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CATEGORY: 19 U.S.C. § 1337; Unfair Competition

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VIA EMAIL: bdeblank@orrick.com

RE: Ruling Request; U.S. International Trade Commission; Limited Exclusion Order; Investigation No. 337-TA-1191; Certain Audio Players and Controllers, Components Thereof, And Products Containing the Same

Dear Mr. de Blank:

Pursuant to 19 C.F.R. Part 177, the Exclusion Order Enforcement Branch (“EOE Branch”), Regulations and Rulings, U.S. Customs and Border Protection (“CBP”) issues this ruling letter in response to your request, dated March 24, 2022, on behalf of Sonos Inc. (“Sonos”) for an inter partes proceeding regarding the above-referenced matter.¹ Specifically, Sonos requested a ruling whether certain audio players and controllers manufactured or imported by Google LLC (“Google”) are subject to the limited exclusion order (“LEO”), dated January 6, 2022, that the U.S. International Trade Commission (“Commission” or “ITC”) issued in Investigation No. 337-TA-1191 (“the underlying investigation” or “the 1191 investigation”) pursuant to section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (“Section 337”). See Ruling Request at 1. Based on Sonos’ Reply indicating that it does not contest that the “Google imported players” incorporate the features or functionalities of a redesigned product

¹ The parties respectively filed the following submissions: Sonos Ruling Request (dated March 24, 2022) (“Ruling Request”); Google Response to Sonos’ Ruling Request (dated April 22, 2022) (“Google Response”); Sonos Reply to Google’s Response (dated May 17, 2022) (“Sonos Reply”); and Google Sur-Reply to Sonos Reply (dated May 24, 2022) (“Google Sur-Reply”).

adjudicated by the Commission not to infringe U.S. Patent Nos. 9,195,258 (“the ’258 patent”); 10,209,953 (“the ’953 patent”); 9,219,959 (“the ’959 patent”), we find that Google audio players, such as the Home Mini, Nest Mini, Home, Nest Audio, Home Max , Home Hub, Nest Hub, Nest Hub Max, Nest Wifi Point, Chromecast, Chromecast Audio, Chromecast Ultra, and Chromecast with Google TV the Chromecast, Chromecast Ultra, Chromecast Audio, Home Mini, Nest Mini, Home, Home Max, Home Hub, Nest Hub, Nest Hub Max, and Nest Wifi Point, are not subject to exclusion from entry and, for purposes of Section 337, may be entered for consumption. See Sonos Reply at 1. Furthermore, we find that Google has met its burden to show that the updated Google controllers, such as (1) Pixel smartphones (i.e., Pixel 3, Pixel 3 XL, Pixel 3a, Pixel 3a XL, Pixel 4, Pixel 4 XL, Pixel 4a phones, Pixel 6a, Pixel 7, and Pixel 7 Pro); (2) the Pixel Slate tablet; and (3) Pixel computers (i.e., the Pixelbook and Pixelbook Go laptops) (collectively “articles at issue”), incorporate the features or functionalities from the redesigned products the Commission adjudicated not to infringe U.S. Patent No. 8,588,949 (“the ’949 patent”). However, we find that Google has not met its burden to show that the articles at issue incorporate only the features or functionalities of the redesigned product that the Commission adjudicated not to infringe U.S. Patent No. 10,439,896 (“the ’896 patent”). Thus, CBP’s position is that the relevant articles at issue are subject to exclusion from entry for consumption on the basis of the 1191 LEO until Google either: (1) disables or renders inoperable the Device Utility app addressed in this ruling such that it can no longer be used with the relevant articles at issue and provides notice as to that disabling or inoperability; or (2) receives a non-infringement determination pursuant to an ancillary proceeding at the Commission or a ruling in an inter partes proceeding from CBP under 19 C.F.R. Part 177 that addresses operation of the Device Utility app on the articles at issue. Google may concurrently pursue options (1) and (2) above.

We further note that determinations of the Commission resulting from the underlying investigation or a related proceeding under 19 C.F.R. Part 210 are binding authority on CBP and, in the case of conflict, will by operation of law modify or revoke any contrary CBP ruling or decision pertaining to Section 337 exclusion orders.

This ruling letter is the result of a request for an administrative ruling from CBP under 19 C.F.R. Part 177, which was conducted on an inter partes basis. The process involved the two parties with a direct and demonstrable interest in the question presented by the ruling request: (1) your client, Sonos, the ruling requester and complainant in the 1191 investigation; and (2) Google, respondent in the 1191 investigation. See, e.g., 19 C.F.R. § 177.1(c).

Parties to an inter partes proceeding must clearly identify confidential information in their submissions, including information subject to the administrative protective order in the underlying investigation in their submissions to CBP. See 19 C.F.R. §§ 177.2 and 177.8. If there is information in this ruling letter not currently bracketed in red [] that either party believes constitutes confidential information, and should be redacted from the published ruling, then the parties are asked to contact CBP within ten (10) working days of the date of this ruling letter to indicate this. See, e.g., 19 C.F.R. § 177.8(a)(3).

Please note that disclosure of information related to administrative rulings under 19 C.F.R. Part 177 is governed by, for example, 6 C.F.R. Part 5, 31 C.F.R. Part 1, 19 C.F.R. Part 103, and 19 C.F.R. § 177.8(a)(3). See, e.g., 19 C.F.R. § 177.10(a). In addition, CBP is guided by

the laws relating to confidentiality and disclosure, such as the Freedom of Information Act (“FOIA”), as amended (5 U.S.C. § 552), the Trade Secrets Act (18 U.S.C. § 1905), and the Privacy Act of 1974, as amended (5 U.S.C. § 552a). A request for confidential treatment of information submitted in connection with a ruling requested under 19 C.F.R. Part 177 faces a strong presumption in favor of disclosure. See, e.g., 19 C.F.R. § 177.8(a)(3). The person seeking this treatment must overcome that presumption with a request that is appropriately tailored and supported by evidence establishing that: the information in question is customarily kept private or closely-held and either that the government provided an express or implied assurance of confidentiality when the information was shared with the government or there were no express or implied indications at the time the information was submitted that the government would publicly disclose the information. See Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 2366 (2019) (concluding that “[a]t least where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is ‘confidential’ within the meaning of exemption 4.”); see also U.S. Department of Justice, Office of Information Policy (OIP): Step-by-Step Guide for Determining if Commercial or Financial Information Obtained from a Person is Confidential Under Exemption 4 of the FOIA (updated 10/7/2019) and OIP Guidance: Exemption 4 after the Supreme Court’s Ruling in Food Marketing Institute v. Argus Leader Media (updated 10/4/2019).

I. BACKGROUND

A. ITC Investigation No. 337-TA-1191

1. Procedural History at the ITC

The Commission instituted Investigation No. 337-TA-1191 on February 11, 2020, based on a complaint filed by Sonos, Inc. Certain Audio Players and Controllers, Components Thereof, and Products Containing Same, Inv. No. 337-TA-1191, EDIS Doc. ID 762093, Public Commission Opinion (Feb. 1, 2022) (“Comm’n Op.”) at 3 (citing 85 Fed. Reg. 7783 (Feb. 11, 2020)). The complaint alleged a violation of Section 337 by reason of infringement of certain claims of U.S. Patent Nos. 9,195,258 ; 10,209,953 ; 8,588,949 ; 9,219,959 ; and 10,439,896 . Comm’n Op. at 3. The notice of investigation named Google LLC of Mountain View, California and Alphabet Inc. of Mountain View, California as respondents.² Id. at 3. The Commission’s Office of Unfair Import Investigations (“OUII”) was also named as a party. Id. at 3.

On August 13, 2021, the presiding Chief Administrative Law Judge (“CALJ”) issued his final initial determination (“FID”) finding a violation of Section 337. Id. at 5. Specifically, the CALJ determined that a violation of Section 337 occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation, of certain

² Sonos filed an unopposed motion on August 21, 2020, seeking to terminate respondent Alphabet Inc. based upon withdrawal of allegations in the complaint directed to that respondent. The Chief Administrative Law Judge granted the motion in an ID (Order No. 18) that issued on September 1, 2020 (unreviewed on Sept. 21, 2020). Comm’n Op. at 3.

audio players and controllers, components thereof, and products containing the same with respect to the '258 patent, '953 patent, '959 patent, '949 patent, and the '896 patent. Id. at 5-7. The CALJ also determined that one redesign for each of the five asserted patents did not infringe.³ Id. at 180-182.

On November 19, 2021, the Commission issued a notice in which it determined to review in part the FID. Comm'n Op. at 8 (citing 86 Fed. Reg. at 67492). In the notice, the Commission determined to review the FID's analysis of whether the products accused of infringing the '258 patent and '953 patent are articles that infringe at the time of importation. Id. at 8. The Commission also determined to correct two typographical errors on pages 24 and 84 of the FID. Id. at 8-9. The Commission notice also requested written submissions on remedy, the public interest, and bonding. Id. at 9. The Commission affirmed the FID's finding that the accused products infringed the '258 patent and the '953 patent at the time of importation. Id. at 21. Thus, the Commission found a violation of Section 337 as to claims 17, 21, 24, and 26 of the '258 patent; claims 7, 14, and 22-24 of the '953 patent; claim 10 of the '959 patent; claims 1, 2, and 5 of the '949 patent; and claims 1, 5, 6, and 12 of the '896 patent. Id. at 21-22.

On January 6, 2022, the Commission issued a LEO and a cease and desist order in the 1191 investigation. Certain Audio Players and Controllers, Components Thereof, and Products Containing Same, Inv. No. 337-TA-1191, EDIS Doc. 759897, Limited Exclusion Order (Jan. 6, 2022) ("1191 LEO"); Certain Audio Players and Controllers, Components Thereof, and Products Containing Same, Inv. No. 337-TA-1191, EDIS Doc. 759899, Cease and Desist Order for Google LLC (Jan. 6, 2022). The 1191 LEO expressly carved out from the scope of the exclusion order Google's redesign products that the Commission found not to infringe the asserted patent claims. 1191 LEO at 2-3 ("Covered articles shall not include the Google redesign products that were adjudicated in this investigation and found to be non-infringing (i.e., (i) as to the '258 patent, the redesign '258 NIA No. 1; (ii) as to the '953 patent, the redesign '953 NIA No. 1; (iii) as to the '959 patent, the redesign '959 NIA No. 4; (iv) as to the '949 patent, the redesigns submitted for adjudication by Google with respect to the '949 patent; and (v) as to the '896 patent, the redesign '896 NIA No. 2").

2. The Legacy and Redesigned Products in the Underlying Investigation

The legacy products in the underlying investigation were certain "networked speaker devices, and devices (for example, mobile phones and laptops) capable of controlling these devices." FID at 2. In particular, Sonos accused Google's Home Mini, Nest Mini, Home, Nest Audio, Home Max,⁴ Home Hub, Nest Hub, Nest Hub Max, Nest Wifi Point, Chromecast,

³ CALJ determined that '258 NIA No.1 did not infringe any asserted claim of the '258 patent, '953 NIA No. 1 did not infringe any asserted claim of the '953 patent, '959 NIA No. 4 did not infringe asserted claim 10 of the '959 patent, Google's redesign products for the '949 patent and the accused Pixel Controllers installed with either the YouTube Music or Google Play Music application did not infringe any asserted claim of the '949 patent, and '896 NIA No. 2 did not infringe any asserted claim of the '896 patent. Comm'n Op. at 5-7.

⁴ Google discontinued the Home Max in the fourth quarter of 2018. The device is no longer for sale through Google's online store. FID at 2.

Chromecast Audio, Chromecast Ultra, and Chromecast with Google TV, Pixel smartphones (i.e., Pixel 3, Pixel 3 XL, Pixel 3a, Pixel 3a XL, Pixel 4, Pixel 4 XL, and Pixel 4a phones); the Pixel Slate tablet; and Pixel computers (i.e., the Pixelbook and Pixelbook Go laptops installed with the Google Home app, the YouTube Music app, or the Google Play Music app); and Google’s Hub displays (i.e., the Home Hub, Nest Hub, and Nest Hub Max installed with Home/Nest software) of infringing the asserted claims of the patents at issue. Id. at 2-3

Google also introduced redesigned products for adjudication during the underlying investigation. The CALJ found, and the Commission affirmed, that at least one redesign for each underlying patent was non-infringing. Comm’n at 4-7. Redesigns for two patents (the ’949 patent and ’896 patent) are applicable to the Google controllers at issue in this ruling. First, with respect to the ’949 redesign (i.e., the 949 NIAs), the Commission found no infringement because the redesign modified the Google controllers “such that their user interfaces cannot accept the ‘group-level’ volume input required by limitation 1(d)” of the ’949 patent. Comm’n Op. at 7, n. 8. Second, with respect to the ’896 redesign (i.e., ’896 NIA No. 2), the Commission found no infringement because the redesign modified the Google controller such that it “[

]]” such that the redesign does not satisfy limitation 1.7 of the ’896 patent. FID at 164.

a. Legacy and Redesigned Google Controllers “Playback Device Setup”

i. **Legacy Google Controllers “Playback Device Setup”**

The legacy Google controllers could install and use the Google Home app to set up a playback device on a secure wireless local area network (“WLAN”). Ruling Request at 29; FID at 156. When a legacy Google controller is used with the Google Home app to set up a playback device on a secure WLAN, the user would first see the following “Device Found Screen”⁵ on the Google Home app:

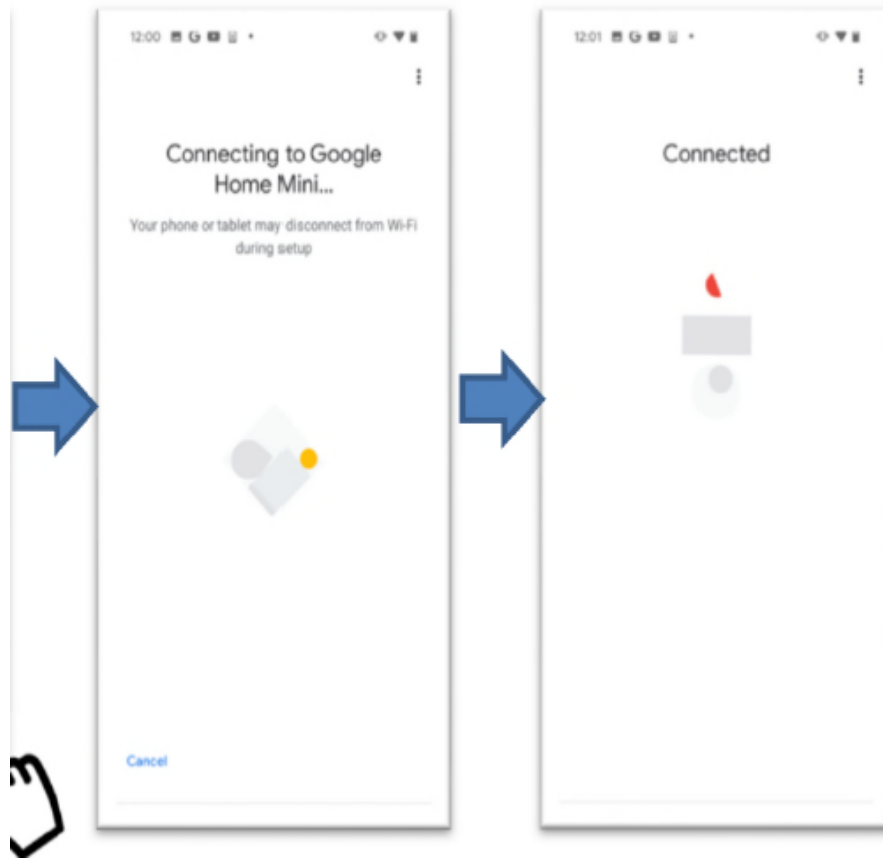


See FID at 154; see also Ruling Request at 30 (depicting the legacy products).

