

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN UNIVERSAL TRANSMITTERS FOR
GARAGE DOOR OPENERS**

Inv. No. 337-TA-497

**INITIAL DETERMINATION¹ CONCERNING TEMPORARY RELIEF ON
VIOLATION OF SECTION 337**

Administrative Law Judge Charles E. Bullock

(November 4, 2003)

I. Introduction

On July 16, 2003, complainant, The Chamberlain Group (“complainant” or “Chamberlain”), filed a complaint and a motion for temporary relief (497-001) with the U.S. International Trade Commission. The complaint, as supplemented, alleges violations of § 337 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain universal transmitters for garage door openers (“GDOs”) by reason of infringement of claims 1-8 of U.S. Patent No. RE 35,364 and claims 5-62 of U.S. Patent No. RE 37,986 and violation of § 1201(a)(2) of the Digital Millennium

¹ Section 210.66 of the Commission’s Rules of Practice and Procedure requires that this decision be called an initial determination so that it can be reviewed by the Commission even if no petition for review is filed. This is not the final decision of the administrative law judge in this investigation, which will also be called an initial determination. Pursuant to Commission Rule 210.66(f), this initial determination shall become the determination of the Commission twenty (20) calendar days after issuance thereof, unless the Commission modifies or vacates the initial determination within that period.

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Copyright Act, 17 U.S.C. On August 20, 2003, the Commission issued a Notice of Investigation that was published in the Federal Register on August 26, 2003. *See* 68 Fed. Reg. 51,301. The Notice instituted an investigation to determine:

(a) whether there is a violation of subsection (a)(1)(A) 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 universal transmitters for garage door openers by reason of violation of section 1201(a)(2) of the Digital Millennium Copyright Act, 17 U.S.C. ¶ 1201(a)(2) the threat or effect of which is to destroy or substantially injure an industry in the United States; and

(b) 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 universal transmitters for garage door openers by reason of infringement of claims 1-8 of U.S. Patent No. RE 35,364 or claims 5-62 of U.S. Patent No. RE 37,986 and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

Chamberlain is a Connecticut corporation with offices at 845 Larch Avenue, Elmhurst, Illinois, 60126-1196. The respondents are Skylink Technologies, Inc., a Canadian corporation, and Philip Tsui, an individual, both located at 2213 Dunwin Drive, Mississauga, Ontario, L5L 1X1, Canada; and Capital Prospect, Ltd., located at Room 1316B, Veristrong Industrial Center, 36 Au Pui Wan Street, Fo Tan, New Territories, Hong Kong (collectively “respondents”).

Complainant’s motion for temporary relief or a temporary exclusion order (“TEO”) is entirely based on its DMCA claim and does not address the two reissue patents. Order No. 3, issued on August 26, 2003, set the procedural schedule for both the TEO phase and full

investigation phase of the investigation. A three-day TEO hearing was scheduled to take place on September 23-25, 2003.

On September 8, 2003, the undersigned issued a notice requesting the parties to submit jurisdictional briefs,² by September 16, 2003, on whether an alleged violation of the

² The following abbreviations will be used throughout this initial determination:

- **“Respondents’ Jurisdictional Brief”** refers to the Respondents’ Brief Regarding Jurisdictional Issues, dated September 9, 2003
- **“Chamberlain’s Jurisdictional Brief”** refers to Complainant’s Brief in Support of Assertion of Jurisdiction in this Investigation, dated September 15, 2003
- **“Staff’s Jurisdictional Brief”** refers to the Commission Investigative Staff’s Brief on Jurisdiction, dated September 16, 2003
- **“Respondents’ Motion”** refers to the Respondents’ Motion for Summary Determination of Chamberlain’s DMCA Claim, dated September 15, 2003
- **“Respondents’ Facts”** refers to Respondents’ Separate Statement of Material Undisputed Facts Supporting Summary Determination of Chamberlain’s DMCA Claim, dated September 15, 2003
- **“Chamberlain’s Response”** refers to the Complainant’s Response to Respondent’s Motion for Summary Determination of Chamberlain’s DMCA claim, dated October 2, 2003.
- **“Chamberlain’s Facts”** refers to Complainant’s Response to Respondents’ Separate Statement of Material Undisputed Facts Supporting Summary Determination of Chamberlain’s DMCA Claim, dated October 2, 2003
- **“Staff’s Response”** refers to the Commission Investigative Staff’s Response to Respondent’s Motion for Summary Determination of Chamberlain’s DMCA Claim, dated October 2, 2003
- **“Staff’s Facts”** refers to the Commission Investigative Staff’s Response to Respondent’s Statement of Material Undisputed Facts Supporting Summary Determination of Chamberlain’s DMCA Claim and the Staff’s Additional Material Undisputed Facts, dated October 2, 2003
- **“CU Response”** refers to the Consumers Union’s Submission in Support of Respondent Skylink, Inc.’s Motion for Summary Determination, dated October 2, 2003
- **“Respondents’ Reply”** refers to the Respondents’ Reply Memorandum in Support of Summary Determination of Chamberlain’s DMCA Claim, dated October 9, 2003
- **“Respondents’ Rebuttal Facts”** refers to Skylink’s Reply to Chamberlain’s Response to Material Undisputed Facts Warranting Summary Determination, and Response to Chamberlain’s Statement of Additional Facts, dated October 9, 2003
- **“Chamberlain’s Reply”** refers to Chamberlain’s Reply to Commission Investigative Staff’s Response to Respondents’ Motion for Summary Determination of Chamberlain’s

DMCA is an “unfair act” that is cognizable under § 337. On September 9, 2003, respondents filed their jurisdictional brief. On September 15, 2003, Chamberlain filed its jurisdictional brief. And on September 16, 2003, the Commission Investigative Staff (“Staff”) filed its jurisdictional brief. No responsive briefs were filed by any parties.

On September 15, 2003, respondents filed a motion (497-004) for leave to file a summary determination motion, to waive the TEO hearing and to suspend the TEO schedule.

DMCA Claim, dated October 9, 2003

- “**Chamberlain’s Rebuttal Facts**” refers to Complainant’s Response to Commission Investigative Staff’s Additional Material Undisputed Facts Supporting Summary Determination of Chamberlain’s DMCA Claim, dated October 9, 2003
- “**Staff’s Reply**” refers to the Commission Investigative Staff’s Reply to Responses to Respondent’s Motion for Summary Determination of Chamberlain’s DMCA Claim, dated October 9, 2003
- “**Staff’s Rebuttal Facts**” refers to the Commission Investigative Staff’s Response to Chamberlain’s Statement of Additional Facts with Respect to Respondents’ Motion Summary Determination of Chamberlain’s DMCA Claim, dated October 9, 2003
- “**Chamberlain’s Motion to Strike**” refers to Chamberlain’s Motion to Strike Respondents’ Arguments in their Reply Memorandum on Burden of Proof or in the Alternative, to Consider Rebuttal Argument in Chamberlain’s Memorandum Filed in the District Court, dated October 10, 2003
- “**Chamberlain’s Opposition to CU**” refers to Chamberlain’s Opposition to Consumer Union’s Motion for Leave to File Submission in Support of Respondents’ Motion for Summary Determination of Chamberlain’s DMCA Claim and Alternatively, its Response, dated October 14, 2003
- “**Staff’s Opposition to Motion to Strike**” refers to the Commission Investigative Staff’s Opposition to Chamberlain’s Motion to Strike Respondents’ Arguments in their Reply Memorandum on Burden of Proof or in the Alternative, to Consider Rebuttal Argument in Chamberlain’s Memorandum Filed in the District Court, dated October 17, 2003
- “**Respondents’ Opposition to Motion to Strike**” refers to the Opposition to Chamberlain’s Motion to Strike Reply Brief re Motion for Summary Determination or, in the Alternative, for Leave to File Rebuttal Materials; Evidentiary Objections, dated October 17, 2003
- “**District Court’s Order**” refers to the Memorandum Opinion and Order issued on August 29, 2003 in *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, Case No. 02-C-6376, (N.D.Ill.)

On September 16, 2003, complainant filed a response in support. On September 17, 2003, Staff also filed a response in support. Order No. 6, issued on September 17, 2003, granted respondents motion and stayed the TEO procedural schedule with the explicit understanding that if respondents' motion for summary determination is denied by the undersigned and that the Commission agrees with the undersigned's determination, that respondents will voluntarily enter into the Consent Order Stipulation and Proposed Consent Order, attached as Exhibit A to respondents' motion, which ultimately grants complainant the requested temporary relief.

Order No. 6 also accepted respondents' motion for summary determination as filed, which was not separately docketed as a motion. Responses to respondents' summary determination motion were received on October 2, 2003 from complainant and the Staff. In addition, on October 2, 2003, a motion (497-005) was filed by a third party, the Consumers Union, for leave to file a submission in support of respondents' motion for summary determination, which was granted by Order No. 8, dated October 15, 2003. Replies were received on October 9, 2003 from all parties. In addition, on October 10, 2003, complainant filed a motion (497-006) to strike respondents' arguments in their reply memorandum on burden or proof, or in the alternative, to consider rebuttal argument in Chamberlain's memorandum filed in the District Court. On October 17, 2003, respondents and Staff both filed responses in opposition. Complainant's motion to strike was denied in its entirety by Order No. 9, issued October 24, 2003.

