

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

In the Matter of

**CERTAIN WI-FI ROUTERS, WI-FI
DEVICES, MESH WI-FI NETWORK
DEVICES, AND HARDWARE AND
SOFTWARE COMPONENTS**

Investigation No. 337-TA-1361

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-1361, titled *Certain Wi-Fi Routers, Wi-Fi Devices, Mesh Wi-Fi Network Devices, and Hardware and Software Components*, issued on June 6, 2024.¹

The App Association is a global policy trade association for small and medium-sized 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 ecosystem—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.² Our small-business innovator members develop and leverage patented technology to innovate and compete across sectors and use cases, driving the growth of the internet of things (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 internet of things (IoT)³ technologies that build upon open standards, including those that utilize Wi-Fi connectivity standards.

¹ 89 FR 48444.

² ACT | The App Association, *State of the App Economy* (2022), <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf>.

³ Similar to 5G, IoT will involve everyday products that use the internet to communicate data collected through sensors. IoT is expected to enable improved efficiencies in processes, products, and services across every sector. In key segments of the U.S. economy, from agriculture to retail to healthcare and others, the rise of IoT is demonstrating efficiencies unheard of even a few years ago. *See, e.g.*, Department of Commerce Internet Policy Task Force and Digital Leadership Team, *Fostering the Advancement of the Internet of Things* (Jan. 2017), available at https://www.ntia.doc.gov/files/ntia/publications/iot_green_paper_01122017.pdf.

There are endless possibilities when it comes to how IoT devices will change Americans' lives, including miniaturized and embedded connected medical devices that can monitor a patient's biometric data and allow real-time communications between patients and doctors, sensors deployed to alert security of an unauthorized presence, and the mobile technology and software apps used to enable America's first responders in a new planned national public safety broadband network. With a predicted 20.1 billion connected devices deployed by 2025, almost every sector of the U.S. economy will be affected ranging from finance and health to gaming and the global digital ecosystem.⁴

In this case, Administrative Law Judge (ALJ) Doris Johnson Hines made an initial determination that TP-Link violated section 337 of the Tariff Act for the importation of certain Wi-Fi routers, Wi-Fi devices, mesh Wi-Fi network devices, and hardware and software components based on infringement of U.S. Patent Nos. 7,936,714 and 10,681,698. While we take no position on whether any of the patents in question are essential to certain Wi-Fi specifications published by Wi-Fi Alliance Network, if any of the patents are essential and within the scope of Netgear's RAND licensing commitment to the Wi-Fi Alliance, the issuance of limited exclusion orders (LEOs) and/or a cease and desist order (CDOs) requested by Netgear in this case 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.⁵ From a competition

⁴ See Statista, *Number of Internet of Things (IoT) connections worldwide from 2022 to 2023, with forecasts from 2024 to 2033* (June 2024), available at <https://www.statista.com/statistics/1183457/iot-connected-devices-worldwide/>.

⁵ 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

law standpoint, technologies selected for inclusion in a standard might be viewed as “winners” that are collaboratively “whitelisted” by industry participants.⁶ Conversely, technologies that are not selected might be viewed as “losers” that are collaboratively “blacklisted.”⁷ Accordingly, the use of patented technologies of certain companies rather than those of other companies can give rise to thorny competition issues and may provide companies with favored technologies with unchecked and significant market power to demand excessive royalties, exclude competitors, or otherwise take advantage of an industry’s collaborative agreement to make products in a certain way (i.e., in accordance with the standard).⁸

To address these competition law issues, many standard-setting organizations (SSOs), including the Wi-Fi Alliance, 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.⁹ Although no company has an obligation to commit its patents to a standard, where a company

company having contractual relationships with the dominant company, is abusive”), *available at* <http://www.etsi.org/images/files/IPR/etsi%20guidelines%20for%20antitrust%20compliance.pdf>.

⁶ *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.”), *available at* https://www.wi-fi.org/system/files/Antitrust_Policy_v2_0_approved_20140623.pdf.

⁷ *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (“standard[ization], by definition, eliminates alternative technologies”).

⁸ *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.”).

⁹ 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.”), *available at* https://www.wi-fi.org/system/files/gd_8_RevisedMarch1%2C2006WFAIPRPoly.pdf.

chooses to do so, the F/RAND promise 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,”¹⁰ as it is designed to protect against the competitive abuses and consumer harm that standardization can otherwise enable.

App Association members rely on a competitive information and communications technology hardware environment, specifically with respect to SEP licensing. Without this environment our members would be significantly hampered 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. As standardized technologies provide a baseline for the IoT innovations our members develop, an exclusion order in the case at hand stands to impact those opportunities. 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.¹¹ 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

¹⁰ *Microsoft v. Motorola*, 795 F. 3d 1024, 1052 (9th Cir. 2015).

¹¹ ACT | The App Association, *Standards, Patents, and Competition Policy to Drive Small Business Innovation*, <https://actonline.org/wp-content/uploads/ACT-SEP-Gen-Position-Paper-sent-081619.pdf>; see also Scarpelli, Brian, Nair, Priya, *A Call To Action: Guiding A Fair Standard Essential Patent Licensing Process For A Thriving Indian Economy* (14 August 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4536835; 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://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents/F3434403_en.

the patent holder's commitment to license on []RAND terms."¹² The availability of SEP exclusion orders can raise significant public health and safety, as well as competition, concerns, and consequently are used sparingly and only under extremely rare circumstances.¹³ 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 and partake in standards-setting activities in an SSO. 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 examine the potential effects its decision will have on SEP licensing if it alters the availability of exclusion orders with respect to SEPs (and, therefore, the ability of the United States to compete and create jobs in new IoT verticals using standards). Furthermore, the USITC should examine the impact any such shift would have on key stakeholders across countless consumer and enterprise use cases that rely on reasonable access to open standards as part of its public interest analysis that considers the F/RAND commitment.

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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¹² Letter to the Honorable Irving A. Williamson, United States International Trade Commission Chairman re *Disapproval of the U.S. International Trade Commission's Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers*, Investigation No. 33-TA-794, (August 3, 2013) available at <https://ustr.gov/sites/default/files/08032013%20Letter1.PDF>.

¹³ The App Association notes that a party preserving its legal rights should not indicate unwillingness or unreasonableness.