In the above image, the Google Home app receives a message that the Google Home Mini playback device is available for set up and the user is prompted to press the “Yes” button on the App’s graphical user interface (“GUI”) in order to proceed with the setup of that playback device. FID at 154-154; Ruling Request at 30-31. The user can also select “Set up a different device.” Id.

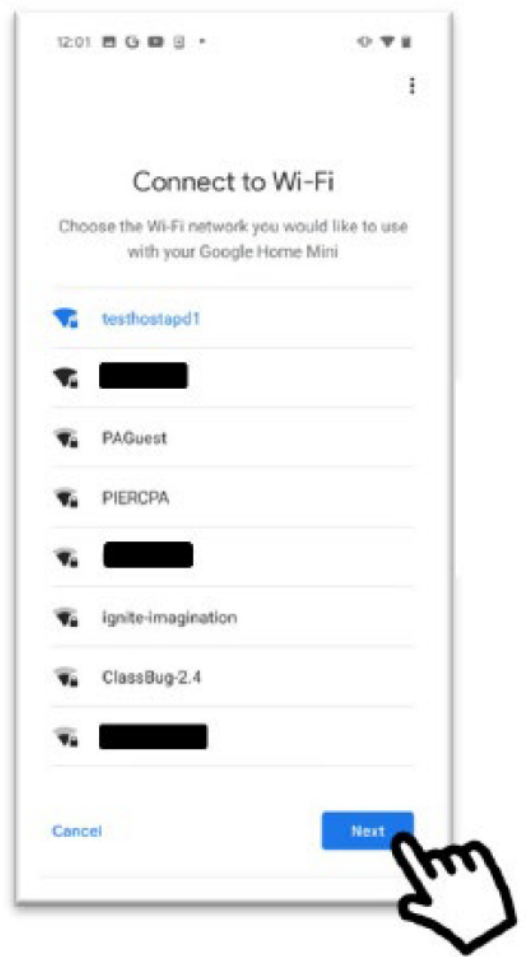
⁵ Also referred to as the “Select Device Screen” in the underlying investigation. See e.g., FID at 158.

If the user presses the “Yes” button on the GUI to indicate that they want to proceed with the process to set up the playback device on the secure WLAN to which the legacy Google controller is connected, the Google Home app will display the below “Device Connected” screens:



See FID at 154-5; Ruling Request at 31; Ex. CDX-6C to Ruling Request at 570, Ex. CDX-6C to Ruling Request at 418, Ex. CDX-6C to Ruling Request at 419, Ex. CDX-6C to Ruling Request at 420; Ex. CX-12C (Weissman Dir.) to Ruling Request at Q859.

After the legacy Google controller has been connected to the playback device, the Google Home App will display the following “Connect to Wi-Fi Screen”:



See FID 155-6.

The “Connect to Wi-Fi Screen” lists the Wi-Fi networks available to the audio player. FID at 156. [[

]]. FID at 156.

In the underlying investigation, Google did not dispute that the legacy Google controllers “transmit[ed], to the given playback device via the initial communication path, at least a second message containing network configuration parameters, wherein the network configuration parameters comprise an identifier of the secure WLAN and a security key for the secure WLAN” as required by limitation 1.7 of claim 1 of the ’896 patent. See FID at 152.

ii. **Adjudicated Google Controller Redesign**

The Commission affirmed the CALJ’s finding that the ’896 NIA No. 2 redesign did not practice limitation 1.7 of claim 1 of the ’896 patent. Comm’n Op. at 7 n. 9. The Google controller redesign for the ’896 patent modifies the process to set up a new audio player on the

Google controller's secure WLAN with minimal user input by using an updated version of the Google Home app that "[[

]]." Comm'n Op. at 7 n.9;

Google Response at 8. In the redesigned Google controllers "[[

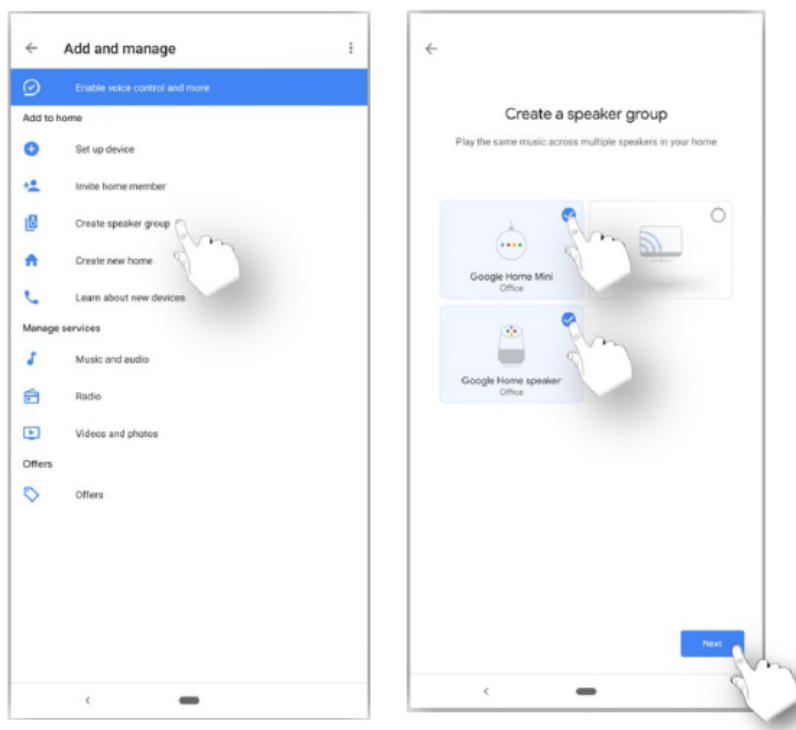
]]." FID at 163 (quotation

omitted).

b. Legacy and Adjudicated Redesign Google Controllers "Group Volume Player"

i. Legacy Google Controllers

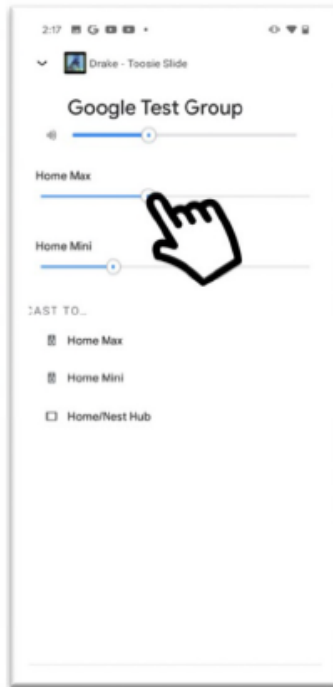
Like the adjudicated redesigns at the Commission and articles at issue in this ruling request, the legacy Google controllers when using the Google Home app can accept an input to facilitate formation of a player group via a user interface. The images below show an example of a player group (that includes a Google Home Mini playback device and a Google Home playback device) being created on a legacy Google controller using the Google Home app:



See Ruling Request at 35; Ex. CDX6C to Ruling Request at 158; Ex. CDX6C to Ruling Request at 159.

Once a player group has been created in the Google Home app, the legacy Google controllers using the Google Home app can then accept an input to adjust the volume of an individual player in the player group or an input to adjust the volume of the entire player group. Ruling Request at 36. The image below shows that the legacy Google controller using the

Google Home app can accept an input to adjust the volume of an individual player (i.e., the Home Max or the Home Mini) or an input to adjust the volume of the entire player group:



See Ruling Request at 36.

The legacy Google controllers also used a “media coin” as an alternative way to accept an input that can adjust the volume of the player group. The image below shows an example of the “media coin” used in the Google Home app:

Group Volume Control, Home App (Pre-Redesign)

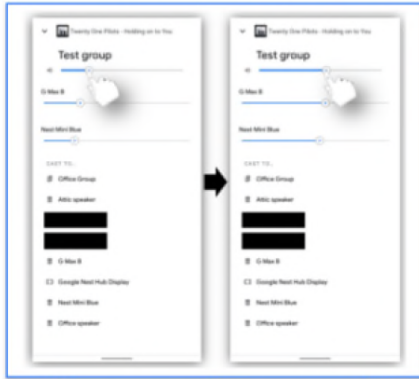


See Ruling Request at 37; Ex. RX-1474C (Li Dir.) to Ruling Request at Q14.

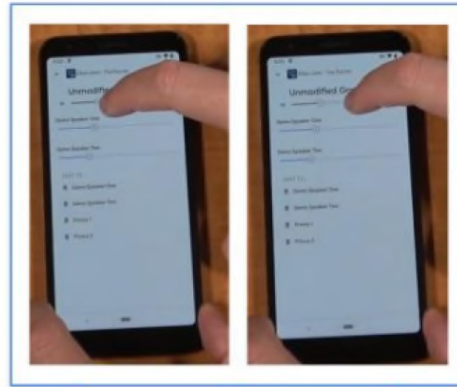
ii. **Adjudicated Google Controller Redesign**

The Commission affirmed the CALJ's finding that "Google's redesign products do not practice any asserted claim of the '949 patent." Comm'n. Op at 7 n.8. The '949 redesign for the '949 patent updates the Google controllers so they can no longer accept the 'group-level' volume input as required by limitation 1.4 of the '949 patent. *Id.* In the Google controller redesign adjudicated during the underlying investigation, the group volume indicator is still visible, but the group volume slider is disabled such that the user is not able to manipulate the slider to adjust volume. Ruling Request at 38-40. The below examples show that the user is unable to manipulate the group volume slider in the Google controller redesign adjudicated during the underlying investigation:

Group Volume Control, Home App (Pre-Redesign)



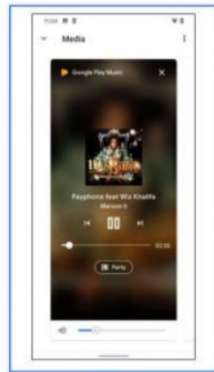
Group Volume Control, Home App (Post-Redesign)



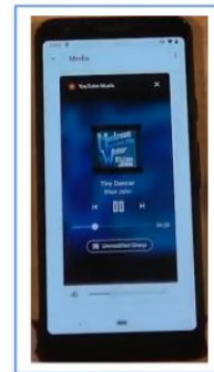
See Ruling Request at 39; Ex. RX-1474C (Li Dir.) to Ruling Request at Q16-17 (annotations in the original).

The Google controller redesign adjudicated during the underlying investigation also allowed the group volume slider on the Google Home app to remain visible, but disabled the user's ability to adjust the group volume using a slider displayed on the screen that shows the song that is being played:

Group Volume Control, Home App (Pre-Redesign)



Group Volume Control, Home App (Post-Redesign)



See Ruling Request at 40; Ex. RX-1474C (Li Dir.) to Ruling Request at Q18-19.

3. The Patents and Claims in the 1191 LEO

The 1191 LEO prohibits the entry for consumption of audio players and controllers, components thereof, and products containing the same that infringe one or more of claims 17, 21, 24, and 26 of the '258 patent; claims 7, 14, and 22-24 of the '953 patent; claim 10 of the '959 patent; claims 1, 2, and 5 of the '949 patent; and claims 1, 5, 6, and 12 of the '896 patent and are manufactured abroad by or on behalf of, or imported by or on behalf of Google LLC or any of its affiliated companies, parents, subsidiaries, agents, or other related business entities, or its

successors or assigns. See ¶ 1 of 1191 LEO. For purposes of this ruling, the only dispute remaining between the parties is the application of the ‘949 patent and the ‘896 patent to the articles at issue.

a. Claims 1, 2, and 5 of the ‘949 Patent

The ‘949 patent is titled “Method and Apparatus for Adjusting Volume Levels in a Multi-Zone System,” and in general relates to “user interfaces for controlling or manipulating a plurality of multimedia players in a multi-zone system.” FID at 119 (citation omitted); see also ‘949 Patent Abstract. Claim 1 of the ‘949 patent is an independent claim and claims 2, 4, and 5 are dependent claims that depend from independent claim 1. See ‘949 patent, col. 12:30-48.

The text of claim 1 of the ‘949 patent is reproduced below:

[1.0] A multimedia controller including a processor, the controller configured to:

[1.1] provide a user interface for a player group, wherein the player group includes a plurality of players in a local area network, and wherein each player is an independent playback device configured to playback a multimedia output from a multimedia source;

[1.2] accept via the user interface an input to facilitate formation of the player group, wherein the input to facilitate formation of the player group indicates that a least two of the plurality of players in the local area network are to be included in the player group for synchronized playback of a multimedia output from the same multimedia source;

[1.3] for any individual player in the player group, accept via the user interface a player-specific input to adjust a volume of that individual player, wherein the player-specific input to adjust the volume of that individual player causes that individual player to adjust its volume; and

[1.4] accept via the user interface a group-level input to adjust a volume associated with the player group, wherein the group-level input to adjust the volume associated with the player group causes each of the players in the player group to adjust its respective volume.

See ‘949 patent, col. 12:30-48; FID at 120.

During the 1191 investigation, the CALJ construed four terms in the ‘949 patent, which the Commission adopted. Comm’n Op. at 13. These four terms were construed as follows:

Term	Claim Construction
“playback device”	“data network device configured to process and output audio”
“multimedia”	“any type of media that comprises audio (including audio alone)”

“local area network”	“a data communications network spanning a limited geographical area, such as an office, an entire building, or industrial park”
“independent playback device”	“data network device configured to process and output audio that is capable of independent operation”

See FID at 121.

b. Claims 1, 5, 6, and 12 of the '896 Patent

The '896 patent is titled “Playback Device Connection,” and in general relates to “techniques for connecting various devices to a network for secure communications with a minimum of human interaction and technical ability.” FID at 150 (citation omitted); see also '896 Patent Abstract. Claim 1 of the '896 patent is an independent claim and claims 5, 6, and 12 are dependent claims that depend from independent claim 1. See '896 patent, col. 17:61-19:22.