II. Legal Standards

A. Temporary Exclusion Order Standard

In a case in which the complainant seeks a temporary exclusion order, the Commission has held that the issues are the same as those in a district court case in which a temporary injunction is sought.³ The issues that must be balanced against one another include: (1) a reasonable likelihood of success on the merits; (2) irreparable harm to the domestic industry in issue in the absence of temporary relief; (3) the balance of harm tipping in complainant's favor, and (4) a tolerable effect on the public interest.⁴ Temporary relief is "not to be routinely granted."⁵ This initial determination, however, only focuses on the likelihood that complainant will be successful on the merits, based on complainant's DMCA § 1201(a)(2) "unauthorized access" claim, which was the basis of accepting respondents' motion for summary determination in lieu of holding a hearing.

B. Summary Determination Standard

Pursuant to Commission Rule 210.18, summary determination "... shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together

³ See *Certain Hardware Logic Emulation Systems and Components Thereof*, Inv. No. 337-TA-383, Order No. 34: Initial Determination, July 8, 1996; *Certain Circuit Board Testers*, Inv. No. 337-TA-342, Initial Determination on Motion for Temporary Relief, January 11, 1993.

⁴ *Id.* See also *Sofamor Danek Group Inc. v. Depuy Motech Inc.*, 74 F.3d 1216 (Fed.Cir.1996).

⁵ *Intel Corp. v. ULSI Systems Technology, Inc.*, 955 F.2d 1566, 1568, (Fed.Cir.1993), *cert. denied*, 1145 Ct. 923 (1994).

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.”⁶

“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”⁷ The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.”⁸ “Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.”⁹ “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute.”¹⁰

⁶ 19 C.F.R. § 210.18(b); also see *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg., Inc. v. Coating Machinery Systems, Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001).

⁷ *Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed.Cir. 2001).

⁸ *EMI Group North America, Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998).

⁹ *Sandt Technology, Ltd. v. Resco Metal and Plastics Corp.*, 264 F.3d 1344, 1357 (Fed.Cir. 2001) (Dyk, C.J., concurring).

¹⁰ *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

III. Jurisdiction

All parties participated in the TEO phase of this investigation by filing briefs and have consented to the Commission's personal jurisdiction. The TEO phase of this investigation presents a case of first impression, as it the first case brought to the Commission that involves the Digital Millennium Copyright Act ("DMCA"). As such, it presents the issue of whether the Commission has subject matter jurisdiction over complainant's DMCA claim. Respondents argue that the Commission does not have jurisdiction under § 337 of the Tariff Act to hear actions brought under § 1201 of the DMCA, 17 U.S.C. § 1201.

Respondents have made two primary arguments to support their claim. Their first argument is that Congress explicitly withheld jurisdiction from the Commission over cases involving § 1201. *See* Respondents' Jurisdictional Brief at 1-2. Their second argument is that a contrary interpretation would render subsequent congressional amendments superfluous. *See* Respondents' Jurisdictional Brief at 2-3. Respondents' arguments fail because they do not recognize the Commission's broad jurisdiction under § 337(a)(1)(A); they mistakenly claim that Congress expressly withheld jurisdiction; and they misconstrue Congress' reason for amending § 337(a)(1)(E).

A. The Commission has Broad Jurisdictional Powers Under § 337(a)(1)(A) which apply to the DMCA

Section 337 states that unfair practices in import trade are "unlawful, and when found by the Commission to exist shall be dealt with, *in addition to any other provision of law*, as provided in this section" 19 U.S.C. § 1337(a)(1) (emphasis added). Among the unfair

practices prohibited by § 337 are “[u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer or consignee” 19 U.S.C. § 1337(a)(1)(A). On its face, § 337 expressly grants the Commission power to regulate unfair practices in import trade and, implicitly, grants the Commission all the reasonably necessary powers – including the assertion of jurisdiction – to carry out its express power. *See* Norman J. Singer, *Sutherland Statutory Construction* at § 65:3 (6th ed. 2001) (“The grant of an express power carries with it the authority to exercise all other activities reasonably necessary to carry it into effect, and this has been employed with great liberality in interpreting statutes granting administrative powers.”).

The concept of unfair competition and unfair practices in trade is a broad concept that covers a wide range of conduct and is not susceptible to precise limitation or definition. *See generally* 1 J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §§ 1:8-1:9 (4th ed. 2001). Moreover, the Commission’s subject matter jurisdiction is broad, having been delegated by Congress pursuant to its plenary powers under the foreign commerce clause. U.S. Const. Art I, § 8, cl. 3; *Certain Steel Rod Treating Apparatus*, Inv. No. 337-TA-97, Commission Memorandum Opinion at 4 (June 29, 1981).

The Commission has broad discretion to determine what constitutes unfair practices in import trade. *In re Von Clemm*, 229 F.2d 441, 443-44 (C.C.P.A. 1955). Although the terms “unfair methods of competition” and “unfair acts,” as such, have not been extensively analyzed by the Commission, there is a large body of law analyzing these same terms under

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, a statute which is analogous to § 337. *See Certain Apparatus for the Continuous Production of Copper Rod*, Inv. No. 337-TA-89, Action, Order and Opinions Concerning Temporary Relief at 7 (April 1981) (Commission noted that § 337 and FTCA § 5 were analogous.). Among the factors the FTC looks to in determining whether a practice constitutes an unfair trade act is “. . . whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise – whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness” *Federal Trade Comm’n v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, n.5 (1972).

Accordingly, the Commission has great latitude in deciding what constitutes “unfair methods of competition” or “unfair acts in importation” and thereby, whether jurisdiction exists.¹¹ Ignoring the broad statutory grant of § 337, respondents have made the arguments that Congress explicitly withheld jurisdiction and that a contrary view would be incompatible with later congressional amendments. Neither argument, however, is persuasive.

In the face of the broad statutory grant, respondents must demonstrate why the Commission does not have subject matter jurisdiction under § 337(a)(1)(A) to hear cases brought under § 1201 of the DMCA. As respondents have not supported this view, their position must fail.

¹¹ *See Certain Chain Door Locks*, Inv. No. 337-TA-5, Order (April 3, 1976). (“Under section 337, the Commission’s subject matter and personal jurisdictions are very broad.”)

B. Congress Did Not Explicitly Withhold the Commission's Jurisdiction Regarding § 1201

Respondents' claim that Congress stripped the Commission of jurisdiction regarding DMCA claims is completely based on their reading of the DMCA's legislative history. Interestingly, respondents interpret the removal of an express authorization as an express denial. *See* Respondents' Jurisdictional Brief at 1-2. Respondents argue that the amendment to the original text of the DMCA is definitive on the jurisdiction issue because "the statutory text was amended to remove a right of action under Section 337 for violation of Section 1201." *See* Respondents' Jurisdictional Brief at 2. According to respondents, Congress' removal of an express grant of jurisdiction in this context can be interpreted as an express denial of jurisdiction.

The flaw in respondents' reasoning is that Congress could have removed the express authorization because it was unnecessary in light of § 337(a)(1)(A). If the Commission already had jurisdiction under § 337, there was no need for Congress to expressly provide for jurisdiction. In fact, an express grant might be more harmful than helpful when it has already been stated that there is no specific definition of unfair competition provided in § 337.

Despite Congress's granting of broad discretion to the Commission to determine what constitutes an unfair trade act and the fact that there have been only limited restrictions on the types of unfair acts that come within the Commission's jurisdiction, respondents claim that a few selected quotations from the legislative history of the DMCA and a conclusory

statement tucked in a footnote of a law review article written by one of respondents' own counsel of record preclude the Commission from assuming jurisdiction over unfair trade acts under DMCA § 1201. *See* Respondents' Jurisdictional Brief at 1-2. Respondents rely heavily on one sentence from a letter by House Ways and Means Committee Chairman Archer to House Judiciary Committee Chairman Hyde regarding the withdrawal of a proposed subsection (c) of § 1201 in arguing that "the revision was made specifically to prevent enforcement of Section 1201 by the Commission . . ." *See* Respondents' Jurisdictional Brief at 1.¹² The portion of the sentence that respondents emphasize in their brief reads as follows: "[T]he underlying framework of section 1201, in terms of actionable conduct, affected parties, and available remedy, is not compatible with the structure of section 337." 144 Cong. Rec. E1714-02 (letter dated July 21, 1998).

On its face, the sentence relied upon would appear to support respondents' conclusion. However, the sentence is only a small part of a two-letter exchange between Chairman Archer and Chairman Hyde and when the two letters are taken as a whole it is clear that Chairman Hyde merely asked the floor manager to remove § 1201(c) as a courtesy to Chairman Archer whose committee had concurrent jurisdiction over the import ban and had

¹² The proposed subsection (c) of § 1201 stated in full:

Importation. The importation into the United States, the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee of any technology, product, service, device, component, or part thereof as described in subsection (a) or (b) shall be actionable under section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337).

