

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

**In the Matter of**

**CERTAIN AUDIO PLAYERS AND  
CONTROLLERS, COMPONENTS  
THEREOF, AND PRODUCTS  
CONTAINING THE SAME  
CERTAIN AUDIO PLAYERS AND  
CONTROLLERS, COMPONENTS  
THEREOF, AND PRODUCTS  
CONTAINING THE SAME**

**Investigation No. 337-TA-\_\_\_\_  
Docket No. 3428**

**STATEMENT OF THIRD PARTIES  
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION  
AND DEVELOPER'S ALLIANCE  
IN RESPONSE TO THE COMMISSION'S JANUARY 14, 2020,  
NOTICE OF REQUEST  
FOR STATEMENTS ON THE PUBLIC INTEREST**

The Computer & Communications Industry Association (“CCIA”) and Developer’s Alliance (“DA”) submit the following comments in response to the Commission’s Federal Register Notice of January 14, 2020, inviting comments on the investigation proposed by Sonos’s complaint of January 7, 2020. CCIA represents over two dozen companies of all sizes providing high technology products and services.<sup>1</sup> DA is a non-profit corporation that advocates for software developers, with members including over 70,000 global software developers.<sup>2</sup> CCIA and DA members manufacture devices like those proposed to be excluded, such as smartphones and smart speakers, and develop software for such devices.

Sonos’s requested remedy raises significant public interest concerns. Sonos has requested an exclusion order that would exclude Google smartphones, laptops, and smart speaker devices, despite the wide array of non-infringing uses for those devices and the undisputed non-infringing nature of the devices themselves. Exclusion of these devices would harm U.S. consumers, as well as harming companies and developers who rely on developing software that operates on the accused smartphones, laptops, and smart speakers as the source of their livelihood.

#### **I. USE OF ARTICLES SUBJECT TO REQUESTED ORDER**

Sonos’s complaint misidentifies the subject articles. Sonos describes the articles as “certain audio players and controllers,” but the articles are not simply audio players and controllers. Audio functionality is only a small piece of what the articles in question provide.

The identified articles are personal mobile electronic devices and voice assistant devices. These devices are used directly by individual consumers in the United States. The smartphones and laptops identified in the complaint have myriad uses. The voice assistant devices are used for information retrieval, home control, and single room audio playback. The identified articles are also general-purpose computing devices which software developers use to build software and for which software developers distribute software, including applications that are triggered by smart speakers. Developers thus use these

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<sup>1</sup> A list of CCIA’s members is available online at <https://www.ccianet.org/about/members>. Proposed respondent Google is a CCIA member.

<sup>2</sup> *About the Developer’s Alliance*, <https://www.developersalliance.org/about/about-the-alliance/>.

articles both as a tool for their work and as the target market for their products.

For all accused devices, the overwhelming majority of the ways in which they are used have nothing to do with the accused multiroom audio functionality. Exclusion of general-purpose computing devices based on functionality provided by apps that are not installed at the time of importation is not in the public interest.

## II. PUBLIC HEALTH, SAFETY, AND WELFARE CONCERNS

The proposed exclusion order raises significant public health, safety, and welfare concerns. CCIA notes that a majority of American households rely solely on wireless devices for voice telephony<sup>3</sup> and approximately 17% of American adults rely on smartphones as their primary Internet connection.<sup>4</sup> Excluding personal mobile electronic devices such as those identified in the complaint risks depriving American consumers of basic modern communication tools, even though those devices are not themselves alleged to contain any infringing functionality. Many devices also provide health and safety benefits to consumers in the form of mHealth, Emergency Alerts, and 911 Location Accuracy.<sup>5</sup>

Further, in at least some instances, smart speakers are used as part of home control systems for disabled people, allowing them to control their physical environment via voice and helping mitigate their disabilities.<sup>6</sup> Excluding these devices directly impacts the health and welfare of disabled individuals.

Excluding personal mobile electronic devices such as the identified articles should receive additional scrutiny given the potential effects on the health and welfare of the American public as a whole

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<sup>3</sup> Centers for Disease Control, National Center for Health Statistics, *Wireless Substitution: State-Level Estimates from the National Health Interview Survey, 2018* (Dec. 17, 2019), [https://www.cdc.gov/nchs/data/nhis/earlyrelease/Wireless\\_state\\_201912-508.pdf](https://www.cdc.gov/nchs/data/nhis/earlyrelease/Wireless_state_201912-508.pdf).

