September 10, 2024

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RE: ***Input of ACT | The App Association regarding the U.S. Trade Representative's Request for Comments Concerning China's Compliance With WTO Commitments (USTR–2024–0012; 89 FR 63462)***

ACT | The App Association writes in response to the interagency Trade Policy Staff Committee's (TPSC) request for comments to assist the Office of the United States Trade Representative (USTR) in preparing its annual report to Congress on China's World Trade Organization (WTO) commitments,[1] in accordance with section 421 of the U.S.-China Relations Act of 2000.[2]

I. Introduction and Statement of Interest

The App Association is a global trade association representing small business technology companies from across the United States. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. Today, 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.[3]

The App Association is pleased to provide its comments addressing China's compliance with its commitments to the WTO. We support efforts by the U.S. government to protect American small businesses and remain committed to working with public and private sector stakeholders to ensure WTO agreements effectively reduce or eliminate trade

[1] 89 FR 63462.

[2] Pub. L. 106-286.

[3] ACT | The App Association, State of the U.S. App Economy, available at https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf.

barriers in the app economy. U.S. trade and investment partners must implement policies that embrace the realities of our global economy and address trade abuses.

II. ACT | The App Association's General Trade Priorities

The global digital economy holds great promise for small app development companies, but our members face a diverse array of trade barriers when entering new markets. These barriers may take the form of laws, regulations, policies, or practices that protect domestic goods and services from foreign competition, artificially stimulate exports of domestic goods and services, or fail to provide adequate and effective protection of intellectual property rights (IPR). While these barriers have different forms, they all have the same net effect: impeding U.S. exports and investment at the expense of American workers. Such trade barriers include:

- ***Limiting Cross-Border Data Flows***: Limiting cross-border data flows hurts all players in the digital economy. The seamless flow of data across economies and political borders is essential to the global economy. In particular, innovative small app development companies rely on unfettered data flows to access new markets and customers.
- ***Data Localization Policies***: Companies expanding into new overseas markets often face regulations that force them to build and/or use local data infrastructure. These data localization requirements seriously hinder imports and exports, as well as jeopardize an economy's international competitiveness and undermine domestic economic diversification. Small app developers often do not have the resources to build or maintain infrastructure in every country in which they do business, which effectively excludes them from global commerce.
- ***Customs Duties on Digital Content***: American app developers and technology companies take advantage of the internet's global nature to reach the 95 percent of customers who are outside the United States. However, the "tolling" of data across political borders with the intent of collecting customs duties directly contributes to the balkanization of the internet and prevents small business digital economy innovators from entering new markets.
- ***Requirements to Provide Source Code for Market Entry:*** Some governments have proposed or implemented policies that make legal market entry contingent upon the transfer of proprietary source code. For app developers and tech companies, intellectual property is the lifeblood of their business, and the transfer of source code presents an untenable risk of theft and piracy. These requirements present serious disincentives for international trade and are non-starters for the App Association's members.
- ***Requirements for "Backdoors" in Encryption Techniques:*** Global digital trade depends on technical data protection methods and strong encryption techniques to keep users safe from harms like identity theft. However, some governments and companies insist that "backdoors" be built into encryption for the purposes of government access. These policies would degrade the safety and security of data,

as well as the trust of end users, by creating known vulnerabilities that unauthorized parties can exploit. From a security and privacy standpoint, the viability of app developers' products depends on the trust of end users.

- ***Intellectual Property Violations***: The infringement and theft of intellectual property (IP) jeopardizes the success of App Association members and hurts the billions of consumers who rely on their app-based products and services. Each kind of IP (copyrights, trademarks, patents, and trade secrets) represents distinct utilities upon which App Association members depend. IP violations lead to customer data loss, interruption of service, revenue loss, and reputational damage – each alone is a potential "end-of-life" occurrence for a small app development company. Strong and fair protection of intellectual property for copyrights, patents, trademarks, and trade secrets is essential to their businesses.
- ***Misapplication of Competition Laws to the Digital Economy:*** Various regulators, including key trading partners, are currently considering or implementing policies that jeopardize the functionality of mobile operating systems and software distribution platforms that have enabled countless American small businesses to grow. Since its inception, the app economy has successfully operated under an agency-sale relationship that has yielded lower overhead costs, greater consumer access, simplified market entry, and strengthened intellectual property protections for app developers with little-to-no government influence. Foreign governments regulating digital platforms inconsistent with U.S. law will upend this harmonious relationship enjoyed by small-business app developers and mobile platforms, undermine consumer privacy, and ultimately serve as significant trade barriers.

