INFRINGEMENT BEING CARRIED OUT BY NON-IMPORTED NETFLIX SERVERS AND NETFLIX USER INTERFACES AFFECTS WHETHER THE NETFLIX SDK INDUCES INFRINGEMENT AT THE TIME OF IMPORTATION. ADDITIONALLY, EXPLAIN HOW THE COMMISSION OPINION IN *CERTAIN ELECTRONIC DEVICES WITH IMAGE PROCESSING SYSTEMS, COMPONENTS THEREOF, AND ASSOCIATED SOFTWARE*, INV. NO. 337-TA-724, APPLIES TO THE ACCUSED NETFLIX SDK FOR EACH OF THE ASSERTED PATENTS

A. Use Of Non-Imported Netflix Servers And User Interfaces To Implement And Complete The Direct Infringement Does Not Shield Inducement By Netflix SDKs As Integrated In Netflix Ready Devices At The Time Of Importation

The Commission has held that “[S]ection 337(a)(1)(B)(i) covers imported articles that directly or indirectly infringe when it refers to ‘articles that infringe,’” and has interpreted “the phrase ‘articles that infringe’ to reference the status of the articles at the time of importation.” *Certain Electronic Devices with Image Processing Systems, Components Thereof, and Associated Software*, Inv. No. 337-TA-724, Comm’n Op. at 13-14 (December 21, 2011) (“*Electronic Devices*”). Here, the imported article is the Netflix SDK as integrated in a Netflix Ready Device, such as a television.

After importation, customers access the Netflix service from their Netflix Ready Device and retrieve Netflix user interfaces, video programming, and recommendations from Netflix servers. While non-imported user interfaces and Netflix servers implement and complete the direct infringement, it is the Netflix SDK integrated at the time of importation that makes access to the Netflix service possible and that initiates the direct infringement.

There is no requirement that everything which participates in infringement be imported. All that is required is that there be an importation or sale for importation of an article that infringes—which includes an article that indirectly infringes. The SDK as integrated in the Netflix Ready device is such an article. It induces the infringement (*see* Section B., *infra*).

Electronic Devices does not foreclose action against the SDK as integrated in the imported Netflix Ready Devices simply because non-imported Netflix servers and user interfaces are used to implement and complete the direct infringement. If anything, *Electronic Devices* suggests otherwise. In *Electronic Devices*, the Commission found no Section 337 violation based on direct infringement by a product that did not perform the claimed method at the time of importation. Comm’n Op. at 18. However, the Commission suggested that a violation of Section 337 might have been proved based on indirect infringement even though the method would have been performed post-importation. *Id.* Similarly, the fact that software other than the imported Netflix SDK integrated in the Netflix Ready Device is downloaded after importation and used to implement and complete the direct infringement should not in any way alter the indirectly infringing “status” of the SDK software at the time of importation.

B. *Electronic Devices* Is Satisfied Here: The SDK Integrated In The Netflix Ready Devices (NRDs) As Imported Induces Infringement Of Each Of The Asserted Patents

1. The '906 Patent

Source code from the Netflix SDK not only is used to deploy the Netflix Applications on the NRDs so as to enables access to the Netflix service and initiate the direct infringement, it also is used to perform steps of the asserted '906 claims. *See* Peters Tr. 510:10-25; JX-0004C (Mavinkurve Dep. Tr.) at 31, 63, 65-67, 76, 92-94, 102, 108 (testimony explaining that the Netflix SDK includes [REDACTED] (“[REDACTED]”) and the Netflix [REDACTED] client, and that these components are used to carry out steps that infringe the asserted claims of the '906

patent). The '906 patent is about pausing and resuming playback over multiple devices in different formats. [REDACTED]

[REDACTED] A very goal of the imported Netflix software is to facilitate resumed watching of a program on a second device in a different format.¹

After a user pauses content on a first device and then goes to a second device, the user is informed that the program was interrupted (and shown how much of the program was watched before the interruption) and is encouraged to “continue watching” the paused program on and in the format of that second device:



See CX-5750C (Shamos WS) at Q550 with reference to demonstrative exhibit no. CDX-0733 (showing screenshot of CPX-0034). As seen in the above screenshot, the Netflix screen includes

¹ See JX-0004C (Mavinkurve Dep. Tr.) at 31, 63, 65-67, 76, 92-94, 102, 108 (testifying that [REDACTED] causes delivery of media, interrupting delivery of media, recording a bookmark, and resuming delivery of media); Holmes Tr. 567:1-569:20

[REDACTED] CX-5928C (Lowe Dep. Tr.) 24-26 ([REDACTED]); CX-5929C (Streuter Dep. Tr.) 33:4-19; CX-5927C (Brinkman Dep. Tr.) 354:17-355:12 [REDACTED]; CX-5930C (Vandebree Dep. Tr.) 144, 238 [REDACTED].

a category called “Continue Watching” which shows that the programs “Office Space” and “Family Guy” were interrupted.² The screen also provides a red progress bar that shows how much of each program was watched prior to the interruption. The user is then encouraged to “Continue Watching” either program from the point the program was interrupted.

As explained in connection with ISSUE 7, in order to resume playback, the [REDACTED]

[REDACTED]

In this manner, the [REDACTED] of the SDK integrated in the NRD at the time of importation affirmatively aid and abet end users to resume watching a program on a second device in its format.

2. The '709 Patent

The imported [REDACTED] of the SDK creates a “[REDACTED]” (also referred to as a “[REDACTED]”) using the imported [REDACTED] in response to an end user’s activity on a Netflix Ready Device. JX-0004C (Mavinkurve Dep. Tr.) 29, 31; JX-0005C (Peters Dep. Tr.) 26:21-25 (testifying that [REDACTED] is sent to server when the client stops playback); *see also* Compls. Br. at 75-77. Information from [REDACTED] created from user viewing activity is kept by the Netflix servers. JX-0004C (Mavinkurve Dep. Tr.) 31, 76, 92-94.

The '709 patent claims methods and systems for providing personal viewing recommendations to users based on their viewing activity. For example, asserted claim 13

² The UI does not carry out the infringing steps. What the UI does is facilitate user invocation of the imported [REDACTED] client and [REDACTED] protocol that do carry out the infringing steps.

recites “generating a viewing history database comprising program listings and associated program criteria,” steps for using the viewing history database and a user’s preference profile to generate a personal viewing recommendation, and then “providing the personal viewing recommendation to a user.” When an end user uses the Netflix Application for its main purpose of viewing programming, [REDACTED]

[REDACTED]. The Netflix server generates the claimed [REDACTED] using Netflix’s [REDACTED] ([REDACTED]), which stores “[REDACTED].” Compls. Br. at 231 (citing CX-1877C ([REDACTED])). [REDACTED] Compls. Br. at 234 (citing JX-0006C (Sanders Dep. Tr.) 84:7-14, 95).

The Netflix servers then [REDACTED]
[REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Likewise, [REDACTED] as imported also induce the infringement of the system claims when an end user “put[s] the invention into service” to “obtain benefit from it.” *Centillion Data Sys., LLC v. Qwest Communs. Int’l*, 631 F.3d 1279, 1284 (Fed. Cir. 2011) (“*Centillion Data*”).

3. The '762 Patent

The '762 patent is generally directed towards tracking a user’s viewing history, finding programs that are consistent with the user’s viewing history and presenting the found programs

to the user in a way that visually distinguishes the programs that the user has and has not previously viewed. The Netflix SDK as imported induces infringement of claims 1, 6, 13, and 17 of the '762 patent.

In one manner of infringement, Netflix finds and presents programs that have been previously viewed in a "Recently Watched" row and programs that have not been previously viewed in one or more recommendations rows (*e.g.*, Top 10, Alt-genre, and Because You Watched). Sanders Tr. 667:5-7. These rows are visually distinguished from each other by their physical placement on the Home screen.

In another manner of infringement, Netflix finds episodes relating to a program that the user has watched. Netflix provides an Episode Selection screen that contains progress bars visually distinguish whether or not a particular episode has been previously viewed. JX-0003C (Marengi Dep. Tr.) 102-103, 134-136.

In both situations, the Netflix SDK as imported handles the user input at the NRD and the communication from the NRD to Netflix's servers. It is the Netflix SDK as imported that aids and abets user interaction with the NRD and its communication to Netflix's servers to add user activity to the user's viewing history. In particular, as already discussed in connection with the '709 patent, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Netflix's servers track user activity and adjust how movies and television shows are presented to the user based on the user viewing activity. *See* Compl. Br. at 160; *see also id.* at 35 (citing RX-1227C). The Netflix server is programmed to always take that viewing history into account when determining how to present programs to the user of the Netflix Application in a manner such that watched programs will always be visually distinguished from unwatched programs. *See* Compl. Br. at 169-170.

Specifically, the screens of the Netflix Application that have both watched and unwatched programs (the Home screen and Episode Selection screens) are presented to viewers when they run the Netflix Application (for the Home screen) and select a television series for which they have watched at least one episode (for the Episode Selection screens). *Id.* As such, the imported [REDACTED] of the SDK affirmatively aid and abet user interaction with the NRD and its communication to Netflix's servers to add user activity to the user's viewing history in the process of carrying out the claim 1 step that "visually distinguishes the programs determined by the program guide server to have been previously viewed from the programs that have not been previously viewed".

