

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of

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

Investigation No. 337-TA-963

**NOTICE OF COMMISSION DETERMINATION (1) 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 (2) ON REVIEW TO
AFFIRM THE INITIAL DETERMINATION WITH MODIFICATION**

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to review an initial determination ("ID") (Order No. 40) of the presiding administrative law judge ("ALJ") granting a motion for summary determination that the asserted claims of U.S. Patent Nos. 8,398,546 ("the '546 patent") and 8,446,275 ("the '275 patent") are directed to ineligible subject matter under 35 U.S.C. § 101; on review, the Commission has determined to affirm the ID with modification.

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 <http://www.usitc.gov>. The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at <http://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-963 on August 21, 2015, based on a complaint filed by AliphCom d/b/a Jawbone of San Francisco, California and BodyMedia, Inc. of Pittsburgh, Pennsylvania (collectively, "Jawbone"). 80 *Fed. Reg.* 50870-71 (Aug. 21, 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 activity tracking devices, systems, and components thereof by reason of infringement of certain claims of

U.S. Patent Nos. 8,073,707; 8,793,522 (“the ’522 patent”); 8,529,811; 8,961,413; the ’275 patent; and the ’546 patent. The complaint further alleges misappropriation of trade secrets, the threat or effect of which is to destroy or substantially injure an industry in the United States. The notice of investigation named the following respondents: Fitbit, Inc. of San Francisco, California; Flextronics International Ltd. of San Jose, California; and Flextronics Sales & Marketing (A-P) Ltd. of Port Louis, Mauritius (collectively, “Fitbit”). The Office of Unfair Import Investigations (OUII) is a party to the investigation.

On January 8, 2016, Fitbit moved for summary determination that the ’275 patent, ’546 patent, and ’522 patent (subsequently terminated from the investigation) are directed to ineligible subject matter under 35 U.S.C. § 101. On January 19, 2016, Jawbone filed an opposition to the motion. On January 20, 2016, the Commission Investigative Attorney (“IA”) filed a response in support of the motion.

On March 3, 2016, the ALJ issued the subject ID (Order No. 40) granting Fitbit’s motion for summary determination that the ’275 and ’546 patents are directed to ineligible subject matter under 35 U.S.C. § 101. The ID found there was no genuine issue of material fact in dispute as to the asserted claims of the ’275 and ’546 patents. On March 10, 2016, Jawbone petitioned for review of the ID. On March 17, 2016, Fitbit and the IA filed oppositions to Jawbone’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. On review, the Commission has determined to affirm the ID with the following modification. The Commission recognizes that the law remains unsettled as to whether the presumption of patent validity under 35 U.S.C. § 282 applies to subject matter eligibility challenges under 35 U.S.C. § 101. *See In re TLI Commins. LLC Patent Litig.*, 87 F. Supp. 3d 773, 797 (E.D. Va Feb. 6, 2015) (observing that neither the Supreme Court nor the Federal Circuit has addressed the issue and that “[a]s a result of this deafening silence, district courts, not surprisingly, are split over the standard of proof applicable to §101 challenges.”). Indeed, the parties did not cite, nor is the Commission aware of, any definitive case law holding that the presumption applies in § 101 eligibility challenges. Regardless of whether or not such a presumption applies, the record here warrants a finding that the asserted patent claims are directed to ineligible subject matter. Commissioner Schmidlein observes that because the outcome is the same either way, she need not reach the legal question of whether the presumption is required to be applied.

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". The signature is stylized and cursive.

Lisa R. Barton
Secretary to the Commission

Issued: April 4, 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, Peter J. Sawert, Esq., and the following parties as indicated, on **April 4, 2016**.



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

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

Kalpana Srinivasan, Esq.
SUSMAN GODFREY LLP
1901 Avenue of the Stars, Suite 950
Los Angeles, CA 90067-6029

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

**On Behalf of Respondents Flextronics International Ltd. and
Flextronics Sales & Marketing (A-P) Ltd.:**

Mark L. Hogge, Esq.
DENTONS US LLP
1900 K Street, NW
Washington, DC 20006

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

On Behalf of Respondent Fitbit, Inc. :

Josh A. Krevitt, Esq.
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, NY 10166

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