

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

**NOTICE OF COMMISSION DECISION TO REVIEW IN PART A REMAND INITIAL
DETERMINATION FINDING NO VIOLATION OF SECTION 337;
REQUEST FOR WRITTEN SUBMISSIONS**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review in part the presiding administrative law judge's ("ALJ") remand initial determination ("Remand ID") issued on December 18, 2012, finding no violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 in the above-captioned investigation.

FOR FURTHER INFORMATION CONTACT: Megan M. Valentine, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 708-2301. 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 at <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 November 8, 2010, based on a complaint filed by Motorola Mobility, Inc. of Libertyville, Illinois. *75 Fed. Reg.* 68619-20 (Nov. 8, 2010). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wireless communication devices, portable music and data processing devices, computers and components thereof by reason of infringement of certain claims of U.S. Patent Nos.

6,272,333 (“the ‘333 patent”); 6,246,862 (“the ‘862 patent”); 6,246,697 (“the ‘697 patent”); 5,359,317 (“the ‘317 patent”); 5,636,223 (“the ‘223 patent”); and 7,751,826 (“the ‘826 patent”). The complaint further alleges the existence of a domestic industry. The Commission’s notice of investigation named Apple Inc. of Cupertino, California as respondent. The Office of Unfair Import Investigation (“OUII”) was named as a participating party, however, on July 29, 2011, OUII withdrew from further participation in the investigation. *See* Commission Investigative Staff’s Notice of Nonparticipation (July 29, 2011). The Commission later partially terminated the investigation as to the ‘317 patent and the ‘826 patent. Notice (June 28, 2011); Notice (Jan 27, 2012).

On April 24, 2012, the ALJ issued his final ID, finding a violation of section 337 as to the ‘697 patent and finding no violation as to the ‘223, ‘333, and ‘697 patents. On May 9, 2012, the ALJ issued his recommended determination on remedy and bonding. On June 25, 2012, the Commission determined to review the final ID in part. *77 Fed. Reg.* 38826-29 (June 29, 2012). On August 24, 2012, the Commission found no violation with respect to the ‘333 patent, the ‘697 patent, and the ‘223 patent. *77 Fed. Reg.* 52759-761 (Aug. 30, 2012). The Commission remanded the investigation to the ALJ with respect to the ‘862 patent upon reversing his finding that the asserted claim of the patent is invalid as indefinite. *Id.*; *see* Order (Aug. 24, 2012). Specifically, the Commission instructed the ALJ to make findings regarding infringement, validity, and domestic industry concerning the asserted claim of the ‘862 patent. The Commission’s Order instructed the ALJ to set a new target as necessary to accommodate the remand proceedings. On October 1, 2012, the ALJ issued Order No. 36, setting the target date for completion of the remand proceedings as April 22, 2013. Order No. 36 (Oct. 1, 2012). On October 18, 2012, the Commission determined not to review the ID setting the new target date. Notice (Oct. 18, 2012).

On December 18, 2012, the ALJ issued his Remand ID, finding no violation of section 337 with respect to the ‘862 patent. In particular, the ALJ found that the relevant accused products infringe claim 1 of the ‘862 patent literally and under the doctrine of equivalents. The ALJ also found, however, that claim 1 is invalid as anticipated by U.S. Patent No. 6,052,464 to Harris (“Harris ‘464”). The ALJ further found that claim 1 is not invalid for obviousness in light of Harris ‘464 in combination with the knowledge of one of ordinary skill in the art or in combination with U.S. Patent No. 5,894,298 to Hoeksma (“Hoeksma ‘298”). The ALJ also found that Motorola has satisfied the economic and technical prongs of the domestic industry requirement with respect to the ‘862 patent.

On January 7, 2013, Motorola filed a petition for review of certain aspects of the Remand ID’s findings concerning claim construction and validity. Also on January 7, 2013, Apple filed a petition for review of certain aspects of the final ID’s findings concerning infringement. On January 15, 2013, Motorola filed a response to Apple’s petition. Also on January 15, 2013, Apple filed a response to Motorola’s petition.

Having examined the record of this investigation, including the ALJ’s Remand ID, the petitions for review, and the responses thereto, the Commission has determined to review the

Remand ID in part. Specifically, the Commission has determined to review the Remand ID's construction of the claim limitation "touch sensitive input device" in claim 1 of the '862 patent. The Commission has further determined to review the Remand ID's finding that the accused products literally infringe claim 1 of the '862 patent. The Commission has also determined to review the Remand ID's finding that Harris '464 anticipates claim 1 of the '862 patent. The Commission has further determined to review the Remand ID's finding of non-obviousness pursuant to section 210.44 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.44).

The Commission has determined not to review the remaining issues decided in the Remand ID.

In connection with its review, the parties are requested to brief their positions on the issue of whether claim 1 of the '862 patent is obvious in view of Harris '464 in combination with the knowledge of one of ordinary skill in the art or in combination with Hoeksma '298. The Commission is particularly interested in responses to the following question:

Does the evidence in the record support a finding that claim 1 of the '862 patent is obvious in view of Harris '464 in combination with the knowledge of one of ordinary skill in the art or in combination with Hoeksma '298 where the evidence demonstrates that the existence of portable communication devices using "touch sensitive input devices," including touch screens, were known in the art prior to the filing of the application leading to the '862 patent and is disclosed in Hoeksma '298? In discussing this issue, please refer to the teachings of the references, the knowledge of one of ordinary skill in the art at the time of filing of the '862 patent application, and the evidence in the record regarding the motivation to combine Harris '464 with the knowledge of one of ordinary skill in the art or with Hoeksma '298. Also, please address whether there are any secondary considerations that would prevent a finding of obviousness.

The parties have been invited to brief only the discrete issues described above, with reference to the applicable law and evidentiary record. The parties are not to brief other issues on review, which are adequately presented in the parties' existing filings.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United States, and/or (2) issue a cease and desist order that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or a cease and desist order would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005, 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury.

The Commission will consider the issues related to remedy, the public interest, and bonding based upon filings previously submitted by the parties to the investigation, interested government agencies, the Office of Unfair Import Investigations, and other interested parties. *See* Public Interest submissions filed on July 9, 2012. We also note that the Complainant has previously provided the dates that the patent-at-issue expires and the HTSUS numbers under which the accused products are imported. *See* Complainant Motorola Mobility LLC's Opening Brief on Commission Review (Public Ver.) at 70 (July 19, 2012). Complainant has also previously submitted proposed remedial orders for the Commission's consideration. *See id.* at Exhs. 7 & 8.

WRITTEN SUBMISSIONS: The parties to the investigation are requested to file written submissions on the issues identified in this notice. The written submissions must be filed no later than close of business on March 8, 2013. Reply submissions must be filed no later than the close of business on March 15, 2013. 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-745") 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 sections 210.42-46 and 210.50 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.42-46 and 210.50).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written over a horizontal line.

Lisa R. Barton
Acting Secretary to the Commission

Issued: February 19, 2013