

June 5, 2023

Office of Science and Technology Policy  
1650 Pennsylvania Avenue NW  
Washington, District of Columbia 20502

**RE: Comments of ACT | The App Association to the Office of Science and Technology Policy on its Request for Information re NSPM 33 Research Security Programs Standard Requirement**

ACT | The App Association (App Association) appreciates the opportunity to provide input to the Office of Science and Technology Policy (OSTP) on the draft Research Security Programs Standard Requirement developed in response to National Security Presidential Memorandum 33 on National Security Strategy for United States Government-Supported Research and Development (Standard Requirement).<sup>1</sup>

The App Association is a global trade association for small and medium-sized technology companies. 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.<sup>2</sup> The App Association supports the National Science and Technology Council's goals outlined in the Guidance for Implementing National Security Presidential Memorandum 33 (NSPM-33), which urges OSTP and other federal agencies to “coordinate activities to protect federally-funded research and development from foreign government interference, and outreach to the United States scientific and academic communities to enhance awareness of risks to research security and Federal Government actions to address these risks.”<sup>3</sup>

Now more than ever, the small business and startup innovators we represent rely on clear and consistent policies that foster a trustworthy and secure environment to reach millions of potential users so they can continue to grow their businesses and create new jobs. The App Association applauds the Administration's efforts to ensure the United States leads the world in technologies that are critical to our economic prosperity and

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<sup>1</sup> <https://www.federalregister.gov/documents/2023/03/07/2023-04660/request-for-information-nspm-33-research-security-programs-standard-requirement>

<sup>2</sup> ACT | The App Association, State of the U.S. App Economy: 2020 (7th Edition) (Apr. 2020), available at <https://actonline.org/wp-content/uploads/2020-App-economy-Report.pdf>

<sup>3</sup> <https://www.whitehouse.gov/wp-content/uploads/2022/01/010422-NSPM-33-Implementation-Guidance.pdf>

national cybersecurity, by prioritizing equity, clarity, feasibility, burden, and compliance in the Standard Requirement.

Noting our general support for the goals of the Standard Requirement, we offer the following recommendations:

- **Alignment with Other Leading Federal Policies:** The implementation of the Standard Requirement should align with other federal efforts to maintain the security of research and development efforts, such as the National Institute of Standards and Technology's (NIST) Risk Management Framework, a policy developed in close collaboration with the private sector, academia, and others for voluntary use with the goal of improving the ability to incorporate trustworthiness considerations into the design, development, use, and evaluation of products, services, and systems.<sup>4</sup> The implementation of the Standard Requirement should also align with other leading guidance addressing risk mitigation, like NIST's Cybersecurity Framework, Privacy Framework, and AI Risk Management Framework.
- **Require Agencies to Advance Thoughtful Design Principles Use Cases:** The implementation of the Standard Requirement should be informed by real-world workflows, human-centered design and usability principles, and end-user needs. Research and development system solutions should facilitate a transition to changes in the delivery of goods and services that benefit consumers and businesses. The design, development, and success of technology should leverage collaboration and dialogue among users, technology developers, and other stakeholders to have all perspectives reflected in solutions. As this concept must run across sectors and use cases, OSTP should continue to incorporate guidance for agencies to advance thoughtful design principles.
- **Require Agencies to Advance Ethics and Equity in Research and Development:** The success of all innovation requires responsible and ethical processes in research and development processes. An agency's approach will need to promote many of the existing and emerging ethical norms for broader adherence by technologists, innovators, computer scientists, and those who use such systems. The implementation of the Standard Requirement should:
  - Ensure that research and development align with all relevant ethical obligations, from design to development to use.
  - Encourage the development of new ethical guidelines to address emerging issues as needed.
  - Maintain consistency with international conventions on human rights.
  - Ensure that research and development is inclusive such that solutions benefit consumers across various socioeconomic status, age, gender, geographic origin, and other groupings.

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<sup>4</sup> <https://csrc.nist.gov/publications/detail/sp/800-37/rev-2/final>

- Reflect that digital tools may reveal extremely sensitive and private information about a user and ensure that laws protect such information from being used to discriminate against certain consumers.
- **Prioritizing Disclosure and Transparency:** The Administration should further prioritize clarity in all disclosures when implementing the Standard Requirement. Providers, technology developers, vendors, and other stakeholders will all benefit from understanding the distribution of risk and liability in building, testing, and using digital tools. To minimize miscommunication and streamline financial or administrative burden, the implementation of the Standard Requirement should directly address liability to ensure the appropriate distribution and mitigation of risk and liability (i.e., those in the value chain with the ability to minimize risks based on their knowledge and ability to mitigate should have appropriate incentives to do so). Furthermore, OSTP should require that federal agency policies require developing, offering, or testing systems to provide truthful and easy- to-understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the digital solution.
- **Support the Development of, and Access to, Open Standards Needed to Drive U.S. Leadership:** The implementation of the Standard Requirement should support the development and use of voluntary consensus standards that promote innovation. The App Association strongly encourages the implementation of the Standard Requirement to be informed by public-private collaboration on standardization by enabling key U.S.-based standard-setting organizations (SSOs) such as IEEE to grow and thrive. The U.S. government can support such organizations through pro-innovation policies that encourage private sector research and development of innovations and the development of related standards.

