

PUBLIC VERSION

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING WIRELESS
COMMUNICATION DEVICES, PORTABLE
MUSIC AND DATA PROCESSING
DEVICES, AND TABLET COMPUTERS**

Investigation No. 337-TA-794

**REPLY OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS TO RESPONSES
TO THE COMMISSION'S MARCH 13, 2013 NOTICE REQUESTING ADDITIONAL
WRITTEN SUBMISSIONS ON REMEDY AND THE PUBLIC INTEREST**

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I. INTRODUCTION

The Office of Unfair Import Investigations (“OUII”) respectfully submits this Reply to the Responses to the Commission’s March 13, 2013 Notice Requesting Additional Written Submissions on Remedy and the Public Interest filed by Complainants Samsung Electronics Co., Ltd. and Samsung Telecommunications America, LLC (collectively “Samsung”) and Respondent Apple, Inc. (“Apple”), as well as to the public interest comments submitted to the Commission by various third parties.

II. RESPONSES TO QUESTIONS

- 1. How would remedial orders barring the entry and further distribution of the Apple articles alleged to infringe the asserted claims of the ’348 patent affect the public interest, as identified in 19 U.S.C. §§ 1337(d)(1) and (f)(1)? The Commission is particularly interested in the effect on the public interest with respect to (a) the percentage of the total number of imported mobile telephone handsets that would be affected by such orders, (b) the percentage of the total number of imported cellular-network-enabled tablets that would be affected by such orders, and (c) the qualitative impact of exclusion of such handsets and tablets. The Commission is also interested in any other relevant market information bearing on the four statutory public interest factors. In addressing these issues, the Commission requests that submitters avoid discussing issues related to standards-setting organizations, as the record concerning those issues has been well developed.**

In OUII’s view, the public interest considerations identified in 19 U.S.C. §§ 1337(d) and (f) do not bar an exclusion order or cease and desist order covering Apple’s accused products, particularly an order limited to articles alleged to infringe the asserted claims of the ’348 patent. In this investigation, the public interest in protecting U.S. intellectual property rights outweighs any effect that remedial orders might have on U.S. consumers or on competitive conditions in the United States. *See* OUII Resp. to Request for Add’l Briefing at 5-7 (Apr. 3, 2013) (“OUII Resp.”). OUII submits that Apple’s arguments to the contrary are unpersuasive.

Apple argues, for example, that “[a] consumer may be dependent on a particular network based on the available quality of reception, or because of contractual service term requirements.” Apple Resp. to Request for Add’l Briefing at 18 (Apr. 3, 2013) (“Apple Resp.”). Thus, for dependent consumers who rely on the GSM/UMTS network, Apple argues, there is no substitute for the ’348 accused devices at the same price point. *Id.* at 15. The evidence does not support this argument, however. Even if a customer is unable or unwilling to switch to a non-UMTS wireless network, all wireless carriers that offer the ’348 accused devices also offer alternative non-Apple mobile devices at comparable price points for the GSM network. Samsung notes, for example, that four of the seven non-Apple tablet models offered by AT&T are priced lower than Apple’s iPad 2. Samsung Resp. to Request for Add’l Briefing at 10 (Apr. 3, 2013) (“Samsung Resp.”). Apple does not disagree that such products exist, but argues that they are not substitutes for the ’348 accused products because “they do not enable access to the large and diverse library of popular software applications uniquely available on the accused Apple devices.” Apple Resp. at 15. As discussed in OUII’s Response to Commission Question 1, however, the Android system used in comparable substitutes offered by Samsung and others features a large number of apps that perform the same functions as the most commonly used apps available on the accused Apple devices. OUII Resp. at 9-10 (citing comScore, *Mobile Future in Focus 2013*); *see also* Comments of the Association for Competitive Technology at 1 (Apr. 2, 2013) (“Mobile apps are a huge and fast-growing industry. . . . Today, billions of apps are downloaded[.]”). OUII submits, therefore, that U.S. consumers would have adequate access to comparable substitute hardware and software products if the allegedly infringing Apple devices were excluded from the U.S. market.

