UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, D.C.

In the Matter of	
CERTAIN VIDEO CAPABLE ELECTRONIC DEVICES, INCLUDING COMPUTERS, STREAMING DEVICES, TELEVISIONS, AND COMPONENTS AND MODULES THEREOF	**Investigation No. 337-TA-1380**

STATEMENT OF THIRD PARTIES COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION AND ALLIANCE FOR AUTOMOTIVE INNOVATION IN RESPONSE TO THE COMMISSION'S JANUARY 6, 2025, NOTICE OF REQUEST FOR STATEMENTS ON THE PUBLIC INTEREST

The Computer & Communications Industry Association ("CCIA") and Alliance for Automotive Innovation ("AFAI") submit the following comments in response to the Commission's Federal Register Notice of January 6, 2025. CCIA represents over two dozen companies of all sizes providing high technology products and services.[1] CCIA members manufacture devices like those proposed to be excluded, such as computers and streaming devices, and develop software for such devices. AFAI represents the full automotive industry, including the manufacturers producing most vehicles sold in the U.S., equipment suppliers, battery producers, semiconductor makers, technology companies, and autonomous vehicle developers.[2] The automotive industry is the nation's largest manufacturing sector.

Exclusion of standards-practicing products, especially over minor aspects of the standard, is an inappropriate remedy. While § 1337 does not contain an explicit bar on such an order, it does require the Commission to address the impact on competitive conditions within the United States, among other factors, before issuing such an order. Considering this factor, an exclusion order based on a standard-essential patent is inappropriate here—and in any circumstance in which a respondent would reliably pay an adjudicated FRAND rate.

Given Amazon's stated willingness to license and the existence of an active proceeding to set such a rate, there is no rationale to cause harm to the U.S. economy and competitive conditions by excluding Amazon's products. And given the wide range of products that incorporate H.264, H.265, and AV1 standards, issuance of an exclusion order here would ultimately allow Nokia to extract supra-FRAND royalties from a wide array of American manufacturers using the *in terrorem* threat of exclusionary relief.

[1] A list of CCIA's members is available online at https://www.ccianet.org/members. Respondent Amazon is a CCIA member, but took no part in the preparation of these comments.
[2] A list of AFAI's members is available online at https://www.autosinnovate.org/about/our-members.

I. EXCLUSION OF THE REQUESTED ARTICLES WOULD HARM CONSUMERS AND COMPETITIVE CONDITIONS

While Nokia has limited the accused products in this case to specific Amazon products implementing H.264, H.265, and AV1, there is no reason to differentiate those products from other products that implement these standards. In the event that an exclusion order does issue, it would be trivial for Nokia to request a modification order to add additional products that implement the accused standards. The Initial Determination relies on exactly that argument, noting that the relevant patents "are infringed by the Accused Products by way of those claims being essential to the H.264, H.265, and AV1 standards."[3]

Given this, the ITC would be unlikely to resist modifying the exclusion order, or issuing exclusion orders in future proceedings, to include other products[4] that practice the H.264, H.265, and AV1 standards. That potential scope is immense. The vast majority of all computers on the U.S. market today implement one or more of these standards, as do all smartphones, streaming devices, and other such products. While the Commission may focus on the devices identified in this investigation, an exclusion order on standard-essential patents threatens all such devices.

Specifically, the *in terrorem* threat of an exclusion order allows patent owners to extract a reward far in excess of the value of their patents, even in the majority of cases where the defendant infringed innocently and without knowledge of the patent.[5] This is particularly inappropriate in the case of standard-essential patents, where the patent owner has—as Nokia has—committed to license their patents on FRAND terms. Such a commitment bars the patent

[3] Initial Determination, USITC Inv. No. 337-TA-1380, Doc. Id. 840761 at 45 (Jan. 8, 2025); *see also id.* at 27, 97, 128, 129, 130.
[4] While a LEO has been requested in the present proceeding, there does not appear to be any rule against requesting modification of an order from an LEO to a GEO in a modification proceeding.
[5] *See generally* Written Testimony of Joshua Landau to the Senate Judiciary Committee Subcommittee on Intellectual Property, *Hearing on The RESTORE Patent Rights Act: Restoring America's Status as the Global IP Leader* (Dec. 18, 2024).

owner from refusing to license a party such as Amazon which has expressed a willingness to take a license. As such, and contrary to the ID, assertion of a SEP in a proceeding which requests exclusion should in and of itself be treated as a violation of the duty to bargain in good faith.[6]

Further, in complex, multi-component products such as semiconductors, smartphones, computers, and other high-tech products, a patent will typically only cover a small portion of the product. However, an exclusion order allows the patent owner to block the entire product from the market. Given the choice between its product being taken off the market or over-paying the patent owner for a license, a product manufacturer will be willing to significantly over-pay for even a minor feature, allowing the patent owner to confiscate value that the product manufacturer created independently of the patent. Manufacturers do so in order to avoid the complete loss of value that would ensue from an injunction or exclusion order. These windfall settlements, where a patent owner obtains far more than its contribution, in turn incentivize additional patent litigation, particularly from non-practicing entities.

