

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

In the Matter of

**CERTAIN DIGITAL VIDEO-
CAPABLE DEVICES AND
COMPONENTS THEREOF**

Docket No. 3492

**STATEMENT OF THIRD PARTY
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
IN RESPONSE TO THE COMMISSION'S SEPTEMBER 24, 2020 NOTICE
REQUESTING WRITTEN SUBMISSIONS ON THE PUBLIC INTEREST**

Pursuant to the Commission’s Federal Register Notice of September 24, 2020,¹ inviting the public to file written submissions regarding public interest issues associated with Philips’ 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. Respondent Intel is a member of CCIA, but did not participate in or fund the preparation of CCIA’s comments.

Complainant asserts that no public interest issues are raised by the proposed exclusion order. However, complainant’s proposed exclusion order appears to effectively exclude 80% of the U.S. processor market and 66% of the U.S. computing market, severely harming U.S consumers and competitive conditions as a result. Additionally, 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.

II. IMPACT ON PUBLIC HEALTH AND WELFARE

The complainant’s public interest statement claims that issuance of an exclusion order “will not have an adverse effect on the public health 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 “typically used for entertainment, web-browsing, streaming video, gaming, and so on,”⁴ that does not reflect modern society. Computers are no longer optional entertainment devices. Instead, they are the main or even exclusive portals through which nearly every American interacts with nearly every aspect of modern life, especially during the pandemic. Modern consumers use their computers as primary devices for satisfying essential

¹ Commission Notice of Request for Statements on the Public Interest, 85 Fed. Reg. 60266 (“Notice”).

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

³ Philips Public Interest Statement at 1.

⁴ *Id.* at 3.

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. Particularly as COVID-19 continues to impact 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.

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. ABILITY OF PHILIPS AND ITS LICENSEES TO REPLACE SUBJECT ARTICLES

Complainant requests exclusion of Intel laptop processors with integrated graphics. While identifying specific Intel processors, those are non-exclusive examples and do not appear to differ in meaningful ways from other Intel processors. Intel processors with integrated graphics power approximately 80% of both the laptop and desktop markets.⁵ Alternative CPU manufacturers are already facing supply constraints⁶ and could not reasonably be expected to more than quadruple their output to replace Intel's position in the market. Philips and its licensees cannot fully replace the subject articles.

The same is true when looking at the market for such processors integrated into computers. Proposed respondents Lenovo, HP, and Dell together represent two-thirds of the U.S. personal computing market,⁷ but the remainder of the market is also primarily powered by Intel processors and an exclusion order extending to computers powered by Intel processors would likely be interpreted to exclude those competing products as well—a market which is already experiencing supply shortages.

⁵ See, e.g., Timothy Green, “AMD's Notebook Market Share Gains Accelerate”, *The Motley Fool* (Aug. 6, 2020), <https://www.fool.com/investing/2020/08/06/amds-notebook-market-share-gains-accelerate.aspx>.

⁶ See Dave James, “AMD is increasing chip supply for Big Navi and Zen 3, but Su says '7nm is tight'”, *PC Gamer* (July 29, 2020), <https://www.pcgamer.com/amd-7nm-is-tight/>.

⁷ See Gartner, “Gartner Says Worldwide PC Shipments Grew 2.8% in Second Quarter of 2020” (July 9, 2020), <https://www.gartner.com/en/newsroom/press-releases/2020-07-09-gartner-says-worldwide-pc-shipments-grew-2point8-percent-in-second-quarter-of-2020>.

Complainant argues that the market is “saturated.”⁸ Such an argument ignores present realities and contradicts available evidence. U.S. PC unit shipments in Q2 2020 alone were approximately 15 million, a rise of approximately 4% year-on-year. These shipments represent a recognition that existing PCs may not be sufficient to meet new requirements—a computer suitable for light web browsing is unlikely to prove sufficient for full-time work from home using video conferencing and remote access applications, for example, and a family may need additional computers to allow for simultaneous virtual school and work-from-home.⁹ Exclusion of 66% of PCs and 80% of processors used in the U.S. market alone, much less in the face of such shifts in utilization in the computing market, would create severe price shocks. The harm from these price shocks would in turn be borne by U.S. consumers.

