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July 7, 2014

The Honorable Lisa R. Barton
Acting Secretary
United States International Trade Commission
500 E Street SW
Washington, DC 20436

Re: Notice of Request for Statement on the Public Interest in *Certain Wireless Devices with 3G Capabilities and/or 4G Capabilities*, Inv. No. 337-TA-868

Dear Secretary Barton:

Pursuant to the June 16, 2014, Notice from the U.S. International Trade Commission ("ITC"), third party Microsoft Corporation ("Microsoft") respectfully submits the following comments on the severe, long-term, and avoidable harms that the remedial orders requested by Complainants InterDigital Communications, Inc.; InterDigital Technology Corporation; IPR Licensing, Inc.; and InterDigital Holdings, Inc. (collectively, "InterDigital") would have on the public interest.

I. FRAND-ENCUMBERED PATENTS SHOULD NOT BE ASSERTED

Microsoft submitted comments on the public interest issues in Investigation No. 337-TA-752 on July 7, 2012, concerning the impropriety of granting exclusion orders on FRAND-committed patents, and it expands on those comments here.

The Federal Circuit recently has affirmed Judge Posner's denial of injunctive relief to Motorola on a FRAND-committed patent. *See Apple Inc. v. Motorola, Inc.*, __F.3d __, 2014 WL 1646435 at **34-35 (Fed. Cir. Apr. 25, 2014) ("*Motorola*"). In concluding that FRAND promises preclude injunctive relief, Judge Posner relied, in part, upon the submission by the U.S. Federal Trade Commission ("FTC") in Investigation No. 337-TA-745,[1] which was ignored by the ALJ. *See Motorola*, 869 F. Supp. 2d 901, 913-14 (N.D. Ill. 2012). Further, in affirming the denial of the injunction in *Motorola*, the Federal Circuit relied on guidance from the U.S.

[1] The FTC filed corresponding comments in Investigation No. 337-TA-752. *See Certain Gaming and Ent. Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752, Third Party FTC's Statement on the Public Interest at 5 (June 6, 2012) (*"Consoles"*).

Department of Justice ("DOJ") and the U.S. Patent and Trademark Office ("PTO"),[2] which the ALJ also ignored here. *See* 2014 WL 1646435 at *35. Although the Federal Circuit's and Judge Posner's analysis are framed by the equitable considerations set out in *eBay v. MercExchange, LLC,* 547 U.S. 388 (2006) (*"eBay"*),[3] the observations on the sufficiency of monetary relief apply with equal force to the statutory public interest inquiry under 19 U.S.C. § 1337(d)(l). In the typical ITC investigation, it may be that "the public interest favors the protection of intellectual property rights." *San Huan New Materials High Tech, Inc., v. ITC,* 161 F.3d 1347 (Fed. Cir. 1998). That said, the public interest does ***not*** "inevitably lie[] on the side of the patent owner," and the importance of patent rights is only "one factor to consider" in the public interest analysis. *Rosemount, Inc. v. ITC,* 910 F.2d 819 (Fed. Cir. 1990). Where a complainant asserts FRAND-committed, standards-essential patents, it shifts the public interest balance. As in the *Motorola* case, InterDigital has agreed that a FRAND royalty is all it needs to adequately protect its patent rights, and, indeed, that is InterDigital's sole business today. So, the inevitable harms to the public interest (as well as the specific harms otherwise outlined in this letter) arising from the requested relief – including, more limited access to technological innovation and choices among implementers' products – are not offset by the need to protect patent rights in this case. *Cf Viscofan, S.A. v. ITC,* 787 F.2d 544, 548 (Fed. Cir. 1986) ("[T]he Commission has broad discretion in selecting the form, scope and extent of the remedy."); *Certain Devices for Connecting Computers via Tel. Lines,* USITC Pub. No. 2843, Inv. No. 337-TA-360, Comm'n op. at 9 (Dec. 1994) (noting that ITC has "applied [its remedial] authority in measured fashion and has issued only such relief as is adequate to redress the harm caused by the prohibited imports").

