UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of **CERTAIN VIDEO CAPABLE ELECTRONIC DEVICES, INCLUDING COMPUTERS, STREAMING DEVICES, TELEVISIONS, AND COMPONENTS AND MODULES THEREOF**	**Investigation No. 337-TA-1380**

ACT | THE APP ASSOCIATION'S STATEMENT ON THE PUBLIC INTEREST

ACT | The App Association (App Association) hereby submits comments to the U.S. International Trade Commission (USITC) in response to the Commission's call for comments on public interest issues in the investigation 337-TA-1380, titled *Certain Video Capable Electronic Devices, Including Computers, Streaming Devices, Televisions, and Components and Modules Thereof*, issued on December 20, 2024 per 90 FR 670.

The App Association is a global policy trade association for small business technology companies located across the United States that create the leading software and hardware solutions used across countless consumer and enterprise use cases. The value of the ecosystem the App Association represents—which we call the app economy—is approximately $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion internet of things (IoT) revolution.[1] Our small-business innovator members develop and leverage patented technology to innovate and compete across sectors and use cases, driving the growth of IoT.

The App Association urges careful consideration of our views and how the USITC's next steps will affect the U.S. small business innovators that develop and deploy IoT technologies that build upon open standards, including those that utilize advanced video coding (AVC) standards. IoT devices have revolutionized American life, from medical devices that enable real-time doctor-patient communication,

[1] ACT | The App Association, State of the App Economy (2022), https://tinyurl.com/y9cv9v9d .

to sensors for security alerts, and mobile tech supporting first responders in a new national public safety network. With a projected 40 billion IoT devices expected online by 2030, nearly every U.S. sector—finance, health, entertainment, and more—will likely be impacted.[2]

In this case, Administrative Law Judge (ALJ) Cameron Elliot made an initial determination that Amazon violated section 337 of the Tariff Act for the importation of certain video capable electronic devices, including computers, streaming devices, televisions, cameras, and components and modules thereof based on infringement of one or more claims of U.S. Patent Nos. 7,724,818, 8,050,321, 8,007,991, 10,536,714, and 11,805,267. If any of the patents are essential and within the scope of Nokia's F/RAND licensing commitments, the U.S. federal district court system is the appropriate venue for determining whether market exclusion or the issuance of a bond is appropriate due to the availability of alternative monetary remedies to make the complainant whole. The limited remedies available in this court, if applied, would harm the public interest and the health and welfare of American consumers.

App Association members use technical standards, and specifically the interoperability they provide, to support a wide variety of innovation and—absent abuses—to create and promote competition. Standardization is particularly critical in today's highly digitized markets. The benefits of these standards only accrue when technical standards-setting processes operate as intended. However, when the system is gamed, standardization processes can carry significant competitive risks due to close technical collaboration between horizontal and vertical market participants being involved in standard setting.[3] From a competition law standpoint, technologies selected for inclusion in a standard might be viewed as collaboratively

[2] IoT Analytics, *State of IoT 2024:Number of connected IoT devices growing 13% to 18.8 billion globally* (September 3, 2024), https://iot-analytics.com/number-connected-iot-devices/.
[3] *See e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030-31 (9th Cir. 2015) (standardization "creates an opportunity for companies to engage in anti-competitive behavior"); *see also* ETSI, ETSI Guidelines for Antitrust Compliance, §§ A-B (ETSI is "a forum in which competitors interact with each other. Therefore, the market-related rules apply to the decisions which are adopted by the Institute as a standardization body as well as with regard to the activities of Members within ETSI"; accordingly, "[t]he imposition of discriminatory and unfair conditions by the dominant company, to any categories of users, or any other company having contractual relationships with the dominant company, is abusive"), https://tinyurl.com/yvcyxf4b.

accepted by industry participants,[4] while the technologies that are not included lose the opportunity to be part of the widely adopted standard.[5] Accordingly, accepted companies are effectively provided unchecked and significant market power to demand excessive royalties, exclude competitors, or otherwise take advantage of an industry's collaborative agreement to standardize a product or feature.[6]

To address these competition law issues, many standard-setting organizations (SSOs), including the International Telecommunications Union (ITU), have adopted patent or intellectual property rights (IPR) policies that require members who voluntarily contribute their technologies to standards to license the patents necessary for the implementation of the standard (known as "standard-essential patents" [SEPs]) on fair, reasonable, and non-discriminatory (F/RAND) terms. The F/RAND promise—when kept—serves to mitigate anticompetitive practices associated with standardization by providing that patent licenses will remain available to all market participants on reasonable terms that promote a "level playing field" for competition.[7] Although no company has an obligation to commit its patents to a standard (or agree to license them on F/RAND terms), where a company chooses to do so, the F/RAND commitment is irrevocable and

[4] *See*, *e.g.*, Wi-Fi Alliance, Antitrust Compliance Policy and Guidelines, §2 ("Wi-Fi Alliance, in the course of its activities, shall not agree with, participate in, or give consideration to any activity, plan, understanding, agreement, or other arrangement that constitutes a violation of any federal or state antitrust laws, including but not limited to actions that would (a) raise or stabilize prices or fees, (b) boycott or refuse to do business with any third parties (other than through Wi-Fi Alliance's bona fide business contractual arrangements), (c) restrict or interfere with the exercise of free and independent judgment by the members in the management or operation of their respective businesses, or (d) obstruct or interfere with commerce or free and lawful competition."), https://tinyurl.com/bdevr4fx.

