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January 28, 2026

Fair Standards Alliance Submission to USTR Special 301 Review

I. Introduction

The Fair Standards Alliance (FSA) would like to thank the United States Trade Representative (USTR) for its commitment to support industry, consumers, and the international rules-based system of trade.

FSA submits the following comments to USTR as part of the 2026 Special 301 Review. Our comments highlight the use of injunctions and anti-suit injunctions issued in certain countries in relation to licensing disputes and litigation involving standard essential patents (SEPs), and we identify specific issues and concerns in Germany, the UPC, and Brazil.

Standards play an increasingly important role across a broad range of sectors, including in new and emerging technologies such as the Internet of Things (IoT), which are dependent on the connectivity enabled by interoperability standards such as 5G and Wi-Fi. Trade policy has an important role to play in supporting the uptake of standards by ensuring that companies and consumers can access technologies that have been standardized across borders, allowing technologies developed in one country to be adopted in others without undue hindrance and friction.

Nevertheless, standardization also raises competition concerns that do not apply in other IP contexts. The standard-setting process involves competitors collaborating to select and elevate specific technologies over previously competing alternatives. This gives the owners of patents essential to the standard significant market power. Standards development organizations (SDOs) typically seek to reduce these competition concerns by asking their participants to make voluntary, but irrevocable commitments to license their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms. American Courts have recognized these commitments as giving

companies that use these standards an enforceable contract rights that protect them from injunctions. However, some jurisdictions refuse to enforce these contracts. This has given rise to abusive practices by some SEP holders, including the unjustified and systematic seeking of SEP injunctions in certain jurisdictions, which have made it more difficult for potential licensees to obtain FRAND licenses or to access justice in U.S. courts and other competent jurisdictions.

For these reasons, we request that USTR consider the unique context of standardization when identifying countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on (appropriately balanced) IP protection.

II. FRAND Obligations and Global SEP Disputes

A. Context of the FRAND Obligation

Standards can play an important role in enabling competitive and dynamic markets where innovation and the need for interoperability go hand in hand. But for standards to be successful and widely adopted by the market, it is critical that SEP licensing occurs in a fair and balanced manner.

Standardization inherently implicates competition concerns. Because standards are set by groups of competitors collectively choosing a single set of technologies over previously competing alternatives, the standard-setting process can provide significant market power to the owners of patents associated with the selected technologies. Such market power would not exist if those technologies were forced to compete against the alternative solutions foreclosed during the standard-setting process.¹

In addition, once a technology standard is set and businesses substantially invest in it by innovating and developing products that support the standard, those businesses become effectively “locked in” to using the selected technology, making it virtually impossible for them to design around that technology.² This “lock-in” creates a dominant position for SEP holders, particularly in areas such as telecommunications

¹ See, e.g., *Microsoft Corp. v. Motorola, Inc.*, 2013 WL 2111217, at *33–36, No C10-1823JLR (W.D. Wash. Apr. 25, 2013) (“Here, Motorola does not explain beyond ipse dixit expert testimony why its Scan Family of patents [adopted by the standard] would be superior to the alternatives cited by Microsoft.”).

² Lemley, Mark A., and Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991 (2006), available at <https://ssrn.com/abstract=923468>; Lemley, Mark A., and Carl Shapiro, *The Role of Antitrust in Preventing Patent Holdup*, 168 U. Pa. L. Rev. 2019 (2020), available at https://ssrn.com/abstract_id=3666211.

where certain standards (such as LTE and 5G) are universally adopted worldwide.

As a safeguard against competition concerns, most SDOs require companies and individuals who participate in standard setting to state whether they will voluntarily agree to license their SEP's on FRAND terms to all users of the standard. The trade-off is simple: SEP owners benefit from having their technologies recognized as part of an industry standard that may become widely adopted, and in exchange they commit to licensing their patented technologies on FRAND terms so that everyone seeking to adopt that standard can obtain the patent licenses needed to do so.

