

SAMSUNG'S SUBMISSION TO THE OFFICE OF THE U.S. TRADE REPRESENTATIVE
IN CONNECTION WITH ITC INVESTIGATION NO. 337-TA-796

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Introduction

Samsung is the number one smartphone manufacturer in the world, and provides the broadest range of smartphone devices in the United States – from inexpensive products used by millions of Americans as the sole means of internet connectivity to unique top end devices, like the flagship Galaxy S4. About one in four smartphones in the United States was made by Samsung, and, as evidenced by the many public interest comments filed at the ITC (attached), Samsung has the broadest reach into the U.S. wireless market of any phone provider – particularly in rural and underserved (“prepaid”) markets ignored by Apple and many other major manufacturers. Samsung has invested tens of billions of dollars in the United States and employs thousands of Americans to support its products and the American consumers who use them on a daily basis.

As in the 794 investigation, the volume of products actually affected by the Commission’s orders is perhaps small.¹ However, the USTR should look beyond their immediate impact and consider the broader, long-term policy implications. Smartphones and other highly sophisticated electronic devices are increasingly targeted at the ITC by relatively insignificant patents that claim only a tiny fraction of the accused products’ functionality. Exclusion orders are disproportionate remedies for infringement of such trivial patents, and are better addressed by damages in the district courts. As it did in the 794 Investigation, the USTR should examine broad policy issues and disapprove the Commission’s remedy in this investigation for the foregoing reasons.

A patentee has “the right to exclude others from making, using, offering for sale, or selling the invention.”² But as the Supreme Court explained in *eBay*, “the creation of a right is distinct from the provision of remedies for violations of that right.” Any remedy must be issued “in accordance with the principles of equity.”³ The remedial orders issued in this investigation are neither fair nor equitable. Rather, because the patents cover small, insignificant features of complex electronic devices, the orders unfairly grant Apple a remedy well beyond the contribution of its inventions and deprive the public of products incorporating hundreds, if not thousands of other innovative features. Courts, scholars, and even Apple agree that injunctive relief in such situations is inappropriate, and the USTR has a strong policy interest in assuring that the scope of any remedy is commensurate with the scope of the invention at issue.

The overly-broad scope of the Commission’s orders also threatens to negatively affect legitimate trade and U.S. consumers. There has been a growing and worrisome trend among complainants to broadly define the scope of the investigation, but attempt to prove a violation based on a narrow category of products. The end result of such strategy is a broad remedial order that potentially covers numerous products that were never adjudicated by the Commission, much less found to infringe. Consistent with the Administration’s goal of creating greater

¹ While the ITC found a violation based on Apple’s ’949 and ’501 patents, it also found that Samsung’s design arounds for these patents were non-infringing, and expressly excluded them from the scope of the remedial orders. *See* Comm’n Op. at 105, 107. Samsung has worked with Customs to develop a certification process that permits products containing these design arounds to enter the United States.

² *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392 (2006).

³ *Id.*

transparency in remedial order enforcement, the USTR has a strong policy interest in ending this disruptive practice. Disapproval of the orders in this investigation would send a strong message that overly-broad remedial orders are inappropriate.

A Remedy That Far Exceeds The Scope Of The Patented Contributions Threatens U.S. Consumers

Complex electronic devices such as smartphones and tablets comprise hundreds, if not thousands of discrete features and components. These features and components implicate thousands of patents.⁴ Courts, scholars and industry participants agree that granting injunctive relief over an entire product based on the infringement of one or a few of these features disproportionately rewards the patentee at the expense of U.S. consumers.⁵

Unlike federal district court, however, to obtain injunctive relief before the ITC, a complainant historically has not been required to show a specific “causal nexus” between the infringing feature and the harm to the patentee.⁶ Rather, a complainant need only prove infringement of any valid and enforceable patent claim. Once a violation is found, the ITC considers whether the statutorily-enumerated “public interest factors” justify precluding remedial relief. The ITC historically has not considered, however, the importance or significance of the asserted invention in the context of its public interest analysis.⁷