Given the inability of complainant or its licensees to replace 80% of the U.S. processor market and 66% of the computing market in any reasonable amount of time and the paramount interest in access to personal computing in general, much less during a pandemic, the public interest absolutely disfavors exclusion of the Intel processors and the computers accused in this case.

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

Complainant also ignores the significant competitive and consumer harms caused by exclusion orders based on SEPs. While Philips does not appear to have participated in the HDCP standard, its assertions are based on the HDCP standard, rendering the patents allegedly standard-essential.

Although Philips has chosen not to participate in the standard,¹⁰ Philips does release products using HDCP technology.¹¹ It is unsurprising that Philips chose not to license the HDCP technology, as doing so would have barred this action—HDCP licensees promise not to assert patents against the standard.¹² Philips appears to be attempting to benefit from the HDCP standard’s technical merits while

⁸ Philips Public Interest Statement at 3.

⁹ AP, “US Faces Back-To-School Laptop Shortage”, *N.Y. Post* (Aug. 23, 2020), <https://nypost.com/2020/08/23/us-faces-back-to-school-laptop-shortage-amid-covid-19/>.

¹⁰ See HDCP Licensee List (last accessed Sept. 29, 2020), <https://digital-cp.com/licensee-list>.

¹¹ See, e.g., Philips 75PFL5604/F7 User Manual at 14 (last accessed Sept. 29, 2020), https://www.download.p4c.philips.com/files/7/75pfl5604_f7/75pfl5604_f7_dfu_aen.pdf.

¹² See HDCP License Agreement Review Copy at § 2.2 (Mar. 6, 2017), https://digital-cp.com/sites/default/files/HDCP%20License%20Agreement_March%206%2C%202017_FOR%20REVIEW%20ONLY.pdf.

refusing to accept the conditions governing access to the standard.

In most standards, the participants in the standard reach a voluntary agreement as to how intellectual property in the standard is to be licensed. These agreements protect against the risk of a patent being used to extract a royalty in excess of the value a given technology contributes to the overall value of the standard. In the HDCP standard, that guidance is in the form of a non-assertion requirement—adopters of the standard agree not to assert their patents against fellow adopters.

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 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.¹³ 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.¹⁴ To avoid this, standards participation agreements typically include royalty-free or FRAND obligations, and U.S. damages law requires that “the patentee’s royalty must be premised on the value of the patented feature, not any value added by the standard’s adoption of the patented technology.”¹⁵ A patentee is not entitled to use its patent to obtain value contributed by the standard as a whole—in this case, the value contributed by Intel’s foundational HDCP technology and the other respondents’ participation in a widely-adopted standard that allows copyright owners to trust that their content will be protected, encouraging them to make it available in an interoperable form, thus ensuring that consumers can lawfully access copyrighted content.

An exclusion order provides unfair leverage to obtain a license that exceeds the value contributed

¹³ See FTC, *Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* at 241 (Mar. 2011), <https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition>.

¹⁴ Mark Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2007).

¹⁵ *Ericsson Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1232 (Fed. Cir. 2014).

by the technology to the standard. This is contrary to the intent of U.S. damages law and will result in licenses for more than the value of the technology. 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 royalties above the value of the technology, 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 harms U.S. consumers and competition in U.S. markets.

The decision to utilize the intellectual property necessary to implement HDCP while simultaneously refusing to acquire the necessary licenses from others suggests that Philips' interest in protecting intellectual property rights extends only to its own IP, not to respecting IP owned by others. 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 SEPs. In addition, the Commission should refuse to treat Philips' interest in enforcing intellectual property as significant when Philips itself apparently refuses to respect the intellectual property of the creators of the HDCP standard. 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. consumers in the form of higher prices and inferior features due to reduced R&D spending.

V. CONCLUSION

For these reasons, the Commission should deny Philips' complaint with regards to SEPs, 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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