For these reasons, it is important that competition law frameworks play a significant role in enforcing that FRAND commitment to promote market competition and innovation. In the United States, district courts' application of the *eBay v. MercExchange* factors mean that injunctions in patent disputes are granted only in limited circumstances where the patentee is faced with an irreparable harm that cannot be remedied through monetary damages. Such circumstances are rarely met when the SEP holder has committed to offering licenses on FRAND terms.³ Unfortunately, other countries apply their injunction regimes differently, thereby negatively impacting the IP rights of U.S. companies.

B. The Use of SEP Injunctions and Market Exclusion to Compel Acceptance of a Global Licensing Rate Can Implicate the TRIPS Agreement

In recent years, patent infringement actions in certain foreign jurisdictions, most notably Germany and Europe's Unified Patent Court, have resulted in de facto royalty rate setting for U.S. patents through the use or threat of SEP injunctions that can be avoided only by accepting global portfolio licenses. By leveraging local injunctive relief to compel agreement on global licensing terms, these proceedings depart from the long-standing principle that national courts exercise jurisdiction only over patents issued under their own laws.⁴

These courts issue SEP injunctions as a near-automatic remedy without first requiring a determination that the SEP holder has complied with its FRAND obligations. In EU national courts, this enables SEP holders to use the threat of market exclusion in a

³ *Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1331–32 (Fed. Cir. 2014).

⁴ See Enrico Bonadio & David Katz, *Borderless Patents: How Foreign Patent Injunctions Undermine National Court Patent Jurisdiction*, Rutgers L. Rev. Forthcoming (Uploaded Oct. 30, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5681187

critical European market to impose global licensing terms, thereby undermining the ability of U.S. courts to adjudicate U.S. patent infringement and royalty issues. In the UPC, injunctions are Europe-wide, increasing SEP holders' negotiating leverage exponentially.

We encourage USTR to assess whether the practices of German courts with respect to injunctive relief in SEPs cases are consistent with applicable TRIPS Agreement obligations.

C. Foreign SEP Injunctions Erode the Value of U.S. IP

In addition to threatening the jurisdiction of U.S. courts and forcing manufacturers to pay excessive, non-FRAND royalties, foreign SEP injunctions erode the value of U.S. Research and Development (R&D), including other non-SEP patents that support the most innovative technologies in many products. The devices frequently targeted for litigation rely on both standardized and non-standardized technologies, sometimes involving tens or hundreds of thousands of patents for both standardized and non-standardized technologies. Although a SEP holder is entitled to be compensated for the technological value its patents contribute to a standard, an injunction gives the SEP holder leverage to extract royalties based not only on the patented technology⁵, but on the entire device, which includes the manufacturer's R&D investments as well as proprietary, non-standardized, and differentiating technologies. Thus, the SEP holder improperly captures value which should properly be attributed to other, unrelated patents and technologies. And because many of the most valuable proprietary technologies are patented, SEP injunctions effectively remove the competitive advantages afforded to manufacturers by the U.S. patents covering their most innovative technologies.

In other words, protecting manufacturers from foreign SEP injunctions is critical for protecting the strength of patents and interests of the U.S. companies that invest heavily in developing valuable and innovative proprietary technologies. It is unsurprising that in 2021, when DOJ sought stakeholders' views on SEP licensing policies, the R&D spend of U.S. companies that opposed SEP injunctions was 20 times greater than the R&D spend of the companies that supported them.⁶ Thus, licensing

⁵ *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1232–33 (Fed. Cir. 2014).

⁶ Brian Scarpelli, *Biden Should Act Now to Finalize SEP Draft Policy Statement*, Law360 (May 9, 2022), <https://www.law360.com/articles/1487588/biden-should-act-now-to-finalize-sep-draft-policy-statement>.

and litigation tactics associated with one specialized type of patented technologies (SEPs) threatens to erode incentives for U.S. companies to invest in developing all other types of valuable and beneficial technologies.

