

PUBLIC VERSION

**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 REVIEW THE FINAL INITIAL
DETERMINATION; SCHEDULE FOR FILING WRITTEN SUBMISSIONS ON THE
ISSUES UNDER REVIEW AND ON REMEDY, PUBLIC INTEREST, AND BONDING**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review the final initial determination issued by the presiding administrative law judge in the above-captioned investigation on September 14, 2012. The Commission requests certain briefing from the parties on the issues under review, as indicated in this notice. The Commission also requests briefing from the parties and the public on the issues of remedy, the public interest, and bonding.

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 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, 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 October 1, 2012, complainant Samsung and the Commission investigative attorney filed petitions for review of the ID, while Apple filed a contingent petition for review.

Having examined the record of this investigation, including the ID, the petitions for review, and the responses thereto, the Commission has determined to review the ALJ’s determination of no violation in its entirety.

In connection with the final disposition of this investigation, the Commission may issue an order that results in the exclusion of the subject articles from entry into the United States. *See* 19 U.S.C. § 1337(d). Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337TA360, USITC Pub. No. 2843, Comm’n Op. at 7-10 (December 1994).

When 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 cease and desist orders 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. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

When 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 is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Parties to the investigation, interested government agencies, the Office of Unfair Import Investigations (“OUII”), and any other interested parties are encouraged to file written

submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding.

The Commission further encourages briefing from the parties to the investigation, interested government agencies, OUII, and any other interested parties on the following topics:

1. Does the mere existence of a FRAND undertaking with respect to a particular patent preclude issuance of an exclusion order based on infringement of that patent? Please discuss theories in law, equity, and the public interest, and identify which (if any) of the 337(d)(1) public interest factors preclude issuance of such an order.
2. Where a patent owner has offered to license a patent to an accused infringer, what framework should be used for determining whether the offer complies with a FRAND undertaking? How would a rejection of the offer by an accused infringer influence the analysis, if at all?
3. Would there be substantial cost or delay to design around the technology covered by the '348 and '644 patents asserted in this investigation? Could such a design-around still comply with the relevant ETSI standard?
4. What portion of the accused devices is allegedly covered by the asserted claims of each of the '348 and '644 patents? Do the patents cover relatively minor features of the accused devices?

In addition to the foregoing, the parties to the investigation are requested to brief their positions on the following subset of the issues under review, with reference to the applicable law and the evidentiary record:

5. What evidence in the record explains the legal significance of Samsung's FRAND undertakings under French law?
6. []
7. []
8. With respect to the asserted claims of the '348 patent, what record evidence shows that a person of ordinary skill in the art would understand the phrase "10 bit TFCI information" to allow or preclude the use of padding bits? What is the difference between the "10 bit TFCI information" in the portion of Table 1a shown in columns 13 and 14 of '348 patent and the TFCI information with padding zeroes allegedly used in the alleged domestic industry devices? Is the patent's discussion of padding zeroes at col. 3, lines 27-34 of any relevance? What consequence would construing "10 bit TFCI information" to allow padding bits have on the issues of infringement, validity, and the technical prong of the domestic industry requirement?

9. With respect to the asserted claims of the '348 patent, what claim language, if any, limits the claim to the use of a look-up table and precludes the claim from covering the embodiment of the invention shown in Figures 8 and 14 of the '348 patent?
10. With respect to asserted claims 82-84 of the '348 patent, identify any support in the patent specification or the record generally for construing the term "puncturing" in asserted claims 82-84 to encompass "excluding" bits (*see, e.g.*, '348 patent at 32:10-17). What consequence would such a construction have on the issues of infringement, validity, and the technical prong of the domestic industry requirement?
11. With respect to the asserted claims of the '644 patent, what is the proper construction of "extracting"? What variable, if any, in the source code relied upon by Samsung to prove infringement and domestic industry represents a "60-bit rate-matched block" that has been extracted from a received signal?
12. With respect to the '980 patent, has Samsung waived all infringement and domestic industry allegations except for those based on claim 10? Identify by source code file name or other specific record designation the precise "dialing program" that Samsung relies upon to prove infringement and domestic industry with respect to claim 10. Also identify, using record evidence, the conditions that trigger execution of the "dialing program" in the relevant devices.
13. With respect to the '980 patent, if the Commission were to construe "dialing icon" to require a "pictorial element," what record evidence demonstrates that Samsung's alleged domestic industry products meet that limitation?

The parties have been invited to brief only the discrete issues enumerated 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.

WRITTEN SUBMISSIONS: Written submissions and proposed remedial orders in response to this notice must be filed no later than close of business on December 3, 2012. Complainant and OUII are also requested to submit proposed remedial orders for the Commission's consideration. Complainant is also requested to state the dates that the patents expire and the HTSUS numbers under which the accused products are imported. Initial submissions by the parties are limited to 80 pages, not including any attachments or exhibits related to discussion of the public interest. Initial submissions by other members of the public are limited to 50 pages, not including any attachments or exhibits related to discussion of the public interest. Reply submissions must be filed no later than the close of business December 10, 2012. All reply submissions are limited to 50 pages, not including any attachments or exhibits related to discussion of the public interest. 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.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Acting Secretary to the Commission

Issued: November 19, 2012