

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

**NOTICE OF COMMISSION DETERMINATION TO EXTEND THE TARGET DATE;
REQUESTING ADDITIONAL WRITTEN SUBMISSIONS
ON REMEDY AND THE PUBLIC INTEREST**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to extend the target date for completion of the investigation until May 31, 2013. The Commission requests additional written submissions from the parties and from the public on the issues indicated in this notice.

FOR FURTHER INFORMATION: Clark S. Cheney, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2661. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on August 1, 2011, based on a complaint filed by Samsung Electronics Co., Ltd. of Seoul, Republic of Korea, and Samsung Telecommunications America, LLC of Richardson, Texas (collectively, "Samsung"). 76 *Fed. Reg.* 45860 (Aug. 1, 2011). The complaint alleges violations of section

337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain electronic devices, including wireless communication devices, portable music and data processing devices, and tablet computers, by reason of infringement of various patents, including U.S. Patent Nos. 7,706,348 (“the ’348 patent”), 7,486,644 (“the ’644 patent”), 7,450,114 (“the ’114 patent”), and 6,771,980 (“the ’980 patent”). The notice of investigation names Apple Inc. of Cupertino, California (“Apple”), as the only respondent.

On September 14, 2012, the presiding administrative law judge (“ALJ”) issued his final initial determination (“ID”) in this investigation finding no violation of section 337. The ALJ determined that the ’348, ’644, and ’980 patents are valid but not infringed and that the ’114 patent is both invalid and not infringed. The ALJ further determined that the economic prong of the domestic industry requirement is satisfied for all four patents at issue, but that the technical prong is not satisfied for any of the asserted patents.

On November 19, 2012, the Commission determined to review the ID in its entirety and issued a notice requesting written submissions from the parties and from the public on certain patent issues, on the assertion of FRAND-encumbered patents at the Commission, and on the issues of remedy, the public interest, and bonding. *77 Fed. Reg.* 70464. The Commission received written submissions from the parties and from the public in response to the notice.

The Commission has determined to seek additional information on the potential effect on the public interest, as identified in 19 U.S.C. §§ 1337(d)(1) and (f)(1), if the Commission were to order remedies against articles alleged by Samsung to infringe claims 75, 76, and 82-84 of the ’348 patent. (A dissenting memorandum from Commissioner Aranoff can be found on EDIS under Inv. No. 337-TA-794.) Parties to the investigation, interested government agencies, the Office of Unfair Import Investigations, and any other interested persons are encouraged to file written submissions on the following issues, with reference to the applicable law, the existing evidentiary record, and if necessary, additional sworn testimony or expert declarations:

1. How would remedial orders barring the entry and further distribution of the Apple articles alleged to infringe the asserted claims of the ’348 patent affect the public interest, as identified in 19 U.S.C. §§ 1337(d)(1) and (f)(1)? The Commission is particularly interested in the effect on the public interest with respect to (a) the percentage of the total number of imported mobile telephone handsets that would be affected by such orders, (b) the percentage of the total number of imported cellular-network-enabled tablets that would be affected by such orders, and (c) the qualitative impact of exclusion of such handsets and tablets. The Commission is also interested in any other relevant market information bearing on the four statutory public interest factors. In addressing these issues, the Commission requests that submitters avoid discussing issues related to standards-setting organizations, as the record concerning those issues has been well developed.
2. What third, fourth, and later generation products (if any) are currently available in the U.S. market that are authorized by Samsung to utilize the technology covered by the asserted claims of the ’348 patent? Are these products acceptable substitutes for the

accused iPhones and iPads and are they widely viewed to be acceptable substitutes for the accused iPhones and iPads?

3. In what ways, if any, should a remedy with respect to infringement of the '348 patent be specifically tailored to avoid harm to the public interest, as identified in 19 U.S.C. §§ 1337(d)(1) and (f)(1)? In addressing this issue, the Commission requests that submitters avoid discussing issues related to standards-setting organizations, as the record concerning those issues has been well developed.

In addition to the foregoing, the parties to the investigation are requested to brief their positions on the following issues, with reference to the applicable law, the existing evidentiary record, and if necessary, additional sworn testimony or expert declarations:

4. With respect to the '348 patent, Samsung's infringement case before the Commission relied upon accused third and fourth generation Apple products that operate on the AT&T wireless network. If the Commission were to issue remedial orders covering articles covered by the asserted claims of the '348 patent, would such an order cover (a) Apple products that operate on other wireless networks in the United States, and (b) later generation Apple products (*e.g.*, iPhone 5, later iPad versions)?
5. Please summarize the history to date of negotiations between Samsung and Apple concerning any potential license to the '348 patent, either alone or in conjunction with other patents. Please provide copies of all written offers and counteroffers concerning a license that would cover the '348 patent, whether made by Samsung or Apple.
6. Please summarize all licenses to the '348 patent granted by Samsung to any entity. Please provide copies of, or cite to their location in the record of this investigation, all agreements wherein Samsung grants any entity a license to the '348 patent.
7. Samsung and Apple are each requested to submit specific licensing terms for the '348 patent that each believes are fair, reasonable, and non-discriminatory. Would Samsung's terms change if the Commission were to enter remedial orders against Apple's products accused in this investigation? If so, please explain whether such an offer would be fair, reasonable, and non-discriminatory.
8. Which factors in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970) are most relevant to determining whether Samsung has offered to license the '348 patent to Apple on fair, reasonable, and non-discriminatory terms? Please apply any relevant *Georgia-Pacific* factors to Samsung's offer(s) to license the '348 patent to Apple. This analysis should include a comparison of Samsung's licensing offers to a hypothetical negotiation between the parties prior to adoption of the '348 patent into the standard at issue here. What other factors, if any, are relevant in determining whether Samsung has made a fair, reasonable, and non-discriminatory offer?

The Commission has invited briefing on only the discrete issues enumerated above. Other issues on review are adequately presented in existing filings.

WRITTEN SUBMISSIONS: Written submissions in response to this notice must be filed no later than close of business on April 3, 2013. Initial submissions, not including any attachments, expert declarations, or exhibits, are limited to 50 pages for parties and 25 pages for non-parties. Reply submissions must be filed no later than the close of business on April 10, 2013. Reply submissions, not including any attachments, expert declarations, or exhibits, are limited to 35 pages for parties and 20 pages for non-parties. No further submissions on these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit 8 true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 C.F.R. 210.4(f)). Submissions should refer to the investigation number (“Inv. No. 337-TA-794”) in a prominent place on the cover page and/or the first page. (*See Handbook for Electronic Filing Procedures*, http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf). Persons with questions regarding filing should contact the Secretary (202-205-2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 C.F.R. § 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with the any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

/s/

Lisa R. Barton

Acting Secretary to the Commission

Issued: March 13, 2013