The ITC’s practice of issuing remedial orders outside of the context of the particular infringing claim(s) has garnered intense scrutiny since the Supreme Court’s *eBay* decision. Respected scholars Colleen Chien and Mark Lemley observe that, following Justice Kennedy’s suggestion, federal district courts rightly have been less inclined to award injunctive relief “when the patented invention covers a small component of the defendant’s product.”⁸ Thus far, the ITC, however, has not followed suit and has continued to issue broad exclusion orders. Chien and Lemley explain that the ITC’s failure to consider the relationship between the patented invention and the excluded product threatens to harm U.S. consumers, especially where the claimed invention covers a minor feature or component:

[A] patent on a particular circuit layout may constitute only a tiny fraction of the value of a microprocessor that uses the layout, but an exclusion order will exclude the microprocessor as a whole, preventing the defendant from importing both the small infringing element and the much larger noninfringing elements. The social harm in this latter case is disproportionate to the social benefit, as many productive, noninfringing components will be shut down to give the patentee

⁴ See, e.g., *Mobile-Related Patents Are Increasing: One In Four Patents Issued Last Year Pertain To The Smartphone*, Daniel O’Connor (Mar. 28, 2013), <http://www.project-disco.org/intellectual-property/032813-mobile-related-patents-are-increasing-one-in-four-patents-issued-last-year-pertain-to-the-smartphone/>; *One In Six Active U.S. Patents Pertain To The Smartphone*, Daniel O’Connor (Oct. 17, 2012), <http://www.project-disco.org/intellectual-property/one-in-six-active-u-s-patents-pertain-to-the-smartphone/>.

⁵ See Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 6 (2012).

⁶ See, e.g., *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 695 F.3d 1370 (Fed. Cir. 2012).

⁷ Chien & Lemley, *supra* note 4, at 20-25

⁸ Chien & Lemley, *supra* note 4, at 13 (citing *eBay*, 547 U.S. at 396-97 (Kennedy, J., concurring)).

control over only a single, small component. The ITC cases applying the public interest exception, however, have generally not found much of a public health and welfare interest in information technology products, where the holdup problem is most acute.⁹

Others share these views. On June 4, 2013, the White House issued seven Legislative Recommendations focused on high-tech patent issues, one of which was to change the ITC standard for exclusion orders to better align it with the traditional four-factor test enumerated in *eBay*.¹⁰ Several industry participants such as Sprint and Google also echoed these concerns in submissions to the ITC during the remedy phase in this investigation.¹¹

The FTC has also explained that patent-hold up can support withholding injunctive relief in certain circumstances, including when “the patented technology is a minor component of a complex product that would have been easy to design around *ex ante*.”¹² This is especially true in the ITC, where a finding of infringement “has led to a nearly automatic exclusion order, which is sometimes tantamount to an injunction.”¹³

Further, consistent with this prevailing view, federal courts have noted that injunctive relief may not be appropriate where the infringing features or components are insignificant.¹⁴ For example, the court in *Apple Inc. v. Samsung Elecs. Co., Ltd.*, denied Apple’s request for injunctive relief, explaining that “[t]he phones at issue in this case contain a broad range of features, only a small fraction of which are covered by Apple’s patents.”¹⁵ Although the court noted that Apple did have an interest in protecting its intellectual property rights with respect to the relevant feature, the court found that “it does not follow that entire products must be forever banned from the market because they incorporate, among their myriad features, a few narrow protected functions.”¹⁶ This was especially true because “none of the patented features is core to the functionality of the accused products mak[ing] an injunction particularly inappropriate here.”¹⁷

Finally, when it has been a respondent, Apple has agreed that broad remedial orders issued for infringement of minor features and components is contrary to the public interest. In an investigation instituted based on a complaint by Kodak, Apple argued to the ITC:

[W]hen considering the countless tasks that the iPhone product performs, it is clear that the value of the accused digital camera technology is a small fraction of

⁹ Chien & Lemley, *supra* note 4, at 25.

¹⁰ Fact Sheet: White House Task Force on High-Tech Patent Issues (June 4, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues>.