ISSUE 2. WHETHER COMPLAINANTS' LICENSING OF THE NETFLIX READY DEVICES PURSUANT TO THE LGE AND VIZIO LICENSES AFFECTS WHETHER THE ACCUSED NETFLIX SOFTWARE INFRINGES

When speaking of "the now licensed importation of Netflix Ready Devices such as LGE and Vizio televisions" (ID at 42), the ALJ conflated what is licensed with what plainly is not, *i.e.*, the Netflix Applications. A finding of inadequate importation "status" based upon licenses to LGE and Vizio was manifestly wrong and internally inconsistent. The Netflix Applications integrated with the imported and indirectly infringing SDK are plainly not licensed.

Rather, the LGE license and the Vizio license both "*expressly and affirmatively negate*" any license for the Netflix Applications. ID at 360 (emphasis added). The otherwise licensed

importation of Netflix Ready Devices, such as LGE and Vizio televisions, cannot change what is licensed to what clearly is not, *i.e.*, the Netflix Applications. *See id.* (discussing *TransCore v. Electronic Transaction Consultants Corp.*, 563 F. 3d 1271, 1274-75 (Fed. Cir. 2009)).

For example, Rovi’s licensing agreement with Vizio is subject to specific conditions. *See* RX-1331C (Vizio, Inc. Settlement, Release, and Patent License Agreement, section 2.1 (Dec. 28, 2012) (ITC-845 Inv. No., Order No. 21) (“Rovi-Vizio License Agreement”). Section 2.4 (“Reservation of Rights”) expressly states that [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] *Id.* at § 2.4 (emphasis added).

Section 2.3 (“Third Party Applications”) expressly says: “[REDACTED]
[REDACTED].” *Id.* at § 2.3. The Netflix Application is directly called out as a Third Party Application that is *not* licensed. *Id.* at § 1.1 (defining “Third Party Applications” as “third party software applications that are not made for and/or on behalf of Licensee, *including, but not limited to, applications by* [REDACTED] [REDACTED] *Netflix, [REDACTED] or other similar companies, that may be provided on Licensee Products.”). The Rovi-Vizio License Agreement additionally says: “*Nothing in this section shall prevent Rovi from seeking* additional payment from such third-party entities, or from seeking *an injunction, exclusion order, a cease and desist order, or any other remedy* in equity in such action *against such third-party entity.*” *Id.* at § 2.3 (emphasis added).*

Rovi’s license to LGE is similar. *See* RX-1332C (Settlement Agreement between Rovi and LG (Feb. 25, 2013); *see* Order No. 36 (the “Rovi-LGE License Agreement”). It too expressly negates any implied license for third-party applications, specifically calling out

Netflix: “Notwithstanding any other provision in this Agreement, *no license or release is granted hereunder to any and all third-party applications* (e.g. [REDACTED] Netflix, [REDACTED], etc.)” Rovi-LGE License Agreement, TERM SHEET at ¶ 3. It further states that “Rovi will negotiate any necessary licenses under the licensed Patents associated with such third-party applications *directly with the third-party entities*”. *Id.*

That LGE and Vizio are no longer respondents in this investigation also is of no consequence. No “governing precedent, rule or law” (*see* 19 C.F.R. § 210.43(b)(1) (ii)) suggests that the actual importer of the article that Respondent Netflix *sold for importation* must also remain an active respondent in order for the Commission to find a violation by Netflix. *See e.g., Certain Chemiluminescent Compositions and Components Thereof and Methods of Using, and Products Incorporating, the Same*, Inv. No. 337-TA-285, USITC Pub. No. 2370, Comm’n Op. at 3-4, Order No. 25 (Initial Determination) at 31 (March 1981) (sole remaining respondent found to have violated Section 337 based only on the sale for importation of indirectly infringing necklaces).

ISSUE 3. WHETHER NETFLIX’S PROVISION OF ITS SDK PURSUANT TO ITS AGREEMENTS WITH LGE AND VIZIO CONSTITUTES A “SALE” WITHIN THE MEANING OF SECTION 337(A)(1)(B)

The Federal Circuit’s decision in *Enercon GmbH v. Int’l Trade Comm’n*, 151 F.3d 1376, 1381 (Fed. Cir. 1998) (“*Enercon*”) governs what constitutes a “sale for importation” under section 337. There the Court looked to the Uniform Commercial Code (U.C.C.) as “the general law governing the sale of goods” and a “useful, though not authoritative, source in determining the ordinary commercial meaning of the term ‘sale.’” *Id.* at 1382. As recognized in *Enercon*, “[s]ection 2-204(1) of the U.C.C. provides that ‘a contract for [the] sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes

the existence of such a contract . . . even though the moment of its making is undetermined.” *Id.* at 1383.

Here, there are specific agreements for LGE and Vizio to build on the Netflix-supplied software to create and distribute device-specific applications (the respective “Netflix Applications”) that run on NRDs to communicate with Netflix servers. *See* RX-1227C (Netflix-Vizio License Agreement) at §§ 1.12, 2.1.1, 2.1.2, 2.1.5 ([REDACTED]

[REDACTED]; RX-1218C (Netflix-LGE License Agreement) at §§ 1.17, 1.39, 2.1 ([REDACTED]

[REDACTED]). In return, Netflix benefits in a number of ways, including [REDACTED]

[REDACTED]. *See e.g.*, Peters Tr. 534:15-535:14; Holmes Tr. 585:20-588:4. The agreements are governed by California law. *See* Resps. Pet. at 10 n.2.

Under California UCC, software licenses such as Netflix’s agreements with LGE and Vizio are appropriately considered contracts for the sale of goods. *See e.g.*, Cal. Com. Code §§ 2105, 2101; *RRX Indus., Inc., v. Lab-Con, Inc.*, 772 F.2d 543, 544 (9th Cir. 1985) (“*RRX*”)

applied in *Gross v. Symantec Corp.*, Civ. Action No. 12-00154, 2012 WL 3116158 (N.D. Cal. July 31, 2012) (“*Gross*”). Indeed, the vast majority of courts that have analyzed the issue have found that UCC Article 2 governs software license transactions such as the ones at issue here. *See* Compls. Reply Br. at 14-15, n. 4.³

A software license can qualify as a sale of goods under the California UCC⁴ even though software is downloaded via the internet instead of being purchased in a fixed medium. *Gross*, 2012 WL 3116158, at *3, *9 (“Although Plaintiff purchased and downloaded Symantec’s software from the internet, and did not install the software from a CD, the ‘essence of the agreement’ is the same.”). Courts look to the “essence of the agreement” to find that “the sales aspect of the transaction predominates,” notwithstanding a provision in the agreement for incidental services, such as training, repair, and upgrading. *See RRX*, 772 F.2d at 546. *See also Advent Sys. v. Unisys Corp.*, 925 F.2d 670, 676 (3d Cir. 1991) (finding software license to constitute a sale of goods because “the contract’s main objective was to transfer ‘products.’”); *Triangle Underwriters, Inc. v. Honeywell, Inc.*, 604 F.2d 737, 742-43 (2d Cir. 1979) (in sale of computer hardware, software, and customized software, goods aspect predominated; services were incidental); *Rottner v. AVG Tech. USA, Inc.*, Civ. Action No. 12-10920, 2013 U.S. Dist. LEXIS 63595, *18-21 (D. Mass. May 3, 2013) (applying predominance test to find commercial transaction involving software download as a UCC sale of goods).

³ In a lengthy footnote the court in *Digital Ally, Inc. v. Z3 Tech., LLC*, Civ. Action No. 09-2292, 2010 WL 3974674, at *8 n.86 (D. Kansas Sep. 30, 2010), collected cases recognizing the applicability of the UCC to software transactions.

⁴ Section 2105 of the California UCC defines “goods” as “all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale.” *Gross*, 2012 WL 3116158, at *8.

PUBLIC VERSION

Here, the whole purpose of Netflix’s agreements with LGE and Vizio was to get the licensed software integrated into Netflix Applications that are pre-loaded onto devices so they will be “Netflix-Ready.” That makes the transaction a sale under the “essence of the agreement” test, and its recognition as a sale for importation of an article is entirely in line with the Commission’s consistent treatment of software as an “article” subject to the Commission’s remedial authority under Section 337. *See, e.g., Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, USITC Pub. 3089, Comm’n Op. on Remedy, Bonding, and the Public Interest at *18, 1998 ITC LEXIS 138 (March 1998) (“*Hardware Logic*”), (issuing a cease and desist order directed to the electronic transmission of software).

[REDACTED]

[REDACTED]

[REDACTED]

The software itself was transferred for a price. In accordance with the California UCC, “price can be made payable in money or otherwise.” Cal. Com. Code § 2304(1) (emphasis added). Characterization of the transaction as “royalty-free” does not mean that the transaction

⁵ The agreements say that [REDACTED].
[REDACTED].
See RX-1227C (Netflix/Vizio agreement) at RX-1227C.0004 (§4.1); RX-1218C (Netflix/LGE agreement) at RX-1218C.0006-.7 (§4.1). [REDACTED]

[REDACTED] *See* RX-1227C (Netflix/Vizio agreement) at RX-1227C.0002 (§1.10)

[REDACTED] RX-1218C (Netflix/LGE agreement) at RX-1218C.0003 (§1.18) (same with respect to LG). The UCC makes an analogous distinction when it states: “[a]ny retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest.” U.C.C. § 2-401(1).

lacks consideration sufficient to constitute a “price” under the UCC.⁶ See Cal. Civ. Code § 1605 (“good consideration” includes “[a]ny benefit conferred” to which the party otherwise “is not lawfully entitled”); see also Compls. Br. at 36-37. Here, Netflix’s own witnesses testified that Netflix receives valuable consideration in return for the software it provides to its NRD partners. *Id.* at 10-11.

