

December 18, 2024

The Honorable Jim Jordan  
Chairman  
House Committee on the Judiciary  
Washington, District of Columbia 20515

The Honorable Jerrold Nadler  
Ranking Member  
House Committee on the Judiciary  
Washington, District of Columbia 20515

The Honorable Darrell Issa  
Chair  
House Committee on the Judiciary  
Subcommittee on Courts, Intellectual  
Property, and the Internet  
Washington, District of Columbia 20515

The Honorable Henry C. Johnson  
Ranking Member  
House Committee on the Judiciary  
Subcommittee Courts, Intellectual Property,  
and the Internet  
Washington, District of Columbia 20515

Dear Chairman Jordan, Ranking Member Nadler, Chair Issa, and Ranking Member Johnson:

Thank you for the opportunity to provide a statement for the record for the Subcommittee's December 18, 2024, hearing titled "IP and Strategic Competition with China: Part IV – Patents, Standards, and Lawfare." ACT | The App Association (the App Association) is the leading trade group representing small businesses in the app economy. Today, the App Association represents an ecosystem valued at approximately \$1.8 trillion and responsible for 6.1 million American jobs.<sup>1</sup> Our members are innovators that create the software bringing your smart devices to life. They also make all the connected devices that are revolutionizing healthcare, agriculture, public safety, financial services, and virtually all other industries. They propel the data-evolution of these industries and compete with each other and larger firms in a variety of ways, including on privacy and security protections.

The App Association is a member of the Save Our Standards (SOS) coalition of American innovators, small businesses, associations, academics, and consumer groups dedicated to reinforcing the voluntary fair, reasonable, and non-discriminatory (FRAND) licensing commitment made by standard-essential patent (SEP) holders and its important role in technical standards to enable competition and innovation that directly benefit consumers. SOS works to educate decision-makers and stakeholders on policies that allow all innovators to thrive through pro-competitive SEP licensing practices.

The United States has long maintained the world's strongest intellectual property (IP) system due to its emphasis on developing mechanisms that support innovation and foster competition and technological progress. However, this system is increasingly under threat from foreign actors, particularly those aligned with the Chinese government, who exploit weaknesses in U.S. SEP policy and antitrust enforcement.

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<sup>1</sup> ACT | The App Association, *State of the U.S. App Economy: 2023*, <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL-1.pdf>

**U.S. economic and national security are threatened by harmful SEP licensing practices perpetrated by foreign entities and their patent pools**

Technical standards provide an alternative path to modern invention that differs from the exclusivity of non-essential patents. The goal of establishing technical standards is to create an efficient and interoperable foundation for technology development that can be used by any industry participant who is willing and able to fairly compensate the relevant SEP holder. The SEP holder understands and agrees that by contributing to the standardization process, it cannot unduly exclude competitors from a standard past requiring a FRAND license.

Opportunistic SEP holders have distorted this system by taking advantage of SSO policies that have ambiguous definitions of FRAND and manipulating a fair licensing negotiation process by, for example, overcharging or refusing to license to certain entities in a supply chain. Since SSOs facilitate access to technical standards that touch various industries, these opportunistic SEP holders plague many verticals, always looking for the next market to extract additional and unrelated value for their SEP. The anticompetitive harms experienced in the SEP licensing ecosystem disrupt fair usage of technical standards that support efficient innovation.

It has become increasingly evident that foreign SEP holders, especially Chinese companies, have developed strategies to manipulate their position in technical standards through SEP licensing practices that extract billions of dollars out of the U.S. economy. These practices harm American businesses and consumers by disrupting mature supply chains and discouraging American competitiveness in critical technologies.

