

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

**In the Matter of**

**CERTAIN WIRELESS CONSUMER  
ELECTRONICS DEVICES AND  
COMPONENTS THEREOF**

**Investigation No. 337-TA-853**

**THIRD PARTY SPRINT SPECTRUM, L.P.'S  
STATEMENT REGARDING THE PUBLIC INTEREST**

Third party Sprint Spectrum, L.P.<sup>1</sup> (“Sprint”) respectfully submits this Statement Regarding the Public Interest in response to the Commission’s Notice dated November 25, 2013 (Doc. ID 522995). Sprint takes no position regarding the merits of Complainants’ patent claims or Respondents’ defenses. However, when the accused technology is a small component or feature of a complex electronic device, or the Complainants are non-practicing entities (“NPEs”), the Commission should not grant an exclusion order absent exceptional circumstances. If the Commission grants an exclusion order, it should include a significant transition period of not less than twelve months and a provision to allow for refurbished or replacement handsets.

Sprint is a national provider of wireless voice, messaging, and data services and together with other entities in the Sprint family of companies serves more than 54 million customers throughout the nation. Sprint’s customers use a variety of multi-functional devices such as smartphones and other handsets and mobile broadband cards, with Sprint’s voice and data services. Sprint respects intellectual property rights and takes no position on the merits of this dispute.

**I. IF RESPONDENTS ARE CORRECT THAT THE ACCUSED TECHNOLOGY IS A SMALL COMPONENT OR FEATURE OF A COMPLEX ELECTRONIC DEVICE, OR THAT COMPLAINANT IS AN NPE, THEN AN EXCLUSION ORDER IS LIKELY TO HARM THE PUBLIC INTEREST**

As Sprint understands it, the accused technology is a small component of a complex electronic device and Complainants Technology Properties Limited LLC, Phoenix Digital Solutions LLC, and Patriot Scientific Corporation are NPEs. When either of those two factors

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<sup>1</sup> Sprint Spectrum, L.P. is the primary Sprint-related entity that sells various smartphone and other devices and corresponding services to end users in the United States.

are present, an exclusion order is likely to harm the public interest and should not issue absent exceptional circumstances.

“[T]he Commission must balance the damage to the patent holder’s rights against the adverse impact of the remedy on the public health and welfare and the assurance of competitive conditions in the United States economy.”<sup>2</sup> As this standard implicitly recognizes, granting a patentee a remedy beyond the contribution of his or her patent harms competitive conditions.<sup>3</sup> When a patent covers only a small feature in an accused device, the risk of unduly expanding the exclusionary power of a patent is particularly high. Federal courts are increasingly recognizing this principle and denying injunctive relief in industries like the smartphone industry—which sells complex devices encompassing thousands of patented features. Justice Kennedy, joined by three other Justices, observed in *eBay* that injunctions for patent infringement “may not serve the public interest” in cases where “the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations.”<sup>4</sup> District courts have acted on this observation.<sup>5</sup> And recently the Federal Circuit agreed with such reasoning in a smartphone case.<sup>6</sup>

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<sup>2</sup> *Certain Inclined-Field Acceleration Tubes and Components Thereof*, Inv. No. 337-TA-67, Comm’n Op. at 22, USITC Pub. No. 1119 (Dec. 1980) (internal citation omitted).

<sup>3</sup> See Colleen V. Chien & Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest*, 98 CORNELL L. REV. 1, 6 (2012) (“Eliminating a big product from the market because of a small patent harms consumers, and blocking a large number of lawful components and features from the market along with the infringing one distorts competition.”)

<sup>4</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396-97 (2006) (Kennedy, J., concurring) (internal citations omitted).

<sup>5</sup> See Chien & Lemley at 13-14 and cases cited in n.66-68.

<sup>6</sup> *Apple v. Samsung Elecs. Co., Ltd.*, 735 F.3d 1352 (Fed. Cir. 2013) (affirming district court finding that “while the public interest does favor the protection of patent rights, it would not be in the public interest to deprive consumers of phones that infringe limited non-core features”) (remanded on other grounds).

