

March 18, 2021

The Honorable Joe Manchin, Chairman
Senate Committee on Energy and Natural Resources
304 Dirksen Senate Office Building
Washington, District of Columbia 20510

The Honorable John Barrasso, Ranking Member
Senate Committee on Energy and Natural Resources
307 Dirksen Senate Office Building
Washington, District of Columbia 20510

Dear Chairman Manchin and Ranking Member Barrasso,

We applaud you for holding a full-Committee hearing regarding innovative transportation technologies “with a focus on solutions that decrease emissions, reduce our reliance on foreign supply chains, and increase manufacturing in the United States.”¹ As you contemplate Congress’ role in enabling and supporting tech-driven advancements in transportation and energy distribution, we urge you to prioritize safeguarding competition and consumers against anticompetitive conduct involving technical standards. Across committee jurisdictions in the Senate, there is clear bipartisan interest in more aggressive assertion of competition law where warranted, and standard-essential patent (SEP) abuse is one such category of activities that could seriously harm innovation in the transportation sector.

In your respective states and districts, the ability for innovators to create jobs and produce cutting-edge products and services in an increasingly broad set of industry verticals—including in advanced manufacturing, transportation, environmental monitoring and remediation, and energy applications and supply chains—depends on strong technical standards like USB, Wi-Fi, 4G, and 5G. However, in order to safeguard the continued growth and success of these key industries and to protect the consumers of their end products and services (including state and local governments purchasing new transportation technologies and many small and medium manufacturers), Congress must ensure that the law effectively prevents SEP licensing abuses. Incorporating a patent declared as essential into a standard typically confers market power on a SEP owner, so SEP owners make voluntary commitments pursuant to those declarations to license those SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms.² These commitments balance the market power SEP owners obtain with the need for innovators to license the patented inventions essential to use the standard. When kept, FRAND commitments prevent anticompetitive licensing behavior. But some SEP owners break these FRAND promises and engage in activities that harm competition and consumers by

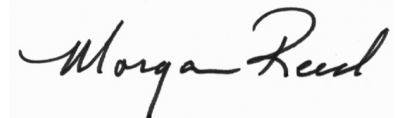
¹ Press Release, “Full Committee Hearing on Transportation Technologies,” Senate Comm. on Energy and Nat. Resources (Mar. 2021), *available at* <https://www.energy.senate.gov/hearings/2021/3/full-committee-hearing-on-transportation-technologies>.

² See Brian T. Yeh, “Availability of Injunctive Relief for Standard-Essential Patent Holders,” CONG. RESEARCH. SERV. Summary (Sept. 7, 2012), *available at* https://www.everycrsreport.com/files/20120907_R42705_9c71ac36b1c0030af0d1bd97b53e8b7ba6fd3e73.pdf.

increasing prices, reducing the quality and variety of products and services, and reducing innovation.³ Breaking these promises implicates antitrust law, in addition to other sources of law.

Unfortunately, as internet connectivity and computing capacity revolutionize emerging and established industries, from auto manufacturing to connected waste management services, stakeholders in those industries are discovering that SEP abuse accompanies the arrival of these capabilities. As overly-aggressive licensors continue to systematically chip away at the applicability of antitrust law to their harmful licensing activities, the Senate Energy and Natural Resources Committee could play an important role in ensuring that federal law and policy protects innovators and consumers from this conduct in the transportation sector. We urge you to closely examine what policy levers are available, from oversight to legislative opportunities and agency guidance, to create changes where necessary to protect consumers and promote innovation in the environment, energy, and transportation sectors. We stand ready to assist in these endeavors and hope that you will draw on our expertise and perspective as you consider this as part of your broader antitrust and consumer protection agendas.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is fluid and cursive, with the first name "Morgan" and last name "Reed" clearly distinguishable.

Morgan W. Reed
President

ACT | The App Association

³ See Findings of Fact and Conclusions of Law, *Fed. Trade Comm'n v. Qualcomm, Inc.*, Case No. 17-CV-00220-LHK (N. D. Cal., 2019), available at https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2019/05/2019-05-21-Findings-dckt-1490_0.pdf; *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), available at <https://caselaw.findlaw.com/us-3rd-circuit/1069408.html>.