Protecting Small Business Innovation

June 8, 2012

By Electronic Filing

The Honorable Lisa R. Barton
Acting Secretary
U.S. International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: ***In the Matter of Gaming and Entertainment Consoles, Related Software, and Components Thereof,*** **Investigation No. 337-TA-752**

Dear Acting Secretary Barton:

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 developers, including more than 4,000 based in the United States. Inclusive in ACT's membership are developers who create games and productivity software for use on multiple platforms, including "gaming and entertainment consoles." The current market for software written by our members and by other software vendors in this industry segment exceeds $7 billion, and the total market for all consoles, games, and accessories exceeds $25 billion. In 2011 alone, more than 300,000,000 retail software products for gaming consoles were sold, and millions more downloaded via storefronts built directly into the platforms. This software development ecosystem affects millions of Americans and provides real, tangible benefit to their lives.

The software ecosystem is also a small business phenomenon. On the Xbox platform, small businesses have multiple ways of competing with larger software companies. As of January 2012, more than 2,250 games were available as part of *Xbox Indie* [short for independent] *games*. Sales of games on this platform are significant, and can have significant revenue impact for small business. For example, the game FortressCraft by ProjectorGames, has sold more than 750,000 copies, and generated more than $2,000,000 in revenue, yet was built by a team of less than five full and part time workers.

ACT is a strong supporter of intellectual property in general, and specifically supports the presence of patented technology in standards. However, ACT's members are deeply concerned about the impact of granting an exclusion order for "Standards Essential Patents" believing that such a finding is against the public interest. Additionally, we believe Motorola's request for an

exclusion order fails to meet basic threshold tests including the lack of a directly competing product.

Motorola is Not a Direct Competitor Therefore any Exclusion of Xbox Would Have no Effect on Motorola Sales

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).

ACT believes that Motorola's request for an exclusion order fails the first, most obvious test of public interest – does Motorola have a competing product that would benefit from such an exclusion?

The Xbox and Motorola, a manufacturer of mobile phones and set top boxes, are not competing in the same market such that a use of the standard patents by the Xbox would directly affect the sales of Motorola phones or set top boxes. The exclusion of Xbox from the U.S. market would allow Motorola to effectively destroy a significant portion of an industry in which it does not even participate.

In fact the Xbox is the *only* console developed by a U.S. company and to ban its import would allow foreign-based companies such as Sony and Nintendo greater market share. As the Xbox is a significant portion of the gaming console ecosystem, excluding it would have a significant negative impact on competitive conditions in the United States economy. *See* Commission Opinion in the Matter of Certain Mobile Devices, Associated Software, and Components Thereof, Investigation No. 337-TA-744, 27, 30.

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

To permit the owners of standards essential 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. This Commission has recognized that standard essential patents are different and raise additional considerations when determining whether to grant an exclusion. Commission Opinion in the Matter of Certain Mobile Devices, Associated Software, and Components Thereof, Investigation No. 337-TA-744, 27.

RAND terms governing standards essential patents are vital for companies who develop their own devices and platform products. Obtaining licenses in advance from *every* declared-essential patent holder for *every* standard covering its products would be impossible. Put simply, device 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.

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.

The bottom-line is that in order to allow independent software developers to make reasonable business decisions and remain competitive, the costs associated with the use of standard patents must be clear.

Technology Standards are Critical for Independent Software 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.

The Commission should respect the path that Motorola took when it made RAND commitments in connection with patents it holds in the H.264 and 802.11 standards, and thereby agreed to accept reasonable monetary compensation for use of those patents. Motorola chose to forego the ability to use those patents to exclude products implementing the standard from the market the day it made those RAND commitments. 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.

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 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 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. Letter from Motorola, Inc., IEEE 802.11 Intellectual Property Statement (March 1, 1994). 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. "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." Rudi Bekkersa,, Bart Verspagenb, Jan Smitsb, *Intellectual property rights and standardization: the case of GSM,* Telecommunications Policy 26, 171–188 (2002).

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 and that those terms allowed for an "unrestricted number of applicants…"

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