III. Specific Comments of ACT | The App Association on China and its WTO Commitments

Accession to the WTO in 2001 brought an expectation that China would harmonize its regulations with well-established, pro-trade policies that enabled fair treatment of new market entrants. However, we do not believe that these commitments have been met. China initially took steps to amend domestic laws and regulations to align them with WTO policies, but we have observed an increasing tendency to violate the WTO at will through forced intellectual property and technology transfers, misuse of the technical standardization process on behalf of domestic companies, and a failure to address IP theft and infringement. The App Association submits the following comments to outline potential violations of China's WTO commitments:

Technology and intellectual property transfer requirements as a condition for market access: During its accession to the WTO, China committed to not make foreign direct investment and market access opportunities dependent upon technology transfer requirements. Unfortunately, such practices continue to this day. We are aware of instances of joint venture requirements, foreign equity limitations, ambiguous regulations and regulatory approval processes, and other means (such as source code

"escrowing") that force foreign companies to transfer IP to access the Chinese market. These practices are a present and ongoing concern for our members, and likely constitute violations of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Trade-Related Investment Measures (TRIMs).

Using standards and certifications to create barriers to trade: China has notably been operating consistent with its "China Standards 2035" strategy, which has the stated goal of setting global standards in emerging technologies such as artificial intelligence (AI), 5G, the Internet of Things (IoT), and advanced manufacturing systems.[4] The strategy elaborates on China's intention to utilize "indigenous" (i.e., China-specific) technical standards to the detriment of "foreign" companies, most notably in the information and communications technology (ICT) sector. For example, this indigenous innovation policy has been implemented through standard-setting organizations (including those called "social organizations" by the Chinese government) which are closed off to companies that are not headquartered in China. Such standard-setting organizations then develop technical standards that are written into Chinese law, requiring those desiring to enter the Chinese market to attain a certification approval to the same technical standard. Many times, such standards are developed in parallel to technologies standardized through open and international standard-setting organizations. China pursues indigenous technology standards because it seems to believe that China's domestic producers will gain an advantage over foreign competitors and the royalties Chinese firms pay for foreign technologies will be reduced.[5] China is certainly within its right to develop a strategy to influence standards development in a way that is advantageous to its companies. However, China is not entitled to develop discriminatory technology standards to preclude foreign companies from "equitably participating in domestic standards-setting processes, or to otherwise contravene principles for the development of international standards identified in the WTO's Technical Barriers to Trade agreement.[6]

USTR has already recognized such practices in prior Section 421 reports, specifically in the ICT sector, and the App Association fears they will be extended to new IoT technologies poised to revolutionize economic sectors. Already, China has put forward

[4] Alexander Chipman Koty, "What is the China Standards 2035 Plan and How Will it Impact Emerging Industries?" *China Briefing* by Dezan, Shira, and Associates, July 2, 2020, https://www.china-briefing.com/news/what-is-china-standards-2035-plan-how-will-it-impact-emerging-technologies-what-is-link-made-in-china-2025-goals/.

[5] Id.

[6] Stephen Ezell, "False Promises II: The Continuing Gap Between China's WTO Commitments and Its Practices," (July 26, 2021), https://itif.org/publications/2021/07/26/false-promises-ii-continuing-gap-between-chinas-wto-commitments-and-its.

regulations regarding critical and emerging technologies such as artificial intelligence[7] which very likely present technical barriers to trade, and which should be documented by USTR it in 421 report.

