

January 15, 2013

The Honorable Lisa R. Barton
Acting Secretary to the Commission
500 E Street, SW, Room 112
Washington, DC 20436

Re: *Docket No. 337-2929 Certain Wireless Devices with 3G and/or 4G
Capabilities and Components Thereof*

Dear Acting Secretary Barton:

In response to the Commission's Notice of Receipt of Complaint; Solicitation of Comments Relating to the Public Interest (78 Fed. Reg. 958 (Jan. 7, 2013)) we submit the following comments on behalf of proposed respondents Huawei Technologies Co. Ltd., Huawei Device USA, Inc., and Futurewei Technologies, Inc. d/b/a Huawei Technologies (USA) (collectively "Huawei"). The Complaint filed by InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc. and InterDigital Holdings, Inc. (collectively "InterDigital") threatens harm to the public interest. As such, it would benefit the Commission to have the Administrative Law Judge ("ALJ") develop an evidentiary record on the public interest.

The exclusion order sought by InterDigital here threatens to harm competitive conditions in the wireless device market, negatively impact U.S. consumers, and stifle innovation. The public interest concerns are numerous. First, the patents InterDigital asserts are standard essential patents ("SEP") subject to fair, reasonable, and non-discriminatory ("FRAND") licensing terms. If the requested exclusion order issued despite InterDigital's FRAND obligations, the resulting patent hold-up would harm competitive conditions in the wireless industry. Second, the proposed respondents in this investigation supply a large segment of the wireless device market, particularly in the more affordable end of the smartphone and mobile device markets. Exclusion of all such devices would jeopardize consumers and severely limit

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competition in these markets. Finally, InterDigital's revenue-driven licensing business model, and the resulting anticompetitive patent hold-up further threaten to harm the public interest.¹

A. Threat To Competitive Conditions and Consumers Because the Asserted Patents Are Subject To a FRAND Commitment

In recent months, multiple district courts and federal agencies have acknowledged that injunctive relief in cases involving a SEP subject to a FRAND commitment is contrary to the public interest where the alleged infringer is able, and has not refused, to license on FRAND terms. This case raises similar public interest concerns.

InterDigital's complaint asserts seven patents that are essential to wireless communication 3G and/or 4G standards and for which it made commitments to license on FRAND terms. *See, e.g.* IPR Information Stmt. and Licensing Declaration for InterDigital Technology Corp., Annex 1, ISLD-200407-004 (April. 8, 2004) (declaring patent essential to the European Telecommunications Standards Institute ("ETSI")). Because respondents' products are designed to be used in one or more 3G or 4G systems, they are alleged to infringe the asserted patents. *See* Complaint ¶ 7.46 ("Because the accused products are specifically designed [to comply with system standards] they have no substantial non-infringing uses."). Huawei is a willing licensee, and has sought to establish a FRAND rate in Delaware Chancery Court and the U.S. District Court for the District of Delaware. *See Huawei Technologies Co. Ltd., v. Interdigital Technology Co.*, C.A. No. 6974-CS; *InterDigital et al. v. Huawei Technologies et al.*, C.A. No. 11-cv-00654-RGA (D. Del.). InterDigital vigorously opposed such efforts, making clear it was far more interested in exploiting the hold-up power of the ITC process than complying with its FRAND obligations. Issuing an exclusion order applicable to respondents' products that practice these SEPs would permit InterDigital to bypass its FRAND commitments.

This would have negative consequences for the public interest by threatening standard setting organizations, harming competition and consumers, and jeopardizing innovation in the wireless industry. Standard setting organizations facilitate inter-operability, which in turn

¹ While the Commission declined to delegate public interest to the ALJ in an earlier investigation between InterDigital and Huawei, Futurewei and Nokia, the public interest issues in this investigation differ significantly. *See Wireless Devices with 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800. As an initial matter, the proposed respondents in this investigation include Samsung, one of the largest suppliers of wireless devices in the United States. Further, since the institution of the prior investigation, the Federal Trade Commission, the Department of Justice and United States Patent & Trademark Office have recognized the potential harm to the public interest posed by ITC exclusion orders issued in the context of FRAND commitments. *See* Section A, *infra*. Both circumstances warrant reconsideration of whether to delegate consideration of the public interest here.