The text of claim 1 of the '896 patent is reproduced below:

[1.0] A computing device comprising:

[1.1] a user interface;

[1.2] a network interface;

[1.3] at least one processor;

[1.4] a non-transitory computer-readable medium; and program instructions stored on the non-transitory computer-readable medium that, when executed by the at least one processor, cause the computing device to perform functions comprising:

[1.5] while operating on a secure wireless local area network (WLAN) that is defined by an access point, (a) receiving, via a graphical user interface (GUI) associated with an application for controlling one or more playback devices, user input indicating that a user wishes to set up a playback device to operate on the secure WLAN and (b) receiving a first message indicating that a given playback device is available for setup;

[1.6] after receiving the user input and receiving the first message, transmitting a response to the first message that facilitates establishing an initial communication path with the given playback device, wherein the initial communication path with the given playback device does not traverse the access point;

[1.7] transmitting, to the given playback device via the initial communication path, at least a second message containing network configuration parameters, wherein the network configuration parameters comprise an identifier of the secure WLAN and a security key for the secure WLAN;

[1.8] after transmitting at least the second message containing the network configuration parameters, detecting an indication that the given playback device has successfully received the network configuration parameters; and

[1.9] after detecting the indication, transitioning from communicating with the given playback device via the initial communication path to communicating with the given playback device via the secure WLAN that is defined by the access point.

See '896 patent, col. 17:61-18:35; FID at 150-151.

During the 1191 investigation, the CALJ construed six terms in the '896 patent, which the Commission adopted. Comm'n Op. at 13. These six terms were construed as follows:

Term	Claim Construction
“playback device”	“data network device configured to process and output audio”
“network interface”	“physical component of a device that provides an interconnection with a data network”
“security key”	Plain and ordinary meaning
“while operating . . .”/ “after receiving . . .”	Plain and ordinary meaning, which includes a sequence of steps
“program instructions . . .”	Plain and ordinary meaning
“at least a second message containing network configuration parameters, wherein the network configuration parameters comprise an identifier of the secure WLAN and a security key for the secure WLAN”	“at least one second message containing network configuration parameters, wherein the network configuration parameters comprise an identifier of the secure WLAN and a security key for the secure WLAN”

See FID at 151.

B. 19 C.F.R. Part 177 Ruling Request

1. Procedural History

On March 24, 2022, following the issuance of the 1191 LEO, Sonos submitted to the EOE Branch a request for an administrative ruling pursuant to 19 C.F.R. Part 177 that included 30 exhibits. Sonos specifically “request[ed] a ruling that audio players, controllers, components thereof, and products containing the same currently imported by Google, LLC [] are not the same as the redesigned products that were adjudicated as not infringing” and such products “that have not been adjudicated as non-infringing should be excluded until and unless Google seeks a ruling of non-infringement from the Commission or obtains a Part 177 ruling from CBP that such

products are outside the scope of the Limited Exclusion Order.” Ruling Request at 1 (quotation omitted).

On March 28, 2022, the EOE Branch had an initial conference call with Sonos and Google and discussed their views with respect to the procedures for this inter partes proceeding. See EOE Branch email to Parties (dated March 28, 2022). The EOE Branch requested that the parties submit comments on (1) the appropriate number of submissions; (2) procedures for executing a non-disclosure agreement allowing the exchange of information between the parties; (3) procedures regarding the availability, handling, and review of source code; and (4) procedures and filing deadlines to address, if necessary, the questions presented in Sonos’ Ruling Request. See EOE Branch email to Parties (dated March 28, 2022).

On March 29, 2022, Google provided its comments on the procedure. See Google Comments on Procedure (dated March 29, 2022). On March 30, 2022, Sonos provided its comments on the procedure. See Sonos Comments on Procedure (dated March 30, 2022).

On April 1, 2022, the EOE Branch had a conference call with Sonos and Google to discuss their comments on the procedure. See EOE Branch email to Parties (dated April 1, 2022). The EOE Branch requested that the parties submit additional comments addressing the procedural schedule and proper questions presented for this inter partes proceeding. See EOE Branch email to Parties (dated April 1, 2022).

On April 4, 2022, Sonos and Google provided their responses to the EOE Branch’s questions. See Sonos Response to EOE Branch Questions (dated April 4, 2022); see also Google Response to EOE Branch Questions (dated April 4, 2022). In Sonos’ response to the EOE Branch’s questions, Sonos believed the appropriate questions for this inter partes proceeding were: “1. Has Google removed all of the code found to infringe? 2. Has Google added all of the redesigned code adjudicated not to infringe? 3. Has Google added new code – different from the redesigned code – relevant to any patented feature (volume control, setup, playing in synchrony, or pairing/equalization)?” Sonos Response to EOE Branch Questions at 3. In Google’s response to the EOE Branch’s questions, Google believed the appropriate questions for this inter partes proceeding were: “1. According to the Commission Opinion, what features or functionalities were sufficient to render Google’s Redesign Products non-infringing? 2. Do Google’s current products include those features or functionalities? 3. Has Google added new features or

functionalities relevant to the entirety of any of subject matters ‘a’ through ‘d’[⁶]?” Google Response to EOE Branch Questions at 4-5.

On April 9, 2022, the parties provided the EOE Branch with a copy of the executed non-disclosure agreement. See Google email to EOE Branch (dated April 9, 2022). On April 14, 2022, after reviewing the parties’ submissions, and consulting with the Commission, the EOE Branch established the procedural schedule and provided the following as the appropriate questions to be addressed in this inter partes proceeding:

- 1) What are the features and functionalities, irrespective of the exact code used to implement those features or functionalities, in the redesigns that the Commission adjudicated to be non-infringing?**

⁶ Google described the subject matter relevant to its proposed question three as: “a. Providing a user interface for a player group, accepting via the user interface an input to facilitate formation of the player group, accepting via the user interface an input to adjust a volume associated with the player, and accepting via the user interface an input to adjust a volume associated with the player group. b. While operating on a secure WLAN that is defined by an access point, (a) receiving, via a GUI associated with an application for controlling one or more playback devices, user input indicating that a user wishes to set up a playback device to operate on the secure WLAN, and (b) receiving a first message indicating that a given playback device is available for setup; after receiving the user input and receiving the first message, transmitting a response to the first message that facilitates establishing an initial communication path with the given playback device; transmitting, to the given playback device via the initial communication path, a second message containing network configuration parameters; after transmitting the second message, detecting an indication that the given playback device has successfully received the network configuration parameters; and after detecting the indication, transitioning from communicating with the given playback device via the initial communication path to communicating with the given playback device via the secure WLAN. c. Receiving a direction or a request that a first zone player enter into a synchrony group with a second zone player; in the synchrony group, the zone players being configured to play back audio in synchrony based at least in part on (i) audio content, (ii) playback timing information (i.e., information indicating when the audio content is to be played back), and (iii) clock time information (i.e., information representing a time value indicated by a device’s clock); the generated playback timing information and clock time information being transmitted from one of zone players to the other; and the zone players remaining independently clocked (i.e., operating in accordance with their own respective clocks during synchronous playback) while playing back audio in synchrony. d. Receiving a signal from a controller that instructs a playback device to pair with one or more playback devices, processing the audio data before the playback device outputs audio from a plurality of speaker drivers, determining that a type of pairing (i.e., configuration involving two or more playback devices that have different playback roles) of the playback device is a first or second type of pairing, configuring the playback device to perform a first equalization of the audio data before outputting the audio when the type of pairing is the first type of pairing, and configuring the playback device to perform a second equalization of the audio data before outputting the audio when the type of pairing is the second type of pairing.” Google Response to EOE Branch Questions at 4-5.

- 2) **Do the “audio players and controllers currently imported by or on behalf of Google” referred to in Sonos’ ruling request (“the articles at issue”) include the features or functionalities from the adjudicated redesigns that the Commission found non-infringing, irrespective of the exact code used to implement those features or functionalities?**
 - a. **If the answer to Question 2 is yes, identify those features or functionalities?**
- 3) **Whether the articles at issue include new or different features or functionalities, beyond any identified in response to Question 2, that are relevant to the asserted claims of the underlying patents?**
 - a. **If the answer to Question 3 is yes, how are these features or functionalities new or different and why are said features or functionalities relevant to the asserted claims of the underlying patents?**
 - b. **If the answer to Question 3 is yes, should U.S. Customs and Border Protection at this point prevent the entry for consumption of the articles at issue that include these new or different features or functionalities until they are found not to infringe?**

See EOE Branch email to Parties (dated April 14, 2022).

On April 21, 2022, Google requested a modification of the procedural schedule such that the deadline for Google to provide Sonos access to review the source code on the Articles at Issue be changed from April 22, 2022, to April 25, 2022. See Google email to EOE Branch (dated April 21, 2022). On April 22, 2022, the EOE Branch agreed to this modification and made conforming amendments to the procedural schedule such that: (1) the deadline for Sonos to file a Reply to Google’s Response was changed from May 6, 2022, to May 10, 2022; and (2) the deadline for Google to file a Sur-Reply was changed from May 13, 2022, to May 16, 2022. See EOE Branch email to Parties (dated April 4, 2022).

On April 22, 2022, Google filed its Response to Sonos’ Ruling Request. See Google Response. In the Response, Google stated it would make the code for the Device Utility app available for review on April 25, 2022, but would not provide Sonos with access to the code for the Google Home app or Google audio players. On April 28, 2022, the EOE Branch had a status call with Sonos and Google to discuss various procedural aspects. See EOE Branch email to the Parties (dated April 28, 2022). At the status meeting, Google agreed to provide Sonos access to the code for the Google Home app and audio players by April 29, 2022.

On May 2, 2022, Sonos requested a modification of the procedural schedule such that: (1) the deadline for Sonos to file a Reply to Google’s Response would be changed from May 10,

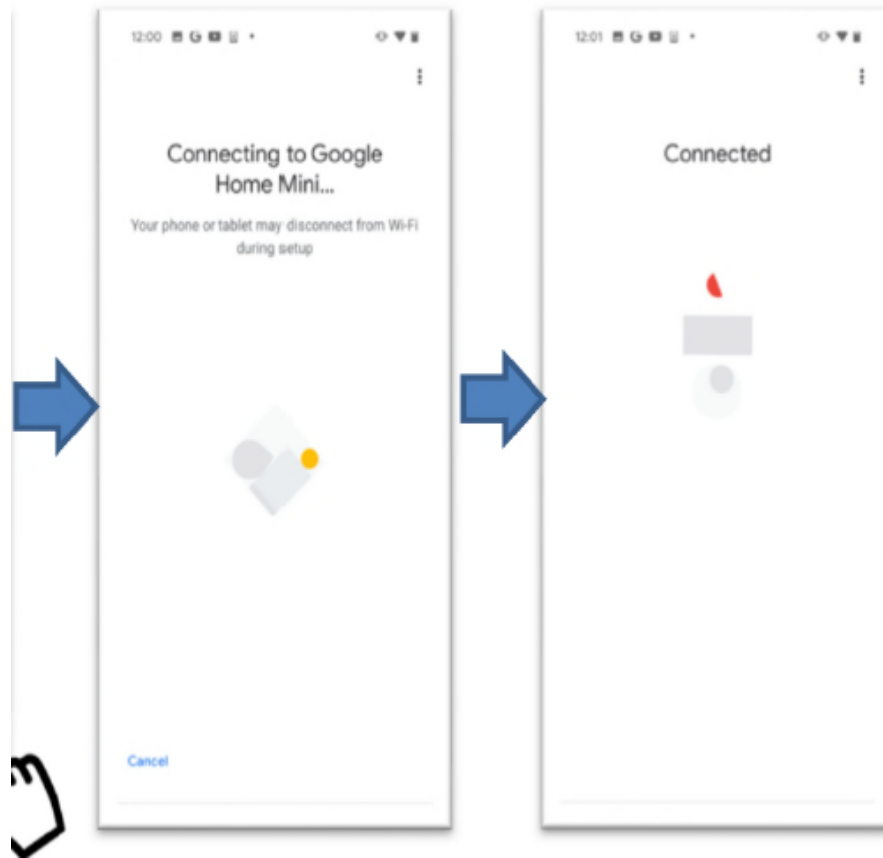
2022, to May 17, 2022; and (2) Google's Sur-Reply to Sonos' Reply would be changed from May 16, 2022, to May 23, 2022. See Sonos email to EOE Branch (dated May 2, 2022). On May 3, 2022, the EOE Branch agreed to this modification. See EOE Branch email to Parties (dated May 3, 2022). On May 17, 2022, Sonos filed its Reply, which included four exhibits. See Sonos Reply. On May 20, 2022, Google requested a modification of the procedural schedule such that the deadline for Google to file a Sur-Reply to Sonos' Reply would be changed from May 23, 2022, to May 30, 2022. See Google email to EOE Branch (dated May 20, 2022). On May 20, 2022, the EOE Branch modified the procedural schedule such that the deadline for Google to file a Sur-Reply to Sonos' Reply would be changed from May 23, 2022, at noon to May 24, 2022, at 11:59 PM. See EOE Branch email to Parties (dated May 20, 2022). On May 24, 2022, Google filed its Sur-Reply to Sonos' Reply, which included ten exhibits. See Google Sur-Reply. On May 25, 2022, Sonos sent a short letter to CBP responding to Google's Sur-Reply and discussing some procedural matters. See Sonos Letter to CBP (dated May 25, 2022).

2. The Articles at Issue

The articles at issue in this Ruling Request are certain Google controllers. See Sonos Reply at 1; see also Ruling Request at 29. Specifically, the Google controllers at issue in this ruling are (1) Pixel smartphones (i.e., Pixel 3, Pixel 3 XL, Pixel 3a, Pixel 3a XL, Pixel 4, Pixel 4 XL, Pixel 4a phones, Pixel 6a, Pixel 7, and Pixel 7 Pro); (2) the Pixel Slate tablet; and (3) Pixel computers (i.e., the Pixelbook and Pixelbook Go laptops). Id. at 7-13; Comm’n Op at 12. In Sonos’ Ruling Request, Sonos initially also accused Google audio players, but subsequently “voluntarily [withdrew] its petition with respect to [Google Audio Players]” because “Google’s currently imported players appear to implement the redesigns found not to infringe the ’258, ’953, and ’959 Patents.” See Sonos Reply at 1. According to the Ruling Request, the articles at issue are not the same redesigned products that were adjudicated to be non-infringing during the underlying investigation, and therefore, Sonos argues that the articles in question should be excluded until, as the Commission notes, “Google [] take[s] advantage of procedures offered by the Commission to obtain such an adjudication under Commission Rules 210.76 (modification) and 210.79 (advisory opinion) or [] request[s] a ruling from CBP under 19 C.F.R. Part 177” to import these new unadjudicated products. Ruling Request at 1-2 (quoting Comm’n Op. at 25 n.19.).