With regard to competitive conditions in the U.S. cellular market, Apple argues that “[t]he immediate exclusion of the iPhone 4 (AT&T) and iPad 2 3G (AT&T) would adversely affect two national carriers, AT&T and T-Mobile, and two regional carriers, GCI in Alaska and CT Cube in Texas.” Apple Resp. at 13. OUII has already addressed the effect of remedial orders on the national carriers, noting that two-thirds of the U.S. national market already consists of non-Apple products, which compete with one another on price and product features. OUII Resp. at 5-6. In OUII’s view, the evidence also does not show that remedial orders based on the ’348 patent would have a significant adverse effect on the two regional carriers Apple has identified.

The first regional carrier, GCI, operates a UMTS-based mobile wireless network in Alaska, in addition to cable-based telecommunications, a fiber-optic and microwave network, and a satellite communications network. Apple Resp. exh. A ¶¶ 3-4 (GCI Decl.). Within the geographical area serviced by GCI, there are at least four other major competitors for wireless services: AT&T Mobility, ACS Wireless, Inc., Matanuska Telephone Association, Inc., and as of 2013, Verizon Wireless. *Id.* ¶ 6. Thus, Alaskan consumers would continue to have a choice of service suppliers even if GCI’s wireless product offerings were curtailed. Moreover, it is not obvious that GCI’s product offerings would be significantly affected by remedial orders based on the ’348 patent. GCI currently offers handsets supplied by six manufacturers: Apple, Blackberry, HTC, LG, Samsung, and Sony. *Id.* ¶ 8. While the Apple iPhone represented [

] of GCI’s sales in 2012, *id.* ¶ 9, the only product currently distributed by GCI that would no longer be available would be the iPhone 4.¹ GCI could continue to sell the iPhone 4S and iPhone 5, as well as the complete product lines of the other five handset manufacturers.

¹ The current configurations of the iPhone 4S and iPhone 5 contain []. See Samsung Resp. at 12. As discussed with regard to Question 4 below, Samsung does not allege that products containing [] infringe the asserted claims of the ’348 patent.

Accordingly, OUII submits that the effect of remedial orders on competitive conditions in the Alaskan wireless services market would be minimal.

The second regional carrier identified, CT Cube, serves twenty-six rural counties in central and west Texas with wireless services based on the GSM/UMTS standard. Apple Resp. exh. B ¶ 3 (CT Cube Decl.). In OUII's view, GCI and CT Cube are similarly situated. CT Cube's current competitors include the four national carriers: AT&T Mobility, T-Mobile, Sprint, and Verizon Wireless. *Id.* ¶ 4. Like GCI, CT Cube sells wireless handsets from multiple manufacturers: Apple, Blackberry, Motorola, Nokia, and Samsung. *Id.* ¶ 5. CT Cube has only recently started to sell the Apple iPhone series, beginning in December 2012. *Id.* ¶ 6. It currently offers the iPhone 4, the iPhone 4S, and the iPhone 5. *Id.* The iPhone 4, the only product sold by CT Cube that would be affected by a remedial order based on the '348 patent, is currently offered for free in conjunction with a two-year service contract. *Id.* ¶ 7. Thus, OUII submits that remedial orders based on the '348 patent likely would have a minimal effect on competitive conditions in the area serviced by CT Cube. Not only would consumers continue to have a choice of wireless providers, but those opting for CT Cube would continue to have a choice of handsets from multiple providers. Under these conditions, OUII submits that remedial orders based on the '348 patent would not have a significant adverse effect on the regional markets that Apple has identified.

