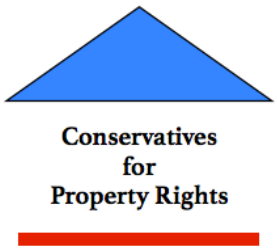

November 6, 2023

United States Patent and Trademark Office
600 Dulany Street
P.O. Box 1450
Alexandria, VA 22313

RE: Joint Collaboration Initiative Regarding Standards (Docket No. PTO-C-2023-0034)

To whom it may concern:

Conservatives for Property Rights (CPR), a coalition of public policy organizations concerned with preserving and protecting private property rights with respect to all forms of property, provides comment on Joint Collaboration Initiative Regarding Standards (Docket No. PTO-C-2023-0034).

The National Standards Strategy for Critical and Emerging Technology has put forward a "whole of government approach" intended to foster U.S. involvement and leadership in standards development, particularly standards related to critical and emerging technology (CET). Involvement in standards development is instrumental to U.S. industrial competitiveness.

CPR has advocated for constructive policies related to U.S. industrial competitiveness and technological leadership.[1] Key policies for success ensure secure, reliable, enforceable property rights and free markets in which to exercise private property rights. Importantly in the standards context, property rights include intellectual property (IP) rights.

We appreciate that the strategy aims to advance U.S. innovators' engagement in the existing "rules-based and private sector-led approach to standards development." This must remain front and center in the agencies' efforts implementing the National Standards Strategy. The government can successfully foster robust engagement in standards development in CET through wise policies; it can also diminish innovators' ability and willingness to participate in standards development if the government adopts unwise policies.

Moreover, the only way the United States will lead in CET standards development will be if private-sector innovators continue to have strong incentives to invest in standards-related invention, research, and development. Strong incentives include secure patents, market-based

[1] For example, see our monograph, Property Rights: The Key to National Wealth and National Security.

negotiation and private determination of FRAND licensing rates and terms, and access to courts (and other bodies similar to the U.S. International Trade Commission (USITC)) in any appropriate jurisdiction globally to enforce patent rights, terms of licensing agreements, and contractual FRAND rates and obtain robust remedies.

Foundational invention, R&D, and standards work are not for the faint of heart. Companies in this type of innovation voluntarily assume long, uncertain trailblazing. Intrepid innovators invest huge sums and vast resources into technology-leading research and development with no "money-back guarantee" in case years later their inventions are not selected as part of a standard. This arduous path is long-horizon and highly uncertain. FRAND (fair, reasonable, and nondiscriminatory licensing) commitments are made, through private contracts, at the beginning of the standards-development process. These voluntary commitments surrounding a particular emerging new technology, such as 5G wireless connectivity, occur in the context of standards-development organizations (SDOs). At the time of a new SDO effort, the innovators in associated R&D will have been inventing in this area for several years. Then, the SDO process takes a near-decade to define the standards.

The risks that innovators, whose foundational research leads to cutting-edge technology and standard-essential patents (SEPs), confront are mitigated in several ways. Foremost is having their inventions adopted as technological standards. SEP licenses with technology implementers provide them a fair return on their extensive R&D investment in the form of revenues. The innovators' SEP technology becomes part of the products and devices that comply with the new standard. Patent licensing revenue also fund innovators' future R&D. These companies' risks are rewarded through their experts becoming leaders in their SDO.

At the same time, these risk mitigators also incentivize standardization innovators to risk the up-front capital investment that leads to SEP IP and licensing revenues to fund R&D. Having access to the full panoply of patent enforcement remedies for SEPs ensures fair, reasonable payments for use of the technology that won the competition in transparent, voluntary, consensus- and merit-based SDO proceedings. Robust patent rights enable SEP innovators to hold accountable implementers that "hold out" from complying with their FRAND commitments.

Thus, it is in the national interest of the United States that the strategy refrain from government injecting regulatory, legal, or other policies or barriers that disrupt market-based determination of FRAND rates, enforcing one's SEP patent rights, merit- and consensus-based SDO governance, or change SEPs and patent rights into either a compulsory licensing scheme or devalue SEPs by aggregating royalty rates.

Some of the threats to standards-related engagement by America's innovators include:

- The EU's proposed Framework for Transparent Licensing of Standard Essential Patents would impose a compulsory licensing scheme on SEP licensing in Europe, disrupting market-based SEP licensing in a region that, like the United States, is a net exporter of IP-protected technology. This policy would devalue the value of SEPs. Bipartisan officials of the current and past U.S. administrations wrote the EU with profound concerns. Domestic implementers are pursuing the same sort of bias for implementers and devaluation of SEPs through the Standard Essential Royalty Act.

- The Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Docket No. ATR-2021-0001), which was ultimately, wisely withdrawn. The 2022 proposed policy statement on SEPs would have tilted the government's interpretation of FRAND commitments in favor of implementers and against innovators, who bore the risks; dictated what licensing negotiations may and may

not entail, approached through a distorted lens; and empowered implementers and patent holdout while disadvantaging innovators through its negotiation prescriptions.

- Antisuit injunctions (ASIs), a growing practice of certain foreign courts, particularly in China, of inappropriately using ASIs to assert global jurisdiction over SEPs and justify global price setting. This restricts U.S. patent owners from asserting their SEPs in U.S. or other nations' courts. The Defending American Courts Act would take measures to ensure that IP owners have access to U.S. courts and are able to exercise their U.S. IP rights by judicial means. By contrast, the Defending American Patents Act would effect a similar denial of U.S. innovators' access to foreign courts to enforce their SEPs as Chinese courts pursues.

- Legislation would weaken the U.S. International Trade Commission's (USITC) ability to issue exclusion orders to halt importation of patent-infringing goods containing U.S. SEPs: The Advancing America's Interests Act. H.R. 3535 would tilt public interest considerations far in favor of importers of infringing products.

- The Federal Trade Commission (FTC) position—again expressed in a Section 337 dispute—considers assertion of SEPs before the USITC seeking an exclusion order anticompetitive behavior. In 2022, the FTC weighed in against a SEP owner seeking relief against a SEP technology implementer committing "holdup"—intentionally delaying uptake of a license to use the patented technology incorporated in the foreign-made, imported products. The FTC's stance in SEP cases misses the forest for the trees—the fact SEPs make standards work by laying the foundation on which implementers build their little devices that rely on the functionality of the foundational technology, e.g., 5G, AI, quantum computing, biotech; the fact such dynamic competition far surpasses the tiny competitive dynamics between one SEP owner and one implementer holding up a licensing deal; and the fact that the larger dynamic competition and follow-on innovation and technological interoperability yield exceedingly greater benefits for consumers than any microeconomic effect from respecting patent exclusivity and holding accountable patent infringers. In the SEP arena, the FTC is on the wrong side of innovation, national security, and profound U.S. innovative and economic interests. Such policies only harm American interests and diminish U.S. leadership in standards development and long-term R&D.

In closing, if the National Standards Strategy for CET is to achieve its goal of fostering U.S. involvement and leadership in standards development in the most important technological areas, then every policy proposal and regulatory action must accord with private property rights and free markets. Every agency, no matter its mission, must not divert into bureaucratic games that stymie what the strategy aims to do. Otherwise, the initiative is destined to fall short with regard to fostering U.S. innovation, standards development, SEPs, and licensing.

Respectfully,

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