May 6, 2020

By Electronic Filing

The Honorable Lisa R. Barton

Secretary to the Commission

U.S. International Trade Commission

500 E Street, SW, Suite 112

Washington, D.C. 20436

Re: Request to File Out of Time: Public Interest Comments of Third Party Fair Standards Alliance in *Certain LTE- and 3G- Compliant Cellular Communications Devices*, Inv. No. 337-TA-1138

Dear Secretary Barton,

Pursuant to Commission Rule 201.14(b)(2), the Fair Standards Alliance (FSA) respectfully requests the Commission's leave to file "Statement Of Third Party Fair Standards Alliance In Response To The Commission's Notice Of Request For Statements On The Public Interest" in Investigation No. 337-TA-1138 out of time. The Commission's filing deadline was yesterday, May 5, 2020. FSA timely filed its Statement on May 5, 2020 (at 3:18p.m.), but we were notified by Attorney-Case Manager Ryan Glazer that FSA needed to refile its Statement with double-spacing because it was over two pages. We accordingly reformatted the Statement and re-submitted it, unfortunately after the filing deadline of 5:15 p.m. (at 5:35p.m.). On May 6, 2020, Mr. Glazer informed us that we needed to refile the Statement together with a letter requesting permission to file out of time.

FSA requests that the Commission accept our filing one day late because this is the first time our trade association has filed in an investigation at the U.S. International Trade Commission. It was, consequently, the first time we had used the Commission's Electronic Document Information System, and we were unfortunately not sufficiently familiar with the procedure. The six-hour time difference between Washington, D.C. and Brussels, where we are located, further contributed to our missing the deadline. Given the importance of the topic at issue and the insights we hope we can bring from a broader public interest perspective, representing 47 large and small innovating companies around the globe, we hope you can accept our request. We will, of course, make sure to timely file any future submissions with the Commission.

Thank you for your consideration of this request.

Sincerely,

/s/ Robert Pocknell

Robert Pocknell

Chair Fair Standards Alliance

23 Avenue Marnix, 1000 Brussels, Belgium

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of Certain LTE- and 3G- Compliant Cellular Communications Devices	Investigation N° 337-TA-1138

STATEMENT OF THIRD PARTY
FAIR STANDARDS ALLIANCE
IN RESPONSE TO THE COMMISSION'S NOTICE OF REQUEST
FOR STATEMENTS ON THE PUBLIC INTEREST
DATED MAY 5, 2020

Pursuant to the Commission's Federal Register Notice of April 6, 2020, inviting interested parties and members of the public to file comments on the above-mentioned matter, the Fair Standards Alliance ("FSA") submits the following observations.

FSA is an alliance of global companies, large and small, that advocates for fair licensing of standardized technology, including in the development and rollout of the Internet of Things (IoT). Our 47 members are active in a broad variety of sectors, including automotive, technology, telecom, energy, broadcasting, etc. The group includes companies at different positions in the value chain and includes both holders of standard essential patents (SEPs) and downstream innovators. Our members rank among the world's largest innovators, and spend on aggregate more than $150 billion on R&D per year developing technologies, participating in standards development and licensing SEPs to others.[1]

In our experience, the public interest is generally inconsistent with the issuance of exclusion orders for patents for which a voluntary commitment has been provided to license on Fair, Reasonable and Non-Discriminatory ("FRAND") terms. Such orders harm the competitive conditions in the United States, directly impact American consumers, and should only be issued under highly exceptional circumstances.

The meaning of a FRAND commitment. Often, if a patent is not a SEP, the public interest may be served if a patent holder freely seeks or enforces exclusionary relief against patent infringement, subject to applicable legal requirements. The ability to exclude others from practising patented inventions can serve to seek to obtain the societal benefits achieved by disseminating knowledge, improving quality of products and increasing consumer choice.

However, the situation is different for patents that relate to technology that its owner has chosen to contribute to a standard, and for which the patent holder has provided a voluntary commitment to license on FRAND terms. In this situation, there is a *quid pro quo*: the FRAND commitment limits the assertion of the patent holder's patent rights, but in return the patent holder – as a result of the

[1] The following companies are members of FSA: AirTies, Apple, BMW Group, Bullitt, Bury, Cisco, Continental, Crosscall, Daimler, Dell, Denso, Emporia, Fairphone, Freebox, Ford, Google, Gramm Lins, Harman, Hitachi, Honda, HP, Hyundai, Intel, Juniper, Kamstrup, Landys+Gyr, Lenovo, Microsoft, Molex, N&M Consultancy, Nordic Semiconductor, Pearl Cohen, Sagemcom, Sequans, Sierra Wireless, Sky, Tech Law Associates, Deutsche Telekom, Telit, Tesla, TomTom, Toyota, u-blox, Valeo, Visteon, Volkswagen Group and Wiko. The positions presented in this statement are those of the FSA, and do not necessarily reflect the detailed individual corporate positions of each member. Further information is available at https://fair-standards.org/.

promulgation of the standard – obtains the ability to seek reasonable licensing fees for a much larger pool of potential licensees than it otherwise could have accessed.

