

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C. 20436**

**Before the Honorable Robert K. Rogers, Jr.  
Administrative Law Judge**

**In the Matter of**

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

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

**HUAWEI RESPONDENTS' STATEMENT ON THE PUBLIC INTEREST**

Pursuant to 19 C.F.R. § 210.14(f), Respondents Huawei Technologies Co. Ltd., Huawei Device USA, Inc., and Futurewei Technologies, Inc. (collectively "Huawei") submit this Statement on the Public Interest in connection with the January 2, 2013 Complaint filed by InterDigital Communications, Inc., InterDigital Technology Corporation, IPR Licensing, Inc. and InterDigital Holdings, Inc. ("InterDigital").

The exclusion order sought by InterDigital raises significant public interest concerns. First, the patents InterDigital asserts are declared standard essential patents ("SEP") required to be licensed to all applicants on fair, reasonable, and non-discriminatory ("FRAND") licensing terms. Since Huawei is a willing licensee, if the requested exclusion order issues despite InterDigital's FRAND obligations, the resulting patent hold-up would harm competitive conditions in the wireless industry. Second, the 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 competition in these markets. Finally, InterDigital's revenue-driven licensing business model exacerbates the anticompetitive patent hold-up and thereby further threatens to

harm the public interest.

#### **A. 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 willing, and has not refused, to license the SEP on adjudicated FRAND terms. This investigation raises similar public interest concerns.

InterDigital's complaint asserts three patents that InterDigital has declared to be essential to wireless communication 3G and/or 4G standards, and which InterDigital has irrevocably committed to license on FRAND terms. *See, e.g.* IPR Inform. Stmt. and Licensing Decl. (April 8, 2004); (Nov. 4, 2011) (declaring asserted 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; Ex. 40, 49-51. Huawei is a willing licensee, and indeed, has sought affirmatively to establish FRAND rates for InterDigital's US declared-essential patents in federal and state courts in Delaware, in order to pay them. *See, e.g., Huawei Technologies Co. Ltd., v. Interdigital Technology Co.*, C.A. No. 6974-CS; *InterDigital et al. v. Huawei Technologies et al.*, C.A. Nos. 11-cv-00654; 13-cv-00008 (D. Del.). Nevertheless, InterDigital vigorously has opposed all such efforts to adjudicate a FRAND rate. Relatedly, in litigation between Huawei and InterDigital in China, Huawei sought and obtained a determination of a FRAND rate for InterDigital's Chinese declared-essential patents. Huawei remains ready and willing to pay the court-determined FRAND rate. InterDigital has made it clear it is 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 facilitate InterDigital's effort to bypass its FRAND commitments, and to leverage

exclusionary relief in this proceeding into a worldwide license on non-FRAND terms.

This would have negative consequences for the public interest by threatening standard setting organizations (“SSOs”), harming competition and consumers, and jeopardizing innovation in the wireless industry. SSOs facilitate inter-operability, which in turn promotes competition between suppliers and increases choice for consumers.<sup>1</sup> SSOs, 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 required by SSOs 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.”<sup>2</sup> The FTC has expressed similar concerns.<sup>3</sup> Such fears recently resulted in a FTC

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<sup>1</sup> 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)).

<sup>2</sup> DOJ/USPTO Paper at 9.

<sup>3</sup> 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).

Consent Order prohibiting Google from seeking injunctions against willing licensees at the ITC on any SEP Google has committed to license on FRAND terms.<sup>4</sup>

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.<sup>5</sup> 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.”<sup>6</sup>

### **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. According to publicly available market data, Respondent Samsung has 34% of the US handset market share, and the remaining respondents make up an additional 8% of the market.<sup>7</sup> It is unlikely that InterDigital’s licensees could supply like or directly competitive articles to replace Respondents’ products. This is particularly true because the Respondents are significant sources of more affordable mobile phones in the United States.<sup>8</sup> At least some of the major unaccused suppliers of smartphones, such as Apple, predominantly manufacture high-end smartphones and could not

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<sup>4</sup> 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).

<sup>5</sup> DOJ/USPTO Paper at 10; FTC Report at 244.

<sup>6</sup> DOJ/USPTO Paper at 9. See also FTC Report at 244.

<sup>7</sup> Strategy Analytics, Vendor Share: North America Handset Vendor Marketshare: Q3 2012 (Oct. 2012).

<sup>8</sup> 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](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)).

replace the supply of more affordable mobile phones provided by the Respondents.<sup>9</sup>

Thus, if Respondents smartphones were excluded from the United States, licensed suppliers 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.

**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. 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 into the public interest analysis).

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<sup>9</sup> *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>.

Dated: February 21, 2013

Respectfully submitted,

/s/ Winslow B. Taub

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**CERTIFICATE OF SERVICE**

I, Danute Abrishami, certify that on February 21, 2013, copies of the foregoing **HUAWEI RESPONDENTS' STATEMENT ON THE PUBLIC INTEREST** were delivered, pursuant to Commission regulations, to the following interested parties as indicated:

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