UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Before the Honorable Robert L. Barton, Jr.
Administrative Law Judge

In the Matter of **CERTAIN PERSONAL COMPUTER/ CONSUMER ELECTRONIC CONVERGENT DEVICES, COMPONENTS THEREOF, AND PRODUCTS CONTAINING SAME**	**Inv. No. 337-TA-558**

ORDER NO. 6: INITIAL DETERMINATION ORDERING TEMPORARY STAY

(February 7, 2006)

I. PROCEDURAL HISTORY

On July 20, 2004, the patent at issue in this investigation, U.S. Patent No. 6,765,788 ("the '788 patent"), issued. On November 15, 2005, a petition for *ex parte* reexamination of the '788 patent was filed by Daniel R. McClure with the United States Patent and Trademark Office ("PTO"). Complaint ¶ 58, p.14, Exh. 19. On February 9, 2005, the PTO granted the petition, and stated that all ten claims would be reexamined and that several items of prior art not considered by the PTO during the original prosecution raised new questions of patentability. Complaint ¶ 58, p.14, Exh. 19. On August 15, 2005, InterVideo Technology Corporation ("Complainant" or "InterVideo") filed a lawsuit against Dell, Inc. in the United States District Court for the Northern District of California. On November 15, 2005, Defendant Dell, Inc. filed a motion to stay the litigation pending the reexamination. On November 30, 2005, the PTO issued a First Office Action rejecting all ten claims of the '788 patent on two separate bases. Complaint ¶ 58, p.14, Exh. 19. On December 6, 2005, InterVideo filed a complaint with the United States International Trade Commission ("ITC") alleging

violations of section 337, 19 U.S.C. § 1337, in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain personal computer/consumer electronic convergent devices, components thereof, and products containing same by reason of infringement of claims 1-10 of the '788 patent. On January 4, 2006, the Notice of Investigation ("the Notice") was published in the Federal Register. 71 Fed. Reg. 363-364 (January 4, 2006). The Notice states that "[t]he presiding Administrative Law Judge shall set the target date pursuant to Commission Rule 210.51, 19 C.F.R. § 210.51, and, as soon as is practicable, pursuant to 19 C.F.R. § 210.42(c), issue an Initial Determination (ID) concerning whether to stay the proceedings in light of the reexamination of the '788 patent." Id.

On January 4, 2006, I issued Order No. 2 in which I scheduled a pre-hearing conference in this investigation for January 25, 2006. In order to facilitate a discussion on the issue of whether or not the proceedings should be stayed pending resolution of the *ex parte* reexamination, I required the parties to submit a proposed procedural schedule to me by January 18, 2006. On January 18, 2006, Respondents and Staff filed a Joint Response to Order No. 2 ("Joint Response"), and Complainant filed a separate response to Order No. 2. In the Joint Response, Respondents ask that I stay the proceedings for six months (i.e., until July 4, 2006), and Staff asks that I stay the proceedings for three months (i.e., until April 4, 2006). Joint Response at 2. In Complainant's submission, Complainant contends that a stay is not appropriate for this investigation and proposes that a fifteen-month target date be set for this investigation. Complainant Response at 1. Although Respondents suggested a target date of eighteen months, in Order No. 5, issued on February 1, 2006, I concurred with the suggestions of Complainant and Staff and set a target date of fifteen months for this investigation.

On January 23, 2006, Respondent Dell, Inc. ("Dell") filed a response to the complaint and Notice of Investigation. On January 23, 2006, Respondent Cyberlink.com filed its response to the complaint and Notice of Investigation. On January 26, 2006, Dell filed a motion to amend its response to the complaint and Notice of Investigation [558-001]. On January 30, 2006, Respondent Cyberlink Corporation filed its response to the complaint and Notice of Investigation.

In the Joint Response Staff stated that InterVideo's response to the First Office Action was due January 30, 2006, and therefore Staff proposed that the prehearing conference scheduled for January 25 be postponed a week to February 1, so that the Judge and the parties would have the opportunity to address InterVideo's response to the PTO. In Order No. 3, issued on January 20, I adopted that suggestion and rescheduled the conference for February 1. I also required InterVideo to provide me and the parties with a copy of its response to the PTO. On January 30, 2006, InterVideo filed a Reply to the First Office Action with the PTO. In this Reply, InterVideo amended claims 1 and 6 of the '788 patent (the only independent claims) and added claims 11-22.

