UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of **CERTAIN AUDIO PLAYERS AND CONTROLLERS, COMPONENTS THEREOF, AND PRODUCTS CONTAINING SAME**	**Investigation No. 337-TA-1191**

STATEMENT BY USIJ REGARDING THE PUBLIC INTEREST

The Alliance of U.S. Startups & Inventors for Jobs ("USIJ") submits this statement in response to the Commission's August 16, 2021 Notice of Request for Submissions on the Public Interest. USIJ files this statement in support of complainant Sonos because the public interest in promoting competitive conditions in the United States would be advanced through issuance of an effective exclusion order against the products of Google that have been adjudged to infringe, without exception for hypothetical products for which Google has sought an advisory opinion of non-infringement.

1. USIJ's Mission

USIJ is a group of inventors, startup companies, venture capitalists, incubators, and research institutions who have come together in the interest of safeguarding our nation's innovation ecosystem.[1] The research and development that our companies and institutions perform has led to numerous breakthrough technologies in fields such as medical devices, mobile technologies, biotechnology, clean energy, and cloud computing. Our venture capital members and incubators have – for many years – founded and financed dozens of companies that have generated billions of dollars in value and created thousands of jobs.

[1] https://www.usij.org/about

USIJ's members invent real things and create real companies, and we support efforts to strengthen the patent system in the United States. A strong patent system is integral to our innovation ecosystem and global competitiveness. We are committed to promoting a strong intellectual property system that supports innovation, investment, and breakthrough technologies that change our world. Our mission is to ensure this system continues to thrive for the benefit of American startups and inventors, and most importantly, American jobs.

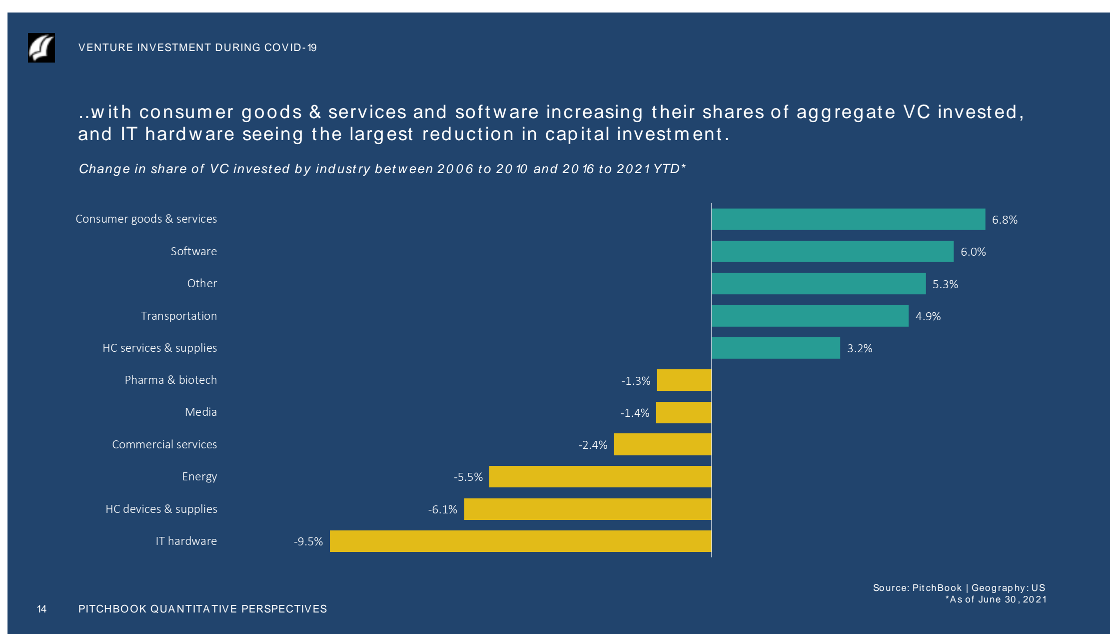
2. The Impact of "Efficient Infringement" on Innovation in the United States

It is essential for smaller innovators, like Sonos, to be able to meaningfully and expeditiously enforce patents covering their inventions to sustain and promote competition. However, in the aftermath of the U.S. Supreme Court's decision in *eBay v. MercExchange*, coupled with the advent of the Patent Trial and Appeal Board ("PTAB"), it has become virtually impossible to enjoin a competitor that is infringing the upstart's patents. Delay, delay, delay is the gameplan of the infringer, which can afford to string out years of litigation as part of a strategy which is designed to drown the innovator in costs and delay. Except in the ITC, there is no swift mechanism to enjoin an infringer and protect the innovator's market share.

