SAMSUNG'S SUBMISSION TO THE OFFICE OF THE U.S. TRADE REPRESENTATIVE IN CONNECTION WITH ITC INVESTIGATION NO. 337-TA-794

JUNE 19, 2013

Samsung Electronics Co., Ltd. and Samsung Telecommunications America, LLC ("Samsung") appreciate and welcome the opportunity to submit this statement relating to the Section 337(j) review of the remedial orders issued in ITC Inv. No. 337-TA-794 to the U.S. Trade Representative and members of the Trade Policy Staff Committee. As discussed herein, there are no policy reasons to disapprove of the Commission's remedial orders resulting from this investigation. In particular, the limited impact this exclusion order will have does not begin to approach that caused by several recently issued exclusion orders on smartphones that were allowed to take effect, and any concerns regarding the potential for abuse of standard essential patents ("SEPs") do not apply on the clear facts found by the Commission in this investigation.

While Samsung fully supports the FTC, Justice Department, and Patent Office's concerns that injunctions and exclusion orders should not be used by patent holders to engage in "hold-up" activities (Samsung is presently a respondent in two such investigations at the ITC), this investigation demonstrates that a bright-line rule prohibiting exclusion orders for SEP infringement would be misplaced because it would create incentives for implementers to unreasonably refuse to negotiate and enter into FRAND licenses for their infringing use of essential IPR—a problem known as "reverse hold up" and characterized by Apple's stance as an unwilling licensee to Samsung's portfolio of declared essential patents, including the '348 patent at issue here.

Samsung has participated in over forty Section 337 investigations, predominantly as a respondent. Apple is also a frequent participant before the ITC, filing six complaints against its competitors in the last three years, including the 796 investigation against Samsung that will be decided in August. Samsung firmly believes that technology companies should compete in the market, not the courtroom, and should negotiate licensing arrangements that respect the technological contributions of others. Samsung is proud of its contributions to the development of mobile telephony, and began producing cell phones commercially in 1988. Samsung is now the world's largest manufacturer of smartphones, with thousands of US employees engaged in research and other activities across the United States developing the next generation of mobile devices.

Samsung filed this action only after Apple both refused to negotiate toward a patent license and sued Samsung for patent infringement. This litigation is not an isolated event between the companies, but is one part of a global conflict started by Apple that has spanned several years. Samsung placed a generous, FRAND-compliant offer for a license including the '348 patent on the table well before the ITC's decision, the ITC validated that offer, and it still stands. While Apple can accept that offer at any time and avoid the 794 exclusion order, Samsung did not present it as a "take it or leave it" option. [redacted]. As discussed below, because Apple has refused to even engage in negotiations of a FRAND license to Samsung's SEPs, Samsung deserves the exclusion order issued by the ITC to be allowed to take effect.

The limited impact of this exclusion order dispels any economic policy concerns

The ITC's limited exclusion order (LEO) currently applies only to two commercially available models of Apple products: the GSM versions of its iPhone 4 mobile telephone and the iPad 2 tablet computer.[1] Both of these low-end Apple products are currently approaching the end of their life cycles. Exclusion of these devices will have a much smaller impact on the market and consumers than other recently allowed exclusion orders.

The iPhone 4 was released in June 2010. Unlike Apple's more recently released iPhone 5, the iPhone 4 does not support broadband 4G network access. Apple generally sells three versions of its smartphones at three price points. For example, AT&T currently offers the iPhone 4 for free with a 2 year contract, the iPhone 4S for $99; and its flagship iPhone 5 for $199. Whenever Apple introduces a new phone, it discontinues the phone at the bottom of the range and shifts the others down a notch. While Apple keeps its marketing plans secret, based on past behavior the iPhone 4 will likely be phased out within the next few months. Moreover, the LEO applies only to the iPhone 4 model A1332 that is designed to work on GSM-based networks, such as AT&T and T-Mobile. The iPhone 4 model sold for use on CDMA-based networks, such as those owned by Verizon and Sprint, is not affected.

The iPad 2 was released in March 2011. Since then, three new iPad versions have been released, including the current, fourth generation version being marketed as "iPad with Retina display," and the iPad Mini. The iPad 2 is available in three models: WiFi only, WiFi + 3G GSM, sold for exclusive access to the AT&T network, and WiFi + 3G CDMA, sold for the Verizon network. Like iPhones, the more recent versions of iPads are sold at higher price points, though the iPad mini is less expensive than the iPad 2. Only the model A1396 iPad 2 is subject to the LEO. The WiFi only and CDMA versions of the iPad 2, all versions of the iPad with Retina display and the iPad mini are not subject to the LEO.

