



**Conservatives
for
Property Rights**

December 28, 2018

Secretary Lisa R. Barton
U.S. International Trade Commission
500 E Street, S.W.
Room 112A
Washington, D.C. 20436

RE: Inv. No. 337-TA-1065

Dear Secretary Barton:

Attached please find an article for the International Trade Commission's consideration in regard to the Qualcomm-Apple matter presently before the ITC. This submission responds to the ITC's recent notice of partial review of the final initial determination.

The article is titled "Exclusion of Patent Infringing iPhones Delayed Is Justice Denied," appearing December 27, 2018, on IPWatchdog.com. The article discusses the public interest in this case in Qualcomm's obtaining exclusion and cease-and-desist orders that become effective immediately. Its discussion includes Qualcomm's private property rights, particularly how essential it is to obtain meaningful enforcement of one's intellectual property rights and how a delayed remedy deprives the company of its property rights.

Thank you for including this item among the material reviewed and given the commission's consideration as the commission seeks further input on this matter.

Sincerely,

James Edwards
Executive Director
Conservatives for Property Rights

Attachment

www.property-rts.org

"protecting the exertions of talents and industry . . . securing to them their justly acquired fruits"
— Alexander Hamilton



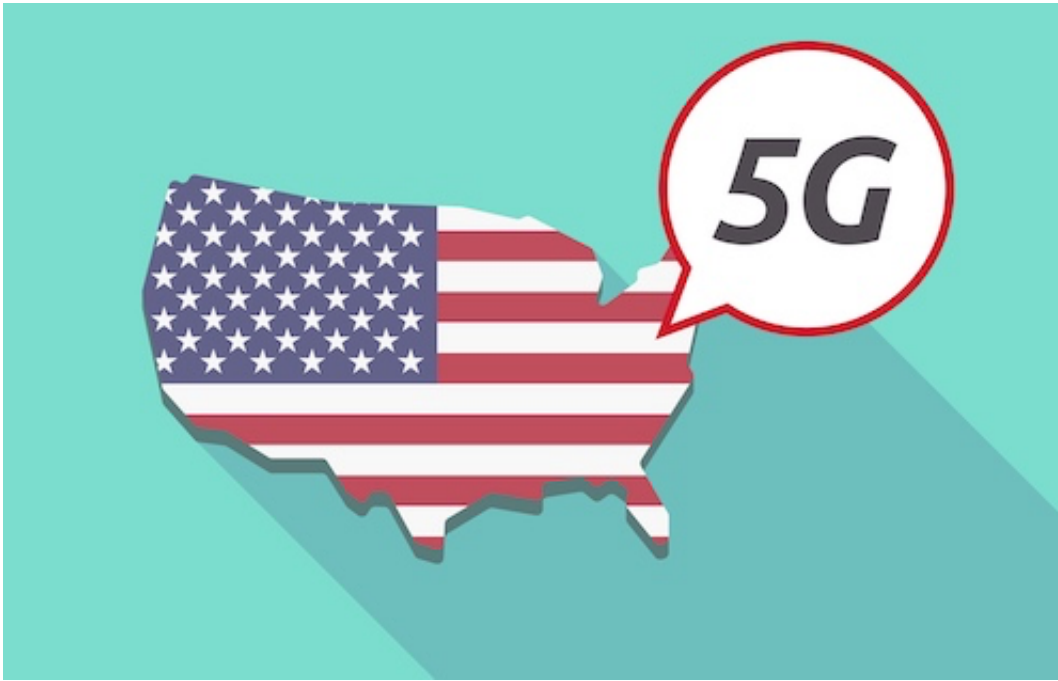
Exclusion of Patent Infringing iPhones Delayed Is Justice Denied



By **James Edwards**
December 27, 2018

Print Art

“Apple’s cavalier conduct toward other people’s intellectual property should run into a red, white and blue brick wall at the American border... keeping iPhone imports that infringe Qualcomm’s patents out of the United States.”