As one acknowledged, “[REDACTED]”
[REDACTED]
[REDACTED]
[REDACTED].”

See Holmes Tr. 587:4-13. See also Peters Tr. 534:15-535:14 ([REDACTED]
[REDACTED]
[REDACTED])

That Netflix actually benefits from these agreements is further confirmed by Netflix’s own “internal projections,” [REDACTED]
[REDACTED]. See RX-1207C (Netflix NRD Mix Trends) ([REDACTED]). Clearly, Netflix receives significant and tangible benefits in return for the software it provides.

The *Enercon* court looked to *Black’s Law Dictionary* and *Webster’s Third New International Dictionary*, and found that a “sale for importation” may include “situations in

⁶ In *NSK Ltd., v. U.S.*, 115 F.3d 965, 975 (Fed. Cir. 1997), the court concluded there was no sale because “there is no evidence that potential customers had any obligation regarding samples received from NSK,” and “[t]hese potential customers were free to transact with NSK based solely on their whim.” *Id.* Here, LGE and Vizio could not simply “choose to perform based solely on a whim.” Rather, they are subject to specific obligations under their agreements with Netflix. See, e.g., RX-1227C (Netflix-Vizio License Agreement) at RX-1227C.0004-.10 (§§5-8 (listing the Mutual Conditions and Obligations)).

which a contract has been made between two parties who agree to transfer title and possession of specific property for a price.” *Enercon*, 151 F.3d at 1382. There is, however, no requirement that parties explicitly agree to transfer title to qualify as a “sale.” To the contrary, *Black’s Law Dictionary* defines “sale” as “the transfer of property or title for a price.” Resps. Pet. at 9 (emphasis added). Here, there was a transfer of specific property – namely, a copy of the SDK actually obtained from Netflix via download.

In any event, the UCC provides that “[u]nless otherwise explicitly agreed *title passes to the buyer at the time and place at which the seller completes performance with reference to the physical delivery of the goods....*” U.C.C. § 2-401(2) (emphasis added). Even absent physical movement, the UCC provides that “where delivery is to be made without moving the goods ... if the goods are at the time of contracting already identified and no documents of title are to be delivered, *title passes at the time and place of contracting.*” U.C.C. § 2-401(3)(b) (emphasis added). As such, regardless of the manner in which Netflix’s software is considered to be delivered, title in the goods themselves passed to Netflix’s partners notwithstanding the reservations in the agreements.

Netflix acted as the supplier of a constituent, *i.e.*, its SDK software, which was integrated as part of the manufacturers’ devices prior to importation. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ISSUE 4. IDENTIFY THE SPECIFIC SOFTWARE THAT ALLEGEDLY INDUCES INFRINGEMENT OF EACH OF THE ASSERTED PATENTS, AND EXPLAIN WHERE SUCH SOFTWARE IS PRESENT IN BOTH THE NETFLIX SOFTWARE ALLEGEDLY “SOLD FOR IMPORTATION” AND IN THE NETFLIX READY DEVICES IMPORTED INTO THE UNITED STATES. OR EXPLAIN WHY NO SUCH SOFTWARE EXISTS

A. The [REDACTED] Protocol And [REDACTED] Client Of The SDK Is The Specific Software That Induces Infringement

As discussed under ISSUE 1 above, the specific software that induces infringement of each of the asserted patents is the Netflix [REDACTED] protocol and [REDACTED] client of the SDK.

In the case of the '906 patent, the [REDACTED] protocol and [REDACTED] client aid and abet end users to resume watching a program on a second device in its format. [REDACTED]

[REDACTED]

[REDACTED] See CX-5750C (Shamos WS) at Q528-536; JX-0004C (Mavinkurve Dep. Tr.) 31, 64-67, 104-105; Compls. Br. at 72-74. See also CX-5750C (Shamos WS) at Q534.

In the case of the '709 patent, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

In the case of the '762 patent, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. The [REDACTED] Protocol And [REDACTED] Client Are Present In The SDK Sold For Importation And The Imported NRDs

Netflix admits that its partners use the SDK “in whole or in part” to create Netflix Applications on the imported devices. Resps. Br. at 41-42. Netflix admits that the SDK (which is sold for importation as integrated in NRDs as discussed in ISSUE 3 above) includes the Netflix [REDACTED] protocol and [REDACTED] client. *See* Compl. Br. at 34-35; Compl. Reply Br. at 33, n. 14; Holmes Tr. 567:1-569:20 (testifying that consistent with the terms of the license agreements, that the SDK includes, among other things, the Netflix [REDACTED] protocol and [REDACTED] client).

The presence of the [REDACTED] client and [REDACTED] protocol on the imported devices is confirmed by witnesses from LGE and Vizio who testified that the Netflix Application is already loaded on devices when they are imported. *See* Compl. Br. at 23-25; CX-5928C (Lowe Dep. Tr.) 24:17-26:1 (testifying that Vizio televisions have Netflix Application on them at time of importation); CX-5929C (Streuter Dep. Tr.) 33:4-19; CX-5927C (Brinkman Dep. Tr.) 354:17-355:12 (testifying that when Vizio products are imported into the United States, the Netflix Application is already loaded onto the products); CX-5930C (Vandenbree Dep. Tr.) 144:3-5, 238 (testifying that Netflix Application is already loaded on to LGE televisions when imported).

ISSUE 5. EXPLAIN SPECIFICALLY HOW THE NETFLIX SDK ITSELF INDUCES INFRINGEMENT OF EACH OF THE ASSERTED PATENTS. OR EXPLAIN WHY THE NETFLIX SDK ITSELF DOES NOT INDUCE INFRINGEMENT OF EACH OF THE ASSERTED PATENTS

The Netflix SDK does not “itself induce” infringement of the asserted patents in any sense that it infringes any of the asserted claims “on its own”. As discussed in connection with ISSUE 1, *supra*, and in Complainants’ Petition for Review of the Final Initial Determination in this Investigation, neither Commission precedent nor any statutory language imposes any requirement that Netflix or its business partners must have imported an indirectly infringing article that brings about the direct infringement “on its own”.

Here, the Netflix SDK as integrated in the NRD at importation does “itself induce” infringement of each asserted patent in the sense that it aids and abets such infringement. *See* the discussions under ISSUES 1 and 4 above. That, as taught by *Electronic Devices*, is the only “itself induce” requirement imposed by the statute. And here that requirement is indeed satisfied— the infringements of each asserted patent is based on functionality and system elements present at importation, namely the functionalities of the Netflix [REDACTED] protocol and [REDACTED] client already discussed.

ISSUE 6. WHETHER NETFLIX MAY INDUCE INFRINGEMENT WHERE THE DIRECT INFRINGEMENT IS CARRIED OUT BY NETFLIX SERVERS AND NETFLIX USER INTERFACES

As a threshold matter, direct infringement of the asserted claims is not carried out solely by Netflix servers and Netflix user interfaces. As such, Netflix does not necessarily induce infringement only of itself when claimed steps are performed by a combination of the integrated Netflix software, the NRD partner, and/or users. For example, users participate in the claimed step in the ’906 patent of “recording a bookmark specifying a position in the media” of claims 1 and 10, and the step of “interrupting said delivery of the media” of claim 10. In another example,

Netflix Ready Devices participate in the claimed step in claim 1 of the '762 patent of “displaying, with a program guide client implemented on the user television equipment, a display of program titles . . .” Since Netflix is not the only one who performs steps of the asserted claims, Netflix is liable for inducing infringement. *See Move Inc. et al. v. Real Estate Alliance Ltd.*, 709 F.3d 1117, 1122-23 (Fed. Cir. 2013) (“*Move Inc.*”) (holding that the accused infringer could be liable for inducement when it performed certain steps of the claimed method and users performed other steps of the claim). Moreover, the asserted system claims of the '709 and '762 patents are directly infringed by users who put the claimed systems into operation, and Netflix induces that infringement.

In any event, though inducement of another is certainly actionable under 35 U.S.C. § 271(b), there is no *requirement* in the statute that the inducement *must* be of another.⁷ The proper focus is on the *conduct* that is induced, not on whether something other than Netflix servers or Netflix user interfaces carry out the infringement. *Akamai Techs., Inc. v. Limelight Networks, Inc.*, 692 F.3d 1301, 1308 (Fed. Cir. 2012) (“It is enough that the inducer (cause[s], urge[s], encourage[s], or aid[s]) the infringing *conduct* and that the induced *conduct* is carried out.” (emphasis added)); *cf. id.* (“[inducement] requires that the accused inducer act with knowledge that the *induced acts constitute patent infringement*” (emphasis added)).

As a matter of statutory interpretation, the absence of “another” in § 271(b) is a significant indicator that inducement is not limited to inducing another. That is especially so inasmuch as “another” is used in subsection (d)(1), (d)(2), (d)(3), and (d)(5) of 35 U.S.C. § 271

⁷ Performing all the steps of a method claim is an infringement chargeable separately from inducement and the same actor being charged with either or both. *See Move Inc.*, 709 F.3d at 1123 (accused infringer could be liable for inducement even if it performed steps of the claimed method).

but not in § 271(b). *See Dean v. United States*, 556 U.S. 568, 573 (2009) (“[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion”).