Apple did not provide the Commission with current data regarding its import and sale of products subject to the exclusion order in its April, 2013 submissions on remedy and the public interest. .[2] Apple did not mention whether most of those sales occurred in the first half of 2012, before the launch of the iPhone 5 or fourth generation iPad with Retina display. Nor did Apple inform the Commission whether it already has plans to discontinue these models as new products are released this year. Even assuming Apple surprises the market by not introducing a new iPhone and iPad this year, the impact from withdrawal of the two affected products from the market will be far smaller than the impact of the recently approved exclusion orders against Motorola (337-TA-744) and HTC

[1] Depending on the baseband processor used in Apple's products to connect to UMTS bands, future models of mobile devices could become subject to the LEO. This processor selection is completely in Apple's control.

[2] *See* Apple's Submission in Response to the Commission's Request for Additional Written Submissions on Remedy and the Public Interest at 13 (Apr. 3, 2013

(337-TA-710). [3] yet Apple told the Commission in the 710 investigation that:

> The mobile communications industry is intensely competitive, and thus the exclusion of HTC's Infringing Products (which constitute only a small share of the industry) will have no material impact on competitive conditions.

See Apple's Reply on Remedy, Public Interest and Bonding, Inv. 337-TA-710 at 11 (Oct. 17, 2011). If excluding all of HTC's Android smartphones would have "no material impact" on competitive conditions, . *See id.* at 14 ("HTC itself recognizes that its Infringing Products are used by a relatively small portion of the overall market, only 14% of overall postpaid smartphone subscribers as of June 30, 2011. Thus, the intense competition in the industry and numerous manufacturers could easily replace the relatively small market share of HTC's Infringing Products, if excluded.").

Nor would exclusion of these two Apple products have a material impact on consumers. Those who feel locked into Apple's closed iOS ecosystem can upgrade to a broadband 4G iPhone 5 or iPad with Retina display.[4] Apple has recently told the Commission in the 796 investigation that it has considerable flexibility in its supply chain, and should easily accommodate such vertical moves. Those consumers who do not feel locked into Apple's iOS ecosystem can find many more 3G and 4G substitute smartphones and tablets from over a dozen manufacturers.

Apple argued to the Commission that exclusion of only GSM mobile devices would upset competitive conditions at US carriers because it would only impact GSM carriers such as AT&T and T-Mobile.[5] Apple failed to mention that it did not sell its phones to T-Mobile until 2013, and has played carriers off each other for years. No carrier except AT&T has ever been permitted to sell the infringing GSM iPad 2. Finally, it is worth noting that the ITC has protected consumers who currently own the excluded products by including an exception to the exclusion order permitting refurbished articles imported on or before June 3, 2015 for use as a replacement for identical articles that were imported prior to the date of the LEO.

In sum, the limited impact of the LEO on current Apple products raises no economic policy concerns sufficient to take the extraordinary and nearly unprecedented step of disapproval of the LEO.

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[3] *See* comScore, "Mobile Future in Focus 2013," at 21(Feb. 2013) (listing 2012 smartphone market shares for HTC (10.2%) and Motorola (9.1%)).

[4] *See* Peter Burroughs "Apple Said to Start iPhone Trade-in Program in Stores," (June 6, 2013) (reporting on new Apple program to allow GSM iPhone 4 owners a free upgrade to iPhone 5), available at http://www.bloomberg.com/news/2013-06-06/apple-said-to-start-trade-in-program-to-boost-new-models.html

[5] *See* Apple's Submission in Response to the Commission's Request for Additional Written Submissions on Remedy and the Public Interest at 12 (Apr. 3, 2013).

The limited exclusion order will have no impact on public health, welfare, US production, or foreign relations

The limited range of excluded Apple devices negates any impact on public health and welfare, because a number of alternative devices (including non-excluded Apple products) can replace the E911 functionality and health and safety applications that may be run on the GSM iPhone 4 and iPad 2. There will be no shortages of substitute products to consumers, physicians or first responders, and neither of the excluded products is even capable of broadband 4G connectivity needed to run more sophisticated health and safety applications.