H.R. Rep. No. 105-551, pt. 1 at 4 (2nd Sess. 1998).

not met to consider the provision. 144 Cong. Rec. E1714-02 (letter dated July 22, 1998). The two letters taken together do not support the conclusion drawn by respondents regarding the views of Chairman Archer, whose committee in any case never formally considered subsection 1201(c).¹³ The sentence that respondents rely upon merely observes that there is an incompatibility between § 1201 and the structure of § 337, not its substance. Respondents have based their argument on the very thin reed of this one sentence taken out of context. Indeed, Chairman Archer's comments may have simply meant that a wholesale incorporation of § 1201 into § 337, as suggested by the wording of § 1201(c), would have needlessly complicated § 337 by incorporating an entirely new offense completely unconnected to long-standing Commission jurisprudence. Although subsection 1201(c) appeared to be a broad grant of authority to the Commission, it was not clear how it related to the existing proscriptions of § 337(a)(1). For example, it was not clear whether certain attendant elements of a § 337 investigation, such as domestic industry and injury, would have any place in an investigation arising from the proposed subsection 1201(c). Given the potential confusion from the express provision of subsection 1201(c), Chairman Archer's concern that "the underlying framework of section 1201, in terms of actionable conduct, affected parties, and available remedy, is not compatible with the structure of section 337" is understandable.

Thus, Congress ultimately made no express delegation of authority to the Commission to enforce § 1201, nor did it need to since it was clear that the Commission already had the

¹³ The only House committee to have considered and voted upon subsection 1201(c) – the Judiciary Committee – had passed the provision.

authority to look to the provisions of an unfair trade statute such as § 1201 in determining what constitutes an unfair act under § 337. In light of the absence of any reference to § 337, in § 1201 as finally enacted, the sentence from Chairman Archer's letter cited by respondents does not provide a basis to effectively strip the Commission of the authority to decide whether a violation of § 1201 constitutes an unfair act under § 337. Accordingly, respondents' argument is rejected.

In any event, statements of individual Congressmen concerning legislation are not definitive on the question of congressional intent. To find the intent to limit jurisdiction, respondents need to offer something greater than one sentence of legislative history that is taken out of context regarding the compatibility of the Tariff Act (§ 337) with the DMCA.

The question of congressional intent cannot be determined solely by scant references to the legislative history, especially regarding something as broad as the Commission's jurisdiction under § 337. When Congress has sought to deny jurisdiction to the Commission, it has chosen to do so expressly. For example, Congress chose to withhold jurisdiction when enacting the Audio Home Recording Act of 1992 ("AHRA"), which is similar to the DMCA. 17 U.S.C. § 1001. In the AHRA, much like the DMCA, Congress sought to protect the rights of copyright holders by prohibiting the "import, manufacture, or distribut[ion of] any device, . . . the primary purpose or effect of which is to avoid, bypass, remove, deactivate, or otherwise circumvent any program or circuit which implements, in whole or in part, a system described in subsection (a) . . ." 17 U.S.C. § 1002(c). In § 1008, however, Congress chose

to prohibit causes of action in federal courts against dealers or manufacturers of digital or analog recording devices or media and against noncommercial consumer uses. 17 U.S.C. § 1008.

At no point during the legislative history of the bill was any provision for granting the Commission jurisdiction ever offered. It seems clear, however, that Congress assumed that the Commission's jurisdiction would already inherently exist under § 337 because, having prohibited the causes of action in federal court set out above, Congress also passed a conforming amendment to § 337(b)(3) stating: “[i]f the Commission has reason to believe that the matter before it . . . (B) relates to an alleged copyright infringement with respect to which action is prohibited by section 1008 of title 17, the Commission shall terminate, or not institute, any investigation into the matter.” 19 U.S.C. § 1337(b)(3).¹⁴ Therefore, it is reasonable to assume that when Congress passes a statute establishing a prohibition against a particular range of unfair trade practices relating to imports, Congress understands that those practices will also be included in the category of unfair trade acts related to imports regulated by the Commission under § 337 unless Congress expressly provides otherwise. For this additional reason, respondents' argument is rejected.

C. A Finding of Jurisdiction does not Render § 337(a)(1)(E) Superfluous

Respondents' second argument is that jurisdiction cannot exist because it would make subsequent amendments to § 337 of Congress unnecessary. More specifically, respondents

¹⁴ The conforming amendment is in § 3(d) of S. 1623, 102nd Congress; Public Law 102-563 (1992).

cite to § 337(a)(1)(E), which states that “[t]he importation into the United States...by the owner, importer, or consignee, of an article that constitutes infringement of the exclusive rights in a design protected under chapter 13 of” Title 17 is considered to be “unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section.” 19 U.S.C. 1337(a)(1)(E).¹⁵ The subsection deals with the protection of unpatentable designs in boat hull configurations, which was enacted in the wake of the Supreme Court’s decision in *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*¹⁶ In *Bonito Boats*, the Supreme Court invalidated a state protection scheme for boat hull designs that was preempted by the federal patent law. After the decision, Congress chose to create a federal intellectual property right for these boat hull designs.

Respondents argue that Congress’s decision to amend § 337 to create a cause of action for infringement of an intellectual property right in boat hull designs, combined with its decision not to specifically amend § 337 to create a cause of action for violations of the DMCA, reflects an intent to withhold jurisdiction for acts prohibited by the DMCA. See Respondents’ Jurisdictional Brief at 2-3. Respondents’ argument is not persuasive.

The 1988 amendment to § 337 created a separate category of specifically-identified types of unfair acts or unfair methods of competition for which it is unnecessary to prove injury to a domestic industry. Section 337(a)(1)(A) prohibits “unfair methods of competition

¹⁵ See Pub. L. 106-113, November 29, 1999, 113 Stat. 1501.

¹⁶ *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

and unfair acts” and requires proof of injury to a domestic industry for such violation. Before the 1988 amendment, all § 337 investigations required injury to a domestic industry under §337(a)(1)(A). After the amendment, § 337(a)(1)(A) eliminated the injury requirement for violations listed in §§ 337(a)(1)(B)-(D), which prohibit importation of products that infringe a patent or copyright [§ 337(a)(1)(B)], infringe a trademark [§ 337(a)(1)(C)], or infringe a mask work [§ 337(a)(1)(D)]. Thus, Congress amended § 337 to eliminate the injury requirement for investigations involving certain statutory violations, not to create new areas of jurisdiction under § 337.¹⁷

The amendment to § 337(a)(1)(E) discussed above, which was passed shortly after passage of the Vessel Hull Design Protection Act (“VHDPA”),¹⁸ resulted in omitting the domestic industry injury requirement for § 337 investigations involving infringement of rights under the VHDPA. Thus, the VHDPA was given the same treatment as patent infringement, trademark infringement and mask work infringement claims under §§ 337(a)(1)(B)-(D), wherein there is no proof of injury requirement. Therefore, contrary to respondents’ arguments, the different treatment of DMCA violations and VHDPA violations is not superfluous. In any event, how Congress treats the import violations of one intellectual property statute is not relevant to the treatment of entirely different intellectual property statutes.

¹⁷ See Pub. L. 100-418, 102 Stat. 1107 (1988).

¹⁸ See Pub. L. 105-304, October 28, 1998, 112 Stat. 2905.

The respondents argue that the VHDPA is part of the DMCA. That argument is beside the point. Assuming the VHDPA is part of the DMCA, the 1999 amendment did nothing more than take one type of unfair act or unfair method of competition under the DMCA, i.e. infringement of a vessel hull design, and place it in the category of unfair acts or unfair methods of competition cognizable under § 337 that do not require proof of injury to establish a violation of § 337. Accordingly, the 1999 amendment to § 337 neither expanded nor limited its jurisdiction, but rather, simply categorized one type of DMCA violation as an unfair act or unfair method of competition for which a complainant does not have to prove injury. Respondents' argument is therefore rejected.

D. Conclusion Regarding Jurisdiction

Under § 337(a)(1)(A), the Commission has broad jurisdiction to hear a wide variety of cases. The reason the Commission needs such a broad grant, and why Congress has given it such latitude is because the terms “unfair methods of competition” and “unfair acts in the importation of articles” are undefined in the statute and apply to a broad range of activities. The Commission, therefore, has wide discretion in deciding if the actions of a party violate § 337 and whether subject matter jurisdiction exists. Accordingly, the Commission has jurisdiction under § 337(a)(1)(A) to hear cases brought under § 1201 of the DMCA.

IV. Parallel District Court Litigation

Before this investigation was instituted, complainant and respondent Skylink, but not respondents Capital Prospect or Tsui, were (and still are) involved in parallel litigation in the

United States District Court for the Northern District of Illinois, *The Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, Case No. 02-C-6376. That case was filed on September 6, 2002. Chamberlain requested a preliminary injunction on November 4, 2002, which was subsequently withdrawn on February 11, 2003.¹⁹ Chamberlain filed a motion for summary judgment on December 3, 2002, which was denied by the District Court on August 29, 2003. The District Court denied the motion for summary judgment based on its decision that there were disputes of material fact concerning whether the computer program in Chamberlain's rolling code is a work protected by copyright and whether the owner of a Chamberlain rolling code GDO is authorized to use the Model 39 universal transmitter. On September 9, 2003, Skylink filed its own motion for partial summary judgment, which is still pending before the District Court.

V. Facts

Chamberlain manufactures and sells remote control garage door openers ("GDOs"), along with transmitters for use with GDOs, to customers who install them and use them to access their garages. *See* Complaint at ¶¶ 6-7. A GDO typically refers to an entire garage door opening system which includes a (1) stationary garage door opening motor with a processing unit and an AM receiver and (2) a transmitter, which is either (a) a hand-held, visor-mounted portable transmitter, or (b) a keyless entry device. *See* Complainant's Exhibit

¹⁹ According to complainant, Chamberlain agreed to file a motion for summary judgment and withdraw the motion for preliminary injunction based on the District Court's suggestion that doing so would result in obtaining a faster decision regarding the DMCA issue. *See* Chamberlain's Response at 3-4.

