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December 3, 2012

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Re: *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet*, Inv. No. 337-TA-794

Dear Acting Secretary Barton:

Hewlett-Packard Company ("HP") respectfully submits comments in response to the Commission's request for written submissions on remedy and the public interest in the above-captioned investigation.[1]

HP previously submitted comments on remedy and the public interest in Investigation Nos. 337-TA-745[2] and 337-TA-752.[3] Those written submissions—which are attached here as exhibits A and B—explained that an exclusion order in a case involving a standard-essential patent subject to a RAND commitment is contrary to the public interest.

While HP takes no stance on the merits of this investigation or the patents at issue, HP wishes to address Commission Questions No. 1 and 2 in this investigation by reference to its earlier Written Submissions.

Specifically, Question No. 1 asks "Does the mere existence of a FRAND undertaking with respect to a particular patent preclude issuance of an exclusion order based on infringement of that patent?" In response, HP draws the Commission's

[1] *Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet*, Inv. No. 337-TA-794, Notice of Commission Determination To Review the Final Initial Determination (U.S.I.T.C. Nov. 19, 2012).

[2] *Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Inv. No. 337-TA-745, Written Submission of Verizon Communications Inc., Cisco Systems, and Hewlett-Packard Company (July 9, 2012) ("7/9/2012 Written Submission").

[3] *Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Inv. No. 337-TA-745 and *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof,* Investigation No. 337-TA-752, Written Submission of Hewlett-Packard Company (June 6, 2012) ("6/6/2012 Written Submission").

attention to pages 1–15 and 18–19 of the 7/9/2012 Written Submission and pages 1-5 of the 6/6/2012 Written Submission.

Question No. 2 asks "Where a patent owner has offered to license a patent to an accused infringer, what framework should be used for determining whether the offer complies with a FRAND undertaking? How would a rejection of the offer by an accused infringer influence the analysis, if at all?" In response, HP draws the Commission's attention to pages 15–18 of the 7/9/2012 Written Submission and page 5 of the 6/6/2012 Written Submission.

* * *

For the reasons set forth in its previous Written Submissions, HP respectfully submits that when a standard-essential patent is infringed and a remedy is warranted, monetary damages in federal district court provide the appropriate remedy.

Respectfully submitted,

<u>/s/ Vaishali Udupa</u>
Cynthia Bright
Vaishali Udupa
HEWLETT-PACKARD COMPANY
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# EXHIBIT A

Bancroft PLLC

July 9, 2012

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Re: *Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Inv. No. 337-TA-745

Dear Acting Secretary Barton:

On behalf of Verizon Communications Inc., Cisco Systems, and Hewlett-Packard Company, we respectfully submit these comments in response to the Commission's Request for Written Submissions addressing the issues of remedy and the public interest in the above-captioned matter.[1] Verizon, Cisco, and Hewlett-Packard are leading providers of high technology products and services, whose businesses depend on systems that incorporate a large number of components and perform a variety of functions. In that capacity, we must frequently defend against baseless allegations of patent infringement. We also each conduct extensive research and own many patents. We therefore have a strong interest in a system of patent remedies that discourages infringement and protects legitimate property rights while avoiding the harmful effects of over-deterrence that threaten innovation and the public interest. While we take no position on the merits of this case or the patents at issue, in our view, issuing an

[1] United States International Trade Commission, *In re Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof*, Notice of Commission Decision To Review In Part a Final Initial Determination Finding a Violation of Section 337; Request For Written Submissions, at 6, Inv. No. 337-TA-745 (June 25, 2012) (hereinafter "Request for Written Submissions"). In addition to commenting on remedies and the public interest, the comments contained herein are relevant to Questions 7-13 proposed by the Commission to the parties. *See id.* 4-5. This filing takes no position as to the remaining questions or issues raised in the Request for Written Submissions.

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exclusion order in a case involving a standard-essential patent subject to a RAND commitment will always be contrary to the public interest.[2] Correspondingly, when a standard-essential patent is infringed and a remedy is warranted, monetary damages in federal district court provide the appropriate remedy.

### I. Awarding Exclusion Orders For The Infringement Of Standards-Essential Patents Is Contrary To The Public Interest

Section 337(d) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 ("section 337"), requires that the Commission consider "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers" in deciding whether to grant or deny an exclusion order.[3] These public interest factors "are not meant to be given mere lip service"—they are "the overriding considerations in the administration of the statute" authorizing Commission action.[4] As a result, an exclusion order should not be granted if doing so would adversely impact the public interest.

When the patent at issue in a Commission proceeding is standard-essential, an exclusion order will never serve the public interest. That is because exclusion orders in this context undermine the continued functioning of standard-setting organizations that play a critical role in the modern economy, threaten to create anticompetitive hold-up in industries where access to

[2] We use "standard-essential patent" to mean a patent that is claimed to be essential to a widely implemented standard. The analysis contained herein applies with equal force when the Commission considers issuing a cease and desist order. 19 U.S.C. § 1337(f)(1).
[3] 19 U.S.C. § 1337(d)(1).
[4] *In re Certain Inclined-Field Acceleration Tubes*, Inv. No. 337-TA-67, 2 IRTD 5572, 0080 WL 594319, at *11 (Dec. 1979) (citing S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 197 (1974)).

standards-essential patents is required, lead to an increase in costs to consumers, and reduce consumer choice, market efficiency, fluidity in international trade, and innovation.

