



The Save Our Standards Coalition’s Response to the Request for Information on the Development of an Artificial Intelligence (AI) Action Plan

Submitted March 15, 2025

I. Introduction

Save Our Standards is a broad-based coalition of innovators, small businesses, associations, academics, and consumer groups dedicated to reinforcing the voluntary FRAND licensing commitment and its important role in technical standards to enable competition and innovation that directly benefits consumers. We work to educate decision-makers and stakeholders on policies that allow all innovators to thrive through pro-competitive practices and the reinforcement of fair, reasonable and non-discriminatory licensing terms for standard-essential patents. SOS welcomes the opportunity to provide feedback responding to the Request for Information (90 FR 9088) on the Development of an Artificial Intelligence (AI) Action Plan¹. As it formulates an Action Plan, SOS respectfully requests that the Administration consider the following points:

- A critical challenge to U.S. leadership in standardization,² and particularly the use of technical standards, is the ready availability of injunctions or exclusionary relief in certain courts and administrative bodies for standard essential patents (SEPs). SEPs are patents that have been voluntarily contributed to industry technical standards by their owners, who make binding commitments to license them on fair, reasonable, and non-discriminatory (FRAND) terms. Yet some of these owners – most of whom are foreign entities targeting U.S. companies – renege on their FRAND commitments. They leverage injunctions and exclusionary relief to impose excessive, non-FRAND royalties on licensees. This behavior disadvantages U.S. companies, chills standards adoption by U.S. industry, inhibits technological innovation and harms the standardization process itself.
- The United States should lead the way in curtailing such SEP abuse by supporting efforts here and abroad that decrease this behavior.

II. The Value of Standard Setting in AI Development and the Need for American Leadership

The potential benefits of industry standardization for AI development are well recognized. In the first Trump Administration, Executive Order 13859 on Maintaining American Leadership in Artificial Intelligence outlined how the “United States must drive the development of appropriate technical standards and reduce barriers to the safe testing and deployment of AI

¹ The consensus views expressed in this submission do not necessarily reflect the specific individual organizational positions of each member.

² For the purposes of this submission, “standardization” refers to the formal process of developing and establishing technical standards through Standards Development Organizations (SDOs) where contributions and FRAND commitments are voluntarily made.

technologies in order to enable the creation of new AI-related industries and the adoption of AI by today's industries.”³

Commerce Secretary Howard Lutnick recently testified at his confirmation hearing, standards are “the right model” for advancing American interests in AI: “Set those standards so the world heeds our standards and goes with our standards, would be very important for America and something I’m going to try to drive.”⁴ Likewise, Michael Kratsios, President Trump’s nominee to lead the White House Office of Science and Technology Policy and Science Advisor to the President, observed when testifying before Congress in 2023 about AI governance: “Beyond research, the government should convene stakeholders, provide direction, and assert American leadership at international standards organizations.”⁵

The potential benefit of relying on the participation of the private sector and other stakeholders in AI development is that it enables approaches “that are potentially more adaptable to the demands of a rapidly evolving technology.”⁶ American companies have been at the forefront of AI development, and the United States must harness and foster their continued innovation. The best system for doing that is by continuing to rely on private industry supported by the government.

While American standardization efforts should be led by the private sector, the U.S. government has a critical role to play by participating in and supporting those efforts. The U.S. government should assist industry by providing resources, including investing in research to maintain American preeminence in AI, and drive standards contributions. As outlined below, the Trump Administration should also take steps to ensure that AI standardization is not undermined by problems that have plagued other technologies, such as cellular and increasingly Wi-Fi. The traditional U.S. approach to standard setting, where the government promotes and supports private, voluntary, and consensus-based standard setting, is the right one.

III. The Promise of Standard Setting Too Often Falls Short

For all the potential benefits of standard setting promoting AI development, there are clear risks to this approach that are evident from current challenges in standards development.

A. SEP Injunctions, Particularly from Foreign Companies, Threaten U.S. Businesses and Consumers

Two of the greatest challenges currently facing standardization are unfair SEP licensing practices and the availability of injunctions and other forms of exclusionary relief. The unfair enforcement of SEPs has been long recognized as a threat to the adoption and success of standards. In 2013, for example, the Federal Trade Commission recognized that “[s]eeking and threatening injunctions against willing licensees of FRAND-encumbered SEPs undermines the

³ Executive Order 13859 of February 11, 2019, Maintaining American Leadership in Artificial Intelligence.

⁴ [Nomination Hearing – U.S. Secretary of Commerce](#) at 2:08-2:09, Jan. 29, 2025.

⁵ Michael J.K. Kratsios, [Statement before the Science, Space, and Technology Joint Investigations & Oversight and Research & Technology Subcommittees United States House of Representatives](#) at 5, Oct. 18, 2023.