It is critical that the United States should ensure that such standards are accessible to innovators by promoting a balanced approach to standard-essential patent (SEP) licensing. Technical standards, built on contributions through an open and consensus-based process, bring immense value to consumers by promoting interoperability while enabling healthy competition between innovators; these standards often include patented technology. When an innovator gives its patented technology to a standard, this can represent a clear path to reward in the form of royalties from a market that likely would not have existed without the standard being widely adopted. To balance this potential with the need for access to the patents that underlie the standard, many SSOs require holders of patents on standardized technologies to license their patents on fair, reasonable, and non-discriminatory (FRAND) terms. FRAND commitments prevent the owners of patents used to implement the standard from exploiting the unearned market power that they otherwise would gain due to the broad adoption of a

standard. Once patented technologies incorporate into standards, it compels manufacturers to use them to maintain product compatibility. In exchange for making a voluntary FRAND commitment with an SSO, SEP holders gain the ability to obtain reasonable royalties from numerous standard implementers that might not have existed absent the standard. Without the constraint of a FRAND commitment, SEP holders would have the same power as a monopolist that faces no competition.

Unfortunately, several owners of FRAND-committed SEPs are flagrantly abusing their unique position by reneging on those promises with unfair, unreasonable, or discriminatory licensing practices. These practices, under close examination by antitrust and other regulators in many jurisdictions, not only threaten healthy competition and unbalance the standards system but also influence the viability of new markets. This amplifies the negative effects on small businesses because they can neither afford years of litigation to fight for reasonable royalties nor risk facing an injunction if they refuse a license that is not FRAND compliant.

Patent policies developed by SSOs today will directly change the way we work, live, and play for decades to come. SSOs vary widely in terms of their memberships, the industries, and products they cover, and the procedures for establishing standards. In part due to the convergence associated with the rise of IoT, each SSO will need the ability to tailor its intellectual property policy for its particular requirements and membership. The App Association believes that some variation in patent policies among SSOs is necessary and that the U.S. government should not prescribe detailed requirements that all SSOs must implement. At the same time, however, as evidenced by judicial cases and regulatory guidance, basic principles underlie the FRAND commitment and serve to ensure that standard setting is pro-competitive and the terms of SEP licenses are in fact reasonable. Ideally, an SSO's intellectual property rights policy that requires SEP owners to make a FRAND commitment would include the following principles that prevent patent "hold-up" and anti-competitive conduct:

- **Fair and Reasonable to All** – A holder of a SEP subject to a FRAND license such SEP on fair, reasonable, and nondiscriminatory terms to all companies, organizations, and individuals who implement or wish to implement the standard.
- **Injunctions Available Only in Limited Circumstances** –SEP holders should not seek injunctions and other exclusionary remedies nor allow these remedies except in limited circumstances. The implementer or licensee is always entitled to assert claims and defenses.
- **FRAND Promise Extends if Transferred** – If there is a transfer of a FRAND-encumbered SEP, the FRAND commitments follow the SEP in that and all subsequent transfers.

- **No Forced Licensing** – While some licensees may wish to get broader licenses, the patent holder should not require implementers 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.
- **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, and 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 implement the standard.

We also note that several SSO intellectual property rights policies require SSO participants to disclose patents or patent applications that are or may be essential to a standard under development. Reasonable disclosure policies can help SSO participants evaluate whether technologies considered for standardization are covered by patents. Disclosure policies should not, however, require participants to search their patent portfolios as such requirements can be overly burdensome and expensive, effectively deterring participation in an SSO. In addition, FRAND policies that do not necessarily require disclosure, but specify requirements for licensing commitments for contributed technology, can accomplish many, if not all, of the purposes of disclosure requirements.

The U.S. Department of Justice (DOJ) already encouraged SSOs to define FRAND more clearly. For example, DOJ's former assistant attorney general Christine Varney explained that "clearer rules will allow for more informed participation and will enable participants to make more knowledgeable decisions regarding implementation of the standard. Clarity alone does not eliminate the possibility of hold-up...but it is a step in the right direction."<sup>5</sup> As another example, Renata Hesse, a previous head of the DOJ's Antitrust Division, provided important suggestions for SSOs to guard against SEP abuses that included at least three of the aforementioned principles.<sup>6</sup> The implementation of the Standard Requirement should be updated to advance open standards, consistent with OMB-A119 ("Federal Participation in the Development and Use of Voluntary

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<sup>5</sup> Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Innovation Through Patent and Antitrust Law and Policy, Remarks as Prepared for the Joint Workshop of the U.S. Patent and Trademark Office, the Federal Trade Comm'n, and the Dep't of Justice on the Intersection of Patent Policy and Competition Policy: Implications for Promoting Innovation 8 (May 26, 2010), available at <http://www.atrnet.gov/subdocs/2010/260101.htm>.

<sup>6</sup> Renata Hess, Deputy Assistant Attorney General, *Six 'Small' Proposals for SSOs Before Lunch*, Prepared for the ITU-T Patent Roundtable (October 10, 2012), available at <https://www.justice.gov/atr/speech/six-smallproposals-ssos-lunch>.

Consensus Standards and in Conformity Assessment Activities"),<sup>7</sup> open standards and access to open standards with respect to SEPs.

The App Association appreciates OSTP's consideration of the above views. We urge OSTP to contact the undersigned with any questions or ways that we can assist moving forward.

Sincerely,



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<sup>7</sup> [https://www.nist.gov/system/files/revise/circular\\_a-119\\_as\\_of\\_01-22-2016.pdf](https://www.nist.gov/system/files/revise/circular_a-119_as_of_01-22-2016.pdf).