The International Trade Commission appears to be looking for a way to “split the baby” in the Qualcomm-Apple case.

As the ITC nears its decision on whether to impose a limited exclusion order and a cease-

and-desist order against certain patent-infringing Apple devices, the commission may consider a remedy that doesn’t remedy the patent infringement and end the harm.

In its notice to review in part a final initial determination finding, the ITC asks, among other things:

Explain whether delaying implementation of a limited exclusion order or cease-and-desist order for a fixed period of time (e.g., six months or one year) would effectively balance enforcement of Qualcomm’s patent rights against the adverse consequences alleged by the parties with respect to industry competition, monopolization, the alleged exit of Apple’s chipset supplier from the market for 5G technology, and other concerns. If not, explain whether any other “carve-out” or limitation in a remedial order can accomplish this objective.

This disturbing question indicates that the commission could end up awarding Qualcomm the remedy sought but delaying its taking effect. That would render the remedy no remedy at all.

Delaying implementation of a remedy would amount to injustice. Here, justice delayed is indeed justice denied.

Delayed exclusion and cease-and-desist orders would amount to worse than a hollow victory for the inventor firm. Such an ill-advised outcome would reward a proven patent infringer and signal to it and other implementers-IP infringers that it's open season for importing products with patent-infringing components.

Both the law and the facts here favor Qualcomm. This case should be a slam-dunk for Qualcomm.

The law, Section 337 of the Tariff Act (19 U.S.C. 1337), charges the ITC with keeping intellectual property-infringing goods from entering the United States. Section 337 presumes an exclusion remedy when violation of IP is shown. The commission's available remedies against an "unfair act" (i.e., importing and selling a product that contains patent-infringing components) are exclusion orders and cease-and-desist orders. That's it.

Unlike a federal court, the ITC cannot award monetary damages. Were this a case in an Article III venue, it would warrant both injunctive relief and damages — perhaps even punitive damages.

There is clear precedent for an exclusion order and cease-and-desist order here. In every previous smartphone case, the ITC has always blocked importation upon a finding of an import's patent infringement. This distinguished record of near-automatic exclusion orders by the ITC demonstrates the commission's proper respect for property rights in one's IP.

The facts, too, are straightforward. The global leader in semiconductors has already proven to the ITC that a number of models of iPhones infringe its intellectual property related to Qualcomm's patented baseband processing technology (U.S. Patent No. 9,535,490). This invention saves power in the communication between an application process and the smartphone's modem.

Apple manufactures its infringing devices in China and exports them to the United States. Thus, the ITC has jurisdiction over keeping the devices out of the United States.

In the matter before the ITC, essentially called into question are Apple's character and mischaracterizations. As to character, Apple has not exactly responded consistently when courts in China and Germany recently issued injunctions against Apple for patent infringement by various iPhone models that infringe Qualcomm patents. Apple has said it will stop selling the phones in Germany, but has snubbed the court order in China (the larger market), continuing to sell the infringing mobile devices.

Apple has long behaved badly with regard to things like laws and principles. This is unfortunate, because Apple has aggregated others' IP in truly creative ways. The iPhone changed the game in the consumer cell phone market, namely because of the "user experience" aspects of its customer-facing devices coupled with sleek designs.

Remember the old TV commercials featuring the cool Apple guy and the nerdy PC guy? Apple brought that coolness element, along with consumer-friendly platforms for using its devices — iTunes, the App Store — again, aggregating others' creations — recorded music, mobile apps.

Like the kid who grows too big for his britches and become a bully, Apple suffers from not being held accountable, not being taught good manners and not being instilled with respect for other people's property. Apple has gotten away with much of its misconduct because it's a darling of Silicon Valley with an iconic founder. Apple's aggressive posture has long since gone from cute to cunning to coercive and manipulative.

