PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of	
CERTAIN MAGNETIC DATA STORAGE TAPES AND CARTRIDGES CONTAINING THE SAME	**Inv. No. 337-TA-1012**

RECOMMENDED DETERMINATION

Administrative Law Judge David P. Shaw

Pursuant to the notice of investigation, 81 Fed. Reg. 43243 (July 1, 2016), this is the recommended determination on remedy and bonding in *Certain Magnetic Data Storage Tapes and Cartridges Containing the Same*, United States International Trade Commission Investigation No. 337-TA-1012.

For the reasons stated herein, it is recommended that, subject to any public interest determination of the Commission, the Commission should: (1) issue a limited exclusion order covering products that infringe one or more of the claims as to which a violation of section 337 has been found; (2) issue a cease and desist order; and (3) require no bond during the Presidential review period.

I. PROCEDURAL BACKGROUND

On May 27, 2016, complainants Fujifilm Corporation and Fujifilm Recording Media U.S.A., Inc. ("Fujifilm USA") (collectively, "Fujifilm") filed a complaint alleging that respondents unlawfully import "certain magnetic tape media for data storage, and cartridges containing the same[.]" Compl., ¶ 1.1. The complaint asserted the following six patents:

- U.S. Patent No. 6,641,891 (the "'891 Patent") (JX-0001);
- U.S. Patent No. 6,703,106 (the "'106 Patent") (JX-0002);
- U.S. Patent No. 6,703,101 (the "'101 Patent") (JX-0003);
- U.S. Patent No. 6,767,612 (the "'612 Patent") (JX-0004);
- U.S. Patent No. 8,236,434 (the "'434 Patent") (JX-0005); and
- U.S. Patent No. 7,355,805 (the "'804 Patent") (JX-0006).

By publication of a notice in the Federal Register on July 1, 2016, pursuant to subsection (b) of section 337 of the Tariff Act of 1930, as amended, the Commission instituted this investigation to determine:

> whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain magnetic data storage tapes and cartridges containing the same by reason of infringement of one or more of claims 1, 4–9, 11, and 14 of the '891 patent; claims 2, 5, and 6 of the '106 patent; claim 1 of the '101 patent; claims 1, 2, 4, 5, and 7–11 of the '612 patent; claim 1 of the '434 patent; and claims 3 and 10 of the '805 patent, and whether an industry in the United States exists as required by subsection (a)(2) of section 337[.]

81 Fed. Reg. 43243 (July 1, 2016). The Commission further directed the administrative law judge to take:

> evidence or other information and hear arguments from the parties and other interested persons with respect to the public interest in this investigation, as appropriate, and provide the Commission with findings of fact and a recommended determination on this issue, which shall be limited to the statutory public interest factors set forth in 19 U.S.C. 1337(d)(1), (f)(1), (g)(1).

Id. (citing 19 C.F.R. § 210.50(b)(1)).

The Commission named Fujifilm Corporation and Fujifilm USA complainants. *Id.* The Commission named Sony Corporation, Sony Corporation of America, and Sony Electronics Inc.

(collectively, "Sony") respondents. *Id.* The Office of Unfair Import Investigations ("Staff") was also named a party to the investigation. *Id.*

During the pre-hearing phase of this investigation, the administrative law judge issued unreviewed initial determinations granting Fujifilm motions to terminate the investigation as to certain claims and patents so that by the time post-hearing briefs were filed, only claims of the following five patents remained at issue: the '891 Patent, the '106 Patent, the '612 Patent, the '434 Patent, and the '805 Patent. *See* Initial Determination, Part I(B) (Procedural History Synopsis).

On September 1, 2016, the administrative law judge issued the final initial determination in this investigation, finding that a violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain magnetic data storage tapes and cartridges containing the same, with respect to certain claims of the '891 and '612 Patents, but not the three other asserted patents.

The Commission Rules provide that subsequent to issuing an initial determination on the question of violation of section 337, the administrative law judge shall issue a recommended determination containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of section 337; and (2) the amount of the bond to be posted by the respondents during Presidential review of Commission action under section 337(j).[1] 19 C.F.R. § 210.42(a)(1)(ii).