1. In order to open or close the garage door, the user presses a button on the transmitter or keys a code into the entry device, which sends a radio frequency signal to the AM receiver that relays the signal to the processing unit which directs the door motor to open or close the garage door. *See* Complainant's Exhibit 1. In order to prevent signals from another person's GDOs from opening a customer's GDO, GDOs use unique coded signals that link each transmitter to its own GDO. *See* Complainant's Exhibit 1.

In general, the GDOs on the market today contain fixed code and/or rolling code technology. Fixed code technology has been around since 1984, while rolling code technology has been around since 1996. *See* Fitzgibbon²⁰ dep. at 136-137 (Respondents' Exhibit 3). Chamberlain was not the first company to come up with rolling code technology, nor is it the only company in the market today that sells GDOs with rolling code technology. *See* Fitzgibbon dep. at 51-52 (Respondents' Exhibit 3).

The software in Chamberlain's rolling code technology, which was written around 1996, was registered with the U.S. Copyright Office in mid-2002. *See* Fitzgibbon dep. at 18 (Respondents' Exhibit 3). The copyright on the original transmitter computer program is registered as TX5-553-065, while the copyright on the receiver computer program is registered as nos. TX5-549-995 and TX5-783-934. *See* Complainant's Exhibits 4, 5, 6, 41. Various "versions" of these computer programs, which Chamberlain considers to be

²⁰ James Joseph Fitzgibbon is an employee of Chamberlain. His current position is Director of Intellectual Capital. He has been with Chamberlain since 1990. He earned a B.S. in Electrical Engineering from the Illinois Institute of Technology in 1980. *See* Fitzgibbon dep. at 105-108 (Respondents' Exhibit 3); Fitzgibbon dec. at ¶ 1 (Complainant's Exhibit 7).

“derivative works,” are used to control the operation of Chamberlain’s GDOs employing the rolling code technology, which is designated by “SECURITY+™” and sold by Chamberlain under the brand names of Chamberlain, LiftMaster and Sears Craftsman. *See* Fitzgibbon dep. at 23 (Respondents’ Exhibit 3); Chamberlain’s Response at 10.

Rolling code technology typically includes two components: (1) a fixed identification number, or the “identification code,” and (2) a variable number, or the “rolling code.” *See* Fitzgibbon dec. at ¶ 3 (Complainant’s Exhibit 7). For hand-held remotes, the identification code is fixed at the factory and cannot be changed by the user. *See* Complaint at ¶¶ 23-24. For keyless entry devices, the identification code is a personal identification number (“PIN”) that is chosen by the user. *See* Staff’s Exhibit C at 36; Complainant’s Exhibit 52. If a customer purchases an additional held-held remote or keyless entry device for their Chamberlain GDO, the GDO has a “program” mode where it must “learn” to recognize the new transmitter. *See* Fitzgibbon dec. at ¶ 4 (Complainant’s Exhibit 7). Chamberlain provides customers with instructions on how to program a GDO to add the signal of new transmitters. *See* Fitzgibbon dec. at ¶ 4 (Complainant’s Exhibit 7).

The rolling code changes each time the transmitter is pressed and increases by a predetermined value of three. *See* Fitzgibbon dec. at ¶ 3 (Complainant’s Exhibit 7). In addition to the “program” mode, where a receiver “learns” the message of a transmitter in order to include it in the list of authorized transmitters kept in the receiver’s memory, there is also an “operate” mode. *See* Fitzgibbon dec. at ¶¶ 4-5 (Complainant’s Exhibit 7).

Three “windows” exist in Chamberlain’s rolling code software. *See* Fitzgibbon dep. at 40 (Respondents’ Exhibit 3). The forward window represents normal operation for the GDO. *See* Fitzgibbon dep. at 42-43 (Respondents’ Exhibit 3). The backward or rear window disallows resynchronization with past transmissions. *See* Fitzgibbon dep. at 42 (Respondents’ Exhibit 3). If the newly received rolling code is identical or within the rear window, the program ignores the transmission and will not operate the GDO. *See* Fitzgibbon dec. at ¶ 5 (Complainant’s Exhibit 7). The insecure window represents resynchronization. *See* Fitzgibbon dep. at 43 (Respondents’ Exhibit 3).

A “code grabber” is a device that can capture and record a coded signal that is being transmitted by the transmitter to make it possible to open a garage door. *See* Fitzgibbon dep. at 34-36, 38-39 (Respondents’ Exhibit 3); Complainants’ Exhibits 38, 39. Chamberlain claims that its GDOs with rolling code technology defeat “code grabbers.” *See* Fitzgibbon dep. at 38 (Respondents’ Exhibit 3). According to Chamberlain, when a GDO contains rolling code technology, a code grabber cannot operate the GDO because when the code grabber plays back the transmitted code, the code grabber is transmitting a rolling code that is most likely in the rear window. *See* Fitzgibbon dep. at 131 (Respondents’ Exhibit 3); Fitzgibbon dec. at ¶ 6 (Complainant’s Exhibit 7).

GDOs with rolling code technology contain a resynchronization feature that essentially resets the rolling code. More specifically, “[r]esynchronization is two transmissions in numerical sequence that allows [sic] it then to operate and put it back into

operation into the normal window.” *See* Fitzgibbon dep. at 44-45 (Respondents’ Exhibit 3). Resynchronization is needed where an authorized transmitter has been depressed numerous times while out of range of the receiver, *i.e.* where the next rolling code transmission is outside the forward window of specified values, or for people who have summer homes and want to use their transmitter in two different places. *See* Fitzgibbon dep. at 44-45 (Respondents’ Exhibit 3). The user of a Chamberlain GDO can resynchronize the receiver with the transmitter if the receiver receives a rolling code outside of both the forward and rear windows of the previously received rolling code. After the receiver receives such a rolling code, the receiver listens for the next rolling code and determines if these two rolling codes are in sequence in accordance with Chamberlain’s copyrighted rolling code computer program. If so, the receiver will treat them as valid rolling code transmissions, resynchronize to those newly-received transmissions and cause the GDO to operate. *See* Fitzgibbon dec. at ¶¶ 17, 19 (Complainant’s Exhibit 7).

Chamberlain sells additional and/or replacement transmitters under the name “CLICKER®” that allows customers to operate their Chamberlain rolling code GDOs. *See* Fitzgibbon dec. at ¶ 8 (Complainant’s Exhibit 7). The CLICKER® is a universal transmitter that is capable of opening other manufacturers’ non-rolling or fixed code GDOs, but cannot open other manufacturer’s rolling code GDOs. *See* Fitzgibbon dec. at ¶¶ 7-8 (Complainant’s Exhibit 7). Chamberlain still manufactures non-rolling code GDOs. *See* Fitzgibbon dep. at 110-111 (Respondents’ Exhibit 3).

Chamberlain does not impose any limitations on customers who purchase its GDOs. *See Gregory*²¹ dep. at 174-175 (Respondent's Exhibit 2). Chamberlain's rolling code GDOs also do not contain any type of "end user license," such as those received when consumers purchase computer programs, such as Windows. *See Fitzgibbon* dep. at 183 (Respondents' Exhibit 3).

Skylink also sells replacement transmitters, specifically, Models 39 and 89, that allow customers to operate their Chamberlain GDO. *See Fitzgibbon* dec. at ¶¶ 12, 14; *Tsui* dec. at ¶¶ 2, 9. Model 39 is a hand-held device (*see Complainant's Exhibit 9*), while Model 89 is a keyless entry device (*see Complainant's Exhibit 10*).

Philip Tsui came up with the idea for the development of Models 39 and 89 around 2001, which was then fully developed by Gallen Tsui and the engineering department at Capital Prospect. *See Tsui* Dep. at 30-31, 35 (Complainant's Exhibit 14). In deposition, Mr. Tsui testified that he came up with the idea because he thought there were some demerits to the rolling code because of the forward window. His understanding of the forward window was that all rolling code software has forward windows which enable transmitters to still be functional when the user pushes the button at an inappropriate time. *See Tsui* dep. at 31 (Complainant's Exhibit 14). Mr. Tsui testified that when developing the Model 39 transmitter, he read Chamberlain's GDO user's manual, but did not look at the source code

²¹ Richard Allen Gregory is an employee of Chamberlain. His current position is National Sales Manager of the Retail Products Group. He has been with Chamberlain for five years. *See Gregory* dec. at ¶ 1 (Complainant's Exhibit 24).

of Chamberlain's computer program. *See* Tsui dep. at 35 (Complainant's Exhibit 14). Mr. Tsui testified that the Model 39 transmitter can transmit both fixed codes and rolling codes, but that it only transmits fixed codes, specifically three fixed codes, to operate a Chamberlain rolling code GDO. *See* Tsui Dep. at 36-37 (Complainant's Exhibit 14). All Model 39 transmitters transmit the same three fixed codes to operate a Chamberlain rolling code GDO. *See* Tsui Dep. at 37 (Complainant's Exhibit 14).