ISSUE 7. For Each Claim That Netflix Is Accused Of Inducing Infringement, Explain Who Or What Carries Out The Direct Infringement For Each Claim Limitation

A. The '906 Patent

1. Claims 1-3

Preamble: A method for providing configurable access to media in a media-on-demand system comprising the steps of:

Notwithstanding that this preamble language is not limiting, the Netflix SDK, the user, and the Netflix server are involved in providing configurable access to media in a media-on-demand system. Specifically, the integrated portion of the Netflix software resident on a Netflix Ready Device is configured to communicate with Netflix servers to provide media-on-demand Netflix streaming service to end users. CX-5750C (Shamos WS) at Q526.

Element 1a: delivering the media to a first client device through a first communications link, wherein the media is configured in a format compatible with identified device properties of said first client device and said first client device is associated with a first user;

The Netflix SDK and Netflix server carry out this claimed step. The SDK as integrated in the NRD causes the [REDACTED] servers to deliver programs to a first device over the Internet in a format compatible with the properties of the device on which the program is being viewed. [REDACTED]

[REDACTED]

[REDACTED]

Element 1b: recording a bookmark specifying a position in the media;

Bookmarks are recorded to permit the proper resumption of an interrupted program. [REDACTED]

[REDACTED]

Element 1c: delivering the media to a second client device through a second communications link, said delivery to said second client device beginning at said position specified by said recorded bookmark, wherein the media is configured in a format compatible with identified device properties of said second client device and said second client device also is associated with said first user;

The Netflix SDK and Netflix server carry out this claimed step. As explained with respect to element 1a, [REDACTED]

[REDACTED]

2. Dependent Claim 2

Claim 2: The method according to claim 1, further comprising the steps of: identifying device properties for each of said first and second client devices, device properties of said first client device being identified prior to commencing delivery of the media to said first client device and device properties of said second client device being identified prior to commencing delivery of the media to said second client device.

The Netflix SDK and Netflix server carry out these claimed steps. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. Dependent Claim 3

Claim 3: The method according to claim 2, wherein the media is stored in a media-on-demand server (MODS) and delivered to said first and said second client devices via said first and said second communications link respectively.

Claim 3 is met by the Netflix CDN server. The media are stored in that server and delivered to the first and said second client devices via the first and second communications link, respectively, as described above with respect to claim 1. *See* CX-5750C (Shamos WS) at Q566-571.

4. Claims 10-11

Preamble: A method for providing configurable access to media in a media-on-demand system comprising the steps of:

See discussion above in connection with the preamble.

Element 10a: delivering the media to a first client device in a first format compatible with said first client device, wherein said first client device is associated with a first user;

Element 10a is essentially the same as Element 1a, but without recital of “communications link.” See discussion above in connection with Element 1a of the '906 patent.

Element 10b: interrupting said delivery of said media;

The user of the Netflix Application integrated with the imported and indirectly infringing SDK performs this step. Specifically, the user stops watching the movie (and thus interrupts delivery) by clicking the “stop” button or another button on the remote. See JX-0004C (Mavinkurve Dep. Tr.) 29-30. This was reconfirmed by Netflix witness, Mr. Mavinkurve during the hearing when he testified that [REDACTED]

[REDACTED]. This was also confirmed by another Netflix witness, Greg Peters, who testified that [REDACTED]. JX-0005C (Peters Dep. Tr.) 26:20-25 (testifying that [REDACTED] is sent to server when the client stops playback).

Element 10c: recording a bookmark specifying a position in the media when said interruption occurred, and;

See discussion above in connection with Element 1b of the '906 patent.

Element 10d: resuming delivery of the media to a second client device in a second format compatible with said second client device, said resumed delivery beginning at a position in the media specified by said recorded bookmark, wherein said second client device also is associated with said first user;

See discussion above in connection with Element 1c of the '906 patent.

5. Dependent Claim 11

Element 11a: The method according to claim 10, further comprising the steps of identifying a device type for each of said first and second client devices;

See discussion above in connection with Element 1a of the '906 patent.

Element 11b: delivering the media to said first client device in said first format, said first format selected based upon said identified device type for said first client device; and

See discussion above in connection with Element 1a of the '906 patent.

Element 11c: delivering the media to said second client device in said second format, said second format selected based upon said identified device type for said second client device; and

See discussion above in connection with Elements 1c and 1d of the '906 patent.

B. The '709 Patent

As already discussed, the software from the Netflix SDK integrated into Netflix Ready Devices induces infringement of claims 13-20 of the '709 Patent. Claims 13-16 are method claims and claims 17-20 are system claims. The method claims are carried out at the Netflix servers, which perform the steps of the claims at the direction of an end user of a Netflix Ready Device (*i.e.*, a device with the Netflix Application and incorporating the Netflix SDK). The Netflix Ready Devices meet every element of the system claims and thus the direct infringement is carried out by the end users of those Netflix Ready Devices, because infringing “use” of a system occurs when an end user “put[s] the invention into service, *i.e.*, control the system as a whole and obtain benefit from it.” *Centillion Data*, 631 F.3d at 1284 (Fed. Cir. 2011).

Each of the method steps of claim 13 are performed by the Netflix servers, at the direction of an end user of a Netflix Ready Device. An end user makes use of the Netflix Application on a Netflix Ready Device for its main purpose—viewing programming—and that viewing activity directly results in the Netflix servers generating the claimed viewing history database. Compls. Br. at 231 (citing CX-1877C ([REDACTED])). The end user’s activity also causes the Netflix servers to [REDACTED]

[REDACTED]

Compls. Br. at 234 (citing JX-0006C (Sanders Dep. Tr.) 84:7-14, 95). As a result of the end user’s activity, the Netflix server [REDACTED]

[REDACTED]

[REDACTED]. See Compls. Br. at 233-243. Dependent claims 14-16 further refine the steps of

claim 13 performed by the Netflix servers, at the direction of an end user of a Netflix Ready Device.

System claim 17 calls for a device comprising user equipment on which an interactive program guide client is implemented and a communications path to transmit the user's activity to the Netflix program guide server. Claim 17 also identifies aspects of the program guide server that the claimed system must be designed to communicate with via the recited communications path, but do not claim the program guide server as an element of the claimed system. Compls. Br. at 250-251; Compls. Reply Br. at 93. The Netflix Ready Devices include each of the claimed elements of system claim 17 and are designed to communicate with the program guide server as called for in the claim. Compls. Br. at 246-254. Dependent claims 18-20 further refine the elements of the claim 17 system included in Netflix Ready Devices. Direct infringement of the system claims occurs when an end user "put[s] the invention into service, *i.e.*, control the system as a whole and obtain benefit from it." *Centillion Data* 631 F.3d at 1284. In addition, direct infringement of the system claims occurs when the directly infringing Netflix Ready Devices are imported and/or sold (*e.g.*, by LGE and Vizio) in the United States.

1. Claim 13

Preamble: A method for use in an interactive program guide system for providing a customized viewing experience to a user, comprising

This preamble language is not limiting. Nevertheless, the preamble language of claim 13 is met by the Netflix servers at the direction of an end user of a Netflix Ready Device when they operate on the user's viewing history and preference profile and generate the personalized viewing recommendations provided to the user. The [REDACTED] client handles user activity on a Netflix Ready Device and uses the [REDACTED] protocol in the process of generating the recommendations.

Element 13a: generating a viewing history database comprising program listings and associated program criteria

Netflix servers perform this step at the direction of an end user of the NRD. [REDACTED]

[REDACTED]

Element 13b: determining at least one of the associated program criteria from the viewing history database that meets a user preference profile

Netflix servers perform this step. Individualized programs are recommended to the user based on ratings of programs. Netflix arranges for users to save their preferences by assigning star ratings to programs. CX-5750C (Shamos WS) at Q225; CX-2072C ([REDACTED])

[REDACTED]. [REDACTED]

[REDACTED] JX-0006C (Sanders Dep. Tr.) 81:3-11; CX-2519C ([REDACTED])

[REDACTED] See CX-5750C (Shamos WS) at Q222; CX-2072C ([REDACTED]); JX-0006C (Sanders Dep. Tr.) 84:7-14, 95, 116:22-117:25; CX-2392C ([REDACTED]), at CX-2392C.3, CX-2392C.7 –

.8; JX-0009C (Gomez-Uribe Dep. Tr.) 86:14-23, 87:12-89:14.

Element 13c: determining from a program listing database a set of programs not yet watched

Netflix servers perform this step. The [REDACTED] service can be queried for [REDACTED] [REDACTED]. JX-0006C (Sanders Dep. Tr.) 107:11-18. [REDACTED] [REDACTED] CX-2197C (Filters 2.0), at CX-2197C.4. [REDACTED] [REDACTED] CX-2197C (Filters 2.0), at CX-2197C.5. [REDACTED] [REDACTED] CX-2519C ([REDACTED] [REDACTED]) at CX-2519C.32; JX-0006C (Sanders Dep. Tr.) 115:16-116:19; Sanders Tr. 666:25-667:4.

Element 13d: applying the at least one of the associated program criteria to the set of programs not yet watched to generate at least one personal viewing recommendation

Netflix servers perform this step. A personal viewing recommendation of programs not yet watched is based on the associated program criteria. CX-5750C (Shamos WS) at Q240.

