

January 28, 2026

Claire Avery-Page  
Director for Innovation and Intellectual Property  
Office of the United States Trade Representative  
Executive Office of the President  
600 17th Street NW  
Washington, District of Columbia 20508

**RE: *Input of ACT | The App Association Regarding the U.S. Trade Representative's Request for Comments and Notice of Public Hearing Regarding the 2026 Special 301 Review [USTR-2025-0243]***

Dear Ms. Avery-Page:

ACT | The App Association (ACT) submits this response to the Office of the United States Trade Representative's (USTR) request to inform the 2026 Special 301 Report.<sup>1</sup> This process identifies countries that deny adequate and effective protection of intellectual property rights (IPR) or deny fair and equitable market access to U.S. persons who rely on IPR protections.

ACT is a global policy trade association representing small and medium-sized technology developers. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem. We work with and for our members to promote a policy environment that rewards innovation and provides resources to help them raise capital, create jobs, and build transformative technologies. Our members, including small and medium-size entities (SMEs) developing streaming platforms, video games, and other digital content, rely on strong intellectual property protections. The value of the ecosystem ACT represents—which we call the app economy—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.<sup>2</sup>

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<sup>1</sup> 89 FR 97161.

<sup>2</sup> ACT | The App Association, State of the App Economy (2022), <https://actonline.org/wp-content/uploads/APP-Economy-Report-FINAL.pdf>.

## I. General Comments

While the global digital economy offers significant opportunity for small innovators, our members encounter numerous trade barriers in foreign markets. These barriers include laws, regulations, policies, or practices that shield domestic industries from foreign competition, artificially promoting exports or failing to protect IPR effectively. Despite their varied forms, these barriers all have the same net effect: impeding U.S. exports and investment at the expense of American workers. Key trade barriers ACT members experience include:

- **Intellectual Property Violations:** The infringement and theft of IPR (copyrights, trademarks, patents, and trade secrets) threatens our members and the consumers who rely on their digital products and services. Strong, fair IP protection is fundamental to their business. Concerning practices include foreign courts granting near-automatic injunctions and anti-suit injunctions on patent litigation, which coerce U.S. innovators into accepting unreasonable global licensing rates under threat of market exclusion, thereby distorting negotiations and erecting trade barriers.
- **Limiting Cross-Border Data Flows:** The seamless flow of data across borders is essential to the global digital economy. Restrictions on these flows hinder all digital economy participants, particularly innovative small developers seeking to access new markets and customers.
- **Data Localization Policies:** Requirements to use local data storage and processing infrastructure create serious impediments to trade, undermining an economy's international competitiveness and domestic diversification. SMEs typically lack the resources to build or maintain infrastructure in every market, effectively barring them from global commerce.
- **Customs Duties on Digital Content:** Imposing customs duties on digital transmissions contributes to the fragmentation of the internet and prevents small digital innovators from reaching the 95% of consumers who live outside the U.S.
- **Requirements to Provide Source Code for Market Entry:** Policies that condition market entry on the disclosure of proprietary source code pose an untenable risk of theft and piracy. For SMEs, intellectual property is their core asset, making such requirements major disincentives for international trade and a non-starter for ACT's members.
- **Requirements for "Backdoors" in Encryption Techniques:** Government demands for built-in vulnerabilities ("backdoors") in encryption degrade data security and erode user trust by creating exploitable weaknesses that unauthorized parties can exploit. The viability of SME products depends fundamentally on user trust in their security and privacy.
- **Misapplication of Consumer Protection and Competition Laws to New and Emerging Technology Markets:** Various regulators, including key trading partners, are currently considering or implementing policies that would put mandates on nascent and developing emerging technology markets. For example, some regulators are jeopardizing small businesses' ability to compete by upending the functionality of digital platforms that lower overhead costs, greater consumer access, simplified market entry, and strengthened intellectual property protections. Others are considering interventions into undefined and emerging technology markets, such as for artificial intelligence.

Online IP infringement and theft undermine consumer welfare by stifling innovation, investment, and job creation among digital content creators. Revenue losses from pirated apps are estimated at \$46.3 billion for SMEs globally, presenting a major threat to our members, their customers, and their workforce.<sup>3</sup> Different forms of IPR serve distinct functions for our members, and violations can lead to data loss, service disruption, revenue loss, and reputational damage, any of which can be catastrophic for a small developer. Common violation scenarios include:

- **Software Piracy:** An infringer replicates software but remove the digital rights management (DRM) component, enabling them to publish a copy on illegitimate websites or legitimate app stores.
- **Content Theft and Reuse:** An infringer steals content—such as sounds, animations, characters, or video—and repurposes it in their own software.
- **Ad Revenue Hijacking and Feature Unlocking:** An infringer alters advertising keys to divert ad revenue or removes locks on functions like in-app purchases and security checks.
- **“Brand-Jacking”:** An infringer injects malicious code into software and republishes a counterfeit version that mimics the original’s name, logo, or graphics, tricking customers into giving up their sensitive data. A survey of ACT members indicates one-third of those with trademarks have experienced brand-jacking.<sup>4</sup>
- **Sideloaded that Sidesteps Platforms Safeguards:** Piracy often exploits sideloading (installing apps from outside official stores), with an estimated 80% of piracy linked to illegal streaming via devices and apps.<sup>5</sup> Sometimes, SME developers’ own apps become conduits for pirated content.
- **Trademark Misappropriation:** Infringers use protected names or brands to deceive users and harvest their information.
- **Patent Infringement:** Unauthorized use of patented technology, commonly seen in utility and design patents (e.g., for graphical user interfaces).
- **Government Mandated Transfer or Inspection of IP:** Market access conditioned on joint ventures, equity limits, opaque regulations, or practices like source code “escrowing” that force disclosure or transfer of IP to a government.
- **Trade Secret Theft:** Theft of trade secrets is exacerbated in jurisdictions with weak legal protections or rule of law, leaving SMEs without recourse.

ACT also remains concerned about third-party litigation funding (TPLF) as a mechanism to abuse patent processes against U.S. companies. While this issue is global, the impact on the U.S. market is acute. Non-practicing entities (NPEs) initiate a majority of the abusive and frivolous patent

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<sup>3</sup>See Revenera, *Software Piracy Statistics (October 18, 2024)*, [https://www.revenera.com/blog/software-monetization/software-piracy-stat-watch/#:~:text=Software%20Piracy%20in%20the%20United%20States%20\(and%20Western%20Europe\)&text=The%20BSA's%20most%20recent%20Global,software%20worldwide%20was%20\\$46.3%20billion](https://www.revenera.com/blog/software-monetization/software-piracy-stat-watch/#:~:text=Software%20Piracy%20in%20the%20United%20States%20(and%20Western%20Europe)&text=The%20BSA's%20most%20recent%20Global,software%20worldwide%20was%20$46.3%20billion).

<sup>4</sup> Survey Says: IP is Essential to Innovation (June 21, 2022), <https://actonline.org/2022/06/21/survey-says-ip-is-essential-to-innovation/>.

<sup>5</sup> David Blackburn, PH.D. et. al., *Impacts of Digital Video Piracy On The U.S. Economy (June 2019)*, <https://www.theglobalipcenter.com/wp-content/uploads/2019/06/Digital-Video-Piracy.pdf>.

infringement suits in the U.S.,<sup>6</sup> and many are funded anonymously through shell corporations or funds that have a real interest in the outcome of litigation.<sup>7</sup> TPLF has affected critical U.S. technology industries, including telecommunication, automotive, and semiconductors. Funders may include hostile foreign nations and their wealth funds, seeking to undermine U.S. industry and national security. TPLF threatens equity for U.S. businesses, workers, and consumers. We urge USTR to examine the motivations behind TPLF and address its abuse in U.S. and global IP systems. The availability of anonymous investment sources enables bad actors to flood adjudicating bodies with potentially illegitimate claims. The launch of Europe's Unified Patent Court (UPC) has intensified this problem by facilitating multi-jurisdictional litigation and high-damage claims against U.S. companies. USTR should lead the U.S. government in investigating TPLF motivations and adopting strong disclosure requirements in all relevant U.S. venues, including the U.S. International Trade Commission (USITC), the U.S. Patent and Trademark Office (USPTO), and federal courts. USTR should similarly encourage foreign jurisdictions to adopt similar transparency measures.

A distinct and critical area of IP policy involves Standard-Essential Patents (SEPs). Technological standards enable seamless global interoperability. These standards are typically developed through collaborative, consensus-based processes within Standard Development Organizations (SDOs), where companies may contribute their patented technologies. To balance the immense public benefit of standardization with the rights of patent holders, SDOs generally require participants to license any patents deemed essential to implementing the standard on Fair, Reasonable, and Non-Discriminatory (FRAND) terms. This voluntary FRAND commitment is a crucial safeguard: it prevents patent "hold-up," where an SEP holder could exploit the market power conferred by the standard's widespread adoption to demand exorbitant royalties or seek exclusionary injunctions after companies are locked into using the technology. ACT advocates for a balanced and predictable global framework for SEP licensing centered on the following core principles, which are vital for protecting small innovators and ensuring healthy competition:

- **The FRAND Commitment Means License to All and is Transferrable:** A holder of a FRAND-committed SEP must license it to all who wish to implement the standard. This commitment is a covenant that runs with the patent, binding all subsequent owners.
- **Injunctive Relief Should Be Exceptional:** Prohibitive orders (injunctions, exclusion orders) for FRAND-committed SEPs should be granted only in rare circumstances, such as against an unwilling licensee where monetary damages are inadequate. The threat of market exclusion distorts good-faith licensing negotiations.
- **Royalties Must Reflect the Invention's Value, Not the Standard's:** A FRAND royalty should be based on the value of the patented technological contribution itself, not on the value of the standard as a whole or downstream product features unrelated to the invention.