Chamberlain performed some tests in 2002 on Skylink's Model 39 and Model 89 transmitters to determine how it operated with the Chamberlain GDO system. *See* Fitzgibbon dep. at 54-55, 81-82 (Respondents' Exhibit 3); Fitzgibbon dec. at ¶¶ 9-16 (Complainant's Exhibit 7). Mr. Fitzgibbon, the employee at Chamberlain who performed the tests, testified in deposition that he understood the Skylink transmitter to operate as sending out three fixed codes. He analogized the system to a numerical circle of all the different possible numbers within the roll, or approximately 3 1/2 billion possibilities. The Skylink transmission puts out one number that is in the normal window and then two more numbers in direct numerical sequence that would perform a resynchronization.²² *See* Fitzgibbon dep. at 56-57 (Respondents' Exhibit 3); Fitzgibbon dec. at ¶¶ 16, 18 (Complainant's Exhibit 7).

Mr. Fitzgibbon's understanding is that the three codes that are sent out by the Skylink transmitter are the same each time. *See* Fitzgibbon dep. at 58-59 (Respondents' Exhibit 3);

²² In other words, "[s]o the first operation, it does the normal operation and ignores the resync. Then the second operation, the second reception, if you will, it does the resynchronization and operates off of that one and just keeps going back and forth between the two." *See* Fitzgibbon dep. at 57 (Respondents' Exhibit 3).

Fitzgibbon dec. at ¶ 20 (Complainant’s Exhibit 7). Specifically, the first fixed code is one that is arbitrarily set at a code value, which is learned by the Chamberlain GDO when the user operates the transmitter during the “program” mode. The second fixed code is set at a value of -1800 of the first code, while the third fixed code is set a value of +3 from the second code. *See* Fitzgibbon dec. at ¶ 18 (Complainant’s Exhibit 7).

In order for a Skylink transmitter to work with a Chamberlain GDO, the customer must program the Skylink transmitter’s signal into the GDO memory. *See* Fitzgibbon dec. at ¶ 15; Tsui dec. at ¶ 9. In other words, Skylink’s transmitters “learn” or “store” values before the transmission of the three codes which causes resynchronization to occur. *See* Fitzgibbon dep. at 112-114 (Respondents’ Exhibit 3); Fitzgibbon dec. at ¶ 15 (Complainant’s Exhibit 7).

VI. Section 1201 of the DMCA

Section 1201 of the DMCA contains three distinct anti-circumvention prohibitions. Section 1201(a)(1)²³ prohibits the act of circumvention of technological measures that protect against gaining access to works protected by copyright. Section 1201(a)(2) prohibits trafficking in products designed to circumvent technological measures. And § 1201(b)²⁴

²³ Section 1201(a)(1) of the DMCA reads “[n]o person shall circumvent a technological measure that effectively controls access to a work protected under this title.”

²⁴ Section 1201(b) of the DMCA reads:

(b) Additional Violations. --

- (1) No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or

prohibits acts of circumvention of technological measures which protect one or more rights of the copyright owner. Chamberlain's TEO is based on the allegation that respondents are violating § 1201(a)(2) of the DMCA. Chamberlain does not allege that respondents are liable under the other two anti-circumvention prohibitions – §§ 1201(a)(1) and 1201(b) – of the DMCA. *See* Chamberlain's Response at 11-13.

Section 1201(a)(2) of the DMCA contains three independent bases for liability, which reads:

No person shall manufacture, import, offer to the public, provide, or otherwise traffic in any technology, product, service, device, component, or part thereof, that –

- (A) is primarily designed or produced for the purpose of circumventing a technological measure that effectively controls access to a work protected under this title;

part thereof, that --

- (A) is primarily designed or produced for the purpose of circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof;
- (B) has only limited commercially significant purpose or use other than to circumvent protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing protection afforded by a technological measure that effectively protects a right of a copyright owner under this title in a work or a portion thereof.

- (B) has only limited commercially significant purpose or use other than to circumvent a technological measure that effectively controls access to a work protected under this title; or
- (C) is marketed by that person or another acting in concert with that person with that person's knowledge for use in circumventing a technological measure that effectively controls access to a work protected under this title.

17 U.S.C. §1201(a)(2). Section 1201(a)(3) provides the following additional definitions:

As used in this subsection -

- (A) to "circumvent a technological measure" means to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological measure, without the authority of the copyright owner; and
- (B) a technological measure "effectively controls access to a work" if the measure, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work.

17 U.S.C. § 1201(a)(3).

Chamberlain alleges that respondents satisfy all three independent bases for liability under § 1201(a)(2). *See* Chamberlain's Response at 13. Specifically, Chamberlain alleges that respondents' universal transmitters violate § 1201(a)(2)(A) because they are designed and produced for the purpose of circumventing Chamberlain's protective measure that controls access to Chamberlain's copyrighted rolling code computer program which, in turn, activates the motors in Chamberlain's GDOs. *See* Chamberlain's Response at 14. Chamberlain alleges that respondents' universal transmitters violate § 1201(a)(2)(B) because when set to operate Chamberlain's rolling code GDOs, respondents' universal transmitters

have no other purpose or use than to circumvent Chamberlain's technological protective measure. *See* Chamberlain's Response at 14. Finally, Chamberlain alleges that respondents' universal transmitters violate § 1201(a)(2)(C) because they are marketed for use in circumventing Chamberlain's technological protective measure. *See* Chamberlain's Response at 15. Although Chamberlain alleges that respondents violate all three independent bases of § 1201(a)(2), Chamberlain's primary argument focuses on "authorization." *See in general*, Chamberlain's Response.

Respondents' primary argument is that, as a matter of law, a customer's use of a Skylink transmitter cannot be held as providing "unauthorized access" to Chamberlain's software under the DMCA. *See* Respondents' Motion at 1. Respondents' alternative argument is that Chamberlain has provided its customers with authorization – either express or implied – to use third-party transmitters. *See* Respondents' Motion at 5-6. Staff supports respondents' arguments. *See* Staff's Response at 2.

Before deciding the issues on the merits, an issue as burden of proof must be resolved. Respondents argue that Chamberlain has the burden of proof on the "unauthorized access" issue because Chamberlain is the one that is claiming a violation of the DMCA. *See* Respondents' Motion at 1, 2, 4, 8, 9; Respondents' Reply at 1. Chamberlain, however, disagrees and argues that respondents' "implied authorization" argument is an affirmative defense and that respondents should carry the burden of proof instead. *See* Chamberlain's

Response at 22. The Staff states that Chamberlain is attempting to shift the burden of proof regarding express authorization. *See* Staff's Reply at 11.²⁵

Respondents' and Staff's position on burden of proof is persuasive. It is also consistent with the District Court's ruling that, in order to "establish a violation of § 1201(a)(2) of the DMCA, a plaintiff must demonstrate that a defendant's product circumvents a technological measure. . . . As a result, in order for Skylink to be liable under any of the three bases, Chamberlain must demonstrate that the Model 39 transmitter provides unauthorized access to Chamberlain's software." *See* District Court's Order at 24. That standard, as stated by the District Court, is consistent with the undersigned's interpretation of the DMCA and will also be adopted here. As such, the burden of proof is on Chamberlain to prove that respondents' transmitters provides unauthorized access to Chamberlain's software.

A. Unauthorized Access

The primary issue for purposes of this TEO is whether or not Skylink's transmitters are "circumventing a technological measure" in Chamberlain's GDO, as that term is defined in §1201 of the DMCA. In other words, the question is whether Skylink's transmitter provides "unauthorized access" to the software within Chamberlain's GDOs. Based on the

²⁵ The Staff cites the basic principles that "incident to the purchase of any article, whether patented or unpatented, is the right to use and sell it," *United States v. Univis Lens Co.*, 316 U.S. 241, 249 (1942) and "[g]enerally, when a seller sells a product without restriction, it in effect promises the purchase that in exchange for the price paid, it will not interfere with the purchaser's full enjoyment of the product purchased," *Hewlett-Packard Corp. v. Repeat-O-Type Stencil Mfg. Corp., Inc.*, 123 F.3d 1445, 1451 (Fed. Cir. 1997). *See* Staff's Reply at 11.

evidence presented to the undersigned and a reading of the DMCA, it is clear that Skylink's transmitters do not provide such "unauthorized access" for the reasons set forth below.

1. Authorization - Express or Implied

Respondents contend that a customer's use of a Skylink transmitter cannot constitute unauthorized access because a customer cannot operate a Chamberlain GDO using a Skylink transmitter unless the customer affirmatively chooses to program and store the Skylink transmitter's signal into the Chamberlain GDO's memory. This, according to respondents, constitutes "express authorization." *See* Respondents' Motion at 4. The Staff also supports respondents' argument that there is no "unauthorized access." *See* Staff's Response at 2. Chamberlain, however, is of the opinion that a customer is not entitled to provide any authorization with the use of any Skylink or non-Chamberlain transmitter because only Chamberlain, and not the customer, can provide proper authorization. *See* Chamberlain's Response at 20-21, 28-29. Respondents counter that it is unreasonable for customers to know that they're not supposed to use other companies' transmitters when Chamberlain does not expressly notify its customers of such restrictions or limitations. *See* Respondents' Motion at 5. Chamberlain, on the other hand, states that its limited warranty does provide such an express restriction. *See* Chamberlain's Response at 19-20. Both respondents and Staff disagree with Chamberlain's assertion that the limited warranty places express restrictions on customers. *See* Respondents' Reply at 13-15; Staff's Response at 14-15.

a. Programming a Chamberlain GDO to Learn a New Transmitter

As previously explained, in order for a GDO and a transmitter to work together, the transmitter must be programmed into the GDO and the GDO must “learn” the new transmitter, so that when the transmitter is subsequently used, the GDO will operate properly. *See* Fitzgibbon dec. at ¶ 4 (Complainant’s Exhibit 7). When the transmitter is a hand-held remote, the identification code is fixed at the factory and cannot be changed by the user. *See* Complaint at ¶¶ 23-24. When the transmitter is a keyless entry device, the identification code is a personal identification number (“PIN”) that is chosen by the user. *See* Staff’s Exhibit C at 36; Complainant’s Exhibit 52. Chamberlain provides its customers with instructions on how to program a GDO to add the signal of new transmitters. *See* Fitzgibbon dec. at ¶ 4 (Complainant’s Exhibit 7).

