

**PUBLIC VERSION**

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

**In the Matter of**

**CERTAIN ELECTRONIC DEVICES,  
INCLUDING WIRELESS COMMUNICATION  
DEVICES, COMPUTERS, TABLET  
COMPUTERS, DIGITAL MEDIA PLAYERS,  
AND CAMERAS**

**Inv. No. 337-TA-952**

**Order No. 20**

On July 10, 2015, complainants Ericsson Inc. and Telefonaktiebolaget LM Ericsson (collectively, “Ericsson”) filed a motion to compel respondent Apple, Inc. (“Apple”) “to produce all missing source code responsive to Ericsson’s discovery requests, namely Ericsson Request for Production Nos. 13, 16, 47–63, 69–71, 73–77, 79, 81, 82, 94–113 and 124.” Motion Docket No. 952-38.

On July 22, 2015, respondent Apple, Inc. (“Apple”) filed a response opposing the pending motion. No other response was filed.

Ericsson argues:

Apple knows or should know what portions of Apple’s source code are responsive to Ericsson’s discovery requests and has only produced a fraction of the source code responsive to Ericsson’s requests. Upon Ericsson repeatedly identifying Apple source code production deficiencies, Apple has only provided one source code supplementation, and this supplementation not only fails to address most deficiencies that have been raised and discussed at length by Ericsson, but has led to discovery of additional source code deficiencies that were masked by the one deficiency Apple resolved. Apple then subsequently claims that the parties are not at an impasse and demands additional meet and confers or specificity with respect to the source code that is missing from Apple’s

source code computer.

Apple's serial use of the meet and confer process as a tool to improperly delay discovery has resulted in numerous issues remaining unresolved weeks after being first raised and has significantly slowed Ericsson's source code reviewers by preventing them from reviewing the code that was originally requested and by requiring them to spend significant time identifying the code that Apple should have produced at the outset and justify its relevance. Given that the close of fact discovery is less than one month away on August 7, 2015, Ericsson cannot tolerate Apple's failure to produce relevant source code and Apple's unduly prejudicial delaying tactics. Apple's posturing in an attempt to argue that the parties are not at an impasse stands in contrast to both the actual facts and Ground Rule 1.1's requirement that the parties to engage in intensive good faith efforts to facilitate discovery.

Mem. at 1-2.

In opposition, Apple argues:

Ericsson's premature filing of motions to compel has again unnecessarily burdened the ALJ and Apple. Instead of focusing on the merits of this investigation, Ericsson has decided to create issues where none exist. Ericsson's unjustified routine has led to this present motion, which should be denied for several reasons.

First, much of Ericsson's motion is already moot. Apple informed Ericsson that it had resolved certain issues identified in Ericsson motion *before* Ericsson filed the same. And, at the time of filing this opposition, Apple has produced the majority of Ericsson's outstanding requests, and expects to have the remainder of it no later than Monday, June 27.

Second, Apple has not refused to produce any source code that is *relevant* to Ericsson's infringement theory. Rather, Apple committed to producing all relevant source code in the meet and confer that preceded this motion. Since then, Apple has been diligently identifying, collecting, and producing source code, which has been no small task given the overbreadth of Ericsson's discovery requests. Thus, the remainder of Ericsson's motion is moot at least because the ALJ does not need to compel Apple to produce any relevant source code—Apple has already committed to producing it. Apple has only refused to produce source that is irrelevant to any issue in the investigation, namely [

].

Ericsson cannot be permitted to use the discovery process as a fishing

expedition. Thus, Apple has committed to producing all relevant source code and reasonably refused to produce that which it has shown to be irrelevant.

Third, Ericsson's motion is premature. Apple has been diligently investigating and resolving every source code request made by Ericsson. In fact, Apple has made [

]. As Ericsson itself concedes, complex source code analysis is not an overnight endeavor, especially in a case of this size. Indeed, responding to each of Ericsson's inquiries has taken considerable time and effort, both for outside counsel, in-house counsel, and Apple engineers. For each Ericsson inquiry, Apple has promptly contacted the relevant Apple engineer to learn the whereabouts of the allegedly missing code. Ericsson has increased the time frame of this already lengthy process by serving continuous "demands" for instant production that are often vague, unfounded, and/or overly broad, rather than providing specific requests that highlight the functionality that Ericsson believes to be missing. In fact, several of the requests in the subject motion were requested *for the first time* in Ericsson's motion to compel; others, only two business days prior. Either way, Apple has been engaged in helping Ericsson resolve outstanding issues, whereas Ericsson's apparent objective has been forcing a motion to compel, as evidenced by the fact that Ericsson identified source code in its motion it previously had not even raised with Apple. As such, Ericsson's motion to compel is improper.

Opp'n. at 1-3 (emphasis in original).

The evidence shows that Apple has already produced most of the source code that Ericsson seeks in its motion. Apple represents that it has already produced the following source code modules:

I

];

*See* Opp'n at 10 *citing* Decl. of Walter Overby, ¶¶ 7-22.

In the opposition, Apple states that its current source code production [

]. It is argued that that

production includes four supplementations, one of which came on June 30, before Ericsson filed its motion, and after Ericsson filed its motion, Apple supplemented its source code on July 15, July 20, and July 22, 2015 to add additional modules Ericsson requested. *See* Opp'n at 10-11; Colaianni Decl., ¶ 4.