Intellectual property in China: Theft and infringement of IP has grown exponentially in recent years and often originates in China. China's harmful practices put our members' businesses and the jobs they create at serious risk– a single occurrence can represent an "end-of-life" scenario. Both criminals and government-backed hackers based in China are a demonstrated and well-known risk to our members in the digital economy, and the Center for International and Strategic Studies has described China's behavior as "long-running state espionage programs targeting Western firms and research centers" that has carried over into cyberspace.[8] Numerous USTR National Trade Estimate (NTE) reports have detailed how actors affiliated with the Chinese Government and the Chinese military have infiltrated the computer systems of U.S. companies, stealing terabytes of data, including the companies' proprietary information and IP, for the purpose of providing commercial advantages to Chinese enterprises. China appropriately remains on USTR's Priority Watch List of countries committing the most extensive IP rights infringements.[9] We support investigations into unfair cloud computing-related and other digital trade barriers, where China has intentionally disenfranchised U.S. firms.[10] Furthermore, we urge USTR to address intellectual property theft and infringement originating from China in violation of WTO TRIPS to be addressed in the Section 421 report. When addressing intellectual property in the Section 421 report, we strongly urge USTR to use precise language because copyrights, trademarks, patents, and trade secrets each represent distinct intellectual property rights, particularly in the licensing context. Further, with regard to patents, we address both (1) intellectual property licensing generally and then (2) the unique case of standard-essential patent licensing.

First, we fully support strong and enforceable IP rights for U.S. companies and condemn government policies that seek to diminish those rights to hinder market entry. To the extent these policies are used by the Chinese government, we urge USTR to investigate and document them to determine its next steps. One of the most problematic Chinese policies is the application of the controversial "essential facilities" doctrine to IP

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[7] China has proposed for finalized a range of measures to address various aspects of AI, including its Algorithm Recommendation Regulation (focused on the use of algorithm recommendation technologies to provide internet information services in China; its Deep Synthesis Regulation, focused on the use of deep synthesis technologies, a subset of generative AI technologies, to provide internet information services in China; its Ethical Review Measure, focused on the ethical review of, among others, the research and development of AI technologies in China; and its Generative AI Regulation, which more broadly regulates the development and use of all generative AI technologies to provide services in China.

[8] Jim Lewis, "Learning the Superior Techniques of the Barbarians," Center for International and Strategic Studies.

[9] https://ustr.gov/sites/default/files/IssueAreas/IP/2022%20Special%20301%20Report.pdf

[10] Stephen Ezell, "Hearing on U.S.-China Innovation, Technology, and Intellectual Property Concern," (April 14, 2022), 15, https://www2.itif.org/2022-us-china-innovation-tech-ip.pdf.

in the State Administration for Industry and Commerce's (SAIC)[11] Rules on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition (IP Abuse Rules), which took effect on August 1, 2015, and were later incorporated wholesale into China's State Administration for Market Regulation (SAMR) Provisions Prohibiting the Abuse of IPR to Eliminate or Restrict Competition, that were most recently updated in 2023.[12] These rules prohibit the preclusion or restriction of competition without justifiable reasons by refusing to license others to use, under reasonable terms, its intellectual property which is an essential facility in production and operation.

The App Association does not support the notion that competitors should have access to regular patents simply because they cannot compete without such access, even in the rare cases where there is little damage to the IP holder, or consumer interests are allegedly harmed by lack of competition. Application of this provision would seriously undermine the fundamental right to exclude others from using one's intellectual property, and thus, impact incentives to innovate in the long term. Under this provision, U.S. innovators, particularly those with operations in China, are vulnerable given the significant discretion vested in SAMR to balance the necessary factors to determine the issuance of a compulsory license. The App Association encourages USTR to include such practices in its Section 421 report in the context of the WTO TRIPS.

The App Association notes the critical differences between *regular* patents and standard-essential patents (SEPs), which must be considered separately. Generally, seamless interconnectivity is made possible by technological standards, like Wi-Fi, LTE, and Bluetooth. Companies often collaborate to develop these standards by contributing their patented technologies. These technological standards, which are built through an open and consensus-based process, bring immense value to consumers by promoting interoperability while enabling healthy competition between innovators. When a patent holder lends its patented technology to a standard, it can result in a clear path to royalties in a market that likely would not have existed without the wide adoption of the standard. To balance this potential with the need to access the patents that underlie the standard, many standards development organizations (SDOs) require patent holders on standardized technologies to license their patents on fair, reasonable, and non-discriminatory (FRAND) terms. FRAND commitments prevent the owners of SEPs, the patents needed to implement a standard, from exploiting market power that results from the broad adoption of a standard. Once patented technologies are incorporated into a standard, manufacturers are compelled to use them to maintain product compatibility. In exchange for making a voluntary FRAND commitment with an SDO, SEP holders can obtain reasonable royalties from manufacturers producing products compliant with the standard, who may not have existed absent the standard. Without a FRAND

[11] SAIC has since been merged into the State Administration for Market Regulation.

