

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

In the Matter of

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

Investigation No. 337-TA-2929

**PROPOSED SAMSUNG RESPONDENTS'
STATEMENT ON THE PUBLIC INTEREST**

Pursuant to the Commission Notice dated January 7, 2013, proposed Respondents Samsung Electronics Co. Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively, "Samsung") submit this Statement on the Public Interest in connection with the above-captioned complaint filed by InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc. and InterDigital Holdings, Inc. (collectively, "InterDigital"). For the reasons discussed below, Samsung respectfully requests that, if the Commission institutes an investigation, it authorize the presiding administrative law judge ("ALJ") to take evidence regarding the public interest and to issue a recommended determination pursuant to Commission Rule 210.10(b).

I. HOW SAMSUNG'S ARTICLES ARE USED IN THE UNITED STATES

InterDigital seeks an exclusion order against a broad range of products that are critical to wireless communications, including "cellular mobile telephones (including 'smart phones'), cellular PC cards, cellular USB dongles or sticks, personal computers, notebooks, netbooks, tablets, and other mobile internet devices with cellular capabilities, cellular access points or 'hotspots', and cellular modems." Complaint at ¶¶ 8-9.¹ Samsung currently sells more mobile phones, smartphones, and Android-powered tablet computers in the United States than any other company. Samsung serves as a leading innovator of mobile phones and tablets, releasing dozens of new devices each year and repeatedly bringing first to market new features and functionalities. Samsung employs more than 2,000 U.S. personnel involved in commercializing and supporting these devices in the U.S. market.

In addition to its status as a market leader, Samsung has the largest breadth of distribution for its products in the United States. For example, Samsung sells its mobile phones and tablets to the "big four" carriers – AT&T, Sprint, T-Mobile, and Verizon – and many local and regional carriers, such as US Cellular and MetroPCS. Samsung's wide breadth of distribution enables more customers – including rural and economically-disadvantaged consumers – access to cutting-edge technology. Samsung prides itself on offering consumers

¹ Despite the literal breadth of the caption of InterDigital's complaint, the specific allegations in the complaint against Samsung relate only to Samsung's smartphone and tablet products, to which Samsung's comments here are similarly limited.

maximum choice across platforms, carriers, and price points.

II. PUBLIC HEALTH, SAFETY, AND WELFARE CONCERNS ASSOCIATED WITH ANY EXCLUSION ORDERS

Beyond basic communication and connectivity, consumers and health and safety professionals increasingly rely on Samsung mobile phones and connected tablets to access and communicate health and medical information, report and respond to emergencies, and stay in contact with children and the elderly. A smartphone or tablet provides many families with their only connectivity to the Internet, further underscoring the need for a broad range of affordable and accessible products. The varying price points and diverse carrier sales channels – including both pre-paid and post-paid – through which Samsung's mobile devices are sold assists consumers who may not have access to other smartphones and tablets to stay connected and obtain and transmit important health and safety information in the event of a natural disaster, health emergency, or other time of need. Moreover, President Obama recognized in his 2011 State of the Union Address that getting more people connected via wireless devices is a national goal that will provide tangible benefits to the economy, including job creation.

III. WHETHER LIKE OR DIRECTLY COMPETITIVE ARTICLES EXIST THAT COULD REPLACE THE ACCUSED ARTICLES FOLLOWING EXCLUSION

InterDigital contends, without support, that any U.S. consumer will have access to mobile devices offering the same features as the accused products through InterDigital's licensees.² See InterDigital Statement on the Public Interest at 4-5. But InterDigital fails to identify competitive devices offering the same features and advantages as the accused Samsung products. For example, U.S. consumers may not want to purchase other smartphones or tablets that do not operate with Samsung-specific software or features. As the Commission has previously found, "[i]f some 3G handsets are excluded from the U.S. market, the public would lose some of the public health and safety benefits that could flow from enhanced data transmission capabilities, improved ability to locate a caller, and elimination of voice blanking as more members of the public move to phones with 3G technology." *Certain Baseband Processor Chips and Chipsets*, Inv. No. 337-TA-543, Comm'n Op. on Remedy, Public Interest and Bonding (public version, June 19, 2007). Certainly, InterDigital cannot provide any substitute to Samsung's accused products, because InterDigital is a non-practicing entity and does not make any competitive articles that could replace Samsung's products if they were to be excluded.

