

August 19, 2021

Mark Przybocki
U.S. National Institute of Standards and Technology
100 Bureau Drive
Gaithersburg, Maryland 20899

RE: Comments of ACT | The App Association to the National Institute of Standards and Technology on an Artificial Intelligence Risk Management Framework

ACT | The App Association (App Association) appreciates the opportunity to submit views to the National Institute of Standards and Technology (NIST) on its planned framework addressing the management of risks to individuals, organizations, and society associated with artificial intelligence (AI).¹

The App Association represents thousands of small business software application development companies and technology firms that create the technologies that drive internet of things (IoT) use cases across consumer and enterprise contexts. Today, the value of the ecosystem the App Association represents – which we call the app economy – is approximately \$1.3 trillion and is responsible for 5.7 million American jobs. Alongside the world's rapid embrace of mobile technology, our members create the innovative solutions that power IoT across modalities and segments of the economy. NIST's planned voluntary risk management framework (RMF)—and the efforts of numerous agencies with respect to AI policy and regulation—directly impacts the app economy. We support NIST's goal of helping designers, developers, users, and evaluators of AI systems better manage risks across the AI lifecycle.²

¹ 86 FR 40810.

² *Id* at 40811.

The App Association also continues to work proactively to advance the use of AI in key use cases. As just one example, the App Association's Connected Health Initiative³ (CHI) assembled a Health AI Task Force in the summer of 2018 consisting of a range of innovators and thought leaders. CHI unveiled its AI Task Force's deliverables during a public-private multistakeholder dialogue in Washington, DC, which include a position piece supporting AI's role in healthcare, policy principles addressing how policy frameworks should approach the role of AI in healthcare, and a terminology document targeted at policymakers.⁴ Since then, CHI has also developed Good Machine Learning Practices specifically for AI development and risk management of AI meeting the Food and Drug Administration's definition of a medical device.⁵ More generally, the App Association continues to lead in advocating for the development of frameworks that will responsibly support the development, availability, and use of AI innovations.

AI is an evolving constellation of technologies that enable computers to simulate elements of human thinking – learning and reasoning among them. An encompassing term, AI entails a range of approaches and technologies, such as Machine Learning (ML) and deep learning, where an algorithm based on the way neurons and synapses in the brain change due to exposure to new inputs, allowing independent or assisted decision making.

AI-driven algorithmic decision tools and predictive analytics are having, and will continue to have, substantial direct and indirect effects on Americans. Some forms of AI are already in use to improve American consumers' lives today – for example, AI is used to detect financial and identity theft and to protect the communications networks upon which Americans rely against cybersecurity threats. Moving forward, across use cases and sectors, AI has incredible potential to improve American consumers' lives through faster and better-informed decision making, enabled by cutting-edge distributed cloud computing. As an example, healthcare treatments and patient outcomes stand poised to improve disease prevention and conditions, as well as efficiently and effectively treat diseases through automated analysis of x-rays and other medical imaging. AI will also play an essential role in self-driving vehicles and could drastically reduce roadway deaths and injuries. From a governance perspective, AI solutions will derive greater insights from infrastructure and support efficient budgeting decisions. An estimate states AI technological breakthroughs will represent a \$126 billion market by 2025.⁶

³ See www.connectedhi.com.

⁴ The CHI Health AI Task Force's deliverables are accessible at <https://actonline.org/2019/02/06/why-does-healthcare-need-ai-connected-health-initiative-aims-to-answer-why/>.

⁵ The CHI's Good Machine Learning Practices are available at <https://bit.ly/3gcar1e>.

⁶ McKinsey Global Institute, *Artificial Intelligence: The Next Digital Frontier?* (June 2017), available at <https://www.mckinsey.com/~media/McKinsey/Industries/Advanced%20Electronics/Our%20Insights/How%20artificial%20intelligence%20can%20deliver%20real%20value%20to%20companies/MGI-Artificial-Intelligence-Discussion-paper.ashx>.

Today, Americans encounter AI in their lives incrementally through the improvements they have seen in computer-based services they use, typically in the form of streamlined processes, image analysis, and voice recognition (we urge consideration of these forms of AI as “narrow” AI). The App Association notes that this “narrow” AI already provides great societal benefit. For example, AI-driven software products and services revolutionized the ability of countless Americans with disabilities to achieve experiences in their lives far closer to the experiences of those without disabilities.

