

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

In the Matter of

**CERTAIN ELECTRONIC DEVICES,
INCLUDING COMPUTERS,
TABLET COMPUTERS, AND
COMPONENTS AND MODULES
THEREOF**

Docket No. 3466

**STATEMENT OF THIRD PARTY
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN RESPONSE TO THE COMMISSION'S JULY 9, 2020 NOTICE REQUESTING
WRITTEN SUBMISSIONS ON THE PUBLIC INTEREST**

Pursuant to the Commission’s Federal Register Notice of July 9, 2020,¹ inviting the public to file written submissions regarding public interest issues associated with Nokia’s complaint, the Computer & Communications Industry Association (“CCIA”) submits the following comments.

I. SUMMARY

CCIA represents over two dozen companies of all sizes providing high technology products and services.² Many CCIA member companies manufacture products like those at issue in the proposed investigation, including cellular handsets and baseband processors. CCIA promotes full, fair and open competition in the computer, telecommunications, and Internet industries. Neither the complainant nor any respondent is a member of CCIA.

Complainant asserts that no public interest issues are raised by the proposed exclusion order, even if the asserted patents were adjudged to be standard-essential patents (“SEPs”). However, several of the patents in this case raise public interest issues unique to potentially standard-essential patents that justify delegating the public interest inquiry to the Administrative Law Judge and providing additional time dedicated to building a public interest record. Further, they raise serious issues regarding enforceability that justify early resolution in order to protect the public’s interest in preventing abusive ITC litigation.

II. THE PROPOSED EXCLUSION ORDER HAS A SIGNIFICANT IMPACT ON PUBLIC HEALTH AND WELFARE

The complainant’s public interest statement claims that issuance of an exclusion order would “have no adverse effect on the public health, safety, or welfare in the United States.”³

While the complaint claims that exclusion of laptops, tablets, and desktop computers would not impact public health, safety, and welfare, and characterizes the devices as used for “internet, entertainment, and social media services,”⁴ that does not reflect modern society. Computers are no longer optional entertainment devices. Instead, they are the main or even exclusive portholes through which nearly every American interfaces with nearly every aspect of modern life, especially during the pandemic.

¹ Commission Notice of Request for Statements on the Public Interest, 85 Fed. Reg. 41243 (“Notice”).

² A list of CCIA’s members is available online at <https://www.ccianet.org/about/members>.

³ Nokia Public Interest Statement at 2.

⁴ *Id.*

Modern consumers use their computers as primary devices for satisfying essential needs as diverse as ordering groceries and medical supplies, accessing medical information, communicating with health practitioners, and accessing government services such as unemployment and stimulus benefits. Further, these devices are used to communicate with friends and family, helping to mitigate what had been characterized as an American “epidemic of loneliness”⁵ even before COVID-19 made face-to-face contact with local friends risky. Loneliness, far from being of minimal concern, has significant negative health impacts likened to “the effects of smoking 15 cigarettes a day.”⁶ Particularly as COVID-19 cases continue to increase in the United States, exclusion of laptop and desktop computers that are used for telework and remote learning also threatens public health and safety by limiting the ability of the public to engage in social distancing. For this reason alone, building a robust public interest record is necessary. Further, even if COVID-19 were eliminated by the time a remedial order were to issue, exclusion would likely harm ongoing measures to limit future pandemics by, for example, limiting the ability and increasing the price of access to telework equipment.

Because of these strong potential impacts on public health, safety, and welfare, the Commission should delegate the public interest issue to the ALJ and provide separate and additional time to build a public interest record to avoid forcing Respondents to choose between their non-infringement and invalidity cases and public interest concerns.

III. HARM TO CONSUMERS AND COMPETITIVE CONDITIONS IN THE U.S.

Complainant’s public interest statement claims that many of the claims are not essential and thus do not implicate any public interest concern. However, that statement implicitly admits that at least some of the claims *are* alleged to be essential, creating unique public interest considerations.

One of those unique public interest issues is abuse of standard-setting. Several of the patents in the complaint appear to be emblematic of this abuse. For example, the ‘469 patent was applied for in 2001 and issued in September of 2005. Nokia failed to declare the patent as essential to H.264 until June

⁵ Jamie Ducharme, “COVID-19 Is Making America’s Loneliness Epidemic Even Worse”, TIME (May 8, 2020), available at <https://time.com/5833681/loneliness-covid-19/>.

⁶ *Id.*

of 2007, despite having filed 19 declarations of essentiality for H.264 in the period between application and ultimate declaration. This exact type and duration of delay has rendered patents unenforceable due to abuse of the standard setting process. *See* Order Granting Defendant’s Motion For A Finding Of Unenforceability, *Conversant Wireless Licensing v. Apple*, 5:15-CV-05008-NC (N.D. Cal. May 10, 2019) (Dkt. No. 575) (five year delay between filing and disclosure rendering patent unenforceable). The *Conversant Wireless* patent was also originally filed by Nokia, rendering this a potential pattern of misconduct. The ‘764 and ‘808 patents present similar issues. The ‘764 patent was filed in 2005, based on a 2001 patent. The ‘808 patent was filed in 2003. At no time in the intervening decades has Nokia ever declared these patents as essential to H.264—though it has declared them as essential to H.265.