There are three groups of Google controller products that are relevant to this ruling. First, the legacy Google controllers found to infringe during the underlying investigation (“legacy Google controllers”). Second, the Google controller redesigns adjudicated to be non-infringing during the underlying investigation (“adjudicated Google controller redesigns”). Third, the articles at issue are the Google controllers under consideration in this ruling with the features and functionality described below.

a. Articles at Issue “Playback Device Set Up”



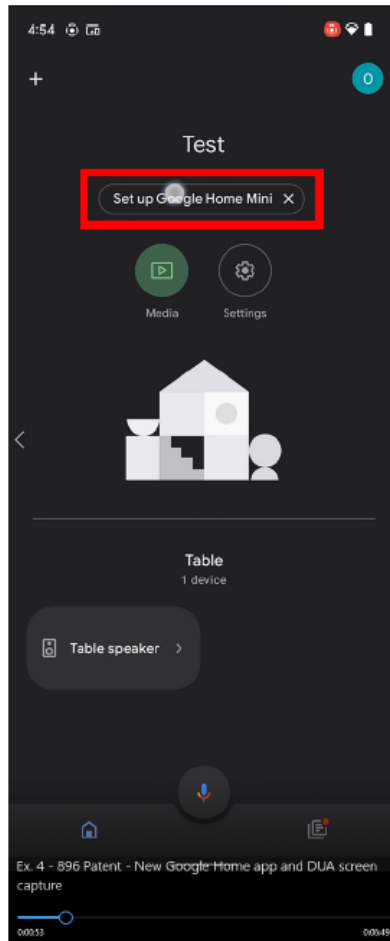
Like the adjudicated Google controller redesigns, the articles at issue can use a Google Home app that []

WLAN. [] to set up certain playback devices on a secure

However, unlike the legacy Google controllers and adjudicated Google controller redesign, the articles at issue can install and use a new Device Utility app (“Device Utility app” or “DUA”) to set up certain playback devices on a secure WLAN. Sonos Reply at 46. According to Google, the new DUA helps “a relatively small subset of consumers of Google Home devices that (1) purchased a previously imported Google Home device before Google released the updated firmware and (2) had not yet connected those Google Home devices to the Internet when Google released the updated firmware (or that own very old devices that are no longer supported) ... to set up their older Google Home device to the Internet for the first time.” Google Sur-Reply at 13; Herman Decl. to Google Sur-Reply ¶¶ 21-24. Google estimates that “only about [[]] of Google Home devices set up each day in the United States since January 2022 are set up using the DUA, and that percentage is further trending downwards.” *Id.* (Herman Decl. ¶ 25).

Exhibit 4 of Sonos’ Reply is a video that shows the article at issue being used to set up a Google playback device running the legacy firmware on a secure WLAN. *See* Ex. 4 to Sonos Reply. In the Exhibit 4 video, the updated Google Home app and DUA are already installed on the article at issue and the user begins to use the Google controller to set up a Google audio player on a secure Wi-Fi network.⁷ When the user opens the Google Home app to begin set up, the Google controller running the Google Home app displays the following screen:

⁷ The packaging of a Google playback device will contain literature that instructs the user to setup Google playback devices on the articles at issue by “download[ing] the Google Home app from Google Play or the App store[.]” *See* Sonos Reply at 37; Exhibit 3 to Sonos Reply at 1:24. Additionally, a new Google Home Mini, when turned on, verbally instructs the user that “to get started, download the Google Home app on a phone or tablet.” Sonos Reply at 37; Ex. 3 to Sonos Reply at 1:05-1:16.

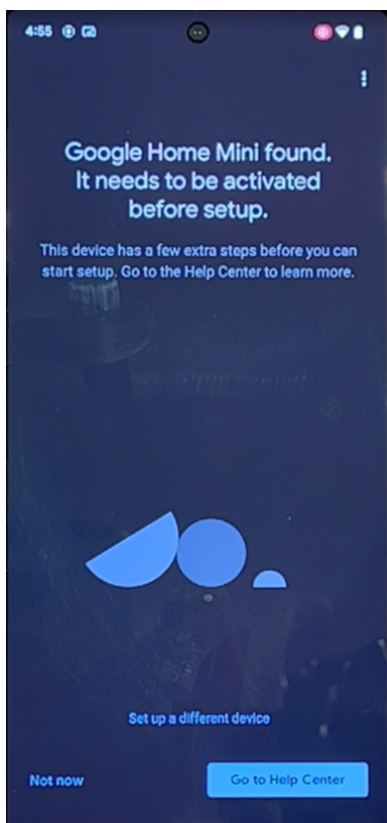
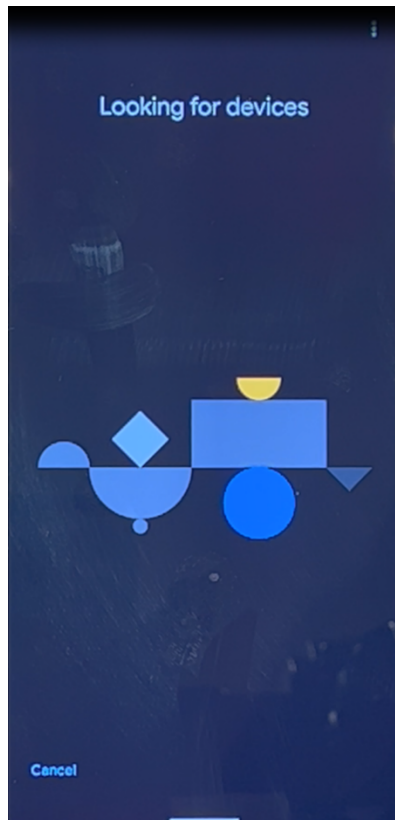
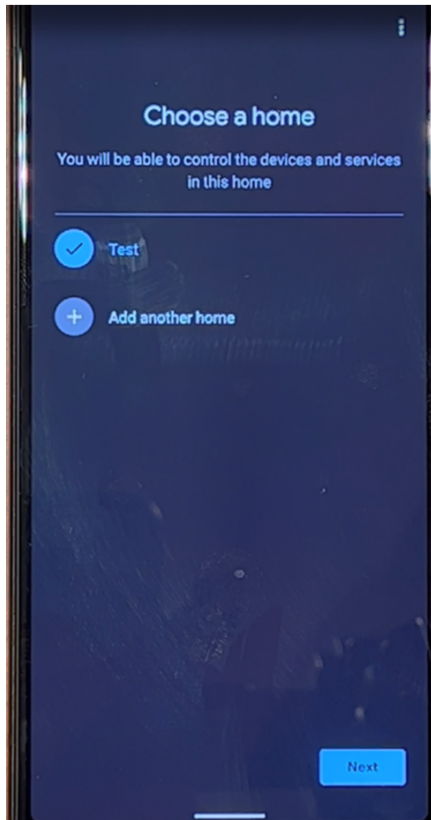


See Sonos Reply at 41; Ex. 4 to Sonos Reply at 0:53 (depicting a Google controller at issue).

This “Set Up Device” screen displays a “Set up Google Home Mini” button on the GUI that can receive a user input indicating that the user wishes to “Set up Google Home Mini” on the secure WLAN. See Sonos Reply at 41; Ex 4 to Sonos Reply at 0:53. When the user presses the “Set up Google Home Mini” button on the Google Home app’s GUI, the Google controller running the Google Home app displays a “choose home screen.” See Ex. 3 to Sonos Reply at 2:32.

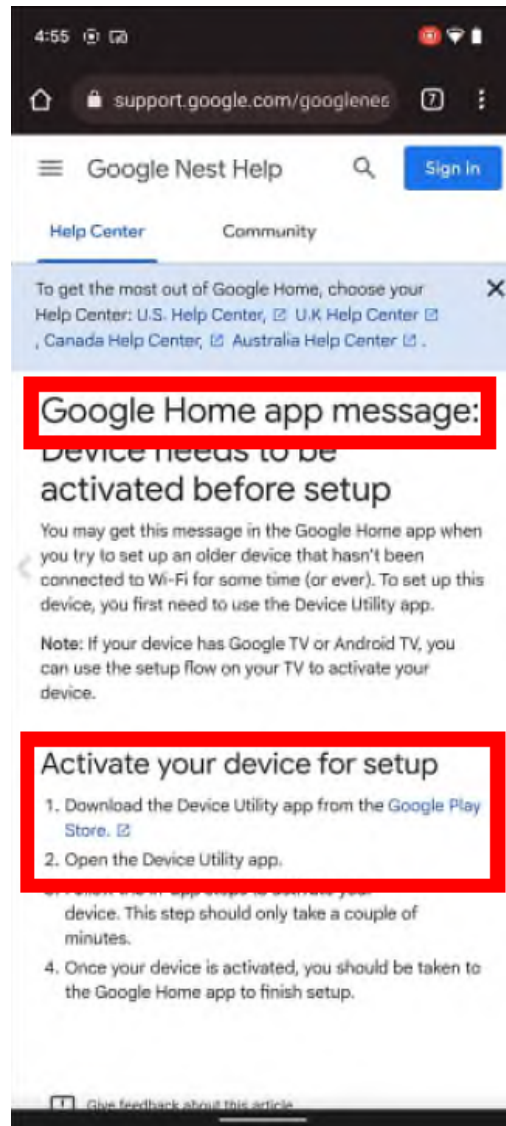
Once a home is selected and the user presses the “Next” button, if the Google audio player being set up is running the legacy firmware such that it [[

]], the Google Home app cannot be used to set up the device and the Google controller running the Google Home app will display a “Looking for devices” screen, followed by a screen instructing the user that the “[Google playback device] needs to be activated before setup”:



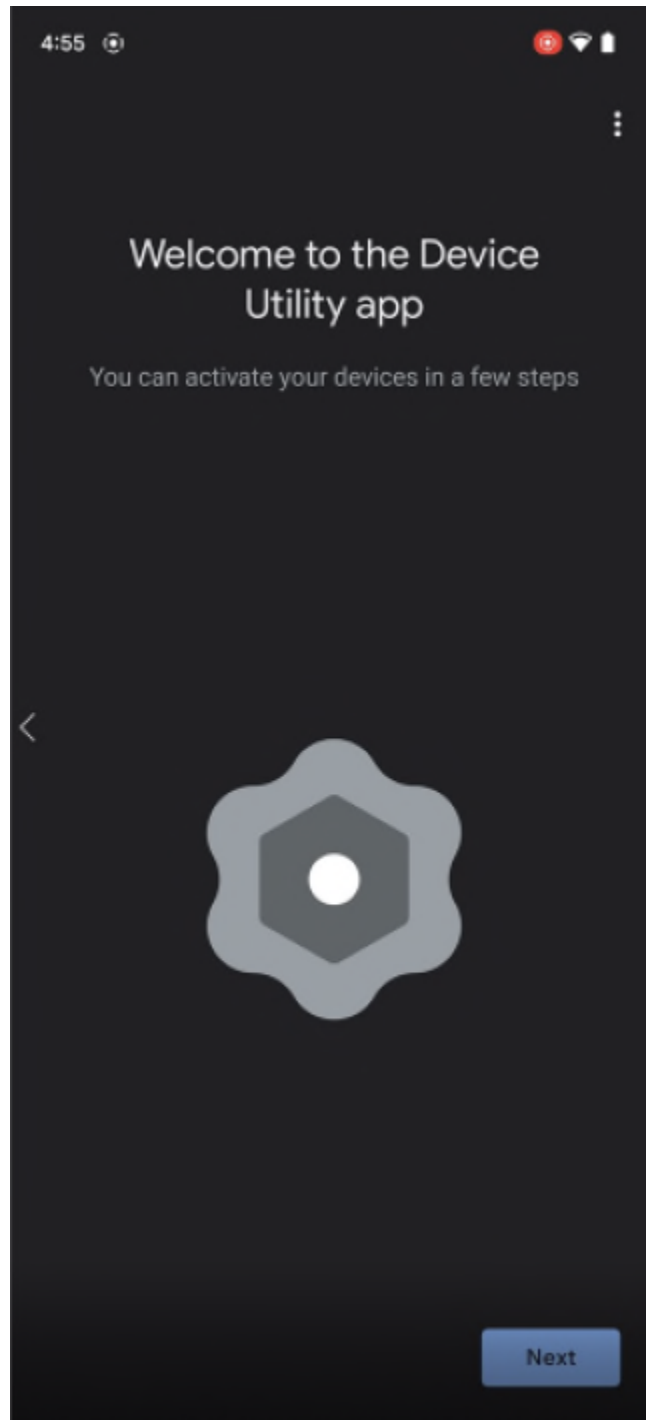
See Ex. 3 to Sonos Reply at 2:32-50; see also Herman Decl. to Google Sur-Reply at ¶¶ 17-18.