On February 1, 2006, I held a pre-hearing conference to discuss the issue of a stay. The conference lasted approximately three hours, and I allowed all parties to this investigation unlimited oral argument. Complainant InterVideo requested the opportunity to file a brief following the conference, which was opposed by the Respondents and Staff. Tr. at 108-109. In view of the fact that I allowed prior filings by the parties, and the fact that the parties were allowed lengthy oral argument, and the need to issue a prompt decision, I declined to receive further briefing. Tr. at 109.

II. DISCUSSION

A. Statutory and Regulatory Authority to Stay Proceedings

In the Notice, the Commission required the presiding Administrative Law Judge ("ALJ") to issue, as soon as practicable, an Initial Determination concerning whether to stay the proceedings in light of the reexamination of the '788 patent. Although Complainant does not contend that the Commission or the Judge lacks authority to stay the proceeding, (Tr. At 85-86), nevertheless the first issue to consider is whether I have the statutory or regulatory authority to issue a stay. This requires a brief discussion of recent developments concerning the statute governing this proceeding. See 19 U.S.C. § 1337.

Prior to the Uruguay Round Agreements Act, the Commission had the authority to suspend investigations in which the patent(s)-in-suit were undergoing a reexamination or reissue proceeding before the PTO or were the subject of concurrent proceedings in a district court. See Certain Monoclonal Antibodies Used for Therapeutically Treating Humans Having Gram Negative Infections, Inv. No. 337-TA-323, Commission Opinion at 2-3, 1991 WL 788550 (U.S.I.T.C. June 28, 1991) (suspending investigation due to impending decision by district court); see also Certain Cryogenic Ultramicrotome Apparatus and Components Thereof, Inv. No. 337-TA-256, Commission Opinion, 52 Fed. Reg. 13324 (U.S.I.T.C. April 22, 1987) (deciding not to review Initial Determination of presiding ALJ to suspend the investigation during reexamination of patent-in-suit); Certain Apparatus for Flow Injection Analysis and Components Thereof, Inv. No. 337-TA-151, Commission Action at 2 (U.S.I.T.C. May 7, 1984) ("Flow Injection") (suspending investigation until completion of reexamination proceeding); Certain High-Voltage Circuit Interrupters and Components Thereof, Inv. No. 337-TA-64, Commission Notice and Order of Suspension of

Investigation, 204 U.S.P.Q. 50, 53 (U.S.I.T.C. November 16, 1979) ("High-Voltage") (reversing ALJ's decision denying a stay of the investigation after Office Action in a reissue proceeding at the PTO cancelled all claims at issue). This authority was exercised at the discretion of the Commission and was based on the legislative history of 19 U.S.C. 1337 (b)(1) as established by the Trade Act of 1974.

> The provision for the tolling of the running of the time limits provided by this amended section is intended to apply to situations where the section 337 proceedings are suspended due to concurrent proceedings involving similar issues concerning the same subject matter before a court or agency of the United States. Such suspension of proceedings may be undertaken by the Commission, as an exercise of its own discretion.

S. Rpt. 93-1298, 93d Cong., 2d Sess. 194-195 (1974).

In deference to the PTO, the government agency responsible for issuing patents, the Commission often granted suspensions when the sole patent-in-suit was undergoing reexam or reissue proceedings and the claims at issue had been cancelled. See, e.g., Flow Injection at 2; High-Voltage at 53. However, this was not the sole determining factor, and the Commission analyzed multiple factors to determine whether a suspension was appropriate, including: 1) the similarity of issues between the section 337 investigation and the concurrent proceeding; 2) the probability that the concurrent proceeding would render a final decision dispositive of some or all of the section 337 issues; 3) a complainant's interest in resolution; 4) a respondent's interest in avoiding expensive and duplicative litigation; 5) preservation of Commission resources; and 6) avoiding duplicative government proceedings on key issues. Certain Diltiazem Hydrochloride and Diltiazem Preparations, Inv. No. 337-TA-349, Order No. 33, Initial Determination at 3-4, 1993 WL 852935 (U.S.I.T.C. November 24, 1993) (unreviewed by Commission) ("Diltiazem"); Certain Card Data