In support of respondents’ contention that Chamberlain provides its customers with instructions on how to program new transmitters, respondents point to Chamberlain’s website. *See* Respondents’ Motion at 5-6. Chamberlain argues that respondents’ reference to a Chamberlain website printout is irrelevant because there is no proof that the website printout is provided to customers when Chamberlain’s GDOs and respondents’ transmitters are sold. *See* Chamberlain’s Response at 18-19. Regardless of whether customers are provided with the information contained in the website, the undersigned finds that it is clear that the users manual that comes with the Chamberlain GDO provides similar instructions on how to program additional transmitters. *See* Staff’s Exhibit C at 35-36.

Both respondents and the Staff maintain that the fixed identification code, which is first received during the “program” and “learn” process, is the “technological measure that effectively controls access” to Chamberlain’s rolling code GDO computer software program. *See* Respondents’ Motion at 5-6; Staff’s Response at 1-2, 11-15. In the Staff’s view, the fixed identification code of the transmitter that controls access is similar to a password that enables execution of Chamberlain’s software. *See* Staff’s Response at 2, 11.

Chamberlain disputes the Staff’s characterization of what the “technologic measure effectively controlling access” to the copyrighted software is and maintains that it is the rolling code that is the technological measure that controls access. *See* Chamberlain’s Reply at 2. Chamberlain states that the fixed identification code, or password, alone, is not sufficient to obtain access to the copyrighted software, because a rolling code is also required in order to operate the copyrighted software, which is what provides the additional layer of security. *See* Chamberlain’s Reply at 3-4. In Chamberlain’s view, the rolling code measure is a layer of access control in addition to the identification code (password) measure that prevents unauthorized use of the rolling code GDO. *See* Chamberlain’s Reply at 4. Chamberlain maintains that the system was designed to prevent unauthorized access by code grabbers or other unauthorized users. *See* Chamberlain’s Response at 14. Chamberlain contends that the learning of identification codes is irrelevant to the question of whether consumers or respondents are authorized to circumvent Chamberlain’s rolling code security measure. *See* Chamberlain’s Rebuttal Facts at ¶ 9.

In the alternative, Chamberlain argues that the “learning” of the identification code into the receiver is only a part of Chamberlain’s entire technological measure, which by itself cannot be circumvented to operate a Chamberlain rolling code GDO. *See* Chamberlain’s Response at 20. According to Chamberlain, even if a customer were authorized to circumvent the “learning” of the identification code, that does not provide the authority to circumvent the complete technological measure, which includes the rolling code security feature. *See* Chamberlain’s Response at 20.

The respondents’ and Staff’s arguments are persuasive. It is clear, based on the deposition testimony and declaration from Chamberlain’s own employee, that the rolling code feature in Chamberlain’s rolling code GDOs is not the “technological measure” that is controlling access to a protected work. The rolling code is just one piece, or subroutine of the software that controls the operation of the GDO. The more persuasive argument is that the fixed identification code is the “technological measure” that is controlling access to the protected work.

This is supported by the fact that Chamberlain’s copyrighted program will never execute if an improper fixed transmitter identification code is received, but may execute if the transmission contains a proper fixed identification code and an “improper” rolling code, or initiation of the resynchronization feature. Chamberlain itself confirms this in its own brief, which states that “[t]he copyrighted computer program does not execute if an improper

identification code or an improper rolling code (*i.e.* not in the forward window) is received from a transmitter.” *See* Chamberlain’s Response at 9.

Chamberlain instructs its customers on how to program their GDOs to accept the fixed identification codes of new transmitters. *See* Staff’s Exhibit C at 35-36. The process is the same for Chamberlain transmitters as well as non-Chamberlain transmitters. *See* Staff’s Response at 3 at n. 2, 13. After validation of a transmitter identification code, the Chamberlain software program, which contains subroutines for the rolling code and resynchronization feature, is executed to cause the garage door to open. Chamberlain has not alleged that the respondents’ transmitters circumvent the fixed identification code. As there is no allegation that respondents are circumventing a technological measure to control access to a protected work by the fixed identification code, there is no unauthorized access, and therefore, no circumvention within the meaning of the DMCA. Because access is authorized, the appropriate legal analysis for any further circumvention is one of copyright infringement, which has not been alleged in this investigation and will not be addressed here.

The fact that respondents are utilizing the resynchronization function in order to operate Chamberlain’s rolling code GDOs does not provide support that there is circumvention. Resynchronization is an important part of Chamberlain’s rolling code GDOs. The situation would be different if Chamberlain’s rolling code GDO software did not contain a resynchronization function, and only contained a rolling code feature and respondents had conjured up the resynchronization function as a way to operate Chamberlain’s rolling code

GDOs. But that is not the situation here, and as such, Chamberlain’s arguments will not be adopted.

Finally, Chamberlain’s arguments regarding “code grabbing” are not persuasive either. Chamberlain admits that respondents’ transmitters do not transmit rolling codes; instead, they maintain that respondents’ transmitters transmit three fixed values that perform the resynchronization feature. *See* Chamberlain’s Response at 14. Chamberlain maintains that because a Skylink transmitter transmits three fixed codes, a code grabber can record and play back the codes. *See* Chamberlain’s Response at 14. Although there was evidence introduced that Chamberlain’s rolling code GDOs are not susceptible to “code grabbing” because of the rolling code technology, it is unclear whether the Chamberlain rolling code GDO is also susceptible to code grabbing when a Chamberlain transmitter is performing the resynchronization, rather than the rolling code, function.

1) Legislative History

Respondents and Staff cite to the legislative history of the DMCA in support of their alternative argument that the prohibition on circumvention of a technological measure applies only to the *initial* access to a copyrighted work:

Paragraph (a)(3) defines certain terms used throughout paragraph (a). Subparagraph (1) defines the term “circumvent a technological protection measure” as meaning “to descramble a scrambled work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair a technological protection measure, without the authority of the copyright owner.” This definition applies to paragraph (a) only, which covers protections against unauthorized *initial* access to a copyrighted work.

S. Rep. No. 105-190 at 29 (emphasis added). Likewise, the House Judiciary Committee Report²⁶ states:

Paragraph (a)(1) does not apply to the subsequent actions of a person once he or she has obtained authorized access to a copy of a work protected under Title 17, even if such actions involve circumvention of additional forms of technological protection measures. In a fact situation where the access is authorized, the traditional defenses to copyright infringement, including fair use, would be fully applicable. So, an individual would not be able to circumvent in order to gain unauthorized access to a work, but would be able to do so in order to make fair use of a work which he or she has acquired lawfully.

H.R. Rep. No.105-551, pt. 1 at 18.

Chamberlain disputes the Staff's interpretation and reliance on the legislative history of the DMCA and argues that the statutory language in §§ 1201(a)(2) and 1201(a)(3) is clear on its face, making it unnecessary to resort to the legislative history. *See* Chamberlain's Reply at 5. In addition, Chamberlain argues that the above reference relates to a preliminary version of § 1201(a)(1) which was not adopted in the final version of § 1201(a)(1) and should not be considered an authoritative pronouncement. *See* Chamberlain's Response at 27-28. In addition, Chamberlain argues that the respondents' and Staff's references to § 1201(a)(1) is not relevant. *See* Chamberlain's Response at 27; Chamberlain's Reply at 7. In fact, Chamberlain has made extensive arguments that § 1201(a)(1), which deals with a

²⁶ The legislative history states that § 1201(a)(2) was enacted to enforce the prohibitions of § 1201(a)(1):

The prohibition in 1201(a)(1) is necessary because prior to this Act, the conduct of circumvention was never before made unlawful. The device limitation in 1201(a)(2) enforces this new prohibition on conduct.

S. Rep. No. 105-190 at 12.

customer's anti-circumvention, is very different from § 1201(a)(2), which deals with respondents' anti-trafficking. *See* Chamberlain's Response at 17; Chamberlain's Reply at 7.

Respondents and Staff contend that once someone obtains authorized access to a protected work (*i.e.* a valid fixed transmitter identification code is recognized), bypassing a subroutine within a copyrighted work (*i.e.* resynchronization) does not constitute "circumvention" within the meaning of the DMCA. *See* Staff's Response at 3-4, 12-13. In other words, respondents and Staff are asserting that the DMCA only prohibits circumvention of a technological measure to gain initial access to a copyrighted work.

