

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

In the Matter of

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

Investigation No. 337-TA-800

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

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This investigation presents an ideal opportunity for the Commission to provide additional guidance on the issue of unwilling licensees and reverse hold-up in the context of FRAND licensing. As demonstrated by the findings in the Final Initial Determination, Respondents have refused to take licenses for years despite InterDigital's multiple offers and good faith negotiations toward reaching licenses with each of them on FRAND terms and conditions.

The public interest is very infrequently a basis for rejecting a remedy, and this investigation does not warrant departure from that norm. The USTR's recent disapproval of an exclusion order in Inv. No. 337-TA-794¹ was based on a very different record and does not create a ground for rejecting relief here. Respondents' status as unwilling licensees who have engaged in "reverse hold-up" is well-supported by an extensive record, and the Commission can easily find that an exclusion order is appropriate in light of those considerations.²

Importantly, one of the asserted patents (the '970) is not even arguably essential as to any standard practiced by the accused products, and therefore ***no FRAND considerations are applicable to the '970 patent in any event.***³ As to the other asserted patents, even if they were found to be SEPs, this investigation stands in marked contrast to *Electronic Devices*. Unlike in that investigation, here an extensive record was developed with respect to the FRAND issue, which demonstrated overwhelmingly that Respondents are unwilling licensees. InterDigital cited the Policy Statement in its pre- and post-hearing briefs as providing guidance on the proper result, and the parties tried and briefed the issues raised therein. The Policy Statement provides:

¹ *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794 ("*Electronic Devices*").

² See DOJ/USPTO Policy Statement for Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments ("Policy Statement") at 7 (Jan. 8, 2013).

³ Nokia acknowledges as much; its only attempt to claim essentiality of the '970 patent is based on inapposite case law about a different definition of essentiality under the policy of a different SSO (IEEE) that is not at issue in this case. Nokia Statement at 1 n.2.

An exclusion order may still be an appropriate remedy in some circumstances, such as where the putative licensee is unable or refuses to take a FRAND license and is acting outside the scope of the patent holder's commitment to license on FRAND terms. For example, if a putative licensee refuses to pay what has been determined to be a FRAND royalty, *or refuses to engage in a negotiation to determine FRAND terms*, an exclusion order could be appropriate. *Such a refusal could take the form of a constructive refusal to negotiate, such as by insisting on terms clearly outside the bounds of what could reasonably be considered to be FRAND terms in an attempt to evade the putative licensee's obligation to fairly compensate the patent holder. . . . This list is not an exhaustive one.*

Policy Statement at 7. The evidence demonstrated Respondents' "refusals to pay" what the ALJ determined to be FRAND royalties, as well as Respondents' "constructive refusal[s] to negotiate" by taking unreasonable positions in negotiations. The parties collectively submitted the trial testimony of 10 expert witnesses and 9 fact witnesses, and over 400 pages of briefing, on the FRAND issues alone. The parties specifically briefed the "unwilling licensee" issue (*see, e.g.,* Resp. Post-Hr'g Br. at 539-47; Compl. Post-Hr'g Br. at 496, 502, 510-12, 544-47), and cross-examined witnesses on this subject at the hearing (*see* Tr. 1578:11-25; 2430:10-19). On this record, the ALJ found that InterDigital acted in good faith, and in a manner consistent with FRAND obligations, by making repeated offers to license on FRAND terms and conditions.

By contrast, Respondents spent *years* obstructing and evading their license obligations before InterDigital was forced to file its complaint. They exemplify a constructive refusal to negotiate. To cite just a few examples:

- Respondents demanded from InterDigital unusual and unreasonable license terms [REDACTED].
- As the ALJ noted, [REDACTED]

⁴ The behavior of ZTE and Huawei is consistent with the findings of the U.S. House of Representatives, which released an investigative report expressing serious concern about the trade practices of these companies, including Huawei's "pattern of disregard" for U.S. IP rights. *See* [http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20\(FINAL\).pdf](http://intelligence.house.gov/sites/intelligence.house.gov/files/documents/Huawei-ZTE%20Investigative%20Report%20(FINAL).pdf), at 31-32, 42-43.

[REDACTED]
[REDACTED] demonstrates that ZTE is an unwilling licensee who constructively refuses to license.

