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 notice for written submission on certain issues under review and on remedy, the public interest, and bonding in the investigation 337-TA-1380, titled *Certain Video Capable Electronic Devices, Including Computers, Streaming Devices, Televisions, and Components and Modules Thereof*, addressing the recommended determination issued on December 20, 2024 per 89 FR 4844.

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.

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

We address certain issues below to inform the Commission's review of the recommended determination in investigation 337-TA-1380, titled *Certain Video Capable Electronic Devices, Including Computers, Streaming Devices, Televisions, and Components and Modules Thereof.* As noted in our previous comments to this investigation, we strongly urge the USITC to act consistent with, and to build upon, existing global-consensus guidance providing clarity on what a fair, reasonable, and non-discriminatory (F/RAND) commitment in the standard-essential patent (SEP) context means, and the effects of F/RAND abuse on competition and innovation, reflected in the United States and in other key markets.[2]

To address the Commission's certain question number five (5), a F/RAND licensing commitment should be considered as both legal and equitable defenses and as part of the Commission's consideration of the public interest factors. A Complainant that asserts a SEP subject to F/RAND licensing terms is appropriately limited in their ability to seek an exclusion order and/or cease and desist order based on infringement of the patent to rare circumstances where monetary remedies are not available. Breach of the voluntary FRAND commitment made on SEPs 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 areas.

Technical standards are developed based on industry consensus and facilitated for the purpose of providing innovators with an alternative path to new and patentable products. The F/RAND licensing obligation has been adopted by many standard-setting organizations (SSOs)

[2] 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.

to address the inherent competition law issues in SEP licensing and serves as an irrevocable constraint on the abuse of market power associated with SEPs. U.S. courts and agencies have both acknowledged the antitrust issues rooted from SEP holders manipulating or avoiding their F/RAND obligation altogether.[3] We reiterate from our previous comments to this investigation that it is critical that the F/RAND commitment receives 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."[4]

To address the Commission's certain question number six (6), if a violation is found, the Commission should consider the parties' F/RAND obligation and licensing attempts across all public interest factors. 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.[5] SEP holders that only support a non-critical part of the implementing device should not be able to exclude the whole product from a market. 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

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[3] *See In re Robert Bosch GmbH*, 2012 WL 5944820, at *3-4 (FTC Nov. 21, 2012); *see also Microsoft v. Motorola*, 795 F. 3d 1024, 1052 (9th Cir. 2015) (the court explains that the voluntary F/RAND commitment "must be construed in the public interest because it is crafted for the public interest," as it is designed to protect against the competitive abuses and consumer harm that standardization can otherwise enable.)

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

[5] 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.

make the plaintiff whole, representing a better solution to serve the public interest.[6] A significant public interest factor is considering United States consumers, who are affected by the decrease in quality and increase in costs of daily and critical products brought by exclusion orders. In determining whether SEP licenses comply with their F/RAND obligation and in analyzing public interest factors, the Commission should consider the valuation methodologies used by the SEP holder to arrive at a claimed F/RAND rate; the basic documentation that the SEP holder provides to all the potential licensee to assess the patent in question's ownership and essentiality to the standard; and comparable licensing terms offered by the SEP holder to similarly situated potential licensees.

To address the Commission's certain question ten (10), the resolution of the Amazon-Nokia dispute in the UK court may provide some relevant evidence. The actions of the parties may be indicative of their compliance with the F/RAND licensing obligations. For example, Amazon sought from the UK High Court an interim license while awaiting a final RAND determination by the court. Amazon's willingness to take a court determined F/RAND rate is indicative of their willingness to enter into a RAND license with Nokia (i.e., Amazon is a willing licensee).[7] Nokia's opposition to a court-determined interim license is indicative of their lack of willingness to accept any rate outside their initially offered rate, for which compliance with the F/RAND obligation is being litigated.

The App Association reiterates that the USITC should fully consider the harmful impact that issuing an exclusion order in this case would have considering the SEP licensing landscape, U.S. competitiveness, and job creation in emerging IoT sectors. The USITC must consider the

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[6] *eBay Inc. v. MercExchange, L.L.C*, 547 U.S. 388, 396 (2006).
[7] *Amazon Digital UK Ltd. v. Nokia Corp.*, No. CA-2024-002342, (High Court of Justice, 2024).

F/RAND licensing commitment to properly analyze the public interest factors and if a remedy from the USITC is appropriate to support American businesses and U.S. consumers.

Respectfully submitted,

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