¹¹ See Third Party Sprint Spectrum, L.P.’s Statement Regarding the Public Interest at 2-6 (June 11, 2013); Submission of Non-Party Google Inc. in Response to the Commission’s Request for Submissions on the Public Interest at 2-3 (June 11, 2013).

¹² FEDERAL TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION at 26 (Mar. 2011).

¹³ *Id.* at 29-30.

¹⁴ See, e.g., *Apple*, 695 F.3d at 1376.

¹⁵ 909 F. Supp. 2d 1147, 1164 (N.D. Ca. 2012).

¹⁶ *Id.*

¹⁷ *Id.*

the overall economic value of the accused iPhone products to U.S. consumers. It is also clear that the accused digital camera technology is a tiny fraction of the core functionality of the accused iPhone products, which perform the tasks outlined above without the use of the digital camera. Thus, when viewed in the proper context, any remedy issued against Apple would disproportionately and adversely affect Apple, competitive conditions in the market, and the general public . . .¹⁸

Here, it is beyond dispute that the patents found to infringe are not “core” – or even important – features of the overall products. The ’949 patent is directed to a discrete user interface software feature that helps distinguish between a vertical screen scrolling command and a two-dimensional screen translation on a touchscreen.¹⁹ The ’501 patent is directed to a specific type of detection circuitry that can determine whether a headset inserted into the jack of the electronic device has or does not have a microphone.²⁰

Given the insignificant nature of these inventions in relation to the accused Samsung products as a whole, the USTR should utilize this investigation as an opportunity to state, as a policy matter, that when considering the impact of any remedial order on U.S. markets and consumers, a proper analysis must take into account the nature of the patented inventions. Under that proper framework, disapproval is warranted here.

Overly-Broad Remedial Orders Threaten Legitimate Trade

Two trends have developed recently relating to ITC remedial orders that threaten legitimate trade by creating market uncertainty and enforcement difficulties: (1) the use of overly-broad case captions to encompass unadjudicated products; and (2) the use of unspecific language in remedial orders to encompass products that include features and functionality not addressed by the ITC in the underlying case. Apple has aggressively pursued both strategies, and this investigation provides an opportunity for the USTR to make clear that both it and the White House have a significant policy interest in fostering transparency and certainty, which, in turn, promotes legitimate trade.

Case Captions

The case caption defines the scope of the investigation and the scope of any remedial relief.²¹ Notwithstanding the crucial significance of the case caption, the complainant is solely responsible for deciding how broadly or narrowly it will style its complaint. In recent months, the ITC has instituted investigations purporting to cover “portable electronic communication devices,” “consumer electronics with display and processing capabilities,” and “digital media

¹⁸ *Certain Mobile Telephones and Wireless Communication Devices Featuring Digital Cameras, and Components Thereof*, Inv. No. 337-TA-703, Respondent Apple’s Brief on the Issues Under Commission Review at 79 (Apr. 8, 2011).

¹⁹ See Comm’n Op. at 53.

²⁰ See Comm’n Op. at 66-67.

²¹ See, e.g., *Certain Automated Mechanical Transmission Sys.*, Inv. No. 337-TA-503, Comm’n Op. at 4 (May 9, 2005) (“the scope of the remedy is dependent upon the scope of the investigation, which is determined by the notice of investigation.”).

devices.”²² For global electronics companies, such as Samsung, these overbroad and unregulated case captions create uncertainty as to what products are at issue and may ultimately be excluded. Such broad case-captions also create uncertainty for U.S. consumers, retailers and distributors, and for Customs officials responsible for enforcement.

Here, Apple chose to style its complaint as relating to “certain electronic digital media devices and components thereof.” While arguably encompassing numerous categories of electronics, Apple focused its entire case on particular mobile phones, tablet computers and media players.²³ Nevertheless, as written, the remedial orders issued by the Commission appear to go beyond even those product categories. For example, the exclusion order states that Samsung is permitted to import under bond during the Presidential review period, which “shall be in the amount of 1.25 percent of entered value for covered mobile phones, media players, and tablet computers, and without bond for *any other covered products*.”²⁴ The simple fact that the exclusion order appears to contemplate categories of products other than those adjudicated, i.e., mobile phones, tablets and media players, that could be excluded, creates uncertainty for Samsung, the U.S. market, and Customs. This uncertainty directly contradicts recent statements from the White House emphasizing the importance of transparency in ITC remedial order enforcement.