2. **What third, fourth, and later generation products (if any) are currently available in the U.S. market that are authorized by Samsung to utilize the technology covered by the asserted claims of the '348 patent? Are these products acceptable substitutes for the accused iPhones and iPads and are they widely viewed to be acceptable substitutes for the accused iPhones and iPads?**

In response to Commission Question 2, OUII noted that at least two categories of third, fourth, and later generation products currently available in the U.S. market are authorized to use

the technology covered by the asserted claims of the '348 patent: Samsung's own 3G and/or 4G/LTE products operating on a GSM/UMTS network in the United States, and 3G and/or 4G/LTE products of Samsung's current licensees. OUII Resp. at 7-8. The private parties argue that a third category of authorized products exists: Apple products that contain [

]. Apple Resp. at 17; Samsung Resp. at 9. OUII disagrees with Apple's statement that all such products are "licensed under the '348 patent[,]"² but agrees with Samsung that these devices, which include the iPhone 4 (CDMA version), iPhone 4S, iPhone 5, iPad 2 (CDMA version), iPad 4, iPad mini and Wi-Fi only iPad, "are widely viewed as replacements for the legacy iPhone 4 and iPad 2 devices that would be subject to remedial orders." Samsung Resp. at 9. Such products are not necessarily "authorized by Samsung," but they are alternatives that would lawfully continue to be available in the United States if the Commission issued remedial orders based on the '348 patent because they would not fall within the scope of the remedial orders. *See* discussion with regard to Commission Question 4 below.

² The Final ID correctly rejected Apple's licensing and patent exhaustion defenses, in part because the "first sale" on which Apple relied took place outside of the United States. Final ID at 509. Apple claims that "[t]hat analysis has since been called into question by the U.S. Supreme Court in *Kirtsaeng v. John Wiley & Sons*, No. 11-697, ___ S. Ct. ___, 2013 WL 1104736 (Mar. 19, 2013)." Apple Resp. at 3 n.4, 10. Apple is incorrect. In *Kirtsaeng*, the Court held that in the context of a specific copyright statute, "the 'first sale' doctrine applies to copies of a copyrighted work lawfully made abroad." *Kirtsaeng*, 2013 WL 1104736 at *5. Patents are not mentioned in the opinion, which is based on statutory analysis, not on common law as Apple suggests. *See* Apple Resp. at 10. Moreover, the Court subsequently denied the petition for writ of certiorari in *Ninestar Technology Co. v. U.S. Int'l Trade Comm'n*, No. 12-552, ___ S. Ct. ___, 2013 WL 1187588 (Mem) (cert. denied Mar. 25, 2013), which would have raised the issue of whether a 'first sale' in a patent context must still occur in the United States in light of *Kirtsaeng*. Thus, at least for now, patent exhaustion law remains unchanged.

3. **In what ways, if any, should a remedy with respect to infringement of the '348 patent be specifically tailored to avoid harm to the public interest, as identified in 19 U.S.C. §§ 1337(d)(1) and (f)(1)? In addressing this issue, the Commission requests that submitters avoid discussing issues related to standards-setting organizations, as the record concerning those issues has been well developed.**

Apple argues that any remedy imposed with respect to infringement of the '348 patent should be tailored to allow service and repair or replacement units for both in- and out-of-warranty accused iPhones and iPads. Apple Resp. at 22. Apple also argues that it would be appropriate to allow a transition period of five months before any remedial order takes effect. *Id.* at 15, 20. OUII has no objection to these modifications, which are consistent with those suggested by OUII in response to Commission Question 3. OUII Resp. at 10-11.

Apple also argues, however, that “any remedy should expressly carve out Apple products containing a Qualcomm baseband processor.” Apple Resp. at 19. Citing *Certain Power Supply Controllers*, in which the Commission excluded specific products from the scope of an exclusion order, Apple contends that to prevent confusion at the border, any exclusion order based on the '348 patent should expressly exempt the following products: the iPhone 4 (CDMA version); the iPhone 4S; the iPhone 5; the iPad 2 3G (CDMA version); the third and fourth generation cellular iPads; and the cellular iPad mini. *Id.* at 19-20; *see Certain Power Supply Controllers and Products Containing Same*, Inv. No. 337-TA-541, USITC Pub. No. 3993, Limited Exclusion Order at 3 (May 2008).

