
UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, DC

In the Matter of

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

Inv. No. 337-TA-800

NOKIA RESPONDENTS' STATEMENT ON THE PUBLIC INTEREST

Pursuant to 19 C.F.R. § 210.50(a)(4), Respondents Nokia Corporation and Nokia Inc.

(collectively, “Nokia”) hereby submit the following Public Interest Statement.

I. AN EXCLUSION ORDER COVERING INTERDIGITAL’S DECLARED STANDARD ESSENTIAL PATENTS WOULD HARM COMPETITION IN DETRIMENT TO THE PUBLIC INTEREST.

In light of the ruling by the USTR on August 3, 2013, in Inv. No. 337-TA-794,¹ the Commission must decline, on public interests grounds, to issue an exclusion order against Nokia products based upon U.S. Patent Nos. 7,706,830; 8,009,636; 7,502,406; 7,706,332; 7,970,127; or 7,536,013 – all of which have been declared to be essential to the WCDMA standard, the CDMA2000 standard, or both.² Indeed, in addition to declaring the patents essential to the SSOs, []³

The USTR Ruling, citing the policy statement of the US Department of Justice and the US Patent and Trademark Office (RX-3924), stated that “to mitigate against patent hold-up, exclusionary relief based on FRAND-encumbered SEPs should be available *only* based on the relevant factors described in the [DOJ/PTO] Policy Statement.”⁴ Those relevant factors relate to whether “the putative licensee is unable or refuses to take a FRAND license and is acting outside

¹ Exec. Office of the President, US Trade Rep., Disapproval of the USITC Determination in Certain Elec. Devices, Including Wireless Commc’n Devices, Portable Music and Data Processing Devices, and Tablet Computers, Inv. No. 337-TA-794 (Aug. 3, 2013) (“USTR Ruling”).

² In addition, InterDigital declared US Patent No. 7,616,970 essential to the GERAN standard, and InterDigital’s infringement theory merely adds WLAN functionality to functionality otherwise required by WCDMA. Accordingly, under present definitions of “essential,” it is an SEP encumbered patent as well. *See Innovatio IP Ventures LLC Patent Litig.*, Case No. 11 C 9308, Mem. and Order, at 33-37 (N.D. Ill. July 26, 2013).

³ *See* [] Thus, if the Commission were to change any of the ALJ’s claim construction rulings supporting his determination of no infringement, and adopt InterDigital’s proffered claim construction to support a finding of infringement, then the question of essentiality raised in USTR’s letter would be answered in the affirmative.

⁴ USTR Ruling at 2 (citing RX-3924) (emphasis added).

the patent holder's commitment to license on FRAND terms."⁵ Here, there is no factual finding that Nokia has refused to take a FRAND license; indeed, the record compels the opposite conclusion. In particular, [

] ⁶ Moreover, Nokia has also asked the US District Court in Delaware to set the FRAND rate on these patents, a request InterDigital has sought to dismiss.⁷ The willingness to have a third party set a FRAND rate where the parties cannot agree is tangible evidence that a licensee is willing, according to the US Federal Trade Commission.⁸

The USTR was clear that, "in any future cases involving SEPs that are subject to voluntary FRAND commitments," the Commission was: "(1) to examine thoroughly and carefully . . . the public interest issues . . . when determining whether a particular remedy is in the public interest; and (2) seek proactively to develop a comprehensive factual record related to these issues in proceedings before the Administrative Law Judge."⁹ In this matter, the ALJ has made no factual findings on the public interest, much less factual findings relating to the question of [

], as those issues were not delegated to the ALJ. Moreover, the ALJ did no more analysis of the FRAND issue in this case than the ALJ did in the 794 decision: he simply ruled as a matter of law that the patent owner only had an obligation to negotiate in good faith.¹⁰ Because the analysis required by the USTR has not been done, should the Commission overturn the

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⁶ [].

⁷ *InterDigital Commc'ns, Inc. v. Nokia Corp.*, Civil Action No. 1:13-cv-10, Dkt. Nos. 21-22 (Apr. 22, 2013).

⁸ See FTC Analysis of Proposed Consent Order to Aid Public Comment at 6-7, available at <http://ftc.gov/os/caselist/1210120/130103googlemotorolaanalysis.pdf>. Moreover, in the event it becomes necessary, []

⁹ USTR Ruling at 3.

¹⁰ Compare ID [] with *Certain Elec. Devices, Including Wireless Commc'n Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, Initial Determination, at 460-70 (Oct. 3, 2012) (public version).

ALJ's rulings of non-infringement and find one or more of these FRAND-encumbered patents to be valid and infringed, it still cannot issue an exclusion order that would survive USTR review.

Commissioner Pinkert also recently recognized the dangers of granting exclusionary relief against willing licensees with respect to FRAND-encumbered patents, noting that where such a patent holder fails to offer FRAND license terms with respect to patents representing portions of multicomponent products, such failure "would in all likelihood impose substantial costs on consumers while undermining the standards setting process and thus public welfare and competitive conditions in the U.S. economy."¹¹ The Initial Determination in this Investigation erroneously concludes that InterDigital's FRAND commitments are satisfied by good faith negotiation alone, limiting its analysis of InterDigital's offers to a summary conclusion that they were not discriminatory. In fact, however, the record here clearly shows [

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Moreover, InterDigital is not seeking an exclusion order to protect its own US sales; it is seeking an exclusion order to compel payment of royalties [

].¹² Indeed, as noted above, [

]. Permitting InterDigital to use an exclusion order to leverage such payments from declared-essential patents undermines the public interest.