As part of its Fact Sheet relating to high-tech patent issues, the White House issued several executive actions “to help bring about greater transparency to the patent system,” including strengthening the enforcement process of exclusion orders.²⁵ One initiative was to strengthen the enforcement process of exclusion orders by launching “an interagency review of existing procedures that CBP and the ITC use to evaluate the scope of exclusion orders [] to ensure the process and standards utilized during exclusion order enforcement activities are transparent, effective, and efficient.”²⁶ On June 20, the U.S. Intellectual Property Enforcement Coordinator (IPEC) issued a request for comments relating to the exclusion order enforcement process.²⁷ While comments were received from numerous entities with differing points of view, the one common and consistent theme was that the public, complainants and respondents would all benefit from greater consistency and transparency.²⁸

²² Samsung’s Response to IPEC’s Request for Comments on the Interagency Review of Exclusion Order Enforcement Process at 2; *see also Certain Electronic Devices, Including Wireless Communication Devices, Tablet Computers, Media Players, and Televisions, and Components Thereof*, Inv. No. 337-TA-862; *Certain Electronic Devices, Including Mobile Phones and Tablet Computers, and Components Thereof*, 337-TA-847; *Certain Consumer Electronics, Including Mobile Phones and Tablets*, Inv. No. 337-TA-839; *Certain Electronics with Display and Processing Capabilities*, Inv. No. 337-TA-884; *Certain Digital Media Devices, Including Televisions, Blu-Ray Disc Players, Home Theater Systems, Tablets and Mobile Phones, Components Thereof and Associated Software*, Inv. No. 337-TA-882.

²³ Comm’n Op. at 5 (“The accused products in this investigation are certain Samsung mobile phones, media players, and tablet computers”).

²⁴ Exclusion Order at 1 (emphasis added).

²⁵ Fact Sheet, *supra* note 9.

²⁶ *Id.*

²⁷ 78 Fed. Reg. 37242 (June 20, 2013).

²⁸ *See, e.g., Adduci Mastriani & Schaumberg LLP* at 2 (“[T]he procedures used by CBP to implement ITC exclusion orders lack transparency. . . . CBP’s [current procedure] creates great uncertainty as to the scope of exclusion orders.”); *Microsoft* at 2–3 (providing recommendations “[t]o achieve transparency . . . [and] provide for greater predictability and continuity”); *Rode & Qualey* at 3 (“[General exclusion orders] should be enforced . . . in a fully transparent and efficient way. . . . But [the current] enforcement process is neither fully transparent, nor

The USTR has a strong policy interest in promoting this transparency by disapproving the remedial orders in this investigation because they purport to encompass products that were never adjudicated by the ITC.²⁹

Scope of Remedial Orders

Historically, the ITC has issued broadly-worded remedial orders that are not product-specific. Rather, they apply to all products “covered” by the asserted patents.³⁰ The ITC’s stated purpose for this practice is to prevent unscrupulous respondents from circumventing the orders “simply [by] changing model numbers.”³¹ While Samsung agrees avoiding circumvention is an appropriate goal, the practice has become outdated and should be re-evaluated in the context of the complex devices at issue in today’s ITC proceedings.³² Similar to the problems associated with broad case captions, the use of the term “covered” in ITC remedial orders leads to uncertainty and confusion as to the scope of the orders. This uncertainty creates difficulties for Customs enforcement and threatens legitimate trade.

