

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

**CERTAIN WEARABLE ACTIVITY
TRACKING DEVICES, SYSTEMS, AND
COMPONENTS THEREOF**

Investigation No. 337-TA-973

**NOTICE OF COMMISSION DETERMINATION TO REVIEW AN INITIAL
DETERMINATION GRANTING RESPONDENTS' MOTION FOR SUMMARY
DETERMINATION THAT CERTAIN ASSERTED CLAIMS ARE DIRECTED TO
INELIGIBLE SUBJECT MATTER UNDER 35 U.S.C. § 101; AND ON REVIEW TO
REMAND THE INVESTIGATION TO THE PRESIDING ADMINISTRATIVE LAW
JUDGE**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined (1) to review an initial determination ("ID") (Order No. 24) of the presiding administrative law judge ("ALJ") granting a motion for summary determination that the asserted claims of U.S. Patent No. 8,920,332 ("the '332 patent"); and U.S. Patent No. 8,868,377 ("the '377 patent") are directed to ineligible subject matter under 35 U.S.C. § 101; and on review, to vacate and remand to the ALJ to continue the investigation as to those patents; and (2) not to review the summary determination that the asserted claims of U.S. Patent No. 9,089,760 ("the '760 patent") are directed to ineligible subject matter under 35 U.S.C. § 101.

FOR FURTHER INFORMATION CONTACT: Panyin A. Hughes, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-3042. Copies of non-confidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone (202) 205-2000. General information concerning the Commission may also be obtained by accessing its Internet server at <https://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <https://edis.usitc.gov>. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205-1810.

SUPPLEMENTARY INFORMATION: The Commission instituted Inv. No. 337-TA-973 on December 7, 2015, based on a complaint filed by Fitbit, Inc. of San Francisco, California (“Fitbit”). 80 *Fed. Reg.* 76040 (Dec. 7, 2015). The complaint alleges violations of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain wearable activity tracking devices, systems, and components thereof by reason of infringement of certain claims of the ’332 patent, the ’377 patent, and the ’760 patent. The notice of investigation named the following respondents: AliphCom d/b/a Jawbone of San Francisco, California and BodyMedia, Inc. of Pittsburgh, Pennsylvania (collectively, “Jawbone”). The Office of Unfair Import Investigations (OUII) is a party to the investigation.

On May 23, 2016, Jawbone moved for summary determination that the ’332 patent, the ’377 patent, and the ’760 patent are directed to ineligible subject matter under 35 U.S.C. § 101. On June 2, 2016, Fitbit filed an opposition to the motion. On June 3, 2016, the Commission investigative attorney (“IA”) filed a response supporting the motion as to the ’760 patent and opposing as to the ’332 patent and the ’377 patent.

On July 19, 2016, the ALJ issued the subject ID (Order No. 24) granting the motion for summary determination that the ’332 patent, the ’377 patent, and the ’760 patent are invalid under 35 U.S.C. § 101 for being directed to ineligible subject matter, and terminated the investigation in its entirety. The ID found that there were no genuine disputes of material fact as to the asserted claims of the ’332 patent, the ’377 patent, and the ’760 patent. On August 1, 2016, Fitbit petitioned for review of the ID. On August 8, 2016, Jawbone and the IA filed oppositions to Fitbit’s petition.

Having examined the record of this investigation, including the subject ID and the submissions of the parties, the Commission has determined to review the ID as to the ’332 patent and the ’377 patent. The Commission notes that summary determination is proper where the record shows that “there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(b). The evidence must be viewed in the light most favorable to the nonmovant. With respect to the ’332 patent, the ID relied on the Ahmed reference, but the parties dispute what the reference discloses and whether it constitutes prior art. Regarding the ’377 patent, the parties dispute what was conventional at the time of the invention. The Commission finds that the ID did not view the evidence in the light most favorable to Fitbit as required to grant summary determination. Thus, the Commission has determined to vacate the ID’s grant of summary determination that the asserted claims of the ’332 patent and the ’377 patent are directed to ineligible subject matter under section 101. The Commission remands the investigation to the ALJ for continuation of the investigation as to those two patents. The Commission has determined not to review the summary determination as to the ’760 patent.

The authority for the Commission’s determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in Part 210 of the Commission’s Rules of Practice and Procedure (19 C.F.R. Part 210).

By order of the Commission.

A handwritten signature in black ink, appearing to read 'Lisa R. Barton', written in a cursive style.

Lisa R. Barton
Secretary to the Commission

Issued: September 7, 2016§

PUBLIC CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **NOTICE** has been served by hand upon the Commission Investigative Attorney, **Yoncha Kundupoglu, Esq.**, and the following parties as indicated, on **9/7/2016**



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

On Behalf of Complainant: Fitbit, Inc.:

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- Via Hand Delivery
- Via Express Delivery
- Via First Class Mail
- Other: _____

**On Behalf of Respondents: AliphCom d/b/a Jawbone and
BodyMedia, Inc.**

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