Even if there were sufficient substitute devices available, the Commission should still authorize the ALJ to take evidence and make findings as to the public interest to determine the range of choices available to consumers and how that might bear on the economic welfare. As Commissioner Pinkert recently explained:

[T]he availability of substitutes does not necessarily mean the consumer's desire

² Because InterDigital does not identify its licensees or any competitive devices, it is impossible to formulate a response to these allegations, particularly in view of the rapidly and constantly changing competitive landscape.

for quality and variety can be satisfied in the absence of the infringing devices. This observation is particularly apposite in a rapidly changing, technologically driven, market like today's smartphone market. Excluding devices from such a market could be significantly detrimental to economic welfare, regardless of whether substitutes are available.

Certain Personal Data and Mobile Comm. Devices and Related Software, Inv. No. 337-TA-710, Comm'n Op., Additional Views of Commissioner Pinkert on Remedy and the Public Interest, at 2. Commissioner Pinkert thus concluded that "the existence of substitutes for the infringing devices does not obviate consideration of the likely impact of exclusion on the range of choices available to consumers in the smartphone market. Such impact may warrant more searching inquiry in other investigations." *Id.* at 4.

With respect to this important point, Samsung sells a wide variety of mobile phones, tablets, and wireless devices at many price points and through a variety of sales channels. The diversity of markets and price points served by Samsung, as well as the unique features and innovations in Samsung's products, means that no competitor could truly replace Samsung's affected articles in the event that an exclusion order issues. For example, no competitor can meet demand at each wireless carrier that would suffer lost inventory and sales as a result of the exclusion of Samsung's mobile devices. Samsung sells one or more devices to nearly every national, regional, and local wireless carrier. Many of these carriers rely heavily on Samsung's product catalog to serve the needs of consumers in their respective markets and at their target price points. No other manufacturer of mobile devices offers Samsung's diverse array of products for as diverse an array of consumers. A remedial order that excluded these products from the U.S. market would reduce consumer choice and raise the average price that consumers must pay for like products, if such products were available.

IV. THE IMPACT OF EXCLUSION ON CONSUMERS IN THE UNITED STATES

The exclusion of Samsung's mobile phones and tablets would negatively affect U.S. consumers. Consumers may face difficulty in obtaining repair parts or replacement devices under existing warranty obligations, even though Samsung and its resellers contractually guarantee such repair and service. Exclusion would also limit consumer choice in the expanding mobile device market, particularly for customers who desire an Android-powered device, a low-cost device, a pre-paid device, or a post-paid device from a regional carrier. The reduced competition in the mobile device market may also result in restricted Internet access, product shortages, fewer innovations, and higher prices.

V. THE INVESTIGATION THREATENS HARM TO THE PUBLIC INTEREST

InterDigital is a patent assertion entity ("PAE") whose primary business is litigating against some of the world's most innovative and productive companies to extract royalty payments. In the first two quarters of 2012, ninety three percent (93%) of InterDigital's \$141 million in revenues came from patent licensing royalties. *See* Apr. 25, 2012 InterDigital Press Release "InterDigital Announces First Quarter 2012 Financial Results"; July 25, 2012 InterDigital Press Release "InterDigital Announces Second Quarter 2012 Financial Results."

Simply put, rather than manufacturing or designing innovative products that compete with Samsung's accused products, InterDigital's real expertise is litigation.

This use of litigation to extract exorbitant monetary payments is not the business practice of "extensive licensing" that is "genuinely designed to exploit" intellectual property rights as envisioned by Congress when it amended Section 337 in 1988. *See, e.g., Certain NAND Flash Memory Devices & Products*, Inv. No. 337-TA-553, Initial Determination (Nov. 20, 2006) ("[M]aking a large monetary payment to defend itself from suits alleging patent infringement culminating in broad cross-licenses is not the business practice of 'extensive licensing' that is 'genuinely designed to exploit' intellectual property rights that was envisioned by Congress when it amended section 337 in 1988."). InterDigital does not promote the public interest by licensing technology; it harms innovation by misusing injunctive relief to impose a toll on productive and innovative companies.