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<sup>6</sup> Love, Brian J. and Lefouili, Yassine and Helmers, Christian, *Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets* (November 8, 2020), 17, [https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp\\_tse\\_1160.pdf/](https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp_tse_1160.pdf/).

<sup>7</sup> See *In re Nimitz Technologies LLC*, No. 23-103 (Fed. Cir. 2022); see also *At Least 25% of the last 3 years NPE Litigation Caused by Litigation Investment Entities (LIEs)*, Unified Patents (Feb. 21, 2023), <https://www.unifiedpatents.com/insights/2023/2/21/litigation-investment-entities-the-investors-behind-the-curtain>.

- **Respect for Patent Territoriality:** Patents are national rights. Absent party agreement, courts should avoid imposing global licensing terms or adjudicating foreign patent validity under threat of a domestic injunction, which constitutes jurisdictional overreach.
- **Prohibition of Harmful Tying:** A SEP holder cannot force a licensee to accept licenses for non-essential, invalid, or unenforceable patents as a condition for accessing FRAND-committed SEPs.

Pursuant to Section 182 of the Trade Act, USTR must identify countries that deny adequate and effective IPR protections, including designating as "Priority Foreign Countries" those with the most deficient protections.<sup>8</sup> In accordance with this mandate, ACT provides the following recommendations for the 2026 Priority Watch List and Watch List.<sup>9</sup> We support U.S. government efforts to protect American small businesses that rely on IPR to innovate and who require certainty in foreign markets. We are committed to partnering with USTR to advance responsible global IPR protections, helping our members enter new markets and create more American jobs.

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<sup>8</sup> 19 U.S.C. § 2242.

<sup>9</sup> 19 U.S.C. § 2411–2415.

## **II. Countries that Should Be on, or Remain on, USTR's Priority Watch List**

### **A. Australia**

In 2020, the Australian Competition and Consumer Commission (ACCC) launched a five-year Digital Platform Services Inquiry.<sup>10</sup> The ACCC has issued multiple interim reports and released its final report on June 23, 2025. The report concluded with 35 recommendations, including economy-wide prohibitions on unfair trading practices and granting the ACCC authority to create mandatory codes of conduct. Following this, the Treasury conducted a consultation on a new digital competition regime from December 2024 to February 2025, with legislation anticipated in late 2025 or early 2026. Australia appears to be adopting a 'fast follower' model, drawing lessons from the EU's Digital Markets Act while tailoring it to local circumstances.

ACT actively engaged in this process, providing detailed commentary on digital platforms and competition, responding to specific conclusions in the ACCC's September 2022 interim report, and participating in a stakeholder hearing in June 2022.<sup>11</sup> We have significant concerns that the ACCC is positioning the government to intervene in the digital economy without a sufficient evidence base. Such intervention threatens to disrupt the functionality of mobile operating systems and software distribution platforms that have been fundamental to the growth of countless American small businesses, particularly regarding the enforcement of intellectual property rights at the platform level.

We therefore request that the ACCC's digital platform regulatory efforts and the risks they pose to American small business innovators be highlighted in the 2026 Special 301 Report. We further request that the U.S. government engage with Australia to mitigate these risks and support the trade and leadership of U.S. small businesses in the digital economy.

### **B. Brazil**

Brazil has made progress in combating online piracy through sustained enforcement, particularly via successive phases of Operation 404 and has set positive examples for other Latin American countries in some respects. State-level efforts, such as those by São Paulo's CyberGaeco unit against circumvention tools and increased actions by ANATEL to disrupt illegal pay-TV services and confiscate piracy equipment, have also contributed positively. Despite these gains, several serious setbacks have overshadowed progress: the government's decision to abandon ratification of the WIPO Internet Treaties (WCT and WPPT), persistent piracy rates, ongoing delays in activating ANCINE's mandated administrative site-blocking system (now stalled for two years), and proposed changes to the Copyright Act (Bill 4868/2024) that would introduce an extra remuneration right alongside exclusive rights while introducing troubling definitions of public performance and communication to the public. Enforcement remains heavily dependent on periodic Operation 404 campaigns rather than steady year-round action, and recent staff changes have sparked doubts about long-term political backing, staffing, and funding. To build on past achievements, authorities should establish a dedicated Operation 404 unit within the executive branch to ensure continuity, expand focus to enablers that bypass technological protections, boost resources and training for enforcement bodies at all levels, and strengthen collaboration between public agencies and

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<sup>10</sup> <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-25>.

<sup>11</sup> <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platform-services-inquiry-2020-25/september-2022-interim-report>.

private stakeholders. Above all, Brazil should reverse course by ratifying and fully implementing the WIPO Internet Treaties and reconsidering the problematic copyright reform proposals.

Brazil is also emerging as a significant source of IPR and competition challenges for ACT members, particularly concerning Standard Essential Patents (SEPs). The country is experiencing a surge in SEP litigation, where courts are granting injunctions rapidly without adequate consideration of competition principles. Data shows a sharp acceleration, with infringement case filings in the preferred Rio de Janeiro forum jumping from 6 in 2024 to 31 in 2025.<sup>12</sup> This trend is exacerbated because Brazilian IP law does not require prior licensing negotiations or notice prior to seeking an injunction. Furthermore, Brazilian courts do not differentiate between SEP cases and those involving regular patents, unlike U.S. courts which apply an equitable balancing test to determine when an injunction serves the public interest.<sup>13</sup>

Instead, Brazilian courts grant injunctions without fully considering SEP holders' voluntary FRAND (Fair, Reasonable, and Non-Discriminatory) commitments. For example, while preliminary injunctions are assessed based on the impact on the defendant's business and public interest as mandated by Article 300(3) of the Civil Procedure Code, final injunctions are often issued automatically upon a finding of infringement.<sup>14</sup> This dynamic empowers SEP holders to act as gatekeepers to essential standards.

Consequently, Brazil's patent system enables and emboldens foreign SEP holders to systematically abuse their dominant position to extract supra-FRAND terms (a practice known as "hold-up") from U.S. businesses.<sup>15</sup> For instance, Swedish company Ericsson has sought injunctions in Brazilian and Colombian courts in 2024-2025 related to a U.S. case, even before a U.S. court could determine FRAND compliance. While a U.S. district court initially denied an anti-suit injunction against Ericsson, the U.S. Court of Appeals for the Federal Circuit reversed that decision.<sup>16</sup>

Brazil, particularly the Rio de Janeiro state courts, has emerged as a key jurisdiction for SEP enforcement.<sup>17</sup> Brazilian courts treat SEPs as any other patent with no special limitations on exclusionary rights. Key cases shaping this landscape include the *Sun Patent v. Great Wall Motor* case, which established a fast-track procedure, and the *DivX v. Netflix* appeal, which upheld injunctive relief and damages while rejecting FRAND royalties as an alternative. Notably, in the *DivX* appeal, the Rio de Janeiro Court of Justice rejected the implementer's FRAND defense, framing the Brazilian system as a binary choice between licensed use and infringing use, leaving no legal room for court-imposed FRAND terms as a substitute for an injunction. There are, however, nascent efforts to center FRAND in litigation. In *Dolby v. Roku*, a Rio court ruled that a SEP holder

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<sup>12</sup> *SEP Litigation in Brazil: Five Big Developments in 2025*, Rob Rodrigues & Tatiana Machado, Kluwer Patent Blog (Jan. 5, 2026), <https://legalblogs.wolterskluwer.com/patent-blog/sep-litigation-in-brazil-five-big-developments-in-2025>.

<sup>13</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).

<sup>14</sup> Enrico Bonadio, Jorge Tinoco & Daniel Leopoldino, *SEPs Injunctions with a Tropical Flavour: The Brazilian Scenario*, KLUWER PAT. BLOG (Oct. 8, 2024), <https://legalblogs.wolterskluwer.com/patent-blog/seps-injunctions-with-a-tropical-flavour-the-brazilian-scenario/>.

<sup>15</sup> Mark Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 TEX. L. REV. 1991 (2007).

<sup>16</sup> *Telefonaktiebolaget LM Ericsson v. Lenovo (United States), Inc.*, 120 F.4th 864 (Fed. Cir. 2024).

<sup>17</sup> Rob Rodrigues & Tatiana Machado, *SEP Litigation in Brazil: Five Big Developments in 2025*, KLUWER PAT. BLOG (Jan. 5, 2026), <https://legalblogs.wolterskluwer.com/patent-blog/sep-litigation-in-brazil-five-big-developments-in-2025>.

must prove compliance with FRAND—particularly non-discrimination—as part of its case for injunctive relief, though it stopped short of setting a FRAND rate.