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promotes competition between suppliers and increases choice for consumers. *See* U.S. Dept. of Justice & U.S. Patent and Trademark Office, Policy Stmt. on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013) (“DOJ/USPTO Paper”) (citing OMB Circular A-119, Fed. Participation in the Dev. and Use of Voluntary Consensus Stds. (1998)).

Standard setting organizations, however, can also facilitate patent hold-up. For example, once a standard is adopted by an industry, the owners of SEPs can exact higher royalty rates because switching to a different standard is often prohibitively expensive, difficult or even impossible. FRAND commitments minimize the risk of patent hold-up.

Where FRAND commitments are not upheld, and the threat of an ITC exclusion order is instead used as a bargaining point — as is the case here — the patent holder can exact higher royalties. The devastating effects on the public interest in such a case has been recognized by the U.S. Patent and Trademark Office (“USPTO”), the Department of Justice (“DOJ”) and the FTC. For instance, the DOJ and USPTO recently expressed

concern[] about the potential impact of an exclusion order on ‘competitive conditions in the United States’ and ‘United States consumers’ in some cases involving F/RAND-encumbered patents that are essential to a standard, and the conditions on which they may be denied . . . [T]he public interest may preclude issuance of an exclusion order in cases where the infringer is acting within the scope of the patent holder’s F/RAND commitment and is able, and has not refused to license on F/RAND terms.

DOJ/USPTO Paper at 9. The FTC has expressed similar concerns. *See* Federal Trade Commission, *Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* at 244 (Mar. 2011) (“FTC Report”); *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Inv. No. 337-TA-745, Third Party U.S. Federal Trade Commission’s Stmt. on the Public Interest (Jun. 6, 2012). Such fears recently resulted in a FTC Consent Order prohibiting Google from seeking injunctions against willing licensees at the ITC on any SEP Google has committed to license on FRAND terms. *See* Press Release, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search, Federal Trade Comm’n (Jan. 3, 2013).

Here, the threat to the public interest by patent hold-up is exacerbated by the significant segment of the wireless device market targeted by InterDigital’s complaint. According to publicly available market data, proposed respondent Samsung has 34% of the US handset market share, and the remaining respondents make up an additional 8% of the market. Strategy Analytics, *Vendor Share: North America Handset Vendor Marketshare: Q3 2012* (Oct. 2012).

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Consequently, the potential patent hold-up may impact more than a third of the market, and this broad market impact, is likely to raise prices and limit innovation.

Both the DOJ /USPTO paper and the FTC report urge the Commission to examine FRAND issues when assessing the appropriate remedy by applying the statute's public interest factors. DOJ/USPTO Paper at 10; FTC Report at 244. Further, both recognize that the approach the Commission adopts "will be important to the continued vitality of the voluntary consensus standards-setting process and thus competitive conditions and consumers in the United States." DOJ/USPTO Paper at 9. *See also* FTC Report at 244.

Huawei respectfully requests that the Commission listen to the advice of its sister agencies, and examine the impact of the standard essential patents and FRAND commitments here by delegating authority to the ALJ to develop an evidentiary record on public interest.

B. Negative Impact on Consumers of More Affordable Mobile Phones

The threat of InterDigital's requested exclusion order is likely to impose a heavy burden on consumers by restricting importation of a large segment of mobile phones. As discussed, the proposed respondents together supply, according to at least one source of market data, 42% of the handsets in the United States. It is unlikely that InterDigital's licensees (the identity of which is confidential) could supply like or directly competitive articles to replace respondents' products.