When the user presses the “Go to Help Center” button on the GUI, the Google controller opens the Google Nest Help website which provides instructions to “[a]ctivate your [Google playback device] for set up” by “1. Download[ing] the Device Utility app from the Google Play Store... 2. Open the Device Utility app”:



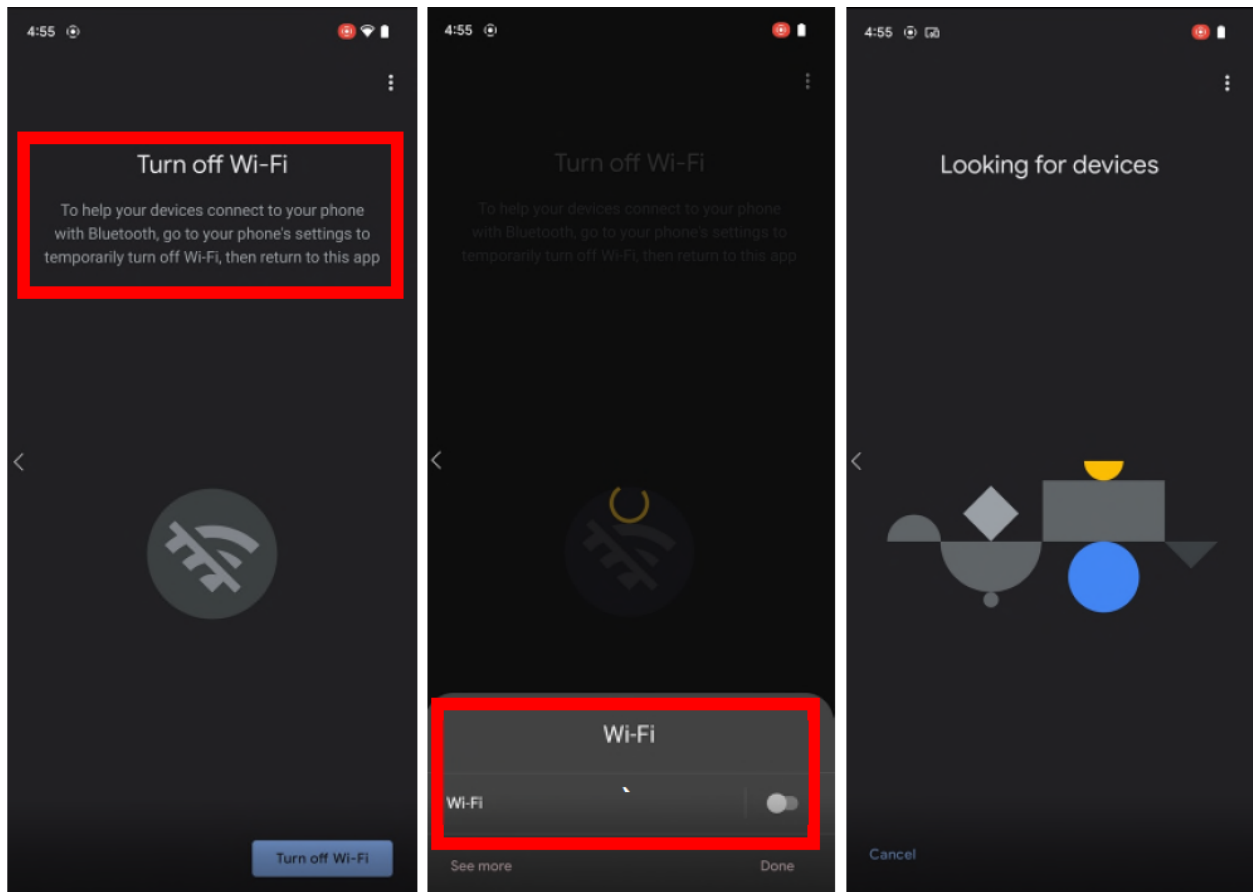
See Sonos Reply at 42 (annotation in original); see also Ex. 4 at 1:15.

After the user has downloaded and opened the DUA on a Google controller, the following “Welcome” screen will be displayed:



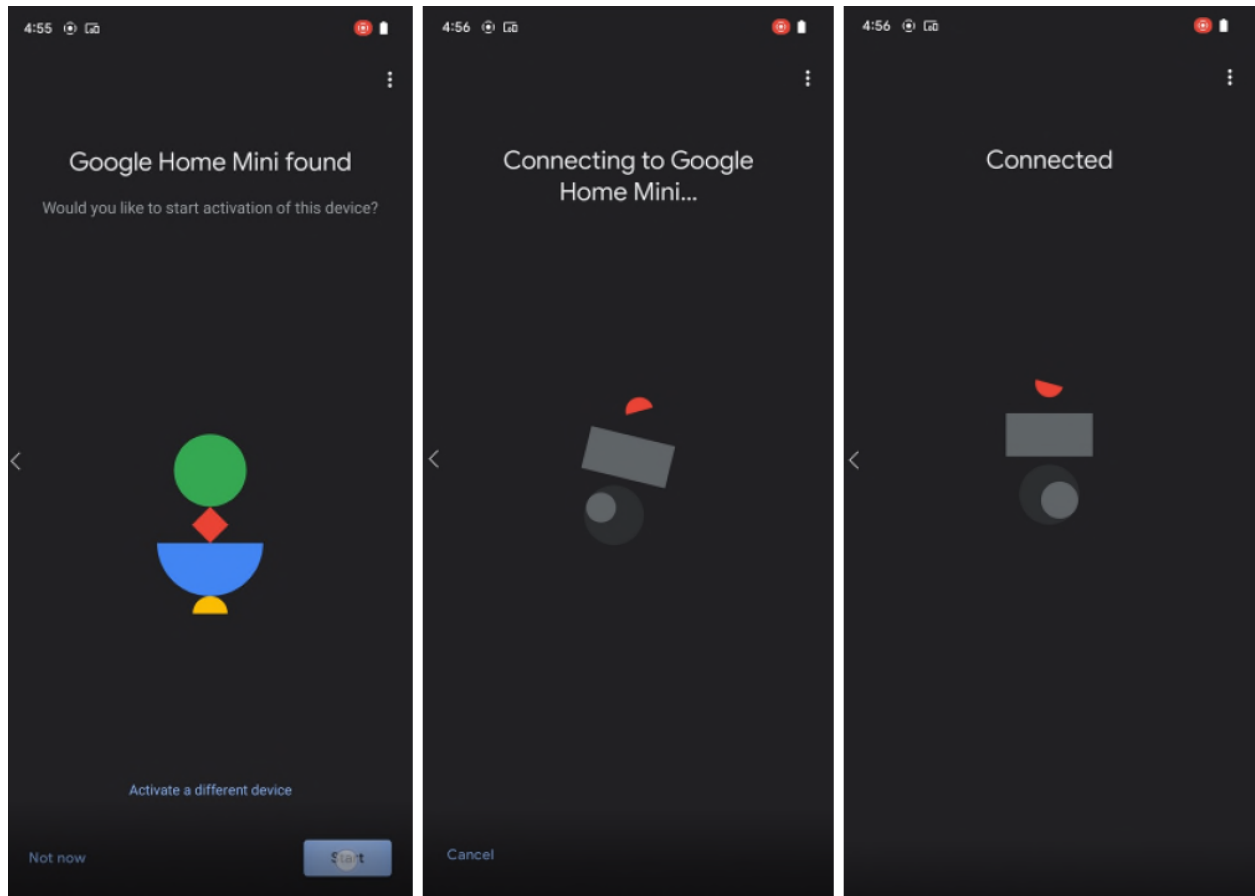
See Ex 4 to Sonos Reply at 1:24; see also Sonos Reply at 42.

After a user presses the “Next” button on the “Welcome” screen, the Google controller running the DUA executes program instructions that require the user to disable Wi-Fi so that the initial communication path does not traverse the access point and the Google controller running the DUA displays the following screens:



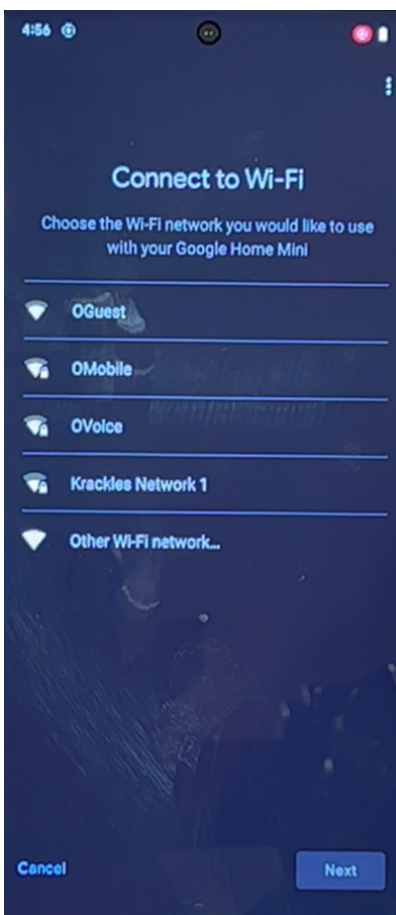
See Sonos Reply at 43 (annotations in original); see also Ex. 4 to Sonos Reply at 1:31-1:43.

After a user disables the Wi-Fi and presses the “Done” button, the Google controller running the DUA app will display an “activation start” screen asking the user if they “[w]ould like to start activation of this device?” Ex. 4 to Sonos Reply at 1:58. When the user presses the “start” button on the “activation start” screen, the Google controller running the DUA executes program instructions to establish a Bluetooth initial communication path with the Google playback device so that it is connected and displays the following screens on the GUI:



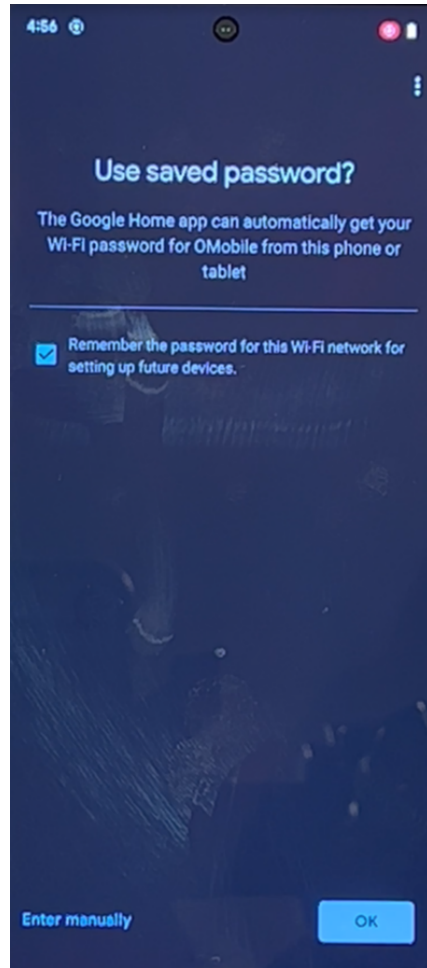
See Sonos Reply at 42; see also Ex 4. to Sonos Reply at 1:58-2:13.

After the Google controller has established a Bluetooth connection with the Google playback device, the Google controller running the DUA will display the following “Connect to Wi-Fi” screen that instructs the user to “Choose the Wi-Fi network you would like to use with your Google [playback device]”:



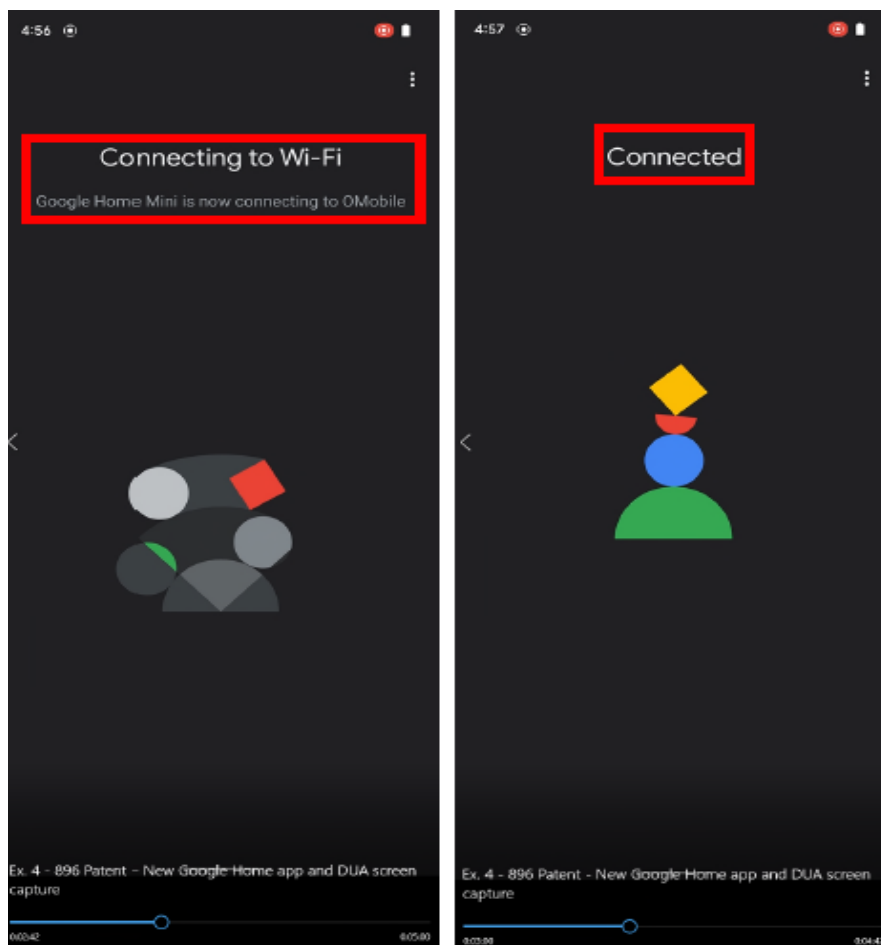
See Ex. 3 to Sonos Reply at 3:56.

After a user selects a Wi-Fi network and presses the “Next” button on the GUI, the Google controller running the DUA will display the following “saved password” screen that instructs the user that “[t]he Google Home app can automatically get your Wi-Fi password for [selected Wi-Fi network] from this phone or tablet” and prompts the user to “[e]nter manually” or press “OK” to use saved password:



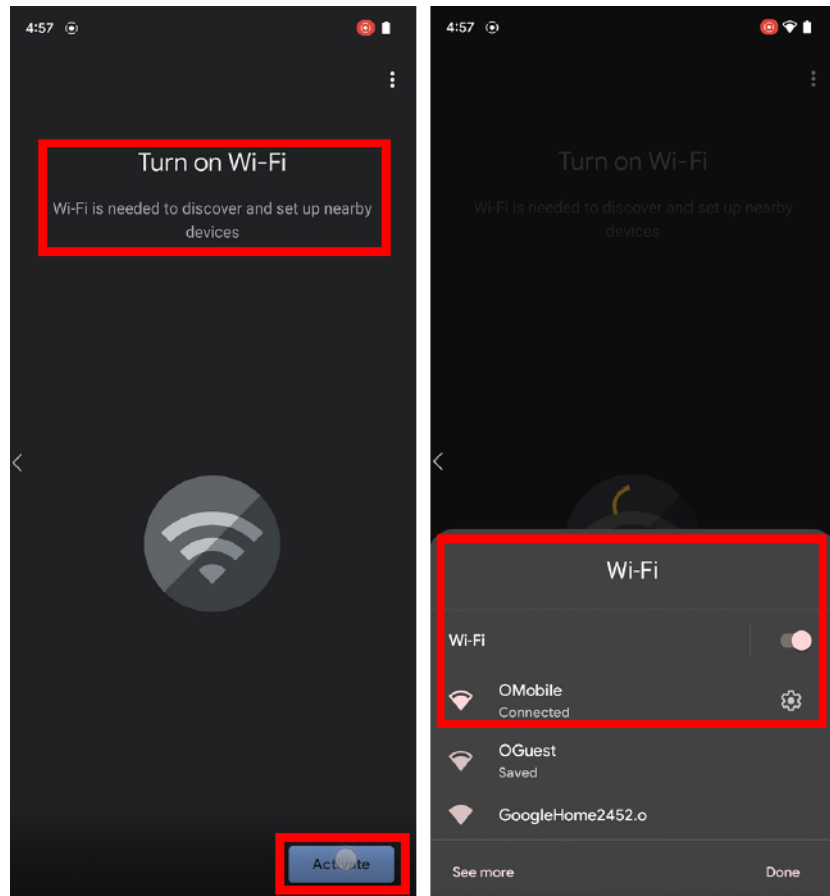
See Ex. 3 to Sonos Reply at 4:04.

