

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

In the Matter of

**CERTAIN ELECTRONIC DEVICES, INCLUDING
MOBILE PHONES AND TABLET COMPUTERS,
AND COMPONENTS THEREOF**

Inv. No. 337-TA-847

**ORDER NO. 3: INITIAL DETERMINATION GRANTING GOOGLE, INC.
INTERVENOR STATUS, BUT DENYING GOOGLE, INC.'S
REQUEST TO INTERVENE AS A RESPONDENT**

(August 3, 2012)

On July 16, 2012, Non-Party Google, Inc. (“Google”) filed a motion to intervene as a respondent in this investigation. (Motion Docket No. 847-002) On July 26, 2012, Respondents HTC Corp. and HTC America, Inc. (collectively “HTC”) filed a response in support of Google’s motion to intervene. On July 26, 2012, Complainants Nokia Corp., Nokia Inc., and Intellisync Corp. (collectively “Nokia”) filed a response in opposition to Google’s motion. On July 31, 2012, Google filed a motion for leave, which is hereby DENIED, to file a reply in further support of their motion to intervene. (Motion Docket No. 847-003) On August 3, 2012, Nokia filed an opposition to Google’s motion for leave to file a reply.¹

¹ Nokia makes the argument in its opposition that Google’s reply includes a new request to intervene as a non-respondent. I disagree as such a request is implicit in Google’s motion to intervene as a respondent. Nokia’s argument that it had no opportunity to address an argument to intervene as a non-respondent is not persuasive and without merit. To intervene as a respondent it is *a fortiori* that Google must meet the requirements of an intervenor under Commission Rule 210.19. Accordingly, Nokia had the opportunity in its opposition to Google’s motion to intervene to address the issue of whether Google meets the requirements to intervene under Commission Rule 210.19.

Parties Positions

Google argues that it should be permitted to intervene in this investigation as a respondent to defend the Google products and services identified in the Complaint and to protect its significant interest in this investigation. Google argues that the applicable factors for intervention under Fed. R. Civ. Pro. 24 weigh overwhelmingly in favor of granting Google's request for intervention. Google also argues that granting intervention would aid in the adjudication of the issues in five of the nine patents at issue in this investigation because the products or services accused of infringement are proprietary Android applications that are developed by Google and supplied by HTC.

HTC supports Google intervening as a respondent arguing that Google is uniquely situated to provide information necessary for the efficient resolution of Nokia's infringement allegations with respect to at least five of the patents asserted in this Investigation, which are primarily directed to features of Google-developed applications that are embedded in the accused HTC products. In particular, HTC argues that for five of the asserted patents, Nokia's claim charts identify and rely on features of Gmail, Google Calendar, or other aspects of the Android operating system in order to allege infringement of these HTC products. Thus, HTC argues allowing Google to intervene will avoid the need for complicated third party discovery with respect to those accused features.

Nokia opposes Google intervening. Nokia argues that granting a request to intervene as a respondent is an extraordinary request that is rarely granted by the Commission. Nokia argues that the Commission requires at a minimum that the moving party show with relevant evidence that its products could be directly excluded from importation by the requested remedy in the investigation in question. Nokia argues that Google failed to make such a showing, because it only showed that

it supplies an essential component of the excluded articles. Nokia also argues that Google has failed to comply with my typical requirement to meet and confer at least two days before filing its motion and that it is sufficient to deny Google's motion on this point alone.²

Analysis

Commission Rule 210.19 establishes certain procedural requirements and provides, *inter alia*, that a motion to intervene may be granted "... to the extent and upon such terms as may be proper under the circumstances." 19 C.F.R. § 210.19. Commission Rule 210.19 looks to Fed. R. Civ. Pro. 24 for additional guidance on when to permit intervention. Fed. R. Civ. Pro. 24 permits intervention as of right either "when a statute of the United States confers unconditional right to intervene," or:

When the application claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. Pro. 24.

The Notice of Investigation ("NOI") in this investigation was published on June 8, 2012. 77 Fed. Reg. 34063 (June 8, 2012). On July 24, 2012, Order No. 2 issued as an Initial Determination setting an eighteen month target date. As this investigation is still in its infancy, I find that Google timely filed its motion to intervene.

In the present investigation, proprietary Android applications developed by Google and imbedded in the accused HTC devices form the basis of Nokia's infringement allegations as to five of the nine patents at issue, U.S Patent No. 5,884,190, U.S Patent No. 6,141,664, U.S Patent No.

² Specific Ground Rules have not yet issued in this investigation and thus I find Nokia's argument is without merit.

6,728,530, U.S Patent No. 7,209,911 and U.S Patent No. 7,366,529. See Complaint ¶ 3 and Exs. 22, 26, 27, 29, 30-32, 35. As such I find that Google has an interest in the investigation and that disposition of Nokia's infringement allegations may as a practical matter impair or impede Google's ability to protect that interest. I find that HTC, as the accused device manufacturer, but not the developer of the Android applications embedded in those devices, does not adequately represent Google's interests. Accordingly, I find that pursuant to 19 CFR 210.19 and Fed. R. Civ. Pro. 24 that Google be GRANTED intervenor status in this investigation.