II. EXCLUSION OF NOKIA'S PHONES WILL BE A DETRIMENT TO US CONSUMERS AND COMPETITION.

¹¹ See Inv. No. 337-TA-794, Comm'n Op., at D5 (July 5, 2013).

¹² See [

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Nokia sells exclusively Windows-based smartphones in the United States under its Lumia brand and is by far the largest provider of such Windows Phones (“WP”) in the country. Should an exclusion order issue against Nokia, competitive conditions in the United States and US consumers will be adversely affected because it would devastate further development of the WP mobile ecosystem, which is presently the only viable alternative to the effective smartphone duopoly of Apple-iOS and Google-Android.¹³

Smartphone operating systems in the United States are at present divided primarily between iOS, Android, Windows, and BlackBerry.¹⁴ With roughly 92% of the smartphone market, iOS and Android comprise an effective duopoly in this market, with the next viable competitor, WP (a later entrant to the market), at only 4%, but growing.¹⁵ It is vital to continued competitiveness in the mobile phone market to maintain an alternative ecosystem that can compete with the iOS-Android duopoly. Increasing the number of participants in the market benefits competition and consumers by spurring innovation and keeping prices competitive. For this reason, both consumers and cell phone carriers prefer more participants in the market rather than fewer, but without WP, there is no viable alternative ecosystem on the horizon.

In addition, of the four primary ecosystems, only Android and WP permit multiple vendors to produce handsets that operate on those systems. By contrast, iOS and BlackBerry only run on

¹³ For a more fulsome explanation, *see* Submission by Non-Party Microsoft Corporation in Response to the Commission’s Request for Comments on the Public Interest (Aug. 7, 2013).

¹⁴ Each of these operating systems supports an “ecosystem” of sorts that includes manufacturers of smartphones to use on the operating system, consumers who purchase the phones, “app” developers who create add-on applications that provide extended functionality and run on that operating system, and other entities that make content to specifically support that operating system. Of these four ecosystems, Android holds roughly 79% of the smartphone market, iOS holds roughly 13%, WP holds roughly 4%, and Blackberry holds roughly 3% (with other minor players making up the remaining 3%). *See* IDC Worldwide Mobile Phone Tracker (Aug. 7, 2013), <http://gigaom.com/2013/08/07/even-as-apple-sells-more-iphones-its-share-of-smartphone-market-falls/>).

¹⁵ Blackberry is close behind WP, but most analysts note that Blackberry is continuing to rapidly lose market share. *See, e.g., “Blackberry Losing Significant Market Share in the U.S.,”* The Motley Fool (June 10, 2013).

Apple- and Blackberry-manufactured phones, respectively. Thus, WP is presently the only Android alternative open to multiple vendors, and its demise would leave Android as the only choice.

Both Microsoft and Nokia have made substantial investments to develop WP and to create a successful, sustainable ecosystem.¹⁶ To accomplish that in today's smartphone market requires extensive resources to: (1) create and sell innovative products that are attractive to consumers;¹⁷ and (2) subsidize and promote development of an extensive pool of "apps" by third parties for the WP ecosystem.¹⁸ Without these investments in R&D, app development, and marketing, it would have been impossible to achieve even the modest gains WP has experienced (going from less than 1% of the U.S. smartphone market in 2011, to 4% now). All of this investment, and the related jobs in the United States, would be lost if the WP ecosystem is destroyed.

Microsoft and Nokia are both highly successful companies in their respective fields, and their strategic alliance places them in a unique position to serve as a viable competitor to iOS and Android. No other entity is in a position to step in and provide the investment and innovation needed to keep the WP nascent ecosystem on a positive trajectory, or to offer a sustainable alternative. Both companies are fully committed to the WP market—it is the backbone of Microsoft's corporate strategy, and Nokia continues to sell only WPs in the United States. No other smartphone makers have shown this level of commitment to developing an alternative ecosystem, nor have any other smartphone makers had Nokia's success in the WP arena. If Nokia's WPs, which comprise roughly 80% of all WPs in the United States, are excluded, the disruption to this emerging market would be fatal, thereby eliminating the only presently feasible alternative to iOS

¹⁶ For example Nokia has [

Microsoft's investment is discussed more fully in its public interest submission in this matter.

¹⁷ Nokia's Lumia 920 was voted Engadget Reader's Choice Smartphone of the Year for 2012, and many features of Nokia's Lumia products are touted as best in class, such as Nokia's smartphone cameras, like the unparalleled 41 megapixel camera in the recently announced Lumia 1020.

¹⁸ When Nokia first announced its entry into the WP market in 2011 there were only 5,000 apps available for WP at that time; today, just 2 years later, there are 165,000 and counting.

and Android and diminishing US competitive conditions to the detriment of US consumers.

Dated: August 8, 2013

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day, a true and correct copy of the foregoing document was served by the indicated means to the persons at the addresses below:

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Dated: August 8, 2013

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