By assuming its FRAND obligations, InterDigital freely gave up exclusionary remedies in favor of a reasonable royalty in to have its technology incorporated into technical standards. InterDigital put its patents on the store shelf for a FRAND price, and they are available to anyone anywhere in the world willing to pay a true FRAND value. Having done so, InterDigital has no "recourse to the equity power of the Commission." *Certain Dynamic Random Access Memories, Components Thereof and Prods. Containing Same* ("DRAM"), Inv. No. 337-TA-242, 1987 ITC LEXIS 95, at *32 (May 21, 1987). Correspondingly, InterDigital should not be permitted to use even the threat of injunctive relief as a club to wield in attempting to extract higher royalties under the FRAND banner. *Apple,* 869 F. Supp. 2d at 913-14.

The development and implementation of technical standards depend on reliable licensing commitments. It is the FRAND commitment itself that bars exclusionary relief, and the commitment must be enforceable, regardless of whether a particular implementer has relied on a particular patentee's statements or conduct. As one district court has explained, "the fact that

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[2] POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS at 9 (Jan. 8, 2013) ("DOJ/PTO POLICY STATEMENT").

[3] Judge Posner rejected Motorola's pursuit of an injunction on its FRAND-encumbered patent on contractual and policy grounds, then independently applied *eBay*. 869 F. Supp. 2d at 913-15,

letters of assurance were allegedly required from, and provided by, patentees . . . necessarily anticipates reliance on those commitments. Otherwise, the process of acquiring [Letters Of Assurance] would be a meaningless exercise." *Barnes & Noble, Inc. v. LSI Corp.*, No. 11-cv-2709, 2012 WL 359713, at *13 (N.D. Cal. Feb. 2, 2012). For this reason, there is no need to show reliance on any particular misleading statements: "the allegation that they adopted the standards in question is sufficient to infer reliance on the propriety of the standards-setting process itself." *Id.* Industry- wide commitments and industry-wide reliance allows competition to flourish based on features and pricing unique to each product. InterDigital is not entitled to eliminate competition among implementers' products on the basis of features that are meant to be shared by all industry participants – that is what makes the features "standards."

II. INTERDIGITAL'S HOLD-UP HARMS THE PUBLIC INTEREST

Even if the assertion of FRAND-encumbered patents is allowed at the ITC, the harms that would result from doing so in this investigation outweigh any public interest in protecting the intellectual property rights of InterDigital. Aside from the negative consequences to Respondents in this matter, which are sizeable, the hold-up leverage that InterDigital seeks via an exclusion order would have detrimental effects on a whole host of third parties that have made abundant, good-faith investments in the ecosystem in which the U.S. Windows Phone Operating System ("WPOS") exists.

More specifically, [redacted] *See* RX-3956C (Roark) at QQ51-53, 62. An immediate exclusion of this magnitude during [redacted]

Further, the US WPOS [redacted]. Thus, the potential [redacted] the US WPOS ecosystem would have devastating implications on consumer choice in these areas. [redacted]

Endorsing InterDigital's hold-up of the entire US WPOS ecosystem based on patents allegedly related to 4G physical signaling in a phone's chipset fails to defend or give any weight to the interests of innocent public bystanders. Such deleterious effects are particularly egregious considering there is a simple route that would both circumvent such results ***and*** compensate InterDigital appropriately. That route is for InterDigital to accept a FRAND offer for its US patents. InterDigital took a [redacted]. Following such a route, however, would prevent InterDigital from pursing exclusionary relief in the ITC as the ultimate hold-up tactic.

