

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

In the Matter of

**CERTAIN GPS DEVICES AND
PRODUCTS CONTAINING SAME**

Investigation No. 337-TA-602

ADVISORY OPINION

On March 5, 2010, Atheros Communications, Inc. (“Atheros”) filed a request for an advisory opinion pursuant to Commission rule 210.79 (19 C.F.R. § 210.79) as to whether the importation, sale for importation, or sale after importation of global positioning system (“GPS”) products incorporating Atheros GPS chips would violate the Commission’s limited exclusion order issued in this investigation. Upon consideration, the Commission hereby grants Atheros’ advisory opinion request.

I. PROCEDURAL HISTORY

This investigation was instituted on May 7, 2007, based on a complaint filed by Global Locate, Inc., a subsidiary of Broadcom Corporation (collectively “Broadcom”). *72 Fed. Reg.* 25777 (2007). The complaint alleged violations 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 GPS devices and products containing the same by reason of infringement of various claims of six different patents. The complaint named SiRF Technology, Inc. (“SiRF”), E-TEN Corp. (“E-TEN”), Pharos Science & Applications, Inc. (“Pharos”), MiTAC International Corporation (“MiTAC”), and Mio Technology Limited (“Mio”) as respondents. More specifically, the

complaint was directed to “SiRF GPS Devices,” *i.e.*, integrated circuit chips, and “downstream products using accused SiRF GPS devices” manufactured and/or distributed by MiTAC, Mio, E-TEN or Pharos. Complaint at ¶¶ 86-87. Atheros was not named as a respondent.

On January 15, 2009, the Commission found a violation of section 337 by SiRF, MiTAC, Mio, E-TEN, and Pharos by reason of infringement of all six asserted patents. The Commission issued a limited exclusion order and several cease and desist orders. The limited exclusion order directs U.S. Customs and Border Protection to exclude:

GPS devices and products containing the same that are covered by one or more of claims 1, 2, and 11 of the ‘801 patent, claims 4 and 11 of the ‘346 patent, claims 1 and 9 of the ‘187 patent, claims 1, 2, and 22 of the ‘080 patent, claims 1 and 2 of the ‘651 patent, and claims 1, 2, and 5 of the ‘000 patent and that are manufactured abroad by or on behalf of, or imported by or on behalf of, SiRF, Pharos, MiTAC, Mio, and E-TEN or any of their affiliated companies, parents, subsidiaries, or other related business entities, or their successors or assigns . . .

On March 5, 2010, Atheros filed a request for an advisory opinion pursuant to Commission rule 210.79 (19 C.F.R. § 210.79) as to whether the importation, sale for importation, or sale after importation of GPS products incorporating Atheros GPS chips, rather than SiRF GPS chips, would violate the Commission’s limited exclusion order. *See* Memorandum In Support of Request of Atheros Communications, Inc. For Advisory Opinion that Atheros GPS Chips and Products Containing Same Are Outside the Scope of the Limited Exclusion Order (“Request”). The Commission received no response to this request, either from any party to the underlying investigation or any member of the public.

II. APPLICABLE LAW

Commission rule 210.79 states, in relevant part:

Upon request of any person, the Commission may, upon such investigation as it deems necessary, issue an advisory opinion as to whether the person's proposed course of action or conduct would violate a Commission exclusion order, cease and desist order, or consent order. The Commission will consider whether the issuance of such an advisory opinion would facilitate the enforcement of section 337 of the Tariff Act of 1930, would be in the public interest, and would benefit consumers and competitive conditions in the United States, and whether the person has a compelling business need for the advice and has framed his request as fully and accurately as possible. . . .

19 C.F.R. §210.79(a). The Commission's authority to issue advisory opinions has been recognized by the U.S. Court of Appeals for the Federal Circuit. *Allied v. U.S. Int'l Trade Comm'n*, 850 F.2d 1573 (Fed. Cir. 1988).

III. DISCUSSION

In its request, Atheros explains that it intends to sell its GPS chips to certain respondents for incorporation into GPS products, *e.g.*, personal navigation devices ("PNDs"). Request at 2. Atheros explains that its GPS chips were not before the Commission during the investigation and contends that any products incorporating its GPS chips, as opposed to SiRF's GPS chips, are not covered by the limited exclusion order. *Id.* Atheros points to the language of the limited exclusion order, the complaint filed by Broadcom, the notice of investigation, the administrative law judge's final initial determination, and the Commission's opinion to support its assertion that PNDs of respondents, which incorporate Atheros GPS chips, would not be covered by the limited exclusion order. We find Atheros' request meets the requirements of Commission rule 210.79 because it will "facilitate the enforcement of section 337 of the Tariff Act of 1930, would be in the public interest, and would benefit consumers and competitive conditions in the United States," and Atheros has shown "a compelling business need for the advice." *See* 19 C.F.R.