<sup>4</sup> See Pew Research Center on Internet & Technology, *Internet/Broadband Fact Sheet* (last visited Jan. 21, 2020), <http://www.pewinternet.org/fact-sheet/internet-broadband/>.

<sup>5</sup> See, e.g., FCC, *Wireless Emergency Alerts* (Dec. 19, 2019), <https://www.fcc.gov/consumers/guides/wireless-emergency-alerts-wea>.

<sup>6</sup> See, e.g., *Tech enables people with disabilities to take control of their life*, NBC News, <https://www.nbcnews.com/tech/tech-news/how-smart-home-empowers-people-disabilities-n756731>; *Google Nest Partners with the Christopher & Dana Reeve Foundation to Improve Independence for Individuals Living with Paralysis—About Us*, Reeve Foundation, <https://www.christopherreeve.org/about-us/press-releases/google-nest-partners-with-the-christopher-dana-reeve-foundation-to-improve-independence-for-individuals-living-with-paralysis>.

and on particular disadvantaged sectors.

### III. SUBSTITUTE ARTICLES MADE BY COMPLAINANT OR ITS LICENSEES

Sonos does not itself make devices that could replace the subject articles—and in the case of voice assistants, has explicitly stated to shareholders that it does not intend to.

Sonos does not make laptops or smartphones. Sonos also does not itself provide a smart voice assistant capable of information retrieval, home control, or voice-controlled audio playback. To the extent Sonos's smart speakers provide such functionality, they do so by relying on respondent's technology, or similar technology Sonos has alleged also infringes, including the voice assistant technology used by Sonos and the general-purpose computing devices on which Sonos's application runs. In fact, Sonos's app software runs on the devices for which Sonos requests exclusion. This means that at the time of importation, when a Customs agent needs to decide if a device is to be excluded, the Customs agent must weigh between a use authorized and encouraged by the patentee and the alleged induced infringement.

And while Sonos has recently acquired voice assistant technology, Sonos has made clear statements to its shareholders that it “do[es] not intend to replicate the big tech ‘ask anything’ voice services”<sup>7</sup> and Sonos's CEO has stated on shareholder calls that Sonos is “not looking to replicate what general purpose voice assistants offer.”<sup>8</sup> These public statements about a newly acquired company make clear not just that Sonos neither has nor intends to develop the ability to replace the subject articles.

Exclusion of smartphones and tablets with a huge number of applications based solely on a single app that can be installed by the customer and which has substantial non-infringing uses, such as single room audio control, is not in the public interest. This is particularly true given the absence of any evidence that a significant number of users actually use the allegedly infringing functionality.

Sonos's overbroad requested remedy would result in exclusion of articles that Sonos and its

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<sup>7</sup> Sonos, *Q4 2019 Letter to Shareholders* (Nov. 2019), [https://s22.q4cdn.com/672173472/files/doc\\_financials/2019/q4/FINAL-SONO-Q4-and-FY2019-Shareholder-Letter-11.20.19.pdf](https://s22.q4cdn.com/672173472/files/doc_financials/2019/q4/FINAL-SONO-Q4-and-FY2019-Shareholder-Letter-11.20.19.pdf).

<sup>8</sup> Motley Fool, *Sonos Q4 Earnings Call Transcript* (Nov. 20, 2019), <https://www.fool.com/earnings/call-transcripts/2019/11/20/sonos-inc-sono-q4-2019-earnings-call-transcript.aspx>.

licensees cannot replace, to the harm of consumers and the public interest.

#### **IV. ABILITY OF COMPLAINANT AND LICENSEES TO REPLACE EXCLUDED ARTICLES IN A COMMERCIALY REASONABLE TIME**

Sonos cannot itself replace the subject articles in a commercially reasonable amount of time, as Sonos does not currently manufacture smartphones or tablets and has no capacity to begin to manufacture them within a commercially reasonable time. While Sonos manufactures smart speakers, it does so by relying on respondent's technological contributions and cannot itself—and as described above, does not intend to—provide the entirety of the functionality it seeks to exclude.<sup>9</sup>

Given the above, Sonos does not currently—and does not wish to—replace the excluded articles in a commercially reasonable amount of time. The failure to replace these articles would harm consumers by reducing consumer choice as well as harming developers by reducing the number of devices available for which they can develop.