The Brazilian Antitrust Authority (CADE) is also increasing its scrutiny of SEP enforcement. In a significant 2025 decision, CADE opened an ex-officio administrative inquiry into Ericsson's SEP licensing practices, signaling its view that alleged abuses such as refusing to offer national licenses or imposing global license terms can violate competition law. This action underscores CADE's willingness to intervene to protect the public interest in competitive markets, even after private parties settle, and establishes that FRAND commitments are subject to antitrust oversight.

A new and concerning front is the arrival of connected-car SEP litigation.<sup>18</sup> The first case, *IP Bridge v. BYD* in mid-2025, resulted in an ex-parte preliminary injunction. While settled, it set a precedent. By year's end, three more lawsuits were filed pool members against other automakers. This signals Brazil is becoming a repeatable venue for global automotive SEP enforcement strategies. A notable procedural innovation in these cases is the court-ordered "expert-first, expedited" track, designed to reach a technical and FRAND assessment faster, which may make injunctive relief both more predictable and more difficult to avoid.

We expect Brazil's jurisprudence to have a significant impact on the global SEP licensing landscape. We strongly encourage USTR to work with Brazil to align its approach to SEPs with the fundamental principles of the FRAND commitment and to address the systemic bias toward rapid injunctive relief that undermines good-faith negotiations and puts U.S. implementers at a severe disadvantage.

### **C. Canada**

ACT remains concerned with Canada's approach to IP enforcement. The "notice and notice" regime under Canada's Copyright Act is an ineffective mechanism to ensure that internet services providers (ISPs) take reasonable steps to prevent piracy on their platforms. This process fails to deter infringers from engaging in illicit acts, such as the common IPR violations described above that affect ACT members. Stronger enforcement mechanisms, such as the "notice and-takedown" procedures established by the U.S. Digital Millennium Copyright Act (DMCA) are demonstrably more effective. We urge the U.S. government to encourage Canada to adopt more robust measures to protect businesses, including ACT members, that operate within its market.

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<sup>18</sup> *Id.*

## **D. China**

IP theft and infringement, which increasingly originate in China, pose a serious risk to our members' businesses and the American jobs they support. In many cases, a single IPR violation can be an existential threat to small businesses and innovators. Numerous Chinese government laws and policies have a negative impact on our members, most of whom have experienced IPR infringement in the Chinese market across the common scenarios previously outlined. Overall, our members view the business environment in China as a continued challenge, largely driven by a lack of confidence in IPR protections.

China's rampant and evolving piracy is largely fueled by stringent market access barriers that severely restrict foreign digital content distribution, combined with prolonged court delays, deterrence issues, and procedural gaps that prevent rights holders from adequately protecting and monetizing their works. These domestic hurdles push consumers toward unauthorized domestic and international online services for restricted foreign material, while Chinese entities increasingly profit by exporting piracy tools, services, and devices—including piracy devices (PDs), apps, and now cloud-based infringing storage disseminated via social media, e-commerce sites, and linking platforms—to global markets in 2025. The National Copyright Administration (NCAC) deserves recognition for its ongoing anti-piracy initiatives, including periodic campaigns that occasionally result in criminal prosecutions, yet large-scale commercial online infringement persists across content categories with minimal reductions, low administrative fines, and little enforcement against "export-only" or geo-blocked operations even when servers or operators are China-based. Cooperation from social media and e-commerce platforms has notably declined in 2025 due to cumbersome takedown procedures, underscoring the need for clearer, more robust, and streamlined civil, criminal, and administrative copyright enforcement mechanisms to create genuine deterrence. While the 2021 Copyright Law revisions introduced certain improvements, many remain unimplemented years later, perpetuating uncertainty in the protection framework; moreover, the updates failed to incorporate key international alignments like extending protection terms to at least 70 years or properly defining the "making available to the public" right. Ultimately, China's position as one of the world's toughest markets for legitimate copyrighted content stems from extensive legal and practical barriers that limit foreign participation—often breaching multilateral and bilateral trade commitments with the U.S.—thereby fostering both local and exported piracy. We call on USTR to ensure that Chinese authorities fulfill trade obligations, dismantle these access restrictions, and fully open the market to U.S. innovators.

### **1. The “Essential Facilities” Doctrine**

A notable concern is the Chinese government's application of the controversial “essential facilities” doctrine to IPR via the State Administration for Industry and Commerce's (SAIC)<sup>19</sup> *Rules on Prohibition of Abusing Intellectual Property Rights to Eliminate or Restrict Competition* (IP Abuse Rules), which took effect on August 1, 2015. Article 7 of SAIC's IP Abuse Rules states that a dominant undertaking “shall not, without justification,” refuse to license IPR that constitutes an “essential facility” under reasonable terms if such refusal eliminates or restricts competition.

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<sup>19</sup> While its functions (along with a number of further Chinese agencies) have since been consolidated under the State Administration for Market Regulation, the SAIC rules have not yet been replaced by SAMR.

ACT does not support the notion that competitors should have compulsory access to “essential” patents (outside of the standardization context) simply because they cannot compete without them. This provision seriously undermines the fundamental right to exclude others from using one’s intellectual property, weakening long-term incentives to innovate. Under this provision, U.S. innovators with operations in China are left vulnerable to SAIC’s significant discretionary power in determining whether to issue a compulsory license.

## 2. Standard-Essential Patents (SEPs)

China’s approach to SEPs presents a complex picture. It is critical to distinguish the issues here from the general “essential facilities” doctrine, as SEPs are governed by the voluntary FRAND framework described in Section I. ACT acknowledges that past efforts by Chinese standardization bodies to undermine royalty payments for patents without differentiating between SEPs and other patents were thwarted. Subsequently, SAIC’s IPR Rules have appropriately recognized that violating FRAND principles (e.g., through refusal to license) by a dominant SEP holder can be an abuse of dominance.

In contrast to its problematic approach to patents generally, SAIC’s specific treatment of FRAND-encumbered SEPs is consistent with an established global consensus (reflected in the principles outlined in Section I) on addressing serious breaches of FRAND commitments. We strongly urge the USTR to maintain a clear distinction between general patent licensing issues and the unique, consensus-driven framework governing SEPs and competition law.

This regulatory evolution continued under China’s State Administration for Market Regulation (SAMR). In 2020, SAMR released the *Guidelines on Anti-monopoly in the Field of Intellectual Property*, which included Article 27 addressing “Special Issues in SEPs.” Although no official English translation is available, this article appeared to align with global SEP norms. Subsequently, in 2023, SAMR released draft *Anti-Monopoly Guidelines for Standard Essential Patents* for public comment. ACT provided detailed comments on these drafts and, at USTR’s request, met with U.S. government agencies (including the USPTO, USTR, and DOJ) to discuss our concerns where the draft text diverged from consensus-based FRAND principles.

The final *Anti-Monopoly Guidelines for Standard Essential Patents* were released in 2024 and reflect a relatively balanced position, introducing proactive measures to mitigate supra-FRAND royalty demands and the misuse of injunctions, including transparency requirements and good-faith negotiation provisions. However, this balanced regulatory stance is inconsistent with the aggressive and problematic practices of Chinese courts

Relatedly, the USTR should consider its position on anti-suit injunctions (ASIs), particularly as it relates to the European Union’s (EU’s) dispute at the World Trade Organization (WTO) against China (DS611). A blanket condemnation of ASIs would be detrimental to U.S. companies, consumers, and broader national interests. As a procedural instrument, ASIs are properly exercised to preserve a court’s jurisdiction by prohibiting a party from pursuing parallel foreign proceedings on the same dispute, a long-standing practice of U.S. courts, including in SEP cases such as *Microsoft v. Motorola*.<sup>20</sup> U.S. case law demonstrates that ASIs are appropriate on a case-

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<sup>20</sup> 696 F. 3d 872 (9th Cir. 2012). A U.S. court issued an ASI to prevent Motorola from pursuing injunctive relief against Microsoft in Germany after Microsoft filed a breach of contract claim case against Motorola in the United

by-case basis under a carefully balanced legal test. Therefore, the issuance of an ASI by any country's court is not, in itself, evidence of a failure to protect intellectual property rights.

However, the systemic use of ASIs by Chinese courts in SEP disputes has drawn significant international scrutiny. The WTO dispute DS611, concluded in 2025, centered on China's "ASI policy." The final arbitration award found that this policy, which manifested in cases like *Huawei v. Conversant* and *Xiaomi v. InterDigital*, was inconsistent with China's TRIPS obligations (specifically Articles 28.1 and 28.2). The arbitrators held that China's practice of issuing broad ASIs backed by severe penalties effectively deprived SEP holders of the practical ability to enforce their patent rights in other jurisdictions. While the WTO found no violation regarding the availability of injunctive relief (TRIPS Article 44.1), the ruling underscores that ASIs can cross a line from procedural tool to a substantive barrier to IP enforcement.