Chamberlain argues that the statutory language makes no distinction between protection measures "within" a copyrighted work, or between "initial", "further" or "later" access. Chamberlain also argues that, should it be necessary to look at the legislative history, that the drafters of the DMCA intended to give a broad meaning to § 1201(a)(2). *See* Chamberlain's Reply at 4-7.

Since the undersigned has already found that respondents are not circumventing a technological measure to access a protected work based upon a reading of the statutory language, no resort to the legislative history is required.

b. Notification of Restriction or Limitation

Respondents argue that Chamberlain's failure to sell its GDOs without any restrictions constitutes an implied license or authorization for customers to use whatever replacement transmitters they want. *See* Respondents' Motion at 6. Respondents argue that Chamberlain's

failure to communicate such restrictions is especially telling in light of the fact that Chamberlain is fully aware that its customers will likely need replacement transmitters. *See* Respondents' Motion at 6. Two employees of Chamberlain have stated that Chamberlain does not place any restrictions on its product when sold to customers. *See* Gregory dep. at 174-175 (Respondent's Exhibit 2); Fitzgibbon dep. at 183 (Respondents' Exhibit 3).

Chamberlain argues that, until recently, it had no reason to give its customers any warnings not to use any unauthorized transmitters because Chamberlain did not believe it was possible to circumvent the rolling code system. That situation changed when Skylink's transmitters were introduced into the market. *See* Chamberlain's Response at 25. And, according to Chamberlain, even though there has been a history of anyone marketing universal GDO transmitters in the past, those universal transmitters only worked with fixed code technology, and that there is no evidence of marketing universal GDO transmitters that operate GDOs with rolling code technology. *See* Chamberlain's Response at 26.

Chamberlain's arguments are unpersuasive. The fact that it did not give customers any warning about not using any unauthorized transmitters because there were none at one time does not explain why Chamberlain has done nothing now that they know that there are transmitters that can be used with their rolling code GDOs. And the fact that there is new technology in the rolling code GDOs, versus the fixed code GDOs, does not mean that consumers' expectations in the GDO market are much different. That is, it is reasonable for

consumers to expect that a universal transmitter that operates a rolling code GDO will be available.

The District Court's Order also supports this result:

In this case, Plaintiff [Chamberlain] sells a GDO to a homeowner who then utilizes the product to access his or her own garage. As pointed out above, there are no limitations placed on the homeowner who buys the Chamberlain rolling code GDO, regarding which type of replacement or additional transmitter he or she purchases to access the GDO. The court notes, further, that there is a history in the GDO industry of universal transmitters being marketed and sold to allow homeowners an alternative means to access any brand of GDO (citation omitted). In fact, Chamberlain's own Clicker transmitter is capable of activating a variety of GDO brands (citation omitted). Furthermore, the homeowner has a legitimate expectation that he or she will be able to access the garage even if his transmitter is misplaced or malfunctions. During oral arguments on this motion, Plaintiff acknowledged that under its interpretation of DMCA, a garage owner violates the Act if he or she loses the transmitter that came with its Chamberlain rolling code GDO, but manages to operate the opener by somehow circumventing the rolling code. This court agrees with Defendant [respondents] that the DMCA does not require such a conclusion.

See District Court's Order at 25-26.

Chamberlain argues that the hypothetical posed by the District Court during oral argument was in reference to § 1201(a)(1), and therefore irrelevant. *See* Chamberlain's Response at 30. Chamberlain highlights that the liability of users and traffickers is markedly different because users of copyrighted works can be exempted from the prohibitions against circumvention set forth in § 1201(a)(1)(A) by a determination of the Librarian of Congress, pursuant to §§ 1201(a)(1)(C) and (D). *See* Chamberlain's Response at 31. The Librarian of Congress has exempted literary works "including computer programs and databases, protected by access control mechanisms that fail to permit access because of malfunction,

damage or obsolescence.” *See* 65 F.R. 64574, October 27, 2000 (Complainant’s Exhibit 47). According to Chamberlain, its customers are therefore free to circumvent because of malfunction, damage or obsolescence, but are prohibited from using respondents’ transmitters to circumvent Chamberlain’s protective technology because doing so is not in an exempted class of works.

The undersigned finds that the hypothetical posed during oral argument in front of the District Court does not fit, as Chamberlain alleges, only into the categories of “malfunction, damage, or obsolescence.” The hypothetical not only covers situations where the original transmitter malfunctions, but also covers situations where the original transmitter is misplaced. Therefore, Chamberlain’s interpretation of DMCA, which requires a finding that a consumer is violating the Act if he or she misplaces the transmitter that came with their Chamberlain GDO and opens their garage some other way, is not persuasive.

In Chamberlain’s response to respondents’ statement of material facts regarding the above citation in the District Court’s Order, Chamberlain states that there is no evidence that the homeowner has a legitimate expectation that he or she will be able to access their garage even if the homeowner’s transmitter is misplaced or malfunctions. *See* Chamberlain’s Rebuttal Facts at ¶ 5. It is rather curious why Chamberlain would take such an extreme position, considering that, if marketed as such, few homeowners would be inclined to purchase such a product.

During oral argument, the District Court analogized a GDO transmitter to a universal TV remote. *See* June 12, 2003 Hearing Transcript at 41-42 (Respondents' Exhibit 5). The undersigned is in agreement that TV remote controls are a good analogy to the GDO transmitters. When a consumer purchases a TV, it generally comes with a remote. The consumer may need to replace that remote at some time, either because the remote becomes misplaced or damaged, and the consumer can either purchase a replacement from the manufacturer of the TV or a "universal" remote. It is also possible to program a TV remote to control other home entertainment devices, such as DVD players, cable TV boxes and satellite boxes, which are not necessarily manufactured by the same company as the TV, which usually requires a "learning" process. Although the analogy is not perfect, as a GDO poses a security issue in a consumer's home, it is a fair analogy that is helpful in understanding consumer expectations. *See* June 12, 2003 Hearing Transcript at 51-52 (Respondents' Exhibit 5). Therefore, it is reasonable to assume that Chamberlain's GDO customers have a reasonable expectation that they can replace the original transmitter with a Chamberlain or Skylink transmitter, and this provides an additional basis for rejecting Chamberlain's argument.

c. Chamberlain's Limited Warranty

Chamberlain argues that the limited warranties in its product manuals support its contention that Chamberlain in no way intends to provide customers an express license to

circumvent the rolling code technology. See Chamberlain's Response at 19-20.

Chamberlain's GDO One-Year Limited Warranty reads as follows:

The Chamberlain Group, Inc., ("Seller") warrants to the first retail purchaser of this product, for the residence in which this product is originally installed, that it will be free from any defect in materials and/or workmanship for a period of one year from the date of purchase. Additionally, the motor is warranted for the lifetime of the product. The product must be used in complete accordance with Chamberlain's instructions for installation, operation and care. **The proper operation of this product is dependent on your compliance with the Owner's Manual instructions regarding installation, operation, maintenance and testing. Failure to comply strictly with those instructions will void this warranty in its entirety. Please note that the safety reverse system, in order to operate properly with your garage door, must be adjusted and periodically tested in accordance with the Owner's Manual.**

[...]

THIS LIMITED WARRANTY IS IN LIEU OF ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE, AND OF ANY OTHER OBLIGATIONS OR LIABILITY ON SELLER'S PART. THIS LIMITED WARRANTY DOES NOT COVER NON-DEFECT DAMAGE, DAMAGE CAUSED BY IMPROPER INSTALLATION, OPERATION OR CARE (INCLUDING, BUT NOT LIMITED TO ABUSE, MISUSE, FAILURE TO PROVIDE REASONABLE AND NECESSARY MAINTENANCE, OR ANY ALTERATIONS TO THIS PRODUCT), LABOR CHARGES FOR DISMANTLING OR REINSTALLING A REPAIRED OR REPLACED UNIT, REPLACEMENT OF BATTERIES AND LIGHT BULBS, OR UNITS INSTALLED FOR NON-RESIDENTIAL USE.

See Complainant's Exhibit 43 (emphasis in original). Chamberlain claims that the language in its LiftMaster Warranty is even stronger due to additional language (underlined):

The Chamberlain Group, Inc., ("Seller") warrants, to the first retail purchaser of this product, for the residence in which this product is originally installed, that it will be free from any defect in materials and/or workmanship for a period of one year from the date of purchase. Additionally, the motor is fully warranted for the lifetime of the product for Model 2220 and 2220-267. The product must be used in complete

accordance with Chamberlain's instructions for installation, operation and care. **The proper operation of this product is dependent on your compliance with the Owner's Manual instructions regarding installation, operation, maintenance and testing. Failure to comply strictly with those instructions will void this warranty in its entirety. Please note that the safety reverse system, in order to operate properly with your garage door, must be adjusted and periodically tested in accordance with the Owner's Manual.**

[. . .]