### A. Issuing Exclusion Orders To Enforce Standards-Essential Patents Threatens The Vitality Of Standard-Setting Organizations, To The Detriment Of The Public Interest

Standard-setting organizations (SSOs) are integral to the development of technical interoperability standards that enable competition and create consumer choice. Familiar examples include the standards that govern the transmission of voice and data across cellular networks and the Ethernet standards for wired and wireless local area networks. Without these standards, it would be difficult to provide many of the services vital to the modern U.S. economy, such as the Internet, wireless broadband, and components that use Universal Serial Bus (USB) technology.[5]

The desirability of SSOs and the standards they craft is more than an academic hypothesis. The Executive Branch has recognized the contribution of voluntary industry standards to the U.S. economy, consumer welfare, and the public interest. In particular, the Department of Justice and Federal Trade Commission have noted the benefits of consensus-driven standard setting:

> Industry standards are widely acknowledged to be one of the engines driving the modern economy. Standards can make products less costly for firms to produce and more valuable to consumers. They can increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a "fundamental building block for international trade." Standards make networks, such as the

[5] Mark A. Lemley, *Intellectual Property Rights and Standard Setting Organizations*, 90 CAL. L. REV. 1889, 1892 (2002); *see also* Christopher S. Gibson, *Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards*, 22 BERKLEY TECH. L.J. 1403, 1409-10 (2007).

> Internet and wireless telecommunications, more valuable by allowing products to interoperate.[6]

Congress has also acknowledged the importance of standard setting to the Nation's economy. In enacting the National Technology Transfer and Advancement Act of 1995, for example, Congress mandated that "all federal agencies and departments" use standards "developed by voluntary consensus standards bodies."[7] In response to this Act, Congress later found that "technical standards developed or adopted by voluntary consensus standards . . . allow[] the national economy to operate in a more unified fashion."[8] In fact, Congress found collaboratively set standards so vital that it granted SSOs protection from numerous antitrust laws when enacting the Standards Development Organization Advancement Act of 2004.[9]

As the Department of Justice, the Federal Trade Commission, and Congress acknowledge, SSOs play an important role in the Nation's economy. But abuse of the standard setting process can create significant risks for misuse that can be exacerbated when the holder of a standard-essential patent is able to obtain an exclusion order. Once an agreed-upon industry standard gains widespread implementation, the owner of a standard-essential patent is in a position to demand royalties far in excess of the value of the patent. Specifically, the owner is able to take advantage of the fact that companies have made specific sunk investments and now face high switching costs, to demand royalties higher than those that could have been obtained

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[6] U.S. Dep't of Justice & Fed. Trade Comm'n, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 37-38 (2007) ("2007 IP REPORT").
[7] Pub. L. No. 104-113 (1996).
[8] Pub. L. No. 108-237, Title I, § 102, (2004).
[9] 15 U.S.C. § 4301-05.

before the adoption of the particular technology and the implementation of the standard.[10] This problem is aggravated by the fact that the development of interoperability standards often occurs in industries characterized by patent thickets, resulting in standard-compliant products being covered by multiple patent rights claims.[11] For example, it has been estimated that a notebook computer implements at least 251 interoperability standards, each potentially requiring the practice of hundreds or thousands of essential patents.[12] If the holder of any one of the patents that is claimed to be essential to implement any one of the standards could exclude the entire product from the market, it would be in a position to extract royalties based on the value of the entire product, which dwarfs the contribution of the patented technology over its alternative at the time of design.[13] Implementers thus face the threat of potential hold-up from multiple—potentially hundreds—of owners of standards-essential patents.[14]

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[10] 2007 IP REPORT, *supra* note 6, at 37-38; *see also* Joseph Farrell, et al., *Standard Setting, Patents, and Hold-Up*, 74 ANTITRUST L.J. 603 (2007); Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

[11] *See* Fed. Trade Comm'n, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY, ch. 2, at 28, 34, 52 (2003) ("2003 IP REPORT"); 2007 IP REPORT, *supra* note 6, at 37-40; CARL Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting, in* 1 INNOVATION POLICY AND THE ECONOMY 119 (Adam Jaffe, Joshua Lerner & Scott Stern, eds., 2001).

[12] Brad Biddle, Andrew White, & Sean Woods, *How Many Standards in a Laptop? (And Other Empirical Questions)* (Sept. 10, 2010), *available at* http://ssrn.com/abstract=1619440.

[13] *See* Fed. Trade Comm'n, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 189-90, 194 (2011) ("2011 IP REPORT").

[14] The hold-up problem presented by a patentee asserting patent rights over one component in a multi-component device can appear even where patents were not contributed to a standard-setting organization. As the Federal Trade Commission has noted outside the standard-setting context, "the threat of an injunction can lead an infringer to pay higher royalties than the patentee could have obtained in a competitive technology market. At the time a manufacturer faces an infringement allegation, switching to an alternative technology may be very expensive if it has sunk costs in production using the patented technology. That may be true even if choosing the alternative earlier would have entailed little additional cost. If so, the patentee can use the threat of an injunction to obtain royalties covering not only the market value of the patented invention,

Because these patentees acquire such significant hold-up power once a standard is implemented, the intellectual property rights policies that SSOs create usually require standard participants in standards development to agree to issue licenses to standards-essential patents on reasonable and non-discriminatory ("RAND") terms.[15] The rules may vary from one SSO to another, but in many situations, if a patentee refuses to agree to a RAND arrangement, the patent holder's technology may not become part of the standard.[16] SSOs and implementers often rely on these commitments when deciding what technologies to include in the standard and whether to implement the standard.

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but also a portion of the costs that the infringer would incur if it were enjoined and had to switch. … [Such] [p]atent hold-up can overcompensate patentees, raise prices to consumers who lose the benefits of competition among technologies, and deter innovation by manufacturers facing the risk of hold-up." 2011 IP REPORT, *supra* note 13, at 5; *see also id*. at 30 (noting that the ITC's statute "should allow consideration of whether an exclusion order based on a minor patented component of a complex product can unduly harm consumers by causing hold-up, distorting competition, raising prices and deterring innovation"); Edith Ramirez & Lisa Kimmel, *A Competition Policy Perspective on Patent Law: The Federal Trade Commission's Report on the Evolving IP Marketplace*, THE ANTITRUST SOURCE, Aug. 2011, at 9 ("[I]njunctive relief for minor technologies incorporated into multi-component products encourages opportunism by allowing the patentee to extract a settlement that far exceeds the value of its technology.").

