UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of **CERTAIN ELECTRONIC DEVICES, INCLUDING WIRELESS COMMUNICATION DEVICES, PORTABLE MUSIC AND DATA PROCESSING DEVICES, AND TABLET COMPUTERS**	**Inv. No. 337-TA-794**

CORRECTED STATEMENT REGARDING THE PUBLIC INTEREST BY NON-PARTY INTEL CORPORATION

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This case raises an issue of exceptional importance for maintaining the Nation's competitiveness in high-technology industries: when should the governing public interest factors preclude an Exclusion Order sought by a patentee that has contractually committed to license its "standard-essential patents" ("SEPs") to *all* applicants on fair, reasonable, and non-discriminatory ("FRAND") terms. Intel submits that the public interest should generally preclude an Exclusion Order on SEPs that are subject to a FRAND commitment, except in limited circumstances. Such exceptions include when: (i) a U.S. court with competent jurisdiction or a binding arbitrator previously determined (prior to institution of the ITC investigation) in a final, non-appealable judgment that the complainant has made an offer to the respondent that satisfied its FRAND obligations and the respondent rejected the offer; or (ii) the respondent and its affiliates are not subject to the jurisdiction of U.S. courts and the ITC's in rem authority is the only recourse.[1]

The Commission has broad discretion to refuse an Exclusion Order when such an order would harm the public interest. 19 U.S.C. § 1337(d)(1). As part of its public-interest analysis, the Commission must evaluate "the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." *Id.*; *see also id.* § 1337(f)(1) (same factors considered in evaluating cease-and-desist order). In the past, the Commission has refused to enter Exclusion Orders that would cause serious harm to the public interest.

That harm often took the form of depriving the public of products necessary for consumer

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[1] Intel values its close business relationships with both Apple and Samsung. Intel takes no position on the dispute between the parties, and submits this statement only to address the general question of the proper standards to apply in determining whether to issue an Exclusion Order on the basis of FRAND-encumbered SEPs, which is an issue of recurring and substantial importance for high-technology industries.

welfare. *See*, *e.g.*, *Certain Fluidized Supporting Apparatus & Components Thereof*, Inv. No. 337-TA-182/188, USITC Pub. 1667 (Oct. 5, 1984); *Inclined-Field Acceleration Tubes & Components Thereof*, Inv. No. 337-TA-67, USITC Pub. 1119 (Dec. 29, 1980). An Exclusion Order in this case would result in a different, but equally severe, public-interest harm: the exploitation of market power (which was created by an industry standard, not by the individual SEPs) to deny producers and consumers the benefits of industry standard-setting, after the patentee publicly waived its right to exclude prospective FRAND licensees from practicing the SEPs in exchange for FRAND royalties. Exclusion Orders with respect to FRAND-encumbered SEPs create a risk of coerced windfall settlements that would distort competition, undermine the standard-setting process, and injure consumers—the very sort of harm that § 337's public-interest inquiry was designed to prevent. Indeed, because SEPs are incorporated into a variety of products (e.g., the IEEE 802.11 ("WiFi") standard is used in laptops, tablets, mobile phones, printers, medical devices, network equipment, televisions, etc.), granting an Exclusion Order for a FRAND-encumbered SEP could enable a party to effectively shut down multiple U.S. industries or subject them to a windfall tax that is attributable more to the ubiquity of the standard than to any individual SEP. Certainly such market distortion and harm to the standard-setting process and consumers is precisely what Congress intended the ITC to consider under the public interest factors.

As the Administrative Law Judge ("ALJ") explained, Samsung claims that the '348 and '644 patents cover certain aspects of telecommunications standards promulgated by the Third Generation Partnership Project ("3GPP"), a collaboration of SSOs that includes the European Telecommunications Standards Institute ("ETSI"). *See* Initial Determination at 24-25, 76; 3GPP, Legal Matters, http://www.3gpp.org/Legal-matters (last visited Dec. 3, 2012). According to

Samsung, moreover, the accused devices practice those standards and therefore infringe its SEPs. Samsung is a member of ETSI, and its participation in the standard-setting process was therefore subject to ETSI's rules, pursuant to which it was required to submit "an irrevocable undertaking in writing" to "grant irrevocable licences on fair, reasonable and non-discriminatory terms and conditions" to its claimed SEPs.[2] Thus, pursuant to ETSI's Intellectual Property Rights ("IPR") Policy, Samsung committed to license any willing licensee to make, sell, repair and use standard-compliant products on FRAND terms.

A stated goal of ETSI's IPR Policy is "to reduce the risk . . . that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD . . . being unavailable."[3] As the former Chairman of ETSI's Technical Committee Special Mobile Group from 1996 to 2000 has explained, "'[t]he intention in ETSI was that once the undertaking is given, the owner would have *no possibility* to use his blocking rights as long as the licensee is prepared to accept FRAND terms and conditions. . . . This was commonly understood, and is very much at the heart of the IPR Policy.'"[4]

In accordance with these requirements, Samsung committed to license the '348 and '644 patents to anyone willing to pay a FRAND royalty. In so doing, Samsung accepted that FRAND royalties would sufficiently compensate it for the use of its SEPs by *any* implementer of the

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[2] ETSI Rules of Procedure § 6.1 (2011), http://www.etsi.org/WebSite/document/Legal/ETSI%20IPR%20Policy%20November%202011.pdf. Declarations to ETSI pertain to relevant work within 3GPP, by virtue of 3GPP Working Procedures. See 3GPP, Working Procedures § K, Art. 55 (Oct. 29, 2012), http://www.3gpp.org/ftp/Information/Working_Procedures/3GPP_WP.pdf ("Individual Members shall be bound by the IPR Policy of their respective Organizational Partner."); 3GPP, Call for IPR (meetings), http://www.3gpp.org/Call-for-IPR-Meetings (last visited Dec. 3, 2012); 3GPP, Partnership Project Description 46 (1998), http://www.3gpp.org/ftp/Inbox/2008_web_files/3GPP.ppt.