[1] The recommended determination should also address the public interest under sections 337(d)(1) and (f)(1) in investigations in which the Commission has ordered the administrative law judge, under 19 C.F.R. § 210.50(b)(1), to take evidence with respect to the public interest.

II. PUBLIC INTEREST

The Commission delegated the taking of evidence or other information with respect to the public interest in this investigation to the administrative law judge. *See* 81 Fed. Reg. 43243; 19 C.F.R. §210.10(b). Before issuing any remedial order for a violation of section 337, the Commission must weigh the effects of the remedy on the public interest by considering four factors. *Certain Inclined-Field Acceleration Tubes*, Inv. No. 337-TA-67, USITC Pub. No. 1119, Comm'n. Op. at 21-22 (Dec. 29, 1980) ("*Acceleration Tubes*"). These public interest factors are: (1) the public health and welfare; (2) the competitive conditions in the United States economy; (3) the production of like or directly competitive articles in the United States; and (4) the United States consumers. 19 U.S.C. § 1337(d)(1); *see also Spansion, Inc. v. Int'l Trade Comm'n*, 629 F.3d 1331, 1359-60 (Fed. Cir. 2010). The Commission must then balance any potentially adverse impact on the public interest against the public's interest in protecting and enforcing intellectual property rights. *See Acceleration Tubes* at 26-27, 29-31. If the negative impact of the remedial order outweighs its benefit, the Commission must deny the requested relief. *Id.*

Sony argues that the public interest supports what it calls a "limited remedy." *See* Sony Br., § XI. In general, Sony argues that:

- An exclusion order would hand Fujifilm a monopoly and "negatively impact competitive conditions in the U.S. market" (Sony Br. at 386-88);
- Alternatives to Sony's LTO-7 tapes "are limited and often unsuitable" (Sony Br. at 388-91);
- Fujifilm cannot meet market demand and has a "supply chain [that is] susceptible to disruption" (Sony Br. at 391-93);
- United States consumers "will be adversely impacted" (Sony Br. at 393-94); and
- A remedial order "would adversely affect the public health and welfare" (Sony Br. at 394-95).

Sony's arguments are addressed below.

A. Public Health and Welfare

Sony argues:

> As noted, Sony LTO-7 customers include U.S. and state and local government customers, as well as critical institutions such as hospitals and pharmaceutical companies. U.S. Pharmacopeia, for example, is the nonprofit organization that "sets standards for the identity, strength, quality, and purity of medicines, food ingredients, and dietary supplements manufactured, distributed and consumed worldwide. USP's drug standards are enforceable by the U.S. Food and Drug Administration, and these standards are used in more than 140 countries." RX-0160 (About USP) at 2. Other companies, such as Juno Therapeutics, use Sony LTO-7 products. Juno Therapeutics is a publicly traded clinical trial-stage drug company developing immunotherapies for treatment of leukemia and other cancers, with a pipeline of eight products in phase one and phase two clinical trials. RX-0142.

Sony Br. at 394. Sony then argues that customers in the health-care and public safety sectors should be exempt from an exclusion order. *Id.*

Fujifilm argues:

> The evidence shows that the issuance of Fujifilm's requested exclusion order and cease and desist orders will have no adverse impact on the public health, safety or welfare in the United States. Traditionally, the Commission's public health, safety or welfare concerns have been most frequently directed to medical equipment and pharmaceutical drugs. *See, e.g.*, *Certain Toothbrushes and the Packaging Thereof*, Inv. No. 337-TA-391, Comm'n Op. at 6, USITC Pub. 3068 (Oct. 1997), 1997 WL 803473 at *2 (Oct. 15, 1997). Here, the infringing products are used for long-term or archival data storage, where a lot of alternative or competitive technology is available. These products do not implicate public health, safety or welfare concerns in the United States.

Fujifilm Br. at 361-62. Fujifilm then argues that an exclusion order would protect its domestic industry and support the public interest in protecting intellectual property rights. *Id.* at 362.