The recent issuance of ASIs by Chinese courts can be understood, in part, as a response to perceived jurisdictional overreach by courts in the EU and UK.<sup>21</sup> For example, in *Unwired Planet v. Huawei*, the UK Supreme Court approved injunctions conditioned on defendants accepting global portfolio licenses set by the UK court, a practice that asserts jurisdiction over foreign patents.<sup>22</sup> This has triggered a "race for jurisdiction," with Chinese courts modeling their ASI practice on the U.S. framework but applying it more systematically. In cases such as *Samsung v. Ericsson*, Chinese courts have issued ASIs to protect domestic FRAND rate-setting proceedings, arguing this is analogous to the U.S. approach in *Microsoft v. Motorola*.

In the WTO, the EU specifically challenged China's practice of setting global FRAND royalty rates for worldwide patent portfolios and using ASIs to enforce this jurisdictional claim. The WTO panel and subsequent arbitral award validated this concern, finding that China's ASI policy, coupled with its practice of determining global rates, impaired the exercise of patent rights under TRIPS.

While the global community has expressed a strong concern about Chinese courts' use of ASIs to obstruct a transparent and fair judicial process,<sup>23</sup> we encourage USTR to develop a nuanced position through stakeholder input. The USTR should distinguish between the legitimate, narrow use of ASIs (as practiced in the U.S.) and their deployment as a systemic tool for jurisdictional protectionism that contravenes WTO rulings. The core issue is not ASIs per se, but their expansive use to control global litigation outcomes and undermine the territorial nature of patent rights—a practice the WTO has now found inconsistent with international obligations.

This concern has been further amplified by a new, related WTO dispute (DS632) initiated by the EU in January 2025.<sup>24</sup> It specifically challenges the substantive authority Chinese courts claim: to determine binding worldwide licensing terms, including royalty rates, for global SEP portfolios

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States and agreed to pay a FRAND royalty determined by the court for Motorola's portfolio; *also see* Telefonaktiebolaget LM Ericsson v. Lenovo (U.S.), Inc., No. 24-1515 (Fed. Cir. 2024).

<sup>21</sup> Peter K. Yu, George L. Contreras, and Yu Yang, *Transplanting Anti-suit Injunctions*, 71 AM. U.L. REV. 1537, 21 n. 121 (2022), <https://aulawreview.org/blog/transplanting-anti-suit-injunctions/>.

<sup>22</sup> *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd* (SCUK 2020).

<sup>23</sup> OFF. OF THE U.S. TRADE REPRESENTATIVE 2021 SPECIAL 301 REPORT 47 (2021) (“[r]ight holders have...expressed strong concerns about the emerging practice in Chinese courts of issuing [ASIs] in [SEP] disputes, reportedly without notice or opportunity to participate in the injunction proceedings for all parties.”)

<sup>24</sup> *EU Initiates Dispute Complaint Regarding Chinese Patent Licensing Measures*, WORLD TRADE ORG. (Jan. 22, 2025).

without the consent of both parties. This new case targets the very action—setting global FRAND rates for foreign patents—that China’s ASI policy was designed to enforce. This pairing of expansive substantive jurisdiction with coercive procedural injunctions creates a uniquely powerful tool for forum shopping and undermines the sovereignty of other nations’ patent systems. We urge USTR to monitor this dispute closely and to prevent jurisdictional overreach that distorts the global innovation ecosystem.

### **3. General IP Enforcement**

ACT acknowledges some positive steps within China’s judicial system, including the establishment of specialized IPR courts in Beijing, Guangzhou, and Shanghai and changes to China’s Patent Law in 2020 (effective June 2021).<sup>25</sup> USTR should continue to monitor the impact of these changes, including significant changes to damages calculations in IPR litigation.<sup>26</sup>

However, across patent, copyright, trademark, and trade secrets, enforcement remains inconsistent and often unreliable. Due to the continued high volume of infringement originating from China, as well as the numerous policies and laws that enable IPR infringement, create market access barriers, or are selectively enforced, we strongly recommend that China remain on the Priority Watch List.

#### **E. Colombia**

Colombia is now positioned as a key Latin American center for audiovisual production and digital content, demands significantly stronger government investment in intellectual property enforcement to match its growth. Regrettably, the current system falls short in tackling widespread online piracy, hampered by poor coordination and insufficient specialized knowledge among judges and police. Positive steps include recent law enforcement operations and court rulings that targeted illicit streaming platforms, and authorities should extend comparable aggressive measures to other infringing services. To strengthen protections, Colombia needs to align its rules on technological protection measures (TPMs) with obligations under the U.S.-Colombia Trade Promotion Agreement and abandon proposed copyright law changes that would undermine contractual freedom for international rights holders dealing with local entities. On a constructive note, the Communications Regulation Commission (CRC) appropriately concluded in its OTT services analysis that no valid technical basis exists for imposing network usage charges on online platforms.

ACT expresses significant concern regarding systemic flaws in Colombia’s patent enforcement regime that deny adequate and effective protection to U.S. companies, particularly small businesses engaged in standards-driven markets. Colombia’s legal framework mirrors problematic aspects of systems in Germany and Brazil by bifurcating patent infringement and validity proceedings. This structure creates a risk of injunctions being granted before a patent's validity is

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<sup>25</sup> Aaron Wininger, *China’s National People’s Congress Releases Translation of the Amended Patent Law*, NAT’L L. R. (Sept. 17, 2021), <https://www.natlawreview.com/article/china-s-national-people-s-congress-releases-translation-amended-patent-law>.

<sup>26</sup> Aaron Wininger, *Top 5 Changes in China’s Newly Amended Patent Law*, CHINA IP L. UPDATE (Oct. 19, 2020), <https://www.chinaiplawupdate.com/2020/10/top-5-changes-in-chinas-newly-amended-patent-law/>.

fully examined, a practice in direct misalignment with the U.S. approach established in *eBay Inc. v. MercExchange, L.L.C.*

Recent legal developments underscore and exacerbate this concern. Colombian procedural law, specifically Article 590 of the General Procedural Code, requires courts to assess the necessity, effectiveness, and proportionality of a preliminary injunction. In a key 2024 ruling concerning an SEP dispute between Ericsson and Lenovo, the Superior Tribunal of Bogotá applied this proportionality test and revoked a lower court's injunction, finding it unduly burdensome. However, the Andean Community (CAN) Secretariat has since challenged this approach. In a February 2025 opinion, the Secretariat asserted that Andean Community law (Decision 486) requires a more automatic injunction regime, arguing that Colombian courts may not impose additional procedural requirements like proportionality once basic infringement criteria are met. While this opinion is not yet binding, it creates institutional pressure that could force Colombia to abandon its proportionality safeguards.<sup>27</sup>

This push toward a quasi-automatic injunction standard is directly at odds with the global consensus. Jurisdictions including the United States and others have moved away from automatic injunctions to prevent their abuse, especially in the SEP context where they can be used to force unfair licensing terms.

Unless addressed by the United States, we expect Colombia will solidify its position as a preferred venue for SEP licensing abuse, mirroring tactics used in other bifurcated systems. The conflict between national procedural safeguards and regional pressure for automatic injunctions creates significant legal uncertainty for U.S. implementers. We therefore strongly request that Colombia's harmful patent injunction practices and the concerning influence of the Andean Community Secretariat be included in the 2026 Special 301 Report. We encourage USTR to work with Colombia to uphold and strengthen its proportionality standards and align its approach with international norms that protect against patent hold-up.

## **F. European Union**

ACT supports the EU's Digital Single Market (DSM) strategy's goals of opening digital opportunities for businesses and enhancing Europe's position in the digital economy. To be successful, this strategy must integrate Europe into the global digital market, not isolate it. We encourage USTR to remain actively engaged, as the European Commission has advanced numerous regulations under the DSM that raise significant concerns for ACT and act as trade barriers for American small businesses. Key concerns include:

- A range of competition-themed activities and policies focused on the EU's "digital sovereignty" that stand to cause damage to the digital economy and American small businesses' ability to operate in the EU, such as the regulation of online platforms, via the Digital Markets Act (DMA),<sup>28</sup> intending to address contractual clauses and trading practices

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<sup>27</sup> Enrico Bonadio & Juan Camilo Contreras Jaramillo, *Quasi-Automatic No More? Columbia, the Andean Community, and SEPs Injunction Standards*, KLUWER PAT. BLOG (Dec. 23, 2025), <https://legalblogs.wolterskluwer.com/patent-blog/quasi-automatic-no-more-colombia-the-andean-community-and-seps-injunction-standards/>.

<sup>28</sup> European Commission, *Online Platforms*, available at <https://ec.europa.eu/digital-single-market/en/policies/online-platforms>.

in relationships between platforms and businesses, poses significant risks to U.S. small business engagement in the global digital economy.<sup>29</sup> Although they may not qualify as gatekeepers, SMEs will suffer significant consequences from the new obligations introduced in the DMA. SMEs are particularly vulnerable if those obligations threaten the tangible advantages currently provided to them by digital platforms. Specifically, the DMA, through mandating sideloading, will prevent digital platforms from taking measures to protect IPR in the digital economy. With the DMA now in place and implementation underway, its impact on IP enforcement in the digital economy represents a significant trade barrier in the context of the 301 Special Report and should be included in the Special 301 Report to Congress as such. The EU has intensified enforcement of the Digital Markets Act and Digital Services Act throughout 2025 and into 2026, with major enforcement actions including fines against Apple (€500 million), Meta (€200 million), and X/Twitter (€120 million in December 2025 for DSA non-compliance). The European Commission is required to conduct a DMA evaluation by May 3, 2026.