Imprinters and Components Thereof, Inv. No. 337-TA-104, Order No. 4 at 2, 1981 WL 178550 (U.S.I.T.C. June 29, 1981) (Westlaw pagination) (denying stay where a single claim of one patent-in-suit was cancelled during reissue proceeding), Certain Card Data Imprinters and Components Thereof, Inv. No. 337-TA-104, Order No. 123 at 3, 1982 WL 212960 (U.S.I.T.C. January 19, 1982) (Westlaw pagination); High-Voltage at 52.

Effective January 1, 1995, the Uruguay Round Agreements Act § 321, Pub. L. 103-465, 108 Stat. 4809 (1994), limited the authority of the Commission to suspend section 337 investigations by removing language from section 1337 (b)(1). These amendments were made in response to a determination by a General Agreement on Tariffs and Trade (GATT) committee that some of the procedural aspects of section 337 investigations "violated the national treatment obligation of Article III of GATT 1947." S. Rpt. 103-412, 103d Cong., 2d Sess. 118 (1994). One of the procedural aspects altered by these amendments were the strict time limits. The time limits were eliminated, but Congress required the ITC "to conclude its investigation at the earliest practicable time" and also required that a target date for a final determination be set "within 45 days of the initiation of an investigation." Id. at 119. The committee noted that "these requirements parallel procedures set forth in the Federal Rules of Civil Procedure to provide district courts with various means of expediting litigation. Id. The committee also noted that, despite these amendments "the ITC will nonetheless normally complete its investigations in approximately the same amount of time as is currently the practice." Id. (emphasis added).

According to the Commission's interpretation of the statutory amendments, while a suspension is no longer appropriate where all claims at issue have been canceled during reexam or reissue proceedings, such as in Diltiazem and High-Voltage, extension of the target date may be

utilized to achieve the same result. In adopting the current version of 19 C.F.R. § 210.23, which governs when suspensions are appropriate, the Commission stated:

> This section is revised to reflect amendments to 19 U.S.C. § 1337(b)(1), which eliminate the authority of the Commission to suspend an investigation "because of proceedings in a court or agency of the United States involving similar questions concerning the subject matter" of the investigation.... The need for an investigation to be suspended no longer exists insofar as the statutory deadline for concluding the permanent relief phase has been eliminated. Circumstances that would have warranted suspension under the old rules may warrant an extension of the target date for completing the investigation under these amendments.

59 Fed. Reg. 67622, 67626 (1994) (emphasis added).

Following these amendments, the Commission and Judges at the ITC have exercised their authority to issue a stay of proceedings under "appropriate circumstances." See Certain Semiconductor Chips With Minimized Package Size and Products Containing Same, Inv. No. 337-TA-432, Commission Order at 3 (U.S.I.T.C. January 22, 2001) (maintaining limited stay entered by ALJ while the Commission reviewed an interlocutory appeal) ("Semiconductor Chips"); see also Certain Network Interface Cards and Access Points for Use in Direct Sequence Spread Spectrum Wireless Local Area Networks and Products Containing Same, Inv. No. 337-TA-455, Order No. 67 at 3, 2001 WL 1590414 (U.S.I.T.C. December 10, 2001) (staying discovery pending Commission determination of interlocutory appeal issue); Certain Aerospace Rivets and Products Containing Same, Inv. No. 337-TA-447, Order No. 5, 2001 WL 873263 (U.S.I.T.C. August 1, 2001); Certain Magnetic Resonance Injection Systems and Components Thereof, Inv. No. 337-TA-434, Order No. 17, 2000 WL 1476541 (U.S.I.T.C. 2000) ("Magnetic Resonance") (staying procedural schedule pending Commission review of grant of summary determination that sole patent at issue was invalid); Certain Hardware Logic Emulation Systems and Components Thereof, Inv. No. 337-TA-

383, Order No. 61, 1996 WL 965695 (U.S.I.T.C. December 17, 1996) (proceedings stayed after the Court of Appeals for the Federal Circuit ordered a stay of discovery).

