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The Honorable Lisa R. Barton  
Acting Secretary to the Commission  
United States International Trade Commission  
500 E Street, SW  
Washington DC 20436

*RE: In the Matter of Certain Digital Models, Digital Data, and Treatment Plans for Use in Making Incremental Dental Positioning Adjustment Appliances, the Appliances Made Therefrom, and Methods of Making the Same, Inv. No. 337-TA-833*

Dear Secretary Barton:

The Association of American Publishers (“AAP”) submits this Reply Comment in response to the U.S. International Trade Commission’s (“ITC” or “Commission”) request for public comments as to whether “electronic transmissions” are “articles” within the meaning of Section 337 of the Tariff Act. In submitting this Comment, AAP would like to endorse the Comments submitted in response to this inquiry by the Motion Picture Association of America on February 3, 2014 which explain why “electronic transmissions” are “articles” within the meaning of Section 337. AAP also appreciates this opportunity to provide the Commission with Reply Comments that address a few additional points related to this topic, which is of critical concern to the U.S. publishing industry, which produces and trades millions of eBooks around the world annually.<sup>1</sup>

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<sup>1</sup> See Press Release, *US Publishers See Ongoing Sales Growth in Print and E-Format Books Worldwide, According to 2013 Industry Export Sales Report*, ASSOCIATION OF AMERICAN PUBLISHERS (Jun. 27, 2013) <http://publishers.org/press/111/> (noting that trade (fiction and non-fiction) publishers exported more than 135 million units and saw an increase in net revenue from the export of eBooks by +63% from 2011 to 2012).

**CONGRESS HAS CONSISTENTLY INTENDED “THE PRIMARY PURPOSE OF SECTION 337...TO BE A TRADE STATUTE TO PREVENT UNFAIR PRACTICE THROUGH THE IMPORTATION OF GOODS.”<sup>2</sup>**

Section 337(a)(1)(B) of the Tariff Act of 1930 (as amended) prohibits: “the importation into the U.S., the sale for importation, or the sale within the United States after importation by the owner, importer, or consignee, of **articles** that—(i) infringe a valid and enforceable United States patent or a valid and enforceable United States **copyright** registered under title 17.”<sup>3</sup> The Commission has asked: *whether “electronic transmissions” are “articles” within the meaning of Section 337?*

AAP agrees with the MPAA’s Comments and the Commission’s rationale in *Hardware Logic* that “it would be anomalous for the Commission to be able to stop the transfer of a CD-ROM or diskette containing the respondents’ software, but not be able to stop the transfer of that very same software when transmitted in machine readable form by electronic means.”<sup>4</sup> There is no dispute that a CD-ROM or diskette containing software, music, or a book is properly considered an “article” under Section 337 and that this section authorizes the ITC to exclude such articles from the U.S. market when they infringe a U.S. copyright.

AAP also agrees with Google’s Comments that Section 337 was “drawn for the purpose of protecting domestic interests from unscrupulous importers and others who...perpetrate unfair practices in the importation of goods into this country to be sold in competition with goods produced in this country.”<sup>5</sup> Today, software, books, movies, music, and games are increasingly “transmitted [to consumers] in machine readable form by electronic means” as eBooks, mp3s, etc. Furthermore, as the Copyright Office recognized in its study of digital copyrighted works, “time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted [via the Internet] nearly instantaneously anywhere in the world with minimal effort and negligible cost.”<sup>6</sup> Thus, if anything, the need for Section 337 to provide an effective remedy against unfair competition from imports of infringing, digital copyrighted works may be greater than that for physical goods, the importation of which is naturally hampered by the “time, space, effort and cost” of shipping and importing physical books.

Congress has amended the Tariff Act (and its precursors) a number of times, but has always left the term “articles” undefined in the statute. In doing so, Congress has ensured that the language in Section 337 remains “broad enough to prevent every type and form of unfair practice”<sup>7</sup> as concerns the

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<sup>2</sup> U.S. International Trade Commission, *Certain Digital Models*, Inv. No. 337-TA-833, Comments of Google at 4 (Feb. 3, 2014) (hereinafter “GOOGLE COMMENTS”).