Companies such as Huawei, Nokia, Ericsson, and Abu Dhabi-backed Fortress Investment Group continue to use the U.S. courts, the U.S. International Trade Commission (ITC), and foreign courts against U.S. businesses that are locked-in to key technical standards (e.g., USB and Wi-Fi). Similarly, these entities have used foreign courts, including Chinese, Brazilian, Colombian, German, and the newly established European Union Unified Patent Court (UPC), to avoid public interest safeguards that *eBay* and Section 337 analyses ensure, enabling them to apply undue pressure to U.S. companies that have expressed willingness to conclude a SEP license on FRAND terms. German courts are particularly known to award injunctions prior to determining a patent's validity, making it a primary jurisdiction for SEP holders and their adversaries to litigate SEP disputes. Some of these foreign companies stack their SEPs for key technical standards in foreign patent pools in an attempt to shield pool members from their individual FRAND promises and disincentivize pool members from licensing outside the highly inflated pool royalty rate.

SEP licensing abuse is often supported by third-party litigation funding (TPLF), a mechanism used to abuse the patent process in the United States and internationally against U.S. companies. Non-practicing entities (NPEs), which are entities that acquire patents or patent rights but do not practice the patented inventions, initiate a majority of the abusive and frivolous patent infringement suits in the United States,<sup>2</sup> and many NPE suits are financially backed by unnamed investors hidden through shell corporations or wealth funds that may have

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<sup>2</sup> Love, Brian J. and Lefouili, Yassine and Helmers, Christian, *Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets* (November 8, 2020), 17, [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp\\_tse\\_1160.pdf/](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp_tse_1160.pdf/).

a real interest in the outcome of litigation.<sup>3</sup> TPLF has affected critical U.S. technology industries, including telecommunication, automotives, and semiconductors. Funders may be individual entities seeking economic gain or competing countries strategically undermining essential U.S. industries and U.S. national security. The availability of anonymous investment sources enables foreign bad actors to flood adjudicating bodies with potentially illegitimate claims. For example, Abu Dhabi-backed Fortress Investment Group has been identified numerous times as an undisclosed funder of patent holders initiating frivolous disputes in the United States.<sup>4</sup>

These tactics have enabled (and emboldened) foreign SEP holders to systematically abuse their dominant market position as a gatekeeper to the use of the standard to attain supra-FRAND terms (a practice known as “hold-up”<sup>5</sup>).

***The People’s Republic of China has empowered its domestic businesses to weaponize SEP licensing against American companies, including small businesses***

The People’s Republic of China (PRC) has showcased past behavior that demonstrates a deliberate pattern of weaponizing technical standards and intellectual property (IP) systems to disadvantage the American economy, national security, and American companies. For example, the PRC mandated the use of the WLAN Authentication and Privacy Infrastructure (WAPI) Chinese national standard to undermine the universally used Wi-Fi standard and blocked American companies from accessing Chinese markets while securing a strategic foothold for Chinese entities.<sup>6</sup>

This playbook is now being applied to SEPs, creating vulnerabilities that extend to U.S. national security. A growing number of companies—including those controlled by foreign adversaries, namely China—have turned SEP licensing into a business that, at its base, is predation of good faith American innovators and small companies who simply need to use standardized solutions to interoperate and compete. Unfortunately, many of their efforts have been successful. Today’s framework of SEP laws and policies, both in the United States and abroad, allow foreign adversaries and proxies holding key SEPs to abuse their market position by, for example, enabling the locking out of U.S. competitors from entering entire markets. Small businesses are regular targets of such SEP licensing abuses. For instance, in Q1 2020, small businesses represented 32 percent of patent defendants in SEP licensing infringement cases.<sup>7</sup>

SEP licensing abuses that have taken place in telecommunications markets for well over 20 years are now finding their way into new verticals where connectivity is being built into consumer and enterprise products, such connected healthcare, precision agriculture, and

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<sup>3</sup> See *In re Nimitz Technologies LLC*, No. 23-103 (Fed. Cir. 2022); see also <https://www.unifiedpatents.com/insights/2023/2/21/litigation-investment-entities-the-investors-behind-the-curtain>.

<sup>4</sup> <https://news.bloomberglaw.com/business-and-practice/fortress-billions-quietly-power-americas-biggest-legal-fights>.