[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Element 13e: providing the personal viewing recommendation to a user

Netflix servers perform this step. The recommendations provided by the Netflix servers are displayed on the end user's Netflix Ready Device. CDX-0037; CDX-0038; CDX-0039; CDX-0031; CDX-0034 –CDX-0036; CDX-0040 – CDX-0042.

2. Claims 14-16

Claim 14. The method defined in claim 13 wherein generating a viewing history database comprises storing the program listings and the associated program criteria for at least one of: programs that the user has watched; programs for which the user has scheduled reminders; programs for which the user has scheduled for recording; programs for which the user has searched; and programs for which the user has ordered.

This dependent claim further refines the steps of claim 13 performed by the Netflix servers, at the direction of an end user of a Netflix Ready Device. The Netflix viewing history includes programs that the user has watched as discussed above in relation to claim 13. CX-5750C (Shamos WS) at Q266; CX-2519C ([REDACTED]), at CX-2519C.32.

Claim 15. The method defined in claim 13 wherein the associated program criteria comprises at least one of program categories, ratings, casting, and languages.

This further refines the steps of claim 13 performed by the Netflix servers, at the direction of an end user of a Netflix Ready Device. The associated program criteria in the Netflix viewing history includes program categories. CX-5750C (Shamos WS) at Q270; JX-0009C (Gomez-Uribe Dep. Tr.) 87:12-89:21; JX-0006C (Sanders Dep. Tr.) 119:4-16.

Claim 16. The method defined in claim 13 wherein the at least one of the associated program criteria is the same as at least one criteria defined in the user preference profile.

This dependent claim further refines the steps of claim 13 performed by the Netflix

servers, at the direction of an end user of a Netflix Ready Device. [REDACTED]

3. Claim 17

Preamble: An interactive program guide system for providing a customized viewing experience to a user, comprising

This preamble language is not limiting. Nevertheless, Netflix Ready Devices contain the claimed user equipment and communications path to transmit user activity to the Netflix program guide server and provides a customized viewing experience to a user.

Element 17a: user equipment on which an interactive program guide client is implemented, wherein the interactive program guide client is operative to provide the user with an opportunity to create a user preference profile

Netflix Ready Devices meet this element as they constitute user equipment (e.g., a television) with a Netflix client that allows the creation of criteria relating to user interest in programs or program attributes, e.g., by allowing the user to assign star ratings to programs as discussed previously. CX-5750C (Shamos WS) at Q280, Q250-261, Q282; CDX-0031-CDX-0042; RX-1269C (Burke RWS) at Q214; CDX-0048.

Element 17b: a communications path over which the user preference profile is provided by the interactive program guide client to a program guide server, wherein the program guide server comprises:

Netflix Ready Devices meet this element as they include a communication path over which the preference profile relating to user interest is provided by the Netflix client. This communication path proceeds from the processor on which the program client guide executes, through network interface hardware, and out through an Internet connection. CX-5750C (Shamos WS) at Q286, Q288.

Element 17b1: a first database comprising program listings and associated program criteria based on the user's viewing history at the interactive program guide client

This claim language identifies aspects of the program guide server that the claimed system is designed to communicate with via the recited communications path (“wherein the program guide server comprises”), but does not add elements of the claimed system. Compls. Br. at 250-251; Compls. Reply Br. at 93. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Element 17b2: a second database comprising program listings available from the program guide server

This claim language identifies aspects of the program guide server that the claimed system is designed to communicate with via the recited communications path (“wherein the program guide server comprises”), but does not add elements of the claimed system. Compls. Br. at 250-252; Compls. Reply Br. at 93. [REDACTED]

[REDACTED]

[REDACTED] CX-5750C (Shamos WS) at Q294, Q296; JX-0006C (Sanders Dep. Tr.)

107:11-18.

Element 17c: processing circuitry operative (1) to determine at least one of the associated program criteria from the first database that meets the user preference profile, (2) to determine from the second database a set of programs not yet watched by the user at the interactive program guide client, (3) to apply the at least one of the associated program criteria to the set of programs not yet watched to generate at least one personal viewing recommendation, and (4) to provide the personal viewing recommendation to the user at the interactive program guide client over the communications path

This claim language identifies aspects of the program guide server that the claimed system is designed to communicate with via the recited communications path (“wherein the program guide server comprises”), but does not add elements of the claimed system. Compls. Br. at 250-254; Compls. Reply Br. at 93. [REDACTED]

[REDACTED]

[REDACTED] CX-5750C (Shamos WS) at Q298.

4. Claims 18-20

The dependent system claims further refine the elements of the claim 17 system met by the Netflix Ready Devices.

C. The '762 Patent

1. Claim 1

Preamble: A method for use in a client-server interactive television program guide system for tracking a user's viewing history, comprising:

The preamble is not limiting. Nevertheless, the Netflix SDK and Netflix server are involved in “tracking a user's viewing history,” as described below in connection with Element 1a.

Element 1a: tracking a user's viewing history

The Netflix SDK and Netflix servers carry out this claim step. The [REDACTED] client of the SDK creates a “[REDACTED]” (also referred to as a “[REDACTED]”) using the [REDACTED]

protocol of the SDK. JX-0004C (Mavinkurve Dep. Tr.) 29, 31; JX-0005C (Peters Dep. Tr.) 26:21-25 (testifying that [REDACTED] is sent to server when the client stops playback); *see also* Compls. Br. at 75-77. A user's viewing history is tracked using the [REDACTED] ([REDACTED] CX-5750C (Shamos WS) at Q328; CX-3146C ([REDACTED])); RX-1304C (Sanders RWS) at Q59; RX-1269C (Burke RWS) at Q80-81. The "Recently Watched" row reflects the tracking of a user's viewing history. CX-5750C (Shamos WS) at Q329; CDX-0043 (Recently Watched – Special); CDX-0044 (Recently Watched – Gigabrowser) showing screenshot of CPX-0002; CDX-0045 (Continue Watching – Tablet) showing screenshot of CPX-0034; CDX-0375 (Recently Watched – Gigabrowser); CDX-0376 (Recently Watched – Roku) showing screenshot of CPX-0020. Episode Selection screens also reflect the tracking of a user's viewing history. CDX-0028 (Episode Selection Screen – Special); CDX-0029 (Episode Selection screen - Gigabrowser) showing screenshot of CPX-0002; CDX-0045 (Continue Watching – Tablet) showing screenshot of CPX-0034; CDX-0046 (Episodes Selection screen – Special); CX-2072C ([REDACTED]), at CX-2072C.162 (Episode Selection screen - Special).

Element 1b: storing the user's viewing history on a program guide server

The Netflix servers perform this claim step. The user's viewing history is stored on Netflix servers using the [REDACTED] ([REDACTED]). RX-1269C (Burke RWS) at Q81; CX-5750C (Shamos WS) at Q331. The Netflix servers that provide the [REDACTED] are deployed within [REDACTED]. RX-1269C (Burke RWS) at Q81 and Q88; JX-0006C (Sanders Dep. Tr.) 65:17-66:2.

Element 1c: finding programs with the program guide server that are consistent with the user's viewing history

The Netflix servers perform this claim step. A "Recently Watched" row indicates the

programs that the user has recently watched in reverse chronological order. RX-1304C (Sanders RWS) at Q57-58; JX-0006C (Sanders Dep. Tr.) 78:7-14 and 163-64. *See e.g.*, CDX-0044 (Recently Watched – Gigabrowser) showing screenshot of CPX-0002; CDX-0043 (Recently Watched – Special). If a TV show is listed in the “Recently Watched” row, the programs/episodes associated with the recently-watched TV show are found and displayed in an Episode Selection screen. CX-5750C (Shamos WS) at Q335; RX-1304C (Sanders RWS) at Q118-130. *See also* CDX-0029 (Episode Selection screen – Gigabrowser) showing screenshot of CPX-0002; CDX-0028 (Episode Selection screen – Special); CDX-0049 (Episode Selection screen – Roku 2XS) showing screenshot of CPX-0020. The Episode Selection screen is populated dynamically, on the fly, whenever the user requests to view the episodes for a TV show. JX-0003C (Marengi Dep. Tr.) 98-102. From the perspective of one of ordinary skill in the art, the recommendation of episodes that share a common season in a common series of a viewed episode meet the requirements of element 1c. CX-5750C (Shamos WS) at Q337.

In addition, generally presented is a “Top 10” row that provides the top ten recommendations for the user based on the user’s recent activity. RX-1304C (Sanders RWS) at Q110-115. *See e.g.*, CDX-0037 (Top 10 – Gigabrowser) showing screenshot of CPX-0002; CDX-0034 (Top 10 – Plus); CDX-0031 (Top 10 – Special) showing screenshot of CPX-0027; CDX-0040 (Top 10 – Tablet) showing screenshot of CPX-0034. “Alt-genre” rows, which represent a combination of genres that are compiled based on the user’s recent activity, are also presented. RX-1304C (Sanders RWS) at Q72-78. *See e.g.*, CDX-0038 (Alt-genre – Gigabrowser) showing screenshot of CPX-0002; CDX-0032 (Alt-genre – Special) showing screenshot of CPX-0027; CDX-0035 (Because You Watched – Plus); CDX-0041 (Alt-genre – Tablet) showing screenshot of CPX-0034. Additionally, presented are “Because You Watched”

rows, which recommend programs based on the fact that the user viewed a particular program. RX-1304C (Sanders RWS) at Q98-104; RX-1300C (Gomez-Uribe RWS) at Q34. *See e.g.*, CDX-0039 (Because You Watched – Gigabrowser) showing screenshot of CPX-0002; CDX-0033 (Because You Watched – Special); CDX-0036 (Because you watched – Plus); CDX-0042 (Because You Watched – Tablet) showing screenshot of CPX-0034.

