

**UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.**

In the Matter of

**CERTAIN 3G MOBILE HANDSETS
AND COMPONENTS THEREOF**

**Inv. No. 337-TA-613
(REMAND)**

**WRITTEN SUBMISSION ON THE PUBLIC INTEREST OF
FEDERAL TRADE COMMISSION CHAIRWOMAN EDITH RAMIREZ**

As Chairwoman of the United States Federal Trade Commission, I submit this statement in response to the United States International Trade Commission's Notice of Request for Written Submissions in Investigation No. 337-TA-613 (Remand).¹

This investigation raises an important and unresolved question for the ITC: what standard should the ITC use to evaluate evidence concerning patent hold-up when a complainant seeks an exclusion order for alleged infringement of a FRAND-encumbered standard essential patent?² I recommend that, as part of its public interest analysis before issuing an exclusion order,³ the ITC require a SEP holder to prove that the implementer is unwilling or unable to take a FRAND license.⁴ This standard would ensure that an exclusion order issues only when it would not facilitate patent hold-up and thus only when such an order would be consistent with the public interest. It would also establish a balanced approach to ITC remedies by ensuring that a SEP holder follows through with its FRAND licensing commitment, while at the same time

¹ The views reflected in this statement are my own and do not necessarily reflect the views of the Commission or of any other Commissioner. I take no position on the facts of Investigation No. 337-TA-613 (Remand), or whether Section 337 remedies should issue.

² The threat of an exclusion order or other injunctive relief against a willing licensee "has the potential to distort competition by enabling SEP owners to negotiate high royalty rates and other favorable terms, after a standard is adopted, that they could not credibly demand beforehand." Third-Party U.S. Fed. Trade Comm'n's Statement on the Public Interest at 2, Certain Wireless Commc'ns Devices, Inv. No. 337-TA-745 (ITC filed June 6, 2012) [hereinafter 2012 FTC Statement]. This is commonly known as "patent hold-up." The standard recommended in this statement would also address concerns about "reverse hold-up." Reverse hold-up reflects the potential for a standards implementer to engage in, for examphaern0 6 f2t3f rNp

recognizing that both the SEP holder and the standards implementer have a duty to negotiate in good faith towards a meaningful resolution of FRAND issues.⁵

I.

Consistent with Ambassador Froman's 2013 instruction that the ITC should make explicit findings on hold-up and reverse hold-up "to the maximum extent possible,"⁶ the ITC issued a remand order on March 24, 2014 directing the Administrative Law Judge to "take evidence concerning and/or briefing on whether there is patent hold-up or reverse hold-

holder] has violated its duty of good faith, or tried for [] patent hold-up.”⁹ According to the ALJ, a SEP holder may comply with its FRAND commitment simply by offering to license its SEPs—even on terms that may not be FRAND.¹⁰ Also critical to the ALJ’s finding of no hold-up was

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Semiconductor Corp. v. LSI Corp., LSI, after filing an ITC action seeking an exclusion order, offered to license Realtek its SEPs in exchange for a royalty that exceeded the selling price of Realtek's standard-compliant products.²⁰ A federal district court, after enjoining LSI from pursuing an exclusion order, determined that the cumulative RAND royalty for the patents at issue was 0.19% of the selling price.²¹

Consequently, when the ITC is deciding whether to issue an exclusion order before FRAND terms are set,²² it should require the complainant to prove that the respondent is unwilling or unable to take a license on FRAND terms.²³ This will mitigate the potential for an exclusion order to facilitate actual patent hold-up, while preserving the ITC's ability to issue Section 337 remedies that are consistent with the public interest.²⁴

A SEP holder may demonstrate an implementer's unwillingness in a number of ways.²⁵ First, an implementer may be unwilling if it affirmatively demonstrates that it will not negotiate with the complainant. An implementer may also be unwilling if it engages in a "constructive

²⁰ 946 F. Supp. 2d 998, 1002 (N.D. Cal. 2013).

²¹ *Realtek Semiconductor Corp. v. LSI Corp.*, No. 13-cv-03451, 2014 U.S. Dist. Lexis 81673, at *23 (N.D. Cal. June 16, 2014); see also *Innovatio IP Ventures, LLC Patent Litigation*, No. 2303, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013) ("[i]n light of all of the testimony, and particularly the evidence about Broadcom's real-world concerns about patent hold-up, the court concludes that patent hold-up is a substantial problem that RAND is designed to prevent").

²² The threat of patent hold-up is reduced, or eliminated, once the FRAND terms have been set

refusal to negotiate a FRAND license with the SEP owner or refusal to pay what has been determined to be a FRAND royalty.”²⁶ For example, this may occur when an implementer refuses to license the patent holder’s FRAND-encumbered SEPs unless it also obtains a license to the patent holder’s differentiating patents, or insists on terms that are clearly outside a reasonable interpretation of FRAND. When there is a dispute between the parties about what terms are FRAND terms, the meaning of FRAND must first be determined by a neutral adjudicator in order for the implementer’s offer to be evaluated in the context of a FRAND range.²⁷ An implementer may be unable to take a license if it is bankrupt, or otherwise financially unable to satisfy the terms of a FRAND license. Finally, an exclusion order may be in the public interest when the respondent is outside the jurisdiction of the United States District Courts or is otherwise judgment-proof.

FRAND licensing negotiations can be complex. As the ALJ recognized, it is challenging to determine, during the course of party negotiations, whether an offer is reasonably within a FRAND range.²⁸ It is likewise possible that parties will offer supra- or sub-FRAND rates in the process of eventually settling on FRAND terms. Therefore, if, during the course of the Section 337 investigation, a FRAND range is determined, I recommend that the ITC delay the effective date of Section 337 remedies and provide parties an opportunity to execute a FRAND license. The parties in that instance would face respective risks that the exclusion order will (1) go into

²⁶ Ambassador Froman Letter at 2; see also U.S. Dept. of Justice and U.S. Pat. & Trade Office, Policy Statement on FRAND Licensing, 75 Fed. Reg. 10,000 (2010).

effect if the respondent refuses to make a FRAND offer; or (2) be vacated if the ITC finds that the complainant refuses to accept a FRAND offer.

There are also other situations where a standards implementer would be a willing licensee and therefore it would not be in the public interest for an exclusion order to issue. This would include cases where the implementer commits to be bound by terms that either the parties themselves will determine are FRAND, or that will be determined by neutral adjudication.²⁹

Evaluating an implementer's willingness to license in this way would also address any concerns about reverse hold-up. By adopting the unwilling licensee standard articulated in this statement, the ITC can provide greater clarity as to when an exclusion order may be appropriate.

Finally, I do not agree with the ALJ's reasoning that "[b]y arguing that the products do not practice the patents, the respondents are arguing that the patents are not Standard Essential Patents."³⁰ If a respondent presents affirmative defenses, including arguments about non-infringement, invalidity, or unenforceability, these defenses should not be deemed to waive the alternative position that if the ITC rejects the asserted affirmative defenses, the patent is a SEP and hence the SEP holder's FRAND commitment applies.³¹

²⁹ For instance, a respondent may affirm its willingness to license by instituting a declaratory judgment action or other proceeding in which a court will set FRAND terms.

³⁰ RID at 39 ("As the respondents have presented no evidence that the patents are standard essential, they have failed to prove they are standard essential, and that they are entitled to claim the rights available under the ETSI FRAND policy.") and at 37 ("Respondents in this case have vigorously asserted that the patents in issue are not essential, but rather are not infringed. By so claiming