- Attempts to regulate the free flow of information online through measures such as the EU's Digital Services Act which centers around tackling illegal hate speech with the goal, moving forward, of removing illegal content from the internet.
- Various provisions of the GDPR, which impose additional requirements on non-European firms (due to its extraterritorial reach) that increase the cost and risk associated with handling data pertaining to EU citizens. For example, Article 27 of the law requires firms to physically place a representative in the EU.<sup>30</sup> Such provisions can be an insurmountable hurdle to our small business members seeking to enter the EU market. Anything that can be done throughout the GDPR implementation process to ease the burden for small and medium-sized companies could have tremendously positive economic implications.
- The EU's enactment of sweeping regulations on the use of artificial intelligence (AI)<sup>31</sup> raises concerns for ACT about regulation pre-empting new and innovative uses of AI and related IPR issues. On August 1, 2024, the EU AI Act went into force, which include both positive and uncertain approaches to regulating AI. The regulation includes provisions for SME support, while also including a risk-based approach that categorizes AI systems into different levels to risk. We believe that these approaches are flexible and balanced. We are most concerned with the cost of complying with minimum requirements for transparency and safety standards for SMEs and startups.

The above noted developments of concern, among others, contain regulatory proposals for nascent economic segments and services that are solutions in search of a problem and should not move forward. Demonstrated harms should form the basis for activities under the DSM, rather than hypotheticals and edge use cases.

The established Unified Patent Court (UPC) has posed significant concerns for American companies that operate within the EU economy. The UPC enables holders of IP issued in one of the 18 Member States that joined the court to seek an injunction that would be applied across all 18 jurisdictions. The court has become an attractive venue for SEP holders who use the court to leverage their

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<sup>29</sup> <https://actonline.org/wp-content/uploads/ACT-The-App-Association-DMA-Position-Paper-March-.pdf>.

<sup>30</sup> See <https://www.privacy-regulation.eu/en/27.htm>.

<sup>31</sup> Digital Single Market: Artificial Intelligence, European Commission, last updated September 27, 2021. <https://ec.europa.eu/digital-single-market/en/artificial-intelligence>.

dominant market position against potential licensees. In a 2024 case between Chinese company Huawei and American entity NETGEAR, the Munich Local Division refused to follow the important holding from the Court of Justice of the European Union (CJEU) in *Huawei Technologies Co. v. ZTE Deutschland GmbH*, which provided steps that SEP holders must take in order to enforce an injunction against an alleged infringer.<sup>32</sup> We suspect that the UPC will continue to be a venue abusive/opportunistic SEP holder litigation tactics against American companies. As of May 31, 2025, the UPC has handled 883 cases, with 50% of infringement actions resulting in valid and infringed patents. On January 1, 2026, court fees increased by 33%, and five additional legally qualified judges took positions on March 1, 2026.

A critical failure in EU policymaking was the European Commission's February 2025 withdrawal of its proposed SEP regulation, which sought to address systemic market abuses. This unilateral decision to scrap the bill—despite a negotiated position from the European Parliament and clear evidence of market failure—represents a refusal to correct a known trade barrier and has sparked a constitutional crisis. In a significant development, the European Parliament voted on November 25, 2025, to sue the Commission before the Court of Justice of the European Union, arguing the executive overstepped its powers by using the withdrawal as a "political instrument to short-circuit Parliament's work."<sup>33</sup> This ongoing lawsuit underscores the proposal's importance and the profound flaws in the EU's legislative process on this issue. The continued absence of a regulatory framework leaves U.S. companies exposed to the very abuses the proposal aimed to curb.

We note that while the EU advances policies and proposals, including the to input proportionality tests into injunction determinations, many prominent courts are not adhering to those policies. We urge the USTR to work with the EU to find effective solutions to improve judicial process that is inconsistent with established policy goals.

## **G. Germany**

Germany remains a primary global venue for patent enforcement due to its bifurcated system, which separates infringement and validity proceedings. This structure allows courts to grant injunctive relief based on a finding of infringement before the underlying patent's validity is fully adjudicated.<sup>34</sup> This practice, which conflicts with the U.S. *eBay* standard, has historically created international conflicts when German decisions impact markets beyond its jurisdiction. German courts have continued this problematic approach in SEP disputes, often imposing a disproportionate burden on implementers to prove their "willingness" to license under terms set by the SEP holder. This distorts the balanced framework established by the Court of Justice of the European Union in *Huawei v. ZTE*. Despite legislative amendments to the German Patent Act that pay lip service to proportionality, judicial practice remains heavily skewed toward automatic

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<sup>32</sup> *Huawei Technologies Co. v. ZTE Deutschland GmbH* (CJEU 2015) (The court provided steps that a SEP licensor must take to enforce an injunction against an infringer: 1) The SEP holder must notify a party of infringement before bringing an action; 2) If the party is a willing licensee, the SEP holder must provide a written licensing offer in coordination with the FRAND commitment; 3) If the licensee continues infringement or does not provide a proper response (ex. counteroffer on FRAND terms), the SEP holder may seek an injunction).

<sup>33</sup> Mathieu Pollet, *EU Parliament Votes to Sue Commission for Killing Patents Bill*, POLITICO (Nov. 25, 2025), <https://www.politico.eu/article/parliament-votes-to-sue-commission-for-killing-patents-bill/>.

<sup>34</sup> See *Nokia v Daimler*, District Court (Landgericht) of Mannheim, judgment dated 18 August 2020, Case-No. 2 O 34/19; see *Sisvel v Haier*, Federal Court of Justice, judgment dated 5 May 2020, Case No. KZR 36/17.

injunctions, a point underscored by the European Commission's filing of an amicus brief in the *VoiceAgeEVS v. HMD* case to clarify the proper application of EU law.

This judicial overreach has recently escalated with the issuance of unprecedented "anti-interim license injunctions" (AILIs).<sup>35</sup> In late September 2025, the Munich Regional Court (alongside the Mannheim Local Division of the UPC) issued the world's first AILIs to block Amazon from pursuing a UK-court-ordered interim license from InterDigital. These orders represent a direct attack on contractual FRAND commitments and the ability of other sovereign courts to enforce them, effectively subordinating global contract law to German jurisdictional protectionism. This mirrors the behavior the WTO condemned in China in DS611, as it restricts the ability of parties to enforce their rights in foreign forums.

We note that German courts employ parallel coercive mechanisms that create similar WTO liability concerns. Without requiring SEP owners to fulfill their own FRAND obligations, they require that product companies make global SEP licensing offers, and impose a near-automatic system for granting SEP holders injunctions, and aggressive anti-suit and anti-anti-suit injunctions (AASIs), which prevent standards implementers from seeking relief in other jurisdictions.

We highlight for USTR that German courts in Munich explicitly state that foreign court decisions will not bind or influence German proceedings and issue AASIs to block foreign litigation, mirroring the restriction of foreign enforcement that the WTO condemned China for. Additionally, German courts' limited FRAND assessment allows SEP holders to obtain global injunctions without proving their licensing terms comply with FRAND obligations, forcing accused infringers/standards implementers to accept abusive terms to avoid an injunction.

We urge USTR to clearly state in its report that the German (and UPC) approach to SEP adjudication is flawed and constitutes a significant trade barrier. Of particular concern is the German courts' use of coercive mechanisms—including anti-suit injunctions (ASIs), anti-anti-suit injunctions (AASIs), and now AILIs—to block parallel litigation and contractual enforcement in other jurisdictions, such as the UK. Furthermore, by granting injunctions without rigorously assessing the SEP holder's own compliance with FRAND obligations, German courts force implementers into a global "hold-up" scenario, compelling them to accept potentially abusive terms to avoid market exclusion.

Germany's approach has caused severe supply chain disruptions and led companies to cease operations in the country, directly undermining innovation and the international consensus that injunctions for FRAND-committed SEPs should be limited. Due to its systemic practice of awarding injunctions at the expense of good-faith negotiation, innovation, and now the enforcement of international contracts, ACT believes Germany should be placed on the Priority Watch List.

## **H. India**

India represents an immense opportunity for American small business tech and software development companies. India's technology industry is becoming a global leader, employing over

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<sup>35</sup> Enrico Bonadio & David Katz, *Anti-Interim-License Injunctions and the Erosion of Contract Rights*, KLUWER PAT. BLOG (Oct. 23, 2025), <https://legalblogs.wolterskluwer.com/patent-blog/anti-interim-license-injunctions-and-the-erosion-of-contract-rights/>.

5.4 million workers.<sup>36</sup> However, ACT members continue to experience a wide range of IPR infringement and lack of legal redress, despite ongoing administrative efforts across Indian ministries and courts. Significant barriers further hinder their ability to operate in this key market.