The Staff argues that Sony "offers no evidence as to how any of its customers would be impacted should the requested remedial orders issue." Staff Br. at 116. The Staff also notes that "with respect to U.S. government customers, it is the Commission's standard practice to include an explicit exception for importations by or on behalf of the U.S. Government." *Id.* at 116-17. The Staff concludes that "the evidence adduced at trial does not appear to show that the requested remedial orders would adversely impact the public health and welfare." *Id.* at 117.

Sony's entire reply concerning public health is: "As the record shows, these products are used to backup critical customer data, including legal and regulatory-required financial, healthcare, and personnel information." Sony Reply at 148 (citing JX-0171C; RX-0142; RX-0160).

The evidence that Sony cites does not support finding that an exclusion order would have an adverse impact on public health and welfare. For example:

- RX-0142 is a printout of the main page from Juno Therapeutics's website (https://www.junotherapeutics.com/). RX-0142 does not have a Bates number, and it was printed on December 19, 2016, three days after the close of expert discovery. *See* Order No. 7 (Procedural Schedule). Further, the exhibit does not mention data storage, magnetic tapes (of any type), or Sony or Fujifilm.

- RX-0160 is a printout of the "about us" page from U.S. Pharmacopeial Convention's website (http://www.usp.org/about-usp). The exhibit does not mention data storage, magnetic tapes (of any type), or Sony or Fujifilm.

- JX-0171C is a sales record, although Sony has not provided much context for the document. As with RX-0142, there is no Bates number on the document. Assuming the document is from Sony's records, the evidence shows [ ] to U.S. Pharmacopeial and Juno Therapeutics.

The evidence does not show that excluding the accused products "would deprive the public of products necessary for some important health or welfare need[.]" *See Spansion*, 629 F.3d at 1360 (identifying energy-efficient automobiles, basic scientific research, and hospital equipment as examples of important health-or-welfare needs). In particular, the evidence Sony

cites does not demonstrate that the public (or even the two customers Sony identified) would experience any negative effect from an exclusion order. Accordingly, the administrative law judge has determined that this factor does not support recommending a tailored limited exclusion order.

B. Competitive Conditions in the United States Economy

Sony argues that entering an exclusion order would hand Fujifilm a monopoly of the United States market, would increase consumer costs and reduce consumer choice, would "have a major adverse impact" on innovation, and reduce the adoption rate of LTO-7. Sony Br. at 386-88.

Fujifilm notes that Sony has stated, in a related investigation, that the data storage industry is highly competitive and that LTO-6 and LTO-7 products are directly competitive. Fujifilm Br. at 362 (citing EDIS No. 598168 at 3 (Sony's Statement on Public Interest in 337-TA-1036)). Fujifilm also argues that prices are unlikely to rise given historical trend of stable revenue in LTO systems. *Id.* at 362-63 (citing CX-0010C (Faulhaber WS) at Q/A 37.

The Staff argues that while "the requested remedial orders would likely result in FUJIFILM being the sole supplier of LTO-7 tapes, at least in the short term, the evidence does not appear to show that competitive conditions in the archival data storage market would be adversely impacted because of the availability of FUJIFILM LTO-7 tapes and alternative archival data storage technologies including LTO-6, Enterprise tapes, as well as non-tape storage devices." Staff Br. at 117.

Sony's reply argues that LTO-6 and LTO-7 products compete with each other, not that they are suitable substitutes. Sony Reply at 147.

The evidence shows that issuing a limited exclusion order would not negatively affect competitive conditions in the United States economy. While excluding Sony from the market may decrease consumer choice, the Commission "does not deny a remedy solely because the relief would remove a second supplier from the market." *Certain Table Saws Incorporating Active Injury Mitigation Technology and Components Thereof*, Inv. No. 337-TA-965, Comm'n Op. at 10 (Feb. 1, 2017) ("*Table Saws*").[2] Further, Sony's statements about the fungibility of LTO-7 tapes and other forms of data storage shows that consumers could choose alternative products if Sony's LTO-7 products are excluded from the market. *See* EDIS No. 598168 at 3 (Sony's Statement on Public Interest in 337-TA-1036) (noting "the availability of directly competitive articles in the marketplace"). Additionally, Sony's concerns about pricing are not supported by the evidence, as Fujifilm faces competition from other data storage solutions. *See* CX-0009C (Yahiro WS) at Q/A 69-70; *see also* CX-0010 (Faulhaber WS) at Q/A 39-45.