All of the excluded Apple products are manufactured in China by contract manufacturers unrelated to Apple, and there is no US production of smartphones or tablets in the United States to be impacted. Finally, the exclusion will not impact the United States' foreign relations with China any more than the recent exclusion of Motorola and HTC smartphones, which are also manufactured in China. There remain plenty more Chinese manufactured electronic devices (including those made for Apple) that will not be impacted by the LEO.

This is not the right case for a broad pronouncement about the enforceability of standards-related patents at the ITC

Samsung believes that standard essential patents subject to a FRAND commitment should not be eligible for an injunction or exclusion order except in those cases where the implementer of a standard is clearly unwilling to license SEPs on FRAND terms. [redacted]. In this circumstance, an exclusion order is appropriate.

After careful analysis of the facts and Apple's arguments, the Commission determined that Samsung complied with its FRAND obligations and Apple failed on its FRAND defenses.[6] [redacted] Given Apple's deliberate strategy to avoid licensing SEPs, Samsung had to choose between allowing Apple free and unfettered use of its most important patents or to respond to Apple's patent lawsuits by availing itself of its right to initiate a Section 337 action at the International Trade Commission. Under the facts found by the Commission, the exclusion order should not be overturned.

Apple's assertion that Samsung forfeited any right it might otherwise have had to obtain an exclusion order when it made a FRAND commitment for its declared essential UMTS patents

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[6] Samsung respectfully submits that the TPSC should carefully consider (and not second guess) the Commission's factual findings and that challenges to the Commission's findings should be left to the appellate courts.

has now been rejected twice: first, by the very same Northern District of California jury that initially awarded Apple more than $1 billion in damages for alleged infringement of various Apple intellectual property rights, and now by the Commission after a full hearing on the merits and extensive public interest submissions from Apple, Samsung, and numerous third parties including consumer groups, electronic associations, and participants in standards organizations.

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The ITC found that Apple's position illustrates the problem of "reverse patent hold-up"

Samsung has always honored its commitment to license its declared-essential patents on FRAND terms and conditions. Samsung has never refused to license its SEPs to other companies, including direct competitors like Apple. And Samsung has never offensively used its patents, essential or not, to keep competitors out of the market. To the contrary, as the Commission's opinion notes,

. In December 1998, Samsung submitted a general IPR licensing declaration to ETSI stating that should its technical proposals be incorporated into the UMTS standard, Samsung would make that IPR available on FRAND terms. Over time, Samsung submitted numerous undertakings to ETSI in which it promised to license patents that it believed might be essential to ETSI's work. Samsung submitted an undertaking in 2002 for the '348 patent that Apple was found to infringe, in which it promised to license that patent, to the extent it remained essential to an ETSI standard, on fair, reasonable, and non-discriminatory terms and conditions to any company that desired to implement that standard

, show that Samsung has honored that pledge.

The Commission's Opinion sets forth the parties' license negotiations in great detail, noting that the facts were largely undisputed.

[7]

Instead, in a recent brief to the Commission, Apple publicly declared that “Apple should not have to pay any royalty at all” for a license including the ’348 patent. Apple’s Submission in Response to the Commission’s Request for Additional Written Submissions on Remedy and the Public Interest at 49 (April 3, 2013). By any definition, Apple is an unwilling licensee of Samsung’s declared essential patents.

The Commission found that concerns about the potential for patent holdup are not present here and that Apple utterly failed to prove an affirmative defense of patent misuse. Far from attempting to engage in hold-up, Samsung has licensed all comers,

The facts of this investigation illustrate why there should not be a bright line rule that SEPs are ineligible for protection at the ITC

As noted above, Samsung believes that SEPs should be eligible for an injunction or exclusion order only in those cases where the implementer, like Apple here, is unwilling to engage in licensing negotiations or neutral arbitration to arrive at a FRAND license.

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Other upcoming Section 337 investigations will provide a better opportunity for the ITC or USTR to address the potential misuse of standard essential patents at the ITC

While policy grounds for disapproval of the remedial orders are not present here, there are currently several investigations involving SEPs, including complaints filed by InterDigital and Ericsson, working their way through the ITC. These investigations have far different facts regarding the patent holders' compliance with their FRAND obligations and the willingness of implementers to license on FRAND terms. There will therefore be other, and more appropriate opportunities for the ITC and/or the USTR to weigh in on the potential abuse of SEPs at the ITC. Indeed, it may be appropriate for USTR to make a public statement here, as it did after the Broadcom/Qualcomm review, that although this is not the right case, it will continue to carefully scrutinize all LEOs based on infringement of SEPs for public interest implications.