## 1. Copyright, Trade Secrets and Data Rules

Certain steps indicate the Indian government's willingness to adequately protect IPR. For example, the Indian government undertook efforts to further its commitment to formally establish a copyright royalty board and appoint a functional IP Appellate Property Board. Under the Finance Act of 2017, the informal Copyright Board merged with the Intellectual Property Appellate Board. As a result, applications for copyrights increased by 78 percent from 2016-2017, compared to 2015-2016.<sup>37</sup> As of May 20, 2016, the Indian government established additional commercial courts, advancing the 2015 Commercial Courts Act,<sup>38</sup> which ACT perceives as further evidence of India's commitment to enhance its IPR procedures. Furthermore, India acceded to the WIPO Internet Treaties in July 2018 (namely the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty). The Indian government also appears committed to the IPR Task Force announced by the Maharashtra government. As of January 24, 2018, Cell for IPR Promotion and Management (CIPAM) and Federation of Indian Chambers of Commerce & Industry (FICCI) have made an IPR Enforcement Toolkit for Police, and there have been 26 programs dedicated to training police officers on IP enforcement. Despite this positive movement, ACT members experience weak and ineffective enforcement in India.

Moreover, numerous hurdles to market access, either in place today or proposed, restrict market access for ACT members that rely on IPR, including but not limited to data localization requirements and in-country cybersecurity testing mandates.<sup>39</sup> India's Digital Personal Data Protection Act (DPDP Act), enacted August 11, 2023, has progressed through phased implementation. The DPDP Rules 2025 were notified on November 13, 2025, with Stage 1 implementation (Data Protection Board establishment) effective November 13, 2025, Stage 2 (Consent Managers registration) by November 13, 2026, and Stage 3 (main compliance duties) by May 13, 2027. Indian courts are now delivering record-breaking damages rivaling EU and US enforcement, with India maturing into a serious patent enforcement venue. However, enforcement challenges remain, including lack of specialized IP benches outside major High Courts and weak border enforcement.

ACT members continue to experience IP infringement originating from India, and face challenges in enforcement through the Indian system. India has not yet implemented its obligations under the WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty; furthermore, Indian patent law is inconsistent with the TRIPS Agreement. Another troubling development is the Indian government's proposal decriminalizes provisions in the Patent Act and the Copyright Act.<sup>40</sup> This

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<sup>36</sup> See <https://nasscom.in/sites/default/files/sr-2023-press-release.pdf>.

<sup>37</sup> See <https://spicyip.com/wp-content/uploads/2018/01/IPR-Regime-In-India-Government-Initiatives.pdf>.

<sup>38</sup> See <https://timesofindia.indiatimes.com/city/delhi/Commercial-courts-begin-functioning-in-Delhi-Mumbai/articleshow/52488068.cms>.

<sup>39</sup> See [https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Potection%20Bill%2C%202022\\_0.pdf](https://www.meity.gov.in/writereaddata/files/The%20Digital%20Personal%20Data%20Potection%20Bill%2C%202022_0.pdf).

<sup>40</sup> Surojit Gupta, *Govt Moves to Decriminalise Minor Offences to Woo Investors*, June 12, 2020, <https://timesofindia.indiatimes.com/india/govt-moves-to-decriminalise-minor-offences-to-woo-investors/articleshow/76331374.cms>.

proposal threatens copyright protections that aim to protect small businesses and innovators alike.

## 2. Standard-Essential Patents

India has become a new venue for SEP abuse, impeding over 3,000 SMEs and startups from bringing deep-tech solutions to critical global markets.<sup>41</sup> In 2023, the Delhi High Court held that SEP holders are not prohibited from seeking an injunction from the court at an interim or final stage.<sup>42</sup> Importantly, the court cited the UK Supreme Court 2020 decision in *Unwired Planet v. Huawei*<sup>43</sup> to support the notion that a SEP holder may require a license for a global portfolio of FRAND-encumbered SEPs, or alternatively receive an award of injunctive relief upon a *prima facie* showing that one patent in the portfolio is infringed.

This decision makes it easier for SEP holders to obtain preliminary injunctions, allowing courts to set global FRAND rates based on a likelihood of success rather than a full factual record. It disregards better-reasoned Indian precedent, such as the four-factor test in *Nokia v. Oppo*, and aids opportunistic SEP holders in squeezing SME innovators through threats of supra-FRAND terms and market exclusion.

This problematic SEP jurisprudence exists alongside a critical, unresolved conflict between patent and competition law. The Competition Commission of India (CCI) v. Ericsson saga highlights this tension. For years, the CCI investigated complaints that Ericsson abused its dominance by imposing unfair, discriminatory SEP licensing terms—such as demanding royalties based on the end-product price and using restrictive NDAs. While the Delhi High Court initially upheld the CCI's jurisdiction, a Division Bench later reversed, ruling patent law takes precedence. The Supreme Court of India, in 2025, dismissed the final appeal on procedural grounds after a settlement but explicitly kept the fundamental question of law open. This has created a dangerous vacuum: lower tribunals have misinterpreted the dismissal to preclude competition oversight, leaving anticompetitive SEP abuses without an effective check and disproportionately harming Indian MSMEs and U.S. small businesses.

Small inventors, including ACT members, rely on the FRAND construct to develop cutting-edge technology around the globe, which is defeated by the ability for some SEP holders to hold international technical standards hostage. We address this issue in detail in our piece, "A Call to Action: Guiding a Fair Standard-Essential Patent Licensing Process for a Thriving Indian Economy," a comprehensive paper recommending a pro-competitive standards and SEP framework for India that will protect and augment its Indian innovation as well as India's global leadership.<sup>44</sup>

Due to the systemic weaknesses in copyright and trade secret protection, the emergence of India as a venue for SEP abuse, the unresolved patent-competition law conflict, and the persistent market access barriers, ACT strongly recommends that India remain on the Priority Watch List.

### I. Indonesia

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<sup>41</sup> *Id.*

<sup>42</sup> *Intex Technologies (India) Ltd. V. Telefonaktiebolaget L M Ericsson* [2023 SCC OnLine Del 1845].

<sup>43</sup> *Unwired Planet International Ltd v. Huawei Technologies Co. Ltd* (SCUK 2020).

<sup>44</sup> See [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4536835](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4536835).

While the Indonesian government has taken steps to improve IPR enforcement, Indonesia continues to present challenges with respect to IPR protections and enforcement mechanisms that translate into a barrier to entry for U.S. small business innovators in the Indonesian market. For example, its revision of Indonesian trademark law in November 2016 demonstrates a positive step forward to advance the rights of trademark holders through shorter examination times and better criteria for protected marks. In addition, Indonesia joined the Madrid Protocol in January 2018.

However, there are still ongoing concerns with whether the recent provisions will be adequately enforced and there has been minimal progress in integrating USTR's suggested reforms in its 2018 review. For example, Indonesia has apparently not yet created a specialized IPR unit within its National Police to enforce against Indonesian criminal syndicates that create counterfeit and pirated marks and works. Indonesia's 2016 revisions to its Patent Law continue to raise concern. Indonesia's revised Patent Law included localization rules that require foreign patentees to transfer proprietary technologies to local companies, which, in effect, forces American companies with products in Indonesia to protect their rights. Certainty in enforcement is lacking and continues to present challenges.

Furthermore, numerous hurdles to market access, either in place today or proposed, restrict market access for ACT members that rely on IPR, including but not limited to various local presence requirements; data localization requirements for public sector data; and—of highest concern to ACT—amendments to Indonesia's Harmonized Tariff Schedule to categorize "software and other digital products transmitted electronically," setting the stage for subjecting e-commerce to customs duties. We also continue to monitor Indonesia's new E-Commerce Regulation, issued in November 2019, that may impose restrictions on the flow of data

Based on the above, ACT recommends Indonesia remain on USTR's Priority Watch List.

## **J. Japan**

While Japan maintains a robust intellectual property rights (IPR) framework, recent developments pose significant risks to innovation and market access, particularly for U.S. implementers and small businesses.

ACT has engaged extensively with relevant Japanese government actors for years, including the Ministry of Internal Affairs and Communications, the Headquarters for Digital Market Competition, and the Japan Fair Trade Commission to emphasize the need for protecting IPR on platforms, and has also raised concerns with the law's conflicts with obligations in both Article 16 of the General Agreement on Trade in Services and other trade agreement obligations. Because the SSCPA stands to inhibit some core platform functions, including those that will protect IPR in the digital economy, we urge USTR to track this development, recommend that be reflected in the Special 301 Report as, unless altered, a means of denying adequate and effective protection of IPR (as the SSCPA contains no exception to compliance for protecting IPR), as well as a denial fair and equitable market access to U.S. small businesses who rely on IPR protections. Japan's Smartphone Software Competition Promotion Act (SSCPA) took full effect on December 18, 2025. Apple Inc., iTunes K.K., and Google LLC were designated in March 2025 as companies required to comply. The law permits alternative app stores and payment systems, with AltStore (a US startup) becoming available on December 18, 2025, and Epic Games Store planning a January 2026 launch in Japan. Apple permits

alternative app stores subject to a 5% ‘Core Technology Commission’ on transactions. The JFTC issued Guidelines in July 2025 detailing scope and substantive obligations under the Act.