OUII disagrees that a carve-out of specific model numbers would eliminate confusion at the border, particularly once new models are introduced in the future. Future models might or might not fall within the scope of the exclusion order, and a simple carve-out of existing model numbers would not provide U.S. Customs and Border Protection (“CBP”) with any guidance as to whether a new product should be excluded. OUII submits that a better option would be to

allow importers to certify that a particular imported article is outside the scope of the exclusion order. To assist CBP in enforcing the Commission's orders, it is the Commission's general practice to include certification provisions in exclusion orders involving patents for which the practice of the patent is not easily determined by visual inspection. *See, e.g., Certain Mobile Devices, Associated Software and Components Thereof*, Inv. No. 337-TA-744, Comm'n Op. at 21 (June 5, 2012). OUII agrees that CBP could not readily determine whether a device practices the '348 patent through visual inspection. Therefore, any exclusion order should include a certification provision to assist CBP in enforcing the order. Specifically, as Samsung advocates, "Apple should be permitted to certify that the imported devices contain [], are non-UMTS only, and/or Wi-Fi only and are therefore not subject to an exclusion order based on infringement of the '348 patent." Samsung Resp. at 11. Apple itself has previously requested that any remedial order include a certification provision, and OUII has agreed with that position. Apple Written Submission on Issues Under Review at 71 (Dec. 3, 2012); OUII Reply Br. on Issues Under Review & on Remedy, Public Interest, & Bonding at 25 (Dec. 10, 2012).

4. With respect to the '348 patent, Samsung's infringement case before the Commission relied upon accused third and fourth generation Apple products that operate on the AT&T wireless network. If the Commission were to issue remedial orders covering articles covered by the asserted claims of the '348 patent, would such an order cover (a) Apple products that operate on other wireless networks in the United States, and (b) later generation Apple products (e.g., iPhone 5, later iPad versions)?

Apple and Samsung agree that the only Apple products that Samsung has alleged infringe the '348 patent are UMTS-capable versions of the iPhone 4, the iPhone 3G and 3GS, the iPad 2 (3G), and the iPad (3G), []. *E.g.,* Apple Resp. at 3-4; Samsung Resp. at 4. It is undisputed that all other currently-offered Apple iPhones and iPads []. Apple Resp. at 2; Samsung Resp. at 5-6, 7-8.

Both Apple and Samsung agree that devices [], devices without cellular connectivity, or devices capable of connecting only to non-UMTS networks would not be subject to an exclusion order or cease and desist order based on infringement of the '348 patent. Samsung Resp. at 5-6, 7-8; cf. Apple Resp. at 2 (“A remedial order could not properly extend to (a) same generation Apple products that are designed to operate on CDMA wireless networks in the U.S. or (b) any later generation Apple products.”). Based on this representation, OUII agrees that Samsung has disavowed any claim that these products would be covered by a remedial order, even if they were later found to infringe the '348 patent. OUII disagrees, however, with Apple’s conclusion that this necessarily would allow for importation of any future generation Apple products, regardless of whether they infringe the '348 patent.

(a) Apple products that operate on other wireless networks in the United States

As noted in OUII’s Response to Commission Question 4, in a Section 337 investigation, “the scope of the remedy is dependent upon the scope of the investigation, which is determined by the notice of investigation.” *Automated Mechanical Transmission Sys.*, Inv. No. 337-TA-503, Comm’n Op. at 4; see also *Certain NOR and NAND Flash Memory Devices and Products Containing Same*, Inv. No. 337-TA-560, Order No. 14 (Jul. 6, 2006) (notice of investigation determines scope of investigation). Thus, ordinarily remedial orders based on the '348 patent would cover any Apple product containing the functionality found to infringe the asserted claims of the '348 patent. Products that did not contain that functionality would not infringe the '348 patent and therefore would not be covered by the remedial orders. See OUII Resp. at 11-12.

