

**UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.**

**Before The Honorable Charles E. Bullock
Chief Administrative Law Judge**

In the Matter of

**CERTAIN MEMORY MODULES AND
COMPONENTS THEREOF**

Investigation No. 337-TA-1089

**STATEMENT ON THE PUBLIC INTEREST PURSUANT TO 19 C.F.R. 210.50(a)(4) OF
NONPARTY JEDEC SOLID STATE TECHNOLOGY ASSOCIATION**

I. BACKGROUND

Nonparty JEDEC Solid State Technology Association (“JEDEC”) respectfully submits comments in response to the Commission’s request for submissions on the public interest in the above-captioned investigation. JEDEC is an independent, non-profit semiconductor engineering trade association that is the global leader in developing standards for semiconductors and microelectronics, including the chips and modules implemented in RDIMMs, LRDIMMs and other memory products.

Judge Bullock stated in the Initial Determination 2017, at page 195 that “New York law appears to require that the agreement [to extend a RAND license] be considered unenforceable.” Judge Bullock goes on to state in the Initial Determination 2019, at page 177, that he sees “no reason to disturb the previous finding that the JEDEC agreement is unenforceable.” The Initial Determinations note that neither party in interest has raised enforceability under New York law.

JEDEC believes this finding is erroneous and recommends that the ITC either delete the discussion of enforceability, or withdraw the finding and leave open the proper conclusion. To leave the finding in place would undermine the intellectual property rights (“IPR”) policies of JEDEC and the similar policies of hundreds of other standards development organizations (“SDOs”) that uniformly utilize the phrase “reasonable and nondiscriminatory” without further elaboration, and tens of thousands of extant RAND undertakings under such policies. Failing to do so may do great damage to United States competitiveness, consumers and innovation.

II. THE UNITED STATES AND GLOBAL COMMERCE DO NOT BELIEVE THE PHRASE “REASONABLE AND NONDISCRIMINATORY” TO BE COMMERCIALY VAGUE

There are thousands of national, regional and global standards development organizations in existence.¹ These SDOs are diverse, including global organizations where participation is by national representatives (i.e., the International Organization for Standardization (“ISO”); the International Electrotechnical Commission (“IEC”); and the International Telecommunications Union (“ITU”), a

¹ For a list of over 1,100 organizations that develop or have developed and/or promote standards in the information and communications technology industry alone, see *Standard Setting Organizations and Standards List*, ConsortiumInfo.org, <https://www.consortiuminfo.org/links/#.XdbrwVVKiUk> (last visited Nov. 25, 2019).

United Nations Treaty organization), 240 United States-based SDOs accredited by the American National Standards Institute (ANSI), and many hundreds of other SDOs (often referred to as “consortia”) that are not so accredited. The important role of the standards produced by these SDOs has been recognized by Congress and codified in law and regulations.²

The vast majority of these organizations have IPR policies or provisions in their governance documents that are intended to ensure that patent claims that would be necessarily infringed by the implementation of a standard will be available in a manner that will facilitate the broad and rapid uptake of these specifications. The words that are invariably used to describe the terms upon which such claims must be made available are “reasonable and nondiscriminatory” (or, in Europe and some other parts of the world, “fair, reasonable and nondiscriminatory,” or FRAND).

If there is one thread that ties all of these organizations, accrediting programs, laws and regulations together, it is their common and invariable use of that phrase in relation to obligations that are fundamental to the achievement of the pro-competitive, pro-consumer, pro-innovation goals of standardization.³ Importantly, the vast majority of these same sources – including United States regulators

² By way of example, in 1995 Congress enacted the National Technology Transfer and Advancement Act of 1995, which directed the federal agencies to cease creating or using internally-developed standards wherever possible and instead use standards developed by the private sector. National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 110 Stat. 775 (Mar. 7, 1996), codified at 15 U.S.C. §3701 et seq. (1996). Agency guidance was provided in the implementation of this edict in Office of Management and Budget (“OMB”) Circular A-119, which sets out a preference for standards developed by “voluntary consensus standards.” Office of Mgmt. & Budget, Exec. Office of the President, OMB Circular No. A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (1998). OMB included the following – and no more – regarding licensing terms in its definition of such standards:

These standards include provisions requiring that owners of relevant intellectual property have agreed to make that intellectual property available on a *non-discriminatory, royalty-free or reasonable royalty basis* to all interested parties.

Id. (emphasis added).

