August 7, 2013

Lisa R. Barton
Acting Secretary
United States International Trade Commission
500 E Street, S.W.
Washington, DC 20436

Re: The Innovation Alliance's Response to the Commission's Request for Written Submissions in *Certain Wireless Devices with 3G Capabilities and Components Thereof*, Inv. No. 337-TA-800.

Dear Acting Secretary Barton:

The Innovation Alliance ("IA") respectfully submits these comments in response to the Notice of Request for Statements on the Public Interest issued by the United States International Trade Commission in the matter of Certain Wireless Devices with 3G Capabilities and Components Thereof, Inv. No. 337-TA-800, on July 10, 2013 (the "Commission Request").

Introduction to the Innovation Alliance

The IA is a coalition of companies seeking to enhance America's innovation environment by improving the quality of patents and protecting the integrity of the U.S. patent system. The IA represents innovators, patent owners, and stakeholders from a diverse range of industries that believe in the critical importance of maintaining a strong patent system. Many of the IA's members also manufacture and/or sell products and services that utilize not only their own patents, but those of third parties as well. The IA believes in the pro-innovation and pro-competitive benefits of voluntary standardization efforts and in good faith bilateral negotiation of licenses and cross-licenses among standardization participants.

The IA's members include several cellular technology pioneers that have contributed key essential technologies to the development of current standards and that are longstanding participants in standard setting efforts by the European Telecommunications Standards Institute ("ETSI") and other standard setting bodies. IA companies therefore care deeply about the legal landscape surrounding patents that are relevant to technical standards and that may be encumbered by a commitment to license on certain terms, such as fair, reasonable and nondiscriminatory ("FRAND").

IA's Response

The administrative law judge ("ALJ") in the above-referenced investigation ("the 800 investigation") recently issued an initial determination finding no violation of Section 337. Specifically, the ALJ found the asserted patents to be not infringed and/or invalid. However, in his Recommended Determination on Remedy and Bonding, the ALJ advised the Commission to issue a limited exclusion order in the event the Commission determines that at least one of the asserted patents is both valid and infringed. The IA respectfully submits these comments in response to the Commission's notice soliciting comments on the public interest issues raised by the ALJ's recommended relief. Despite the Administration's recent decision to disapprove the Commission's determination in another matter – a decision with which the IA strongly disagrees – the IA respectfully urges the Commission to carefully consider the significant pro-consumer benefits of standardization and the importance of encouraging innovators' voluntary participation in standard-setting activities. The IA also urges the Commission to be mindful of the significant negative consequences to our national economy from any decision or policy that encourages infringing imports.

Availability of an Exclusionary Remedy

On August 3, 2013, the United States Trade Representative ("USTR") disapproved the Commission's determination to issue an exclusion order and cease and desist order in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation No. 337-TA-794 ("the 794 investigation"). While the USTR's letter to the Commission offers no explanation of the reasons for the disapproval, the USTR noted that exclusionary relief on the basis of a FRAND-encumbered patent should be available in the circumstances outlined by the Department of Justice ("DOJ") and United States Patent and Trademark Office ("USPTO") in their "Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary FRAND Commitments" ("DOJ-USPTO Policy Statement"). For example, to address "reverse patent hold-up", the DOJ-USPTO Policy Statement explains that an exclusionary remedy should be available when a potential licensee refuses to engage in a negotiation to determine FRAND terms, such as by insisting on terms clearly outside the bounds of what could reasonably be considered to be FRAND terms in an attempt to evade the potential licensee's obligation to fairly compensate the patent holder. To facilitate this analysis, the USTR has recommended that in future cases the Commission develop a comprehensive factual record related to such issues.

The IA respectfully urges the Commission to carefully consider the vast record that has already been developed in the 800 investigation when considering the circumstances for exclusionary remedies outlined in the DOJ-USPTO Policy Statement. On the issue of FRAND, the IA understands that the current record includes multiple fact and expert witnesses, and a substantial amount of briefing. Indeed, based on this record, the ALJ has already found that the complainant negotiated in good faith and did not breach any obligations to grant licenses on FRAND terms. The Commission can equally look to this record when considering the issue of "reverse patent hold-up."

Accordingly, the IA respectfully urges the Commission to use the comprehensive record in this investigation to further develop the jurisprudence surrounding the DOJ-USPTO Policy Statement and to make findings related to the presence or absence of patent hold-up or reverse hold-up with respect to any patents that are subject to a standards-based FRAND licensing obligation.

Enforceable Intellectual Property Rights are Vital to an Innovation-Based Economy

Protecting American intellectual property rights is vital to our national economy, regardless of whether those rights implicate technical standards or not. The export of technology is one of the few areas in which the U.S. maintains a trade surplus. The best way to continue encouraging investment in innovation and technology development is to protect valid intellectual property rights from infringement by others, particularly foreign-based manufacturers who operate in exporting countries that do not have an established culture of respect for intellectual property. Denying protection against infringing imports would not only undermine U.S. policies designed to encourage investment in our economy by giving importers an excuse to ignore U.S. trade laws, it would also embolden other countries to continue pursuing, or worse enact, policies intended to undermine the intellectual property rights of others abroad.

Conclusion

For at least these reasons, when considering the ALJ's Recommended Determination in this investigation, the IA respectfully urges the Commission to fully consider the significant pro-economic and pro-consumer benefits that derive from vigorous patent protection and from robust participation in standards.

Sincerely,

Brian Pomper
Executive Director
The Innovation Alliance