



November 6, 2023

Katherine K. Vidal
Under Secretary of Commerce for Intellectual Property and
Director of the United States Patent and Trademark Office
United States Patent and Trademark Office
600 Dulany Street
Alexandria, Virginia 22314

RE: Request for Comments on Joint ITA-NIST-PTO Collaboration Initiative Regarding Standards [Docket No.: [PTO-C-2023-0034](#)]

Dear Under Secretary and Director Vidal:

The Alliance for Automotive Innovation (“Auto Innovators”) is pleased to submit the following comments in response to the Request for Comments on the Joint ITA-NIST-PTO (“the Agencies”) Collaboration Initiative Regarding Standards. Auto Innovators appreciates the opportunity to share the automotive industry’s perspectives on issues that stakeholders face at the intersection of standards and intellectual property, particularly as they relate to standard essential patents (“SEPs”).

Auto Innovators represents the manufacturers that produce most of the cars and light trucks sold in the U.S., original equipment suppliers, technology companies, battery makers, and other value-chain partners within the automotive ecosystem. Representing approximately 5 percent of the country’s GDP, responsible for supporting 10 million jobs, and driving \$1 trillion in annual economic activity, the automotive industry is the nation’s largest manufacturing sector.

As inventors and implementers, automotive manufacturers companies rely on strong technical standards to deliver innovative vehicle technologies to consumers and to meet their environmental and safety goals. The ability to license patents declared essential to technical standards on fair, reasonable, and non-discriminatory (“FRAND”) terms is critical to enabling automotive companies to deploy new technologies that are transforming personal mobility and helping to create a cleaner, safer, and smarter transportation future. FRAND terms prevent anticompetitive behavior by balancing the market power that SEP holders have with the needs of automotive companies to license and implement common standardized technologies such as internet connectivity, increasing computing capacity, broadband cellular networks, or electric vehicle charging.

It is important that the Agencies’ Joint Collaboration Initiative Regarding Standards explore best practices for standards setting organizations (“SSOs”) and standards development organizations (“SDOs”) to ensure that SEP holders adhere to stated FRAND commitments, which include licensing for all willing implementers up and down the supply chain. Automakers typically rely upon their suppliers

to determine what technical standards to integrate in the components they provide to automakers, and to obtain any required licenses to implement those standards. Unfortunately, some SEP holders, including patent pools or platforms, license only to end-users, largely for the purpose of assessing royalties on the value of the entire vehicle instead of the value of the component that integrates the technical standard. This blatant violation of FRAND obligations is extremely disruptive to established and mature automotive supply chains. A worthy objective for implementation of the National Standards Strategy is strengthening FRAND licensing commitments by enforcing the commitment to license to all willing implementers at all SSOs and SDOs. This would provide greater predictability for all participants in standards setting and development processes, as well as encourage greater adoption of technical standards.

The assessment of royalties on the value of the entire product instead of the value of the component that integrates the technical standard is particularly problematic in the automotive space. For example, SEP patent holders, including patent pools or platforms, in the wireless telecommunications space appear to justify a higher licensing fee for the use of 4G and 5G connectivity in a vehicle (as compared to other consumer products) based on the technologies that will be enabled or enhanced through the connectivity. However, only a tiny fraction of the value of these new vehicle technologies comes from the simple act of connecting the vehicle. The real value comes instead from the design and development of sophisticated new vehicle technologies, capabilities, and services by automotive companies. Strong guidance from the Agencies that such licensing fee valuations are not properly within the boundary of U.S. patent rights and that apportionment must be considered in determining a FRAND rate would be welcome.

