

February 3, 2021

The Honorable Dick Durbin  
Chairman  
Senate Committee on the Judiciary  
224 Dirksen Senate Office Building  
Washington, District of Columbia 20510

The Honorable Jerrold Nadler  
Chairman  
House Committee on the Judiciary  
2138 Rayburn House Office Building  
Washington, District of Columbia 20515

The Honorable Maria Cantwell  
Chairwoman  
Senate Committee on Commerce, Science and  
Transportation  
512 Russell Senate Office Building  
Washington, District of Columbia 20510

The Honorable Frank Pallone  
Chairman  
House Committee on Energy and Commerce  
2125 Rayburn House Office Building  
Washington, District of Columbia 20515

Dear Chairman Durbin, Chairman Nadler, Chairwoman Cantwell, and Chairman Pallone:

We represent a diverse set of stakeholders with a common interest in protecting job growth, innovation, and consumers in your states and districts as well as across the country. In your positions of leadership on the Judiciary and Commerce Committees in each chamber, we urge you to prioritize safeguarding competition and consumers against anticompetitive or unfair conduct involving technical standards in tech-driven industries in the 117th Congress. With the intense focus on antitrust issues in both committees, punctuated by blockbuster antitrust lawsuits in tech-driven industries, there is clear bipartisan interest in asserting competition or other consumer protection law where warranted, and standard-essential patent (SEP) abuse is one area where Congress' leadership is sorely needed.

In your respective states and districts, the ability for innovators to create jobs and produce cutting-edge products and services in an increasingly broad set of industry verticals depends on strong technical standards like USB, Wi-Fi, 4G, and 5G. However, in order to safeguard the continued growth and success of these key industries and to protect the consumers of their end products and services, Congress must ensure that the law effectively prevents SEP licensing abuses. Incorporating a patent declared as essential into a standard typically confers market power on a SEP owner, so SEP owners make voluntary commitments pursuant to those declarations to license those SEPs on fair, reasonable, and nondiscriminatory (FRAND) terms. These commitments are necessary to balance the market power they obtain with the need for innovators to access standardized technologies through licenses. Without FRAND constraints, experience and data have shown that some SEP owners will engage in activities that cause harmful market distortions and ultimately injure consumers by reducing the quality and quantity of end products and services.<sup>1</sup> FRAND agreements prevent anticompetitive licensing behavior, and breaking those promises implicates antitrust law, in addition to other sources of law.

Unfortunately, as internet connectivity and computing capacity revolutionize emerging and established industries, from auto manufacturing to connected waste management services, stakeholders in those industries are discovering that SEP abuse accompanies the arrival of these capabilities. As overly-aggressive litigants continue to systematically bring SEP licensing cases in federal courts in order to pressure prospective licensees in private negotiations, the executive branch and Congress play important

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<sup>1</sup> See Findings of Fact and Conclusions of Law, *Fed. Trade Comm'n v. Qualcomm, Inc.*, Case No. 17-CV-00220-LHK (N. D. Cal., 2019), available at [https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2019/05/2019-05-21-Findings-dckt-1490\\_0.pdf](https://www.essentialpatentblog.com/wp-content/uploads/sites/64/2019/05/2019-05-21-Findings-dckt-1490_0.pdf); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297 (3d Cir. 2007), available at <https://caselaw.findlaw.com/us-3rd-circuit/1069408.html>.

roles in ensuring that federal law and policy protects innovators and consumers from their conduct. We urge you to closely examine the available policy levers, from the Federal Trade Commission Act to policy statements issued by a variety of federal agencies, and cause changes to be made where necessary to further this important purpose. We stand ready to assist in these endeavors and hope that you will draw on our expertise and perspective as you consider this as part of your broader antitrust and consumer protection agendas.

Sincerely,

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ACT | The App Association

Alliance for Automotive Innovation

American Antitrust Institute

BadVR

Center for Democracy and Technology

Computer & Communications Industry Association (CCIA)

Computer Ways, Inc.

For All Abilities

High Tech Inventors Alliance: HTIA

MacguyverTech

Main Line Software

New Technology Partners

Particle Health

Public Knowledge

TEEM

Thinkamingo Inc.

The Software & Information Industry Association (SIIA)

Vemos

Cc:

The Honorable Jim Jordan, Ranking Member, House Committee on the Judiciary

The Honorable Chuck Grassley, Ranking Member, Senate Committee on the Judiciary

The Honorable Cathy McMorris Rodgers, Ranking Member, House Committee on Energy and Commerce

The Honorable Roger Wicker, Ranking Member, Senate Committee on Commerce, Science, and Transportation