⁶ Guidance for Regulation of Artificial Intelligence Applications at 8, OMB Memo 21-06, Nov. 17, 2020.

integrity and efficiency of the standard-setting process and decreases the incentives to participate in the process and implement published standards.”⁷

All too often, foreign companies use SEP injunctions to target American companies. Certain foreign courts have attracted SEP holders as litigants because they are willing to issue injunctions on SEPs, despite the fact that the SEP owners have willingly committed to license on FRAND terms. And because these courts are in countries with significant economies, an injunction can be devastating to an American company and provide significant bargaining leverage. Foremost among these jurisdictions is Germany, where one study found that of the 171 global SEP litigations between 2010 and 2023, 122 of those disputes involved an injunction request in Germany, of which 90 were at least partially granted.⁸

The cost of such foreign SEP injunctions is staggering. The same study estimated how much leverage these SEP holders gain through an injunction by considering the annual cost of injunctions issued by German courts. For example, the study considered the German injunction issued against Ford in 2022 at the request of IP Bridge, a Japanese patent assertion entity backed by the Japanese government,⁹ on a patent claimed essential to the 4G standard. The study estimated that Ford would have suffered annual losses of \$1.207 to \$1.593 billion in foregone sales and from recalling and destroying vehicles. By contrast, IP Bridge was seeking a royalty of up to \$20 per vehicle for a license to the patent pool in which it was a member, resulting in annual global royalties for Ford of about \$66.5 million. The annual cost of an injunction was thus about *18 to 24 times higher* than the royalty demand.

In those circumstances, the only rational economic decision is to pay the demanded royalties to avoid the debilitating costs of the injunction, even if the demand is well above FRAND. But when that happens, American consumers suffer as increased costs are passed through to them and because innovation and competition decrease when the pro-competitive benefits of industry-led standard setting are undermined.¹⁰

Ford is not alone in being a target of foreign SEP injunctions. In 2023, Huawei obtained an injunction in Germany against Amazon routers relating to claimed-essential Wi-Fi SEPs, which quickly led to a settlement in March 2024.¹¹ Huawei also targeted Netgear routers on claimed Wi-Fi SEPs, pursuing cases in Germany and also at the newly established Unified Patent Court (UPC) in Europe. In December 2024, Huawei obtained a seven-country UPC injunction against Netgear, which was forced to settle just weeks later.¹² In 2022, Huawei also pursued German SEP injunctions against Stellantis, a car conglomerate that includes the Chrysler, Dodge, Ram, and Jeep brands, which apparently led to a settlement.

⁷ Federal Trade Commission, [Analysis of Proposed Consent Order to Aid Public Comment, Matter of Motorola Mobility LLC and Google Inc.](#), File No. 121-0120, at 2 (Jan. 3, 2013).

⁸ John Hayes & Assaf Zimring, [Injunctions in Litigation Involving SEPs](#), at 241, GRUR Patent 6/2024.

⁹ IP Bridge, [IP Bridge Enters Into License Agreements With 10 Companies](#), Jan. 25, 2019.

¹⁰ A. Doug Melamed & Carl Shapiro, [How Antitrust Law Can Make FRAND Commitments More Effective](#), 127 Yale L.J. 2110, 2116 & n.17, 2132 & n.77, 2133 (2018).

¹¹ Huawei, [Amazon and Huawei sign global patent agreement](#), Mar. 5, 2024.

¹² Sisvel, [Netgear becomes the latest licensee of the Sisvel Wi-Fi 6 pool](#), Jan. 4, 2025.

The risk of SEP injunctions is not just confined to Europe. India’s High Court of Delhi held in 2023 that Indian courts “can and should” issue injunctions before a FRAND determination has even been made.¹³ And courts in Colombia and Brazil have been willing to grant preliminary SEP injunctions with little opportunity for a defendant to meaningfully contest the merits.¹⁴

U.S. courts remain a model for the world, because they have understood that such SEP owners in reality are seeking money, not an injunction.^{15,16} If SEP licensors *actually* succeeded in permanently excluding products containing their SEPs from major jurisdictions, not only would the product company fail in that jurisdiction, but the SEP licensors would too – because they make their money licensing patents to manufacturers. Because the whole point of voluntarily contributing their patents to a standard is to broadly license those patents for money to standards users, it is clear that licensing fees (i.e., money damages) will make SEP licensors whole in any case where they can require the product manufacturer to pay.

Nevertheless, unfortunately, the U.S. International Trade Commission (ITC) has different rules, and has become a favored destination for SEP monetizers—primarily foreign entities targeting U.S. companies—to seek a quick exclusion order to use as leverage in licensing negotiations. Although ITC exclusion orders are governed by a “public interest” standard under 19 U.S.C. § 337, the ITC has yet to recognize the severe harms to the public interest that occur when SEP holders leverage the threat of excluding imports of products.

