

UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC 20436

In the Matter of

CERTAIN GAMING AND
ENTERTAINMENT CONSOLES, RELATED
SOFTWARE, AND COMPONENTS
THEREOF

Investigation No. 337-TA-752

**THE BUSINESS SOFTWARE ALLIANCE'S RESPONSE TO THE
COMMISSION'S REQUEST FOR SUBMISSIONS ON THE PUBLIC INTEREST**

June 6, 2012

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INTRODUCTION

Pursuant to the International Trade Commission's ("Commission") request, the Business Software Alliance ("BSA")¹ respectfully submits the following comments addressing public-interest issues raised by the Administrative Law Judge's May 7, 2012 recommendation that an exclusion order be issued against respondent Microsoft Inc. in the above-captioned investigation. Before issuing an exclusion order, the Commission is mandated to consider whether such an order will help or harm the public interest.² Should the Commission ultimately find a violation of Section 337, BSA believes that it is in the public's interest that an exclusion order not be issued in this case or in other cases with similar facts and circumstances.

BSA believes all patentees should be free to exercise their intellectual property rights as they see fit. It should be their choice, for example, whether or not to submit their patented technologies to become part of internationally recognized standards. But if they make the choice to participate in the creation technology standards and in the process commit to licensing their technologies on fair, reasonable and non-discriminatory ("FRAND") terms, then they should not be allowed to circumvent their original commitment by using the Commission to obtain an exclusion order which could result in extracting unreasonable royalties. Internationally recognized technical standards play a critically important role in today's technology-driven society. Allowing patentees who commit to FRAND licensing and to renege on such commitments would have a chilling effect on competition, and it would harm consumers.

¹ BSA's members include: Adobe, Apple, Autodesk, AVEVA, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Cadence, Compuware, Corel, Dell, Intel, Intuit, Kaspersky, McAfee, Microsoft, Minitab, Progress Software, PTC, Quark, Quest Software, Rosetta Stone, Siemens PLM, Dassault Systemes SolidWorks, Sybase, Symantec, and The MathWorks.

² 19 U.S.C. § 1337(d)(1), (f)(1)

BACKGROUND

BSA is the leading global advocate for the software industry. It is an association of more than 70 world-class companies whose technology solutions spark the economy and improve modern life. Our members invest billions of dollars a year in research and development. Those investments depend on intellectual property protections and internationally recognized standards-setting systems that are predictable, transparent, and fair. When these core values are compromised, BSA members cannot innovate, produce new products, or conduct business in an ecosystem that adds value and provides choices for consumers.

BSA members hold hundreds of thousands of patents around the world, and they have adopted corporate policies that respect others' intellectual property rights. BSA members also participate widely in standards-setting organizations.

WHY STANDARDS ARE IMPORTANT FOR INNOVATORS AND CONSUMERS

Internationally recognized standards are part of the foundation of today's competitive technology marketplace. They allow firms to develop competing, but compatible, products and technologies. Promoting standards does not mean that all products will contain the same features, functions, or performance standards. Quite the opposite.

Consider, for example, the case of two international standards that are built on a foundation of standards-essential patents: Wi-Fi and the Universal Serial Bus, or USB. Because of these two standards, technology companies have had predictable platforms on which to create new and innovative products that give consumers a dazzling variety of choice. The Wi-Fi standard lets consumers connect a range of wireless devices to the same wireless router — from laptops and printers, to smartphones, wireless medical devices and much more. Similarly, consumers can connect many of those same devices using cables and standards-enabled USB ports. The creation and adoption of these and other standards has given rise to tremendous

diversity and richness in today's marketplace. The benefits are immeasurable, as would be the consequences of undermining them. Without standards, innovation would slow, the market would balkanize, and consumers would be stuck in a world of incompatible technologies — a different port or router for every device, creating less value at greater cost.

In order for companies to commit resources to creating and adopting standards, they must trust that their efforts will not be displaced by a patentee attempting to exclude them from the market. This is precisely why standards-setting bodies require that participants in the process commit to licensing their patents under FRAND terms before they are included in a standard. For example, the European Telecommunications Standards Institute (“ETSI”) requires parties submitting ideas to the organization for possible adoption to commit to making their intellectual property available under FRAND terms. The ETSI policy states:

When an ESSENTIAL IPR [Intellectual Property Right] relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses *on fair, reasonable and non-discriminatory terms* and conditions under such IPR to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.³

These commitments give companies the confidence they need to invest the millions of dollars it takes to develop technology using a standard. Without such commitments, standards would not be developed, or, if somehow developed, they would not be widely adopted.

³ ETSI's IPR Policy (Nov. 30, 2011) (emphases added). Other prominent standards setting organizations also have similar requirements, *e.g.*, IEEE, ITU, ANSI, JEDEC. In fact, a 2002 study found that twenty-nine of the thirty-six standards setting bodies studied that had written intellectual property policies required participants to license under FRAND terms. Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 Cal. L. Rev. 1889, 1906 (2002).

PUBLIC INTEREST POSITIONS

Granting Exclusion Orders for Standards-Essential Patents Would Have a Chilling Effect on Competition

If companies cannot trust FRAND commitments made during the standards-setting process, they will have little incentive to participate and competition will suffer. Fewer standards will be developed, and they will not be as widely implemented. Rather than sharing their technologies through standards organizations, companies will hoard innovations and create a variety of proprietary platforms. Firms might still enter into one-on-one agreements to cross-license and develop compatible products, but such small-scale developments have higher transaction costs. These increased costs — and the additional costs of having to individually negotiate licenses for intellectual property (where no FRAND commitment was made) — will create entry barriers that most new competitors will be unable to overcome. All of these negative consequences will have a chilling effect on today's robust and competitive technology industry.

Exclusion Orders for Standards-Essential Patents Would Harm Consumers

Without question, consumers benefit immensely from the creation and use of internationally recognized standards. These standards allow consumers to have advanced technology broadly implemented in a variety of devices that work together. This is why, for example, consumers have a plethora of choices when they shop for a printer to use with their computers. It is also one of the main reasons why consumers' transition costs are low when switching or upgrading a device: they can be sure the new device will work with rest of their personal technology, and the rest of their technology can be upgraded or replaced independently.

If holders of standards-essential patents are able to seek exclusion orders (despite promises to the contrary), then companies likely will respond by forgoing the development or adoption of new standards. Companies will instead produce redundant technology, and the

market will become balkanized. This will mean that fewer companies will invest in the market and the pace of innovation will severely slow down. Reduced competition will drive prices up and diminish value for consumers.

CONCLUSION

When a patentee makes a commitment to license its technology for FRAND terms during a standard setting process if that technology is made part of the standard, the patentee should be held to its promise. Allowing companies to circumvent their promises by using the Commission's sole remedy of an exclusion order would have a detrimental effect on internationally recognized standards systems. The ultimate result of a less robust standards system will be fewer choices for consumers, higher prices, and diminished innovation. Thus, the public's interest will be best served if an exclusion order is not issued in this investigation or any other investigation resting on similar facts and circumstances.

Dated: June 6, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that copies of the THE BUSINESS SOFTWARE ALLIANCE'S RESPONSE TO THE COMMISSION'S REQUEST FOR SUBMISSIONS ON THE PUBLIC INTEREST were served on the following parties as indicated below on this 6 day of June, 2012 as indicated:

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