

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

In the Matter of

**CERTAIN MOBILE ELECTRONIC
DEVICES AND RADIO
FREQUENCY AND PROCESSING
COMPONENTS THEREOF**

Investigation No. 337-TA-1065

**STATEMENT OF THIRD PARTY
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN RESPONSE TO THE COMMISSION'S DECEMBER 18, 2018, NOTICE
REQUESTING WRITTEN SUBMISSIONS ON THE ISSUES OF
REMEDY, THE PUBLIC INTEREST, AND BONDING**

Pursuant to the Commission’s Federal Register Notice of December 18, 2018,¹ inviting interested parties and members of the public to file written submissions regarding the issues of remedy, the public interest, and bonding with respect to the relief described in the Final Initial Determination² issued by Administrative Law Judge (“ALJ”) Pender, the Computer & Communications Industry Association (“CCIA”) submits the following comments.

I. SUMMARY

CCIA represents over two dozen companies of all sizes providing high technology products and services.³ CCIA member companies manufacture products like those at issue in the proposed investigation, including cellular handsets and baseband processors. CCIA promotes open markets, open systems, open networks and full, fair and open competition in the computer, telecommunications and Internet industries. Neither complainant nor respondent is a member of CCIA.

As outlined in CCIA’s comments, both those provided at the outset of this investigation⁴ and those provided subsequent to ALJ Pender’s recommended determination⁵, CCIA believes that excluding Intel-based iPhones is not in the public interest. Accordingly, CCIA supports ALJ Pender’s recommended determination with respect to the public interest⁶ and his reasoned explanation of the harms to competition and national security that would ensue in the event an exclusion or cease and desist order were to issue.

CCIA’s previous comments explain why an exclusion order cannot be justified over the statutory public interest factors. CCIA believes those previous comments remain relevant and urges the Commission to consider them. The present comments address the Commission’s request for submissions regarding design-around, whether the proposed “carve-outs” would be practicable, feasible, and effectively balance enforcement against avoiding Intel’s exit, whether a delay or other carve-out would

¹ Commission Notice of Determination to Review in Part a Final Initial Determination and Schedule for Filing Written Submissions, 83 Fed. Reg. 64875 (hereinafter “Notice”).

² Final Initial Determination (Public) at 192, 337-TA-1065 Document ID 660155 (Oct. 29, 2018) (“FID”).

³ A list of CCIA’s members is available online at <https://www.ccianet.org/about/members>. Neither Complainant nor Respondent are CCIA members.

⁴ See CCIA Comments on the Public Interest, 337-TA-1065 Document ID 617665 (July 20, 2017).

⁵ See CCIA Comments on the Public Interest, 337-TA-1065 Document ID 661358 (Nov. 8, 2018).

⁶ CCIA has no position on the questions of non-infringement or invalidity also under review.

avoid the described adverse consequences, and whether national security concerns may be taken into consideration in evaluating the public interest. The present comments also explain the impacts of the recent PTO determination that claim 31 of the '490 patent is likely invalid on a delay of enforcement of any exclusion order and why the availability of non-Section 337 remedies must be considered in order to fulfill Congress's statutory intent.

Given these considerations, the evidence continues to weigh against issuance of an exclusion order and, at a minimum, requires a significant delay in enforcement of an exclusion order if one is to issue.

II. A DESIGN-AROUND WOULD LIKELY REQUIRE AN EXTENDED TIMELINE BEFORE PRODUCT AVAILABILITY NO MATTER HOW QUICKLY APPLE OR INTEL COULD IMPLEMENT A RE-DESIGN

The Commission Notice requests information on the likelihood that Apple or Intel could implement a design-around and an approximate timeline for such a re-design. CCIA has no information regarding the difficulty or timeline of implementation of a design-around by Apple or Intel. However, even if that re-design were completed tomorrow, the re-design would not be expected to enter the market for a significantly longer period of time.