When a user presses the “OK” button on the GUI to use a saved password on the Google controller to connect to the secured WLAN, the DUA receives an indication and displays a screen stating that “Google [playback] device is now connecting to [secure WLAN [[and then the DUA receives a message and displays a second screen stating that the Google [playback] device ‘Connected’ to that secured WLAN”:



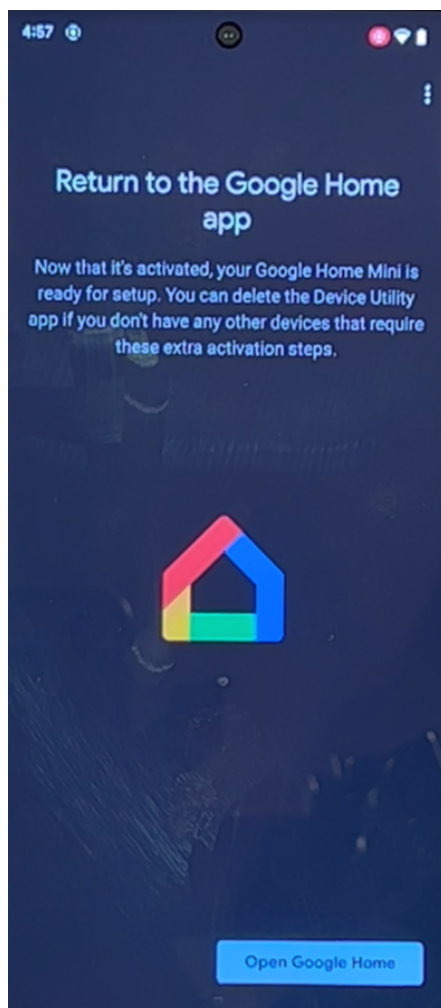
See Sonos Reply at 44-45 (annotations in original); see also Ex. 4 to Sonos Reply at 2:42-3:00.

After the Google controller installed with the new Google Home app and DUA detects that the playback device has connected to the secure WLAN, it displays the following two “Turn on Wi-Fi” screens that instructs the user to turn on the Wi-Fi on the Google controller and connect the Google controller to the secure WLAN:



See Sonos Reply at 46 (annotations in original); see also Ex. 4 to Sonos Reply at 3:02-3:14.

After the user has turned on the Wi-Fi for the Google controller, the Google controller running the DUA will display the following “Return to the Google Home app” screen that informs the user that the “Google [playback device] is ready for setup” in the Google Home app:

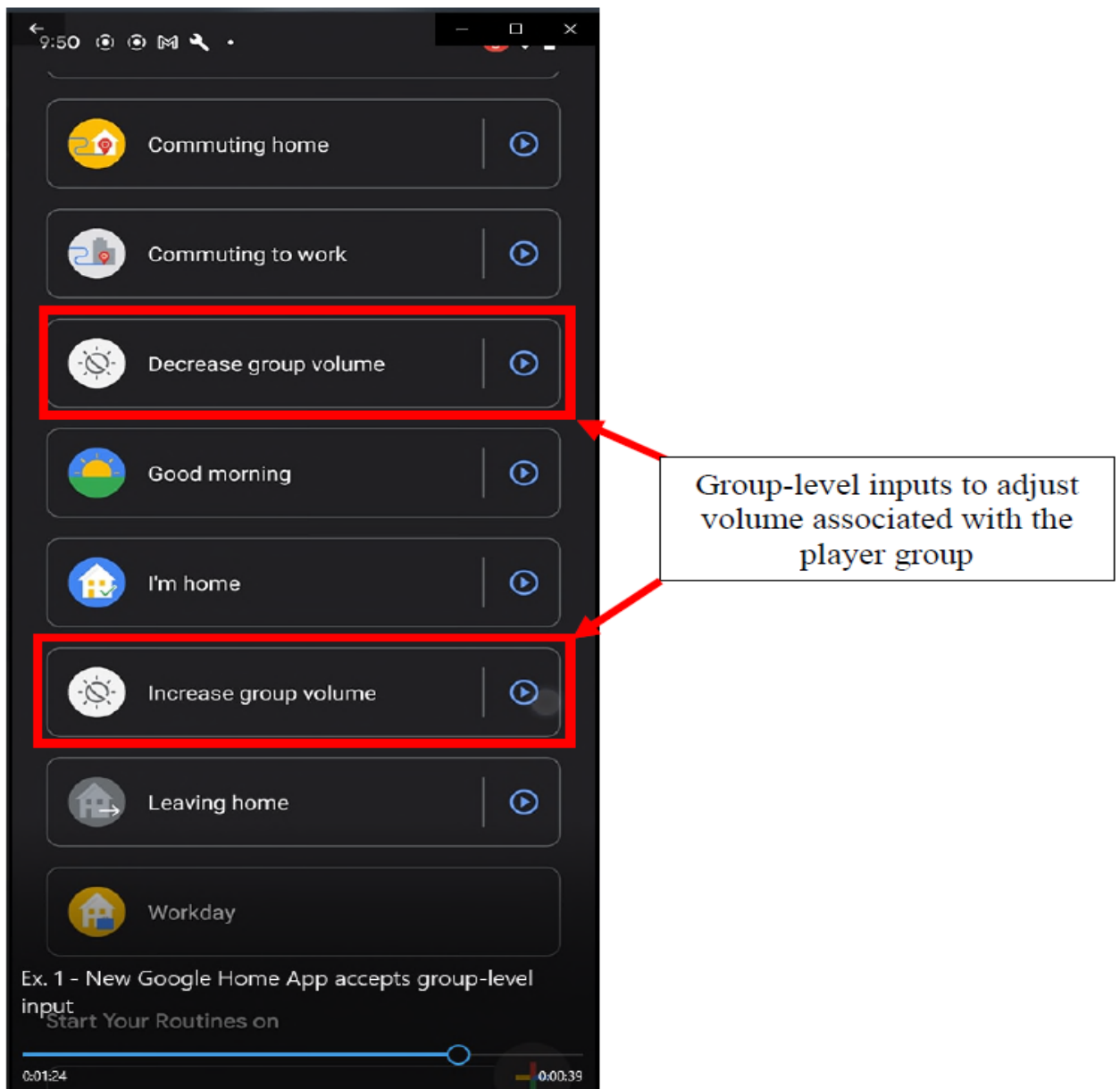


See Ex. 3 to Sonos Reply at 4:56.

b. Google Controllers “Volume Control”

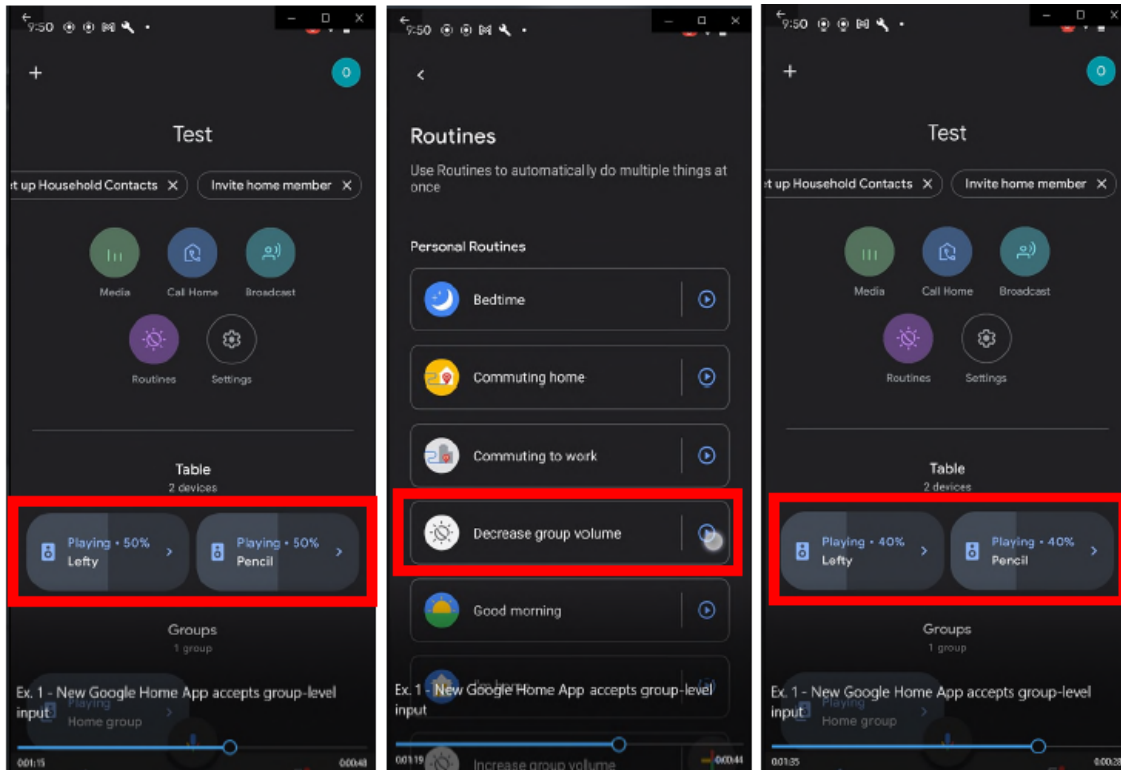
i. Google Controllers at Issue

The articles at issue running the Google Home app have a “Routine” feature that is described by Google’s help website as a way to get “multiple things done automatically.” Sonos Reply at 24-25; Ex. 8 to Sonos Reply. A Routine can be created by opening the Google Home app, tapping Routine and then the + sign, and adding a starter to trigger the new Routine and the action to be performed. Sonos Reply at 25; Ex. 7 to Sonos Reply. A user can create a Routine to adjust the group-level volume of the players in a speaker group. Sonos Reply at 18. The photograph below shows a user-created “Decrease group volume” Routine for decreasing the volume of each player in a player group by 10% and a second user-created “Increase group volume” Routine for increasing the volume of each player in a player group by 10%:



See Sonos Reply at 19-20; Ex. 1 at 1:24.

Once a Routine has been created, the user can access the user-created Routine by pressing the play arrow button or through a voice command. Sonos Reply at 19. The images below show that a 10% decrease in volume occurs for each playback device in a player group after a user presses the play arrow associated with the user-created “Decrease group volume” Routine:



See Sonos Reply at 20; Ex. 1 to Sonos Reply at 1:15-1:35.

II. ISSUE

Whether Google has met its burden to establish that the articles at issue in Sonos' Ruling Request incorporate the features or functionalities of a redesigned product adjudicated by the Commission to be non-infringing, without new or different functionality, such that they are not subject to the 1191 LEO?

III. LAW AND ANALYSIS

A. Section 337 Exclusion Order Administration

The Commission shall investigate any alleged violation of Section 337 to determine, with respect to each investigation conducted by it under this section, whether there is a violation of this section. See 19 U.S.C. § 1337(b)(1) and (c). If the Commission determines, as a result of an investigation under this section, that there is a violation of this section, it shall direct that the articles concerned, imported by any person violating the provision of this section, be excluded from entry into the United States unless the Commission finds based on consideration of the public interest that such articles should not be excluded from entry. See 19 U.S.C. § 1337(d)(1).

When the Commission determines there is a violation of Section 337, it generally issues one of two types of exclusion orders: (1) a limited exclusion order or (2) a general exclusion order. See *Fuji Photo Film Co., Ltd. v. ITC*, 474 F.3d 1281, 1286 (Fed. Cir. 2007). Both types of

orders direct CBP to bar infringing products from entering the country. See Yingbin-Nature (Guangdong) Wood Indus. Co. v. ITC, 535 F.3d 1322, 1330 (Fed Cir. 2008). “A limited exclusion order is ‘limited’ in that it only applies to the specific parties before the Commission in the investigation. In contrast, a general exclusion order bars the importation of infringing products by everyone, regardless of whether they were respondents in the Commission’s investigation.” Id. A general exclusion order is appropriate only if two exceptional circumstances apply. See Kyocera Wireless Corp. v. ITC, 545 F.3d 1340, 1356. A general exclusion order may only be issued if (1) “necessary to prevent circumvention of a limited exclusion order,” or (2) “there is a pattern of violation of this section and it is difficult to identify the source of infringing products.” 19 U.S.C. § 1337(d)(2); see Kyocera, 545 F.3d at 1356 (“If a complainant wishes to obtain an exclusion order operative against articles of non-respondents, it must seek a GEO [general exclusion order] by satisfying the heightened burdens of §§ 1337(d)(2)(A) and (B).”).

In addition to the action taken above, the Commission may issue an order under 19 U.S.C. § 1337(i) directing CBP to seize and forfeit articles attempting entry in violation of an exclusion order if their owner, importer, or consignee previously had articles denied entry on the basis of that exclusion order and received notice that seizure and forfeiture would result from any future attempt to enter articles subject to the same. An exclusion order under § 1337(d)—either limited or general—and a seizure and forfeiture order under § 1337(i) apply at the border only and are operative against articles presented for customs examination or articles conditionally released from customs custody but still subject to a timely demand for redelivery. See 19 U.S.C. §§ 1337(d)(1) (“The Commission shall notify the Secretary of the Treasury of its action under this subsection directing such exclusion from entry, and upon receipt of such notice, the Secretary shall, through the proper officers, refuse such entry.”); id., at (i)(3) (“Upon the attempted entry of articles subject to an order issued under this subsection, the Secretary of the Treasury shall immediately notify all ports of entry of the attempted importation and shall identify the persons notified under paragraph (1)(C).”).

Significantly, unlike district court injunctions, the Commission can issue a general exclusion order that broadly prohibits entry of articles that violate Section 337 of the Tariff Act of 1930 without regard to whether the persons importing such articles were parties to, or were related to parties to, the investigation that led to issuance of the general exclusion order. See Vastfame Camera, Ltd. v. ITC, 386 F.3d 1108, 1114 (Fed. Cir. 2004). The Commission also has recognized that even limited exclusion orders have broader applicability beyond just the parties found to infringe during an investigation. See Certain GPS Devices and Products Containing Same, Inv. No. 337-TA-602, Comm’n Op. at 17, n. 6, Doc ID 317981 (Jan. 2009) (“We do not view the Court’s opinion in Kyocera as affecting the issuance of LEOs [limited exclusion orders] that exclude infringing products made by respondents found to be violating Section 337, but imported by another entity. The exclusionary language in this regard that is traditionally included in LEOs is consistent with 19 U.S.C. § 1337(a)(1)(B)–(D) and 19 U.S.C. § 1337(d)(1).”).