D. Preserving Courts' Jurisdiction to Adjudicate Contractual Disputes Involving FRAND Encumbered SEPs

The FRAND commitment is a voluntary and irrevocable encumbrance on a patent holder's rights to enforce a patent. This contractual encumbrance supersedes the unrestrained enforcement of the patent holder's rights and places limitations on the scope of remedies it may seek from a court. This has been broadly recognized to include an obligation to negotiate in good faith and offer a license to those implementing the patent on FRAND terms.

Courts in the U.S. and U.K. permit companies implementing standards to enforce these contract obligations as third party beneficiaries of patent holder's FRAND commitments as a defense to infringement. Moreover, U.S. and U.K. courts have acknowledged they have jurisdiction to set global license rates *as a matter of contract law* where the patents at issue are encumbered by FRAND commitments to offer a worldwide license on FRAND terms.⁷ These courts have recognized that a SEP holder that pursues an injunction against a putative licensee that is willing to enter into a license on FRAND terms is in breach of this agreement.

Despite being a breach of the FRAND commitment, these injunctions can create significant pressure on manufacturers to enter into licenses on the SEP holder's terms, depriving courts of the ability to enforce FRAND contracts. Courts in the U.S. and U.K. have thus taken steps to limit the ability of patent holders to pursue foreign injunctions on FRAND encumbered patents that would deprive any court of the ability to adjudicate FRAND contractual disputes.

In the U.S., courts have issued anti suit injunctions to protect the court's jurisdiction to adjudicate contract claims when threatened by injunctive relief in a foreign jurisdiction. Anti-suit injunctions themselves are a common and well-recognized procedural instrument in common law jurisdictions, including the United States. U.S. courts have developed a balanced legal framework governing their use and have granted anti-suit injunctions where necessary to prevent foreign SEP injunctions from undermining their

⁷ *Unwired Planet v Huawei* [2020] UKSC 37.

ability to adjudicate disputes concerning FRAND terms for U.S. patents, as illustrated by U.S. case law.

Similarly, in 2024 and 2025, U.K. courts found that a SEP holder that pursued injunctive relief for the purpose of circumventing global rate setting based on an enforcement of the FRAND contract is in breach of its IPR obligations.⁸ These courts ordered the SEP holder to either enter into an interim license during the pendency of the proceeding or be labeled by the court as an unwilling licensor.

The approaches taken by both U.S. and U.K. courts are consistent with the norms of international law. Indeed, a recent WTO appellate arbitration panel recognized that a limitation on a SEP holder's ability to enforce its patent rights in other jurisdictions is not necessarily in conflict with the TRIPS Agreement where the patent holder has not complied with the obligation to negotiate a FRAND license in good faith that encumbers its patents.⁹

III. Assessment of IPR Protections and Enforcement for Each Country

A. Germany and the UPC

In spite of German patent reforms that outlined when a full permanent injunction would be disproportionate, German courts continue to treat injunctive relief as a default remedy, including in SEP cases, based on a “fundamental right” to exclude, without consideration of principles of equity as is the case under U.S. law. German courts place the burden on defendants to avoid an injunction through a narrowly construed “FRAND defense,” with predominant emphasis on whether the implementer can demonstrate sufficient “willingness” to license, rather than on whether the SEP holder has actually complied with its FRAND obligations. This approach stands in sharp contrast to the U.S. legal framework, which conditions injunctive relief on equitable factors and places the burden on the patent holder to justify exclusionary remedies, particularly where monetary relief is adequate.

Although the Court of Justice of the European Union in *Huawei v. ZTE*¹⁰ sought to

⁸ *Panasonic Holdings Corp. v. Xiaomi Tech. UK Ltd.* [2024] EWCA Civ 1143 at ¶ 101; *Lenovo Group Ltd. v. Telefonaktiebolaget LM Ericsson* [2025] EWCA Civ 182 at ¶¶ 153, 157.