³ The exact formulation of the RAND obligation varies somewhat from venue to venue, but the word variations do not make the phrase more specific (e.g., the JEDEC policy includes the phrase, “reasonable terms and conditions that are free of any unfair discrimination” (JEDEC Solid State Technology Association, *JEDEC Manual of Organization and Procedure* § 8.2.5(i) (Nov. 2017)), and the ANSI Essential Requirements refer to “reasonable terms and conditions that are demonstrably free of any unfair discrimination” (American National Standards Institute, *ANSI Essential Requirements: Due process requirements for American National Standards* § 3.1.1(b)(i) (Jan. 2019))).

– include no further words of definition to qualify or explain the meaning of RAND.⁴

III. THE ABSENCE OF A DEFINITION OF “RAND” IS DELIBERATE AND IN ACCORDANCE WITH PUBLIC POLICY

The reason for the absence of further guidance on the meaning of the phrase RAND is not hard to guess: SDOs by definition bring together direct competitors to agree upon ways in which they will all act the same – almost the textbook definition of anti-competitive conduct. In the case of design, as compared to performance, standards, such agreements can limit innovation at the level of standardization.

Notwithstanding such risks, domestic and foreign courts have universally held that the pro-competitive effects of standards development so far outweigh the possible detriments that SDOs enjoy a safe harbor status both at home and abroad, so long as the actions of SDO members stay within appropriate bounds.⁵

This safe harbor status is rightly conditioned, however, on the imposition by competitors of no greater constraints on the owners of standards essential patents (“SEPs”) than is necessary to achieve beneficial results for consumers. It is hardly surprising, then, that SDOs, governments, agencies, and SDO members themselves universally recognize that negotiations among members regarding price and other common licensing terms must not occur in an SDO.⁶ This firewall is often expressly stated, as in the Common Patent Policy of the three global standards organizations referred to above in which participation is by national representative, to the effect that all licensing negotiations, “are left to the

⁴ See, e.g., Rudi Bekkers & Andrew Updegrave, *A study of IPR policies and practices of a representative group of Standards Setting Organizations worldwide*, National Academies of Science (Sept. 17, 2012), https://sites.nationalacademies.org/cs/groups/pgasite/documents/webpage/pga_072197.pdf. In this study commissioned by the US Patent and Trademark Office, the authors observed that, while it would be helpful for IPR Policies to include more robust definitions, “none of the policies in the study set seeks to define the term ‘reasonable’ (and/or the term ‘fair’, if the policy refers to FRAND). *Id.* at 103. Likewise, ‘nondiscriminatory’ also is left to the parties involved to agree upon (or to the courts, if they cannot).” *Id.*

⁵ See, e.g., *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 294 (5th Cir. 1988) ([I]t has long been recognized that the establishment and monitoring of trade standards is a legitimate and beneficial function of trade associations.”).

⁶ Only very rarely has an SDO sought to go further on issues of price and other terms than the simple RAND commitment. However, in 2007, two SDOs – the VMEbus International Trade Association (VITA) and the Institute of Electrical and Electronic Engineers – each submitted Business Review letters to the Department of Justice. Importantly, each of these SDOs sought to increase clarity not by regulating the terms that a member subject to a RAND offer could offer, but by allowing vendors subject to the obligation to disclose their non-negotiated terms in advance of the adoption of the standard in question.

parties concerned and are performed outside ITU-T/ITU-R/ISO/IEC.”⁷

It is important to note that the great majority of standards relating to products and services today are intended to have global application. Were it to be otherwise, domestic industries would find it vastly more difficult and expensive to access global markets. It is further important to note that standards frequently “normatively reference” other standards, either in whole or in part, meaning that to comply with standard A (and achieve the consumer benefits of such compliance), the implementer must comply with each such external standard as well. These standards may have been produced by any of hundreds of other SDOs, each subject to the laws of its own jurisdiction, and all of which are subject to RAND licensing obligations. To unilaterally require that the relevant IPR terms of a United-States based SDO become dramatically more proscriptive than those of other standards bodies would result in three predictable results: a dramatic increase in the complexity of negotiating rights in SEPs for products and services that implement many standards; a refusal of commercial entities to become members of the SDO in question; and the refusal of other SDOs to normatively reference its standards.

Such a radical reformation of the RAND definition would also be at odds with the duties assumed by the United States as a signatory of the World Trade Organization’s Agreement on Technical Barriers to Trade, a portion of which is directed at tearing down standards-based barriers to trade. Under Article 4 of this Agreement, signatory nations are obligated to:

[T]ake such reasonable measures as may be available to them to ensure that local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they or one or more bodies within their territories are members, accept and comply with this Code of Good Practice.