Likewise, federal courts are hesitant to grant an injunction to a non-practicing entity. While failure to practice one's patent does not absolutely preclude injunctive relief under *eBay*, federal courts since *eBay* have confirmed that NPEs face an uphill battle in establishing their right to an injunction.<sup>7</sup> Similarly, the FTC has urged the ITC to consider carefully whether the public interest supports imposition of an exclusion order when the complainant, such as an NPE, could not meet the *eBay* standard and thus could not obtain an injunction.<sup>8</sup> The FTC is particularly and rightly concerned about potential harm to consumers caused by holdup, distortions of competition, raised prices, and deterred innovation.<sup>9</sup>

Both of these developments in federal jurisprudence bear directly on the Commission's analysis of what remedy to impose in Section 337 Investigations. In fact, the President recently set a policy goal of harmonizing the Commission's standard for granting exclusion orders with the federal judiciary's standard for granting injunctions.<sup>10</sup> Indeed, when the Commission recently issued an exclusion order in an investigation involving FRAND-encumbered patents—despite warnings that an injunction on such patents would not likely be available in federal courts—the United States Trade Representative vetoed the order.<sup>11</sup>

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<sup>7</sup> See, e.g., *Voda v. Cordis Corp.*, 536 F.3d 1311, 1329 (Fed. Cir. 2008) (affirming denial of permanent injunction) (“The Supreme Court held only that patent owners that license their patents rather than practice them ‘*may* be able to satisfy the traditional four-factor test’ for a permanent injunction. Nothing in *eBay* eliminates the requirement that the party seeking a permanent injunction must show that ‘it has suffered an irreparable injury.’”) (emphasis added by Federal Circuit).

<sup>8</sup> See FEDERAL TRADE COMMISSION, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION, at 30 (MARCH 2011) (“FTC Patent Report”), <http://www.ftc.gov/os/2011/03/110307patentreport>.

<sup>9</sup> *Id.* at 240-241.

<sup>10</sup> Fact Sheet, The White House, Office of the Press Secretary, 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>.

<sup>11</sup> See August 3, 2013 letter from United States Trade Representative, “RE: Disapproval of the U.S. International Trade Commission's Determination in the Matter of Certain Electronic

## **II. ANY EXCLUSION ORDER SHOULD INCLUDE AT LEAST A TWELVE-MONTH TRANSITION PERIOD AND SHOULD FURTHER ALLOW FOR REPAIR AND REPLACEMENT OF HANDSETS ALREADY SOLD**

The Commission has previously recognized that it is in the public interest to include a transition period when issuing an exclusion order on a small component of a complex electronic device. For example, in Investigation 337-TA-710, T-Mobile advised the Commission that four months would help prepare design-around products for the market and thus avoid some harm to competitive conditions in the U.S. economy.<sup>12</sup> The Commission accepted this recommendation.<sup>13</sup> Unfortunately, that recommendation proved overambitious, and despite this four-month transition period, Customs blocked entry of some of HTC's design-arounds.<sup>14</sup> While Customs eventually found these to be successful design-around devices and let them into the United States, the damage had already been done: HTC missed its release date in the United States.<sup>15</sup> Thus, the four-month transition period was not sufficient to protect the public from the harm inherent to an exclusion order in a smartphone investigation.

When an exclusion order issues with an insufficient transition period it does not only damage the parties in the dispute; it also exacerbates the harm to third-parties like Sprint and its

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Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation 337-TA-794," available at [http://www.ustr.gov/sites/default/files/08032013%20Letter\\_1.PDF](http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF)

<sup>12</sup> *Certain Personal Data and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710, Comm'n Op. at 81 (Dec. 29, 2011).

<sup>13</sup> *Id.*

<sup>14</sup> Clare Jim, *HTC Shares Tumble as Patent Case Delays U.S. Sales*, Reuters (May 16, 2012), available at <http://www.reuters.com/article/2012/05/16/us-htc-idUSBRE84F05L20120516>.

<sup>15</sup> *See id.* ("HTC shares closed down over 6 percent in a broader market down 2.2 percent.").

customers.<sup>16</sup> For example, where such an order excludes even one of Sprint's smartphones, other handsets, or mobile broadband devices, Sprint's substantial investment in its device portfolio will be harmed and such an order threatens irreparable harm to Sprint's market share.

As detailed in the attached declaration of David Owen, Vice President of Product Device Development for Sprint, the devices in Sprint's portfolio are not interchangeable.<sup>17</sup> Sprint carries a limited portfolio of handsets and mobile broadband devices that are carefully chosen to appeal to a broad array of market segments. Consequently, most handsets and mobile broadband devices sold by Sprint serve specific market needs, with limited segment overlap. Sprint also purchases handsets and mobile broadband devices from a limited number of manufacturers, including Respondents Samsung, HTC, LG, Kyocera, Novatel, and ZTE. The devices are not interchangeable.<sup>18</sup>

Each of Sprint's handset and mobile broadband devices have strengths that appeal to different needs of different consumers. Many factors contribute to consumer demand for a particular device. These factors may include, among many others:

- The satisfaction and usability of the device itself, which may be based on a variety of factors, such as the device's attractiveness, durability, screen size, speed, voice quality, battery life, and memory capacity;
- availability of various features such as the ability to access the internet and email, take or send pictures or videos, access Facebook or Twitter, download applications, and use GPS;

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<sup>16</sup> *C.f.* Sprint Spectrum, L.P.'s Amicus Curiae Brief in Support of Reversal of Preliminary Injunction, *dkt. 58-2, Apple Inc. v. Samsung Electronics Co., Ltd.*, 2012-1507 (Fed. Cir. July 23, 2012).