The '348 patent “relates generally to an information transmitting apparatus and method in an IMT 2000 system, and in particular, to an apparatus and method for transmitting a transport format combination indicator (TFCI).” JXM-1 at 1:21-24 ('348 patent). As Samsung notes, this

is technology associated with 3GPP standards for “UMTS” (or “GSM”) wireless networks, such as the network operated by AT&T in the United States.³ Samsung Resp. at 4 & n.2. Thus, OUII agrees with Samsung that “[b]ecause the ‘348 patent relates to 3GPP standards, devices with no cellular connectivity and devices capable of connecting only to non-UMTS networks cannot infringe the asserted claims of the ‘348 patent.” Samsung Resp. at 4. Accordingly, Wi-Fi-only devices such as Apple’s Wi-Fi-only iPads would not be covered by a remedial order based on the asserted claims of the ‘348 patent because they do not contain the accused functionality. Apple devices operating exclusively on a non-UMTS network, such as the network operated by Verizon in the United States, also would be outside the scope of the order.

(b) later generation Apple products (e.g., iPhone 5, later iPad versions)

In addition, OUII agrees that Samsung has disavowed any claim that products containing [] would be covered by remedial orders based on the ‘348 patent, even if such products somehow infringe the patent. Samsung Resp. at 5-6, 7-8, 12; *accord* Apple Resp. at 3-4. This does not mean, however, that *all* future Apple products would be outside the scope of the orders. Generally, if such products contained the UMTS functionality found to infringe the asserted claims of that patent and [], then they would be covered by the Commission’s remedial orders, even though they were not specifically named in the investigation. *See, e.g., Certain Ground Fault Interrupters and Products Containing Same*, Inv. No. 337-TA-615, USITC Pub. No. 4146, Comm’n Op. at 27

³ Samsung notes that “[a]t the time the complaint was filed, Apple’s iPhones and iPads with UMTS connectivity were only available through AT&T. Since then, Apple has expanded its sales to other UMTS carriers.” Samsung Resp. at 12. OUII agrees with Samsung that UMTS-capable Apple products found to infringe the ‘348 patent would be subject to the Commission’s remedial orders even if they were intended to operate on these other carriers (T-Mobile, GCI, and CT Cube). Apple appears to concur. *See* Apple Resp. at 13 (In the event of an exclusion order based on the ‘348 patent, “[t]hese GSM carriers would not be able to sell the iPhone 4[.]”).

(Oct. 2011) (rejecting request to “deviate from the long-standing Commission practice of declining to limit exclusion orders to specific model numbers”). The question of whether a particular product infringed the asserted claims of the ’348 patent would then have to be determined on a case-by-case basis, either by CBP through a certification process or scope ruling, or by the Commission in an advisory or enforcement proceeding.⁴

In this case, however, rather than simply not accusing Apple products [], Samsung has unequivocally excluded such products from the scope of the investigation with regard to the ’348 patent.⁵ In OUII’s view, this makes a difference. A complainant may narrow the scope of an investigation, for example by withdrawing its allegations regarding certain asserted claims, or by terminating the investigation as to a particular respondent, or, as here, by specifically identifying and affirmatively stating that it does not accuse certain products of infringement. Where, as here, a complainant in an ITC investigation specifically withdraws infringement allegations against certain products, the Commission may find that those products are no longer within the scope of the investigation and

⁴ Such proceedings would address Apple’s “due process” concerns. *See* Apple Resp. at 10-11 (“The issuance of any exclusion order or other remedy that would even arguably cover such products without a hearing to determine infringement would violate the Due Process Clause of the Fifth Amendment.”).

⁵ Samsung Resp. at 4 (“In this investigation, Samsung accused Apple devices that comply with 3GPP TS 25.212 rel. 99 or later standard and do not contain [] of infringing the asserted claims of the ’348 patent.”), 5-6 (“Samsung understands that the non-UMTS version of the iPhone 4 and all versions of the iPhone 4S and iPhone 5 currently include []. . . . Samsung has not accused devices containing [] of infringing any claims of the ’348 patent[.]”), 12 (“[F]uture devices incorporating [] would not be subject to an exclusion order or cease and desist order.”). *See also, e.g.*, Apple Resp. exh. C-10 (Jan. 31, 2012 e-mail from G. Lantier) (“Samsung is not accusing the iPhone 4S of infringing the ’348 patent.”); *id.* at 5, exh. C-9 (Samsung contention interrog. resps.); Hearing Tr. at 484:4-485:13, 1260:15-25 (Min) (’348 accused products are []).