Agreement on Technical Barriers to Trade, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A.

Under Annex 3 (Substantive Provisions), Section F of the Agreement:

Where international standards exist or their completion is imminent, the standardizing body shall use them, or the relevant parts of them, as a basis for the standards it develops,

⁷ See ISO/IEC/ITU Common Patent Policy, § 2.1. See also IEC, ISO & ITU, *Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC*, at 9 (Feb. 11, 2018).

except where such international standards or relevant parts would be ineffective or inappropriate, for instance, because of an insufficient level of protection or fundamental climatic or geographical factors or fundamental technological problems.

Id.

In short, the United States should not instruct SDOs headquartered within its boundaries to “opt out” of global IPR policy conventions, either as a practical, commercial, or treaty matter.

IV. THE PUBLIC INTEREST WOULD BE DISSERVED BY ANY FINDING THAT A TYPICAL RAND COMMITMENT IS UNENFORCEABLE

There are hundreds of thousands of standards in active use today enabling commerce, safety, health, transportation and virtually every other aspect of modern society to operate. The use of many of these standards would result in the infringement of patent claims that are currently subject to the RAND obligations of SDO members, and, via contractual RAND reciprocity provisions, non-member implementers of those standards. The IPR policies of these SDOs may be subject to New York State law, or the laws of other jurisdictions that resemble those of that state on this issue.⁸ Were these obligations to suddenly be declared void at law, untold havoc would result as the owners of countless SEPs became free to “hold up” the market, requiring whatever royalties they prefer, deciding which firms they would and would not provide licenses to, and even refusing to license their SEPS to anyone at all.

V. CONCLUSION

For all of these reasons, allowing the finding referenced above to remain has a significant potential to harm the U.S. economy and U.S. consumers and thus be contrary to the public interest. In light of the fact that neither party at interest has asserted that a RAND undertaking is unenforceable under New York, JEDEC believes it would be in the public interest to either delete the discussion on this topic in the final version of the Initial Determination, or make no finding on the question of RAND enforceability.

⁸ As an indication of the vast number of SEPs in existence, Nokia disclosed on October 9 of this year that it had disclosed 2,000 essential patent families under standards relating to just one technology (5G telecommunications) in a single SDO, the European Telecommunications Standards Institute (ETSI). *See Nokia announces over 2,000 5G patent declarations*, Nokia (Oct. 9, 2019), <https://www.nokia.com/about-us/news/releases/2019/10/09/nokia-announces-over-2000-5g-patent-declarations/>.

Date: November 25, 2019

Respectfully submitted,

By: /s/

Andrew Updegrove

Gesmer Updegrove LLP

40 Broad Street

Boston, MA 02109

Telephone: (617) 350-6800

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **STATEMENT ON THE PUBLIC INTEREST PURSUANT TO 19 C.F.R. 210.50(a)(4) OF NONPARTY JOINT ELECTRONIC DEVICE ENGINEERING COUNCIL** were served on the following parties this 25th day of November, 2019 in the manner indicated below:

<p>The Honorable Lisa R. Barton Secretary to the Commission U.S. International Trade Commission 500 E Street, SW, Room 112 Washington, DC 20436</p>	<p>EDIS VIA OVERNIGHT MAIL (8 copies)</p>
<p>The Honorable Charles E. Bullock Chief Administrative Law Judge U.S. International Trade Commission 500 E Street, SW Washington, DC 20436</p>	<p>VIA OVERNIGHT MAIL (2 copies) VIA ELECTRONIC MAIL Michael.turner@usitc.gov</p>
<p>Monisha Deka Office of Unfair Import Investigations U.S. International Trade Commission 500 E Street, S.W., Suite 401 Washington, D.C. 20436</p>	<p>VIA ELECTRONIC MAIL Monisha.deka@usitc.gov</p>
<p><i>Counsel for Complainant Netlist, Inc.</i> James M. Wodarski MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C. One Financial Center Boston, MA 02111</p>	<p>VIA ELECTRONIC MAIL Netlist-ITC-1089@mintz.com</p>
<p><i>Counsel for Respondents SK hynix, Inc., SK hynix America, Inc., and SK hynix memory solutions, Inc.</i> Michael R. Franzinger SIDLEY AUSTIN LLP 1501 K Street, N.W. Washington, DC 2005</p>	<p>VIA ELECTRONIC MAIL SKHynixNetlistSidleyTeam@sidley.com</p>

/s/
Andrew Updegrove
Gesmer Updegrove LLP
40 Broad Street
Boston, MA 02109
Telephone: (617) 350-6800