

March 9, 2023

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

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

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

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

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

Thank you for the opportunity to submit a statement regarding the Subcommittee's March 8, 2023, hearing titled "Intellectual Property and Strategic Competition with China: Part I." 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 \$1.7 trillion and is responsible for 5.9 million American jobs. Our members are innovators that create the software bringing your smart devices to life. They also make 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 intellectual property. To safeguard American leadership in tech-driven markets vis-à-vis foreign entities like the Chinese Communist Party (CCP), Congress must recognize the importance of standards. Specifically, United States policy should account for the crucial role of a balanced approach to standard-essential patents (SEPs) to global commerce, and ensure enforcement of fair, reasonable, and non-discriminatory (FRAND) terms in SEP licensing.

Consensus-based technological standards can fuel innovation. Standards-setting organizations (SSOs) develop standards to promote interoperability between products and services as well as to ensure end-user safety. Because standards have this role in supporting innovation, small businesses need to utilize them to compete in the market. As a technical standard develops within an SSO, participants voluntarily offer their patented technology to be a part of the standard. The patents necessary to practice a standard are generally considered "essential" to the standard. Unfortunately, some SEP holders take advantage of this power dynamic and abuse the standards system in a manner that puts all this innovation at risk. In particular, some CCP-backed companies employ aggressive monetization of their patent portfolios in an attempt to boost profits. Often these companies learn from and refine upon the efforts of SEP aggressors from other parts of the world. The net result is that U.S. innovators suffer and U.S. technological and economic leadership are held ransom to rent seeking by a few.

Over the past decade, we have seen SEP abuses like injunctions and unfair licensing terms spread from smartphones to automotive manufacturing, and increasingly encroach on the healthcare sector. The recent difficulties Ford and other auto manufacturers and automotive suppliers have had with the patent pool Avanci illustrate a common form of SEP abuse (although Avanci is a U.S.-based organization, many of its licensors are foreign companies, including Chinese businesses).¹ Ford's supplier of telematics control units (TCUs), Continental, attempted to license computer chips for its TCUs from a SEP holder participating in Avanci, which purports to provide "efficient, market-driven licensing solutions"² for licensors. But the SEP holder refused to offer Continental a license for the chips under FRAND terms, and multiple Avanci members sued Ford in several courts and secured an injunction against all sales of Internet-linked Ford cars in Germany.³ Faced with the potential of being excluded from the key German market, Ford was forced to settle by entering into a global SEP license with Avanci, thus forfeiting its right to seek relief under U.S. law. More recently, a large CCP-backed Chinese Company became a founding member of a patent pool for the latest generation of Wi-Fi technology organized by Sisvel, which has a well-established track record of filing suits in courts around the world to force manufacturers to take licenses to cellular SEPs under the threat of potential injunctions.⁴ The CCP-backed company has filed lawsuits in multiple jurisdictions against American companies including Netgear and Amazon for infringement of Wi-Fi-related SEPs.^{5,6}

In addition to the monetary harm SEP abuses cause, such aggressive strategies by SEP holders have a national security component. The CCP has long pursued a strategy of forcing American and other non-Chinese businesses to share their intellectual property with Chinese government-backed companies to market in China. Access to such a large market is necessary for businesses to compete globally, and companies may not have the option of staying out of the Chinese market. SEP abuses can also threaten supply chains by either driving suppliers of standards-compliant components like computer chips out of the market or preventing newcomers from competing in the market, thereby forcing American companies to rely on fewer suppliers for critical components.

The App Association has long cautioned against allowing SEP abuses and lax enforcement of FRAND terms in licensing.⁷ We watched the development of this patent monetization strategy in the cellular market and have consulted with automakers as the same tactics are employed in car manufacturing. The next frontier for SEP abuses is health care. The proliferation of Internet-

¹ See Wall Street Journal, "Qualcomm follows Ericsson's lead in joint patent licensing." September 14, 2016. Accessed via <https://www.wsj.com/articles/qualcomm-follows-ericssons-lead-in-joint-patent-licensing-1473871608>.

² See Avanci website, <https://www.avanci.com/>

³ See Reuters, "Court puts sale ban on Ford's Internet-linked cars in Germany in patent dispute." May 20, 2022. Accessed via <https://www.reuters.com/business/autos-transportation/court-puts-sales-ban-fords-internet-linked-cars-germany-patent-dispute-2022-05-20/>.

⁴ See JUVE Patent "Game over in Sisvel and Xiaomi's global SEP dispute" via <https://www.juve-patent.com/cases/game-over-in-sisvel-and-xiaomis-global-sep-dispute/>

⁵ See Lexology website, "Huawei Sues US Netgear for Infringing SEP Patents" via <https://www.lexology.com/library/detail.aspx?g=fd18fb90-9f77-4e24-bdfb-f3b94add4016>

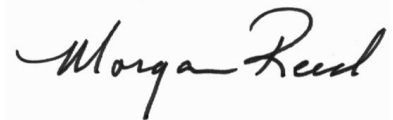
⁶ See JUVE Patents "Multiple firms prepare for wave of lawsuits over Huawei SEPs" via <https://www.juve-patent.com/people-and-business/multiple-firms-prepare-for-wave-of-lawsuits-over-huawei-seps/>

⁷ See variety of App Association blog posts, <https://actonline.org/category/frand/>.

connected medical equipment will lead to similar suits, injunctions, and damages for connected device companies—in fact, some suits are being filed in this field already.

App Association member companies depend on standards to build their businesses. Without that interoperability and assurance of widespread use, we couldn't use USB drives, Wi-Fi, cellular connectivity, or countless other standardized technologies. SEPs are a key part of building this interoperability, so they need to be widely available to businesses. Unfair terms and aggressive monetization of patent portfolios will lead to a fractured world. Standards, which will be vital to the development of next-generation networks and the Internet of Things, will only remain strong if the U.S. standards ecosystem balances the interests of those that work to build standards with those that utilize them to innovate. We urge the Committee to consider legislation to enforce FRAND terms and the fair operation of patent law.

Sincerely,

A handwritten signature in black ink that reads "Morgan Reed". The signature is written in a cursive, flowing style.

Morgan Reed
President

ACT | The App Association