Apple’s conduct against HTC in the 710 investigation and its conduct in this investigation illustrate the inherent problems with overly-broad and unspecific remedial orders. In the 710 Investigation, Apple obtained an exclusion order based on HTC’s infringement of one of its software patents.³³ Throughout the investigation, Apple only accused three discrete

efficient.”); ITCTLA at 2 (noting that “enforcement of exclusion orders is unpredictable” in situations involving design around or new products and “ITCTLA members are also concerned about the lack of transparency”); Imaging Supplies Coalition at 1, 3 (“[V]arious aspects of the enforcement process are unnecessarily complicated and lack transparency . . . [which] result[s] in delayed and inconsistent enforcement of Exclusion Orders. . . . [E]nforcement instructions from IPR Branch that are transparent to rights holders would provide more effective guidance to CBP officers.”); Tessera at 1–2 (“Tessera was . . . left in the dark [T]he procedures used by CBP to implement ITC exclusion orders lack transparency. . . . [and] creates great uncertainty as to the scope of exclusion orders.”); IPO at 4 (describing the lack of transparency in current CBP procedure as a fundamental flaw); AIPLA at 2–3 (“AIPLA thinks that the current procedures, while reasonably clear, lack transparency especially with respect to design-around and new products. . . . AIPLA recommends that an inter partes procedure be developed to assist the CBP and increase the transparency of exclusion order enforcement.”); Motorola at 1, 6 (“Such as [sic] process would achieve the interagency working group’s goals of transparency, effectiveness and efficiency. . . . Motorola’s proposed process for evaluating re-designed products would benefit both patent holders and importers . . . through a transparent process in which all parties fully participate.”); ABA-IPL at 3 (“CBP should have a more transparent and bilateral process for receiving the views of interested parties regarding the scope of an exclusion order . . . and the analysis and reasoning underlying the decision [on the scope of an order] should be made available to all parties with an interest in enforcement of the order.”); Samsung at 1, 4 (“Samsung agrees that the administration and enforcement of exclusion orders by CBP can be improved, particularly with respect to transparency. . . . [T]he Commission should articulate specific, measurable standards that CBP can apply consistently and predictably without undertaking a detailed infringement analysis that CBP may be ill equipped to handle.”).

²⁹ If the USTR disapproves of the remedial orders for this reason, the Commission is free to modify the orders to narrow them commensurate with the product categories actually litigated in this investigation. *See, e.g., Certain Molded-In Sandwich Panel Inserts and Methods for their Installation*, Inv. No. 337-TA-99, Comm’n Op. (Sept. 17, 1982) (modifying remedial orders after Presidential disapproval).

³⁰ *See, e.g.,* Exclusion Order at 2 (excluding “Electronic digital media devices covered by one or more of claims 1, 4-6, 10 and 17-20 of the ’949 patent and claims 1-4 and 8 of the ’501 patent”).

³¹ *See, e.g., Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, Comm’n Op. at 17-18 n.27 (June 2, 1997).

³² *See* Google Submission, *supra* note 10, at 9.

³³ *See Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710, Comm’n Op. at 6 (Dec. 29, 2011).

features of infringing its patent. After HTC redesigned those features to avoid infringing Apple's patent, Apple accused a different feature of infringing and requested that HTC's devices be excluded because they were still "covered" by the patent claims found to infringe.³⁴

Much like the 710 Investigation, here, Apple accused two specific applications (Gallery and Browser) of infringing the '922 patent.³⁵ Samsung redesigned these features and the ALJ found the redesigns to be non-infringing.³⁶ During remedy briefing before the ITC, however, Apple argued against a narrowly-tailored exclusion order, claimed for the first time that the Google Maps application also infringed the '922 patent, and stated that a violation should be found notwithstanding Samsung's redesigns of the Gallery and Browser applications.³⁷ This was despite the fact that the Google Maps application was on every Samsung device which was accused during the investigation and that Apple *never* accused that application of infringing.

Apple is not the only complainant who has tried to take unfair advantage of the overly-broad language of the ITC's orders. After obtaining an exclusion order in the 744 Investigation, Microsoft asked Customs to exclude Motorola products based on their use of certain Google functionality that was not raised before the ITC. Customs refused, finding that Microsoft had abandoned any claim against the extant Google functionality by not accusing it during the underlying investigation.³⁸ Unsatisfied with this result, Microsoft sued Customs in federal district court and sought injunctive relief requiring Customs to comply with Microsoft's overly-broad interpretation of the ITC's exclusion order.³⁹ Although this case is still pending, it further highlights the problems associated with the ITC's practice of issuing broadly-worded remedial orders that refer only to "covered" products.