[15] *See* Joseph Scott Miller, *Standard Setting, Patents, and Access to Lock-in: RAND Licensing and the Theory of the Firm*, 40 IND. L. REV. 351, 358 (2007) (The RAND commitment is a grant to "the adopter community [of] an irrevocable right to use [the patent holder's] patented technology to comply with the standard in exchange for a reasonable royalty and other reasonable terms, the details of which are negotiated later without any possibility of a court injunction."); Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion Ltd. (Feb. 3, 2012), *available at* http://www.justice.gov/opa/pr/2012/February/12-at-210.html ("One common licensing requirement is to require SSO members to commit to license patented technologies essential to a standard on reasonable and nondiscriminatory (RAND) terms.") ("2012 DOJ Statement").

[16] *See* Lemley, *supra* note 5, at 1904, 1906 & n.48 (81% of SSOs with established IP policies require standard participants to promise to license their patents on RAND terms); *see also Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 313 (3d Cir. 2007) ("To guard against anticompetitive patent hold-up, most SDOs require firms supplying essential technologies . . . to commit to licensing their technologies on FRAND terms.").

Allowing the holder of a RAND-encumbered patent to obtain an exclusion order short circuits the holder's RAND obligation and recreates the hold-up problem that RAND licensing commitments are intended to mitigate. This harms the public interest and threatens the continued vitality of the standards development process, which is integral to technological progress.[17] Rather than charge a licensing fee or royalty that reflects the value of the patented technology over the alternatives available when the SSO was making its design decisions, a standard-essential patent holder can demand an excessive royalty unchecked by competition, using the threat of an exclusion order as leverage. Accordingly, the benefits associated with standard setting—lower prices, increased innovation, elevated efficiency, broader consumer choice, product interoperability, and more fluid international trade—will all be reduced to the detriment of the U.S. economy and U.S. consumers. In light of this significant injury to the public interest, exclusion orders should not be granted under section 337.

In the same vein, because issuing exclusion orders to enforce standards-essential patents threatens the pro-competitive work of SSOs, such orders defeat congressional policies favoring standard setting. Those congressional policies define the public interest and can be accommodated through the discretion that section 337(d) grants the Commission. As the Commission has recognized, whether issuing an exclusion order runs counter to congressional intent implicates the consideration of "public health and welfare" that section 337(d) requires. For instance, in *Inclined Field Acceleration Tubes*, the Commission gave great weight to congressional policies supporting basic scientific research, as reflected in the National Science

[17] *Cf.* 2011 IP REPORT, *supra* note 13, at 29; 2007 IP REPORT, *supra* note 6, at 33-39.

Foundation Act.[18] And despite a finding of infringement in that case, the Commission declined to issue an exclusion order because doing so would limit nuclear physics research, thus adversely affecting public welfare.[19]

Similarly, in *Automatic Crankpin Grinders*, the Commission declined to issue an exclusion order because doing so would adversely impact congressional policies regarding the automobile industry.[20] Under the Energy Policy and Conservation Act, Congress mandated that manufacturers improve automobile fuel efficiency. The products involved in the *Crankpin Grinders* investigation were those necessary to do so. In light of congressional policy favoring increased fuel efficiency, the Commission refused to issue an exclusion order, reasoning that such an order would negatively impact the interest of "the public as a whole."[21]

The same reasoning applies here. Congress has expressed a clear preference for the development and continuance of voluntary, consensus-driven, uniform standards, and explicitly recognized the public benefit such standards create. And the same result should obtain—the Commission should deny exclusion orders to enforce standards-essential patents in the name of the public interest.

### B. Issuing Exclusion Orders To Enforce Standards-Essential Patents Adversely Affects The Public Health And Welfare, Competitive Conditions In The United States Economy, And United States Consumers

In addition to threatening the continued vitality of SSOs, enforcing standards-essential patents through exclusion orders has direct negative impacts on public welfare, competitive conditions in the United States economy, and United States consumers.

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[18] Inv. No. 337-TA-67, 1980 ITC Lexis 118 (Dec. 1980).
[19] *Id.* at *36.
[20] Inv. No. 337-TA-60, 1979 ITC Lexis 130 (Dec. 1979).
[21] *Id.* at *32-33.

In its most direct form, the effect of the exclusion order on the firm subject to that order is obvious: the firm can no longer participate in the market for the good in which the patent at issue is essential. The impact of this exclusion order, however, is greater than it might appear at first blush. When components implementing standards-essential patents are involved, firms will often have massive complementary investments at stake. As already noted, standards are an engine for growth in the U.S. economy. Standard-setting organizations frequently establish technical standards that allow for interoperability in multi-component products or systems, and these standards permeate the market. As a result, products that implement industry standards are ubiquitous and play an integral part in fostering economic growth.

In this context, an exclusion order presents standard implementers with a stark dilemma: abandon their specific investments and incur massive, industry-wide switching costs to avoid the patented technology, or pay an excessive licensing demand inflated by the prospect of winning an exclusion order that wipes out massive investments in sunk costs.[22] Abandoning the standard impacts not only the product at issue, but also the firm's complementary products and the complementary investments of other firms working to the standard, inflating switching costs even further. The alternative is no more attractive. Acquiescing to the patent holder's royalty demands made in the shadow of an exclusion order can result in higher product prices and reduce incentives to innovate.[23] Those higher costs do not reflect the true contribution of the patented

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[22] *See* 2011 IP REPORT, *supra* note 13, at 225-26; 2007 IP REPORT, *supra* note 6, at 34-40.
[23] Patent litigation can have significant adverse effects on incremental product innovation. *See, e.g.*, Catherine Tucker, Patent Trolls and Technology Diffusion 1 (Nov. 23, 2011), *available at* http://ssrn.com/abstract=1976593; 2012 DOJ Statement, *supra* note 15 ("After industry participants make complementary investments, abandoning the standard can be extremely costly. Thus, after the standard is set, the patent holder could seek to extract a higher payment than was

technology, but rather are dead weight losses that may be born in substantial part by consumers. Economic welfare is diminished and the U.S. economy and U.S. consumers suffer.