As previously noted, Complainant does not challenge the Commission's authority to stay the proceedings, subject to abuse of discretion. Tr. at 85-86. Based on the above discussed precedent, and in particular the orders granting stays that were issued by judges and the Commission (and in one case at the direction of the Federal Circuit) after the change in the statute, I conclude that the Commission and Administrative Law Judges have the power to stay a Section 337 proceeding in appropriate circumstances.

B. RELEVANT FACTORS TO CONSIDER IN DECIDING TO ISSUE A STAY

The next issue is what factors should be considered in deciding whether to issue a stay. In determining whether to stay this investigation because of the pending reexamination by the PTO, I am considering both the factors considered by Judge Wilken in the pending district court action and those considered by the Commission in High-Voltage and Magnetic Resonance.

Judge Wilken considered the following factors: (1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party. InterVideo Digital Technology Corp. v. Dell, Inc., Civil Action No. C05-03317 CW, Document No. 39, (N.D. Cal. January 17, 2006), citing In re Cygnus Telecomm. Tech., LLC Patent Litig., 385 F. Supp. 2d 1022, 1023 (N.D. Cal. 2005).

These factors are similar to the factors that the Commission considered in High-Voltage. In that case the Commission considered the fact that the PTO examiner had rejected the patent claims at issue, the PTO is the government agency primarily responsible for issuance of patents, and that

the PTO office's determination would be helpful to the Commission. The Commission also considered factors such as the resources that had been dedicated to the investigation and that would be dedicated if it proceeded, and the alternative remedies available in federal court. High-Voltage at 53-54 (Parker, Moore, Bedell concurring).

The order in Magnetic Resonance also is helpful in determining whether an investigation exhibits the "appropriate circumstances" in which a stay should be considered. In that investigation, Judge Luckern granted a motion for summary determination that the sole patent at issue was invalid, and thus, if affirmed by the Commission, would be dispositive of the investigation. Magnetic Resonance at 1. While the complainant appealed that decision, the parties were faced with expending an "exorbitant amount of resources in activities related to the forthcoming discovery pursuant to the procedural schedule" that might be wasted if the Commission upheld Judge Luckern's summary determination of invalidity. Id. at 2. Judge Luckern granted motions to stay the investigation and extend the target date "in order to conserve the resources of the Commission as well as the private parties . . . until the final disposition of [the summary determination] by the Commission." Id. at 4.

I note from the outset that the fact that there is an ongoing reexamination proceeding at the PTO does not mean *per se* that the investigation should be stayed. I have given careful consideration to the arguments made by counsel at the pre-hearing conference on February 1, 2006 and the submissions of the parties in response to Order No. 2. Specifically, I have carefully considered the following factors which are discussed below.

(1) The Stage of Discovery and the Trial Date

In this investigation no discovery has been conducted, and no trial date has been set. The

complaint had not been filed and the Notice of Investigation had not been issued at the time the petition for reexamination with the PTO was filed. Indeed, the complaint in this investigation was not even filed until six days after the PTO issued the First Office Action rejecting all ten claims on two separate bases. The fact that this investigation is just beginning weighs in favor of issuing a stay in this investigation.

(2) The Issues in Question and Trial of the Case

A stay may simplify the issues in question and trial of the case. The validity of the patent at issue is involved in most, if not all, 337 proceedings. It would certainly be helpful to know what the PTO determination is on the question of validity. While Complainant is correct that even during the reexamination proceeding a patent enjoys its statutory presumption of validity (Tr. at 60), the PTO decided to grant the petition for reexamination because there were questions of patentability stemming from prior art that were not before the PTO examiner who issued the patent. Grant of Petition for Reexam at 3-4. Based on two separate grounds, the PTO's First Office Action rejected all of the ten claims at issue in this proceeding. The initial office action rejected claims 1-10 as invalid as anticipated by "Lindy Multimedia Keyboard User Manual Hotkey Driver Installation, First Edition," Feb. 2001, page 1 ("Lindy"); claims 1, 6, and 10 as anticipated by Sakai et. al., U.S. Patent No. 5,613,135; and claims 2-5 and 7-9 under 35 U.S.C. § 103(a) [obviousness] over Sakai in view of Lindy. Initial Office Action pp. 2, 12, 19. Furthermore, in InterVideo's January 30, 2006 submission to the PTO it amended two of its independent claims (its only two independent claims) and sought to add eleven additional claims.

