

November 8, 2018

Lisa R. Barton  
Secretary  
International Trade Commission  
500 E Street, SW  
Room 112A  
Washington, DC 20436

*Re: Public Knowledge and Open Markets Institute's Submission Pursuant to the Commission's Request for Statements on the Public Interest, Investigation No. 337-TA-1065, Certain Mobile Electronic Devices and Radio Frequency and Processing Components Thereof*

The ITC should uphold the administrative law judge's finding that granting an exclusion order in this case would harm the public interest. Signatories to this letter write as groups that believe that intellectual property, competition, and trade policy should serve the public interest.

Qualcomm has asked the ITC to exclude certain models of Apple's iPhone from the U.S. market, claiming that phones incorporating baseband technology from Intel, a new entrant in the baseband market and Qualcomm's only competitor in the premium baseband market, infringe their patents. Qualcomm targeted iPhones that use Intel baseband technology with their lawsuit, conspicuously leaving out iPhones that use Qualcomm baseband technology, despite the fact that those phones also use technology that Qualcomm has claimed is infringing. By exercising its patent rights in a way tailored to harm a new competitor, Qualcomm seems more concerned with maintaining a monopoly position in the premium baseband market than in obtaining patent relief. This behavior appears targeted at pushing Qualcomm's only competitor, Intel, to exit the market.<sup>1</sup> The ITC must consider the severe competitive impacts of an exclusion order against Apple—bringing the incredibly important market for premium smartphone basebands from two

---

<sup>1</sup> In his opinion, Administrative Law Judge Pender found that it was "nearly certain" that Intel would "exit the premium base band chip market if it cannot sell its chips for use for Apple smart phones to be sold in the United States." Op at 191. A company exiting the baseband market in the face of Qualcomm's dominance would not be a new development. Since 2008, Freescale Semiconductor, EoNex Technologies, Texas Instruments, Renesas, Broadcom, ST-Ericsson, NVIDIA, and Marvell have all exited the market, leaving behind a largely-unchallenged Qualcomm.

competitors to one—when analyzing whether the public interest would be served by an exclusion order.

Qualcomm’s anticompetitive intent is obvious. According to Qualcomm, the technologies in dispute concern the “design, structure, and operation of products with envelope tracking technology, voltage shifter circuitry, flashless boot, power management circuitry, enhanced carrier aggregation, and graphics processing units.”<sup>2</sup> Yet rather than suing Apple for the use of the allegedly infringing technology in all its phones, Qualcomm sued only over those phones that use Intel baseband technology. Because many of the disputed patents are common to all iPhones and do not concern baseband technology at all, it’s clear that Qualcomm is choosing to selectively enforce its patents in a way designed to maintain its monopoly position in the baseband market. Qualcomm even acknowledges that, if it is granted its relief, it will likely take over all of Intel’s baseband business—quite incredibly citing this as a factor that weighs *in favor* of exclusion.<sup>3</sup>

The uncompetitive nature of the baseband market is largely a result of Qualcomm’s actions. These include exclusive contracts, a refusal to license FRAND-encumbered patents under terms it had previously agreed to, the “no license-no chips” policy that conditions the sale of physical products on which it has a monopoly on the purchaser agreeing to abusive patent licenses, and other means. Competition authorities in Taiwan, South Korea, China, the European Union, and the United States have found that Qualcomm has abused its dominance to harm competition.

Under the ITC’s rules, an exclusion order may not be issued if the Commission determines that such an order will harm “the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, [or] United States consumers.”<sup>4</sup> Here, as the administrative law judge found, there is a “near certainty there will be real harm to the United States on a potentially very broad basis” if an exclusion is granted, because “there is credible and

---

<sup>2</sup> Qualcomm Complaint ¶ 26. Qualcomm withdrew some of its claims before trial.

<sup>3</sup> Qualcomm Public Interest Statement 2.

<sup>4</sup> 19 USC § 1337(d)(1). (Identical factors are listed in §§ (e)(1), (f)(1), and (g)(1).)

significant testimony in the Record verifying that monopolies are bad and that competition is necessary for quality, innovation, [and] competitive pricing[.]”<sup>5</sup>

Qualcomm’s desired relief would not just harm competition in an ordinary consumer product, but in mobile phones, tools which have become increasingly central to the U.S. economy, to businesses, and to individuals, and to public safety. People use the internet “for a variety of activities including accessing health information, online banking, choosing a place to live, applying for jobs, looking up government services, and taking classes. Access to broadband Internet also has positive effects on individual empowerment, economic growth, and community development.”<sup>6</sup> Increasing numbers of users rely on mobile devices, such as the ones at issue in this case, as their primary method of communication and accessing the internet access.<sup>7</sup> Intel’s entry into the market could not only reduce the cost of baseband technology for Apple, but for other smartphone manufacturers in the future as well. Such competition is sorely needed in the smartphone market, where major components are often sourced from just a handful of providers (in this case two), due to licensing costs, capital requirements, and scale issues. This increased competition could incentivize Qualcomm to adopt more liberal licensing policies in other respects as well, to the further benefit of consumers in terms of lower cost and higher-quality products.