Just as *eBay* prevents such abuses in district court, Microsoft respectfully suggests that the Commission has the inherent power to ensure that complainants do not waste the judicial resources of the ITC by misusing the forum's extraordinary relief to generate hold-up returns on patents. Indeed, the Commission is charged with, and has a long-standing history of, limiting the ITC's protections to only those complainants that seek to utilize the ITC in good faith to safeguard an important domestic industry that makes significant/substantial contributions to the US economy. The DOJ and the PTO as well as the U.S. Federal Trade Commission ("FTC") have indicated they are looking to the Commission to enforce such discipline in investigations involving FRAND-encumbered patents. *See, e.g.,* DOJ/PTO POLICY STATEMENT at 9 ("In an era where competition and consumer welfare thrive on interconnected, interoperable network platforms, the DOJ and USPTO urge the USITC to consider whether a patent holder has acknowledged voluntarily through a commitment to license its patents on F/RAND terms that money damages, rather than injunctive or exclusionary relief, is the appropriate remedy for infringement.") *Consoles*, Inv. No. 337-TA-752, Third Party FTC's Statement on the Public Interest at 5 ("In cases that address RAND-encumbered SEPs, the FTC urges the ITC to follow the requirements of Sections 337(d)(l) and (f)(1) and consider the impact of patent hold-up on competitive conditions and United States consumers."). Microsoft encourages and supports this exercise of power by the Commission as well.

To the extent the Commission chooses not to recognize and use its public interest authority to deny relief to owners of FRAND-encumbered patents that have not satisfied their licensing obligations, the FTC and others have suggested that Congress should consider amending Section 337. *See, e.g.,* Prepared Statement of the FTC Before the US Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights Concerning "Standard Essential Patent Disputes and Antitrust Law" at 14 (July 11, 2102). Such an extreme course of action, at a minimum, would squander governmental time and attention to solve a problem that the ITC already has the statutory ability and the mandate to address. *See Certain Elec. Devices, Including Wireless Commc'n Devices, Portable Music and Data Processing Devices, and Tablet Computers*, Inv. No. 337-TA-794, U.S. Trade Representative's Disapproval of ITC Determination at 3-4 (Aug. 3, 2013).

III. IF RELIEF IS GRANTED, A DELAY IN THE REMEDY IS PROPER

Should the ITC issue a remedyhere, Microsoft requests that its enforcement be delayed by twelve months to mitigate harm to the public interest. First, given that the treatment of FRAND-encumbered patents is so crucial, the Commission should provide a transition. This would allow time to appeal the ITC decision, to determine a FRAND rate (by negotiation or by court order in already pending district court litigation), or to explore design-around possibilities before the harsh impact of a potential exclusion order. Such an approach has been supported by the DOJ, the PTO, and the FTC. *See, e.g.,* DOJ/PTO POLICY STATEMENT at 10; *Consoles*, Third Party FTC's Statement on the Public Interest at 5.

Second, the ITC should provide a transition period for industry participants and consumers to adjust to the ban of the accused WPOS devices from the US market based on enforcement of a patent that may be infringed by all standards-compliant products. During any subsequent ramp-up in the production of replacement products, which would take an extended period of time, the OS could go stale in the United States if existing WPOS phones from Nokia could not be sold, making the US WPOS considerably vulnerable. A delay of at least twelve months, which [redacted]. *See* RX-3956C (Roark) at QQ73-74. Such a delay has been utilized previously by the ITC where the immediate exclusion of certain products would adversely impact competition. *See Personal Data and Mobile Commc'ns Devices and Related Software*, Inv. No. 337-TA-710, Comm'n. Op. at 79-83 (Dec. 29, 2011).

July 7, 2014

Respectfully submitted,

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Counsel for Microsoft Corporation

CERTIFICATE OF SERVICE

I hereby certify that copies of the **Microsoft Corporation's Response to Request for Statement on the Public Interest** were served on the following parties as indicated below on this 7th day of July, 2014 as indicated:

The Honorable Lisa R. Barton Acting Secretary to the Commission U.S. International Trade Commission 500 E Street, SW, Room 112 Washington, DC 20436	VIA EDIS

/s/ Jennifer L. Gordon
Jennifer L. Gordon
IP Litigation Paralegal

CERTIFICATE OF SERVICE

I hereby certify that copies of the **PUBLIC Microsoft Corporation's Response to Request for Statement on the Public Interest** were served on the following parties as indicated below on this 8th day of July, 2014 as indicated:

The Honorable Lisa R. Barton Acting Secretary to the Commission U.S. International Trade Commission 500 E Street, SW, Room 112 Washington, DC 20436	VIA EDIS

/s/ Jennifer L. Gordon
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