<sup>3</sup> Section 337(a)(1)(B) (emphasis added). As the parties in this case and other Comments, *see e.g.* GOOGLE, *supra* at note 2, focus exclusively on the term “articles” as it relates to patents, AAP has emphasized that Section 337 also protects copyrighted works from unfair competition from imports of copyrighted articles from abroad to urge the Commission to keep in mind that Congress intended Section 337 to provide effective protection against unfair imports that compete with legitimate U.S. patented *and copyrighted* works.

<sup>4</sup> U.S. International Trade Commission, *Certain Digital Models*, Inv. No. 337-TA-833, Comments of the Motion Picture Association of America at 6 (Feb. 3, 2014) (citing *Hardware Logic Emulation Sys. & Components Thereof* (“*Hardware Logic*”), Inv. No. 337-TA-383, Comm’n Op. at 25-29 1998 WL 307240 (Mar. 1998)) (hereinafter “MPAA COMMENTS”).

<sup>5</sup> GOOGLE COMMENTS, *supra* at note 2, at 4 (citing 72 Cong. Rec. H. 12325 (1930)).

<sup>6</sup> *See* U.S. Copyright Office, *DMCA Section 104 Report*, 82-83, 2001

[http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html).

<sup>7</sup> GOOGLE COMMENTS, *supra* at note 2, at 8 (citing S. Rep. No. 67-595, 67<sup>th</sup> Cong., 2d Sess., pt. 1, at 3 (1922) for the proposition that “the provision relating to unfair methods of competition in the importation of goods [today Section 337] is

importation of goods, “regardless of the mode in which it is effected.”<sup>8</sup> Allowing electronic transmissions of digital goods (eBooks, movies, software, etc.) that infringe U.S. copyrights to enter the U.S. market would be inconsistent with the longstanding purpose of Section 337. These copies compete unfairly with the eBooks, software, movies, and music intended for the U.S. market. For the publishing industry, unauthorized imports of digital copies also compete with physical books, which still comprise the majority of sales.<sup>9</sup>

Congress has consistently intended Section 337 to protect against such unfair competition, and most recently took action to “*strengthen* the effectiveness of Section 337 in addressing the growing problems being faced by U.S. companies from the importation of articles which infringe U.S. *intellectual property rights*” by amending the statute in 1988.<sup>10</sup> Protecting the copyrights of U.S. companies, such as those held by AAP’s member publishers, means protecting these companies from unfair competition from foreign sources providing U.S. citizens with infringing, electronically transmitted copies of their works. Therefore, “electronic transmissions” of copyrighted works must be considered “articles” subject to the jurisdiction of the ITC<sup>11</sup> in order for the Commission to protect U.S. industries in a manner consistent with the longstanding purpose of the Tariff Act and Section 337.

## **TRADE INCLUDES DIGITAL TRADE, WHICH INCLUDES PRODUCTS AND SERVICES DELIVERED VIA THE INTERNET**

Chairman of the Senate Finance Committee, Max Baucus recently asked the Commission to undertake a two part study on “Digital Trade in the U.S. and Global Economies” in recognition of the fact that “digital trade has increased rapidly in recent years, and is an increasingly important activity within the global economy.”<sup>12</sup> Notably, in Part I of the study, the Commission requested public comments on how to describe “digital trade in the context of the broader economy.”<sup>13</sup> After reviewing the submitted Comments, in August 2013, the ITC released its report “*Digital Trade in the U.S. and Global Economies, Part I*” adopting a definition of digital trade that includes “products and services delivered via the Internet.”<sup>14</sup>

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broad enough to prevent every type of unfair practice and is therefore, a more adequate protection to American industry than any antidumping statute the country has ever had.”)