This is particularly true because the proposed respondents are significant sources of more affordable mobile phones in the United States. *See, e.g.,* Low-End Smartphones Creating Popular New Segment in Market, AllVoices (Jan. 13, 2013) *available at* <http://www.allvoices.com/contributed-news/13796902-lowend-smartphones-creating-popular-new-segment-in-market> (noting Nokia's "resurgence" as a more affordable smartphone provider"; Huawei Makes a Good Call in Low-End Smartphone Market, ChinaDaily USA (Mar. 2, 2012) *available at* http://usa.chinadaily.com.cn/weekly/2012-03/02/content_14736467.htm (indicating that Huawei has "captured the lower-income segment of the market" and grown 250% between 2010 and 2011)). At least some of the major unaccused suppliers of smartphones, such as Apple, predominantly manufacture high-end smartphones and could not replace the supply of more affordable mobile phones provided by the proposed respondents. *See, e.g.,* Apple iPhone with Lower Price Tag Rumors Dismissed, Int'l Business Times (Jan. 11, 2013) *available at* <http://www.ibtimes.com/apple-iphone-lower-price-tag-rumors-dismissed-phil-schiller-says-it-wont-be-future-apple-products>.

Thus, if proposed respondents smartphones were excluded from the United States, licensed supplies would be unlikely to manufacture and replace the market for more affordable mobile phones. As a result, consumers would be forced to choose a much higher priced mobile phone, or be closed out of the market entirely.

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C. Revenue-Driven Licensing Business Model, and the Resulting Anticompetitive Patent Hold-Up Threaten To Harm the Public Interest

In addition to threatening harm to the public interest due to the FRAND issues involved, this investigations further threatens harm because InterDigital is primarily a patent assertion entity (“PAE) with a revenue-driven licensing business model.

Like in the context of SEPs with FRAND commitments, there is growing consensus that the public interest is undermined when the threat of an exclusion order is used by PAEs, such as InterDigital, to obtain litigation driven license payments from existing product manufacturers. In a recent report by the FTC, it found that revenue driven licensing adds a substantial “hold up value” to patent rights. FTC Report at 54. Hold-up, in turn, may “distort competition in technology markets,” raise cost to consumers, increase manufacturers’ costs and risk, and deter innovation. *Id.* at 52-54.

The risk of hold-up is heightened in the context of standard setting and SEPs, such as here. This is because a PAE asserting a SEP can demand both the market value of the invention *and* the cost of investments made to implement the standard. *See id.* at 28, 243.

InterDigital’s licensing strategy focuses on existing manufacturers with large sunk costs. *See, e.g.* Complaint ¶¶ 11.1-11.11 (detailing InterDigital’s numerous suits against existing manufacturers such as Nokia, Huawei and ZTE). Further, InterDigital does not manufacture any products and describes its domestic industry as largely based on licensing and enforcement activity *Id.* ¶ 10.3. Such activities have been recognized by the Commission as entitled to less weight in the domestic industry analysis. *Certain Multimedia Display and Navigation Devices and Systems, Components Thereof, and Products Containing Same*, Inv. No. 337-TA-694, Comm’n Op. at 25 (July 22, 2011). Because of the potential harm, however, the Commission should also evaluate the impact of InterDigital’s revenue-driven licensing, and hold up in the context of the public interest analysis. *See* FTC Report at 243 (recommending that the ITC incorporate concerns about patent hold-up, especially of standards into the public interest analysis).

Accordingly, should the Commission institute an investigation based on the Complaint, Huawei requests that the Commission authorize the Administrative Law Judge to allow discovery, take evidence, and make a recommendation on the statutory public interest factors.

Sincerely,

/s/ Sturgis M. Sobin

Sturgis M. Sobin

CERTIFICATE OF SERVICE

I, Madeline Vaughan, certify that on January 15, 2013, copies of the foregoing **RESPONSE TO THE COMMISSION'S NOTICE OF RECEIPT OF COMPLAINT; SOLICITATION OF COMMENTS RELATING TO THE PUBLIC INTEREST** were delivered, pursuant to Commission regulations, to the following interested parties as indicated:

The Honorable Lisa Barton Acting Secretary to the Commission U.S. INTERNATIONAL TRADE COMMISSION 500 E Street, SW Washington, DC 20436	By EDIS and Overnight Delivery (8 Copies)
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/s/ Madeline Vaughan
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