#### **V. EXCLUSION OF THE REQUESTED ARTICLES WOULD HARM CONSUMERS**

Sonos's requested exclusion order would harm consumers by significantly reducing their ability to access non-infringing smart speakers, a harm that Sonos cannot and does not wish to remedy. This will generally impact consumers who wish to use smart speakers for the myriad non-infringing uses and may further specifically harm the health and welfare of users with disabilities. Sonos also requests exclusion of staple articles capable of non-infringing use—smartphones and tablets—further harming consumers by reducing their access to high quality personal electronic devices.

Further, ITC investigations are expensive for respondents.<sup>10</sup> Respondents pass along these expenses to consumers and the U.S. economy in the form of higher prices, foregone opportunity, and chilling effects on innovation. Such impacts may be justified when a valid patent is infringed and the ITC can provide a remedy but when the ITC is unable to provide a remedy, such a cost is unsupportable and the ITC must not pursue an investigation.

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<sup>9</sup> While others also make smart speakers that could replace some of the market demand, Sonos has also accused those smart speakers of infringing, meaning that it is likely to seek to exclude those devices.

<sup>10</sup> AIPLA, *Report of the Economic Survey 2019* (2019) (estimating median legal costs at \$8,000,000).

There are serious concerns about whether the ITC can or should provide a remedy in the present case. For two of the five patents alleged to be infringed, while the identified article is a smartphone or tablet, the alleged infringing functionality is part of the Google Home app<sup>11</sup> which may be installed by customers after importation.<sup>12</sup> At the time of importation, the identified articles do not infringe. Sonos apparently relies on indirect liability to bridge this gap. However, a smartphone or tablet is the quintessential article with “substantial non-infringing uses”, rendering Sonos’s allegations of contributory infringement meritless. Further, it is black letter law that inducement liability does not exist absent direct infringement.<sup>13</sup> Sonos’s allegations rely on post-importation conduct—the installation of an app by a customer and a specific, uncommon usage of the alleged infringing devices. Exclusion on the basis solely of indirect infringement would force Customs agents at the time of importation to make the impossible determination of which—if any—devices may later be used in an infringing manner by a customer.<sup>14</sup>

These issues raise concerns regarding the ITC’s ability to actually issue the requested remedy. However, a respondent must still defend itself even if no remedy can issue. While the ITC has previously conducted investigations in such circumstances—for example, where a patent would expire before a remedial order could issue<sup>15</sup>—the ITC should make clear that the public interest will not permit an investigation in circumstances where a remedy will not be available.

## VI. CONCLUSION

Given the significant consumer and public harms that would arise from the requested exclusion order, the ITC should determine not to institute the above-referenced investigation.

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<sup>11</sup> See Complaint, Exs. 18 and 20. The remaining patents identify smartphone and tablet devices, but solely as unclaimed “controllers” or “Chromecast-enabled computing devices.” These devices do not infringe any aspect of the remaining patents and it is unclear on what basis Sonos could exclude them.

<sup>12</sup> The app is not a basis for liability because digital data is not an “article” subject to ITC remedy. See *ClearCorrect Operating, LLC v. International Trade Comm’n*, 810 F.3d 1283 (Fed. Cir. 2015).

<sup>13</sup> See *ACCO Brands, Inc. v. ABA Locks Mfrs. Co., Ltd.*, 501 F.3d 1307, 1312 (Fed. Cir. 2007) (for induced infringement, “the patentee must establish ‘first that there has been direct infringement’”).

<sup>14</sup> See *Suprema, Inc. v. International Trade Comm’n*, 796 F.3d 1338, 1358, 1366 (Fed. Cir. 2015) (O’Malley, J., dissenting).

<sup>15</sup> See, e.g., ITC Investigation 337-TA-1094; see also Landau, *Why Is The ITC Instituting Investigations On Expiring Patents?*, Patent Progress (Mar. 30, 2018), <https://www.patentprogress.org/2018/03/30/why-is-the-itc-instituting-investigations-on-expiring-patents/>.

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Respectfully submitted,

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