January 27, 2025

Daniel Lee
Assistant U.S. Trade Representative for Innovation and Intellectual Property
Office of the United States Trade Representative
Executive Office of the President
600 17th Street NW
Washington, District of Columbia 20508

RE: Multi-stakeholder Comments, *Request for Comments and Notice of a Public Hearing Regarding the 2025 Special 301 Review* (USTR-2024-0023; 89 FR 97161)

Dear Mr. Lee:

The undersigned organizations and companies represent a diverse group of technology innovators, leading participants in technology standardization, and creators of products that utilize standardized technologies, all powering U.S. leadership in the global economy. We write to provide our shared views to the U.S. Trade Representative (USTR) and the Special 301 Subcommittee of the Trade Policy Staff Committee (TPSC) on countries that deny adequate and effective protection of intellectual property (IP) rights or deny fair and equitable market access to U.S. persons who rely on IP protections. We all share deep concerns with well-documented standard-essential patent (SEP) licensing abuses that are enabled by numerous foreign countries that should be included in the USTR's next Section 301 Report for denying adequate and effective protection of IP rights and denying fair and equitable market access. As we discuss below, these practices also impact the advancement and security of U.S. supply chains in trade negotiations, enforcement, and other initiatives.

As background, we build and rely on voluntary standards to provide means for product interoperability, quality, and safety. Such standards provide a foundation for competition and innovation and are developed with the clear intent that standardized solutions are able to be used by any innovator seeking to do so. When patented technologies are voluntarily contributed to a technical standard, and exercising the patent is critical to putting the standard into practice, the holder of that patent is positioned to abuse and even lock out innovators of standards-based markets, ultimately harming competition. To check this abuse, standards setting organizations ask that those contributing patents volunteer to licensing their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms. Unfortunately, a growing number of SEP holders are making FRAND commitments that are widely relied upon, only to flagrantly disregard them later. Across verticals that are enabled by standards, SEP abuses are inhibiting innovation, disrupting supply chains, and harming both competition and consumers.

Increasingly, SEP licensors are leveraging foreign courts to litigate alleged infringements and royalty terms for U.S. patents that are SEPs in order to subject companies operating in the U.S. to royalties for their domestic activities at levels far exceeding those that U.S. courts would deem appropriate under established law. While a foreign court may have the jurisdiction to issue injunctive relief for patents issued in its own territory, courts in vital markets, from Germany, to UPC to Brazil to China, are directly or in effect imposing global SEP licenses on pain of a national injunction.

The awarding of these injunctions by foreign courts starkly departs from the U.S. courts' standard for injunctive relief in *eBay v. MerchExchange* where courts issue reasonable royalties when monetary relief is adequate—such as where the patent holder has made a voluntary FRAND commitment—and available.[1] Ultimately, this overreach by foreign courts both denies adequate and effective protection of IP rights as well as fair and equitable market access, resulting in American businesses being forced to either leave that foreign market entirely or agree to licensing terms set by foreign courts for products made, sold, or purchased in the United States.

German courts have been particularly pernicious in this regard, accounting for almost 80% of cellular SEP injunctions globally in recent years despite the German patent office issuing less than 5% of cellular SEPs. Most notably, while German courts condition the acceptance of a global license in order to prevent a national injunction, German courts engage in no substantive effort to verify whether the terms being imposed globally are actually FRAND or inquire into the validity of the SEP(s) in question prior to the awarding of an injunction. U.S. auto manufacturers have been particularly impacted by these tactics and have been coerced into global licenses for cellular standards at rates several times greater than that charged for near identical technology used in smartphones.

Additionally, foreign courts' practice of setting rates for U.S. patents likely violates the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which prohibits signatories from treating U.S. patents as "dependent" on foreign patents, even when the foreign patents cover the same invention. This provision protects national sovereignty and ensures that each nation can appropriately tailor its own patent laws including with respect to validity, royalties, exhaustion, and infringement. Yet, in giving American companies a Hobson's choice between a national injunction and acceptance of SEP licensing terms on a global basis for nationally issued patents, foreign courts imposing global FRAND determinations on US patents effectively assume that the defendant also infringes corresponding U.S. patents, that those patents are essential to the standard, valid and enforceable, and that no equitable defenses against infringement apply.

Equally important is the disruptive impact of SEP licensor abuses on U.S. supply chains for critical and emerging technologies, presenting an economic and national security imperative that USTR can and should address, both within and outside of the Special 301 Report context. Foreign courts' overreach in SEP cases have already disrupted key supply chains in telecommunications, information technology, and automotive sectors and are beginning to impact further Internet of Things verticals.[2]

Initially, we strongly encourage USTR to include the harmful practices by foreign courts in China, Germany, and Brazil described above in its Special 301 Report to Congress. Recognition

[1] *eBay Inc. v. MercExchange, L.L.C*, 547 U.S. 388, 390 (2006).

[2] 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 beyond, 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 athttps://www.ntia.doc.gov/files/ntia/publications/iot_green_paper_01122017.pdf.

of this harmful practice is a critical first step in supporting future action from USTR to address this harmful trend through bilateral and multilateral discussions and fora.

We appreciate the opportunity to provide our shared viewpoints as a contribution to the USTR's Special 301 Review and invite the opportunity to further assist the TPSC moving forward.

Sincerely,

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Engine

HP, Inc.

FMC, Inc.

Save Our Standards