<sup>5</sup> Lemley, Mark A. and Shapiro, Carl, Patent Holdup and Royalty Stacking. 85 Texas Law Review 1991 (2007).

<sup>6</sup> <https://actonline.org/2016/03/17/mobile-mythbusting-wifi-wapi-and-the-encryption-debate/>.

<sup>7</sup> <https://www.unifiedpatents.com/insights/portal-developer-updates-q1-2020>.

sustainability. Such unchecked practices already translate to limited availability and higher prices for Americans (to the benefit of foreign adversaries and their proxies).

SEP abuses also represent one of the most glaring vulnerabilities to U.S. supply chains for critical and emerging technologies, presenting an economic and national security imperative. As a prime example, SEP licensing abuses are occurring in automotive supply chains where some SEP holders in wireless communication standards refuse requests for FRAND licenses from reasonable and willing licensees. Instead, the SEP abusers are arbitrarily insisting on licenses from the end product (the vehicle) to extract unrelated value beyond the components that function from the SEP, leaving suppliers in supply chains unable to license their components and indemnify their customers against SEP infringement claims. The net result has been to introduce preventable uncertainties and disruptions to these supply chains, undercutting important safety and sustainability goals, as well as U.S. economic and national security interests. This result has forced manufacturers in mature supply chains, such as in the automotive industry, to revert to earlier versions of wireless communications standards (e.g., 3G or 4G for telematic control units) and limit the number of alternative suppliers they can choose from to support a resilient supply chain. Due to inaction by the Biden-Harris Administration, foreign adversaries and their proxies (such as state-controlled enterprises and strawman SEP pools) are well positioned to exploit and shut down U.S. supply chains.

Notably, courts in foreign markets are being leveraged to solidify controlling roles in critical U.S. supply chains. Disruptions to supply chains caused by SEP licensor abuse are being perpetuated by foreign courts, including in China, that have concluded that they can force a standards user to accept global FRAND terms on pain of a national injunction. The precedent set by such decisions has (1) emboldened Huawei to abuse their dominant market position in key telecommunication standards; and (2) encouraged other foreign SEP holders to similarly harm American economic and national security interests by excluding competitors and disrupting mature supply chains.

**Government-backed Chinese enterprise Huawei deploys strategic efforts to corner and exploit the market for SEPs in connectivity standards**

Founded in 1987, Huawei is a prominent company in the global telecommunications market for its sale of network equipment and devices, with demonstrated links to the Chinese government and military. Since 2000, Huawei's origins and behavior have given rise to serious national and economic security concerns for the U.S. government.<sup>8</sup> In 2019, the U.S. Department of Commerce added Huawei to its Entity List, a decision that effectively banned the company from buying parts and components from U.S. companies without U.S. government approval. As also noted by CRS, the first Trump Administration imposed, and the Biden Administration upheld, Huawei-related restrictions and tightened restrictions on sales of semiconductors for 5G devices.

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<https://crsreports.congress.gov/product/pdf/R/R47012/2#:~:text=For%20more%20than%20two%20decades,its%20expansion%20globally%2C%20and%20the>

Already holding more than 22,000 granted patents in the United States, Huawei has positioned itself as prominent aggressor against U.S. companies, including leading American telecommunications company Verizon. Notably, Huawei has transferred 766 3GPP-related patent assets to a new non-practicing entity that is publicly noting its intent to target U.S. companies.<sup>9</sup> Huawei is a long-time abuser of the standards system by way of anticompetitive SEP licensing practices leveraged directly by the SEP holder or through patent pools. Huawei has demonstrated its willingness to target and pack critical standards like 5G (where it is the clear leading holder of claimed SEPs), positioning itself to exert disproportionate control over significant industries that incorporate connectivity into products.