Nonetheless, AI also has the potential to raise a variety of unique considerations for policymakers. The App Association appreciates the efforts to develop a policy approach to AI that will bring its benefits to all, balanced with necessary safeguards to protect consumers. To assist NIST and other policymakers, the App Association has appended a comprehensive set of AI policy principles for consideration.⁷ The App Association supports NIST’s efforts to develop a voluntary prioritized, flexible, risk-based, outcome-focused, and cost-effective AI risk management framework (RMF), and strongly encourage NIST to align its voluntary RMF with these principles.

Noting our general support for NIST’s efforts to develop a voluntary prioritized, flexible, risk-based, outcome-focused, and cost-effective AI RMF, we offer the following further input:

- **NIST’s AI RMF Should Advance Thoughtful Design Principles Across AI Use Cases:** The RMF should emphasize that the design of AI systems be informed by real-world workflows, human-centered design and usability principles, and end-user needs. AI systems solutions should facilitate a transition to changes in the delivery of goods and services that benefit consumers and businesses. The design, development, and success of AI should leverage collaboration and dialogue among users, AI technology developers, and other stakeholders in order to have all perspectives reflected in AI solutions. As this concept must run across sectors and AI use cases, we call on NIST to advance thoughtful design principles in the RMF.
- **NIST’s AI RMF Should Advance Ethics in AI’s Development and Use:** The success of AI depends on ethical use. The RMF should promote many of the existing and emerging ethical norms for broader adherence by AI technologists, innovators, computer scientists, and those who use such systems. We call on NIST to include a provision in its RMF providing for stakeholders’ approaches to AI to duly consider ethics so that policies are advanced that:
 - Ensure that AI solutions align with all relevant ethical obligations, from design to development to use.
 - Encourage the development of new ethical guidelines to address emerging issues with the use of AI, as needed.

⁷ See Appendix, ACT | *The App Association’s Policy Principles for Artificial Intelligence* (outlining our organization’s collective AI principles).

- Maintain consistency with international conventions on human rights.
- Ensure that AI is inclusive such that AI solutions beneficial to consumers develop across socioeconomic, age, gender, geographic origin, and other groupings.
- Reflect that AI tools may reveal extremely sensitive and private information about a user and ensure that laws protect such information from being used to discriminate against certain consumers
- **NIST's AI RMF Should Prioritize Necessary Disclosures and Transparency:**
The App Association supports NIST's RMF helping providers, technology developers and vendors, and other stakeholders understand the distribution of risk and liability in building, testing, and using AI tools. The RMF should advance the appropriate distribution and mitigation of AI-related risks and liabilities (i.e., that those in the value chain with the ability to minimize risks based on their knowledge and ability to mitigate should take reasonable steps, and have appropriate incentives, to do so). Further, the RMF should clearly state that those developing, offering, or testing AI systems provide truthful and easy to understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI solution.
- **NIST's AI RMF Should Support the Development of, and Access to, Open Standards Needed to Drive U.S. Leadership in AI:** Building on NIST's longstanding leadership in supporting voluntary consensus standards, the App Association strongly encourages NIST to ensure that the RMF supports public-private collaboration on AI through standardization in standard-setting organizations (SSOs) (such as IEEE⁸) to grow and thrive. The RMF should support pro-innovation policies that encourage private sector research and development of AI innovations and the development of related standards.

It is critical that the United States ensure that AI standards are accessible to innovators by promoting a balanced approach using those standards, including via to standard-essential patent (SEP) licensing. AI technical standards, built on contributions through an open and consensus-based process, bring immense value to consumers by promoting interoperability while enabling healthy competition between innovators; and often include patented technology. When an innovator gives its patented technology to a standard, this can represent a clear path to reward in the form of royalties from a market that likely would not have existed without the standard being widely adopted. To balance this potential with the need for access to the patents that underlie the standard, SSOs require holders of patents on standardized technologies to license their patents on fair,

⁸ <https://standards.ieee.org/initiatives/artificial-intelligence-systems/index.html>.

reasonable, and non-discriminatory (FRAND) terms. FRAND commitments prevent the owners of patents used to implement the standard from exploiting the unearned market power that they otherwise would gain as a consequence of the broad adoption of a standard. Once patented technologies incorporate into standards and a standard becomes increasingly adopted, AI developers will be compelled to use them to maintain product functionality and compatibility. In exchange for making a voluntary FRAND commitment with an SSO, SEP holders gain the ability to obtain reasonable royalties from a large number of standard users that might not have existed absent the standard. Without the constraint of a FRAND commitment, SEP holders would have the same power as a monopolist that faces no competition.