therefore are not subject to any remedy imposed. *See Certain Power Supply Controllers and Products Containing Same*, Inv. No. 337-TA-541, USITC Pub. No. 3993, Comm'n Op. at 2, 4-5 (May 2008) (“[B]ecause we allowed PI to terminate the investigation with regard to [certain] products . . . , we have determined to omit these products from the remedial order”); *see also*, *e.g.*, *Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. 3046, Comm'n Op. at 15 (Jul. 1997) (complainant can withdraw allegations related to particular product designs, but must “unequivocally state” that it is doing so); *Certain NOR and NAND Flash Memory Devices*, Inv. No. 337-TA-560, Order No. 38 at 7-8 (Nov. 17, 2006) (unreviewed) (terminating certain products from investigation).

On the other hand, Samsung has clearly distinguished between future products containing [], which it has disavowed, and other future products, which might contain functionality found to infringe the '348 patent and therefore potentially could be covered by the Commission's remedial orders. *See Samsung Resp.* at 6 n.8, 9-10 n.11 [

]. For this reason, OUII agrees with the private parties that any remedial order based solely on the '348 patent should not apply to current or future Apple products containing []. Other future products, however, would still potentially be covered.

5. **Please summarize the history to date of negotiations between Samsung and Apple concerning any potential license to the '348 patent, either alone or in conjunction with other patents. Please provide copies of all written offers and counteroffers concerning a license that would cover the '348 patent, whether made by Samsung or Apple.**
6. **Please summarize all licenses to the '348 patent granted by Samsung to any entity. Please provide copies of, or cite to their location in the record of this investigation, all agreements wherein Samsung grants any entity a license to the '348 patent.**

In summarizing the history to date of negotiations between Samsung and Apple, Apple complains that [

] *E.g.*, Apple Resp. at 28. Apple's position appears to be that

[

]. *See id.* at 23, 29.

Samsung, however, explains that []:

other companies with declared-essential patent portfolios publish headline rates at which they state they are willing to license their patents. In practice, these companies do not enter into licenses at these rates, but rather execute the same kinds of broad cross-licenses that Samsung and Apple had been discussing before litigation, typically with one company making a balancing payment to adjust for differences in the relative strength of each party's patent portfolio and the relative sales of products covered by the licensed technology.

Samsung Resp. at 17. The history of Samsung's license agreements with third parties [

]. Accordingly,

OUII disagrees with Apple's contention that [

] is necessarily inconsistent with a patent owner's FRAND

obligations. There is no reason why a FRAND offer must be [].

- 7. Samsung and Apple are each requested to submit specific licensing terms for the '348 patent that each believes are fair, reasonable, and non-discriminatory. Would Samsung's terms change if the Commission were to enter remedial orders against Apple's products accused in this investigation? If so, please explain whether such an offer would be fair, reasonable, and non-discriminatory.**

According to Samsung, it has an outstanding FRAND-compliant offer to Apple [

]. Samsung Resp. at 22-23. Samsung estimates that this would require [

]. *Id.* at 23.

Apple, on the other hand, has submitted a new expert report calculating a royalty rate according to the following formula:

[

].

Apple Resp. at 38, ex. J ¶¶ 175-78 (Donaldson Decl.). The result would be [

].

OUII takes no position on whether these proposed terms are responsive to the Commission's question, but notes that Samsung's approach to calculating the royalty that it has proposed appears to be more in line with industry practice. As noted above, owners of declared-

essential patent portfolios typically negotiate broad cross-licenses, with one company making a balancing payment to adjust for “differences in the relative strength of each party’s patent portfolio and the relative sales of products covered by the licensed technology.” Samsung Resp. at 17. Samsung has provided at least [

]. *Id.* at 21-22, exhs. D1-

D40, I. [

].⁶ Apple Resp. at 47-48, exh. J ¶ 117. Moreover, Apple

states that [

].