There is existing evidence regarding these issues. In particular, Intel's acquisition of VIA provides a natural experiment for the timeline of integrating a new design feature into an existing baseband chipset. In that instance, Intel acquired CDMA technology from VIA in 2015 and did not release a product incorporating that technology until 2018.⁷ This three-year time lag from design change to productization is consistent with Qualcomm's own representations regarding the time from design to commercialization.⁸ While a smaller change might be possible to implement somewhat more rapidly than

⁷ See Testimony of Aicha Evans on Cross-Examination, *FTC v. Qualcomm*, Trial Tr. Vol. 3, 615:7-21 (Jan. 8, 2019); see also Goldstein, *Fierce Wireless*, "Intel continues to pare mobile losses, buys CDMA modem assets from VIA Telecom" (Oct. 14, 2015), available at <https://www.fiercewireless.com/wireless/intel-continues-to-pare-mobile-losses-buys-cdma-modem-assets-from-via-telecom>; see also Wolfe, *iDownloadBlog*, "Intel begins production on modems for the 2018 iPhones" (June 15, 2018) ("The XMM 7560 is the first Intel modem [] to support both CDMA and GSM"), available at <https://www.idownloadblog.com/2018/06/15/intel-modem-2018-iphones/>.

⁸ See Testimony of Cristiano Amon on Cross-Examination, *FTC v. Qualcomm*, Trial Tr. Vol. 3, 514:13-15 (Jan. 8, 2019) ("And it takes about two to three years from the beginning of the design of a product to commercialization of a phone.").

the integration of CDMA, a significant lag from design planning to baseband product availability should be expected based on existing industry evidence.

In addition to the lag from design to baseband product availability, additional delays would be expected in the course of a cellular product entering the market. After a baseband chipset becomes available, it must still be integrated into a handset by a product manufacturer. This integration itself takes time. And after product integration is complete, the product must still be qualified for operation on the carrier's network. Each of these stages of testing and qualification add additional lag to the timeline. A multi-year delay is a reasonable estimate of the timeframe required for a re-design to be implemented and make its way to consumers.

III. OUII'S PROPOSED CARVE-OUTS ARE INFEASIBLE AND WOULD NOT AVOID INTEL'S EXIT FROM THE PREMIUM BASEBAND CHIPSET MARKET

OUII proposes a carve-out for Apple products that incorporate Intel baseband chips that include both 4G and 5G technology. Such a remedy would not avoid Intel's exit. An exclusion order that barred Intel from selling non-5G products would effectively bar Intel from sales to its major customer, Apple, and that would in turn result in Intel's almost certain exit.

It has been widely reported that Apple's 2019 cycle of phones will not include 5G functionality.⁹ This is consistent with Apple's historical practice when new generations of cellular radio technology are first implemented; the iPhone launched as a 2G device originally, with 3G appearing later, and the iPhone adopted 4G LTE technology a cycle after the technology became commonplace in other phones launched in the U.S.¹⁰ Intel can thus expect no 5G sales to Apple, its current primary customer, until at least 2020. This alone suggests that Intel would consider exiting the market, rather than continuing to invest significant amounts of research and development into a program that already does not meet financial targets.¹¹

⁹ See, e.g., King et al., *Bloomberg*, "Apple Will Wait Until at Least 2020 to Release a 5G iPhone" (Dec. 3, 2018), available at <https://www.bloomberg.com/news/articles/2018-12-03/apple-is-said-to-miss-rapid-5g-takeoff-sitting-out-tech-shift>.

¹⁰ See, e.g., Lee, *iDownloadBlog*, "Why the iPhone 4S Doesn't Have LTE '4G' Technology" (Oct. 5, 2011), available at <https://www.idownloadblog.com/2011/10/05/lte-iphone-unlikely/>.

¹¹ See Testimony of Aicha Evans, *FTC v. Qualcomm*, Trial Tr. Vol. 3, 586:25-587:22 (Jan. 8, 2019).