Moreover, “[t]he Commission has consistently issued exclusion orders coextensive with the violation of Section 337 found to exist.” See Certain Erasable Programmable Read Only Memories, Inv. No. 337-TA-276, Enforcement Proceeding, Comm’n Op. at 11, Doc ID 43536 (Aug. 1991) (emphasis added). “[W]hile individual models may be evaluated to determine importation and [violation], the Commission’s jurisdiction extends to all models of [violative]

products that are imported at the time of the Commission's determination and to all such products that will be imported during the life of the remedial orders." See Certain Optical Disk Controller Chips and Chipsets, Inv. No. 337-TA-506, Comm'n Op. at 56-57, USITC Pub. 3935, Doc ID 287263 (July 2007).

B. Burden Under Section 337 Administration

As an initial point, Google argues that, as a matter of law, Sonos rather than Google should bear the burden in this inter partes proceeding. See Google Sur-Reply at 24-25; see also Google Response at 3-4. While "not case-dispositive" in its view, Google primarily raises two arguments as support for its position regarding allocation of the burden in this inter partes proceeding. First, Google argues that, given the posture of this case, it would be "incorrect to assign Google the burden to re-prove non-infringement" since the Commission already found certain Google redesigns not to infringe and because Sonos initiated this proceeding, in Google's view, without a valid basis to suspect a violation of the exclusion order. Id. Second, it argues that the governing legal authority is distinguishable from the present case and, as such, does not support placing the burden on Google. Id. However, Google's arguments misconstrue the question presented in this inter partes proceeding, conflict with well-established principles concerning the nature of Section 337 exclusion orders, and ignore binding Federal Circuit precedent and prior CBP rulings concerning exclusion order administration. Lastly, its view underestimates the significance of the burden question, particularly as it relates to any new features or functionalities found on the articles at issue that are material and unadjudicated.

Contrary to its assertion, the burden is not on Google to "re-prove" non-infringement in the context of this inter partes proceeding but rather to show, consistent with the Commission's findings in the underlying investigation and administration of Section 337 generally, that the products it imports are admissible into the United States. There is no dispute between the parties that the Commission's exclusion order does not apply to "redesign products that were adjudicated in this investigation and found to be non-infringing[.]" LEO at paragraph 2, or that Google is permitted to enter those previously adjudicated redesigned products. See Sonos Ruling Request at 1. Accordingly, in this case, as reflected in the specific questions directed to the parties mentioned above, admissibility turns on whether Google has adhered to the Commission's non-infringement findings by continuing to implement the adjudicated redesigns without, for example, returning to the legacy functionality found to infringe or developing new functionalities that, as unadjudicated features, raise an open question as to infringement and, consequently, an open question whether the products incorporating the new functionalities are entitled to entry for consumption into the United States. The burden to show, as a factual matter, continued implementation of the redesigns is on Google and, if the administrative record reveals new or modified functionality not present in the adjudicated redesigns that is material for purposes of the asserted patent claims, it is at that point when a respondent such as Google would need to establish non-infringement for its new products incorporating these unadjudicated features. In other words, a Commission adjudication of non-infringement does not absolve an importer from having to establish that it has continued to implement the adjudicated redesign. Once the Commission has issued an exclusion order based on finding a violation of Section 337, the burden remains squarely on the importer "as a condition of entry" to establish admissibility for purposes of Section 337. Hyundai Elecs. Indus. Co. v. ITC, 899

F.2d 1204, 1210 (Fed. Cir. 1990). Significantly, Google does not cite or discuss Hyundai and the Federal Circuit's recognition that:

in an appropriate case the Commission can impose a general exclusion order that binds parties and non-parties alike and *effectively shifts to would-be importers of potentially infringing articles, as a condition of entry, the burden of establishing noninfringement* [and that] [t]he rationale underlying the issuance of general exclusion orders--*placing the risk of unfairness associated with a prophylactic order upon potential importers rather than American manufacturers that, vis-a-vis at least some foreign manufacturers and importers, have demonstrated their entitlement to protection from unfair trade practices--applies here [in the context of a limited exclusion order] with increased force.*

Id. (emphasis added).

Moreover, as noted above, the question presented in this specific inter partes proceeding is whether Google is continuing to implement the features or functionalities of the non-infringing redesigned products without any new or other material modifications. Furthermore, with respect to Google's accusation that Sonos has acted improperly in requesting this ruling, as discussed in more detail below, since there is no dispute between the parties that the articles at issue contain a new feature in the form of the Device Utility app that was not before the Commission, Sonos' ruling request does not involve a situation, under the Customs regulations, where no ruling will issue because the question presented is "essentially hypothetical in nature." 19 C.F.R. § 177.7. Instead, Sonos has identified a new feature on the articles at issue in its Ruling Request that appears material in light of the asserted patent claims, that feature has not been adjudicated previously, and, as such, it is appropriate for consideration in an inter partes proceeding under 19 C.F.R. Part 177. The factual context presented here does not call for removing the burden to establish admissibility from Google as the ITC respondent and importer but the EOE Branch may, in its discretion, as it did in this case, take into consideration the question whether the articles at issue "include new or different features or functionalities ... that are relevant to the asserted claims of the underlying patents" when determining the point at which CBP should "prevent the entry for consumption of the articles at issue that include these new or different features or functionalities until they are found not to infringe." EOE Branch Question 3. In appropriate cases, and depending on the relevant facts, that point could be at a preliminary stage in an inter partes proceeding, during the pendency of the proceeding, or at its conclusion.

That the burden remains on Google to establish admissibility by continuing to show that the articles at issue have not returned to the legacy functionality found to infringe or developed new functionality is clear from the Commission's own articulation of its remedial orders, including the Commission Opinion from the underlying investigation in this matter. As recognized in the 1191 investigation, "[t]he Commission, as is customary, does not limit the LEO to covered products that were actually adjudicated to infringe the Asserted Patents, thus ensuring that the exclusion order affords Sonos 'complete relief' and cannot be 'easily circumvented.'" Comm'n Op. at 24. The Commission also noted that "[t]o the extent that Google seeks to import a product that has not been adjudicated as non-infringing in this

proceeding, Google may take advantage of procedures offered by the Commission to obtain such an adjudication under Commission Rules 210.76 (modification) and 210.79 (advisory opinion) or may request a ruling from CBP under 19 C.F.R. Part 177.” *Id.* at 25, n. 19. Despite these statements from the Commission, Google argues that it “has not been able to locate any authority applying that burden to an adjudicated non-infringer who is importing, under sworn certification, the products found not to infringe. Indeed, that would defeat the purpose of the certification.” Google Sur-Reply at 25 (quoting Google Response at 3). However, in addition to the above, the Commission expressly indicated that “Google cannot utilize the certification provision in the order for non-accused products because it applies only to products that have been explicitly adjudicated to be non-infringing.” Comm’n Op. at 25, n. 19. If Google develops a product with new features or functionalities that have not been adjudicated, not only is the ability to certify extinguished as to these new products but the burden to establish non-infringement with respect to those new products (rather than just the burden to show continued implementation of an adjudicated non-infringing redesign) comes into play.

Consistent with the Commission’s position above, CBP has applied a uniform approach regarding the use of a certification when a respondent obtains a non-infringement determination from the Commission in the underlying investigation but a question arises, after an exclusion order has issued, about new or different functionality on the respondent’s products. In HQ H323308, as in this *inter partes* proceeding, the respondent argued that its “products implement[ed] the design-around algorithm that the Commission adjudicated not to infringe during the underlying investigation, such that they could not be subject to exclusion from entry in light of the Commission’s binding determination as to non-infringement. *As a starting point, the parties [did] not disagree that the [respondent’s] products in this Ruling Request contain the design-around functionality, as adjudicated not to infringe at the Commission. However, [the complainant] points out that the [respondent] products in this Ruling Request include changes and new functionality that was not part of the adjudication at the Commission.*” HQ H323308 (dated February 8, 2022) at 13 (emphasis added). The EOE Branch, under the facts presented, ruled that:

on the basis of this functionality that differs from or is in addition to that which was adjudicated at the Commission, ***we find that the Commission’s non-infringement determination does not apply to the products in this Ruling Request, that the burden is on [the respondent] to establish admissibility of these products, and that this inter partes proceeding under 19 CFR Part 177 is the proper means to reach that determination.***

Id. (emphasis added)

As required by 19 U.S.C. § 1625, CBP will apply the framework above in this *inter partes* proceeding. See *Int’l Custom Prods. v. United States*, 748 F.3d 1182, 1185-86, 1187 (Fed. Cir. 2014) (“Section 1625(c) requires Customs to undergo notice and comment procedures before it may issue ‘a proposed interpretive ruling or decision which would — (1) modify . . . or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days.’” and “Once Customs issued the Ruling Letter, [plaintiff] and other importers were entitled ‘to expect certainty’ that Customs ‘w[ould] not unilaterally change’ [its position] ‘without

providing proper notice and an opportunity for comment.” (internal citations omitted)); see also 19 C.F.R. § 177.9(a) (“A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked.”).

Conversely, Google has not identified any legal authority for the proposition that a Commission finding of non-infringement for redesigned products, on top of a finding of infringement for the legacy products, alleviates the burden on the importer, as a condition of entry, to establish admissibility. See Google Sur-Reply at 25. Moreover, Google’s analogy to district court actions and doctrines, see Google Response at 4, is misplaced as the Federal Circuit has recognized the distinction between district court injunctions and Section 337 exclusion orders, particularly in regard to the respective legal authority and scope for each. See Spansion, Inc. v. ITC, 629 F.3d 1331, 1359 (Fed. Cir. 2010) (“Given the different statutory underpinnings for relief before the Commission in Section 337 actions and before the district courts in suits for patent infringement, this court holds that eBay does not apply to Commission remedy determinations under Section 337.”). This distinction between Section 337 exclusion orders under the Tariff Act and district court injunctions under the Patent Act follows “the long-standing principle that *importation is treated differently than domestic activity*.” Id. (emphasis added) (internal citations omitted); see also Buttfeld v. Stranahan, 192 U.S. 470, 493 (1904) (“As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country and the terms upon which a right to import may be exercised.”); Arjay Assocs., Inc. v. Bush, 891 F.2d 894, 896 (Fed. Cir. 1989) (“It is beyond cavil that no one has a constitutional right to conduct foreign commerce in products excluded by Congress.”).

Accordingly, we find that Google, as a general matter, bears the burden to establish admissibility into the United States and, specifically in this inter partes proceeding, to show that the articles at issue incorporate the features or functionalities of a non-infringing redesigned product adjudicated at the Commission and have not returned to the legacy functionality or developed new functionality that is material to the relevant patent claims.

C. Scope and Application of the 1191 LEO

The 1191 LEO excludes from entry for consumption into the United States, entry for consumption from a foreign-trade zone, or withdrawal from a warehouse for consumption “[a]udio players and controllers, components thereof, and products containing the same that infringe one or more of claims 17, 21, 24, and 26 of the ’258 patent; claims 7, 14, and 22-24 of the ’953 patent; claim 10 of the ’959 patent; claims 1, 2, and 5 of the ’949 patent; and claims 1, 5, 6, and 12 of the ’896 patent and are manufactured abroad by or on behalf of, or imported by or on behalf of Respondent or any of its affiliated companies, parents, subsidiaries, agents, or other related business entities, or its successors or assigns[.]” See 1191 LEO at ¶ 4

However, as noted above and in the Commission Opinion, the Commission determined that the 1191 LEO would include an exemption for Google’s redesigned products that were adjudicated the underlying investigation and found not infringe. Comm’n Op. at 23. Specifically, the Commission carved out from the LEO:

- As to the ’258 patent, the redesign ’258 NIA No. 1;
- As to the ’953 patent, the redesign ’953 NIA No. 1;
- As to the ’959 patent, the redesign ’959 NIA No. 4;
- As to the ’949 patent, the ’949 NIA redesigns; and
- As to the ’896 patent, the redesign ’896 NIA No. 2.

Id.

The carve outs for Google’s redesigned products are further reflected in paragraph 2 of the 1191 LEO. Paragraph 2 of the 1191 LEO states:

Covered articles shall not include the Google redesign products that were adjudicated in this investigation and found to be non-infringing (i.e., (i) as to the ’258 patent, the redesign ’258 NIA No. 1; (ii) as to the ’953 patent, the redesign ’953 NIA No. 1; (iii) as to the ’959 patent, the redesign ’959 NIA No. 4; (iv) as to the ’949 patent, the redesigns submitted for adjudication by Google with respect to the ’949 patent; and (v) as to the ’896 patent, the redesign ’896 NIA No. 2).

See 1191 LEO at ¶ 2

In paragraph 4 of the 1191 LEO, the Commission set forth the standard to determine whether an article falls within the exemption provided for in paragraph 2 for redesigns products that are not “covered articles” subject to the exclusion order:

At the discretion of CBP and pursuant to the procedures it establishes, persons seeking to import audio players and controllers, components thereof, and products containing the same that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under paragraph 1 of this Order, including because the products **incorporate the features or functionalities of a redesigned product adjudicated by the Commission in the violation investigation not to infringe, and thus such products do not fall within the scope of this Order.** At its discretion, CBP may require persons who have provided the certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

1191 LEO at ¶ 4 (emphasis added).

The language in paragraph 4 of the 1191 LEO explicitly references “features or functionalities” of a redesigned product that the Commission adjudicated to be non-infringing

and must be read in light of the Commission’s confirmation that “Google cannot utilize the certification provision in the order for non-accused products because it applies only to products that have been explicitly adjudicated to be non-infringing.” Comm’n Op. at 25, n. 19. Accordingly, to determine whether the articles at issue incorporate the features or functionalities of a redesigned product adjudicated by the Commission and determined not to infringe, the EOE Branch asked the parties to address 3 questions:

- 1) What are the features and functionalities in the redesigns that the Commission adjudicated to be non-infringing?
- 2) Whether the articles at issue incorporate the features and functionalities of the redesigns adjudicated that the Commission adjudicated to be non-infringing?
- 3) Whether the articles at issue have new or different features and functionalities that are relevant to the asserted claims of the underlying patents?

In response, Sonos primarily raised two allegations: (1) Google controllers using the Google Home app’s Routine function fail to incorporate the features or functionalities of a redesigned product related to the ’949 patent; and (2) Google controllers using the new DUA fail to incorporate the features or functionalities of a redesigned product related to the ’896 patent. Google disagrees and argues that the articles at issue incorporate the features or functionalities of an adjudicated redesigned product related to the ’949 and ’896 patent. With this backdrop of the proper questions under consideration and the parties’ divergent positions, we will address their respective arguments.

