Protecting Small Business Innovation

June 6, 2012

By Electronic Filing

The Honorable James R. Holbein
Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***In the Matter of Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof,*** **Investigation No. 337-TA-745**

Dear Secretary Holbein:

On behalf of the Association for Competitive Technology (ACT), I write to submit comments on the public interest factors that the Commission must consider, pursuant to 19 U.S.C. §1337(d)(1), in the context of determining whether to issue an exclusion order in this investigation.

ACT's membership includes more than 5,000 small and medium sized software and "mobile app" companies, including more than 4,000 based in the United States. Just two years ago, our total industry revenues were $3.8 billion. At the close of last year we had grown to $20 billion and are projected to reach $100 billion by 2015.[1] This is a meteoric rise for an industry sector that didn't even exist four years ago. Today, billions of apps are downloaded, ranging from games to productivity and even healthcare. The app ecosystem affects millions of Americans and provides real, tangible benefit to their lives.

The app ecosystem is also small business phenomenon. Over 88 percent of the top 500 app makers are small businesses.[2] And as small business is the engine of economic growth in our country, app makers are contributing greatly to the job market with half a million jobs created in this new marketplace.[3]

Given the economic and public value of our industry, ACT's members are deeply concerned about the impact of an exclusion order in a case where a patent is the subject of a commitment to license on "Reasonable and Non-Discriminatory" terms as part of a standard.

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[1] *available at* http://www.research2guidance.com/the-application-development-market-will-grow-to-us100bn-in-2015/
[2] *available at* http://Republicans.EnergyCommerce.house.gov/Media/file/Hearings/CMT/100511/Reed.pdf
[3] *available at* http://www.technet.org/new-technet-sponsored-study-nearly-500000-app-economy-jobs-in-united-states-february-7-2012/

We believe that granting an exclusion order for "Standards Essential Patents" is against the public interest.

Instead, the Commission must respect the path that Motorola Inc. (Motorola) took when it added U.S. Patent No. 6,246,697 – an asserted patent in this investigation— to its list of included patents under the UMTS standard. This path should limit any final determination of liability to monetary damages under RAND terms. In short, Motorola clearly set the limitation on the '697 patent the day it agreed to the terms established by the standards setting organization; giving Motorola the power to reach back and overturn this earlier business decision breaks the entire paradigm within which the standards world functions, and does significant harm to the public interest.

Technology Standards are Critical for Independent App Developers and the Public

Standards are critical to the creation of dynamic, interoperable technological ecosystems on which app developers rely and from which the public benefits. They are particularly important in promoting the rapid adoption of communications technologies that require interoperability between devices and software. Standards effectively increase the adoption velocity of new technologies by removing uncertainty about interoperability now and into the future and lowering costs for those technologies.

As network theory dictates, the value of a networked device increases in direct proportion to the number of devices on the network. The rapid adoption enabled by standards provides a more fertile environment for app developers to build solutions, which ensures that these devices are more valuable to the public. In fact, our members often make key decisions about the long-term viability of a product by looking at its use of standards.

At times, developers will make a proactive choice to eschew standards-based solutions in order to build on next generation platforms that offer new functionality. However, this does not diminish the critical role that standards play in creating a baseline platform for developer innovation.

Motorola Understands the Consequences of the Decision to Make Patented Technology Available as Part of a Standard

The modern standards system, with its extensive patent pools and RAND agreements functions precisely because participants know that they can access standard technology without fear of being individually excluded. Companies have a choice whether to participate in a standards body and an additional choice whether to commit to RAND licensing of any technology that reads on those standards. ETSI and other standard setting organizations have differing rules governing how RAND will be implemented, but all require non-discriminatory terms. Simply put, the choice to commit to RAND licensing is a choice to forgo the option of injunction or exclusion order for devices that read on the patent as part of the implementation of a standard.

Larger companies, like Motorola, understand this and make the decision to license a "standards essential" patent on RAND terms based on a very simple question: Do we gain more value from having our patent adopted widely through standards, or by retaining the ability to individually set prices for patented intellectual property?

Motorola is not only aware of this balancing act, they are a decades-long master of making decisions based on whichever model increases revenue. In recent years Motorola patents have been included in key wireless standards like Wi-Fi[4]. However, Motorola actively refused to license its patents under RAND during the initial development phase of the GSM standard precisely so it could seek additional revenue from independently arrived at licensing terms[5].

Nor can Motorola claim ignorance regarding the meaning of RAND commitments. In the ALJ's Initial Determination in ITC CASE 337-TA-752, Motorola stated a willingness to grant patent licenses under RAND terms[6] and that those terms allowed for an "unrestricted number of applicants…".

Granting This Exclusion Order Could Dissolve the Entire Standards Bargain and Harm the Public Interest

To permit the owners of such patents to obtain exclusion orders would undermine the entire standard setting system, and harm the public value that flows from products built on those standards. For larger companies who develop devices / platform products, obtaining licenses in advance from *every* declared-essential patent holder for *every* standard covering its products would be simply impossible. These device manufacturers could no longer invest in, develop, and bring to market new and innovative products without fear that *any* of the of declared-essential patent holders could seek to enjoin product sales. Put simply, devices makers would have to assume that the use of a standard would lead to litigation. Nothing could be more inconsistent with the objectives of standard-setting—and the interests of the public—in promoting innovation and opening competition to innovation around common standards.

Today, our members use standards to 'bridge' barriers to entry. They focus their energy on one specific product, or even one aspect of a product to make it best in class, relying on standards to provide the key underpinnings. If small companies can no longer depend on standards to create that bridge, time and money will be spent simply re-inventing the wheel to manage various functions now handled by standards.

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[4] Letter from Motorola, Inc., IEEE 802.11 Intellectual Property Statement (March 1, 1994) *available at* http://standards.ieee.org/about/sasb/patcom/loa-802_11-motorola-01Mar1994.pdf

[5] Rudi Bekkersa,, Bart Verspagenb, Jan Smitsb, *Intellectual property rights and standardization: the case of GSM* Telecommunications Policy 26, 171–188 (2002). "Motorola presumably expected its GSM sales opportunities in the European market to be restricted and saw licenses as its main source of income in return for its research efforts."

[6] Administrative Law Judge David P. Shaw, Initial Determination in ITC Case 337-TA-752 "Motorola stated that it was prepared to grant licenses for patents essential to the relevant standards to an unrestricted number of applicants on RAND terms and conditions. Motorola does not dispute that it made such RAND commitments."

This need to re-invent creates significant drag on innovation and slows product development in areas of significant public value, including mobile health, productivity and education applications.

In fact it is this very assumption that standards are non-exclusive that leads to small companies to build products around them.

Among the public interest factors that the Commission must consider are "competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." 19 U.S.C. § 1337(d)(1). For the reasons detailed above, issuing exclusion orders for RAND-committed patents would severely harm the public interest with respect to each of these factors: competition would suffer from fewer, higher-priced, less innovative, and lower quality products; production would go down; and consumers would be harmed through diminished options and impaired competition.

We submit that the public interest should preclude any issuance of an exclusion order for a RAND committed patent. The appropriate remedy for infringement of a patent subject to a RAND commitment is RAND royalties collected in district court.

Sincerely,

Morgan Reed