⁹ WTO, *China – Enforcement of Intellectual Property Rights*, Report of the panel, [611-11 e.pdf](#)

¹⁰ Judgment of 16 July 2015 of the Court of Justice in Case C-170/13 *Huawei Techs. Co. v. ZTE Corp.*, available at:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=572907>.

establish a balanced framework that accounts for the conduct of both licensors and licensees, subsequent German case law, including decisions of the Federal Court of Justice, has increasingly treated the SEP holder's compliance with FRAND obligations as largely irrelevant unless the defendant first satisfies demanding behavioral requirements. As a result, implementers are often denied a meaningful opportunity to obtain a judicial determination of whether the licensing terms offered are in fact FRAND.

Recent decisions demonstrate that this injunction-centric approach remains entrenched and is now being replicated at the European level. In its first substantive SEP/FRAND merits decision, *Panasonic v. OPPO*, the Unified Patent Court closely followed German national practice and granted injunctive relief while rejecting the implementer's FRAND defense, raising concerns that Germany's model will be extended across multiple EU markets.¹¹

In practice, injunctions issued by German courts, and now the UPC, are routinely used to compel acceptance of global licenses, including for U.S. patents, on terms dictated by German-style jurisprudence rather than by U.S. law. Cases such as *IP Bridge v. Ford* illustrate how the threat of market exclusion in Germany can force U.S. manufacturers to rapid acceptance of global licensing demands, resulting in de facto rate setting for U.S. patents and denying U.S. courts the opportunity to adjudicate validity, infringement, and appropriate FRAND royalties.

The availability of injunctions in these jurisdictions are being leveraged against American manufacturers. In late 2024, the UPC granted Huawei an injunction against Netgear¹². At the time, Netgear had an active case pending in U.S. District Court alleging Huawei's licensing practices involved fraud, racketeering, and other offenses.¹³ Shortly after the UPC issued its order, the parties settled their dispute and Netgear withdrew its complaint, preventing these allegations from being adjudicated in a U.S. court.

We also note with concern the withdrawal of the European Union's proposed regulatory framework on SEP licensing.¹⁴ The proposed regulation would have introduced important procedural safeguards into the SEP licensing ecosystem, including

¹¹ *Panasonic v. OPPO*, Local Division Mannheim, 22 November 2024, UPC_CFI_210/2023, Unified Patent Court (UPC)

¹² *Huawei Technologies Co. Ltd v. Netgear Inc.*, UPC_CFI_791/2024

¹³ Complaint at 1, *Netgear, Inc. v. Huawei Tech. Co., Ltd.* 2:24-cv-00824 (C.d. Cal., Jan. 30, 2024) Dkt. No. 1.

¹⁴ *The EU withdraws the planned SEP regulation*, IP Helpdesk, European Commission. See here: [The EU withdraws the planned SEP regulation - IP Helpdesk](#)

independent expert guidance on FRAND license conditions through standard-wide aggregate rate opinions and bilateral FRAND determinations, mandatory registration of claimed SEPs in a public database, and an annual process of essentiality checks to provide the market with greater transparency regarding the actual scope and strength of SEP portfolios. These measures had the potential to mitigate the prevalence of injunctions in Germany and the UPC. The decision to withdraw this proposal abandons a critical opportunity to restore balance, transparency, and predictability to SEP licensing in Europe, and leaves unaddressed the structural conditions that enable coercive injunction practices. The withdrawal of the proposed SEP regulation has also emboldened the jurisdictional overreach of both German courts and the UPC.

Unlike courts in the U.S. and U.K., neither German courts nor the UPC permit companies implementing standards to enforce their contract rights as third party beneficiaries of the patent holder's FRAND commitment. Not only do these courts refuse to acknowledge these contract rights, but they are now interfering with the ability of parties to have their contract rights adjudicated in other jurisdictions. Beginning last year, certain German courts and the UPC began issuing injunctions precluding putative licensees seeking a rate setting in the United Kingdom from asking the court presiding over the matter to find that the patent holder has breached its contractual commitments. Thus, not only do these courts ignore the contractual rights, as have been recognized by both the U.S. and U.K., they are actively working to prevent courts from enforcing them.¹⁵

Moreover, the reasoning in one decision indicated that only European courts are competent to set global rates—despite the fact that these courts adjudicate SEP disputes based on European competition law and not the enforcement of contractual commitments which forms the necessary foundation for extraterritorial rate setting jurisdiction. In essence, these decisions are suggesting that both the U.K. and U.S. judiciaries are unable to adjudicate contractual disputes when doing so involves a European regulatory regime.