While patent enforcement always has some effect on competition, signatories are not asserting that exclusions always violate the public interest. Rather, the facts of this case present an unusually clear instance where granting an injunction would harm the public interest through a *severe* reduction in competition—in fact, through the maintenance of a monopoly, which was arguably acquired in the first place through abusive means. An exclusion order in this case would potentially remove the ability of a United States

---

<sup>5</sup> Op. at 195.

<sup>6</sup> CAMILLE RYAN AND JAMIE M. LEWIS, CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, AMERICAN COMMUNITY SURVEY REPORTS, COMPUTER & INTERNET USE IN THE UNITED STATES: 2015 1 (2017), <https://www.census.gov/content/dam/Census/library/publications/2017/acs/acs-37.pdf>.

<sup>7</sup> See COMPUTER & INTERNET USE IN THE UNITED STATES 8; Pew Research Center, Internet/Broadband Fact Sheet (“one-in-five American adults are ‘smartphone-only’ internet users – meaning they own a smartphone, but do not have traditional home broadband service.”), <http://www.pewinternet.org/fact-sheet/internet-broadband>.

company (Intel) to produce baseband technology that competes with Qualcomm's, and would harm American consumers through a reduction in competition, as well as the higher prices and lower quality that would likely result from such a reduction. If this case does not present an instance where the public interest in competition outweighs a company's interest in excluding products from the market, it is unclear what set of facts would. If competition concerns can never outweigh the complaining party's interest, the ITC process would appear to be inconsistent with the Supreme Court's teaching that the patent system must serve the broader public interest,<sup>8</sup> and cases finding that competition concerns may be considered as part of a public interest analysis.<sup>9</sup> The Commission should not render statutory public interest factors superfluous in this case, and should abide by its typical practice of leaving administrative law judge determinations in place.<sup>10</sup>

Respectfully submitted,

/s/ John Bergmayer

John Bergmayer  
Charlotte Slaiman  
Public Knowledge  
1818 N St. NW, Suite 410  
Washington, DC 20036  
(202) 861-0020

Sandeep Vaheesan  
Open Markets Institute  
1440 G Street, NW  
Washington, DC 20005  
(888) 977-4184

---

<sup>8</sup> See *Medtronic, Inc. v. Mirowski Family Ventures*, 134 S. Ct. 843, 851-52 (2014). These public interest considerations are broadly similar to the public interest considerations a court must consider in determining whether a preliminary injunction is in the public interest--a standard the Commission itself follows in determining whether to grant temporary relief. 19 U.S.C. § 1337 e(3); 19 CFR 210.52(a). See *Weinberger v. Romero-Barcelo*, 456 US 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.").

<sup>9</sup> *Abbott Laboratories v. Sandoz*, 544 F. 3d 1341, 1362-63 (CAFC 2008); *Apple v. Samsung Electronics*, 678 F. 3d 1314, 1338 (CAFC 2012).

<sup>10</sup> See 19 CFR §§ 210.43, 210.66.

## CERTIFICATION OF SERVICE

I hereby certify that true and correct copies of the foregoing document, *Public Knowledge and Open Markets Institute's Submission Pursuant to the Commission's Request for Statements on the Public Interest*, has been served on this 8<sup>th</sup> day of November, 2018, on the following:

The Honorable Lisa R. Barton Secretary <b>U.S. International Trade Commission</b> 500 E Street, S.W. Washington, D.C. 20436	Via electronic filing
The Honorable Thomas B. Pender Administrative Law Judge <b>U.S. International Trade Commission</b> 500 E Street, S.W. Washington, D.C. 20436	Via electronic mail Patricia.Chow@usitc.gov
Lisa A. Murray Claire K. Comfort Investigative Attorney Office of Unfair Import Investigations <b>U.S. International Trade Commission</b> 500 E Street S.W., Room 401 Washington, D.C. 20436	Via electronic mail Lisa.Murray@usitc.gov Claire.Comfort@usitc.gov
S. Alex Lasher, Esq. <b>Quinn Emanuel Urquhart &amp; Sullivan LLP</b> 1300 I Street NW, Suite 900 Washington, D.C. 20005 <i>Counsel for Complainants Qualcomm Inc.</i>	Via electronic mail qequalcommitc@quinnemanuel.com qcom-8@adduci.com JonesDay-QC-ITC1065@jonesday.com
Ruffin B. Cordell Lauren A. Degnan Thomas S. Fusco <b>FISH &amp; RICHARDSON P.C.</b> 90115th Street, NW, 7th Floor Washington, DC 20005 <i>Counsel for Respondent Apple Inc.</i>	Via electronic mail cordell@fr.com

/s/ John Bergmayer  
John Bergmayer  
Public Knowledge