Huawei has been front and center for a many major international SEP disputes around the world, including the United States:

- Huawei has targeted **Tesla** in SEP lawsuits in the United Kingdom where it has sought to have the UK courts impose global terms (including for the United States), even though only 7 percent of the relevant patents were UK patents.<sup>10</sup>
- Since 2022, Huawei has sued the **Stellantis** automotive group (Fiat, Opel, Peugeot, and Citroën) in the German court system alleging SEP infringement, significantly disrupting automotive supply chains.<sup>11</sup> Auto manufacturer Continental has detailed the impacts of SEP abuses on the industry.<sup>12</sup>
- Huawei has utilized the Munich division of the EU's newly established Uniform Patent Court (UPC) to pressure American companies **NETGEAR** and **Amazon** into excessive licensing fees. The Munich division is particularly attractive to opportunistic SEP holders like Huawei for its tendency to apply a German approach to SEP disputes with the power to award an injunction that applies across 18 EU Member States.<sup>13</sup> **NETGEAR** was forced to sue Huawei in a California federal court under a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim in response to Huawei's UPC suit weaponizing its SEPs to obstruct U.S.-based NETGEAR from complying with international standard.
- Huawei's established strategy includes weaponizing jurisdictions abroad where injunctions on SEPs can be improperly attained,<sup>14</sup> including Brazil where Huawei has already made 1,794 patent applications since 2018.<sup>15</sup>

The above examples are only what is known from public reporting, and Huawei's activities, emboldened by a lack of U.S. leadership in SEP/FRAND licensing policy, reach far deeper and wider. They are not publicly disclosed, however, because of the high percentage of legal disputes that settle and because Huawei, like many other foreign SEP licensors, insists on

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<sup>9</sup> <https://www.iam-media.com/article/huawei-transfers-766-3gpp-related-patent-assets-new-npe>.

<sup>10</sup> <https://www.law360.co.uk/articles/2267824>.

<sup>11</sup> <https://www.lexology.com/library/detail.aspx?q=b6466f6d-b998-4e85-a96c-de3e06da7719>.

<sup>12</sup> <https://www.regulations.gov/comment/USTR-2023-0014-0040>.

<sup>13</sup> <https://ipfray.com/new-huawei-v-netgear-filings-discovered-in-munich-and-upc-interim-conference-to-take-place-next-week-wifi-6-seps/>.

<sup>14</sup> <https://www.iam-media.com/article/inside-huaweis-americas-ipr-department>.

<sup>15</sup> <https://www.iam-media.com/article/the-top-chinese-patent-holders-adding-brazil-their-strategic-maps>.

overly broad non-disclosure agreements that prohibit revealing their abusive terms. Further, to shield itself from SEP abuses, Huawei has committed thousands of its SEPs to Sisvel SEP patent pools for key technology areas including Wi-Fi, cellular internet of things (IoT), and others.<sup>16</sup> Sisvel, an EU-based patent pool operator, enables Huawei to separate itself from notorious SEP licensor abuses.

*Further background/critical information:*

- “From sanctions to success: Huawei’s novel strategy – IP licensing” <https://www.fierce-network.com/wireless/sanctions-success-huaweis-novel-strategy-ip-licensing>

### **Small and medium-sized businesses are disproportionately harmed by PRC practices in technical standards**

The lack of transparency and clarity in SEP licensing practices provides foreign SEP holders with an opportunity to extract revenue out of the U.S. economy. Small and medium-sized businesses (SMBs) that participate in technical standards often operate with minimal information and resources when negotiating a FRAND-encumbered SEP license. It is common for certain SEP holders to require potential licensees to sign overly restrictive non-disclosure agreements (NDAs), withhold basic information about their deemed essential patent, and require a license under unreasonable term and excessive fees. A survey conducted by Charles River Associates found that more than two-thirds of U.S. businesses are concerned that SEP holders may behave opportunistically, charging excessive royalties or imposing non-FRAND (fair, reasonable, and non-discriminatory) terms.<sup>17</sup> This scenario leaves a SMB with two options, leave the market after significant research and development (R&D) cost has been invested in production or pay an excessive fee that is ultimately passed to their consumers. In mature supply chains, small manufacturers often rely on their upstream and larger suppliers that have more resources and experience to conclude fair agreements and negotiate SEP licenses.