There are several possible actions that the PTO could take in the Final Office Action in response to Complainant's January 30, 2006 submission. The PTO could cancel claims 1-10 and

reject claims 11-22 as unpatentable; the PTO could decide that amended claims 1 and 6 result in those claims being patentable and further allow claims 11-22, resulting in the allowance of all claims; the PTO could cancel claims 1-10 but allow claims 11-22; or the PTO could allow amended claims 1 and 6, along with dependent claims 2-5 and 7-10 but reject claims 11-22 as unpatentable. If all of the claims are canceled and that determination is made final after appeal, then there would be no reason to continue with this investigation. If the claims are allowed, then the Complainant will be in a much stronger position to defend against invalidity. If only the new claims are allowed and the amended claims are not, then the Complainant will have to consider whether to move to terminate the proceeding at the ITC or whether good cause exists to seek to amend the complaint and Notice of Investigation.

In any event the results of the reexamination process would be helpful to the disposition of this investigation, as was noted by Commissioners Alberger and Stern in High-Voltage at 55-56 (Alberger and Stern, concurring). The PTO is the agency within the government responsible for the issuance of patents. "In considering the issue of patent validity, this Commission would certainly benefit in being able to consider the Patent and Trademark Office's ultimate determination on the patentability of the claims involved in the reissue proceeding. . ." High-Voltage at 7. This is just as true in a reexamination proceeding as it is in a reissue proceeding. This factor weighs heavily in favor of a stay.

(3) The Undue Prejudice or Clear Tactical Disadvantage to Any Party

Complainant came to the Commission for an expedited proceeding. Tr. at 58. But if I were to allow this investigation to proceed at this time, and after the PTO proceedings the patent was substantially different than the patent as it existed at the filing of the complaint, Respondents would

suffer tremendous prejudice by expending large amounts of unnecessary resources. While a temporary stay may inconvenience Complainant to some extent, Complainant will not be unduly prejudiced. Complainant chose to file its complaint six days after all ten claims of its patent were rejected in an initial office action. Complainant chose to amend its two independent claims and to add eleven additional claims to its patent on January 30, 2006. Respondents had no choice in these matters. Respondents did not choose to file the petition for *ex parte* reexamination. Respondents did not choose when to file the complaint with the Commission, and Respondents did not choose how to proceed with the reexamination before the PTO. If this investigation were to go forward at this time, before the PTO has issued its Final Office Action, Respondents would be unduly prejudiced.

(4) The Stage of the PTO Proceeding

As noted earlier, the petition for *ex parte* reexamination was filed on November 15, 2004. The PTO granted the petition on February 9, 2005. The PTO issued an Initial Office Action rejecting all ten claims on November 30, 2005. Complainant responded to this Initial Office Action on January 30, 2005. As noted by Respondents, when a reexamination is pending concerning a patent which is in litigation, the PTO processes the reexamination with "special dispatch." 35 U.S.C. § 305; U.S. PATENT & TRADEMARK OFFICE, U.S. DEP'T OF COMMERCE, MANUAL OF PATENTING EXAMINING PROCEDURE § 2261 (8th ed. 2005). While I do not know when the PTO will issue a final action, there is every indication that it will be issued in a timely manner. And although Complainant's counsel argued that the action of the PTO may not be final and unappealable for years (Tr. at 65), if this was a valid rationale for not staying the proceedings, then proceedings at the Commission would never be stayed. Therefore, because the PTO proceeding is at an advanced stage,

this factor also weighs in favor of a stay at this time.

(5) The Efficient Use of Commission Resources

Thus far, only a limited amount of Commission resources has been dedicated to this investigation. The complaint was filed on December 6, 2005, and the Commission voted to institute the investigation on December 29, 2005. Because of the Commission's direction in the Notice of Investigation that I issue an ID concerning whether or not to issue a stay, I have not issued Ground Rules in this investigation. Although the parties have served discovery requests on each other (Tr. at 77-78) no deadlines for responding to discovery requests have been set, and I have informed the parties that no discovery responses will be due until after the issue of the stay is resolved. Tr. at 120. Thus, the parties have not responded to any discovery that has been promulgated.