<sup>8</sup> *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923).

<sup>9</sup> See *infra* at note 20.

<sup>10</sup> GOOGLE COMMENTS, *supra* at note 2, at 8 (citing S. Rep. 100-71, 100<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 128) (arguing this statement by Congress about “strengthening” Section 337 “did not expand the scope of Section 337 beyond its initial purpose” and was improperly relied upon in *Hardware Logic*, see *infra* at note 11, to support application of the statute to “electronic transmissions.”) (emphasis added).

<sup>11</sup> *Dental Appliances*, Inv. No. 337-TA-562, Comm’n Op. at 7 (holding that the ITC has “jurisdiction and authority to reach digital data that are electronically transmitted to a recipient in the United States.”) (citing *Hardware Logic*, Inv. No. 337-TA-383, Comm’n Op. at 20, 29 (Apr. 1, 1998)). As to Google’s conclusion that “electronic transmissions alone simply cannot infringe a valid and enforceable United States patent at the time of importation,” GOOGLE COMMENTS, *supra* at note 2, at 10, it is the case that the “electronic transmission” of an eBook, song, or movie can infringe a valid and enforceable United States copyright. See e.g., *Capitol Records, LLC v. ReDigi, Inc.* 2013 U.S. Dist. LEXIS 48043 (S.D.N.Y. March 30, 2013) (finding that ReDigi’s “unauthorized transfer of a digital music file over the Internet” constituted an unauthorized reproduction of the music file and therefore infringed Capitol Records’ copyright). Thus, there should be no question that “articles” includes the “electronic transmissions” of copyrighted works.

<sup>12</sup> *Digital Trade in the U.S. and Global Economies*, Inv. No. 332-531, USITC Pub. 4415 at Appendix A-1 (Jul. 2013) (containing the letter from Sen. Max Baucus, Chairman of the Sen. Finance Committee, requesting the Digital Trade study).

<sup>13</sup> United State International Trade Commission, *Digital Trade in the U.S. and Global Economies*, 78 Fed. Reg. 2690, 2691 (Jan. 14, 2013).

<sup>14</sup> Press Release, *Digital Trade Growing in the United States and Globally*, USITC (Aug. 15, 2013)

[http://www.usitc.gov/press\\_room/news\\_release/2013/er0815111.htm](http://www.usitc.gov/press_room/news_release/2013/er0815111.htm) (hereinafter “DIGITAL TRADE PRESS RELEASE”); U.S.

Importantly, the Computer & Communications Industry Association (“CCIA”), whose members include Google, Yahoo, Microsoft and eBay, took no issue with including “products...delivered via the Internet” as part of the ITC’s definition of digital trade. In fact, CCIA filed supplemental comments to stress its support for the exact phrasing of this definition and to clarify that “Internet services enable transactions in physical goods (e.g., eBay), and others enable transactions in *digital goods* (e.g., Google Play, Microsoft Windows Store).”<sup>15</sup>

While AAP and other copyright industries suggested that “digital trade” should include all types of digital products and services, regardless of mode of delivery, the Commission’s report illustrates there is no debate that digital trade includes, at a minimum, digital goods delivered via the Internet as it highlighted the growth of the trade in digital music, games, videos, and books in its press release and throughout the report.<sup>16</sup>

Again, there is no dispute that Congress has consistently intended “the primary purpose of Section 337...to be a trade statute to prevent unfair practice through the importation of goods.”<sup>17</sup> Furthermore, there is no evidence that Congress has ever sought to narrow the scope of Section 337 or to define “articles” as only physical goods.<sup>18</sup> The reality of trade today, as Chairman Baucus, this Commission, CCIA, AAP, and numerous other stakeholders that submitted comments in the *Digital Trade in the U.S. and Global Economies* investigation readily admit, is that trade in “products and services delivered via the Internet” is growing. To ignore this reality and construe the term “articles” so narrowly as to leave out the “electronic transmissions” of music, books, movies, and software, would “frustrate Congressional intent and ignore the realities of the marketplace, rendering Section 337 a nullity for important domestic industries.”<sup>19</sup>