The importance of licensing on FRAND terms is not theoretical. An aggressive licensing pool or platform¹ is currently exerting unreasonable pressure on the automotive industry through the bundling of standard essential patents involving wireless telecommunications technologies. Standard essential patent holders in this pool or platform base their licensing demand on the entire value of the vehicle and refuse to license their patents to suppliers in the automotive value chain, which contradicts an established automotive industry practice and increases product costs to the disadvantage of consumers. Even worse, the pool's or platform's license demand includes an unknown unilateral rate change (or hike) in the future once an implementer accepts a license. Furthermore, these licensing offers to SEP implementers have been taking place under pending injunction proceedings or the threat of such proceedings, partly because the monetary incentive given to the SEP holders by the patent pool or platform. This often involves the threat of foreign courts issuing injunctions to force the acceptance of worldwide royalty rates, including for products made and sold entirely in the U.S., a practice in potential violation of the World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS"). The Agencies should explore proposals that can help ensure that FRAND licensing discussions occur before litigation. Such proposals should explore whether injunctive relief is a proper remedy, both in the U.S. and in other jurisdictions. With regards to foreign

¹ It should be noted that although the operator of this pool/platform holds itself out as a neutral party, its monetary interests are largely dependent on the royalties received by the SEP holders it represents, which are based on the rates it unilaterally determines.

injunctions, the Agencies, in conjunction with the U.S. Trade Representative, should evaluate what the U.S. government can do to address potential TRIPS violations where foreign courts intend to set rates for manufacturing and sales activity in the U.S.

The nebulous nature of establishing FRAND royalty rates can also drive up costs for automotive companies and risk slowing the adoption of new automotive and mobility technologies. As such, we would caution against viewing the Joint Collaboration Initiative as purely an exercise in making participation in SEPs more attractive from a profit motive. Licensing fees from multiple patent holders, especially when calculated on a basis other than the smallest salable patent practicing unit, can quickly add up into a patent stack that adds costs beyond what consumers will easily bear. This means that even fees that seem small could add up to unreasonable and uncompetitive rates when stacked together. Automotive companies must consider these license stacks when adopting and integrating new technologies. Fees that are too high will ultimately harm innovation by discouraging companies from integrating these technologies into vehicles, and consumers who will not have access to new technologies or will be priced out of the market for these technologies even if they are made available. Therefore, we urge the Agencies and other policymakers to consider reasonable pricing and licensing at the smallest salable patent practicing unit as a vital component to the advancement of automotive and mobility technologies.

A single FRAND rate negotiated among all patent holders would in many ways best prepare implementers to manage licensing costs and fight against patent stacking that can exceed what the market will bear, but this kind of negotiation necessarily involves horizontal price agreements among competitors that may be considered anticompetitive. Additional thought should be put into ways to lower the costs of patent stacking and create certainty and fairness in pricing without encouraging anticompetitive price fixing or collusion. This would likely require some sort of regulatory oversight and coordination among the Agencies, along with the U.S. Department of Justice or the U.S. Federal Trade Commission. For example, providing safe harbors for licensee negotiation groups (“LNGs”) formed by SEP implementers could provide a balance to the inherent paradox associated with patent pools or platforms.

Another means by which the Agencies can promote the licensure of SEPs on FRAND terms is to support the proposed European Commission SEP regulation, which would increase transparency for both SEP patent holders and implementers. The Proposed Regulation would help fairly apportion royalties to ensure adequate compensation for SEP patent holders while also ensuring that the royalties are set at a rate that is reasonable and reflects the actual value added by the licensed intellectual property. The proposed mandatory registry and essentiality checks should limit the ability of SEP patent holders from declaring non-essential patents essential for monetization or patent assertion purposes. Furthermore, the Proposed Regulation’s mechanism to determine and publish aggregate royalty rates could help constrain excessive licensing costs unrelated to the value added by patented technologies. Opacity in the current system results in high transaction costs for SEP implementers.

In addition to supporting the European Commission SEP regulation, the Agencies and their U.S. government partners should consider complementary action in the U.S. to align with the European

Union in dealing with FRAND determinations and to harmonize implementation of patent laws across borders. Such a step would benefit both SEP holders and implementers by helping to establish how FRAND rates should be determined globally and which jurisdiction should control. This would also increase transparency in the SEP licensing system.

Auto Innovators appreciates the opportunity to provide the automotive industry's perspective on the issues that implicate the intersection of standards and intellectual property rights. We look forward to further engagement with the Agencies on these important topics.

Sincerely,

A handwritten signature in cursive script that reads "Tara Hairston".

Tara Hairston
Senior Director, Technology, Innovation, & Mobility Policy