While the articles proposed to be excluded at this time may not represent a majority of the market, the fact that this proceeding is against standards-compliant products on the basis of standard-essential patents requires the analysis to be conducted differently. Because any device that implements H.264, H.265, and AV1 would be held to be infringing and thus excluded absent a license, the Commission must make the assumption that Nokia will seek to do so. To hold otherwise would be to permit Nokia to engage in anti-competitive behavior via a death of a thousand proceedings. Each one might only cover a small portion of the market, but the sum total would be essentially the entirety of the market.

An exclusion order in this case would permit Nokia to threaten any product manufacturer

[6] *See* Initial Determination at 146.

with products that implement H.264, H.265, and AV1—which is, again, the vast majority of all products in the categories to which this proceeding applies. In the event of such an order, U.S. product makers will face a serious threat to their businesses. And when such a threat exists, they will pay whatever it takes—despite Nokia's putative commitment to provide licenses on reasonable terms—to prevent their products from being taken off-market. And while theoretically Amazon or other product makers could seek a court declaration that the Nokia rate is not FRAND-compliant in order to avoid overpayment, that is cold comfort when you can't conduct business. The end result will be an unfair extraction of money from U.S. businesses and citizens to the benefit of a foreign NPE, all enabled by the Commission's choice to issue an exclusion order in this case.

Because of the predictable and near-certain negative impacts on U.S. consumers and competitive conditions, it is clear the public interest does not favor the imposition of an exclusion order in this case. Further, this case represents yet another example of a foreign NPE attempting to use the ITC as a parallel forum to make an end-run around the district court *eBay* requirement. Such cases force respondents to expend significant monetary and engineering resources, thereby increasing costs to consumers and reducing the number of new products and features consumers will be able to use. The Commission's statutory obligation to protect the public interest does not require the Commission to allow itself to be used for the benefit of foreign corporations at the expense of the entire standards-implementing world.

II. EXCLUSION ORDERS ON THE BASIS OF STANDARD ESSENTIAL PATENTS SHOULD BE ANALYZED AS AKIN TO GENERAL EXCLUSION ORDERS

Formally, Nokia has requested a limited exclusion order. In practice, an exclusion order on the basis of a SEP is more closely akin to a general exclusion order in ultimate effect. While Nokia has only requested the exclusion of a subset of Amazon's H.264, H.265, and AV1-

implementing products, there is no apparent rationale under which the Commission would refuse to cover other standard-compliant products in future proceedings if it finds there is infringement and no public interest concern here. Given that, by its very definition, the nature of a standard-essential patent is that any product that implements a standard necessarily infringes the patent, it is critical that the Commission consider the full potential scope of the requested exclusion order.

III. AN EXCLUSION ORDER WOULD EITHER HARM AMERICAN INDUSTRY OR PERMIT NOKIA TO VIOLATE ITS CONTRACTUAL OBLIGATION

An exclusion order is even less appropriate in this case given the pending rate-setting litigation between the parties, which will ensure that Nokia will receive exactly what it is contractually entitled to—a fair, reasonable, and non-discriminatory license payment. But providing an exclusion order in the present case would result in one of two outcomes, both undesirable. Either Nokia will be able to violate its FRAND obligations using the *in terrorem* effect of the order, or else Amazon will be unfairly forced to remove their products from the market until the conclusion of the rate-setting litigation. Given that Amazon wishes to pay Nokia, and Nokia is obliged to license Amazon, any order should be stayed pending resolution of that litigation.

IV. CONCLUSION

An exclusion order in this case would threaten competitive conditions in the United States and wave the starting flag for non-practicing entities to assert their SEPs in the ITC. Those entities couldn't take products off-market in the district courts—but under the Initial Determination's approach, the Commission would do exactly that.

The Commission was created to protect American industry from unfair foreign competition. The ALJ's initial determination has invited the Commission to do the opposite. CCIA and AFAI respectfully urges the Commission to decline the invitation.

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Respectfully submitted,

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