Element 1d: determining, with the program guide server, whether the programs found by the program guide server were not previously viewed on user television equipment

The Netflix servers perform this claim step. The presence of a program in the “Recently Watched” row means that the Netflix service has *already* determined that the program was previously viewed. Programs/episodes in the Episode Selection screen are accompanied with a progress bar that keeps track of the viewing progress by the user. CX-5750C (Shamos WS) at Q339; JX-0003C (Marengi Dep. Tr.) 102:13-103:5, 134:24-136:8. *See e.g.*, CDX-0029 (Episode Selection screen – Gigabrowser) showing screenshot of CPX-0002; CDX-0377 (Episode Selection screen – Gigabrowser) showing screenshot of CPX-0002; CDX-0028 (Episode Selection screen – Special); CX-2072C (██), at CX-2072C.162 (Episode Selection screen - Special), CX-2072.167 (Episode Selection screen – Plus); CDX-0040 (Continue Watching – Tablet) showing screenshot of CPX-0034; CDX-0045 (Continue Watching –Tablet) showing screenshot of CPX-0034. If a progress bar is not displayed, then the Netflix system has determined that the program/episode has not been viewed.

Programs are removed from the “Top 10”, alt genre, and “Because You Watched” rows if it watched more than █████% . CX-5750C (Shamos WS) at Q237; RX-1267C (Filters 2.0) at RX-1267C.0004; RX-1304C (Sanders RWS) at Q95. Thus, all of the programs listed in these rows were determined to not have been viewed for more █████% of their respective durations.

Element 1e: displaying, with a program guide client implemented on the user television equipment, a display of program titles

The Netflix Application integrated with the imported and indirectly infringing SDK performs this claim step. The NRDs also perform this claim step. The NRDs in combination with the Netflix Application also perform this claim step. The Netflix Application displays Episode Selection screens having program titles. CX-5750C (Shamos WS) at Q344. See CDX-0048 (Episode Selection screen - Tablet) showing screenshot of CPX-0034; CX-2072C ([REDACTED]) at CX-2072C.162 (Episode Selection screen - Special), CX-2072.167 (Episode Selection screen – Plus); CDX-0028 (Episode Selection screen – Special); CDX-0045 (Continue Watching – Tablet) showing screenshot of CPX-0034.

Element 1f: wherein the display: includes the programs found by the program guide server, wherein some of the programs have been previously viewed on the user television equipment and some of the programs have not been previously viewed on the user television equipment

The Netflix Application integrated with the imported and indirectly infringing SDK performs this claim step. The NRDs also perform this claim step. The NRDs in combination with the Netflix Application also perform this claim step. In the Episode Selection screen, certain episodes will have been viewed on user television equipment as long as the user navigated to the Episode Selection screen from the “Recently Watched” row. CX-5750C (Shamos WS) at Q349; JX-0003C (Marenghi Dep. Tr.) 102-103, 134-136. As long as the user has not watched all of the episodes, this claim limitation will be met.

As already discussed above, if the “Recently Watched” row is displayed along with a recommendation row, such as “Top 10,” “Because You Watched,” or Alt-genre, then it is necessarily the case that some of the programs have been previously viewed on the user television equipment (*i.e.*, the programs listed in the “Recently Watched” row) and some of the

programs have not been previously viewed on the user television equipment (*i.e.*, the programs listed in the recommendations row).

Element 1g: visually distinguishes the programs determined by the program guide server to have been previously viewed from the programs that have not been previously viewed

The Netflix Application integrated with the imported and indirectly infringing SDK performs this claim step. The NRDs also perform this claim step. The NRDs in combination with the Netflix Application also perform this claim step. The Episode Selection screen visually distinguishes the previously-viewed episodes from episodes that have not been previously viewed by virtue of whether a progress indicator is displayed. JX-0003C (Marenghi Dep. Tr.) 102-103, 134-136. *See e.g.*, CDX-0028 (Episode Selection screen – Special); CDX-0029 (Episode Selection screen – Gigabrowser) showing screenshot of CPX-0002; CDX-0048 (Episode Selection screen- Tablet) showing screenshot of CPX-0034; CX-2072C ([REDACTED]) at CX-2072C.162 (Episode Selection screen - Special), CX-2072.167 (Episode Selection screen – Plus); CDX-0049 (Episode Selection screen – Roku 2 XS) showing screenshot of CPX-0020; CDX-0377 (Episode Selection screen – Gigabrowser) showing screenshot of CPX-0002; CDX-0045 (Episode Selection screen – Tablet) showing screenshot of CPX-0034.

In all cases, the “Recently Watched” row is a distinct row from the “Top 10” row (as well as other rows like Alt-genre and “Because You Watched”). Sanders Tr. 667:5-7. *See e.g.*, RDX-0131 (Recently Watched); CDX-0044 (Recently Watched – Gigabrowser) showing screenshot of CPX-0002; CDX-0043 (Recently Watched – Special); CDX-0040 (Tablet) showing screenshot of CPX-0034. The “Recently Watched” row is visually distinguished from the other rows by virtue of being different rows. As described above, the “Recently Watched” row includes programs that have been previously viewed. Programs that have been previously viewed are

generally filtered out of the “Top 10” row (and other rows like Alt-genre and “Because You Watched”). Sanders Tr. 666:25-667:4, 667:18-23; RX-1267C (Filters 2.0), at RX-1267C.0004.

2. Claim 6

6. The method defined in claim 1 further comprising collecting program ratings information with the program guide server based on the user’s viewing history.

The method steps of claim 6 are performed by Netflix servers at the direction of a user. Netflix servers collect program ratings information based on the user’s viewing history. [REDACTED]

[REDACTED]

[REDACTED] JX-0006 (Sanders Dep. Tr.) 103-106. This is akin to the Nielsen-like ratings disclosed in the ’762 patent. CX-1294 (’762 patent) at col. 19, lns. 60-63.

Netflix also collects star ratings provided by a user for programs that the user enjoyed watching. CX-5750C (Shamos WS) at Q354. See e.g., CDX-0043 (Recently Watched – Special); CDX-0044 (Recently Watched – Gigabrowser) showing screenshot of CPX-0002; CDX-0048 (Episode Selection screen – Tablet) showing screenshot of CPX-0034; CDX-0037 (Top 10 – Gigabrowser) showing screenshot of CPX-0002; CDX-0038 (Alt-genre – Gigabrowser) showing screenshot of CPX-0002; CDX-0039 (Because You Watched – Gigabrowser) showing screenshot of CPX-0002; CDX-0034 (Top 10 – Plus).

3. Claim 13

Users carry out the direct infringement of the limitations of claim 13 when they “put the invention into service” to “obtain benefit from it.” *Centillion Data*, 631 F.3d at 1284 (Fed. Cir. 2011). In addition, infringement of claim 13 occurs upon importation and sale of the directly infringing Netflix Ready Devices (e.g., by LGE, Vizio) in the United States.

Preamble: A client-server interactive television program guide system for tracking a user’s viewing history

See discussion above in connection with the preamble of claim 1 of the ’762 patent.

Element 13a: user television equipment on which an interactive television program guide client is implemented, wherein the interactive television program guide client is programmed to provide an individual user's viewing history information to a program guide server over a communications path

See discussion above in connection with Elements 1d and 1e of the '762 patent

Element 13(b1): wherein: the program guide server is programmed to find programs based on the individual user's viewing history information

See discussion above in connection with Element 1c of the '762 patent.

Element 13(b2): determine whether the programs found by the program guide server have been previously viewed on user television equipment

See discussion above in connection with Element 1d of the '762 patent.

Element 13(b3): indicate the programs to the interactive television program client over the communications path

Netflix servers provides information to the Netflix Application for displaying the Home screen, which includes the various rows described above, as well as Episode Selection screens.

See also CX-5750C (Shamos WS) at Q366-367.

Element 13(b4): the interactive television program guide client is further programmed to display, on the user television equipment, a display of program titles

See discussion above in connection with Element 1e of the '762 patent

Element 13c: wherein the display: includes the programs found by the program guide server, wherein some of the programs have been previously viewed on the user television equipment and some of the programs have not been previously viewed on the user television equipment

See discussion above in connection with Element 1f of the '762 patent.

Element 13d: visually distinguishes the programs determined by the program guide server to have been previously viewed from the programs that have not been previously viewed

See discussion above in connection with Element 1g of the '762 patent.

4. Claim 15

15. The system defined in claim 13 wherein: the interactive television program guide client is further programmed to provide user preference information to the program guide server over the communications path; and the program guide server is further programmed to obtain programs based on the user preference information and to indicate the programs to the interactive television program guide client.

Users carry out the direct infringement of the limitations of claim 15 when they “put the invention into service” to “obtain benefit from it.” *Centillion Data*, 631 F.3d at 1284 (Fed. Cir. 2011). In addition, infringement of claim 15 occurs upon importation and sale of the directly infringing Netflix Ready Devices (*e.g.*, by LGE, Vizio) in the United States.