With regard to innovation, Sony relies upon Mr. Jarosz's witness statement, RX-0002C at Q/A 220-26. Sony has also argued that an exclusion order would "reduc[e] incentives for innovation." Sony Br. at 388. While excluding Sony from the United States market may reduce Sony's incentive to innovate, allowing Sony to import infringing products would cause a greater harm—eroding the strength of United States intellectual property rights.[3] Further, Sony's

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[2] Sony has argued that Fujifilm has a single manufacturing facility that is susceptible to an "accident or disaster" such as an earthquake or tsunami. Sony Br. at 392. Sony further argues that such a disaster, should it occur, would eliminate the only source for LTO-7 cartridges and may cause a spike in prices and hoarding of LTO-7 tapes. *Id.* If a disaster halts Fujifilm's production and importation, Sony might consider filing a petition to modify or rescind the remedial orders. *See* 19 C.F.R. § 210.76.

[3] Of course, Sony would not be excluded if it developed a way not to infringe. *See State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985) ("One of the benefits of a patent system is its so-called 'negative incentive' to 'design around' a competitor's products, even when they are patented, thus bringing a steady flow of innovations to the marketplace."); *see*

incentive to innovate is reduced only with relation to the United States market; the exclusion order does not reduce Sony's incentive to innovate with respect to international markets (including Japan, for example). Additionally, competition from other data storage solutions (*see* CX-0009C (Yahiro WS) at Q/A 69-70; CX-0010 (Faulhaber WS) at Q/A 39-45) also provides an incentive for LTO tape manufacturers to innovate.

Finally, Sony's argument that the adoption rate of LTO-7 "may" decrease if it were excluded from the United States market, *see* Sony Br. at 387, assuming that the premise is true, does not warrant denying an exclusion order. In particular, a decline in the rate of LTO-7 adoption has not been shown to have a significant adverse effect on competitive conditions in the United States economy (or that a lower rate of adoption is an undesirable outcome).[4] Moreover, the harm of a slower adoption rate of LTO-7 would fall on Fujifilm, which could move to modify the exclusion order, if it desired, if the adoption rate fell too low. Accordingly, the administrative law judge has determined that this factor does not support recommending a tailored limited exclusion order.

C. The Production of Like or Directly Competitive Articles in the United States

The Staff argues:

> Sony does not appear to argue that the requested remedial orders would adversely impact the production of like or directly competitive products in the United States. *See* Resps. Br. at 385-395. Indeed, if anything, it would seem that the requested remedial orders could result in increased production of LTO-7 tapes at

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also TiVo Inc. v. EchoStar Corp., 646 F.3d 869, 883 (Fed. Cir. 2011) ("legitimate design-around efforts should always be encouraged as a path to spur further innovation.").

[4] Sony's expert discusses "the reduced benefits from network effects," benefits to "both consumers and manufacturers," and eliminating consumer "concerns over the continued viability of the technology platform" within the context of Sony's adoption-rate argument. *See* RX-0002C (Jarosz WS) at Q/A 97-98, 164, 211-214. These concerns, however, are too generic to warrant denying Fujifilm an exclusion order.

> FRMU's facility in the United States. The evidence thus does not show any adverse impact on the production of like or directly competitive products in the United States.

Staff Reply at 41; *see also* Staff Br. at 118 (arguing the same).

Fujifilm argues that this factor does not weigh against issuing an exclusion order because [ ]. Fujifilm Br. at 364 (citing *Table Saws* at 10; *Certain Personal Data and Mobile Communication Devices and Related Software*, Inv. No. 337-TA-710, Comm'n Op. at 77 (Dec. 29, 2011) ("*Personal Data Devices*")). Fujifilm also argues that substitutes such as "(i) Fujifilm's LTO-7 cartridges, (ii) Sony's and Fujifilm's LTO-6 cartridges, (iii) Enterprise tapes and (iv) non-tape storage systems such as hard disk drives, NAND flash memory devices, and optical storage systems" will ensure that consumers will not face a potential shortage of data storage solutions. *Id.* at 364-71.