Notably, that leverage is usually employed by foreign SEP holders. Since 2013, 14 of 16 ITC investigations involving SEPs have been pursued by foreign companies—with the other 2 of 16 pursued by non-practicing entities—and American companies have been targeted 69% of the time.

B. Non-FRAND SEP Royalties Distort Standards Development

Excessive, non-FRAND royalties can also affect the development of standards themselves, risking the inclusion of inferior technology in standards and chilling standards adoption, which in turn reduces consumer choice while increasing prices. The ability to obtain above-FRAND royalties creates exaggerated incentives for firms to focus on maximizing their SEP counts—rather than ensuring that standards incorporate the most useful or cost-effective technology.

Certain standards participants have been found to engage in “just-in-time patenting,” whereby they “apply for patents of low technical merit just before a standardization meeting, and then send the patents’ inventors to the meeting to negotiate this patented technology into the standard.”¹⁷ Another tactic some standards participants have adopted is to seek continuations for

¹³ *Intex Techs. (India) Ltd. v. Telefonaktiebolaget LM Ericsson (Publ)*, 2023:DHC:2243-DB 85 (High Ct. of Delhi at New Delhi Mar. 29, 2023).

¹⁴ See, e.g., Ryan Davis, [Colombian Court Ends Patent Injunction on Apple 5G Devices](#), Law360 (Nov. 17, 2022); [Nokia Interim Report for Q1 2023](#), at 24 (April 20, 2023).

¹⁵ *eBay Inc. v. MercExchange L.L.C.*, 547 U.S. 388 (2006)

¹⁶ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014)

¹⁷ Byeongwoo Kang & Rudi Bekkers, *Just-in-Time Patents and the Development of Standards*, 44 Rsch. Pol’y 1948,

their patents after publication of the relevant standard, then tailor those patents' claims to cover the standard after the fact (thus making them "essential"). Indeed, one study found that 84% of SEP continuations were filed after publication of the standard and that standardization leads to an 80-121% increase in the probability that a continuation will be filed—an effect that "is largest for firms that collect most of their revenue through licensing."¹⁸ These distortions can have adverse effects on the quality of standards when companies advocate for inferior or unnecessary technologies in order to increase their SEP counts and licensing revenues.¹⁹

In response to these problems, some aggressive SEP licensors advance a false narrative that frames SEP licensors as "innovators" and SEP licensees as "implementers" that simply adopt standards into their products without further innovation. Relying on this false distinction, they argue that standards cannot exist if they, the "true innovators," are not adequately rewarded by recouping their investments through patent royalties. Based on this premise, these SEP maximalists advocate for permissive legal regimes that allow them to exert maximum leverage against potential licensees—often accompanied by threats that they will withdraw from standardization efforts if they do not get their way.

This rhetoric, however, does not match reality. A study of 2020 R&D expenditures in the smartphone industry estimated that downstream firms accounted for 95% of the \$38 billion in R&D expenditures related to smartphones, while upstream SEP holders accounted for only 5%.²⁰

It is not, and has never been, the case that only a few companies contribute to standards development, such that the above-FRAND royalties that SEP monetizers seek are necessary for the standardization system to thrive. In fact, there are many reasons why companies that develop and sell products without seeking to monetize their patents participate in standards development, including: (1) ensuring that the standards they support are widely adopted, thereby creating new sales opportunities and access to new consumers and geographic regions; (2) developing expertise in the standardized technology to ensure that their engineers can create products that take advantage of the standard's features; (3) guiding the development of standards to ensure that they meet the needs of the market; and (4) mitigating the risks of a go-it-alone approach to expensive R&D endeavors.

IV. Concrete Steps for the AI Action Plan

Based on the risks outlined above, the Save Our Standards Coalition respectfully submits that the AI Action Plan include the following steps to ensure that standardization efforts benefit America in leading in AI innovation and not become a tool to undermine U.S. competitiveness:

1. Work with Congress to seek to limit the ability of foreign SEP holders to target U.S. companies with injunctions abroad.

1948 (2015).

¹⁸ Cesare Righi & Timothy Simcoe, [Patenting Inventions or Inventing Patents? Continuation Practice at the USPTO](#), at 2 (Feb. 2022).

¹⁹ Melamed & Shapiro, *supra* note 8, at 2116.

²⁰ Raphaël De Coninck et al., [SEP Royalties, Investment Incentives and Total Welfare](#), at 3 (2022).

2. Exert influence on foreign governments to rein in their courts from facilitating the hold-up of American companies through SEP injunctions.
3. Take steps in the U.S. to limit SEP hold-up, including (a) reforming the ITC to limit foreign companies from pursuing costly SEP exclusion orders and (b) opposing efforts to do away with the Supreme Court's unanimous *eBay* decision, authored by Justice Thomas, which removed the presumption of injunctions in patent cases.

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