

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**Before the Honorable Theodore R. Essex  
Administrative Law Judge**

**In The Matter Of**

**CERTAIN WIRELESS DEVICES WITH 3G  
AND 4G CAPABILITIES AND  
COMPONENTS THEREOF**

**Investigation No. 337-TA-868**

**COMPLAINANTS' RULE 210.50(a)(4) SUBMISSION ON THE PUBLIC INTEREST**

As one of the first investigations building a full record on the public interest in the context of potentially standard-essential patents (SEPs), this investigation presents an ideal opportunity for the Commission to demonstrate the need for strong protection against reverse patent hold-up. The public interest is very infrequently a basis for rejecting a remedy, and this investigation does not warrant departure from that norm. As the ALJ correctly found, the public interest favors, and does not preclude, relief. The ALJ's finding that Respondents engaged in "reverse hold-up" is well-supported by an extensive factual record and the Commission can easily find that an exclusion order is appropriate.

The ALJ determined that the patents were not infringed, and therefore not essential. Nevertheless, even if the asserted patents were found to be SEPs, that alone would not warrant withholding an appropriate remedy. As the Federal Circuit, DOJ, USPTO, FTC, ITC, and USTR agree, an exclusion order is not precluded simply because an SEP may be asserted.<sup>1</sup> Microsoft Corporation ("Microsoft"), in its third party public interest submission, argues that FRAND-encumbered patents should never be asserted at the ITC.<sup>2</sup> As the ALJ held, and as InterDigital's opposition to Respondents' petition for review explains, there is no *per se* rule that patents subject to FRAND commitments cannot be asserted in the ITC. In addition, Microsoft's claim that InterDigital should simply "accept a FRAND offer" ignores that, as the ID found,

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<sup>1</sup> *Apple Inc. v. Motorola, Inc.*, \_\_F.3d\_\_, 2014 WL 1646435, at \*35 (Fed. Cir. 2014) ("*Apple*") ("To the extent that the district court applied a *per se* rule that injunctions are unavailable for SEPs, it erred."); S. Hrg. 112-552, Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents (Jul. 11, 2012) Statement of the Honorable Edith Ramirez, Commissioner, FTC ("Let me close by emphasizing that the FTC does not take the position that an exclusion order should never issue for standard-essential patents."); *Electronic Devices*, Inv. No. 337-TA-794, Comm'n Op. at 46 (rejecting argument that ITC *per se* cannot investigate violations of Section 337 based on infringement of SEPs as "contrary to established authority"); CX-3683, DOJ/USPTO Policy Statement for Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments at 7; CX-3153, USTR letter, at n. 3.

<sup>2</sup> On July 14, 2014, the Commission declined to review Order No. 16 granting a Motion to add Microsoft's subsidiary Microsoft Mobile Oy ("MMO") as a respondent. (July 14, 2014, Notice.) To the extent MMO also submits another statement as a party, Microsoft's "third party" statement appears to be an attempt to evade MMO's page limits.

InterDigital has repeatedly attempted to negotiate a FRAND license with Respondents, to no avail. Respondents have constructively refused to license.

The USTR has stated that “whether public interest considerations counsel against a particular exclusion order depends on the specific circumstances at issue.”<sup>3</sup> The USTR has encouraged the Commission to examine the public interest issues presented and to “develop a comprehensive factual record related to these issues in the proceedings before the Administrative Law Judge and during the formal remedy phase of the investigation before the Commission, including information on the standards essential nature of the patent at issue if contested by the patent holder and the presence or absence of patent hold-up or reverse hold-up.”<sup>4</sup> Here, a vast record has been developed with respect to the FRAND issues, and demonstrates overwhelmingly that Respondents engaged in reverse hold-up, also known as hold-out. The parties collectively submitted the trial testimony of 16 expert witnesses and 10 fact witnesses, and over 475 pages of briefing, on the FRAND issues alone. Based on this record, the ALJ made specific findings that remove any doubt that InterDigital is entitled to relief for any patents found valid and infringed.

The DOJ/USPTO Policy Statement provides that exclusion may be appropriate where a prospective licensee refuses to pay a FRAND royalty or constructively refuses to engage in a negotiation to determine FRAND terms. Constructive refusals to negotiate can be attempts to evade the prospective licensee’s obligation to fairly compensate the patent holder.<sup>5</sup> The USTR also specifically raised the concern that “technology implementers also can cause potential harm by, for example, engaging in ‘reverse hold-up’ (‘hold-out’).”<sup>6</sup> Here, the ALJ found exactly this:

- “These Respondents chose to take the actions that led to the allegation of infringement rather than follow ETSI policy for obtaining a license.” (ID at 113.)

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<sup>3</sup> CX-3153, USTR letter, at 2.

<sup>4</sup> *Id.* at 4.

<sup>5</sup> CX-3683, Policy Statement, at 7.

<sup>6</sup> CX-3153, USTR letter, at 2.

- “Using the ‘patented’ technology prior to negotiating with InterDigital for a license is a violation of the ETSI Rules of Procedure as well.” (ID at 114.)
- “There is no risk to the exploiter of the technology in not taking a license before they exhaust their litigation options if the only risk to them for violating the agreement is to pay a FRAND based royalty or fee. This puts the risks of loss entirely on the side of the patent holder, and encourages patent hold-out, which is as unsettling to a fair solution as any patent hold up might be.” (ID at 114)

Notably, the ALJ also rejected each of Respondents’ arguments that InterDigital refused to negotiate in good faith toward a FRAND license, calling those arguments “baseless” (ID at 117) and finding that the “obligation InterDigital has taken has been fulfilled.” (ID at 123.) Importantly, the ALJ noted “no evidence” of a risk of holdup. (ID at 123.) Microsoft’s public interest statement ignores these findings, assuming, without support in the facts or the record, that InterDigital seeks “hold-up leverage” and is engaged in “hold-up of the entire US WPOS ecosystem,” an argument not made by any party to the investigation at any time.