[3] ETSI Rules, *supra* note 2, § 3.1.

[4] Pls.' Opening Pre-Trial Brief at 45 & n.132, *Nokia Corp. v. Qualcomm Inc.*, C.A. No. 2330-VCS (Del. Ch. July 15, 2008) (quoting Expert Report of Friedheim Hillebrand at 9, ¶ 19 (May 22, 2008)) (emphasis added).

standards. In other words, to make it possible for its technologies to be incorporated into the standards, Samsung agreed to forgo the right to exclude parties willing and able to pay FRAND royalties from practicing its SEPs. Here, however, the ALJ held that Samsung's FRAND commitments did not preclude it from seeking an Exclusion Order. Initial Determination at 454-70. Respectfully, Intel submits that the ALJ's ruling was in error.

Because Samsung's FRAND commitments constitute promises to license its SEPs to all parties that incorporate the TS 25.212 and TS 25.211 standards into their products, those commitments effectively modified the scope of Samsung's patent rights. A patent confers "a property right," *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002), that ordinarily entitles the holder to obtain an Exclusion Order if it is able to meet the statutory requirements of the Tariff Act. But "[a]s with other property rights, patent-related rights can be contracted away." *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innov. Found.*, 297 F.3d 1343, 1357 (Fed. Cir. 2002). Once the patentee commits to license its SEPs, the scope of its property right is modified and it may no longer seek an injunction or Exclusion Order against willing licensees. *Cf. Tessera, Inc. v. ITC*, 646 F.3d 1357, 1369-71 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 2707 (2012). Samsung's contractual promises to accept compensation from *all* users of the standards leave no room for Commission action barring parties willing and able to pay FRAND royalties from selling standard-compliant products. It follows that the Commission's ordinary presumption in favor of an Exclusion Order should not apply in a case, like this one, in which the patentee has made a FRAND commitment.

That is especially true given the central role that FRAND commitments play in protecting the public from potentially anticompetitive consequences of standard-setting. The adoption of a standard enables the SEP holder to exert leverage over the entire industry by demanding excessive royalties and threatening to enjoin the sale of a variety of standard-compliant products. Unlike with ordinary patents—which an infringer can often design around to produce a materially similar product—it is commercially infeasible for an individual manufacturer to decline to incorporate a commercially accepted standard (and hence the SEPs) into a new product. Indeed, the very purpose of interoperability standards is to incorporate identical standard-compliant features into products so that different manufacturers' products will work together. Failing to adopt the standards at issue here would make Apple's products unable to communicate with other standard-compliant products and networks, dramatically affecting their usefulness.

This commercial reality means that, after a standard is adopted, SEP holders can "hold up" other companies through threats of injunctive relief in order to "capture not just the value of the inventive contribution that [the SEP holders] have made . . . but also some greater amount of money than their invention is worth." Mark A. Lemley, *Ten Things To Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L. Rev. 149, 152 (2007). That is precisely why SSOs require participants to agree to grant licenses to all applicants on FRAND terms *before* the standard is adopted. Indeed, to avoid the risk that essential IPR could become "unavailable," ETSI IPR Policy mandates that members make an "irrevocable" commitment to make SEP licenses available on FRAND terms.[5]

Given the crucial role of FRAND commitments in preserving competition, straightforward application of § 337's public-interest factors shows that an Exclusion Order would be inappropriate here. Most obviously, enforcement of FRAND commitments improves the "competitive conditions in the United States economy" and enhances the welfare of "United States consumers" by mitigating the hold-up problem. 19 U.S.C. § 1337(d)(1). Because of the commercial

[5] ETSI Rules, *supra* note 2, §§ 3.1, 6.1.

infeasibility of designing around standards, allowing an SEP holder to obtain an injunction against a party willing to pay FRAND royalties would empower SEP holders to extract a disproportionate share of the value of accused products, making an unreasonably high settlement the only plausible outcome, and thereby raising prices to consumers. An Exclusion Order would force Apple to choose between withdrawing products from the market or potentially paying far more than a FRAND royalty. Competition and consumers would be harmed in either event.

Even more troubling, issuance of an Exclusion Order in the face of unfulfilled FRAND commitments would undermine the standard-setting process that is so vital to U.S. innovation, economic growth, and consumer welfare. The creation and adoption of standards greatly benefit U.S. consumers by "facilitat[ing] the sharing of information among purchasers of products from competing manufacturers." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007). But companies will become reluctant to agree on standards and to incorporate them into their products if SEP holders can unfairly exploit the resulting standard-derived market power through Exclusion Orders. That will ultimately hurt consumers, who have benefited tremendously from the interoperability of high-technology products.

For the foregoing reasons, the Commission should generally deny an Exclusion Order for FRAND-encumbered SEPs absent such limited circumstances as those discussed above.

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Respectfully submitted,

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CERTIFICATE OF SERIVCE

I, Thomas G. Hungar, certify that on December 3, 2012, copies of the foregoing CORRECTED STATEMENT REGARDING THE PUBLIC INTEREST were delivered, pursuant to Commission regulations, to the following interested parties as indicated:

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