This exercise of extraterritorial jurisdiction matters cannot be viewed in isolation. In 2025, the Court of Justice for the European Union ruled in *BSH v. Electrolux* that European courts had jurisdiction to adjudicate patent disputes involving alleged

¹⁵ See Enrico Bonadio & David Katz, *Anti-Interim-License Injunctions and the Erosion of Contract Rights*, Klewer Patent Blog (Oct. 23, 2025) <https://legalblogs.wolterskluwer.com/patent-blog/anti-interim-license-injunctions-and-the-erosion-of-contract-rights/>

infringement of non-European patents.¹⁶ This deprive U.S. courts of the jurisdiction to be the ultimate arbiters of U.S. patent law. Equally troublingly, this extension of extraterritorial jurisdiction deprives companies doing business in the United States of their constitutional right to have a jury adjudicate issues of fact.

B. Brazil

Recently, Brazil has become an attractive destination for SEP holders due to the availability of *ex parte* preliminary injunctions, and its near-automatic approach to granting permanent injunctions. An injunction is the default remedy in Brazil following a SEP infringement determination, and a SEP holder's failure to abide by its contractual FRAND commitments does not provide a full defense against a Brazilian SEP injunction. Given Brazil's status as the largest country in South America and the sixth largest handset market in the world, a Brazilian SEP injunction can be particularly coercive.

In recent years, companies including Apple, HP, Netflix, Amazon, Roku and other streaming companies, have been targeted for Brazilian SEP injunctions. And aggressive assertions of video codec SEPs led Disney to take the affirmative step of seeking a declaratory judgment that its use of a video codec does not infringe a patent declared essential to the HEVC standard.

At the same time, there are emerging indications that Brazil's competition authority, the Administrative Council for Economic Defense (CADE), may begin to take a more active interest in the competitive implications of SEP enforcement practices.¹⁷ While CADE has not yet articulated a comprehensive framework for addressing SEP-related conduct, recent signals suggest growing awareness of the potential for injunction-based strategies to facilitate hold-up and distort licensing negotiations. Whether competition-law oversight will meaningfully constrain the use of SEP injunctions in Brazil remains uncertain. Absent clearer coordination between patent enforcement and competition policy, however, Brazil is likely to remain a favored venue for SEP holders seeking to exert global licensing pressure through the threat of market exclusion.

IV. Concluding remarks

¹⁶ *BSH Hausgeräte GmbH v Electrolux AB* (Case C-339/22), Court of Justice of the EU, 25 February 2025. See here: [EUR-Lex - 62022CJ0339 - EN - EUR-Lex](#)

¹⁷ CADE investigates Ericsson for antitrust violations, CADE. See here: [CADE investigates Ericsson for antitrust violations — Conselho Administrativo de Defesa Econômica](#).

As part of the 2026 Special 301 Review, we urge USTR to:

- ensure that companies operating in the United States are not excluded from foreign markets as a result of foreign adjudications of matters related to use of U.S. patents;
- assess whether German courts' practices in granting nearly automatic injunctions in SEPs cases are in line with TRIPS obligations;
- assert that U.S. courts hold exclusive jurisdiction over matters of U.S. patent law;
- protect the most valuable U.S. research and development, including patents from being devalued through excessive availability of foreign SEP injunctions; and
- continue to consider the broader context of standardization and competition law when reviewing matters related to anti-suit injunctions, and to avoid making broad pronouncements on anti-suit injunctions that could interfere with U.S. case law.