Relatedly, the issuance of an exclusion order against products compliant with a widely adopted industry standard also harms the public interest by wasting specific investments. As just noted, standard implementers will often have "invested heavily in infrastructure" related to the standard.[24] Even though the patent may cover only a small portion or component of the product,[25] an exclusion order would require the implementer to abandon specific investments made to produce standard-compliant products and to incur substantial switching costs.[26]

The impact of an exclusion order enforcing a standard-essential patent will almost always be felt beyond the firm that is subject to the order. Other firms that use the standard-essential technology that are not directly involved in the controversy in the Commission, or that have goods tied to the excluded firm's offending goods, are also impacted, resulting in "significant adverse effects on the public welfare in terms of economic welfare."[27] Collaboratively set standards allow for interoperability and substitution among various manufacturers' products. An

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attributable to the value of the patented technology before the standard was set. Such behavior can distort innovation and raise prices to consumers.").

[24] *Baseband Processor Chips*, Inv. No. 337-TA-543, 2007 ITC LEXIS 621, at * 190-92, *303, *306-07 (June 19, 2007) (Additional and Dissenting Views of Chairman Pearson and Comm'r Pinkert), *vacated in part*, *Kyocera Wireless Corp. v. U.S. Int'l Trade Comm'n,* 545 F.3d 1340 (Fed. Cir. 2008).

[25] *See* 2003 IP REPORT, *supra* note 11, ch. 2, at 28 (discussing patent thickets in the semiconductor industry involving "hundreds if not thousands of patents"); *id.*, ch. 2, at 34 (discussing "overlapping patent rights (i.e., a patent thicket) in the computer hardware industries"); *id.*, ch. 2, at 52 (the "existence of a patent thicket in the software industry, which makes avoiding patent infringement very difficult.").

[26] *See* Farrell, *supra* note 10, at 619-21; Lemley & Shapiro, *supra* note 10, at 1995-2008.

[27] *Baseband Processor Chips*, 2007 ITC Lexis 621, at *302.

exclusion order—even if against a single firm—thus may have an industry-wide impact.[28] In fact, because of interoperability and network effects, an injunction against one standard implementer can bring down the standard. To switch away from the infringing technology would require the industry to abandon its substantial investments in the standard and develop a new one.[29] Such a switch not only impacts firms producing infringing products, but those that produce complementary products as well.[30] In effect, therefore, an exclusion order against one implementer can be an order against an industry.[31] That an exclusion order can have effects that

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[28] *See* Letter from Thomas O. Barnett, Assistant Attorney General, Department of Justice, Antitrust Division (Oct. 3, 2006), *available at* http://www.justice.gov/atr/public/busreview/219380.htm ("Once a particular technology is chosen and the standard is developed . . . it can be extremely expensive or even impossible to substitute one technology for another. In most cases, the entire standard-setting process would have to be repeated to develop an alternative standard around a different technology.").

[29] *See* 2007 IP REPORT, *supra* note 6, at 38; Letter from Thomas O. Barnett, Assistant Attorney General, Department of Justice, Antitrust Division 9 (April 30, 2007), *available at* http://www.justice.gov/atr/public/busreview/219380.htm ("once the technological choice is made, and particularly once the standard has been commercially adopted, it can be time consuming and expensive to adopt a different technology").

[30] *See, e.g.*, *Baseband Processor Chips*, 2007 ITC LEXIS 621, at *190-92, *303 (in light of substantial specific investments, exclusion order would force non-respondents to incur costs of switching). Moreover, when the Commission issues an exclusion order, economic analysis shows that the vast majority of the costs generally will fall on the downstream producers rather than the direct, upstream infringers. *See* J. Gregory Sidak, *The Law and Economics of Section 337 Exclusion Orders for Patent Infringement at the International Trade Commission*, Criterion Economics LLC Working Paper Series at 86 (2011).

[31] Cases involving widely adopted industry standards thus are distinguishable from *Integrated Circuit Telecommunication Chips*, Inv. No. 337-TA-337, 1993 ITC LEXIS 854 (Aug. 1993). There, the Commission issued an exclusion order because there were numerous manufacturers not named as respondents capable of supplying the infringing product. *Id.* at *64. Even where an exclusion order is potentially warranted in a particular investigation, it may be necessary to reassess the exclusion order in light of other investigations, which could result in substantial harm to customers through industry-wide exclusion orders. *See* Office of Unfair Import Investigations' Reply to Apple's and HTC's Initial Responses to the Commission's Notice of September 15, 2011, and Briefing on the Issues of Remedy, Public Interest and Bonding, *Certain Personal Data and Mobile Communication Devices and Related Software*, ITC Inv. No. 337-TA-710, at 13 n.8 (October 17, 2011).

reverberate throughout the entire economy clearly demonstrates the important public interest at stake.

But in the end, the U.S. economy and U.S. consumers bear the costs of the enforcement of standards-essential patents through exclusion orders. If the relevant industry is forced to move to a new standard because of the exclusion order, consumers will bear the costs of switching and of delay.[32] And depending on the product at issue, some consumers may be completely shut out of the standard-ruled network by an exclusion order because that order prohibits the product from accessing the network.[33]

Consumers—and the public interest—suffer real harm under less severe outcomes as well. If the firm that is subject to the exclusion order is forced from the market, consumer choice is diminished, prices increase, efficiency suffers, and innovation may be stifled. But even if the only impact of the exclusion order is that the firm subject to the order must pay an excessive and anti-competitive licensing fee to the standard-essential patent owner (a fee greater than the RAND fee, which the patentee committed it would offer in return for being permitted to contribute technology for use in a standard), consumers still suffer. The result is likely an increase in the price of products that implement the standard and a corresponding decrease in consumer welfare. The Federal Trade Commission has made this point, stating that "issuance of an exclusion or cease and desist order in matters involving RAND-encumbered SEPs, where

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[32] *Baseband Processor Chips*, 2007 ITC LEXIS 621, at *192, *303 (discussing delay costs of switching).