Concurrently, Japan has established itself as an increasingly influential jurisdiction for global Standard Essential Patent (SEP) litigation.<sup>45</sup> This was demonstrated by the Tokyo District Court’s landmark June 2025 ruling in *Pantech v. Google*, where an injunction was granted against Google for SEP infringement. The court cited Google’s uncooperative negotiation behavior, signaling a shift in Japan’s judicial approach to favor licensors. This case, which culminated in a global settlement, paved the way for a comprehensive procedural framework.

This judicial approach was formally codified in January 2026 with the Tokyo District Court’s new trial guidelines for SEP cases. These guidelines institutionalize a process that pressures implementers into global settlements under the looming threat of injunctions. The court’s framework, while procedurally structured, effectively empowers SEP holders by treating the failure to agree to terms or submit evidence as a lack of good faith, potentially triggering injunctive relief. This creates a severe imbalance, coercing implementers—especially those with limited litigation resources—into unfavorable terms to avoid being shut out of the market.

In essence, Japan is cultivating a legal environment that threatens the careful balance of the FRAND system. By elevating the availability of injunctions, Japan’s new SEP framework risks stifling follow-on innovation, raising costs for consumers and businesses, and creating unfair barriers to market access for U.S. companies that are implementers of standardized technology. We strongly urge USTR to highlight these developments as a serious concern, as they threaten to deny adequate and effective protection for the innovative activities of U.S. implementers and distort the global digital marketplace.

#### **K. Mexico**

Intellectual property laws in Mexico have made significant improvements but lag behind the rest of the world on protection and enforcement. Mexico accession to the U.S.–Mexico–Canada Agreement (USMCA), the WIPO Internet Treaties (WIPO Copyright Treaty [WCT] and the WIPO Performances and Phonograms Treaty [WPPT]) has strengthened both their Federal Copyright Law and Federal Criminal Code. This significant progress is subject to constitutional challenges that are prevent further IP and copyright reform and rendering questioned law unusable to Mexican courts. We urge the USTR to encourage the Mexican government to reject arguments that strong international IP laws that have been implemented across jurisdictions, like the United States, that uphold strong First Amendment protections is a violation of Mexican constitutional rights. If these laws are overturned, Mexico will be a jurisdiction for significant IP abuse.

ACT therefore encourages USTR place Mexico on its Priority Watch List.

#### **L. Poland**

Poland’s treatment of enforcement against online piracy is concerning to ACT members, particularly due to the nation continuing not to implement significant provisions of EU directives, including Article 8(3) of the EU Copyright Directive (2001/29/EC) requiring Member States to ensure injunctive

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<sup>45</sup> Kentaro Hirayama, *Japanese Court Establishes SEP Litigation Guidelines – Japan’s Ambition to Position Itself as Global SEP Dispute Resolution Forum*, Hirayama L. Off. (Jan 22, 2026).

relief is available “against intermediaries whose services are used by a third party to infringe a copyright or related right.”

### **M. Republic of Korea**

The Republic of Korea’s (ROK) continues to propose ill-advised regulations for digital platforms that would unduly restrict the ability of platforms to curate apps and content, including with respect to enforcing IPR. Most recently, the ROK’s legislature is considering amendments to its Monopoly Regulation and Fair Trade Act (MRFTA) which would inhibit the protection of IPR on platforms subject to Korean law. ACT has engaged extensively with the ROK to emphasize the need for protecting IPR on platforms, and has also raised concerns with the law’s conflicts with obligations in both Article 16 of the General Agreement on Trade in Services and the U.S.-Korea Free Trade Agreement in chapters addressing investment and electronic commerce.<sup>46</sup> Because ROK proposals for platform regulation would inhibit some core platform functions, including those that will protect IPR in the digital economy, we urge USTR to track this development, recommending that it be reflected in the Special 301 Report as, unless altered, a means of denying adequate and effective protection of IPR, as well as a denial fair and equitable market access to U.S. small businesses who rely on IPR protections. South Korea’s amended MRFTA became effective August 7, 2024. In September 2024, the KFTC adopted a new approach amending existing competition law to regulate platforms rather than enacting a new law, significantly reducing the scope of prohibited conduct. However, with the election of President Lee Jae Myung on June 4, 2025, the new administration and Democratic Party are expected to push for enactment of a new Online Platform Act curbing platform operators’ market dominance abuse. Legislative amendments strengthening the fine system are expected to be submitted to the National Assembly in the first half of 2026.

### **N. Russia**

The Russian market continues to present massive challenges to ACT members. Unfortunately, Russia has continued to foster an environment that permits extensive software piracy. The Russian government does not appear to be committed to making any systemic changes to protect IPR and has actively encouraged the infringement of patented technologies.<sup>47</sup>

ACT therefore urges USTR to keep Russia on the Priority Watch List.

### **O. South Africa**

IP laws in South Africa do not adequately address protection and enforcement of inventive and creative works in the digital age. Due to insufficient IP protections, inventive technologies and creative works are easily accessed and impact overall innovation and creation in Sub-Saharan Africa. ACT shares concerns with proposed changes to South Africa’s copyright framework, though such changes have not advanced to become final policy.

We further urge USTR to consider the Competition Commission of South Africa’s (CCSA) market inquiry into online intermediation platforms as a potential means of denying adequate and effective

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<sup>46</sup> See <https://actonline.org/2025/01/24/act-the-app-associations-letter-to-the-republic-of-koreas-government-regarding-online-platform-regulation-legislation/>.

<sup>47</sup> See <https://www.economist.com/business/2022/06/02/has-russia-legalised-intellectual-property-theft>.

protection of IPR, as well as a denial fair and equitable market access to U.S. small businesses who rely on IPR protections. CCSA mandates for digital platform operations must preserve the ability for those platforms to provide IPR-related curations that countless developers operating in South Africa rely on.

ACT therefore encourages USTR to place South Africa on its Priority Watch List.

#### **P. Switzerland**

Switzerland continues hold inadequate IP enforcement and consumer protection laws, justifying its previous position on an international watch list for many years. While the Swiss Unfair Competition Law in 2022 is a positive step for Switzerland's enforcement against competition threats implicating IP rights, many right holders for online works have a difficult time enforcing their rights when they are being infringed, particularly considering infringers operating outside of the country.

#### **Q. Thailand**

Per a Thai Royal Decree, Thailand's Electronic Transactions Development Agency (EDTA) has commenced a policy development process for digital platform regulation.<sup>48</sup> ACT has engaged with EDTA and others in the Thai government to emphasize the need for protecting IPR on platforms.<sup>49</sup> Because regulatory interventions into digital platforms markets by the EDTA stand to inhibit some core platform functions, including those that will protect IPR in the digital economy, we urge USTR to track this development and recommend that it be reflected in the Special 301 Report as a potential means of denying adequate and effective protection of IPR, as well as a denial fair and equitable market access to U.S. small businesses who rely on IPR protections.

#### **R. Turkey**

The Law of the Protection of Competition, No. 4054, in Turkey was amended to include a new online platforms regulatory framework that aligns with concepts outlined in the EU's DMA. The regulation, however, imposes additional requires for designated companies intended to enable the interoperability of core platforms services and/or ancillary services, but stands to inhibit the ability of curated online marketplaces to enforce IPRs, which, as explained above, is a vital function small businesses in the digital economy rely upon. Because regulatory interventions into digital platforms markets by Turkey stand to inhibit some core platform functions, including those that will protect IPR in the digital economy, we urge USTR to track this development and recommend that it be reflected in the Special 301 Report as a potential means of denying adequate and effective protection of IPR, as well as a denial fair and equitable market access to U.S. small businesses who rely on IPR protections.

#### **S. United Kingdom**

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<sup>48</sup> See <https://www.trade.gov/market-intelligence/thailand-information-technology-digital-platforms>.

<sup>49</sup> See <https://actonline.org/wp-content/uploads/ACT-Positions-on-Digital-Platforms-and-Competition-for-Thailand-EDTA-EN.pdf>.

In the case *Unwired Planet v. Huawei*,<sup>50</sup> the United Kingdom Supreme Court upheld an injunction prohibiting the sale of wireless telecommunications products in Britain due to a party's failure to enter a patent license for Unwired Planet's worldwide portfolio of SEPs, even though the party was willing to enter into a license for UK SEPs. The ruling also states that the plaintiff did not violate EU competition law by seeking an injunction for infringement of its UK SEPs, even though those SEPs were subject to a commitment to license on FRAND terms. Controversially, the ruling rejects antitrust liability in concluding that a SEP holder's insistence on only agreeing to a worldwide license is consistent with its FRAND obligation. If a single patent in a single jurisdiction can be used to obtain an injunction unless the alleged infringer enters a worldwide license, SEP owners will be highly incented to engage in global forum shopping, depressing the ability for American innovators like ACT members to compete abroad.