Sony does not squarely address this factor in its briefs. *See generally* Sony Br., § XI; Sony Reply, § IX.

The evidence shows that Sony manufactures all of its LTO-7 tapes [ ]. *See* RX-0006C (Yamaguchi WS) Q/A 6, Murai Tr. 764-765. Accordingly, the administrative law judge has determined that this factor does not support recommending a tailored limited exclusion order. *See Table Saws* at 10; *Personal Data Devices* at 77.

D. United States Consumers

Sony argues that excluding Sony's LTO-7 products would reduce consumer choice and force consumers to pay higher prices for Fujifilm's LTO-7 tapes. Sony Br. at 393. Sony further argues that Sony's "government and quasi-governmental customers, customers in the health-care and public safety sectors, and customers who rely on LTO-7 storage to meet important governmental regulations concerning data storage and backup" would face substantial harm from

a limited exclusion order. *Id.* Sony also argues that these customers cannot easily switch between LTO systems and other technologies (*i.e.*, non-LTO systems). *Id.*

Fujifilm argues that Sony's argument "is based on pure speculation." Fujifilm Br. at 371 [

]. Fujifilm also contends that there is no switching cost between Sony's and Fujifilm's LTO-7 products. *Id.* Fujifilm then repeats its arguments about total cost of ownership and market forces that hinder Fujifilm's ability to raise prices. *Id.* at 371-72.

The Staff notes that the governmental customers Sony identified would not be subject to an exclusion order. Staff Br. at 118; Staff Reply at 41.

The evidence does not show that entering an exclusion order would harm United States consumers. With respect to the governmental customers Sony identifies, the Staff is correct in noting that an exclusion order would not reach these entities. With respect to the healthcare customers Sony has identified (*e.g.*, USP and Juno), these sales have been addressed above. *See* Part II(A), *supra*. Further, while Sony discusses switching costs at length, Sony's argument presumes that its customers would switch to another technology platform rather than Fujifilm's LTO-7 tapes. Lastly, Sony's arguments about price increases have been addressed above. *See* Part II(B), *supra*. Accordingly, the administrative law judge has determined that this factor does not support recommending a tailored limited exclusion order.

E. Essentiality

Sony has also argued that its essentiality positions "are part and parcel of the public interest considerations." Sony Br. at 360.

Fujifilm argues that it has not asserted any essential patent claims and that it, therefore, is not obligated to license any of the asserted claims. Fujifilm Br. at 373.

The Staff has argued that the asserted claims are not essential; the Staff does not discuss essentiality within the public interest context. *See generally* Staff Br., §§ V(F) ('612 Patent), VI(F) ('106 Patent), VIII(F) ('805 Patent), XII (discussing public interest); Staff Reply § XI (discussing public interest).

The administrative law judge determined that the asserted claims were not essential claims. *See* Initial Determination, Parts V(E) ('612 Patent), VI(E) ('106 Patent), VIII ('805 Patent). Thus, Sony's essentiality arguments are not relevant to the public interest considerations. However, if the asserted claims are found to be essential, then the public interest still does not favor tailoring or curbing an exclusion order because Fujifilm did not breach its AP-75 obligations. *Id.* at Part IX (discussing Sony's affirmative defenses). Accordingly, the administrative law judge has determined that this factor does not support recommending a tailored limited exclusion order.

In conclusion, the administrative law judge has determined that the above factors do not favor tailoring or curbing an exclusion order.

III. LIMITED EXCLUSION ORDER

A. General Law Relating to Limited Exclusion Orders

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. Int'l Trade Comm'n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order (or "LEO") directed to respondents' infringing products is among the remedies that the Commission may impose. Indeed, upon finding a violation of section 337, the statute provides that the Commission "shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States, unless, after considering the effect of such exclusion upon the public

health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry." 19 U.S.C. § 1337(d)(1); *see Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-972, Comm'n Op. at 28 (May 19, 2017) ("*Automated Teller Machines*"); *Spansion*, 629 F.3d at 1359-60.

B. Summary of the Parties' Arguments

Fujifilm argues that a permanent limited exclusion order prohibiting Sony (and related parties) from importing, selling for importation, or selling after importation any infringing articles is required. *See* Fujifilm Br. at 374.