By making a FRAND promise, the patent holder expressly agrees to pursue licensing, not market exclusion. In other words, by giving a FRAND commitment, the patent holder voluntarily agrees to support the promulgation of the standard via licensing to third parties, rather than seeking to restrict the use of the standard by eliminating some market participants via exclusionary or injunctive remedies.[2] This is so under all the policies of all the standards development organizations (SDOs) of which we are aware under which patent owners commit to license on FRAND or RAND (reasonable and non-discriminatory) terms.

The importance of supporting the promulgation the standard is important in light of the growing number of products that are becoming increasingly interconnected. These products allow businesses to introduce significant efficiencies in their manufacturing processes, and consumers to benefit from an ever-increasing range of tools that facilitate and address the needs of their daily lives.

At the same time, while seeking to promote the wide adoption of standards technology, the FRAND commitment also plays a significant role in ensuring fair competition. The development of standards typically involves multiple parties, perhaps competitors, coming together in the context of an SDO to agree on a common technology specification – accepting certain technical contributions to the specification, and rejecting others. As such, this process can give rise to competition issues. Discussions in the context of standard setting, for example, can provide an opportunity for collusion to reduce or eliminate competition between otherwise competing technologies.

The FRAND commitment ensures that SEPs are not used to abuse the leverage gained from the elimination of technology alternatives through a standard. The challenge is to guard against potential abuse of the inability to design around patented technology selected for standardization (so called "lock-in"). The market strength and bargaining power associated with lock-in may result in right holders seeking to exclude companies from a market, or to obtain high royalties or other unreasonable license

[2] See, in particular, the CEN CENELEC Workshop Agreement 95000 (2019), which over 50 companies and industry organizations have signed and supported: https://www.cencenelec.eu/news/workshops/Pages/WS-2019-014.aspx. The document identifies six core principles and approaches to foster a FRAND outcome when engaging in licensing negotiations.

terms that they would not have been able to obtain before their patented technology was incorporated into the standard. FRAND obligations thus seek to curb a SEP holder's power obtained due to the inclusion of its patented technology in the standard, while not unfairly limiting its rights to seek reasonable and non-discriminatory compensation based on the value of the patented invention.

A voluntary FRAND commitment has public interest considerations. As mentioned above, a patent owner's voluntary FRAND commitment affects the choice of remedy for infringement of a valid and enforceable SEP. In such cases, the remedy of an exclusion order or injunction is generally inconsistent with public interest considerations, in particular from a competition and consumer perspective.

The FRAND commitment arises from a specific competition law context, as it is geared to prevent patent owners from abusing the market power that is achieved through the inclusion of the patent into a standard. Seeking an exclusion order against a downstream innovator generally places undue pressure on the latter to accept terms and conditions that it would otherwise not accept, to avoid its products from being excluded from the market. Those abusive behaviors for FRAND-encumbered patents damage competition on the market. E.g., the Federal Trade Commission has concluded a number of antitrust investigations asserting anti-competitive effects from non-FRAND licensing practices, including an investigation culminating in an antitrust lawsuit against Qualcomm (currently pending),[3] and an investigation of Motorola (which settled in a consent agreement.)[4] Similarly, in 2013 the U.S. Trade Representative noted his concerns about the potential harms from SEP owners who have made FRAND commitments "gaining undue leverage and engaging in 'patent hold-up', *i.e.,* asserting the patent to exclude an implementer of the standard from a market to obtain a higher price for the use of the patent than would have been possible before the standard was set, when alternative technologies could

[3] Complaint, *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017), *available at* https://www.ftc.gov/system/files/documents/cases/170117qualcomm_redacted_complaint.pdf. The U.S. District Court for the Northern District of California ruled in favor of the FTC, and found that Qualcomm's failure to license SEPs on FRAND terms harmed competition and violated the antitrust laws. 411 F. Supp. 3d 658, 2019 U.S. Dist. LEXIS 86219, 2019 WL 2206013 (N.D. Cal. 2019). The case is pending on appeal before U.S. Court of Appeals for the Ninth Circuit. (No. 19-16122).