Unfortunately, today a number of owners of FRAND-committed SEPs are increasingly flagrantly abusing their unique position by reneging on those promises with unfair, unreasonable, or discriminatory licensing practices. These practices, under close examination by antitrust and other regulators in many jurisdictions including the United States, not only threaten healthy competition and unbalance the standards system but also impact the viability of new markets such as AI. These abuses are amplified for small businesses because they can neither afford years of litigation to fight for reasonable royalties nor risk facing an injunction if they refuse a license that is not FRAND compliant.

NIST should, in its RMF, appropriately address how patent policies developed by SSOs today will directly impact the way we work, live, and play for decades to come. SSOs vary widely in terms of their memberships, the industries and products they cover, and the procedures for establishing standards. In part due to the convergence associated with the rise of IoT, each SSO will need the ability to tailor its intellectual property policy for its particular requirements and membership. The App Association believes that some variation in patent policies among SSOs is necessary and that the U.S. government should not prescribe detailed requirements that all SSOs must implement. At the same time, however, as evidenced by the judicial cases and regulatory guidance, basic principles underlie the FRAND commitment and serve to ensure that standard setting is pro-competitive, and the terms of SEP licenses are in fact reasonable. Ideally, an SSO's intellectual property rights policy that requires SEP owners to make a FRAND commitment would include all of the following principles that prevent patent "hold-up" and anti-competitive conduct:

- **Fair and Reasonable to All** – A holder of a SEP subject to a FRAND license such SEP on fair, reasonable, and nondiscriminatory terms to all companies, organizations, and individuals who implement or wish to implement the standard.

- **Injunctions Available Only in Limited Circumstances** –SEP holders should not seek injunctions and other exclusionary remedies nor allowed these remedies except in limited circumstances. The implementer or licensee is always entitled to assert claims and defenses.
- **FRAND Promise Extends if Transferred** – If there is a transfer of a FRAND-encumbered SEP, the FRAND commitments follow the SEP in that and all subsequent transfers.
- **No Forced Licensing** – While some licensees may wish to get broader patent holder should not require implementers to take or grant licenses to a FRAND-encumbered SEP that is invalid, unenforceable, or not infringed, or a patent that is not essential to the standard.
- **FRAND Royalties** – A reasonable rate for a valid, infringed, and enforceable FRAND-encumbered SEP should be based on several factors, including the value of the actual patented invention apart from its inclusion in the standard, and cannot be assessed in a vacuum that ignores the portion in which the SEP is substantially practiced or royalty rates from other SEPs required to implement the standard.

We also note that a number of SSO intellectual property rights policies require SSO participants to disclose patents or patent applications that are or may be essential to a standard under development. Reasonable disclosure policies can help SSO participants evaluate whether technologies considered for standardization are covered by patents.

The U.S. Department of Justice (DOJ) already encouraged SSOs to define FRAND more clearly. For example, DOJ's former assistant attorney general Christine Varney explained that "clearer rules will allow for more informed participation and will enable participants to make more knowledgeable decisions regarding implementation of the standard. Clarity alone does not eliminate the possibility of hold-up...but it is a step in the right direction."⁹ As another example, Renata Hesse, a previous head of the DOJ's Antitrust Division, provided important suggestions for SSOs to guard against SEP abuses.¹⁰ NIST's planned

⁹ Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Promoting Innovation Through Patent and Antitrust Law and Policy, Remarks as Prepared for the Joint Workshop of the U.S. Patent and Trademark Office, the Federal Trade Comm'n, and the Dep't of Justice on the Intersection of Patent Policy and Competition Policy: Implications for Promoting Innovation 8 (May 26, 2010), available at <http://www.atrnet.gov/subdocs/2010/260101.htm>.

¹⁰ Renata Hess, Deputy Assistant Attorney General, *Six 'Small' Proposals for SSOs Before Lunch*, Prepared for the ITU-T Patent Roundtable (October 10, 2012), available at <https://www.justice.gov/atr/speech/six-smallproposals-ssos-lunch>.

RMF should reflect the above with respect to standards and key standards use issues including SEP licensing.

The App Association appreciates NIST's consideration of the above views. AI offers immense potential for widespread societal benefit, which is why NIST's voluntary RMF should foster investment and innovation in any way practicable. Our members both use and develop solutions that include AI, and those are in turn used by countless Americans. As society moves to adopt these technologies on a greater scale, it is important that the small business developers who power a \$1.3 trillion app economy can contribute to this important trend.

We urge NIST to contact the undersigned with any questions or ways that we can assist moving forward.

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian Scarpelli', with a stylized, cursive script.

Brian Scarpelli
Senior Global Policy Counsel

Leanna Wade
Policy Associate

ACT | The App Association
1401 K St NW (Ste 501)
Washington, DC 20005
202-331-2130