Sony argues that if a violation is found, the administrative law judge "must consider the effect that the requested remedy will have on the public interest." Sony Br. at 385. Sony further argues that a limited remedy, with delayed implementation, is appropriate:

> if the Commission grants a remedial order in this investigation, it should (1) except from the remedial order government and quasi-government entities, customers in the health-care and public safety sectors, and customers who can show that they need LTO-7 storage to meet important governmental regulatory requirements, and (2) grant a transition period for all customers, after expiration of the Presidential review period, during with Sony LTO-7 may continue to be imported and sold, prior to the commencement of any LEO. Given the public interest concerns, a transition period is necessary to allow these consumers time to test the viability of Fujifilm's LTO-7 or switch to another data storage method.

Sony Br. at 394-95.

The Staff recommends issuing a limited exclusion order. Staff Br. at 113. The Staff argues that the Commission's standard practice with respect to limited exclusion orders should be followed here. *Id.*

C. Recommendation Concerning Limited Exclusion Order

The administrative law judge recommends that in the event the Commission determines that a violation of section 337 has occurred, and if consideration of the statutory public interest factors does not require that remedies be set aside or modified,[5] the Commission should issue a limited exclusion order covering all of the infringing articles imported, sold for importation, or sold after importation by respondents, and it should apply to respondents' affiliated companies, parents, subsidiaries or other related business entities, or their successors or assigns. Further, the administrative law judge recommends that the Commission should not delay issuing a limited exclusion order (*e.g.*, allow a transition period) after the expiration of the Presidential review period because substitute products (*e.g.*, Fujifilm's LTO-7 products) are available.[6]

IV. CEASE AND DESIST ORDER

A. General Law Relating to Cease and Desist Order

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for a violation of section 337. 19 U.S.C. § 1337(f)(1). The Commission generally issues cease and desist orders "when, with respect to the imported infringing products, respondents maintain commercially significant inventories in the United States or have significant domestic operations that could undercut the remedy provided by an exclusion order." *Automated Teller Machines*, Inv. No. 337-TA-972, Comm'n Op. at 28; *see, e.g.*, *Table Saws* at 4-6 (Feb. 1, 2017); *Certain Protective Cases and Components Thereof*, Inv. No. 337-TA-780, Comm'n Op. at 28 (Nov. 19, 2012) (citing *Certain*

[5] As discussed above, after considering the public interest factors, the administrative law judge determined that those factors do not require that remedies be set aside.

[6] For Sony customers aware of this investigation, there has already been time to consider Fujifilm's LTO-7 products and/or switching to another data storage system.

Laser Bar Code Scanners and Scan Engines, Components Thereof and Products Containing Same, Inv. No. 337-TA-551, Comm'n Op. at 22 (June 14, 2007)).[7]

B. Summary of the Parties' Arguments

Fujifilm argues that a cease and desist order is necessary because Sony maintains commercially significant inventory in the United States. Fujifilm Br. at 373-75. Fujifilm requests that the Commission enter "a cease and desist order prohibiting Respondents from selling, offering for sale, marketing, distributing, using, promoting and/or advertising in the United States all Sony LTO-7 cartridges that infringe one or more Asserted Claims." *Id.* at 375. Fujifilm has also argued that Sony has not cited to any evidence supporting its request to provide warranty and support services. Fujifilm Reply at 140.

Sony argues that its current inventory, totaling [ ] units of LTO-7 product, is not commercially significant in comparison to Fujifilm's inventory and sales. Sony Br. at 396-97; *see also* Sony Reply at 149. Sony further argues it has at most [ ] of inventory for the United States market. Sony Reply at 150 (Sony's post-hearing reply was filed in March 2017). Sony concludes by arguing that if a cease and desist order issues, "it should be narrowly tailored, and permit Sony to provide warranty services and support to its LTO-7 customers." Sony Br. at 397.