## **THE APPLICATION OF SECTION 337 TO THE “ELECTRONIC TRANSMISSION” OF COPYRIGHTED WORKS IS NECESSARY TO PROTECT THE MODERN PUBLISHING INDUSTRY**

AAP represents over 400 publishers, ranging from major commercial book and journal publishers to small non-profit, university, and scholarly presses. Our members publish hardcover and paperback books in every field: general interest fiction and non-fiction, educational materials for the elementary, secondary, postsecondary, and professional markets, scholarly journals, computer software, and digital products and services. In recent years, we have seen rapid growth in digital publications, whether of electronic books (eBooks) or the delivery of professional and scholarly publications through

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International Trade Commission, *Digital Trade in the U.S. and Global Economies*, Inv. No. 332-531, Supplemental Filing of the Computer & Communications Industry Association at 1 (Mar. 2013) (hereinafter “CCIA SUPPLEMENTAL FILING”) (noting that “at the [Digital Trade] hearing, the issue of how precisely to define “digital trade” for purposes of the Commission’s report received substantial attention.”).

<sup>15</sup> CCIA SUPPLEMENTAL FILING, *supra* at note 14, at 1.

<sup>16</sup> DIGITAL TRADE PRESS RELEASE, *supra* at note 14; *see generally*, *Digital Trade in the U.S. and Global Economies*, Inv. No. 332-531, USITC Pub. 4415.

<sup>17</sup> GOOGLE COMMENTS, *supra* at note 2, at 4.

<sup>18</sup> *Id.* at 1-2 (going to great length to note that Congress has never used the term “electronic transmission” interchangeably with “articles” as it has with “goods, products, and merchandise” etc. and that this somehow proves that “articles” must mean only physical articles.). However, as the point has been made repeatedly by all parties, the term “articles” was explicitly left undefined by Congress so that the ITC would have “broad authority” to combat unfair trade. *See supra* note 7. The meaning of “articles” has remained flexible over time, and today, given the continuing growth of digital trade, must include “electronic transmissions” of eBooks, movies, music, software, etc.

<sup>19</sup> MPAA COMMENTS, *supra* at note 4, at 6.

information networks. There has also been growth in the variety of online platforms through which digitized reading materials may be accessed.

The growing consumer adoption of digital formats – for eBooks and digital course materials (in the higher education sector) – is leading to increased market share for digital content. Specifically, in the past five years, unit sales of trade eBooks have increased over 4,456% from just over 10 million eBooks in 2008 to over 457 million eBooks in 2012.<sup>20</sup> The sale of physical books still constitutes the bulk of publishing industry revenue, but as indicated by the slip from 2.4 billion to 2.3 billion units from 2011 to 2012, print book sales are declining whereas eBook market share continues to grow.<sup>21</sup> These changing acquisition patterns of consumers have also affected retail distribution channels, with online retail outlets, digital library lending, online subscription services and others gaining ground in the publishing sector.<sup>22</sup>

The growth of digital publications and the variety of online platforms for accessing these works hold great potential for the publishing industry, which is continuing to invest in innovative digital delivery mechanisms. However, as AAP pointed out in its Digital Trade Comments “every day, large quantities of books, journals and other copyrighted reading materials are distributed or made available, through various online entities or platforms, without the consent of or authorization from the legitimate rights holders.”<sup>23</sup> Parallel to the growth in popularity of eBooks noted above, the scale of online piracy affecting the book and journal publishing industry has also grown exponentially in recent years and constitutes “one of the most significant barriers to the growth of digital trade in electronic books and journals.”<sup>24</sup>