The *Unwired Planet* decision continues to present grave risks to those who rely on standards to innovate and threatens U.S. sovereignty by holding that a UK court can preempt U.S. law in mandating worldwide FRAND licensing, presenting a major barrier to trade for American small businesses in the digital economy and IoT that rely on standards to innovate and compete. ACT strongly encourages the U.S. government to address this harmful development by including it in the Special 301 Report, within the ongoing U.S.-UK Free Trade Agreement negotiation, and through other avenues.

Additionally, in the past year, the UK courts have experienced many developments in their SEP landscape. The ongoing dispute between InterDigital and Lenovo has shed light on significant anticompetitive SEP licensing practices, where InterDigital licensed their SEPs to small entities at a supra-FRAND rate and applied volume discounts for larger entities. Since then, the dispute was appealed by Lenovo to the UK Supreme Court, challenging the Court of Appeal's decision that limitation periods do not apply in FRAND cases. ACT submitted an amicus brief in support of this case being heard. Although the parties ultimately settled, leaving the Court of Appeal's decision as established law for now, this case remains an important reference point in UK SEP jurisprudence. This case sets harmful precedent to remove a statute of limitations period of FRAND cases.

The UK Court of Appeal also heard the dispute in *Panasonic v. Xiaomi*, where Xiaomi successfully appealed the High Court's decision not to grant an interim license to Panasonic's SEP portfolio. The Court of Appeal's judgment is noteworthy not just for its impact on the licensing dispute, but because it strongly criticized Panasonic's conduct in seeking injunctions in Germany and the UPC. The Court found that such actions were out of compliance with the ETSI IPR Policy, making this case an important reference in the ongoing debate over SEP injunctions. This decision is contrasted by *Ericsson v. Lenovo* and *Amazon v. Nokia*, where the UK High Court denied an interim license in both cases. This trend of court decisions shows a new practice by UK courts, which is likely to continue developing for SEP disputes.

It is essential to distinguish the UK's contractual legal mechanism from the overtly coercive tools employed in other forums. Unlike German and Unified Patent Court (UPC) proceedings—which utilize anti-suit injunctions (ASIs) to block parties from accessing other courts and grant near-automatic injunctions without rigorous FRAND assessment—the UK framework operates differently. UK courts do not employ ASIs to prevent foreign litigation. Their authority to set global terms arises from a consensual contractual interpretation when parties choose to litigate there,

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<sup>50</sup> See <https://www.supremecourt.uk/cases/docs/uksc-2018-0214-judgment.pdf>.

not from an order barring recourse elsewhere. Furthermore, UK interim licenses are predicated on a specific finding that an SEP holder is breaching its FRAND obligations by pursuing injunctions against a willing licensee. This targeted approach to prevent "hold-up" contrasts sharply with the German system, which the provided analysis notes "mirror[s] the restriction of foreign enforcement" recently condemned by the WTO in a case against China.

A pivotal development is the UK Supreme Court's decision to hear Tesla's appeal against Avanci and InterDigital. This case directly tests whether patent pools and their members can be compelled to offer FRAND licenses, a safeguard essential for preventing collective hold-up. Allowing pools to operate as unaccountable blocs poses serious anti-competitive risks. The Supreme Court's review in 2026 offers a crucial, final opportunity to correct this imbalance and affirm that FRAND commitments are enforceable obligations, not optional shields.

In July 2025, the UK Intellectual Property Office (UK IPO) announced a formal public consultation on SEP licensing practices—an overdue and necessary step we welcome, as echoed in our submission to the IPO. This consultation is a direct acknowledgment that the "evident frictions and persistent challenges" in the current framework, which we have extensively documented, create significant barriers for innovative implementers and hinder market growth. While this is a positive signal of awareness, it follows years of damaging jurisprudence and comes after the UK IPO's previous 2025 report explicitly failed to address the core issue of injunction abuse. This consultation is poised to lead to concrete, actionable reforms centered on transparency, predictability, and crucially, the establishment of clear safeguards against the coercive use of injunctions in FRAND disputes. This UK initiative also underscores the unresolved and urgent need for coherent regulatory solutions both in the UK and in the European Union to restore balance to the SEP ecosystem.

The UK Intellectual Property Office (UK IPO) separately released their report on SEPs, which includes important objectives, including addressing SME concerns within the SEP licensing landscape. What this report expressly does not include is an inquiry into injunctions as they relate to SEPs. We find this concerning since injunctions are often improperly used in this context and have a direct impact on UK SMEs. The House of Lords has discussed their concern about the IPO's decision.

In addition, the UK's Competition and Markets Authority (CMA) continues to take steps towards competition-themed mandates for digital platforms that would inhibit some core platform functions, including those that will protect IPR in the digital economy. We therefore urge USTR to track this development, recommend that it be reflected in the Special 301 Report as a potential means of denying adequate and effective protection of IPR, as well as a denial of fair and equitable market access to U.S. small businesses who rely on IPR protections.

The UK's Digital Markets, Competition and Consumers Act 2024 came into force in January 2025, enabling the CMA to promote competition and protect consumers from unfair practices by the largest tech firms. On October 10, 2025, the CMA issued its final decision designating Google with Strategic Market Status (SMS) in general search services. On October 22, 2025, the CMA proposed designation of Apple and Google with SMS in their respective mobile platforms.

Given the impact of the above-described developments in the UK, we strongly recommend that the Special 301 Report accurately capture and characterize the above as means of denying adequate

and effective protection of IPR, as well as a denial fair and equitable market access to U.S. small businesses who rely on IPR protections.

#### **T. Philippines**

The Philippines' Internet Transactions Act of 2023 (Republic Act No. 11967) took full effect on June 20, 2025, after an 18-month transition period. The law requires all online marketplaces, digital platforms, and internet-based merchants operating in or targeting the Philippines to comply with requirements including maintaining lists of all online merchants, protecting consumer data privacy, and providing effective redress mechanisms. The E-Commerce Bureau was established under the Department of Trade and Industry for policy formulation and compliance monitoring. While these consumer protection measures represent positive developments, the Philippines should be monitored for potential regulatory overreach in platform regulation that could inadvertently inhibit IPR enforcement functions. The proposed competition rules for digital economy and guidelines on applicability of current frameworks to digital markets warrant close attention to ensure they do not create barriers to fair market access for U.S. SMEs. We recommend inclusion on the Watch List.

#### **U. Singapore**

In December 2025, Singapore launched a public consultation on proposed amendments to the Information and Communications Media Development Authority Act, reflecting convergence of telecommunications, digital platforms, and media services. Key proposed amendments include requirements for IMDA approval for transactions giving 30% or greater voting power and expanded provisions regarding anti-competitive agreements. While Singapore's Competition and Consumer Protection Commission (CCCS) has historically taken a proactive and collaborative approach toward the digital sector, establishing a Data and Digital Division to oversee digital markets, the proposed regulatory changes warrant monitoring to ensure they do not inadvertently inhibit IPR protection on platforms or create unnecessary barriers to market access. Additionally, digital token service provider rules brought Singapore-based providers serving overseas customers into the licensing and compliance perimeter on June 30, 2025. We recommend continued monitoring of Singapore's evolving digital regulatory framework and potential inclusion on the Watch List depending on the final form of the regulatory amendments.

#### **V. Taiwan**

Taiwan promulgated major amendments to its Personal Data Protection Act (PDPA) on November 11, 2025, aligning with EU GDPR standards. The amendments impose data breach notification obligations regardless of PDPA violation. The Personal Data Protection Commission is expected to officially begin operations by August 2026. Additionally, in March 2025, the Taiwan Intellectual Property Office (TIPO) proposed a second draft amendment to the Patent Act recognizing computer graphics and graphical user interfaces as independently patentable 'articles,' addressing development of emerging digital industries. However, data localization requirements create de facto requirements for material customer and medical data storage in Taiwan, and proposed mandatory news bargaining codes would compel digital service providers to make revenue transfers to local news businesses, raising concerns about regulatory overreach that could inhibit cross-border data flows and fair market access for SMEs. We recommend Taiwan be placed on the Watch List for these concerning data localization and regulatory intervention trends.

## **W. Vietnam**

Vietnam's 2025 Amended IP Law, effective April 1, 2026, represents a major overhaul embracing the digital economy. The law defines intermediary service providers more broadly and places proactive IP protection obligations on digital platforms through new Article 198b.5a, requiring platform operators to implement technical and organizational measures protecting IP rights in cyberspace. While this modernization of IP protection is a positive development, it must be implemented in a manner that does not create undue compliance burdens for SMEs. Additionally, Vietnam passed a new Cybersecurity Law on December 10, 2025, effective July 1, 2026. Vietnam's approach to cybersecurity and data localization continues to raise significant concerns about cross-border data flows essential to SMEs. The country's draft Law on Digital Transformation, expected to take effect January 1, 2026, covers multiple platform types and requires alignment across IP, cybersecurity, and e-commerce regulations, creating a complex compliance environment. Vietnam should remain on the Priority Watch List given the need to monitor implementation of these new frameworks and ensure they do not create undue barriers to market access or inhibit the free flow of data across borders.

## **III. Conclusion**

ACT appreciates the opportunity to submit these comments to USTR and welcomes the opportunity to assist the Administration further.

Sincerely,



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