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July 9, 2012

**Via EDIS**

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W., Room 112
Washington, DC 20436

Re: *Certain Wireless Communications Devices, Portable Devices, Computers, and Components Thereof*, Investigation No. 337-TA-745

Dear Acting Secretary Barton:

On behalf of Microsoft Corporation ("Microsoft"), we respectfully submit these comments to address the public interest issues raised by the ALJ's decision on remedy and bonding and in response to the Commission's June 25, 2012 request for written submissions.

Microsoft submitted comments on the public interest issues in this investigation on June 6, 2012, and we incorporate those again here. We submit additional comments at this time in view of (1) Judge Posner's recent opinion in *Apple, Inc. v. Motorola, Inc.*, No. 11-cv-8540, 2012 WL 2376664 (N.D. Ill. June 22, 2012), and (2) the Commission's specific questions in its Notice of June 25, 2012.

On June 22, 2012, Judge Posner (sitting by designation in the U.S. District Court of the Northern District of Illinois) issued an opinion on whether a patentee that has committed to license its standard-essential patents on reasonable and nondiscriminatory ("RAND" or "FRAND") terms may seek injunctive relief. That opinion confirms that the relief Motorola seeks here—and sought in the district court before Judge Posner—conflicts with its promise to accept a reasonable royalty for the use of its technology:

> By committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise? . . . . Motorola agreed to license its standards-

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> essential patents on FRAND terms as a *quid pro quo* for their being declared essential to the standard. . . . A FRAND royalty would provide all the relief to which Motorola would be entitled if it proved infringement of the '898 patent, and thus it is not entitled to an injunction."

*Id.* at *12.

In reaching his conclusion that RAND promises preclude injunctive relief, Judge Posner relied, in part, upon the FTC's submission in this investigation. *Id.* Further, although Judge Posner's analysis is largely framed by the equitable considerations set out in *eBay v. MercExchange, LLC*, 547 U.S. 388 (2006), his observations apply with equal force to the statutory public interest analysis under 19 U.S.C. § 1337(d)(1). In the typical 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). But 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 RAND-committed, standard-essential patents, it shifts the public interest balance. As Judge Posner explains, Motorola has agreed that a RAND royalty is all it needs to adequately protect its patent rights. So the substantial harms to the public interest arising from the requested relief—which are outlined in Microsoft's previous public interest statement—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."); *In re: Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843, Comm'n op. at 9 (December 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").

The Commission's Notice of June 25, 2012, directed the parties to answer specific questions related to the remedy in this Investigation, and some of those questions have significant public interest implications. For example, the Commission asked whether "the mere existence of a RAND obligation preclude[s] issuance of an exclusion order," and whether "a patent owner that has refused to offer a license to a named respondent in a Commission investigation on a RAND obligated patent [should] be able to obtain an exclusion order." Microsoft submits that *the RAND obligation by itself precludes exclusionary relief*, especially when the alleged infringer is willing to pay for a RAND license. Any other rule risks upsetting "competitive conditions in the United States economy." 19 U.S.C. § 1337(d)(1)

By assuming its RAND obligations, Motorola freely gave up exclusionary remedies in favor of a reasonable royalty in exchange for the benefits of having its technology incorporated into technical standards. Motorola put its patents on the store shelf for a RAND price, and they are available to anyone anywhere in the world willing to pay a true RAND value. Having done so, Motorola has no "recourse to the equity power of the Commission." *Certain Dynamic Random Access Memories, Components Thereof, and Products Containing Same* ("DRAM"), Inv. No. 337-TA-242, 1987 ITC LEXIS 95, at *32 (May 21, 1987). And, correspondingly, Motorola is not permitted to use even the threat of injunctive relief as a club to wield in attempting to extract higher royalties under the RAND banner. *Apple*, 2012 WL 2376664, at *13.

The development and implementation of technical standards depend on reliable licensing commitments. It is the RAND 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 recently explained, "[T]he fact that letters of assurance were allegedly required from, and provided by, patentees . . . necessarily anticipates reliance on those commitments. Otherwise, the process of acquiring LOAs 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. Motorola is not entitled to eliminate competition on the basis of features that are meant to be shared by all industry participants—that is what makes the features "standards."

The Commission should exercise its broad remedial discretion to deny exclusionary relief in this investigation, for such relief would be contrary to the public interest.

Respectfully submitted,

Brian R. Nester