As to mischaracterizations, this is where the commission seems befuddled. Apple and Intel have confused and misled the public and the ITC, beginning with the administrative law judge who failed to recommend a remedy. The ALJ's unprecedented error and the ITC's question quoted above, in weighing public interest factors, are based upon a propaganda ploy.

Apple claims Intel would exit the broadband market were the ITC to exclude the patent-infringing iPhones. It is implied that Intel is a leader in 5G wireless technology and this supposed exit would be detrimental to the public interest. In this fictitious narrative, Intel is supposedly critical to U.S. leadership in 5G technology.

However, 5G is a multifaceted technological system. It entails research and development of the underlying science and technology, the infrastructure, mobile semiconductor chips including those that are standard-setting, and various devices.

A host of players in telecommunications, wireless, computers, software, hardware, and units in industrial sectors from automobiles and appliances to consumer electronics and utilities now claim to be big deals in 5G. Most of them aren't. Most are implementers and aggregators. Not unimportant, necessarily, but not central.

A few companies in a few, critical areas of developing next-generation wireless communications can legitimately claim to be leaders. Fewer still deserve the mantle of global leader in 5G.

In R&D and semiconductors, Qualcomm, Huawei and Samsung make up the list of global leaders. In infrastructure, it's Huawei, Ericsson and Nokia. As for leaders in 5G-capable devices, such as smartphones, Huawei, LG, Samsung and ZTE head the rest.

It is vital to understand that device companies, from the leaders of the pack to the back of the pack, implement the other segment leaders' technologies. They aggregate others' technologies — sometimes in “cool” ways, to be sure — but implementation and aggregation of others' components occur long after the investment, experimentation, invention and other aspects of heavy lifting have been accomplished.

That is, Qualcomm's patent licensing-based R&D program has earned this company a coveted spot at the pinnacle of the most important end of wireless technology. The leaders of implementation and aggregation may have products and brands that are familiar to consumers around the world. But brand recognition of that sort tends to mask the essential things inside the cool devices that make them work so well.

Huawei has the benefit of being a Chinese national champion for 5G dominance. Its role in Chinese industrial policy and favoritism by the Chinese Communist Party effectively mean Huawei doesn't have to worry about profits, shareholders and other free-market constraints.

In contrast, Qualcomm has made R&D its road to competitive success. The American firm's R&D has led to state-of-the-art technology that has set the standard in 3G and 4G, and has put Qualcomm well on the way to setting the global technological standard where it counts in 5G. This preeminence informed the Committee for Investment in the United States's recommendation against a hostile takeover of Qualcomm that would surely have decimated its R&D, its core technological dominance and its putting the United States, rather than China, in good position to lead the world to 5G wireless communications.

These facts put Apple's and Intel's claims to the ITC into clearer perspective. A PR campaign asserting otherwise doesn't make Intel's chips and R&D vital to 5G technology. Banners at subway stations and sloganeering don't cause Intel to mean a hill of beans to core 5G technology in a way that would alarm CFIUS.

In devices such as the iPhone, Apple and Intel merely operate on the technological connectivity platform Qualcomm created. In short, what Intel does well doesn't compete meaningfully with Qualcomm where American 5G leadership is concerned.

For the matter before the ITC, the impact of a delayed exclusion order injures Qualcomm's competitiveness by allowing the patent infringer to continue importing and selling infringing devices. Each sale directly deprives Qualcomm of rightful royalties, which fund the company's R&D program. This would have a similar adverse effect as the averted hostile takeover bid would have had on Qualcomm's R&D. It is Qualcomm's ability to continue robust R&D that is of primary importance to the public interest of the United States.

Justice demands immediate effect in barring entry of patent-infringing iPhones. Hopefully, the ITC will not blemish its record of respect for IP rights.

Apple's cavalier conduct toward other people's intellectual property should run into a red, white and blue brick wall at the American border, courtesy of the ITC, in the form of immediately effective exclusion and cease-and-desist orders, keeping iPhone imports that infringe Qualcomm's patents out of the United States.

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