It is important to note what often happens in the actual marketplace if the patent-holding startup decides to pursue litigation, and the litigation becomes a protracted series of moving-target challenges. During the course of litigation, the infringing company maintains or enhances its position in the market, securing revenue, developing customer loyalty, and gaining market share. Simultaneously, the infringer is also free to open a second front by launching multiple *Inter Partes Review* challenges at the PTAB and waiting for the smaller company to simply give up or die. Even if the larger infringing company ultimately loses and is forced to pay monetary damages to the patent owner it simply becomes a cost of doing business for them. They have already integrated the startup's IP, captured market share and used their scale to tilt the balance

in their direction. All for the cost of possibly paying a damages award someday if the startup survives long enough for that to happen. This "efficient infringement" has become the mantra of larger companies seeking to usurp a competitive startup's technology.

Because of these hurdles to meaningful patent enforcement, venture capitalists and other funders are restricting their investments in companies such as Sonos. While venture-backed funding has remained strong for services such as consumer goods, software, e-commerce, and scooter rentals, on the contrary, venture funding has declined for investment-intensive IT hardware companies like Sonos[2]:



Without meaningful patent protection, is too easy for "Big Tech" to imitate these advances and usurp market share, driving the innovator out of business. Venture capitalists bear 100% of the risk for the multitude of their portfolio companies that fail, and now due to the weakening of the patent system they are also stripped of returns for their successful ventures, like Sonos, which fall prey to infringement.

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[2]https://static1.squarespace.com/static/5746149f86db43995675b6bb/t/6137b7a912370a6f0c854745/1631041449729/Trends+in+VC+investing+-+2006+to+2010+vs+2016+to+2021+-+Pitchbook.pdf

3. The Need for an Effective Remedy in this Case

Swift injunctive relief is needed for meaningful patent protection. We understand that Google is attempting to circumvent the exclusion of its products by seeking an advisory opinion that Google's newly proposed designs would not be infringing. This tactic, if allowed, would have the effect of a protracted "game of whack-o-mole," creating an iterative series of litigations. The ITC should not render an advisory opinion that a new, unfinished design would avoid the patents in suit, thereby allowing Google to continue selling products until Sonos files and wins yet another litigation to enjoin Google's next iteration of products. Google's tactic would establish a new variant of "efficient infringement," whereby infringers could avoid the consequences of the ITC's jurisdiction by obtaining an expedited, advisory, approval of a new design, followed by a swift redesign of their products pursuant to the advisory opinion, to stay one step ahead of an exclusion order. Particularly in the software space, where redesigns can be quickly deployed, this ability to sidestep exclusion orders will give innovators only a pyrrhic victory, while yet another litigation must be recommenced to target yet another variant of infringement. The innovators will drown in litigation costs while their market share is crushed.

The current dispute between Sonos and Google is emblematic of the impact on competitive conditions in the United States by entrenched companies that infringe on innovators' protected technologies. A strong patent system is critical to addressing concerns about the increasing concentration of power within a handful of large technology companies. An organization that has gained near monopoly power will naturally seek to undercut the ability of any smaller competitor to challenge it. This is why we have seen many large, incumbent technology companies fight to degrade the U.S. patent system. This dynamic was laid out in

detail recently by USC Law Professor Jonathan Barnett.[3] Big tech companies know that a disruptive competitor with a better idea that is protected by the patent system is one of the few things that can actually challenge them. If you weaken the U.S. patent system you diminish the chances that a new startup will shake the foundations of an established monopoly.

Google's attempt to sidestep the ITC's exclusion orders is only the latest tactic of "Big Tech" to weaken patent enforcement in the United States. Competitive conditions in the United States would suffer if infringers could sidestep the ITC's remedy by obtaining advisory opinions on unfinished products. The ITC should adjudicate the existing case, as to the actual products that Google is importing. If the ITC renders advisory opinions on unfinished designs, this would provide Google a roadmap to avoid the ITC's exclusions orders, and prompt Sonos to file yet another complaint on more patents to exclude the next generation of Google's products. This iterative series of litigations would be prohibitively costly and protracted, and deprive Sonos and its investors of meaningful protection for their innovations. Effective exclusion orders, without the safe harbor sought by Google through its requested advisory opinions, are needed to secure the market share of innovators to promote healthy competition in America.

4. Conclusion

For the foregoing reasons, USIJ respectfully submits that the public interest in promoting competitive conditions in America would be advanced by the Commission proceeding to issue its exclusion order against the products that have been found to infringe Sonos' patents, without exception for hypothetical products of Google for which Google is seeking an advisory opinion of non-infringement.

[3] https://www.cato.org/regulation/spring-2021/why-big-tech-likes-weak-ip

Filed on behalf of the Alliance of U.S. Startups and Inventors for Jobs (USIJ),

/s/ Chris Israel
Chris Israel
Executive Director, USIJ

/s/ Robert P. Taylor
Robert P. Taylor
RPT Legal Strategies PC
2443 Fillmore St., #332
San Francisco, CA 94115
Tel: 650.400.6995
Email: Robert.Taylor@RPTStrategies.com

Counsel to Alliance of U.S. Startups and Inventors for Jobs (USIJ)