[12] https://www.samr.gov.cn/zw/zfxxgk/fdzdgknr/fgs/art/2023/art_e155397fbe5c4c05ad3c1838c1322ad2.html .

commitment, SEP holders would have the same power as a monopolist that faces no competition.

In line with our members' core interests in this area, the App Association has advocated for the following consensus principles to prevent patent "hold-up" and anti-competitive conduct:

> • **Fair and Reasonable to All** — A holder of a SEP subject to a FRAND commitment must license such SEPs on FRAND terms to all companies, organizations, and individuals who wish to use the standard.
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> • **Injunctions Available Only in Limited Circumstances —** Injunctions and other exclusionary remedies should not be sought by SEP holders, except in limited circumstances. Anyone wishing to use the standard is always entitled to assert claims and defenses.
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> • **FRAND Promise Extends if Transferred —** If a FRAND-encumbered SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.
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> • **No Forced Licensing —** While some licensees may wish to get broader licenses, the patent holder should not require anyone wishing to use the standard to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed, or a patent that is not essential to the standard.
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> • **FRAND Royalties —** A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard. The rate cannot be assessed in a vacuum that ignores the portion in which the SEP is substantially practiced or royalty rates from other SEPs required to use the standard.

Specific to China and SEPs, the App Association acknowledges that SAMR has also provided the following in its Guidelines:

> In exercise of intellectual property rights, no business operator may preclude or restrict competition by formulation or implementation of any standard (including mandatory requirements of national technical specification, the same below).
>
> In exercise of intellectual property rights, no business operator that holds a dominant market position may engage in the following activities to preclude or restrict competition without justifiable reasons during formulation or implementation of any standard:
>
> (2) In participating in formulation of a standard, the business operator intentionally avoids disclosing the information in respect of its right(s) to the standard formulating organization or explicitly waives its right(s), but claims

for its patent right(s) against the implementer(s) of such standard after finding out that such standard involves its patent(s).

(2) After its patent becomes a standard-essential patent, the business operator precludes or restricts competition by refusing to license, tie-in sale, or attaching other unreasonable conditions upon any transaction, in violation of the principles of fairness, reasonableness, and non-discrimination.

For the purpose hereof, a "standard-essential patent" refers to a patent that is essential to the implementation of such standard.

In the past, SAMR (and its predecessors) have attempted to finalize policies that would have instructed Chinese-backed standardization bodies to lower or undermine royalty payments of patents without differentiating between FRAND-encumbered SEPs and other patents. With assistance from the international community, such efforts have been thwarted. Today, SAMR appropriately recognizes that it may be an abuse of dominance for SEP holders to eliminate or restrict competition, "such as by refusing to license, tying or imposing other unreasonable trading terms, in violation of fair, reasonable, and non-discriminatory principle." While an official translation is not available, further guidance issued by the Chinese government since appears to be consistent with this approach.[13] The App Association, therefore, does not believe that inclusion of the SAMR's rules addressing SEPs constitutes a WTO violation (in contrast to the SAMR's rules discussed above that require a patent holder to give competitors access to the former's "essential" patents). We additionally commend SAMR for taking positive and significant steps to investigate into patent pool practices that do not align with its Anti-Monopoly Law, including evidenced anticompetitive practices by Avanci in the automotive industry.[14]

In contrast to its policies on patents generally, SAMR's treatment of FRAND-committed SEPs is consistent with an established consensus on the meaning and effect of FRAND commitments. We strongly urge USTR to ensure that it does not conflate general patent licensing issues with the unique set of issues—and global competition law consensus—specific to standard-essential patents.