[4] Complaint, In the Matter of Motorola Mobility LLC, No. C-4410 (July 23, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf; Decision and Order, In the Matter of Motorola Mobility LLC, No. C-4410 (July 23, 2013), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolado.pdf.

have been chosen."[5] In its landmark *Motorola* and *Samsung* decisions,[6] the European Commission also concluded that it was contrary to European competition law to seek (and enforce) an injunction on the basis of an SEP for which an irrevocable commitment to license on FRAND terms had been provided.[7]

Furthermore, in addition to the detrimental impact on competition, having to agree to terms and conditions that any company would not otherwise agree to will very often result in distorted pricing downstream – to the detriment of the business and consumers that are the eventual end-customers. To the extent that a business may be able to absorb some or all of those costs, these inflated royalty payments also require the business to spend financial resources that otherwise could have been invested in research and development. While those constrains may seem relatively theoretical at first glance, the members of our alliance can verify that the threat is real, as is the impact. Some of our members spend millions of dollars on defending themselves against SEP owners that seek to exclude their products from the market based on unfounded validity, essentiality or infringement allegations. Others have no option but to settle, or to accept terms that they would otherwise never have agreed to without the threat of their products being excluded from the market. Further, U.S. consumers have a substantial interest in the development of standards and the availability of interoperable products complying with standards in the U.S. The FRAND commitment is directly related to this public interest of standardisation. Finally, it is hard to see how excluding commonly-used end-devices from the market would not unfairly affect consumers, in particular where, based on the FRAND commitment, alternative remedies available at law, such as monetary damages, are adequate and proportionate to compensate for any harm attendant to use of the technology.[8]

Some may argue that there may be exceptional circumstances in which public interest considerations could still allow for the issuing of a potential exclusionary remedy in SEP cases. We

[5] Letter from Ambassador Michael B .J. Froman, then-United States Trade Representative, to The Honorable Irving A. Williamson, then-Chairman, U.S. International Trade Commission (Aug. 3, 2013) ("Froman letter"), *available at* 337-TA-794, https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

[6] See Case AT.39939 - SAMSUNG, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf, and Case AT.39985 - MOTOROLA, https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

[7] In the *Huawei v. ZTE* decision (C-170/13 *Huawei Techs. Co. v. ZTE Corp*., [2015] E.C.R. 477), the European Court of Justice held that it can be a competition law violation for a patent holder to pursue an injunction against a licensee that has demonstrated its good faith willingness to negotiate a FRAND license. In such cases, the patent holder will not be entitled to market exclusion.

[8] See the FSA Position Paper on "Injunction in Accordance with the Principles of Equity and Proportionality", https://fair-standards.org/wp-content/uploads/2017/01/FSA-Injunction-Position-Paper-23-January-1.pdf.

believe this can be disputed. However, what should be undisputed is that, at the very least, there should be an assessment of whether under the specific circumstances of the case the issuance of an exclusion order for an SEP for which a FRAND commitment has been provided is against the public interest.

Contrary to the findings by the Administrative Law Judge's decision in the above-mentioned matter, FRAND considerations are directly relevant to the public interest factors (especially the "competitive conditions in the United States" and "U.S. consumers"), and most definitely should play a role in the Commission's assessment whether or not to issue a remedy. The term "FRAND" need not be specifically listed in the ITC's statute as a public interest factor for FRAND commitments to be properly considered under the statute. Such an unduly constrained reading of the statute would also eliminate consideration of any other factual circumstances that may be contrary to any of the public interest factors, but not directly listed in the statute. Rather, the significance and effects of voluntary FRAND commitments should properly be considered under the public interest factors in light of their impacts on competitive conditions and U.S. consumers.[9] We agree that in any cases involving SEPs that are subject to voluntary FRAND commitments, the Commission should "examine thoroughly and carefully on its own initiative the public interest issues presented both at the outset of its proceeding and when determining whether a particular remedy is in the public interest."[10]

While FSA does not take position on the fact of the case in question, exclusionary remedies for SEPs for which a commitment has been provided to license on FRAND terms should be very rare. E.g, the public interest should preclude an exclusion order from being issued in cases where the alleged infringer is able and willing to take a license on FRAND terms, and especially – as alleged by the Respondents in this case – in cases where the proposed licensing offers are not FRAND.

/s/ Robert Pocknell, Chair Fair Standards Alliance

[9] Similar considerations are at play under European law, where considerations of equity and proportionality are to be assessed when a court is faced with a request for exclusionary relief in SEP cases. Directive 2004/48/EC, on the enforcement of IPRs, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0048R(01)&from=EN. For this reason, the European Commission's recent SEP Communication has stressed the importance of ensuring that injunctions are subject to proportionality considerations: "Given the broad impact an injunction may have on businesses, consumers and on the public interest, particularly in the context of the digitalised economy, the proportionality assessment needs to be done carefully on a case-by-case basis." Communication from the European Commission – Setting out the EU approach to Standard Essential Patents, section 3.2., https://ec.europa.eu/docsroom/documents/26583.

[10] *See* Froman letter.