The USTR has a strong policy interest in reining in overly-broad, unspecific and disruptive ITC remedial orders. The USTR also has a strong policy interest in furthering the Administration's goal to enhance consistency in the injunction standards applied at the ITC and in district courts. Further, in light of Apple's history of trying to expand the scope of ITC orders to ensnare products and features that were never litigated, disapproval of the remedial orders in this investigation is warranted.

³⁴ See June 19, 2012 Correspondence from HTC to the Commission regarding Apple's Enforcement Complaint at 5-9.

³⁵ See Comm'n Op. at 33-53; See Samsung's Reply Submission on Remedy, Bonding and the Public Interest at 68-75 (June 19, 2013).

³⁶ Initial Determination at 234.

³⁷ See Samsung's Reply Submission on Remedy, Bonding and the Public Interest at 68-75 (June 19, 2013).

³⁸ Customs Ruling Letter, HQ H242025 at 11 (June 24, 2013) ("Based on the foregoing, including the determination that the administrative record does not support a finding that Microsoft specifically accused the ability in the legacy Motorola devices of using Google's servers and Google's synchronization protocols to satisfy the limitation from claim 1 of the '566 patent requiring a 'synchronization component,' and because there is no dispute that these features were present on the devices before the ITC during the investigation, CBP shall not refuse entry on the basis of these features, absent additional guidance from the ITC").

³⁹ *Microsoft Corp. v. United States*, Case No. 1:13-cv-01063, Complaint (July 12, 2013).

The USTR Has A Strong Policy Interest In Avoiding The Perception Of Favoritism And Protectionism

The USTR's disapproval of the narrow remedy in the 794 Investigation marked a significant departure from its historical reviews of ITC remedial orders. In cases with far-greater economic impact, such as Apple's investigation against HTC (710 Investigation) and Microsoft's investigation against Motorola (744 Investigation), the USTR declined to issue a disapproval. However, contrary to its charge to consider only *policy* issues relating to the specific remedy issued by the ITC, the USTR appears to have considered the ITC's *factual* findings in the 794 Investigation, and found them to support the very same *legal* arguments rejected by the ITC. While Samsung agrees with the Patent & Trademark Office, Department of Justice and Federal Trade Commission with respect to standard essential patents generally, the undisputed factual record developed by the ITC in the 794 Investigation cannot be reconciled with the USTR's disapproval.

For these reasons, the USTR, and American trade policy as a whole, have received increased scrutiny from foreign nations, including many important trading partners such as the Republic of Korea.⁴⁰ The world is watching how Samsung is treated by the United States in this "smartphone war" and the Administration has a significant interest in avoiding the perception of favoritism and protectionism toward U.S. companies. Samsung requests nothing more than equal and fair treatment in this, and future investigations.

Conclusion

Samsung urges the USTR to look beyond the short-term impact of the orders issued in this investigation and consider the broader policy implications of those orders. Overly-broad remedial orders covering complex products, of which only minor features are found to infringe, threaten legitimate trade and stifle innovation. There is a strong policy interest in ensuring that a patentee cannot hold an entire market hostage because of insignificant improvements to minor features or components. There is also an equally strong policy interest in ensuring that these remedial orders are limited to the products and features actually litigated before the ITC, thus providing Customs, the parties, and U.S. consumers with transparency and certainty as to their scope. The USTR must apply these policy considerations fairly and evenly for every respondent.

For these reasons, Samsung respectfully requests that the USTR disapprove the ITC's remedial orders in this investigation.

⁴⁰ See, e.g., *Seoul Expresses Concerns Over ITC Decision Reversal on Apple*, Yonhap News Agency (Aug. 5, 2013 2:51 PM), <http://english.yonhapnews.co.kr/business/2013/08/05/50/0502000000AEN20130805005000320F.html>.