As described above, user’s star ratings of a program are provided to the Netflix servers over a communications path. CX-5750C (Shamos WS), at Q375-376; CX-2072C ([REDACTED]) at CX-2072C.168; CX-2189C (Dashboard); CX-2392C (Distance Metric on the Space of Video).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

5. Claim 17

17. The system defined in claim 15 wherein the program guide server is further programmed to collect program ratings information based on the viewing history information.

Users carry out the direct infringement of the limitations of claim 15 when they “put the invention into service” to “obtain benefit from it.” *Centillion Data* 631 F.3d at 1284 (Fed. Cir. 2011). In addition, infringement of claim 17 occurs upon importation and sale of the directly infringing Netflix Ready Devices (*e.g.*, by LGE, Vizio) in the United States. See discussion above in connection with claim 6.

ROVI'S SUBMISSION ON THE FORM OF REMEDY THAT SHOULD BE ORDERED, THE REMEDY'S EFFECT AS TO THE PUBLIC INTEREST, AND THE AMOUNT OF THE BOND THAT SHOULD BE IMPOSED

A. The Commission should Issue a Cease and Desist Order

Netflix is a U.S. entity that is directly subject to the Commission's cease and desist authority. *See Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. 3046, Comm'n Op. at 25 (July 1997) (noting that Commission practice is to issue cease and desist orders to domestic respondents). Rovi seeks the remedy of a Cease and Desist Order ("CDO") directed to Netflix's further "Sale for Importation" of its SDK for integration in NRDs. The CDO should prohibit Netflix from permitting any new downloading by or other transfer of its SDK to foreign manufactures, as well as any further downloading by or other transfer of its SDK to existing foreign manufacturer partners for implementation in Netflix Applications onto imported NRD devices. The CDO should be patterned on the one issued by the Commission, which prohibited:

importing (**including through electronic transmission**), selling, marketing, advertising, duplicating, distributing, offering for sale, advertising, soliciting U.S. agents or distributors for, **or otherwise transferring (including through electronic transmissions)** in the United States, [the accused systems and components thereof, including software,] **whether the software is in the form of source code, object code, or some other form[]** that directly or contributorily infringes one or more of [the asserted claims]

See Certain Hardware Logic Emulation Systems & Components Thereof, Inv. No. 337-TA-383, Order to Cease and Desist (Dec. 3, 1997) (emphasis added).

That Netflix itself imports nothing does not give Netflix the right to continue violating the statute. Netflix's "*sale for importation*," is an independent and sufficient basis for the Commission's remedial authority under Section 337. 19 U.S.C. §§ 1337(a)(1)(B)) (a Section 337 violation may be based on any of "[t]he importation into the United States, *the sale for*

importation, or the sale within the United States after importation” (emphasis added)). This is confirmed by Federal Circuit and Commission precedent. *See Enercon*, 151 F.3d at 1380 (Fed. Cir. 1998), affirming *Certain Variable Speed Wind Turbines and Components Thereof*, Inv. No. 337-TA-376, USITC Pub. 3003, Initial Determination at 19, Comm’n Op. at 23-24 (Nov. 30, 1996) (contract for sale of infringing wind turbines held to be a violation even without actual importation of the articles in question); *see also Certain Chemiluminescent Compositions, and Components Thereof and Methods of Using, and Products Incorporating, the Same*, Inv. No. 337-TA-285, USITC Pub. 2370, Order No. 25 (Initial Determination) (March 1991) (violation based on sale for importation alone).

19 U.S.C. § 1337(f) specifically contemplates “an order directing” violators “to cease and desist from engaging in the unfair methods or acts involved, . . . ”(emphasis added). Without one, Rovi would be left without recourse from the Commission even though Netflix has violated and would continue to violate the statute. That is unprecedented.

Nor is leaving Rovi without a remedy justified by Netflix’s reliance on a 1978 and 1979 opinions for the contention that a CDO is only “an initial step towards possible exclusion” (Resps. Reply Pet. at 5-6 (*citing In the Matter of Doxycycline*, Inv. No. 337-TA-3, 1979 WL 61161 (April 12, 1979)) and the contention that “cease and desist orders always have been ‘ancillary and subordinate to the exclusion power’” (Resps. Reply Pet. at 7 (*citing Certain Welded Stainless Steel Pipe and Tube*, Inv. No. 337-TA-29, Comm’n Op., 1978 WL 50692, at *5 (Feb. 22, 1978)). Any fair consideration of the legislative history of current subsection 337(f) fully supports an interpretation that allows for the issuance of a cease and desist order even in the absence of an exclusion order.

Subsection 337(f) as previously written⁸ was interpreted by the Commission to allow for a cease and desist order *only* in those circumstances where an exclusion order had not been issued. See *In the Matter of Doxycycline*, Inv. No. 337-TA-3, Comm'n Op. 1979 WL 61161, *4-*5 (1979) ("*Doxycycline*") (declining to issue a cease and desist order in addition to an exclusion order). Then Congress amended the statute to provide for cease and desist orders "in addition to, or in lieu of" exclusion orders. Nothing in the legislative history suggest that the amendment was intended to eliminate cease and desist orders when there is no exclusion order. See H. Rep. No. 40, 100th Cong., 1st Sess. 159 (1987); S. Rep. No. 71, 100th Cong., 1st Sess. 131 (1987). Accordingly, as a result of the amendments made to the plain language of Section 337 in 1988, the Commission was provided the express statutory authority to issue both an exclusion order and a cease and desist order directed towards infringing products. Retention of "in lieu of" language in subsection 337(f) when amending the statute to include the "in addition to" language is an unequivocal indication that Congress intended to give the Commission *more* flexibility by allowing for the issuance of *either or both* types of remedial orders. See also *Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, Comm'n Op., 1991 ITC LEXIS 736, *65 (June 1991) ("[R]ecent changes in the statute have increased, rather than restricted, the Commission's flexibility in determining the appropriate remedy for a section 337 violation."); *Certain Compound Action Metal Cutting Snips and Components Thereof*, Inv. No. 337-TA-197,

⁸ Prior to the 1988 amendment to the statute, subsection 337(f) provided:

In lieu of taking action under subsections (d) or (e), the Commission may issue . . . an order directing such person to cease and desist from engaging in the unfair methods or acts involved . . . The Commission may . . . modify or revoke such order, and . . . may take action under subsections (d) or (e), as the case may be.

Doxycycline, 1979 WL 61161, *4 (1979).

Exclusion Order and Cease and Desist Order, 1986 ITC LEXIS 325, *34 (March 1986) (“The legislative history of section 337 states that the Commission’s power to issue cease and desist orders was designed to *add* remedial flexibility” (emphasis added)).

Netflix nevertheless argues that because it imports nothing there can be no exclusion order and because there can be no exclusion or a CDO cannot issue because it would not be to be “in lieu of” an exclusion order. Netflix’s Pub. Int. Stmt. at 2 (Jul. 2013). Wrong. Where the accused “article” is software, the Commission itself has specifically recognized that the Commission can issue cease and desist orders “*instead of*” an exclusion order. *Hardware Logic*, USITC Pub. 3089, Comm’n Op. at 25 (March 1998). In *Hardware Logic*, the Commission observed that :

a cease and desist order that covers the electronic transmission of respondents’ infringing software would be consistent with the 1988 amendments to section 337, which were intended to make section 337 a “more effective remedy” for the protection of the rights of patentees. To be fully effective, the cease and desist order must cover electronic transmission of respondents’ infringing software.

Hardware Logic, Comm’n Op. at 28-29 (emphasis added).

The remedy granted in *Hardware Logic* also dispels any notion that a cease and desist order must be premised on the existence of domestic inventory. The order there was also directed to activities *unrelated* to any sales of domestic inventory, including a prohibition on “servicing previously imported emulation systems” and the “duplication and in-house use of respondents’ software.” *Id.* at 31. As the Congressional reports for the 1988 amendments to section 337(f) make clear, Congress only considered the stockpiling of inventory prior to an exclusion order to be one example of when a cease and desist order might be appropriate. *See* S. Rep. No. 71, 100th Cong., 1st Sess. 131 (1987) (stating “[f]or example, a cease and desist order . . . may be appropriate when the product has been stockpiled . . .”) (emphasis added); H.

Rep. No. 40, 100th Cong., 1st Sess. 159 (1987) (same).

B. The Four “Public Interest Factors”⁹ Do Not Weigh Against a CDO

The Commission has consistently recognized that “the public interest favors the protection of U.S. intellectual property rights.” *Certain Mobile Devices, Associated Software, and Components Thereof*, Inv. No. 337-TA-744, Comm’n Op. 2012 ITC LEXIS 2177 (June 5, 2012) at *57, (citing *Certain Two-Handle Centerset Faucets and Escutcheons and Components Thereof*, Inv. No. 337-TA-422, Comm’n Op. at 9 n.16 (July 21, 2000)); *see also* S. Rep. No. 71, 100th Cong., 1st Sess., 128-29 (1987) (noting “public interest in the enforcement of protected intellectual property rights,” and that which “diminishes the value of the intellectual property ... indirectly harms the public interest”).