[33] *See* Carl Shapiro, *Setting Compatibility Standards: Cooperation or Collusion?*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 81, 88 (Rochelle Cooper Dreyfuss, et al., eds., 2001) (describing stranding effect).

infringement is based on implementation of a standardized technology, has the potential to cause substantial harm to U.S. competition, consumers, and innovation."[34]

### C. Arguments That Exclusion Orders To Enforce Standards-Essential Patents Are Necessary Either Generally Or When Certain Conditions Are Fulfilled Are Unpersuasive

The arguments typically advanced in favor of categorically granting exclusion orders to enforce patent rights are particularly unavailing when the patent at issue is essential to an implemented standard. First and foremost, the text of section 337 makes clear that the grant of an exclusion order does not inexorably follow a finding of infringement. The public interest inquiry is a necessary consideration. Section 337 states that the Commission

> shall direct that the articles concerned . . . be excluded from the United States, unless, after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of

[34] Third Party United States Federal Trade Commission's Statement of the Public Interest, In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof, Inv. No. 337-TA-745. In "explaining the potential economic and competitive impact of injunction relief on disputes involving" standards-essential patents, the FTC further explained that:

> a royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patentee to obtain unreasonable licensing terms despite its RAND commitment, not because its invention is valuable, but because implementers are locked in to practicing the standard. The resulting imbalance between the value of patented technology and the rewards for innovation may be especially acute where the exclusion order is based on a patent covering a small component of a complex multicomponent product. In these ways, the threat of an exclusion order may allow the holder of a RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives.

*Id.* 2-4.

> like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.[35]

As section 337's text makes clear, the importance of protecting industries in the United States relating to articles protected by U.S. patents must be weighed against the impact of doing so on competitive conditions in the U.S. economy and U.S. consumer welfare. And as the foregoing discussion makes plain, when a standard-essential RAND-encumbered patent is at issue, the RAND commitment is critical to ensuring the public interest is served. The RAND commitment and its role in ensuring that standard setting serves the public interest cannot be trumped by invocation of the concept that a patent gives the patentee a right to exclude.[36]

Some in favor of enforcing standards-essential patents through exclusion orders contend that the threat of such orders is necessary to ensure that "reasonable" royalty rates can be negotiated. This position, however, ignores reality. Potential licensees have ample incentive to enter into licensing agreements on reasonable terms to avoid uncertainty in business planning and litigation costs. Those costs are significant: the average patent trial costs $6.25 million, and a finding of infringement can result in tens of millions of dollars in damages.[37] And after all that, there is no guarantee that a court will decide on a royalty lower than that originally offered by the patentee. The court-ordered royalty could be higher. Moreover, damages are not deemed "an

[35] 19 U.S.C. § 1337(d)(1).

[36] The Commission asked the parties to address "[i]f the record of an investigation lacks evidence sufficient to support a RAND-based affirmative defense (*e.g.*, equitable estoppel, implied license, waiver, etc.), under what circumstances (if any) should a RAND obligation nonetheless preclude issuance of an exclusion order?" Request For Written Submissions 4-5. In our view, this is a question wholly separate from whether the 337(d)(1) public interest factors preclude the issuance of an exclusion order. The defenses cited by the Commission relate to the enforceability of the patent. Section 337, on the other hand, asks whether even a fully enforceable patent warrants an exclusion order. When that patent is RAND-encumbered, the answer is no: an exclusion order should not issue.

[37] Am. Intellectual Property Law Ass'n, *Report of the Economic Survey 2009*.

inadequate remedy just because, unless backed by a threat of injunction, [they] may induce a settlement for less than the damages sought . . . . You can't obtain an injunction for a simple breach of contract on the ground that you need the injunction to pressure the defendant to settle your damages claim on terms more advantageous to you than if there were no such pressure."[38]

Declining to issue exclusion orders in cases involving standards-essential patents will not harm the patent system's incentives to innovate. Exclusion orders and other injunctive relief in such circumstances systematically lead to overcompensation of patent holders, not undercompensation.[39] As already explained, such orders allow the patentee to obtain royalties that include the hold-up value of the patent.[40] A patent holder that obtains an exclusion order *after* an industry has made specific investments to implement such a standard can "withdraw more surplus than its technology contributed."[41] Eliminating the standard-essential patentee's ability to extract rents from the market does not undermine incentives to innovate—it aligns those incentives with the patentee's actual inventive contribution.

Perhaps in recognition of the weakness of these broader arguments, some contend that even if exclusion orders are an inappropriate remedy for enforcing standards-essential patents as a general matter, such orders remain appropriate when the infringer (1) refuses to agree to pay a

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[38] Opinion and Order, *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, at 20-21 (N.D. Ill. June 22, 2012).

[39] 2011 IP REPORT, *supra* note 13, at 144; *see also id.* at 226-27.

[40] *Id.* at 58; Ramirez & Kimmel, *supra* note 14, at 1, 5 ("[r]emedies that permit a patentee to capture the hold-up value of the patent do nothing to improve the alignment between economic value and reward in these situations because the hold-up value of the patent has nothing to do with the economic contribution of the patented technology and everything to do with the sunk costs of the infringer").

[41] Farrell, *supra* note 10, at 638; *see also Inclined Field Acceleration Tubes*, 1980 ITC LEXIS 118, at *46 (public interest not outweighed by interest in enforcement of patent where "a noninfringing feature offers significant operational advantages, at a lower cost, to some users").

standard-essential patentee's proposed reasonable royalty, (2) refuses to pay a court-ordered royalty, or (3) challenges the validity of the patent or argues non-infringement. None of these situations warrants an exclusion order.[42]

First, awarding an exclusion order when the implementer of a standard has refused a standard-essential patentee's proposed reasonable royalty would simply replicate the problem with awarding exclusion orders in the RAND context in the first place. The patentee could demand an *un*reasonable royalty rate and subsequently obtain an exclusion order, allowing the patent holder to once again extract the hold-up value of the patent from the implementer.[43] If the implementer refuses to pay the royalty demanded by the standard-essential patent holder, the appropriate course of action is for the patentee to bring suit in federal court. The federal court can award a reasonable royalty or even ongoing royalties, where appropriate.