Further, 5G network availability in the U.S. is expected to be limited in 2019 and into 2020.¹² 5G product availability and sales overall can thus be expected to be limited in that timeframe. Intel has characterized the present position of its cellular baseband chip business as “fragile.”¹³ Even if Intel were to capture the entirety of the 5G market, including adding customers they do not presently sell to, the volume of sales captured would likely be insignificant in comparison to the required resource expenditure to create a 5G product and would be unlikely to avoid Intel’s exit from the premium chipset market and from 5G development.

IV. IN THE EVENT THE COMMISSION DECIDES TO ISSUE AN EXCLUSION ORDER, A SIGNIFICANT DELAY IN IMPLEMENTATION SHOULD BE INCORPORATED

While a significant delay of enforcement would be required in order to avoid the possibility of exit, as described above, such a delay would have an additional benefit. The Patent and Trademark Office (PTO) has recently reached its own determination that it is reasonably likely that claim 31 of the ’490 patent—the sole claim of the sole patent held infringed in the FID—is in fact invalid.¹⁴

In IPR2018-01261, the PTO found that “the information presented establishes a reasonable likelihood that Petitioner would prevail in showing that claim 31 of the ’490 patent (the sole challenged claim) is unpatentable.”¹⁵ The PTO found this to be the case with full awareness of the FID and addressed why it disagrees with ALJ Pender’s contrary determination.

Federal courts operate under the “basic proposition that a government agency such as the [] Patent Office [is] presumed to do its job.”¹⁶ The PTO has a specific expertise—determining whether or not a patent is valid. It would be proper for the ITC to defer to the PTO’s expertise by staying enforcement of an exclusion order until such time as the PTO concludes its review.

¹² See Haselton, *CNBC*, “5G reality check: You won’t need a 5G phone next year” (Dec. 4, 2018), available at <https://www.cnbc.com/2018/12/04/5g-phones-are-coming-next-year-heres-what-that-means-for-you.html>.

¹³ See Testimony of Aicha Evans, *FTC v. Qualcomm*, Trial Tr. Vol. 3, 560:1-4 (Jan. 8, 2019) (“we’re in such a continuous, fragile situation with the modem business at Intel...”).

¹⁴ See IPR2018-01261 Paper 8 (Jan. 15, 2019). In addition to this proceeding, there are four additional IPRs challenging other claims of the ’490 patent. Two have been instituted—IPR2018-01293 and IPR2018-01295—and two more await an initial decision—IPR2018-01344 and IPR2018-01346.

¹⁵ IPR2018-01261 Paper 8 at 37 (Jan. 15, 2019).

¹⁶ *American Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350, 1359 (Fed. Cir. 1984).

Further, in the past, the Commission has allowed enforcement of an exclusion order over a patent that was later found invalid by the PTO, affirmed by the Federal Circuit.¹⁷ This has led to exclusion of products over invalid patents, despite knowledge of the likely invalidity of those patents at the time the exclusion order was implemented, causing significant harm to the excluded manufacturer. In a case like the present case where the complainant is currently being investigated for its own unfair trade practices with respect to patent enforcement,¹⁸ the exclusion of products in a fashion that appears designed to hurt a competitor¹⁹ based on patents that are likely to be found invalid²⁰ cannot be squared with the Commission's mandate to consider the public interest in competitive conditions and impacts on United States consumers.²¹

Delay of enforcement to allow the PTO to reach a determination would also be in line with the principles elucidated by Congress during the passage and revision of Section 337. In particular, Congress requires that the Commission "shall consult with, and seek advice and information from, ... such other departments and agencies as it considers appropriate."²² Congress intended that the Commission would do so because other agencies "will often have significant information, as well as sound advice."²³ Congress further believed that such information and advice would be relevant regarding impacts on the public interest.²⁴ Delay of enforcement until such time as the PTO reaches its determination would represent a mechanism by which the Commission could be considered to have sought advice and

¹⁷ See, e.g., Inv. No. 337-TA-945.