<sup>17</sup> *See* Declaration of David Owens in Support of Sprint Spectrum L.P.'s Amicus Curiae Brief in Support of Reversal of Preliminary Injunction in *Apple Inc. v. Samsung Elecs. Co.*, No. 2012-1507 (Fed. Cir. July 23, 2012) (attached as Exhibit A).

<sup>18</sup> *See id.*

- ability to connect easily and successfully to particular network(s) (e.g., 3G, WiMAX, LTE) or WiFi;
- the devices particular operating system; and
- the cost of the device.<sup>19</sup>

An exclusion order against one or more of the devices Sprint purchases and offers to its customers, such as the devices at issue in this case, thus substantially and irreversibly harms Sprint's investment in its portfolio of devices. Handsets and mobile broadband devices are highly technical, complex devices. Sprint invests heavily and devotes an extraordinary amount of resources to each smartphone and other devices that it brings to market.

Moreover, the process of bringing any device to market is lengthy. Selecting a phone or mobile broadband device to be developed is just the beginning. It then takes approximately 9-12 months to bring a new device to market. Hundreds of people within Sprint and numerous third party vendors and business partners are involved in the process. The device must comply with Sprint specifications, meet thousands of requirements, be tested exhaustively for thousands of features and combinations, and be certified to operate on multiple domestic networks and with multiple network infrastructure providers, plus hundreds more networks and providers if the device is a global one.<sup>20</sup> An exclusion order with an insufficient transition period thus leaves a void in Sprint's device portfolio that cannot be filled for up to a year, placing Sprint at risk of losing significant sales and market share. It impacts the inventory of thousands of downstream

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<sup>19</sup> *Id.* Notably, the lengthy and varied list of features that affect consumer demand is an important reason why injunctions in civil matters are rarely, if ever, appropriate, when a patent relates to a single feature or component that may have little or no impact on consumer demand for a particular device. NPEs and other entities should not be allowed to circumvent the civil injunction standard by seeking an exclusion order from the Commission.

<sup>20</sup> *Id.* at 3.

distribution points, and it tarnishes Sprint's reputation with its customers and potential customers. Such an order makes third parties unwitting victims in the cross-hairs of the parties' dispute. All of these harmful effects are multiplied substantially where multiple devices purchased by Sprint from several of the Respondents may be the subject of an exclusion order.<sup>21</sup> Sprint, therefore, urges the Commission to grant a twelve-month transition period to ensure that Sprint and its customers are not harmed by an exclusion order.

Further, the Commission should also tailor any exclusion order to avoid harm to the public interest by allowing providers to repair and refurbish electronic devices already sold to their customers or provide replacement devices for an identical article imported before the exclusion order. As the Commission has recognized in several other investigations, it serves the public interest to allow providers to honor any warranties or contractual commitments they might have made to their customers, including any obligations to provide refurbished or replacement devices for articles now covered by an exclusion order that were originally imported before such order took effect.<sup>22</sup> Absent such exceptions for repair and replacement, the consuming public is harmed because it may not be able to obtain bargained-for replacements. Further, electronics providers are harmed to the extent consumers impute the failure to provide repairs and replacements to those providers, harming their hard-earned goodwill with their customers.<sup>23</sup> Thus, any exclusion order that issues should allow for refurbished or replacement devices to help minimize harm to the public interest.

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<sup>21</sup> Sprint purchases and sells to its customers smartphones, other handsets, and/or mobile broadband cards from Respondents HTC, LG, Kyocera, Novatel, Samsung, and ZTE.

<sup>22</sup> See, e.g., *Certain Mobile Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers*, 337-TA-794, Issuance of a Limited Exclusion Order and Cease and Desist Order; Termination of the Investigation, at 3 ¶ IV(A). (June 4, 2013).

<sup>23</sup> Ex. A, Owens Decl. at 5.



December 23, 2013

Respectfully submitted,



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*In the Matter of* CERTAIN WIRELESS CONSUMER ELECTRONICS  
DEVICES AND COMPONENTS THEREOF

Investigation No. 337-TA-853

U.S. International Trade Commission; Before the Honorable Lisa R. Barton

**CERTIFICATE OF SERVICE**

I hereby certify that on December 23, 2013, I caused copies of the foregoing document to be served upon the following parties as indicated:

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/s/ Mario R. Reyes Jr.

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