Such misuse of injunctive relief by a PAE to extort royalties has raised public interest concerns in many different forums of national importance. For example, Supreme Court Justice Kennedy noted that, for PAEs "an injunction . . . can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent." *eBay v. MercExchange, LLC*, 547 U.S. 388, 396-97 (2006). Following *eBay*, federal courts have closely scrutinized the impact that an injunction would have on the public interest. *See, e.g., Adv. Cardiovascular Sys., Inc. v. Medtronic Vascular, Inc.*, 579 F. Supp. 2d 554 (D. Del. 2008) (holding that public interest in maintaining access to infringing medical device supported denial of injunction).

Congress also manifested this concern through legislation, such as in the America Invents Act, which directs the GAO to study and report to Congress on the consequences of PAE litigation, including the "economic impact of such litigation on the economy of the United States, including the impact on inventors, job creation, employers, employees, and consumers[.]" Leahy-Smith America Invents Act, Pub. L. No. 112-29 § 34, 125 Stat. 284, 340 (2011).

In addition to Congress, the Federal Trade Commission ("FTC") has also identified the potential for abuse by PAEs. In its analysis of the problems arising from the use of the patent litigation process as a strategy for enhancing royalty revenues from patents, the FTC notes that patent transactions with existing product manufacturers, or "*ex post* transactions," can "distort competition in technology markets," thereby "depriv[ing] consumers of the benefits of that competition." Fed. Trade Comm'n, *The Evolving IP Marketplace, Aligning Patent Notice and Remedies with Competition*, 54 (March 2011). Such distortions, the FTC explains, may pass on inflated or premium purchase costs to consumers. *Ex post* transactions may increase costs and risks to manufacturers and deter innovation. Such costs and the risk of future patent assertions may decrease the manufacturer's "return on its innovative effort, which could lower its incentive or ability to make future investments in R&D." *Id.* at 54. As the FTC recognizes, there may be negative impacts on the public interest from the hold-up tactics used by PAEs.

InterDigital's present Complaint presents a clear example of the PAE-generated abuses identified by the courts, Congress, and the FTC. No broader economic purpose—other than artificially strengthening InterDigital's negotiating position—could be served by the

extraordinary remedy that InterDigital seeks. Indeed, eliminating major suppliers in the mobile device markets would hinder competitive conditions in the U.S. economy, to the detriment of consumers. Overbroad remedial orders would limit innovation, reduce competition among smartphone and tablet manufacturers and sellers, and harm consumers.³

The concerns raised by InterDigital's complaint are exacerbated because the asserted patents are purportedly standard-essential patents which are believed to be subject to FRAND licensing commitments. There has been unprecedented industry and government interest in policy regarding standard-essential patents subject to FRAND licensing commitments. In a case such as this where a PAE is suing multiple manufacturers with purportedly standard-essential patents subject to FRAND licensing commitments, public interest issues are implicated that would benefit from discovery and consideration by the ALJ who is in the best position to evaluate the public interest considerations after full discovery on these issues and an evidentiary hearing. Accordingly, the ALJ should be allowed to take evidence and issue a recommended determination on the public interest issues.

CONCLUSION

An exclusion order against the accused products when no other party is able to meet consumer demand or offer acceptable substitutes could severely harm the wireless communications industries, to the detriment of consumers, competitive conditions in the United States, and the public welfare. The public interest issues raised by this complaint merit serious investigation and consideration.

Respectfully submitted,

FISH & RICHARDSON P.C.

Dated: January 15, 2013

By: /s/ Joseph V. Colaianni
Joseph V. Colaianni, Jr.
FISH & RICHARDSON P.C.
1425 K Street, N.W., 11th Floor
Washington, D.C. 20005
Telephone: (202) 783-5070
Facsimile: (202) 783-2331

Attorneys for Proposed Respondents
*Samsung Electronics Co. Ltd.,
Samsung Electronics America, Inc., and
Samsung Telecommunications America LLC*

³ As an additional public interest issue, InterDigital seeks to exclude a host of products where the allegedly infringing feature is a small component of an overall tablet or smartphone. Seeking an exclusion order based on a discrete part of a larger accused product raises significant issues of public interest affecting U.S. consumers, particularly where, as here, the complainant is a PAE.