¹⁸ See, e.g., CCIA Comments on the Public Interest, 337-TA-1065 Document ID 617665 (July 20, 2017); CCIA Comments on the Public Interest, 337-TA-1065 Document ID 661358 (Nov. 8, 2018).

¹⁹ Qualcomm has not requested exclusion of Apple products utilizing Qualcomm components, despite Qualcomm's apparent position that their patents are not exhausted on those products and that a license is equally required for Qualcomm-based iPhones as for Intel-based iPhones. This selective enforcement strategy is at least suggestive of an attempt to harm Qualcomm's competitor, Intel.

²⁰ Per the Patent Office's most recent statistics on AIA trial outcomes, of the 3,690 instituted petitions which were not either pending or joined to another proceeding, at least one claim is invalidated in 2,236 (60%) of those proceedings. In the remainder, 941 (25%) settle. In 513 (14%) instances, all claims survive either via dismissal or a final written decision. As a settlement at the PTO would imply a settlement between the parties to the present investigation, these statistics strongly suggest that an instituted claim, such as claim 31 of the '490 patent, is likely to ultimately be invalidated.

²¹ 19 U.S.C. § 1337(d)(1).

²² 19 U.S.C. § 1337(b)(2).

²³ S. Rep. No. 93-1298 at 195 (1974).

²⁴ *Id.*

information from an appropriate agency.

Finally, the PTO operates under a statutory one-year deadline for issuance of a decision in these procedures. This fixed timeline for a determination by a sister agency with significant expertise in patent validity weighs in favor of delaying the implementation of any remedy until such time as the PTO can issue its own determination. In the unlikely event that claim 31 is ultimately found patentable by the PTO and that determination is affirmed by the Federal Circuit, any interim harm to Qualcomm's interests can be addressed via damages obtained in their currently pending district court actions. The counterfactual is not true; if Intel is excluded from participation in the market via a Commission exclusion order and thus forced to exit, there is no possible remedy Intel can obtain for their complete loss of market share and the loss of future business opportunities that would be occasioned by the Commission's decision. There is also no remedy that consumers could obtain for the harm to competitive conditions such a decision would cause.

While ALJ Pender's determination that the public interest does not favor the issuance of an exclusion order is correct, in the event the Commission disagrees with ALJ Pender, the public interest requires a significant delay in enforcement of the exclusion order in order to reduce the possibility of Intel's exit and to allow the PTO to complete its own investigation of the validity of claim 31 of the '490 patent, the sole potential basis for exclusion.

V. NATIONAL SECURITY IS PROPERLY CONSIDERED AS PART OF THE PUBLIC INTEREST AND IN PARTICULAR PUBLIC HEALTH AND WELFARE

The Commission has requested input regarding whether national security concerns may be taken into consideration for the purpose of evaluating the public interest. The Commission's organic statute makes clear that national security concerns may be considered, particularly when they—as established in ALJ Pender's FID—intersect with concerns regarding the public welfare or with competitive conditions. And Qualcomm itself has recognized this in the past, stating that relief under section 337 is inappropriate where it would “inflict[] collateral damage on public health and safety and the *national security* of the

United States.”²⁵

The public interest inquiry is statutorily based in the requirement that the Commission issue an exclusion order on a finding of violation “unless, after considering the effect of such exclusion upon the public health and welfare [and] competitive conditions in the United States economy ... it finds that such articles should not be excluded from entry.”²⁶ While national security is not necessarily coterminous with the public health or with competitive conditions, these factors are inextricably intertwined. Harm to national security can produce threats to the public welfare or to competitive conditions, just as harm to competitive conditions can threaten the national security or public health. Congress felt that “the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute.”²⁷ Having given such weight to the public health and welfare, it would beggar belief to think that Congress did not consider national security—a core protector of the public welfare—as a relevant concern.

