



June 21, 2023

The Honorable David Johansen
Chairman, International Trade Commission
500 E Street, NW
Washington, DC 20436

**Re: In the Matter of Certain High-Performance Gravity-Fed Water Filters
and Products Containing the Same: Investigation No. 337-TA-1294**

Dear Chairman Johansen,

Standard-setting bodies are a recognized way that companies of all kinds can work together to promote rather than hinder competition. Participants in standards-setting bodies take care to ensure that the topics discussed and information shared are appropriate and beneficial to the competitive process – ensuring that companies that compete in the marketplace can nevertheless share a common technological baseline, without engaging in unlawful collusion.

To the extent that patented technologies held by a participant in a standards-setting process are necessary to implement a standard, that participant generally must agree to license those patents – called “standards-essential patents” – to anyone who wants to implement the standard on “fair, reasonable, and nondiscriminatory” (FRAND) terms. This is to prevent implicating antitrust concerns by giving excessive, unearned leverage to patent holders whose technology is included into a standard. As one court observed:

[O]nce a patent becomes essential to a standard, the patentee’s bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee’s mercy. The purpose of the FRAND requirements . . . is to confine the patentee’s royalty demand to the value conferred by the patent itself as distinct from the additional value – the hold-up value – conferred by the patent’s being designated as standard-essential. *Apple v. Motorola*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

Further, it is black-letter law that preliminary injunctions are not available to plaintiffs who cannot show irreparable harm. A FRAND patent holder has already declared that its patent can be licensed for some monetary amount. By definition it cannot suffer irreparable harm simply by alleging infringement; the only question for the courts is what that amount should be. Further, Public Knowledge believes that FRAND commitments require that a FRAND patent holder license its patents to any willing licensee, at any level of the supply chain; outright refusal to license constitutes a violation of FRAND commitments.

Accordingly, Public Knowledge and Public Interest Patent Law Institute believe that holders of standards-essential patents who fail to meet their obligation to license them on FRAND terms should not be able to enforce them with exclusionary relief, like injunctions or exclusion orders.

We understand the water filter patent at issue in the 1294 investigation involves a patent that Respondents allege to be standards-essential that was neither declared as essential nor offered for license on FRAND terms. Specifically, Respondents allege that the Petitioner participated in the NSF/ANSI 53 standard setting process, failed to inform anyone that it had applied for a patent that implements the NSF/ANSI 53 standard for lead filtration, and then filed suit against the Respondents for infringing the patent. One Respondent has filed a separate complaint against the Petitioner in federal district court alleging that the Petitioner has violated the antitrust laws by seeking to enforce a patent that is essential to the NSF/ANSI 53 standard without having declared the patent essential and without having offered to license the patent on any terms, let alone on FRAND terms. If true, this level of abuse goes beyond even the FRAND issues that in recent years have been the subject of much debate. "Patent ambush" and the use of so-called submarine patents undermines confidence in the concept of standards-setting itself.

Public Knowledge and Public Interest Patent Law Institute offers no opinion on the underlying merits of the arguments at issue in this case. We write only to emphasize our view that if the patent is found to be standards-essential, and that the patent holder did not offer to license the patent on FRAND terms, the public interest requires that no exclusion order be issued in the case. The International Trade Commission should not be a forum where holders of standards-essential patents who do not abide by the rules of their standard-setting body can turn for relief.

Respectfully submitted,

/s/ Kathleen Burke

Policy Counsel

Public Knowledge

Admitted to the Bar under D.C. App. R. 46-A

(Emergency Examination Waiver)

/s/ Alex Moss

Executive Director

Public Interest Patent Law Institute