[5] *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) ("standard[ization], by definition, eliminates alternative technologies").

[6] *See*, *e.g.*, *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d at 1030-31 (addressing "hold up" power of patents incorporated into standards); FTC, Brief of Amicus Curie in Support of Neither Party 3-4, Apple Inc. v. Motorola, Inc., Nos. 2012-1548 et al. (Fed. Cir. Dec. 14, 2012)("[t]he problem of patent hold-up can be particularly acute in the standard-setting context, where an entire industry may be locked into a standard that cannot be avoided without infringing or obtaining a license for numerous (sometimes thousands) of standard-essential patents.").

[7] Wi-Fi Alliance, *Wi-Fi Alliance Intellectual Property Rights Policy*, ("The purpose of the Wi-Fi Alliance ('WFA') is to promote the IEEE 802.11 wireless networking standard by encouraging manufacturers of wireless networking products to achieve a high degree of interoperability among all products employing the standard and by promoting through a number of means the widespread adoption and use of products employing the IEEE 802.11 standard. At times, the activities of WFA Task Groups result in the creation of documents and other work product with newly created intellectual property rights and/or including the intellectual property rights of others."), https://tinyurl.com/27xtnuyb.

acts as a crucial constraint on the abuse of market power associated with SEPs. As the Ninth Circuit has explained, the voluntary F/RAND commitment "must be construed in the public interest because it is crafted for the public interest,"[8] as it is designed to protect against the competitive abuses and consumer harm that standardization can otherwise enable.

App Association members rely on industry-driven technical standards to compete across technology-enabled markets. Without the ability to use standardized solutions, our members would be significantly disadvantaged in providing countless Americans (both in the consumer and enterprise contexts) with leading edge software and hardware products and services that require an increasing amount of bandwidth and computing power to meet customer demands. An exclusion order in the case at hand stands to impact opportunities for the IoT innovation, including those that our members develop. In this case, we strongly urge the USITC to act consistent with, and to build upon, existing global-consensus guidance providing clarity on what a F/RAND commitment in the SEP context means, and the effects of F/RAND abuse on competition and innovation, reflected in the United States and in other key markets.[9] SEP licensing abuse represents both contract and competition law issues affecting the public interest and an analysis underlying any exclusion order decision with respect to a SEP must address both of these areas.

It is critical that F/RAND commitments receive full consideration in a USITC public interest analysis and in exclusion orders pertaining to SEPs, which should be issued only in extremely rare circumstances. Specifically, an exclusion order should only receive consideration when an infringing party/potential licensee is "unable or refuses to take a [ ]RAND license and is acting outside the scope of the patent holder's commitment to license on [ ]RAND terms."[10] The availability of SEP exclusion orders

[8] *Microsoft v. Motorola*, 795 F. 3d 1024, 1052 (9th Cir. 2015).
[9] ACT | The App Association, *Standards, Patents, and Competition Policy to Drive Small Business Innovation*, https://tinyurl.com/ywyvc7mb *see also* Scarpelli, Brian, Nair, Priya, *A Call To Action: Guiding A Fair Standard Essential Patent Licensing Process For A Thriving Indian Economy* (Aug. 14, 2023), https://tinyurl.com/nhkv2t73; *see also* Response of ACT | The App Association to the European Commission's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) to its Call for evidence for an impact assessment for a new framework for standard-essential patents, https://tinyurl.com/jzasct5b.
[10] Letter to the Honorable Irving A. Williamson, United States International Trade Commission Chairman re *Disapproval of the U.S. Int'l Trade Comm'n Determination in the Matter of Certain Elec. Devices,*

can raise significant public health and safety, as well as competition, concerns, and consequently are used sparingly and only under extremely rare circumstances.[11] Further, we note that SEP holders denied an exclusion order do not become disenfranchised as they have the ability to recover monetary damages through the courts. In line with the sentiment of the U.S. courts, an exclusion order is most improper where the patented invention is a small component of the licensee's product and a monetary award is sufficient to make the plaintiff whole, representing a better solution to serve the public interest.[12] An exclusion order does not only disable production for one entity but provides significant economic setbacks for connected entities across relevant supply chains, causing a negative industry-wide economic effect. Indeed, a promise to voluntary licensing on F/RAND terms per an SSO's patent policy represents an agreement that monetary damages are in most cases the proper form of relief for infringement save for extreme exceptions.

The App Association urges the USITC to fully consider the harmful impact issuing an exclusion order in this case would have considering the SEP licensing landscape, U.S. competitiveness, and job creation in emerging IoT sectors. Accordingly, the USITC should ensure that the F/RAND commitment is considered in public interest analyses when remedies are sought under Section 337 for SEPs, in order to fully appreciate the impact of such remedies on the public health and welfare in the United States, competitive conditions in the U.S. economy, the production of like or directly competitive articles in the United States, and U.S. consumers.

Respectfully Submitted,

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Including Wireless Commc'n Devices, Portable Music & Data Processing Devices & Tablet Computers, Inv. No. 33-TA-794, (Aug. 3, 2013) https://tinyurl.com/5eypajdf.

[11] Such exceptions may include a party refuses or is unable to pay a FRAND rate set in a final and binding adjudication but not exercise of legal rights—such as challenging the validity or essentiality of a SEP.

[12] *eBay Inc. v. MercExchange, L.L.C*, 547 U.S. 388, 396 (2006).