The Commission has framed the appropriate public interest inquiry as follows:

Because section 337(d) mandates that the Commission “shall direct that the articles concerned... be excluded from entry” upon a finding of a violation “unless, after considering the effect of such exclusion upon” the public interest “it finds that such articles should not be excluded,” we need only decide that the public interest does not preclude our remedy. 19 U.S.C. § 1337(d)(1) (emphasis added). We need not decide that the public interest favors our remedy.

*See Certain Cigarettes and Packaging Thereof*, Inv. No. 337-TA-643, Comm’n Op. (Oct. 1, 2009) (emphasis in original).<sup>7</sup> In addition, Commission Rule 210.37 states that “[t]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” Accordingly, Respondents must carry the burden of proving that statutory public interest factors weigh against the public interest and the Commission’s charge of enforcing valid intellectual

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<sup>7</sup> *See also Electronic Devices*, Comm’n Op. at 108 n.21 (July 5, 2013) (“the proper question is not whether a particular disposition will promote ‘competitive conditions in the United States,’ for example. Rather, ‘the statute requires relief for an aggrieved patent holder, except in those limited circumstances in which the statutory public interest concerns are so great as to trump’ the enforcement of intellectual property rights.”).

property rights. Here, they cannot.

The Commission's duty to enforce intellectual property rights should not be given short shrift. Indeed, the USTR also noted the importance of "promoting innovation and economic progress, including through providing adequate and effective protection and enforcement of intellectual property rights. Relief available to the owners of intellectual property rights through section 337 is an important facet of achieving that objective."<sup>8</sup> InterDigital engages in research and development at its facilities in Pennsylvania, New York and California to develop new wireless communications technologies. Since the first quarter of 2001, InterDigital has invested over \$767 million in R&D generally, almost entirely in the United States. This R&D results in more than 1,000 worldwide patents and patent applications each year, which complement InterDigital's overall patent portfolio of over 20,000 patents and patent applications.<sup>9</sup> The statutory public interest factors here do not outweigh the importance of protecting these valuable rights, created by virtue of substantial ingenuity, effort and investment within the United States.

First, competitive conditions would not be adversely affected. The ALJ correctly found that Respondents have engaged in hold-out, rewarding their own infringement. (ID at 176-177.) "It is not in the public interest to support this." (*Id.*) The ALJ further correctly determined that no lasting effect on competitive conditions is likely, particularly as would overcome the "fundamental" right of a patent holder to exclude others from practicing patented inventions, and others will continue to supply sufficient products. Most of Respondents' arguments regarding competitive conditions related to the exclusion of Samsung products, which are no longer at issue because Samsung has taken a license. The evidence of Respondents' respective market shares and reasonable alternative sources show no public interest concern.<sup>10</sup>

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<sup>8</sup> CX-3153, USTR letter, at 2.

<sup>9</sup> CX-2488C at ¶¶ 22-29, 30-31.

<sup>10</sup> See CX-2328C at ¶¶ 158-59, 262-402.

Second, consumers would not be adversely affected by an exclusion order. [REDACTED]

[REDACTED] (ID at 178.) Microsoft submits the same argument that exclusion could result in “elimination” of the Windows Phone Operating System “spawning negative ripple effects throughout the ecosystem.” As the ALJ correctly found, the record does not support this parade of horrors. (ID at 176, 178.) Indeed, as recently as June 4, 2014, Microsoft’s OEM division head emphasized that “Microsoft will continue to have a great relationship with HTC [another provider of Microsoft OS handsets]. New things are coming, so get excited.”<sup>11</sup> Reasonable substitutes for the devices subject to exclusion exist.<sup>12</sup>

Third, the requested relief would not adversely affect the public health and welfare. Respondents’ accused products are not medical or health devices, are not essential for public safety or welfare, and have no unique health or safety features. The ALJ correctly concluded that on this argument Respondents “do little more than recite those words” and fail to raise reasoned concerns, particularly in light of “the importance of protecting IPR in the United States.”

Finally, the production of competitive articles in the U.S. would not be adversely affected where they are not produced in the U.S.

In addressing the public interest, the ALJ correctly recognized that “[i]f there were a finding of infringement, there would be no public interest served in delaying the implementation of the exclusion or cease and desist orders.” (ID at 178.) As detailed in InterDigital’s Petition for Review, this finding is well-supported and no delay is appropriate.<sup>13</sup>

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<sup>11</sup> See Tom Warren, Microsoft hints at renewed HTC partnership, the Verge, available at <http://www.theverge.com/2014/6/4/5778692/microsoft-htc-partnership-hints-htc-w8-rumors>.

<sup>12</sup> CX-2488C at ¶ 152-226, 424-27, 582-603, 610, 685-703, 757-65.

<sup>13</sup> Notwithstanding this finding, the ALJ improperly recommended a limited exclusion order be delayed by six months “to mitigate the effects on the public and U.S. consumers.” That delay, or any delay, including the 12 months espoused by Microsoft, is not well-supported as detailed in InterDigital’s Petition for Review.

/s/ David S. Steuer

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 15, 2014 copies of the foregoing:

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were filed with the Secretary and served upon the following parties as indicated below:

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