Along the same lines, neither the Commission nor the courts should adjudicate whether the refused royalty was "reasonable," and then use a determination of reasonableness as the basis for an exclusion order. There are a number of factors that could separate the parties on what constitutes a reasonable royalty during licensing negotiations. For example, designation of a patent as "essential" or agreeing to offer a patent on RAND terms does not establish the patent as valid, or even that the patent reads on the standard. The implementer may be less confident in the validity or necessity of the patent than the patentee is. The threat of an exclusion order if an

[42] This discussion is relevant to Questions 9-13 posed to the parties in the Commission's Request for Written Submissions. We note that the condition with which the Commission is concerned in Question 9—whether "a patent owner has refused to offer a license to a named respondent in a Commission investigation on a RAND obligated patent"—appears to be absent in this case. Request For Written Submissions 5. And, in any event, that condition is immaterial. So long as the standard-essential patent at issue is RAND-encumbered, for the reasons discussed herein, an exclusion order is inappropriate.
[43] 2011 IP REPORT, *supra* note 13, at 144.

implementer's appraisal of reasonableness, validity, or necessity turns out to be wrong means that disagreements will nearly always be resolved in the patentee's favor, and, again, risk inflating the royalty paid to something approaching the hold-up value of the patent.

Second, and relatedly, even when the holder of a RAND-encumbered patent obtains a court order compelling a standard implementer to pay a reasonable royalty and the implementer refuses, an exclusion order is not warranted. When an adjudged infringer declines to pay a court-ordered royalty, the appropriate remedy is not an exclusion order, but a contempt order from a court where the reasonable-royalty judgment is enforceable.[44]

Third, concluding that challenging the validity of a patent or arguing that no infringement occurred counsels in favor of awarding an exclusion order is fundamentally inconsistent with section 337's public interest factors. The vitality of the patent system, public welfare, competition, and U.S. consumers are all served when questionable patents are challenged.[45] The incentive to challenge questionable patents or their scope is diminished if an implementer will be penalized for asserting that the patent in suit is invalid, not essential, or is not infringed by the products it makes. As a result, punishing an implementer for raising validity and non-infringement defenses disserves the public interest and, correspondingly, does not support awarding an exclusion order.

[44] *Hyde Constr. Co. v. Kohering Co.*, 388 F.2d 501, 511 (10th Cir. 1968) ("Civil contempts provide a remedy for a party who has been injured by the violation of a court order.").

[45] *See Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 100-01 (1993) ("[R]esolving question of patent validity" is important "to the public at large."); *Edward Katzinger Co. v. Chicago Metallic Mfg. Co.*, 329 U.S. 394, 400 (1947) ("[K]eeping open the way for interested persons to challenge the validity of patents" is necessary to "protecting our competitive economy.").

### II. Damages Provide The Appropriate Remedy For Infringing A Standard-Essential Patent When A Remedy Is Warranted

Denying requests for exclusion orders to enforce standards-essential patents will not leave patent holders uncompensated. Rather, it simply will ensure that patent holders obtain appropriate returns, either through district court-awarded monetary relief or a license negotiated in the shadow of the availability of such relief.[46]

Limiting the holders of RAND-encumbered patents to monetary relief is consistent with the public interest that is reflected in the *quid pro quo* that is part-and-parcel of the RAND arrangement. Entities that agree to license their patents on RAND terms commit to accepting a reasonable royalty. The patent holder has effectively bargained away the right to seek an injunction or exclusion order in exchange for, among other things, participating in the creation of the standard. Permitting the patentee to later seek an exclusion order is thus inconsistent with the parties' agreement and, more importantly, inconsistent with the public interest.

In the parallel injunction context, Judge Posner recently recognized the force of this logic in his district court decision in *Apple, Inc. v. Motorola*:

> I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the [FRAND patent] unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the [patent] to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise? How could it be permitted to enjoin Apple from using an invention that it contends Apple *must* use if it wants to make a cell phone with UMTS telecommunications capability—without which it would not be a cell *phone*.[47]

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[46] Because court-awarded monetary relief is awarded only after the patent is found valid and infringed, such relief errs in favor of awarding adequate returns for innovation. *See* 2011 IP REPORT, *supra* note 13, at 167.

[47] Opinion and Order, *Apple, Inc. v. Motorola, Inc.*, No. 1:11-cv-08540, at 19 (N.D. Ill. June 22, 2012) (emphasis in original).

Judge Posner concluded that a "FRAND royalty would provide all the relief to which" a patent owner "would be entitled if it proved infringement" of a patent.[48]

It is important to remember that a patent does not become RAND-encumbered on its own. A patentee chooses whether to participate in standard setting and whether to subject any of its patents to RAND terms. Granting an exclusion order thus yields a windfall to the standard-essential patentee tantamount to unjust enrichment and contrary to the public interest and basic principles of equity.

* * *

For the reasons set forth above, we respectfully submit that issuing an exclusion order in a case involving a standard-essential patent subject to a RAND commitment will always be contrary to the public interest. And when a standard-essential patent is infringed and a remedy is warranted, monetary damages in federal district court provide the appropriate remedy.

Respectfully submitted,

/s/ Paul D. Clement
Paul D. Clement
Bancroft PLLC

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[48] *Id.* at 21.

# EXHIBIT B

Hewlett-Packard Company
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June 6, 2012

**By Electronic Filing**

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***In the Matter of Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof*, Investigation No. 337-TA-745, and**

***In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Investigation No. 337-TA-752**

Dear Secretary Barton:

Hewlett-Packard ("HP") submits these comments in response to the Commission's *Notice of Request for Statements on the Public Interest* in the above-captioned investigations. Because these investigations share important factors in common on whether an exclusion order would be contrary to the public interest pursuant to 19 U.S.C. §1337(d)(1) ("Section 337(d)(1)"), these comments respond to both Notices.