- Huawei [REDACTED]
[REDACTED]
- [REDACTED] and further argued that InterDigital must offer separate licenses for individual patents and individual countries, even though worldwide portfolio licensing is the customary and universally practiced norm for FRAND licensing in the wireless industry.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁵ InterDigital has at all times complied with any applicable FRAND obligations.⁶ Under the principles set forth in the Policy Statement, there is no barrier to exclusionary relief here.

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

Because 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

⁵ The Commission should reject, as did the ALJ, Respondents’ attempts to portray themselves as willing licensees based on their various lawsuits in Delaware courts purporting to seek a conditional US-only FRAND rate determination, as those claims have repeatedly been found to be legally deficient.

⁶ ZTE’s public interest statement attempts to rely on mischaracterizations of hearing exhibits that it alleges show “hold up” and “leveraging.” ZTE Statement at 2-3. Putting aside that the ALJ considered these exhibits and rejected ZTE’s mischaracterizations based on the weight of evidence refuting them, there is nothing improper or impermissible about worldwide licensing, particularly in light of InterDigital’s global portfolio of patent assets in over 45 countries and Respondents’ worldwide sales of products intended to be used throughout the world.

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)⁷ (emphasis in original). 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 property rights. Here, they cannot.⁸

First, the public health and welfare would not be adversely affected by the requested relief. The accused products are not medical or health devices, are not essential for public safety or welfare, and have no unique health or safety features.

Second, competitive conditions would not be adversely affected. Respondents’ combined US market share of 3G handsets is less than 15 percent.⁹ Substantial alternatives would be available, including from at least InterDigital licensees Apple, RIM, HTC, Pantech, NEC, Sharp and Sony, and Pegatron. These products operate on the same (Android and Windows) operating systems as Respondents’ products and on competing operating systems. Consumers and carriers would still have numerous choices that are suitable substitutes for the accused devices. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] meaning that other

⁷ *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.”).

⁸ ZTE, for example, apart from conclusory arguments regarding the the USTR’s disapproval of relief in *Electronic Devices* does not even refer to *any* of the statutory factors.

⁹ *See* <http://www.slideshare.net/MTKDMI/130305-mirae-handsetsinto-the-storm-17781582> at pp. 36-37.

vendors can (and do) offer WP smartphones. Nokia Statement at 4-5.

Other competitors have sufficient capacity to replace the excluded devices across the spectrum of functions, cost, carriers, operating systems and other features. For example, Apple has noted that it has available capacity to replace a significant portion of devices that might be subject to exclusion, having recently increased its own output. *See Certain Electronic Digital Media Devices and Components Thereof* (“Media Devices”), Inv. No. 337-TA-796, Apple Public Interest Reply at 9 (Jun. 19, 2013). Notably, the majority of Respondents’ excluded products are intended to replace existing devices. As such, consumers could continue using their current devices, or they could purchase refurbished devices from buy-back programs.

Third, the production of competitive articles in the U.S. would not be adversely affected where they are not produced in the U.S. Excluding the infringing products could potentially increase domestic operations by causing consumers to switch away from the foreign Respondents and towards vendors such as Apple that have comparatively larger domestic operations.

Fourth, consumers would not be adversely affected by an exclusion order. In the unlikely event that exclusion results in some restriction on choice or an increase in price, this possibility does not outweigh the benefit of providing Complainants with an effective remedy for a section 337 violation¹⁰ Rather, the public interest favors granting the relief requested to protect intellectual property rights.¹¹

¹⁰ *See Certain Personal Data & Mobile Commc’ns Devices*, Inv. No. 337-TA-710, Comm’n Op. (Dec. 29, 2011); *Certain Digital Televisions & Certain Prods. Containing Same & Methods of Using Same*, Inv. No. 337-TA-617, Comm’n Op. (Apr. 23, 2009).

¹¹ *Certain Ground Fault Circuit Interrupters & Prods. Containing Same*, Inv. No. 337-TA-739, Comm’n Op., 2012 ITC LEXIS 1458, at *171 (June 8, 2012).

Dated: August 9, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2013 copies of the foregoing:

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

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

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

Inv. No. 337-TA-868

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