Publishers have undertaken lengthy and costly litigations around the world to shut down sites offering hundreds of thousands of copyrighted eBooks for free, anonymous downloading to anyone with an Internet connection (including U.S. citizens that might otherwise purchase the work through a legitimate online retailer).<sup>25</sup> There is great concern that online or digital piracy will severely impede the continued growth of digital books, journals and other digital copyrighted products. Thus, U.S. industries need enforcement mechanisms that protect the U.S. market from unfair competition with digital piracy in order to allow continued growth of digital trade, to which the copyright industries already make significant contributions. For example, a study released in November of 2013 found that the copyright industries contributed over \$1 trillion in added value to the U.S. economy in 2012.<sup>26</sup>

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<sup>20</sup> Association of American Publishers, Book Industry Study Group, *BookStats Volume 3*, (May 15, 2013) (available for purchase at <http://bookstats.org/>) (“BOOK STATS 2013”).

<sup>21</sup> *Id.* (noting that in 2012, eBooks constituted 20% of the overall sales revenue for the Trade books market).

<sup>22</sup> See *The Rise of Innovative Business Models: Content Delivery Methods in the Digital Age: Hearing Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013) (Post-hearing Statement of the Association of American Publishers available at <http://www.publishers.org/attachments/docs/publicstatements/aapstatement-riseofinnovativebusinessmodels.pdf>) (hereinafter “AAP INNOVATION STATEMENT”).

<sup>23</sup> U.S. International Trade Commission, *Digital Trade in the U.S. and Global Economies*, Inv. No. 332-531, Comments of the Association of American Publishers at 3 (Mar. 14, 2013).

<sup>24</sup> *Id.*

<sup>25</sup> See e.g., Oberlandesgericht Hamburg [Higher Regional Court of Hamburg] Mar. 14, 2012, 5 U 41/11 (Ger.) (“*Rapidshare*”) (deciding case in favor of U.S. and international publishers and thus mandating a filtering requirements for a file hosting site [Rapidshare] and a linking site working in tandem with it that offered an “internet library” containing infringements of more than 400,000 copyrighted eBooks for free and anonymous downloading).

<sup>26</sup> Stephen E. Siwek, *Copyright Industries in the U.S. Economy: The 2013 Report* (Nov. 19, 2013) ([http://www.iipa.com/copyright\\_us\\_economy.html](http://www.iipa.com/copyright_us_economy.html)).

AAP recognizes that the current remedies available to address violations of Section 337 were principally designed in an era focused on physical goods.<sup>27</sup> However, this does not mean that the ITC is without jurisdiction to protect those same goods as they transition from physical to digital formats that no longer proceed through ports of entry. The Supreme Court made clear in *Cunard* that Section 337 applies to importation “regardless of the mode in which it is effected.”<sup>28</sup> Furthermore, as CCIA itself stated, “the significance of the Internet to global trade cannot be overstated” as it is “the shipping lane of the 21st century.”<sup>29</sup>

Therefore, the ITC should construe the term “articles” to include “electronic transmissions” of digital copyrighted products, a construction which is consistent with Congress’s intent that Section 337 apply broadly to unfair competition from imports that undermine U.S. industries. Congress may, however, need to update the remedies available to the ITC in order to ensure that it can effectively implement Section 337’s protections of U.S. industries from unscrupulous imports in an era of digital trade.

### **Conclusion**

AAP appreciates this opportunity to explain how critical it is to the publishing industry that the ITC construe the term “articles” in Section 337(a)(1)(B) to include “electronic transmissions” of copyrighted works, given the increasing importance of digital trade to our industry.

Sincerely,



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<sup>27</sup> GOOGLE COMMENTS, *supra* at note 2, at 7.

<sup>28</sup> *Cunard*, 262 U.S. 100 at 122.

<sup>29</sup> U.S. International Trade Commission, *Digital Trade in the U.S. and Global Economies*, Inv. No. 332-531, Comments of the Computer & Communications Industry Association at 1, 11 (Feb. 27, 2013) (quoting Sen. Wyden at 11).