The Commission should exercise its express statutory authority under Section 337(d)(1) and decline to issue an exclusion order in these investigations. An injunctive remedy in either investigation would negatively impact competitive conditions in the United States and impose substantial harms on U.S. businesses and consumers. Thus, a Commission determination to forego a remedy is not only appropriate but compelled by Section 337(d)(1).

While the Commission has viewed enforcing patent rights as important public interest, these investigations involve unique facts that weigh heavily against (and indeed override) the issuance of an exclusion order in these cases. First, as a participant in a standards-setting body, the complainant previously would have pledged to license the standards-essential patents at issue in these investigations to the respondents on "fair, reasonable, and non-discriminatory" ("FRAND") terms. Permitting the complainant now to use these patents as a weapon to block the importation of respondents' products into the United States, merely because they implement the standards at issue, would thwart competition, stifle innovation, and result in higher prices for consumers—thereby causing precisely the harms that Congress directed Section 337 should not inflict.

Second, both the wireless communications devices at issue in Investigation 745 and the gaming consoles at issue in Investigation 752 have well-developed ecosystems of companies in the United States that depend on these products as "platforms" to reach consumers. Because there are no readily available substitutes for these platforms, many companies and workers across the United States would suffer if these products were excluded from the U.S. market.

Accordingly, the issuance of an exclusion order in either investigation would be contrary to the public interest within the meaning of Section 337(d)(1).

## I. Section 337(d)(1) Requires Consideration Of A Broad Set Of Interests

Section 337(d)(1) authorizes the Commission to exclude articles found to be in violation of the Act from entry into the United States unless:

> after considering the effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, it finds that such articles should not be excluded from entry.

*Id*. This statutory language reflects that Congress intended the Commission to undertake a rigorous economic analysis of the effects of an exclusion order on the public interest before issuing such an order. It also reflects Congress's intent that the Commission look beyond issues of public health and safety and take into account the impact of an exclusion order on the U.S. economy—including on consumer prices, competitive conditions in the United States, and the public welfare.

We recognize that the Commission in past investigations has found a substantial public interest in protecting patent rights. *See, e.g., Certain Battery-Powered Toy Vehicles*, Inv. No. 337-TA-314, Comm'n Op. at 11 (Apr. 10, 1991). That interest, however, is not absolute. Indeed, Section 337(d)(1) expressly identifies other important public interests that Congress expected the Commission, prior to issuing a remedy, would balance against protecting a complainant's private patent monopoly. By articulating these factors in the express language of the statute and requiring the Commission to consider them in every investigation, Congress signaled its expectation that these public interests could and would override the interest in protecting patent rights in certain cases. In these investigations, the totality of interests identified in Section 337(d)(1) weigh heavily against the issuance of an exclusion order.

## II. An Exclusion Order In These Investigations Would Cripple Competition And Harm Hundreds of Companies And Workers

An examination of the public interest in these investigations must take into account the critical role of standards in the IT industry. Hewlett-Packard speaks with some authority on this, as it is both an American company and global leader in the development and implementation of IT standards: HP participates in and contributes to over 200 standards organizations, such as the ETSI and IEEE Standards Associations, and HP implement hundreds of standards across its products.[1] By facilitating interoperability, standards promote competition between suppliers, increase choices for consumers, and reduce prices. They also drive efficiency by leveraging key

[1] *See HP leads the way for IT industry standards* (Dec. 8, 2010), available at http://www8.hp.com/us/en/solutions/article_detail.html?compURI=tcm:245-800793.

technologies across industry, allowing companies to focus their energies into inventing truly new technologies instead of "re-inventing" existing ones.[2]

In the collaborative process that necessarily preceded the setting of the technical standards at issue in these investigations, numerous companies would have committed to disclose any patents they owned that were essential to practice the standard. To ensure that owners of these standards-essential patents ("SEPs") are not able to use them to block products implementing the standards from the marketplace, companies that owned such patents—including the complainant—irrevocably pledge to license these SEPs to companies like the respondents and other standards implementers on FRAND terms. *Cf. Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 313 (3d Cir. 2007) ("To guard against anticompetitive patent hold-up, most SDOs require firms supplying essential technologies for inclusion in a prospective standard to commit to licensing their technologies on FRAND terms."). Just as HP regularly does when implementing standards into its own products, it assumes that the respondents in these investigations implemented the standards at issue in reasonable reliance on such a pledge.

To now permit the complainant to block respondents' standards-compliant products from access to the U.S. market, through an ITC exclusion order or other means, would be disastrous for both competition and consumers, not only in the context of these two investigations, but for all future efforts to bring standardization to particular fields of technology. The availability of an ITC exclusion order will give the complainant both the incentive and ability to use the threat of blocked market access to charge companies supracompetitive prices for use of the standard—after these companies have invested huge sums to implement these standards into their products and therefore are "locked in" to using the standard. This will severely injure competitive conditions in the United States across a range of products. It also will harm consumer welfare by forcing companies to charge higher prices for products that implement these standards and will stifle innovation.

Moreover, if exclusion orders were generally available to owners of SEPs subject to FRAND, these owners would have strong incentives to exploit this leverage and to demand exorbitant royalties for use of the standards. Companies selling standard-compliant products across a wide range of products and industries would then be forced to pay artificially high prices to these SEP owners in order to "purchase" protection against an exclusion order. If this were to occur, standards would become a means to impede, rather than promote, innovation and market competition.

The end results would also be higher prices and frustration for consumers. Fragmentation of a technical segment into multiple competing standards can result in higher prices, wasted investment (if a technical solution later becomes obsolete), and even disincentives for consumers to enter the market segment at all, lest they purchase products that are discontinued or are incompatible with others. Such lack of standardization also results in increased costs for producers, as investments in developing technical solutions are defrayed across fewer companies.

[2] For a collection of studies on the economic and consumer benefits of standards, see *ISO / IEC Inventory of Studies on the Economic and Social Benefits of Standardization*, available at http://www.standardsinfo.net/info/benefits/benefits.html.