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[7] Some commissioners have adopted different approaches to analyzing when it is appropriate to issue cease and desist orders, particularly with respect to the question of whether a commercially significant inventory is a prerequisite for obtaining a cease and desist order. *See Certain Automated Teller Machines, ATM Modules, Components Thereof, and Products Containing the Same*, Inv. No. 337-TA-989, Comm'n Op. at 25 n.11 (Aug. 3, 2017) (Chairman Schmidtlein finds that the presence of some infringing domestic industry, regardless of the commercial significance, provides a basis to issue cease and desist orders); *Certain Network Devices, Related Software and Components Thereof (II)*, Inv. No. 337-TA-945, Comm'n Op. at 126 n.74 (June 1, 2017); *Automated Teller Machines*, Comm'n Op. at 28 n.19.

The Staff argues that Sony's "products are used to support Sony's commercial operations in the United States and are thus commercially significant." Staff Br. at 114. The Staff submits that a cease and desist order is appropriate. *Id.*

C. Recommendation Concerning Cease and Desist Orders

It is recommended, if a violation is found, and subject to any public interest determination of the Commission,[8] that Sony (including affiliated companies, parents, subsidiaries or other related business entities, or their successors or assigns) should be subject to a cease and desist order. In particular, a cease and desist order is warranted to prevent any circumvention of the Commission's exclusion order. The hearing concluded several months ago; any inventory beyond the [ ] units in inventory beyond the end of the hearing would have been used to support Sony's commercial operations. Likewise, any inventory imported and sold during the presidential review period (or beyond) would also circumvent the exclusion order. Finally, Sony has not provided evidence of the warranty and support services it does provide, nor has it sufficiently described the services it intends to provide.

Accordingly, the administrative law judge recommends that the Commission enter a cease and desist order without any service and warranty exceptions.

V. BOND

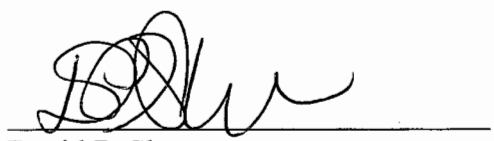
Fujifilm states that it "does not seek a bond in this Investigation." Fujifilm Br. at 373. Consequently, the administrative law judge recommends that no bond (*i.e.*, 0%) be required during any presidential review period. *See Certain Network Devices, Related Software and Components Thereof (I)*, Inv. No. 337-TA-944, Comm'n Op. at 56-58 (July 26, 2016).

[8] As discussed above, after considering the public interest factors, the administrative law judge determined that those factors do not require that remedies be set aside.

VI. RECOMMENDED DETERMINATION AND ORDER

It is recommended that, subject to any public interest determination of the Commission, the Commission should: (1) issue a limited exclusion order covering products that infringe one or more of the patent claims as to which a violation of section 337 has been found; (2) issue a cease and desist order; and (3) require no bond during the Presidential review period.

To expedite service of the public version, each party is hereby ordered to file with the Commission Secretary no later than September 22, 2017, a copy of this recommended determination with brackets to show any portion considered by the party (or its suppliers of information) to be confidential, accompanied by a list indicating each page on which such a bracket is to be found. At least one copy of such a filing shall be served upon the office of the undersigned, and the brackets shall be marked in bold, red text. If a party (and its suppliers of information) considers nothing in the recommended determination to be confidential, and thus makes no request that any portion be redacted from the public version, then a statement to that effect shall be filed.



David P. Shaw
Administrative Law Judge

Issued: September 12, 2017

CERTAIN MAGNETIC DATA STORAGE TAPES AND CARTRIDGES CONTAINING THE SAME

INV. NO. 337-TA-1012

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **RECOMMENDED DETERMINATION** has been served by hand upon the Commission Investigative Attorney, **Whitney Winston, Esq.**, and the following parties as indicated, on

OCT 02 2017

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

FOR COMPLAINANTS FUJIFILM CORPORATION AND FUJIFILM RECORDING MEDIA U.S.A., INC.:	
Robert C. Scheinfeld, Esq. **BAKER BOTTS L.L.P.** 30 Rockefeller Plaza New York, NY 10112	Via Hand Delivery X Express Delivery Via First Class Mail Other: _____
FOR RESPONDENTS SONY CORPORATION, SONY CORPORATION OF AMERICA, AND SONY ELECTRONICS INC.:	
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