210.79. We now turn to the question presented by Atheros' request.

Exclusion orders must be read in the context of the investigation in which they were issued and the Commission's findings in that investigation. The language in Commission limited exclusion orders directed to articles of named respondents "that infringe" or articles "covered by" generally refers to articles found by the Commission to infringe and articles that are "essentially the same," meaning that the differences between them are merely 'colorable' or 'unrelated to the limitations in the claim of the patent.'" See *Yingbin-Nature (Guangdong) Wood Indus. Co. v. U.S. Int'l Trade Comm'n*, 535 F.3d 1322 (Fed. Cir. 2008).¹

In this case, the Commission's opinion indicates that it investigated "SiRF's GPS chips, namely, SiRFstarIII and InstantGPS, and products incorporating the GPS chips such as portable navigation devices ('PNDs'), personal digital assistants ('PDAs') and cell phones made by [E-TEN, Pharos, MiTAC, or Mio]." *Certain GPS Devices and Products Containing Same*, Inv. No. 337-TA-602, Comm'n Op. at 4-5 (Jan. 2009) ("*GPS Devices*") (emphasis added); see also Broadcom's Complaint at ¶¶ 86-88 (indicating that the allegedly infringing products are SiRF GPS chips and "downstream products using accused SiRF GPS [chips]"). The Commission's findings of infringement in the underlying investigation are based almost entirely on the

¹ See also *Certain Automated Mechanical Transmission Systems for Medium-Duty and Heavy-Duty Trucks and Components Thereof*, Inv. No. 337-TA-503, Comm'n. Op. at 4 (July 2005) ("[T]he scope of the remedy is dependent upon the scope of the investigation, which is determined by the notice of the investigation."); *Certain Systems for Detecting and Removing Viruses or Worms, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-510, Comm'n. Op. at 4 (Aug. 2005) ("[O]ur remedial orders cover [respondent] hardware components only in instances where an . . . anti-virus software module [found to infringe by the Commission] is installed on [respondent] hardware.").

operation of SiRF's proprietary software, data services, and hardware in the products of MiTAC, Mio, E-TEN, and Pharos. *See GPS Devices*, Comm'n. Op. at 16 (“[T]he accused chips include [SiRF] hardware and software that function integrally to cause infringement of these claims”) Indeed, the Commission found that SiRF's GPS chips, its proprietary software, and its proprietary data services are responsible for performing all of the claimed features, elements, and method steps in the asserted patents.

We conclude that the *GPS Devices* limited exclusion order, when properly read in the context of this investigation, is directed only to SiRF's infringing GPS chips and products of respondents MiTAC, Mio, E-TEN, and/or Pharos that incorporate SiRF's infringing chips, as the Commission determined. Accordingly, we have determined to grant Atheros' request for an advisory opinion that importation of products containing Atheros GPS chips do not violate our limited exclusion order.

By order of the Commission.



Marilyn R. Abbott
Secretary to the Commission

Issued: April 20, 2010

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SAME**

337-TA-602

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ADVISORY OPINION** has been served by hand upon the Commission Investigative Attorney, Vu Q. Bui, Esq., and the following parties as indicated, on APR 20 2010.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainant Global Locate Inc.:

Michael D. Esch, Esq.
**WILMER CUTLER PICKERING HALE
AND DORR LLP**
1875 Pennsylvania Avenue, NW
Washington, DC 20006

- Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

**On Behalf of Respondents Sirf
Technology, Incorporated; MIO Technology Limited
USA; Mitac International Corporation; Pharos Science
and Applications; and, E-Ten Corporation:**

Gregory A. Castanias, Esq.
JONES DAY
51 Louisiana Avenue, NW
Washington, DC 20001-2113

- Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____

Third-Party Atheros Communications, Inc.:

Thomas L. Jarvis, Esq.
**FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, L.L.P.**
901 New York Avenue, N.W.
Washington, D.C. 20001

- Via Hand Delivery
 Via Overnight Mail
 Via First Class Mail
 Other: _____