The national security considerations ALJ Pender took into account in the FID are relevant to these considerations, as he explicitly recognized in the FID. For example, ALJ Pender stated that “the issue of national security should be matter of pre-eminent importance in this investigation, especially when 5G development, innovation, control, and dominance will so dramatically *affect competitive conditions in the U.S. economy* in the long run.”²⁸ Rather than simply relying on national security concerns regarding 5G development, ALJ Pender made clear that those national security concerns are related to impacts on competitive conditions. ALJ Pender also explicitly tied national security to the public welfare of the United States, stating that some of the impacts on national security derive from adverse impact on the “public health and welfare (national security) of the United States.”²⁹ Where national security is harmed, it creates a concomitant threat to the public welfare, and ALJ Pender’s consideration of national security concerns recognizes this fact.

²⁵ Qualcomm Brief on Remedy and the Public Interest, 337-TA-543 Doc. Id. 311770 at 30 (Feb. 23, 2007) (emphasis added).

²⁶ 19 U.S.C. § 1337(d)(1); *see also* 19 U.S.C. § 1337(e)(1), 19 U.S.C. § 1337(f)(1).

²⁷ S. Rep. No. 93-1298 at 197 (1974).

²⁸ FID at 195 (emphasis added).

²⁹ *Id.* at 193.

Given the inherent impacts of national security on the public welfare and on U.S. consumers, and the potential impact on competitive conditions in the United States, it is properly within the Commission's authority to consider national security concerns—particularly where, as here, those concerns are tied to the impacts on the public welfare and to competitive conditions.

VI. THE AVAILABILITY OF OTHER REMEDIES WEIGHS AGAINST GRANT OF RELIEF UNDER SECTION 337

Finally, it is of significant relevance that other remedies are both available and presently being sought by Qualcomm. Unlike instances in which products are being manufactured abroad and imported into the United States by an entity which is not amenable to the jurisdiction of U.S. courts, respondent Apple is a California corporation which is currently being sued by Qualcomm in a United States District Court. The interest in vitiating Qualcomm's patent right in claim 31 of the '490 patent—should it ultimately overcome the PTO's initial determination that the claim is likely invalid—can be sufficiently upheld via the co-pending district court proceedings.

Qualcomm itself also believes that the availability of other remedies is relevant. Previously, Qualcomm has stated that “Congress has spoken to the correct resolution of this dispute: because public interest considerations are paramount in the administration of the statute, these public interests trump complainant's quest for relief under Section 337. Its claim properly belongs in district court, where, if [Qualcomm] can prove its claim, monetary relief is available without inflicting collateral damage on public health and safety and the national security of the United States.”³⁰

Congress felt that “the public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of” Section 337 investigations.³¹ They also explicitly called for a balance of these considerations against what would be “gained by protecting the patent holder (within the context of the U.S. patent laws).”³² In balancing these considerations—the harm to the public interest against the gain to the patent holder—it is relevant if the

³⁰ Qualcomm Brief on Remedy and the Public Interest, 337-TA-543 Doc. Id. 311770 at 30 (Feb. 23, 2007).

³¹ S. Rep. No. 93-1298 at 197 (1974).

³² *Id.*

patent holder can obtain some other relief, outside of Section 337.

VII. CONCLUSION

Given the significant harms to consumers, competitive conditions, U.S. leadership in 5G technology, and U.S. national security (and thereby U.S. public safety) that would result from issuance of an exclusion or cease and desist order, the Commission should adopt ALJ Pender's conclusions on the public interest and refrain from issuing the requested exclusion order.

To the extent the Commission chooses to ignore the strong public interest against exclusion and issue a remedy, that remedy should be stayed until the PTO completes its review of the sole remaining claim (and any associated appeal), thereby additionally providing a window for completion and implementation of a design-around.

Dated: January 30, 2019

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