THIS LIMITED WARRANTY IS IN LIEU OF ANY OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR OTHERWISE, AND OF ANY OTHER OBLIGATIONS OR LIABILITY ON SELLER'S PART. THIS LIMITED WARRANTY DOES NOT COVER NON-DEFECT DAMAGE, DAMAGE CAUSED BY IMPROPER INSTALLATION, OPERATION OR CARE (INCLUDING, BUT NOT LIMITED TO ABUSE, MISUSE, FAILURE TO PROVIDE REASONABLE AND NECESSARY MAINTENANCE, USE OF UNAUTHORIZED PARTS OR ACCESSORIES, UNAUTHORIZED REPAIRS, OR ANY ALTERATIONS TO THIS PRODUCT), LABOR CHARGES FOR DISMANTLING OR REINSTALLING A REPAIRED OR REPLACED UNIT, REPLACEMENT OF BATTERIES AND LIGHT BULBS, OR UNITS INSTALLED FOR NON-RESIDENTIAL USE. THE USE OF UNAUTHORIZED PARTS OR ACCESSORIES WILL VOID THIS LIMITED WARRANTY. If you have any questions as to whether accessories or replacement parts are authorized, please contact Chamberlain.

See Complainant's Exhibit 44 (emphasis in original, except for underlined portions).²⁷ In further support, Chamberlain states that their previous warranties, e.g. in 1992, did not cover alternations to the product. *See* Complainants' Exhibit 51.

The Staff argues that Chamberlain's "new" warranty does not restrict a customer's use of non-Chamberlain transmitters. Rather, a customer is free to choose a non-Chamberlain

²⁷ A copy of Chamberlain's LiftMaster GDO Five-Year Limited Warranty, with a copyright of 2003 is very similar and was submitted as Exhibit B to Staff's Response.

transmitter, such as respondents' Models 39 and 89, but that doing so may put the customer at the risk of nullifying the warranty. *See Staff's Response* at 14-15. Respondents also argue that, regardless of Chamberlain's "new" limited warranty language, that Chamberlain still does not prevail because the warranty is an obligation that is undertaken by Chamberlain, not an obligation that is undertaken by the customer. *See Respondents' Reply* at 14.

Chamberlain, on the other hand, argues that no matter how the undersigned interprets the warranty language, the warranty language, along with the Chamberlain owner's manuals, cannot, as a matter of law, show evidence of the lack of intent on Chamberlain's part to grant an implied license to breach the rolling code security measure that is the heart of the security of Chamberlain's GDOs. *See Complainant's Reply* at 8.

Chamberlain's argument is not persuasive. It is understandable why a manufacturer would limit a warranty on a product when a customer chooses to fix or accessorize that product with another manufacturer's parts, *e.g.* the manufacturer does not want to take responsibility for any defects in the other manufacturer's part when the manufacturer has no control over the other manufacturer's quality control process, or the manufacturer cannot guarantee that another manufacturer's parts are fully compatible with its own product without any testing. However, a limited warranty does not necessarily indicate that it is a manufacturer's express intention to restrict its customers from ever using another manufacturer's replacement parts or accessories. Similarly, even a broad reading of

Chamberlain's limited warranty does not support Chamberlain's position that it expressly restricts its customers from using non-Chamberlain GDO transmitters.

d. The Lexmark Case

Complainants argue that the *Lexmark*²⁸ case is on point (*see* Chamberlain's Response at 15-16), while the respondents and the Staff maintain that it is distinguishable (*see* Respondents' Reply at 11-12; Staff's Reply at 7-11). At issue in *Lexmark* was the sale of toner cartridges for printers manufactured by Lexmark. Lexmark sold two types of toner cartridges: (1) "prebate" toner cartridges and (2) "regular" toner cartridges. The prebate toner cartridges were sold at a lower price than the regular toner cartridges, but there were express restrictions on the packaging of the prebate toner cartridges. The "shrinkwrap license" agreement on the prebate toner cartridges read as follows:

RETURN EMPTY CARTRIDGE TO LEXMARK FOR REMANUFACTURING AND RECYCLING. Please read before opening. Opening this package or using the patented cartridge inside confirms your acceptance of the following license/agreement. This all-new cartridge is sold at a special price subject to a restriction that it may be used only once. Following this initial use, you agree to return the empty cartridge only to Lexmark for remanufacturing and recycling. If you don't accept these terms, return the unopened package to your point of purchase. A regular price cartridge without these terms is available.²⁹

²⁸ *Lexmark Int'l Inc. v. Static Control Components, Inc.*, 253 F.Supp.2d 943 (E.D.Ky. 2003).

²⁹ *Id.* at n 1 (emphasis in original).

No such restrictions were placed on the regular toner cartridges, and customers who bought regular toner cartridges were free to refill and recycle such cartridges from other manufacturers if they chose to do so.

In *Lexmark*, the court held that a certain “message authentication code sequence” in the prebate toner cartridges was the “technological measure” that was being circumvented by defendant’s microchips. Chamberlain argues that the *Lexmark* court’s findings that the technological measure on the prebate toner cartridges – the “message authentication code sequence” – was being circumvented, should be found in this case as well. See Chamberlain’s Response at 15-16.

Lexmark, however, is clearly distinguishable from the instant case. In *Lexmark*, defendants admitted that the microchips in its product contained an exact copy of the Lexmark’s computer software.³⁰ Here, there is no evidence that Skylink’s transmitters contain an exact replica of Chamberlain’s computer software program. Nor does Chamberlain impose any restrictions on its customers when customers purchase a Chamberlain GDO. There is no “shrinkwrap license” that expressly prohibits customers from purchasing a non-Chamberlain GDO transmitter. The absence of such an express restriction is particularly notable considering that Chamberlain is fully aware that customers frequently need to either buy additional transmitters or replace their existing transmitters. In the absence of such an express restriction, it is unreasonable to conclude, as Chamberlain

³⁰ Id. at ¶¶ 92, 93.

argues, that Chamberlain's own customers are restricted from accessing the software in their GDOs purchased from Chamberlain.

e. Consumer Union's Arguments

In its *amicus curiae* brief, the Consumers Union argues that interpreting the phrase "without the authority of the copyright owner" in the DMCA to require explicit authorization to use peripheral products could lead to higher prices, less product innovation and reduced consumer choice. *See* CU Response at 2. The Consumers Union cites to other product lines, such as automobile parts, where such an interpretation could lead to harmful results to consumers. *See* CU Response at 2-3. Chamberlain opposes the statements in Consumer Union's brief because their references are unsupported. *See* Chamberlain's Opposition to CU at 2.

Consumers Union also argues that Congress did not intend for the DMCA to be used by upstream product manufacturers to control consumers' ability to buy the replacement products of their choice. *See* CU Response at 4. In support, the Consumers Union cites to testimony by copyright law professor Jane Ginsburg, who testified before the U.S. Copyright Office that the DMCA was never intended to protect products like ballpoint pen cartridges, printer cartridges, and garage door openers. *See* CU Response at 5, *citing* Anti-Circumvention Rulemaking Hearing before the U.S. Copyright Office, May 9, 2003 at 46. Chamberlain counters that such concerns regarding adverse consumer consequences were

anticipated by the drafters of the DMCA and addressed through the process establishing user exemptions under §§ 1201(a)(1)(B)-(D). *See* Chamberlain's Opposition to CU at 3.

Given the findings and conclusions in the earlier part of this initial determination, the undersigned does not need to reach the arguments raised by Consumers Union.

B. Limited Commercially Significant Purpose

As the undersigned has already found that there are no facts supporting Chamberlain's contention that respondents' transmitters provide unauthorized access to the software in Chamberlain's GDOs, the undersigned similarly finds that there is no violation of § 1201(a)(2)(B), which prohibits the manufacturing and importation of a product that only has limited commercially significant purpose other than to circumvent a technological measure that effectively controls access to a protected work.

C. Marketing

As the undersigned has already found that there are no facts supporting Chamberlain's contention that respondents' transmitters provide unauthorized access to the software in Chamberlain's GDOs, the undersigned similarly finds that there is no violation of § 1201(a)(2)(C), which prohibits the marketing of an product that circumvents a technological measure that effectively controls access to a protected work.

VII. Conclusion

Based on the foregoing opinion, findings of fact, conclusions of law, the evidence, and the record as a whole, and having considered all pleadings and arguments, it is the Administrative Law Judge's INITIAL DETERMINATION that the Commission has jurisdiction over this matter and Chamberlain's allegation that respondents violate the DMCA has not been supported as a matter of law, and therefore, there is no basis to issue a temporary enforcement order. If a hearing on permanent relief is held after further discovery, and if, at the hearing, the parties are able to make a more complete record or advance different legal arguments, these findings may change.

The Administrative Law Judge hereby CERTIFIES to the Commission this Initial Determination, together with the exhibits and filings in this investigation. Pursuant to Commission Rule 210.66(f), this initial determination shall become the determination of the Commission twenty (20) calendar days after issuance thereof, unless the Commission modifies or vacates the initial determination within that period.

Within seven days of the date of this document, each party shall submit to the office of the Administrative Law Judge a statement as to whether or not it seeks to have any portion of this document deleted from the public version. The parties' submissions must be made by hard copy by the aforementioned date.

Any party seeking to have any portion of this document deleted from the public version thereof must submit to this office a copy of this document with red brackets

indicating any portion asserted to contain confidential business information. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED.



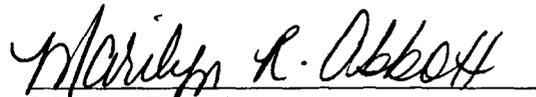
Charles E. Bullock
Administrative Law Judge

**IN THE MATTER OF CERTAIN UNIVERSAL
TRANSMITTERS FOR GARAGE DOOR
OPENERS**

INV. NO. 337-TA-497

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **INITIAL DETERMINATION** was served upon, Karin J. Norton, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on November 21, 2003.


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