Similarly, as any consumer who has a drawer full of power supplies (whether for their cellular phones, portable DVD players, or digital cameras) can likely attest, the failure to standardize in a given technical segment can lead to inefficiency, waste, and increased cost. Having to throw out a functioning power supply for an older cellular phone because it fits no other devices, or being unable to use a device while waiting for a new power supply to ship from the manufacturer because it is not readily available in a store, are common and potentially expensive frustrations of modern life resulting in part from a lack of standardization across products. Standards, by contrast, foster a robust marketplace of competitive but interoperable products for the benefit of all consumers.

Precisely these concerns have led U.S. antitrust enforcement agencies to express strong reservations about the ability of holders of SEPs to obtain exclusion orders or similar remedies. As the Federal Trade Commission (FTC) noted in a recent report,

> Hold-up in the standard setting context can be particularly acute. Standards are often adopted to make products compatible and interoperable with other products in the industry. . . In addition to higher prices and other economic harms, hold-up in standards-based industries may discourage standard setting activities and collaboration, which can harm innovation.[3]

In this regard, the FTC report specifically noted that the language of Section 337(d)(1)

> should allow consideration of whether an exclusion order based on a minor patented component of a complex product can unduly harm consumers by causing hold-up, distorting competition, raising prices and deterring innovation. <u>These concerns can be especially powerful when a patentee asserts a patent in the ITC that is subject to a RAND commitment against standardized technology. . . . The FTC . . . recommends that the ITC incorporate concerns about patent hold-up, especially of standards, into the decision of whether to grant an exclusion order in accordance with the public interest elements of Section 337.</u>[4]

The Department of Justice has voiced similar concerns; indeed, it recently did so with respect to the particular complainant involved in these investigations. *See Statement of Dept. of Justice Antitrust Division on Decision to Close Investigations of Google Inc.'s Acquisition of Motorola Mobility* (noting that the Division "continues to have concerns about the potential inappropriate use of SEPs [standard-essential patents] in the wireless device industry") (Feb. 2012); *see also* Tom Krazit, *FTC "enormously concerned" about some mobile patent tactics*, Gigaom.com (May 31, 2012) (quoting FTC Chairman Jon Leibowitz as saying that the use of standards-essential patents to exclude products from the market is "an area that the Commission is enormously concerned about"). That the United States' two leading antitrust enforcement agencies, after extensive investigations, have each expressed these concerns strongly supports the conclusion that the issuance of an exclusion order in these investigations would negatively impact

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[3] Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (March 2011), at 28.

[4] *Id.* at 30 (emphasis added).

"competitive conditions in the United States" and "United States consumers" within the meaning of Section 337(d)(1).

Given the standards-essential patents at issue, the only dispute at this stage should be whether the royalties demanded by the complainant are "fair, reasonable, and non-discriminatory." That dispute, however, should be resolved in the federal courts, not the ITC, as the federal courts have the authority to fashion a monetary remedy that adequately compensates the complainant. The ITC, by contrast, has no such authority. Nothing suggests Congress promulgated Section 337 to permit patent holders to convert claims for FRAND royalties from SEP licensees into the power to exclude such licensees from access to the U.S. market. To the contrary, Section 337(d)(1) by its terms indicates Congress's intent that, where the effect of an exclusion order would on balance negatively impact that public interest—as is the case here—the Commission should not issue a remedy at all.

An exclusion order would be against the public interest for the further reason that it would harm thousands of companies and workers across the IT industry, beyond the thousands who are directly employed by the named respondents in the United States. Excluding these devices from the U.S. market would result in direct harm to companies that are not parties to the dispute, adversely affecting their ability to compete and succeed, thereby harming the U.S. economy more broadly.

* * * * *

HP owns a large portfolio of patents and keenly understands the strong public interest in protecting patent rights. It has been a frequent party to investigations at the Commission, as both a complainant and a respondent, and values the remedy Section 337 can offer where imported products are competing unfairly and can be excluded in a manner consistent with the Commission's statutory mission of protecting U.S. industry and consumers. The unique facts in these investigations, however, weigh strongly against the issuance of an exclusion order because exclusion would be contrary to the interests of the U.S. industry and consumers the Commission is charged to protect. The appropriate remedy for any underpayment of royalties is an award of FRAND royalties. While the Commission cannot award such a remedy, the complainant can obtain this relief in federal district court. To grant the complainant the power to exclude the products at issue from the U.S. market, after respondents relied on complainant's pledge to license these patents for implementers of the standards at issue, would be directly contrary to the public interest and would frustrate, rather than advance, the goals of Section 337.

Respectfully submitted,


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| In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof | Inv. No.: 337-TA-745 |
|---|---|

## CERTIFICATE OF SERVICE

I, Vaishali Udupa, hereby certify that on June 6, 2012, copies of the foregoing **SUBMISSION ON PUBLIC INTEREST** was delivered, pursuant to Commission regulations, to the following interested parties as indicated:

| | |
|---|---|
| The Honorable Lisa Barton<br>Acting Secretary to the Commission<br>U.S. International Trade Commission<br>500 E. Street, SW<br>Washington, DC 20436 | Via EDIS and 8 copies via overnight delivery |
| The Honorable Thomas B. Pender<br>Office of the Administrative Law Judge<br>U.S. International Trade Commission<br>500 E Street, SW, Room 317<br>Washington, DC 20436 | Via E-mail<br><br>gregory.moldafsky@usitc.gov |
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## CERTIFICATE OF SERVICE

I, Vaishali Udupa, certify that on December 3, 2012, copies of the foregoing **WRITTEN SUBMISSION ON THE ISSUES UNDER REVIEW AND ON REMEDY, PUBLIC INTEREST, AND BONDING SUBMITTED ON BEHALF OF HEWLETT-PACKARD COMPANY** were delivered, pursuant to Commission regulations, to the following interested parties as indicated:

| | |
|---|---|
| The Honorable Lisa Barton<br>Acting Secretary to the Commission<br>U.S. INTERNATIONAL TRADE COMMISSION<br>500 E Street, SW<br>Washington, DC 20436 | By EDIS and 8 copies by overnight delivery |

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