

ID on Infringement and Public Interest in Remand of InterDigital Investigation

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In a long-running investigation brought by InterDigital concerning *Nokia* mobile phones, the administrative law judge (ALJ) on the remand hearing from the U.S. Court of Appeals for the Federal Circuit found that Nokia's handsets infringed two InterDigital patents, and that the declaration of the patents to the European Telecommunications Standard Institute (ETSI) as essential did not bar an exclusion order. ***Certain 3G Mobile Handsets and Components Thereof***, Inv. No. 337-TA-613, Initial Determination on Remand (ITC, Apr. 27, 2015) (Essex, ALJ).

In mid-2009, the late Chief ALJ Luckern issued a final initial determination finding Nokia's products did not infringe two InterDigital patents that had been declared as part of the 3GPP standard to ETSI. The U.S. International Trade Commission (ITC) affirmed that determination, but the Federal Circuit later altered the ITC's construction of two claim terms, reversed the finding of no violation and remanded. On remand, the ITC ordered the ALJ to determine whether 1) Nokia's originally accused and current mobile phones infringed under the new constructions, 2) the public interest would be harmed by an exclusion order, 3) the standard-essential nature of the patents is contested, and 4) there has been patent hold-up by either party.

After finding that both Nokia's originally accused and currently imported handsets infringed under the new claim constructions, the ALJ found that the public interest would not be harmed by an exclusion order. Rejecting the respondents' argument that InterDigital's obligation to ETSI limited it to acceptance of a license on FRAND terms, the ALJ found that ETSI's standard FRAND declaration applied only to patents that were actually standard-essential, and neither InterDigital nor the respondents had offered any evidence that the asserted patents, if infringed, must be standard-essential. The ALJ further noted that, prior to the patents being declared to ETSI, ETSI had removed a bar against injunctive relief from its FRAND declaration, indicating that an exclusion order would not violate the agreement. Finally, the ALJ found that while there was no evidence InterDigital had engaged in patent holdup or failed to negotiate a FRAND license in good faith with the respondents, there was evidence of holdup by the respondents after the Federal Circuit decision reversing the earlier ITC rulings. In the ALJ's view, after the reversal, "the respondents no longer had a decision in their favor, and should have realized they may have to take a license or face an exclusion order." The ALJ found the respondents' unwillingness to state what would be an acceptable FRAND rate was evidence of holdup on the part of the respondents.

Practice Note: In determining infringement, the ALJ noted that the construction of a claim term in the two patents at issue was inconsistent with the ITC's construction of claim terms in related InterDigital patents that were asserted in two later investigations. However, the ALJ determined that resolution of this issue was beyond his authority. On review, the respondents will likely press the ITC to resolve this inconsistency, since the constructions in the later investigations were upheld by the Federal Circuit and resulted in a finding of no violation.

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