While Complainant argues that a stay in this investigation will not conserve the resources of the Commission and the private parties but only defer their expenditure (Tr. at 114), I conclude that deferring a decision whether to proceed with this investigation for a short period of time is a prudent action that may conserve considerable resources, and also may simply the issues, at least as far as the issue of claim construction is concerned. ITC investigations proceed at an expedited pace and are considerably taxing upon both the private parties' resources and the resources of the Commission. If this investigation were to go forward without the determination of the PTO, all of that effort could be wasted. As Judge Harris noted in the Diltiazem case,

> [I]t appears not to be in any party's interest or in the public interest to continue an investigation which is ultimately found to be based on an invalid or non-existent patent. This would be an inefficient and improper use of scarce Commission resources, and of the resources of the parties.

p.4 (citations omitted).

Because of the substantial expenditure in Commission resources and the private parties' resources that would occur if this investigation proceeded, this factor also weighs in favor of issuing a stay.

(6) The Alternative Remedies Available in Federal Court

If Complainant is successful in retaining claims 1-10 of the '788 patent and Complainant is successful in this investigation, Complainant could go to district court to obtain monetary damages for infringement of claims 1-10 during the time the cases in the district court and the ITC have been stayed. Although the district court case has been stayed indefinitely pending the resolution of the PTO proceedings, the case has not been dismissed and could be revived at a later point in time to provide Complainant with compensation for the time period of the stay, in addition to other remedies. This factor also weighs in favor of a stay.

III. CONCLUSION

No party has requested an indefinite stay, similar to that ordered by the district court, and I am not ordering an indefinite stay. In fact, I am rejecting the six month stay requested by Respondents. Recognizing that the Commission has a statutory mandate to complete investigations at the "earliest practicable time", 19 U.S.C. § 1337(b)(1), pursuant to the Notice of Investigation and 19 C.F.R. § 210.42(c), I am ordering a temporary stay. Moreover, at any time any party to this investigation may move to lift the stay for good cause shown.

The stay will take effect upon the issuance of this order and remain in effect until April 19, 2006, which is less than three months from today but slightly more than three months from the date the Notice was published in the Federal Register (the undersigned is in trial in another proceeding during the first week in April). I am ordering that a status telephone conference be held on April 19, 2006 at 9:30 a.m. This conference will enable me to determine what is occurring in the

reexamination proceeding and enable me to make a determination at that time how to proceed with the investigation.

In order to facilitate discussion at this conference, all parties are required to submit, by April 12, 2006, a pleading of no more than twenty-five pages double-spaced explaining the status of the PTO proceedings and how they wish to proceed. Two courtesy copies of this pleading are to be sent to my office at the following address:

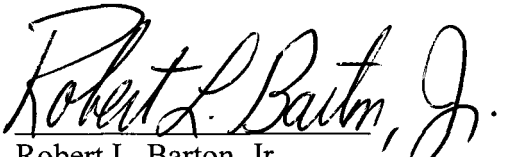
The Honorable Robert L. Barton, Jr.
U.S. International Trade Commission
500 E Street, S.W., Room 317
Washington, D.C. 20436

An electronic copy is also to be e-mailed to my attorney-advisor at Kimberly.Parke@usitc.gov.

I am also ordering that when the PTO takes any official action upon the reexamination petition, all parties and I be notified of the action in writing by Complainant and provided with the copy of the correspondence from the PTO. If Complainant submits anything further to the PTO, the Complainant must serve and file a copy of the submission.

Pursuant to 19 C.F.R. § 210.42(h)(3), this ID shall become the determination of the Commission 30 days after its date of service unless the Commission within those 30 days shall have ordered review of this ID, or certain issues herein, pursuant to 19 C.F.R. § 210.43(d) or § 210.44.

SO ORDERED.



Robert L. Barton, Jr.
Administrative Law Judge

In the Matter of CERTAIN PERSONAL COMPUTER/ CONSUMER ELECTRONIC CONVERGENT DEVICES, COMPONENTS THEREOF, AND PRODUCTS CONTAINING SAME

Inv. No. 337-TA-558

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER** was served upon Jay H. Reiziss, Esq., Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on February 8, 2006.

Marilyn R. Abbott

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