China's Use of Antitrust Laws: The App Association believes USTR should, in the context of China's WTO commitments, remain concerned with China's antitrust laws being used as a means to target foreign firms which USTR has already documented

[13] For example, the China Academy of Information and Communications Technology (CAICT) has published guidelines on SEP licensing related to the automotive industry. *See* https://mp.weixin.qq.com/s/gGFxKZfXxl6MP9XO_sWmZg.

[14] *See* Zhong Chun, A deep dive into China's three-letters-one-notice system as compliance challenges emerge for patent pools, GCR (Aug. 22, 2024), https://globalcompetitionreview.com/hub/sepfrand-hub/2023/article/deep-divechinas-three-letters-one-notice-system-compliance-challenges-emerge-patent-pools; *see also* Carrier, Michael A. and Scarpelli, Brian and Nair, Priya, Admissions Confirm Avanci's Rigged Game (September 03, 2024). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4945572.

and addressed. China's activities justified under antimonopoly laws often contradict China's commitments under the WTO, including in relation to IP licensing in violation of TRIPS Article 40 Section 8, and in violation of Article 40 which invokes other standards in TRIPS, such as due process ("making decisions on the merits," "without undue delay," "based only on evidence," "with an opportunity for review," "with the right to written notice," and "the right to be represented by independent legal counsel").[15] In addition, China's antimonopoly laws justify Chinese court practices, such as extra-territorial antisuit injunctions, likely in violation to China's commitment to TRIPS Articles 1.1, 28.1, 28.2, 41.1, 44.1, 63.1, and 63.3. We encourage USTR to explore and address China's use of antitrust laws in its Section 421 report.

Encryption, Cybersecurity, and Privacy Laws: Small app businesses depend on customer trust to grow and create more jobs, an endeavor that can only be maintained through the use of the strongest technical protection mechanisms (TPMs) available, including encryption. In cross-sector and sector-specific contexts, the Chinese government continues to threaten the ability to utilize TPMs, primarily encryption. Not only do these requirements jeopardize our members' ability to protect their IPR, but they also threaten the integrity and security of the digital economy.

More broadly, numerous policies in place today or proposed in China create significant market access issues for App Association members who all rely on IPR. Such measures include restrictions on cross-border data flows and data localization requirements effected through China's Cybersecurity Law (CSL); vague restrictions and requirements placed on "network providers" with further issues created through standards and measures developed by the Cybersecurity Administration of China pursuant to the CSL; source code disclosure mandates; and foreign direct investment restrictions.

China's encryption rules and cybersecurity laws should be monitored by the USTR and included in the report, including with respect to China's Commercial Encryption Product Certification Catalogue and the Commercial Encryption Certification Measures, its encryption laws, its cybersecurity law, and its privacy laws, all of which impose tough regulations and requirements inconsistent with the App Association's priorities discussed above and unreasonably prevent market access for American companies seeking to do business in China. Through these laws, China notably enforces onerous data localization requirements and uses overly vague language when outlining important provisions (such as when Chinese law enforcement bodies can access a business's data or servers or how frequently a business must perform demanding safety assessments). Legal certainty is vital to app developers' operations and their ability to maintain their customers' trust in the protection of their data. In addition to creating obligations that are often infeasible for our members, vague laws such as China's Cybersecurity Law leave businesses without

[15] Mark Cohen, "RCEP And Phase 1: Strange Bedfellows in IP," *China IPR*, December 3, 2020, https://chinaipr.com/2020/12/03/rcep-and-phase-1-strange-bedfellows-in-ip/; World Trade Organization, "Agreement on Trade-related Aspects of Intellectual Property Rights," https://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

clear guidelines about how the law will be applied, jeopardizes American businesses' potential to succeed in China's important market.

The App Association continues to advocate on behalf of innovative American app developers who actively, or look to, conduct business in China. We have opposed data localization requirements in written comments and have identified numerous areas where China's law uses overly prescriptive and technically and/or economically infeasible mandates to address public safety goals.

The App Association urges China's actions with respect to encryption, cybersecurity, and privacy be addressed in the Section 421 report.

IV. Conclusion

The App Association appreciates the opportunity to submit these comments to USTR, and we commit to work with all stakeholders to address the above concerns to create a prosperous U.S. economy.

Sincerely,

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