

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

In the Matter of

**CERTAIN WIRELESS
COMMUNICATION DEVICES,
PORTABLE MUSIC AND DATA
PROCESSING DEVICES, COMPUTERS
AND COMPONENTS THEREOF**

Investigation No. 337-TA-745

**COMMENTS OF THIRD PARTY INTERDIGITAL COMMUNICATIONS, LLC IN
RESPONSE TO COMMISSION NOTICE DATED JUNE 25, 2012**

Third party InterDigital Communications, LLC (“InterDigital”) submits these comments in response to the Commission’s request for written submissions in Investigation No. 337-TA-745 regarding remedy and the public interest. *See* Notice of Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions (June 25, 2012).

InterDigital has been a participant in the wireless technology industry for more than thirty-five years, providing advanced technologies that enable wireless communications. InterDigital has designed and developed a wide range of innovations that are used in digital cellular and wireless products and networks, including 2G, 3G, 4G and IEEE 802-related products and networks. We actively participate in, and contribute our technology solutions to, standards setting organizations (SSOs) responsible for the development and approval of standards to which such products are often built. These SSOs typically employ policies requiring members and participants to commit to license “essential patents” on fair, reasonable and nondiscriminatory (FRAND) terms, or other similar terms. The common understanding in

the industry for standardized wireless products is that a commitment to license on FRAND terms does not prohibit a patent owner from seeking an exclusion order or other injunctive relief.

By promoting industry standards for products that require interoperability, SSOs further the public welfare by allowing the development of technologies that can be widely adopted across industries. Consumers benefit when products interoperate and the market does not become fractured across multiple, incompatible technologies. The usual way that SSOs address the issue of intellectual property in standards is in a manner that fairly balances the interests of both the owners of intellectual property rights (IPRs) and the implementers of standardized technologies: IPR owners agree to license their standards essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms.¹ This allows implementers to obtain the licenses they need, and allows IPR owners to obtain a fair and adequate reward for the use of their inventions and for the investments they have made to develop those technologies.

FRAND obligations arising from SSO policies contemplate that IPR owners and implementers will negotiate licenses on FRAND terms in a bilateral manner in order to reach terms and conditions that are mutually satisfactory for their individual situations. The FRAND obligation is deliberately left open and undefined, in order to allow parties freedom of contract to tailor their agreements in the manner that best suits their businesses. A FRAND commitment should not, however, be interpreted as a free pass for implementers to infringe while they seek to delay indefinitely taking licenses under the pretext that the terms offered are not FRAND. To the extent that one interprets a FRAND licensing commitment to preclude injunctions or exclusion orders in all circumstances – even where the implementer refuses in bad faith to accept

¹ SEPs may also include claims that are not essential to any particular standard. As such, subject to the policies of a particular SSO, it is generally understood that the commitment to license on FRAND terms only extends to those claims of a SEP that are necessarily infringed as a result of implementing a standard.

FRAND licensing terms and conditions – the IPR owner is left without an adequate means to obtain just compensation for the use of its IPR.

While some commentators have suggested that “patent hold up” is a problem that allows IPR owners undue leverage in negotiating “under threat of injunction,” there is simply no evidence that IPR owners are systematically breaching their FRAND commitments or that the ITC is unable to consider individually allegations of such conduct by respondents in ITC investigations. Moreover, removing the possibility of exclusionary relief will incentivize implementers to engage in “reverse hold up,” where the sunk costs in R&D and technology development incurred by IPR owners cannot be recovered due to implementers who are emboldened in avoiding or refusing to take licenses. Accordingly, a blanket prohibition on exclusionary orders for SEPs would tip the scales too heavily in favor of implementers and give short shrift to patent owners who invested in the development of the underlying technology.

A rule interpreting FRAND requirements to preclude injunctions in all cases would also seriously undermine the processes of the SSOs, which are often international organizations with constituencies from all over the world. These SSOs have gone to great lengths to establish policies that carefully balance the interests of IPR owners and implementers. While in many cases, the SSOs involved in wireless standards have expressly considered implementing rules that require IPR owners to forego injunctions, they have chosen not to do so, after intensive discussions and deliberations. The IPR policies of SSOs as they exist today already reflect the best judgment and expertise of those organizations in crafting rules for encouraging and facilitating standardization. Members who have joined in and participated in those SSO have done so on the basis of established, well-understood policies that did not provide for giving up valuable aspects of intellectual property rights, such as the fundamental right to exclude. To

change those rules retroactively and by fiat would not comport with established notions of fairness and predictability that form the basis on which industry participants run their businesses. Furthermore, a blanket prohibition on exclusionary orders for SEPs will cause IPR owners to withdraw from the standardization process entirely, resulting in more technologically inferior standards.

Whether an IPR owner complied with FRAND commitments may bear on defenses that respondents in ITC investigations may raise at the liability or remedy stages of investigations. Each case will raise unique factual circumstances that should be considered by the Commission on a case-by-case basis. It would not be appropriate, however, to adopt a *per se* rule that the Commission lacks jurisdiction to enter exclusion orders in all cases where a standards-essential patent is asserted.

Respectfully submitted,

Dated: July 9, 2012

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CERTIFICATE OF SERVICE

It is hereby certified that copies of **COMMENTS OF THIRD PARTY INTERDIGITAL COMMUNICATIONS, LLC IN RESPONSE TO COMMISSION NOTICE DATED JUNE 25, 2012** were served on July 9, 2012 as follows:

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