While I have found hereinabove that Google should be granted intervenor status, the question of whether a party may intervene and whether a party may accorded respondent status are separate issues. *Certain Network Interface Cards and Access Points for Use in Direct Sequence Spread Spectrum Wireless Local Area Networks and Products Containing Same* (hereinafter "Network Interface Cards"), 337-TA-455, Comm'n Op. (July 17, 2001); see also, 19 C.F.R. § 210.3 ("Intervenor means a person who has been granted leave by the Commission to intervene as a party to an investigation or a related proceeding under this part. . . . Party means each complainant, respondent, intervenor, or Commission investigative attorney."). In *Network Interface Cards* the Commission stated that a party allowed to intervene in an investigation cannot acquire respondent status as a matter of right. *Network Interface Cards*, Comm'n op. at 9. There must be a "compelling justification" to grant respondent status to an intervenor. *Id.* at 7 ("We believe that these prior ALJ determinations concerning intervention do not give sufficient guidance regarding what would constitute 'a compelling justification' to grant respondent status to a moving party.")

Specifically, the Commission stated that:

determinations on whether to grant respondent status should be based on whether

the moving party could be deemed to have violated section 337; for example, by importing allegedly infringing articles. In those instances, the remedy sought by a complainant, if granted, would result in the direct exclusion of articles supplied by the moving party from entry into the United States.

Thus, in order to be accorded respondent status, the moving party must produce relevant evidence sufficient to show that articles supplied by the moving party could, in fact, be found in violation of section 337 and could therefore be excluded from entry into the United States if the remedy sought by the complainant were granted. ... However, if the articles supplied by the moving party are not themselves properly the subject of the investigation and would not be denied entry, but instead could only be impacted indirectly by the remedy, respondent status would not be appropriate.

Id. at 10.

In *Network Interface Cards* the Complainant had alleged that network interface cards and products containing the same infringe the patents. Nonparty Intersil sought to intervene as a respondent arguing “that respondent status is appropriate because Proxim’s infringement allegations as to 10 respondents are based exclusively on Intersil’s chips, and because respondent status would allow Intersil, if it chooses to do so, to stay concurrent district court actions under 28 U.S.C. § 1659. *Network Interface Cards*, Comm’n Op at 2. The Commission held that “Intersil produced no evidence that its chips themselves are properly within the scope of the investigation and that the remedies sought by Proxim, if granted, would exclude Intersil chips themselves from entry.” *Id.* at 11. In so holding, the Commission noted that “[i]n this regard, the complainant has not alleged that components of network interface cards infringe its patents, but that the network interface cards and products containing same infringe its patents.” *Id.*

Similar to the facts of *Network Interface Cards*, where complainant Proxima alleged the accused network interface cards infringed the asserted patents because certain Intersil chips on the

network interface cards practiced the asserted claims of the asserted patents,³ here complainant Nokia alleges that the accused products infringe five of the asserted patents because certain proprietary Google Android products embedded in the accused products practice the asserted claims of those five asserted patents. *See* Complaint ¶ 3 and Exs. 22, 26, 27, 29, 30-32, 35. However, unlike *Network Interface Cards*, where the scope of the investigation was limited to network interface cards ... **and products containing same** and thus did not include the Intersol chips that formed the basis of the request by Intersol to intervene as respondent in that investigation, the scope of the present investigation includes certain electronic devices, including ... **components thereof**, and thus does include the Android products that form the basis of Google's request. While this is a notable distinction, I find it to be one without a difference for although Google's Android products are within the scope of this investigation, Nokia has only sought a limited exclusion order in this investigation and thus any remedy would be limited to HTC's accused products – not Google's Android products themselves. Thus, I find no compelling reason to permit Google to become a respondent in this investigation because none of Google's Android products would be directly excludable by any exclusion order that could issue in this investigation. Accordingly, I find that Google could only be impacted indirectly by the remedy sought by Nokia and that respondent status under those circumstances would be inappropriate. Google's request for respondent status is hereby DENIED.

³ Paragraph 6.2 of the Complaint in *Network Interface Cards* alleged that “all of the accused products contain . . . , a baseband processor integrated circuit manufactured and sold by Intersil (‘the Intersil chip’)” (*Network Interface Cards*, Complaint, Ex. E at 14.) Paragraphs 6.3-6.5 of the Complaint, respectively, detail Proxim's infringement allegations for three of the asserted patents and reference three claim charts, attached to the Complaint as Exhibits 18-20. (*Id.*, Ex. E at 15.) Each of the claim charts showed that Proxim is relying on the Intersil chip to assert infringement of each of the three patents. (*Id.*, Ex. F, G, H.)

Order

For the reasons stated above, it is my Initial Determination that pursuant to Commission Rule 210.19 Google be granted intervenor status in this investigation, but not status as a respondent.

This Initial Determination is hereby certified to the Commission.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

SO ORDERED.

A handwritten signature in black ink, appearing to read "Thomas B. Pender", written over a horizontal line.

Thomas B. Pender
Administrative Law Judge

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337-TA-847

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **ORDER NO. 3 : INITIAL DETERMINATION** has been served upon, **The Office of Unfair Import Investigations** and the following parties via first class mail and air mail where necessary on August 7, 2012.



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