Furthermore, on July 28, 2015, Apple filed a letter to the undersigned concerning supplemental production of certain source code:

On behalf of Respondent Apple Inc. ("Apple"), we write regarding Apple's Opposition to Ericsson's Motion to Compel Production of Missing Source Code from Respondent Apple Inc. (Dkt. No. 952-038). In its opposition, Apple stated that it would supplement its production with certain source code modules that Ericsson had requested. [*See* Opp'n at 8.] We write to confirm that Apple has made available for inspection those source code modules it had identified as forthcoming, which includes:

[

]

*See* Letter (EDIS Doc. ID No. 561958) at 1-2.

Thus, the administrative law judge denies the pending motion with respect to document requests concerning aforementioned source code as moot.

]

]

With respect to [ ] Ericsson argues:

[

].

Mem. at 16-17.

In opposition, Apple argues:

[ ]. It has nothing to do with any of Ericsson's theories of infringement in the case. For example, Ericsson's original infringement allegations from February 26, attached to the original complaint, identified the interaction of the iPhone 6 with the proximity sensor during a voice call. Ericsson attached charts to its complaint, and those charts expressly called out the operation of the proximity sensor as relevant to the "second mode" of the '059 patent claims: [ ] Those allegations, based on publicly available information, do not mention [ ].

Over the course of the next several months, Ericsson served three sets of requests for production, totaling 194 different requests, three sets of interrogatories, totaling 111 different interrogatories, and 111 requests for admission—[ ] In contrast, Ericsson identifies the proximity sensor in six separate requests for production and six different interrogatories. Thus, it was clear that Ericsson's infringement theory was focused on the proximity sensor, [ ].

Even four months after the complaint had been served, on June 16, Ericsson served responses to Apple's contention interrogatory responses that included Ericsson's updated (and current) infringement theory with respect to the '059 patent. In that response, Ericsson restated its theory with respect to the proximity sensor, and added a similar theory with respect to the operation of the phone when the Sleep/Wake button is pressed: [ ] Again, these allegations do not mention [ ]. In fact, it was not until June 25 that Ericsson first inquired about [ ]. This request was made in a letter to Apple.

Allowing Ericsson to introduce an entirely new infringement theory with respect to [ ] at this stage would prejudice Apple. Apple has already collected the vast majority of relevant documents from dozens of engineers, it has provided its invalidity theories and Notice of Prior Art, both Apple and the Staff have proposed claim terms, identified witnesses and Apple has worked to narrow the terms that are necessary for construction. Adding a new infringement theory would, at minimum, require that Apple identify and construe additional terms from the '059 patent, and potentially require the investigation of additional third party technical material, additional document and source code production, as well as witness identification and depositions, all to be complete by August 7, 2015.

Opp'n. at 12-15.

The administrative law judge finds that the [ ] software may be relevant to issues relating to U.S. Patent No. 8,812,059. Thus, Apple is ordered to produce the missing [ ] source code files by August 21, 2015. It is noted, however, that the undersigned will not extend the due dates of the critical events that are scheduled to occur in the coming weeks prior to the evidentiary hearing. For a large and complex investigation,<sup>1</sup> it is important that we abide by the procedural schedule.

Regarding [ ], Ericsson argues:

[

].

Mem. at 25-26.

Apple argues in opposition:

---

<sup>1</sup> Ericsson continues to assert 6 utility patents and 69 claims involving complex technology. *See* Declaration Pursuant to Order No. 5 and Ground Rule 6.a (EDIS Doc. ID No. 562571 (Aug. 6, 2015)) at 2-3.

...[


]. (*Id.* at ¶ 5.)

Apple represented as much to Ericsson during the meet and confer process and in a letter. *See* Ex. 15, Ltr fr Chen to Goulet re Source Code (July 9, 2015).) Despite Apple's representations, and despite the fact that Ericsson was not able to point to even a single reference within the voluminous amount of source code and the cross references within the code, Ericsson persisted with its motion to compel. Apple's Declaration from the firmware engineer Chris Mullens should moot this issue. (*See* Mullens Decl. at ¶ 1-5; *see also* Ex. 15, Ltr fr Chen to Goulet re Source Code (July 9, 2015).)

Opp'n. at 15.

The administrative law judge denies the pending motion with respect to source code concerning [ ] . It has not been shown that aforementioned source code is relevant to the issues in this investigation.

Motion No. 952-38 is granted in part to the extent indicated.

  
\_\_\_\_\_  
David P. Shaw  
Administrative Law Judge

Issued: August 17, 2015



**CERTAIN ELECTRONIC DEVICES, INCLUDING WIRELESS COMMUNICATION DEVICES, COMPUTERS, TABLET COMPUTERS, DIGITAL MEDIA PLAYERS, AND CAMERAS**

**INV. NO. 337-TA-952**

**PUBLIC CERTIFICATE OF SERVICE**

I, Lisa R. Barton, hereby certify that the attached **Order No. 20** has been served by hand upon the Commission Investigative Attorney, **Todd Taylor, Esq.**, and the following parties as indicated, on **SEP 11 2015**.



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

<b>FOR COMPLAINANTS ERICSSON INC.; AND TELEFONAKTIEBOLAGET LM ERICSSON:</b>	
Thomas L. Jarvis, Esq. <b>WINSTON &amp; STRAWN LLP</b> 1700 K Street, NW Washington, DC 20006	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Express Delivery <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____
<b>FOR RESPONDENT APPLE INC.:</b>	
Joseph V. Colaianni, Esq. <b>FISH &amp; RICHARDSON P.C.</b> 1425 K Street, NW, 11th Floor Washington, DC 20005	<input type="checkbox"/> Via Hand Delivery <input type="checkbox"/> Express Delivery <input checked="" type="checkbox"/> Via First Class Mail <input type="checkbox"/> Other: _____