1. The Features and Functionalities Related to the ‘949 Patent

Both parties agree that the features or functionalities of the ’949 redesign that the Commission adjudicated as non-infringing involved the removal of the ability to accept the group level input to adjust a volume associated with a player group as required by limitation 1.4. Google Response at 11 (“The relevant feature/functionality was the removal of any group level input to adjust a volume associated with a player group the ability to accept the ‘group-level’ volume input as required by limitation 1.4.”); Sonos Reply at 8 (“the features and functionalities that caused the ’949 Redesign not to infringe was a change ‘such that their user interfaces cannot accepts the ‘group-level’ volume input required by limitation [1.4].’”). In the underlying investigation, the Commission adopted the CALJ’s finding that, for the ’949 patent, Google “redesigned every accused device such that their user interfaces cannot accept the ‘group-level’ volume input required by limitation [1.4].” Comm’n Op. at 7, n. 8; FID at 132.

Google also argues that the features or functionalities of an adjudicated redesign as it relates to the ’949 patent includes the features or functionalities of the “accused Pixel Controllers installed with either the YouTube Music or Google Play Music application” because they “‘do not infringe’ any claim of the ’949 patent”. Google Response at 10-11 (quoting Comm’n at 6). The Commission’s language references whether an article incorporates the features or functionalities of “a redesigned product” and does not expressly limit the inquiry to the features or functionalities of the ’949 redesign. 1191 LEO ¶ 4. Therefore, we find that the features and

functionalities of the non-infringing Google Play Music or YouTube apps are also features or functionalities of a redesigned Google controller adjudicated during the underlying investigation.

Google further notes that, beyond the '949 NIA redesigns that the Commission found did not satisfy limitation 1.4 of claim 1 from the '949 patent, the features or functionalities of the non-infringing YouTube Music app and Google Play Music app represent additional Commission findings on non-infringement because they “do not allow users to form groups” as required by limitation 1.2 of claim 1 of the '949 patent. FID at 125-26; Google Response at 12. As such, in the present case, we find that an article with the features and functionalities of a redesigned product adjudicated to be non-infringing by either (1) incorporating the '949 redesign (regarding user interfaces that cannot accept the “group-level” volume input required by limitation 1.4.) or (2) incorporating the features and functionalities of the non-infringing Google Play Music and YouTube Music apps (such that they do not allow users to form player groups as required by limitation 1.2) would not be subject to the exclusion order. However, Google does not appear to argue that the Google Home app running on the articles at issue does not allow users to form player groups, as required by limitation 1.2 of claim 1 of the '949. Therefore, the only question in this ruling request as to the '949 patent is whether the articles at issue incorporate the features and functionalities of the '949 redesign (such that the user interfaces cannot accept the ‘group-level’ volume input required by limitation 1.4).

The dispute between the parties in this inter partes proceeding is centered only on the Routine feature described above. Sonos Reply at 21 (“Sonos agree[s] that none of the other changes to the Google Home app are relevant to whether or not Google controllers infringe.”). Google argues that “CBP is bound to find non-infringement” because “[t]he ITC ruled that Google’s redesign devices—which contained the same feature that Sonos now accuses—did not infringe.” Google has shown that the Routine feature, in an unmodified form, was present on Google controllers manufactured since 2018 and including on the products adjudicated in the underlying ITC investigation. Google Sur-Reply at 7; Lee Decl. to Google Sur-Reply at ¶¶ 5-9 (“Google introduced the [Routine feature] that I have described in the preceding paragraphs in approximately 2018. I am not aware of any changes to this functionality since that time.”)

In HQ H242025, CBP addressed a similar issue regarding application of a limited exclusion order in connection with features present on legacy products that were not specifically accused or found to infringe during the underlying investigation at Commission. In that ruling, the complainant had accused a specific application program running on the legacy mobile devices of infringing the asserted patent claims. The Commission found infringement based solely on this infringement contention. However, after the Commission issued the exclusion order, the complainant argued that a different application program, also present on the same legacy devices but not accused or found to infringe, subjected any imported articles with the non-accused application program to the exclusion order. CBP articulated its position that an article should not be “refuse[d] entry on the basis of features that were present on the accused devices at the time of the ITC investigation but were not specifically accused and found to satisfy the limitations in the asserted patent claims identified in the exclusion order.” HQ H242025 at 9 (June 24, 2013). Accordingly, CBP will not refuse entry on the basis of the Routine feature as it was present on the accused products, including the redesigned products found not to infringe, from the underlying investigation at the Commission but were not specifically accused and found

to satisfy a limitation in the asserted patent claims identified in the exclusion order. As noted previously in this ruling, 19 U.S.C. § 1625 requires that CBP continue to apply this position in this inter partes proceeding. See Int'l Custom Prods., 748 F.3d at 1185-86, 1187.

2. The Features and Functionalities Related to the '896 Patent

The parties disagree on the features or functionalities of the '896 NIA No. 2 redesign that the Commission adjudicated to be non-infringing. Google argues that the features or functionalities of the '896 NIA No. 2 “[

].” Google Sur-Reply at 11. Google further argues that the '896 NIA No. 2 redesign has no “requirement ... for Google to [

] *all* applications available for Pixel devices, whether released by Google or third parties, because only the Google Home app was relevant to the ITC proceeding.” Google Sur-Reply at 14 (emphasis in original). In support of this argument, Google notes that Sonos only accused the Google Home app of infringement such that “[t]he ‘Accused Products’ at issue in the ITC investigation were Google Pixel smartphones, tablets, and computers ‘installed with the Google Home application.’” Google Sur-Reply at 14-15 (quoting Comm’n Op. 12).

Sonos disagrees and argues that the features or functionalities of '896 NIA No. 2 should not be “limited to the new Google Home app”. Sonos Reply at 33. Further, Sonos argues that the primary aspect of the '896 NIA No. 2 is that it “[

]” Sonos Reply at 31 (quoting Comm’n Op. At 7, n.9).

Google responds that “the DUA contains no features or functionalities that are relevant to the asserted claims of the underlying patents[.]” Google Response at 19. However, the '896 patent specifically relates to “techniques for connecting various devices to a network for secure communications with a minimum of human interaction and technical ability.” FID at 150 (citation omitted); see also '896 Patent Abstract. And Google explains that the DUA is used to “help users set up older player devices on a network.” Google Response at 18. Additionally, as Sonos points out, “the DUA includes [

]” Sonos Reply at 34; Ex. 8 at SC-GOOG-SONOSITC011987, at lines 71-91 and 38-69.

Taking the above arguments into consideration, we highlight two points. First, it is undisputed that, in operation on the articles at issue, the updated Google Home app [

]” Google Sur-Reply at 11; Sonos Reply at 46-47 (“[

]”); Herman Decl. of Google Sur-Reply ¶¶ 6-8 (“The redesigned Google Home application []”). The source code file that was previously used to [] is no longer part of the source code repository for the redesigned Google Home application.”).

Second, Sonos argues that the new DUA does not incorporate the features and functionalities of the '896 NIA No. 2 redesign because "Google's new Device Utility app includes [REDACTED]." Sonos Reply at 33. Sonos further argues that Google "controllers with the new Google Home and DUA apps [practice limitation 1.7]," like the original Google Home app, because "it sends both the network identifier and security key in a single message and [REDACTED]." *Id.* Specifically, Sonos argues that Google "[REDACTED]." Sonos Reply at 33-34. As support for this argument, Sonos includes Exhibit 8, which is an excerpt from the DUA source code showing the creation of the [REDACTED] that includes both the identifier and security key. Ex. 8 to Sonos Reply at SC-GOOG-SONOSITC011987, at lines 71-91 and 38-69.

Google and its experts do not contest that the DUA sends both the network identifier and security key in a single message as required by limitation 1.7 of the '896 patent. Google Response at 18; Google Sur-Reply at 14; Jeffay Decl. ¶¶ 14-16. Google also provides a declaration from a Google Engineering Director that acknowledges that "[t]he Device Utility app [REDACTED] needs to be used" for "[Google playback devices] running legacy/older versions of firmware [which] requires [REDACTED] in order to be set up[.]" Herman Decl. at ¶ 16 ("A device running legacy/older versions of firmware requires [REDACTED] in order to be set up, which the redesigned Google Home application is incapable of transmitting. If a particular device is still running legacy firmware, that device cannot be set up through the redesigned Google Home application. The Device Utility application ('DUA') needs to be used for those devices that have not received firmware updates and are still running legacy firmware.")

Significantly, in the underlying investigation, the Commission adopted the CALJ's finding that the '896 NIA No. 2 redesign [REDACTED]

[REDACTED]" Comm'n Op. at 7, n. 9 (quoting FID at 164). Moreover, the Commission's language regarding the '896 NIA No. 2 redesign does not limit the features or functionalities of the redesign to the Google Home app. It would be anomalous to allow importation of a purported redesigned product that removes the feature or functionality for a particular application but reinserts it in connection with a separate application. Therefore, as Google does not dispute that the Device Utility app not only permits a single message containing the network parameters but [REDACTED], we find that Google has not met its burden to show the articles at issue implement the '896 NIA No. 2 redesign or that they are without modification in the form of new or different features or functionalities.

Lastly, Google's reliance on its certification as a basis for the EOE Branch to reach an opposite holding in this inter partes proceeding is without merit. If reliance on a certification was dispositive, it would allow a respondent to self-judge that it was complying with the Commission's remedial orders. CBP has previously refused to permit such a self-certification. See Wirtgen Am., Inc. v. United States, 443 F. Supp. 3d 198, 208 (D.D.C. 2020) ("Customs refused to accept Wirtgen's self-certification stat[ing] that the articles being imported are not

subject to the exclusion order.”) (internal citation omitted). Moreover, the language of the certification that Google signed, on its face, explains that “this certification is done not as a matter of right but at the discretion and acceptance of U.S. Customs and Border Protection and does not preclude the future examination or detention of any imported merchandise.” See Certification at 3, Exhibit A to Google Response. Accordingly, the existence of a certification, standing alone, does not conclusively establish admissibility or satisfy Google’s burden under Section 337 or in this inter partes proceeding that its products implement a non-infringing redesign. This is consistent with prior EOE Branch rulings that distinguish administrative rulings under 19 C.F.R. Part 177, which constitute admissibility determinations, from the exercise of CBP’s discretion to accept a certification. See HQ H323308 (dated February 8, 2022) at 15, n. 6 (where it appeared a party “conflated rulings under 19 C.F.R. Part 177 with certifications. A favorable ruling under 19 C.F.R. Part 177 may provide a basis for using a certification, but rulings under 19 C.F.R. Part 177 and certifications are distinct. For example, rulings issued under 19 C.F.R. Part 177 related to section 337 exclusion orders generally address the question whether an importer or other interested party has met its burden to establish non-infringement.”).

The EOE Branch recognizes that Google has certain non-infringement arguments concerning the operation of the Device Utility app that focus on other claim limitations in the ‘896 patent rather than limitation 1.7 from claim 1 of the ‘896 patent (which represents the limitation that the ‘896 NIA No.2 redesign was specifically found not to satisfy). See Google Response at 18; Google Sur-Reply at 14 (“First, the DUA is not ‘an application for controlling one or more playback devices,’ as required by claim 1 of the ‘896 patent. Jeffay Decl. ¶ 13. Second, because the DUA requires the user to disable Wi-Fi or disconnect from any WLAN after launch, the DUA is not ‘operating on a secure [WLAN]’ when receiving any claimed ‘user input’ or the claimed ‘first message’ as claim 1 requires. Jeffay Decl. ¶¶ 14-16.”); Jeffay Decl. at ¶ 13 (“[T]he DUA does not meet at least three distinct limitations of claim 1 of the ‘896 patent: (1) it is not ‘an application for controlling one or more playback devices’ under Sonos’ interpretation of that term [as required by limitation 1.5]; (2) it does not receive the claimed ‘user input’ or the claimed ‘first message’ ‘while operating on a secure wireless local area network (WLAN)’ [as required by limitation 1.5]; and (3) it does not ‘transmit[] a response to the first message[]’ [as required by limitation 1.6]”). This ruling takes no position on the merits of those non-infringement arguments and only notes that those arguments are outside the scope of this inter partes proceeding as well as the questions directed to the parties and presented in Sonos’ ruling request.

On this basis, we find that the articles at issue running the new DUA can send both the network identifier and security key in a single message as required by limitation 1.7. Accordingly, we find that Google has failed to show that the articles at issue incorporate the features or functionalities of the ‘896 NIA No.2 redesign. Because the Google controllers running the new DUA can send both the network identifier and security key in a single message, it cannot be said that the articles at issue are implementing the non-infringing ‘896 NIA No. 2 redesign as the primary aspect of the redesign is [

], rather than transmitting both network parameters in a single message, as taught by limitation 1.7 of the ‘896 patent. For the reasons above, Google has not met its burden to show that the articles at issue incorporate the features and functionalities of a redesign adjudicated by the Commission to be non-infringing.

IV. HOLDING

We find that Google has met its burden to establish admissibility with respect to the '949 patent but that Google has not met its burden to establish that the articles at issue incorporate the features or functionalities of a redesigned product adjudicated by the Commission not to infringe the '896 patent. Accordingly, we find that the articles do not fall outside the scope of the 1191 LEO. Thus, it is CBP's position that the articles at issue are subject to exclusion from entry for consumption based on the 1191 LEO until Google: (1) disables or renders inoperable the Device Utility app such that it can no longer be used with the articles at issue and provide notice of this action or (2) establishes non-infringement for the articles at issue pursuant to an ancillary proceeding at the Commission or an inter partes proceeding requested from CBP under 19 C.F.R. Part 177 that addresses operation of the Device Utility app on the articles at issue. As stated previously, Google may concurrently pursue options (1) and (2).

Additionally, for the reasons mentioned above, we find that Google audio players such as Chromecast, Chromecast Ultra, Chromecast Audio, Home Mini, Nest Mini, Home, Home Max, Home Hub, Nest Hub, Nest Hub Max, and Nest Wifi Point are not subject to exclusion from entry and, for purposes of Section 337, may be entered for consumption.

The decision is limited to the specific facts set forth herein. If articles differ in any material way from the articles at issue described above, or if future importations vary from the facts stipulated to herein, this decision shall not be binding on CBP as provided for in 19 C.F.R. §§ 177.2(b)(1), (2), (4), and 177.9(b)(1) and (2).

Under 19 C.F.R. Part 177, CBP may modify or revoke a ruling that has been in effect for less than 60 days by giving written notice of the modification or revocation to the person who received the original ruling. Accordingly, CBP has authority to take appropriate action in response to Google pursuing the options discussed above or if either party seeks reconsideration. See 19 C.F.R. § 177.12.

Sincerely,

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