The issue of late declaration or non-declaration creates serious harms to consumers and competitive conditions. Timely declaration is necessary in order to ensure fairness to all participants in the standard process. In contrast, placing technology into the standard without adequate disclosure “increase[s] Nokia’s leverage by bolstering its patent portfolio.”⁷ In turn, “Nokia’s failure to disclose its IPR allowed Nokia [] to inequitably benefit from that misconduct.”⁸ By engaging in conduct that abuses the standard setting process, licensors obtain leverage they can use to artificially inflate rates, harming competitive conditions in the U.S. economy. For this reason alone, this case raises novel public interest concerns and requires delegation of the public interest issue and a robust public interest inquiry, including ordering an early inquiry into whether Nokia’s behavior renders the relevant patents unenforceable.

IV. FRAND AND THE PUBLIC INTEREST

Complainant also ignores the significant competitive and consumer harms caused by exclusion orders based on SEPs.

Exclusion orders in ordinary circumstances give defendants a choice—either license the patent, or design around it. This effectively sets an upper limit on the license value, as a defendant would design around the patent before paying a license fee that exceeds the cost of redesign (including forgone income

⁷ Order Granting Defendant’s Motion For A Finding Of Unenforceability at 10, *Conversant Wireless Licensing v. Apple*, 5:15-CV-05008-NC (N.D. Cal. May 10, 2019) (Dkt. No. 575).

⁸ *Id.*

during exclusion.) If the redesign cost outstrips the *ex ante* value of the patented invention, exclusion orders can thus create “hold up” that harms U.S. competitive conditions and American consumers.⁹ Worse, design-arounds of SEPs are generally impossible without becoming incompatible with the standard, also creating “hold up.” As a result, the upper limit of SEP license value is the entire market value of the product, including thousands of non-patent innovations, not the value of the patented feature or the cost of alternative approaches.¹⁰ Because of this concern, standards bodies require commitments to license SEPs on fair, reasonable, and non-discriminatory (“FRAND”) terms, mitigating the risk of a patent holder blocking entrants from the market or using its leverage to obtain unfair royalties.

An exclusion order provides the unfair leverage that the FRAND commitment is intended to mitigate, resulting in supra-FRAND licenses. The cost of such licenses harms consumers via the direct pass-through of increased product costs and taxes the research and development of new technologies, job creation, and numerous other productive applications of capital, harming U.S. competitive conditions.

In addition to direct cost pass-through and indirect harms to R&D, the issuance of SEP-based exclusion orders would have a chilling effect on new entrants which often cannot afford the costs of redesign. Faced with the threat of supra-FRAND royalties, backed by exclusion orders, new entrants are likely to invest in other technologies or not to invest at all. Permitting exclusion based on SEPs by granting an exclusion order in this case would send a strong signal to entrants that they should not invest in standards-based technologies if they wish to avoid holdup. In the long term, this signal harms U.S. consumers and competition in U.S. markets.

Because of these concerns about competitive and consumer harm, the Commission should refuse to grant an exclusion order in this case or in others involving FRAND-encumbered patents. And if an exclusion order will ultimately be unavailable, the expense and burden of an ITC case is in and of itself a harm to the public interest, raising the costs of all participants, costs which are ultimately borne by U.S.

⁹ See FTC, *Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* at 241 (Mar. 2011), available at <https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition>.

¹⁰ Mark Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2007).

consumers in the form of higher prices and inferior features due to reduced R&D spending.

V. NOKIA’S TACTICS REPRESENT A HARM TO COMPETITIVE CONDITIONS

Complainant Nokia claims that Lenovo is engaged in “hold out”, using this as a justification for requesting exclusion of standard-essential products. Nokia states that it first contacted Lenovo in March 2019. However, Nokia omits that it then proceeded to sue Lenovo in September 2019 in the Eastern District of North Carolina and then in October 2019 in multiple courts in Germany. These lawsuits attempt to pressure licensees to accept unfair terms in the shadow of having their products taken off the market. Despite Nokia’s use of lawsuits after only seven months in order to attempt to increase pressure to take a potentially unfair license, Lenovo continued to discuss potential licenses with Nokia.

The FRAND obligation which applies to the SEP patents in suit requires licensors to license their patents under fair and reasonable terms. Contrary to Nokia’s statement that Lenovo is unwilling to take a license, the complaint admits that Lenovo is willing to take a license—just not at the rate Nokia wants. Further, after a single licensee has taken an unfair license in the shadow of exclusion, future potential licensees will be threatened with the unfair license as evidence of “market conditions”—precisely what Nokia has done in its complaint. This, over time, leads to harm to competitive conditions for U.S. entities who practice the standard by raising the costs of their use of the standard above the fair and reasonable royalty, the sole remedy to which a SEP owner is entitled.

Rather than harm the public interest and U.S. competitive conditions by entertaining lawsuits over SEPs where the dispute is over rate, the Commission should deny any such complaint while negotiations continue or while a parallel district court case which could resolve the issue is ongoing. Only where a licensee has refused to pay an adjudicated rate should the Commission step in. Any other approach risks serious harm to competitive conditions in the U.S. market.

VI. CONCLUSION

For these reasons, the Commission should deny Nokia’s complaint with regards to standard-essential patents, and at a minimum delegate the public interest inquiry for SEP and non-SEP patents, instructing the ALJ to build a public interest record using time separate from that dedicated to issues of infringement and validity.

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Respectfully submitted,

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