- 8. Which factors in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970) are most relevant to determining whether Samsung has offered to license the ’348 patent to Apple on fair, reasonable, and non-discriminatory terms? Please apply any relevant *Georgia-Pacific* factors to Samsung’s offer(s) to license the ’348 patent to Apple. This analysis should include a comparison of Samsung’s licensing offers to a hypothetical negotiation between the parties prior to adoption of the ’348 patent into the standard at issue here. What other factors, if any, are relevant in determining whether Samsung has made a fair, reasonable, and non-discriminatory offer?**

Samsung and Apple appear to be in agreement that while it may be useful to consider certain *Georgia-Pacific* factors when assessing whether the terms proposed by Samsung to Apple are consistent with Samsung’s obligations under Clause 6.1 of the ETSI IPR Policy, “the *Georgia-Pacific* test as a whole is not generally applicable to this inquiry in the context of the Samsung negotiations with Apple.” Samsung Resp. at 25; *see also* Apple Resp. at 40 n.21 (“In a

⁶ [

]

FRAND rate-setting proceeding, the determination of a FRAND rate need not be done by application of the *Georgia-Pacific* factors because of the unique concerns relevant to FRAND royalties.”).

Third parties Cisco Systems, Inc., Hewlett Packard Company, and Micron Technology go further, submitting comments that “[t]he *Georgia-Pacific* factors are an unreliable indicator for assessing a reasonable RAND license and should not be considered.” Comments of Cisco, Hewlett Packard, and Micron at 4 (Apr. 3, 2013). In their view, “[a] proper reasonable royalty analysis need not take into consideration any of the fifteen *Georgia-Pacific* factors, and there may be even less basis to take these factors under consideration in determining whether a RAND offer has been made.” *Id.* at 5.

OUII does not agree with the third-party comments that the *Georgia-Pacific* factors “have limited to no utility in the context of today’s complex products and processes.” *Id.* at 4. Certain factors, such as “the royalties received by the patentee for the licensing of the patent in suit, proving or tending to prove an established royalty” and “[t]he rates paid by the licensee for the use of other patents comparable to the patent in suit[,]” are certainly useful pieces of information to consider when determining whether a licensing offer is made on FRAND terms. *See Georgia-Pacific Corp.*, 318 F. Supp. at 1120.

OUII agrees with Samsung and Apple, however, that it is not necessary to perform a full *Georgia-Pacific* analysis to determine whether Samsung has complied with its FRAND obligations in this investigation. If for no other reason, it is not necessary to do so because this investigation does not involve a true FRAND situation. As the Final ID found, it is possible to practice the relevant industry standard without infringing the asserted ’348 patent. Final ID

at 547. Accordingly, OUII submits that the '348 patent cannot be a "standard-essential" patent.⁷ See OUII Br. on Issues Under Review & on Remedy, Public Interest, & Bonding at 10-12 (Dec. 3, 2012). Moreover, even if Samsung has incurred FRAND obligations with respect to the '348 patent, the unusual circumstances of this investigation are not readily amenable to a *Georgia-Pacific*-type analysis, for the reasons discussed in OUII's original Response to Commission Question 8. OUII Resp. at 23-24.

Respectfully submitted,

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April 10, 2013

⁷ Apple contends that [

] Apple Resp. at 29, 48. If so, this would tend to support OUII's position that not every declared-essential patent is necessarily standard-essential.

CERTIFICATE OF SERVICE

The undersigned certifies that on April 11, 2013, she caused the foregoing **REPLY TO RESPONSES OF THE OFFICE OF UNFAIR IMPORT INVESTIGATIONS TO THE COMMISSION'S MARCH 13, 2013 NOTICE REQUESTING ADDITIONAL WRITTEN SUBMISSIONS ON REMEDY AND THE PUBLIC INTEREST (REVISED PUBLIC VERSION)** to be served by hand upon Administrative Law Judge E. James Gildea (2 copies), and served upon the parties (1 copy each) in the manner indicated below:

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