Accordingly, “the Commission has found public interest considerations to outweigh the need for injunctive relief in protecting intellectual property rights found to have been violated under Section 337 in only three investigations, all of which were decided prior to the 1988 legislative amendment . . . , which *removed* the requirement that a patentee show irreparable harm.” *Spansion, Inc. v. Int’l Trade Comm’n*, 629 F.3d 1331, 1360 (Fed. Cir. 2010) (“*Spansion*”). “Moreover, in those three cases, the exclusion order was denied because inadequate supply within the United States—by both the patentee and domestic licensees—meant that an exclusion order would deprive the public of products necessary for some important health or welfare need: energy efficient automobiles, basic scientific research, or hospital

⁹ Those factors are “(1) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) the production of competitive articles in the U.S. and (4) U.S. consumers.” *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, Comm’n Op. at 107 (July 5, 2013). “The same public interest factors apply to the Commission’s issuance of a cease and desist order.” *Id.*

equipment.” *Id.* That is certainly not the situation here.

Netflix is primarily in the business of providing entertainment to consumer. That does not implicate public interest concerns that the Commission has previously found warrants the denial of relief, such as healthcare, national defense or energy. *Cf. Certain Digital Televisions and Products Containing Same and Methods of Using Same*, Inv. No. 337-TA-617, Comm’n Op., 2009 ITC LEXIS 2465, *24 (April 23, 2009) (“we conclude that concerns of public health and welfare are not implicated here because DTVs are not the type of products that affect public health and welfare”).

Nor does the requested relief raise significant concerns about competitive conditions in the U.S. economy, the production of competitive articles in the U.S., or the impact on U.S. consumers. Rovi has licensed, and continues to license, its patents to entities that could provide competitive services. In this regard, the ALJ specifically found that “there is sufficient evidence that Rovi licensees are continuing to innovate, proving that the covenants [in Rovi’s licenses] have not deterred others from developing and licensing their own IPG-related technology.” *Id.* at 335. The ALJ also found that “competition [in] the IPG space has increased and companies have been and are innovating to improve IPG technology.” *Id.* at 327. As such, there is ample evidence in the record establishing that Rovi, along with its licensees and customers, have the capacity to satisfy U.S. demand if the Commission issues a cease and desist order directed to Netflix’s infringing activities.

Any argument that there is and may never be anything identical to the Netflix system is misplaced. Harm to competition or consumers is not to be confused with harm claimed by Netflix.

Consumer demand for video-on-demand services could readily be met by alternative sources such as Best Buy's CinemaNow service, which is an implementation of the Rovi Entertainment Store platform, and Apple's video-on-demand services, which utilizes patented Rovi technology. These two internet-based video-on-demand services are available as applications on a wide variety of televisions, Blu-ray players, and media streaming players. Furthermore, many consumers access video-on-demand services through their local cable service provider, resulting in additional available alternatives.

Netflix nevertheless has recently urged that a CDO issuing a remedy for Rovi would be "contrary to the public interest" because, according to Netflix, it would circumvent the consequences of the Supreme Court's decision in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) ("*eBay*"). Netflix's Pub. Int. Stmt. at 4-5 (Jul. 2013). That arguments must fail as did the losing arguments in *Spansion*, 629 F.3d at 1359 (Fed. Cir. 2010) ("*Spansion*").

Respondent Spansion there argued that the Commission should consider Section 337 "public interest" under the rubric of *eBay*. *Spansion*, 629 F.3d at 1357 ("Spansion argues that even if Appellants were liable for infringement, the Commission's award of prospective injunctive relief should be vacated because the Commission failed to give meaningful consideration to the public interest consequences of the injunction. In particular, Spansion argues that the public interest inquiry in this context is similar to the traditional test for injunctive relief that district courts apply under *eBay*"). Upon review of the statutory differences and legislative history, the Federal Circuit rejected the argument, finding that *eBay* does not apply to Section 337 remedy determinations. *Id.* at 1359 ("Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for

patent infringement, *this court holds that eBay does not apply to Commission remedy determinations under Section 337.*”) (emphasis added).

Netflix cannot prevail by repackaging the argument as one of “policy”. The Spansion respondents tried that too, without avail:

Spansion’s argument that the term “public welfare” is so “broad and inclusive” that Congress must have intended it to include the traditional equitable principles reflected in the *eBay* standard is unpersuasive when viewed in the context of Section 337. *The scope of the public interest factors recited in Section 337 is a matter of statutory interpretation not necessarily informed by the same principles of equity relevant to the grant of permanent injunctive relief under 35 U.S.C. § 283.* (emphasis added)

Id. For the same reason, Netflix prevail by arguing that the statute makes a CDO discretionary and that its entry should be declined in favor of remedies available in the district court.

C. Bonding

Accordingly, the ALJ’s recommended determination of a 100% bond amount during the Presidential review period is not erroneous.

The ALJ noted in his Recommended Determination that “respondents’ arguments for a [REDACTED] bond (based on the Apple and Panasonic licenses) appears in its Post Hearing briefing, but was not disclosed in respondents’ prehearing brief or in any cited testimony of a hearing witness.” RD at 12. The ALJ appropriately rejected this new argument because it was in violation of his ground rules. This was fully within his discretion. *See Certain Flash Memory Controllers, Drives, Memory Cards and Media Players and Products Containing Same*, Inv. No. 337-TA-619, Comm’n Op. at 26 (Nov. 24, 2009) (“Generally, an ALJ has discretion to establish and enforce ground rules for the proper administration of an investigation.”).

Netflix claims it was contrary to Order No. 43, an order that granted Rovi’s request to supplement certain pretrial disclosures based on recently obtained discovery from Apple. But nothing in that Order gave Netflix *carte blanche* to present new arguments for the first time in its

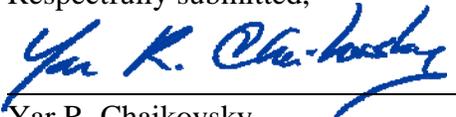
post-hearing brief. If Netflix believed that the Apple discovery necessitated new arguments concerning bond, the proper course of action would have been to seek leave to supplement its papers to address those arguments, as Rovi had requested with respect to its domestic industry contentions in Motion No. 845-119. Instead Netflix unilaterally chose to present a new argument concerning bond based on the Apple license in its post-hearing brief. The ALJ appropriately did not permit Netflix to do so in view of the significant prejudice that it would cause Rovi.¹⁰

Furthermore, even if Netflix's new argument for a [REDACTED] per unit bond were considered, it would not have justified deviating from the ALJ's recommended 100% bond. As noted by the ALJ, "[t]he larger question is whether it is correct to look to any extant Rovi license to determine the appropriate bond amount." RD at 13. The ALJ further noted that "[n]o party has argued that Rovi and the respondents sell comparable products at similar levels of commerce," and that "no party has presented a persuasive argument as to why it is correct to base a bond on the particular license or licensees selected by one side or the other." *Id.* Consideration of the Apple license agreement does not change the equation. There is simply nothing in the record to support the conclusion that a royalty rate calculated from a single license agreement should be considered a "reasonable" basis for a bond amount, especially when there are other Rovi license agreements supporting significantly higher royalty rates. *See* RX-0058C (Gemstar-TV Guide/Koninklijke Philips Electronics N.V. Interactive Program Guide License Agreement), at RX-0058C.007 (setting forth a per unit royalty of [REDACTED] for licensed television products).

¹⁰ For example, Netflix asserts that a per-unit royalty rate can be calculated using the sales information obtained from Apple combined with the [REDACTED] amount included in the Apple license agreement. Resps. Pet. at 42. But Rovi had no opportunity to cross-examine Netflix's expert, Dr. Reed, in order to test whether this could even be considered a reasonable approach for calculating the bond amount.

Date: August 23, 2013

Respectfully submitted,



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Certificate of Service

The undersigned certifies that the foregoing was served as indicated upon the following parties on August 23, 2013:

- **COMPLAINANTS' INITIAL SUBMISSION IN RESPONSE TO COMMISSION'S DETERMINATION TO REVIEW THE FINAL INITIAL DETERMINATION (PUBLIC VERSION)**

<p>The Honorable Lisa Barton Acting Secretary Office of the Secretary U.S. International Trade Commission 500 E. Street, S.W., Room 112 Washington, D.C. 20436 (8 Copies)</p>	<p><input type="checkbox"/> Via First-Class Mail <input type="checkbox"/> Via Hand-Delivery <input checked="" type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email (PDF Files) <input checked="" type="checkbox"/> Via EDIS</p>
<p>Robert Needham Office of the General Counsel U.S. International Trade Commission 500 E Street, S.W., Room 317 Washington, D.C. 20436 (1 Copy)</p>	<p><input type="checkbox"/> Via First-Class Mail <input type="checkbox"/> Via Hand-Delivery <input checked="" type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input type="checkbox"/> Via Email (PDF Files) <input type="checkbox"/> Via EDIS</p>
<p>Ashok Ramani Keker & Van Nest LLP 633 Battery Street San Francisco, CA 94111-1809 Telephone: (415) 391-5400 Email: ITC-Netflix-Rovi@kvn.com Counsel for Netflix Inc. and Roku, Inc.</p>	<p><input type="checkbox"/> Via First-Class Mail <input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email (PDF Files)</p>
<p>James B. Coughlan Perkins Coie LLP 700 Thirteenth Street, N.W., Suite 600 Washington, DC 20005 Telephone: (202) 654-6200 Email: NetflixITCSERVICE@perkinscoie.com Counsel for Netflix Inc. and Roku, Inc.</p>	<p><input type="checkbox"/> Via First-Class Mail <input type="checkbox"/> Via Hand-Delivery <input type="checkbox"/> Via Overnight Delivery <input type="checkbox"/> Via Facsimile <input checked="" type="checkbox"/> Via Email (PDF Files)</p>

By: /s/ Karen J. Reimer

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