American small businesses require strong national FRAND licensing policies and antitrust enforcement to protect the ability to advance critical industries with advanced products. The FRAND commitment is a unique and artificial mechanism intended to support competition in a market that would otherwise enable monopolistic activity. When the FRAND commitment is skewed or not adhered to, standardization no longer sustains an open and industry-led approach to innovation. To address key vulnerabilities in SEP licensing, Congress should define clear and enforceable FRAND obligations that balance the competitive risks associated with technology standardization. The App Association maintains that the following principles underlie a universal understanding of the FRAND commitment:

1. **The FRAND commitment means all can license** – A holder of a FRAND-committed SEP must license that SEP to all companies, organizations, and individuals who use or wish to use the standard on FRAND terms.

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<sup>16</sup> <https://www.sisvel.com/news/huawei-joins-sisvel-cellular-iot-patent-pool/>.

<sup>17</sup> [https://www.crai.com/insights-events/publications/sep-licensing-in-the-united-states-understanding-the-impact-on-us-business/?utm\\_source=chatgpt.com](https://www.crai.com/insights-events/publications/sep-licensing-in-the-united-states-understanding-the-impact-on-us-business/?utm_source=chatgpt.com).

2. **Prohibitive orders on FRAND-committed SEPs should only be allowed in rare circumstances** – Prohibitive orders (including federal district court injunctions and U.S. International Trade Commission exclusion orders) should not be sought by SEP holders or allowed for FRAND-committed SEPs except in rare circumstances where monetary remedies are not available.
3. **FRAND royalties** – A reasonable rate for a valid, infringed, and enforceable FRAND-committed SEP should be based on the value of the actual patented invention itself to the smallest saleable patent practicing unit, which is separate from purported value due to that patent's inclusion in the standard, hypothetical downstream uses, or other factors unrelated to invention's value.
4. **FRAND-committed SEPs should respect patent territoriality** – Patents are creatures of national law, and courts should respect the jurisdiction of foreign patent laws to avoid overreach with respect to SEP remedies. Absent agreement by both parties, no court should impose global licensing terms on pain of a national injunction.
5. **The FRAND commitment prohibits harmful tying practices** – While some licensees may wish to get broader licenses, a SEP holder that has made a FRAND commitment cannot require licensees to take or grant licenses to other patents not essential to the standard, invalid, unenforceable, and/or not infringed.
6. **The FRAND commitment follows the transfer of a SEP** – As many jurisdictions have recognized, if a FRAND-committed SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.

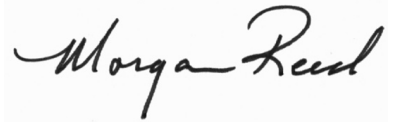
The FRAND obligation should further be upheld through strong antitrust enforcement mechanisms that support a leading IP and competition landscape. Enforcement is needed to disable the use of injunctions to anticompetitively inflate a SEP holder's dominant position in and control of a technical standard. Antitrust enforcement must also address harmful practices by patent pools, often dominated by foreign entities, to circumvent FRAND obligations and inflate royalty rates.

## **Conclusion**

Protecting the ability for American small businesses to use critical technical standards is essential to advancing American-led industries, restoring significant revenue back into the U.S. economy, and protecting U.S. borders from technology warfare. Foreign adversaries continue to benefit from decades of an unclear SEP licensing landscape to strategically extract undeserved revenues from good faith American innovators. By clarifying the FRAND commitment through strong policy and reinforcing strong antitrust enforcement, Congress can ensure that the United States remains a global leader in innovation and economic resilience.

Thank you for your attention to this critical matter. I look forward to supporting the Committee's efforts to address these pressing issues.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive style with a large, prominent 'M' and 'R'.

Morgan Reed  
President  
ACT | The App Association