

Section 337 Technical Domestic Industry: Actual Article

Broadcom Corp. v. Int'l Trade Comm'n, 28 F.4th 240 (Fed. Cir. 2022)

By: Mike Bregenzer & Daniel Sokoloff | April 4, 2022

The instant appeal stems from a dispute between Complainant Broadcom Corporation (“Broadcom”) and Respondents Renesas Electronics Corporation and Renesas Electronics America, Inc., among other respondents, in a 19 U.S.C. § 1337 (“Section 337”) Investigation at the International Trade Commission (“the Commission”) involving U.S. Patent No. 7,437,583 (“the ‘583 patent”), among other patents. In a final initial determination, the administrative law judge (“the ALJ”) held, *inter alia*, that Broadcom did not satisfy the technical prong of the domestic industry because the Broadcom system-on-a-chip (“SoC”) product used to establish a domestic industry did not include a “clock tree driver,” one of the limitations of claim 25 of the ‘583 patent. The Commission affirmed the ALJ’s holding, and both parties appealed. One of the issues raised on appeal was Broadcom’s challenge of the ruling that there was no Section 337 violation of the ‘583 patent due to Broadcom’s failure to satisfy the technical prong of the domestic industry.

To meet the technical prong of the domestic industry requirement, the Complainant must establish that it practices at least one claim of the asserted patent. *Microsoft Corp. v. ITC*, 731 F.3d 1354, 1361–62 (Fed. Cir. 2013) (citing 19 U.S.C. § 1337(a)(2)–(a)(3)). This requires a Complainant to identify “actual ‘articles protected by the patent.’” *Id.* at 1361.

The ALJ found that Broadcom’s SoC did not contain the “clock tree driver” required by claim 25 of the ‘583 patent because the driver must be stored on an external memory that is separate from the SoC. Broadcom argued that it integrates its SoC with the external memory to enable retrieval and execution of the “clock tree driver” with the help of its customers. The ALJ did not find that argument persuasive and noted that an “actual article” protected by the patent is needed to meet the technical prong. In affirming the ALJ’s findings, the Commission further stated that, without identifying an actual integration of the SoC and the “clock tree driver,” Broadcom contemplated only a hypothetical device that did not meet claim 25’s limitations, failing to satisfy the technical prong of the domestic industry.

The CAFC affirmed the Commission’s finding, reasoning that Broadcom did not “show that there is a domestic industry product that actually practices” at least one claim of the asserted patent. *Id.* at 1361. More specifically, Broadcom failed to identify any specific integration of the domestic industry SoC and the “clock tree driver” firmware, or a specific location where the firmware was stored. Unlike in the District Court proceedings, an ITC Complainant must show that it practices the asserted patent(s), so ensuring that there is an “actual article” before the filing of the Complaint is essential.

The remaining open question is whether Broadcom’s argument that it manufactured and tested a “system” that included the SoC and firmware having the clock tree driver would have constituted an “actual article.” This argument was deemed waived because Broadcom did not raise it during the ALJ proceedings, reinforcing the importance of preserving issues for appeal.