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To:  
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Federal Trade Commission  
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**Re: Ericsson Comments: Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201)**

Ericsson commends the Federal Trade Commission (“FTC” or “the Commission”) for seeking input and comment from stakeholders as it undertakes its evaluation of Competition and Consumer Protection in the 21st Century. We are pleased to provide our comments below.

**ABOUT ERICSSON**

Ericsson is a world leader in the rapidly changing environment of communications technology—developing and providing hardware, software, and services that enable the full value of connectivity. With over 100,000 employees worldwide, 23,600 of whom are focused on research and development (“R&D”), Ericsson is a pivotal player in the markets associated with the next generation of cellular technology, known as 5G. 5G will offer higher bandwidth, greater capacity and security, and lower latency than previous generations, providing new opportunities and greater value for consumers, business, and society worldwide.<sup>1</sup>

Ericsson’s activities span the globe. We have customers in more than 180 countries, with a significant proportion of our sales to emerging markets in the Asia Pacific, Latin America, Eastern Europe, Middle East, and Africa regions. In the United States, Ericsson employs more than 10,000 people and supplies standards-compliant network equipment and/or services to every major U.S. telecommunications operator from its offices in California, Colorado, Georgia, Illinois, Kansas, New Jersey, New York, Texas, and Washington, among others. Ericsson has recently announced that it is increasing its investments in the United States to support accelerated 5G deployments.<sup>2</sup> These investments will boost U.S.-based R&D to meet the growing demand

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<sup>1</sup> See more at “5G Open for Business,” <https://www.ericsson.com/en/5g>.

<sup>2</sup> See Press Release, Ericsson, Ericsson Increasing U.S. Investments to Support Accelerated 5G Deployments (Aug. 10, 2018), <https://www.ericsson.com/en/press-releases/2018/8/ericsson-increasing-us-investments-to-support-accelerated-5g-deployments>. In late 2017, Ericsson opened the Austin ASIC Design Center in Austin, Texas, to focus on core microelectronics of 5G radio base stations to accelerate the path to 5G commercialization. Ericsson will also open a new software development center with baseband focus in 2018, to further strengthen its 5G software development. Baseband provides intelligence to the radio access network. It is also the interface between the core network and radio units, processing and forwarding voice calls and internet data to end users. Beginning in 2019,



for 5G in the region. New product introduction and manufacturing in the United States will support global flexibility as well as benefit U.S. customers in their 5G roll-out. The first 5G radios built in the United States are expected to be produced by end of 2018.

At Ericsson, we are dedicated to research and innovation, leading the development of cellular technology—from 2G to 5G. Approximately 15% of Ericsson’s annual global revenue is invested in R&D, totaling tens of billions of dollars over the past few years. This investment reflects in aggregate thousands of years of engineering time each year, by some of the brightest engineers in the world. Our leading R&D efforts have been rewarded with 45,000 issued patents worldwide. Ericsson has successfully licensed its patent portfolio, with more than 100 patent license agreements primarily involving standard-essential patents. The associated royalties assist with Ericsson’s continued contribution to the development of tomorrow’s telecommunications standards.

Ericsson is not only a licensor of essential patents, it is also a licensee to numerous essential patents held by others. As both a licensor and licensee of standard-essential patents, Ericsson places great value on a fair, reasonable, and nondiscriminatory (“FRAND”) licensing regime, pursuant to which holders of essential patents are asked to assure access to such patents on terms that are fair, reasonable, and non-discriminatory. This regime ensures that those implementing a standard are able to secure access to the standardized technology at a fair cost, while those providing innovative technology for the standard are able to secure a fair return on their investments. Ericsson believes that a comprehensive and careful approach to disputes arising over essential patents is necessary to maintain the balance between technology users and innovators that the FRAND regime navigates so effectively.

To continue innovating, we need to invest in the visionaries. Ericsson supports the FRAND licensing regime, which remunerates companies with patent royalties. This system allows innovators to re-invest in future developments, from cellular technology to incredible new advances in video encoding and location-based services. In the longer run, the fruits of early and fundamental research can be contributed back to the ecosystem, creating a virtuous cycle that enhances competition and promotes consumer welfare.

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both facilities will introduce 5G products and software features into the Ericsson portfolio, and will be available for customers globally, including in the United States. Additionally, Ericsson will increase its investment in Artificial Intelligence (“AI”) and automation, employing around 100 specialists in North America by the end of 2018.



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## COMMENTS

Ericsson welcomes the opportunity to add its experience and perspective to this important dialogue. Our initial comments on key issues we recommend that the agency consider are discussed by topic below.

### **TOPIC 1: THE STATE OF ANTITRUST AND CONSUMER PROTECTION LAW AND ENFORCEMENT, AND THEIR DEVELOPMENT, SINCE THE PITOFSKY HEARINGS**

#### *The globalization of antitrust enforcement.*

Over the past two decades, the trend towards globalization of markets and competition enforcement that motivated the Commission's 1995 hearings has accelerated exponentially. The work of the International Competition Policy Advisory Committee ("ICPAC") and consequent launch of the International Competition Network ("ICN") exemplify this development well.

ICPAC was formed in 1997 to address global antitrust problems in the context of economic globalization. Its work focused on issues such as multi-jurisdictional merger review, the interface between trade and competition, and the future direction for cooperation between antitrust agencies. In its concluding report issued in 2000, ICPAC called on the U.S. to explore the creation of a new venue—the "Global Competition Initiative"—where government officials, private firms, and non-governmental organizations could consult on antitrust matters.<sup>3</sup> ICPAC recommended that this Global Competition Initiative be directed toward "greater convergence of competition law and analysis, common understanding, and common culture."<sup>4</sup>

In 2001, 16 competition agencies from 14 jurisdictions launched the ICN aiming to promote sound and effective antitrust enforcement in the wake of economic globalization. Today, less than 17 years later, the ICN brings together 134 competition agencies from over 120 jurisdictions. With today's inter-connected markets and globalization, each of these agencies has the potential to influence global markets and the lives of U.S. consumers.<sup>5</sup> The globalization of antitrust enforcement and large number of young agencies have created due process challenges and raised the costs of doing business for global companies facing divergent principles of substantive law and inconsistent remedies.

These globalization, divergence, and due process challenges render the international enforcement support and policy work at both FTC and U.S. Department of Justice ("DOJ") all the more important. Ericsson, therefore, recommends this important topic be covered at the hearings and for the Commission to consider devoting additional staff and resources for activities that "build cooperative relations with foreign agencies," and "promote[] convergence of international antitrust policies towards best practice[s]."<sup>6</sup>

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<sup>3</sup> INTERNATIONAL COMPETITION ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (2000), <https://www.justice.gov/atr/final-report>.

<sup>4</sup> *Id.* at Chap. 6.

<sup>5</sup> RANDOLPH TRITELL & ELIZABETH KRAUS, FTC, THE FEDERAL TRADE COMMISSION'S INTERNATIONAL ANTITRUST PROGRAM 7 (2018), [https://www.ftc.gov/system/files/attachments/international-competition/federal\\_trade\\_commission\\_international\\_antitrust\\_program\\_-\\_feb\\_2018\\_0.pdf](https://www.ftc.gov/system/files/attachments/international-competition/federal_trade_commission_international_antitrust_program_-_feb_2018_0.pdf).

<sup>6</sup> *Id.* at 2.



***The weakening of patent rights; infringement as an unfair method of competition; unfair or deceptive acts or practices.***

The past two decades have also witnessed a weakening of both the scope and ability to enforce patent rights. The increase in enforcement hurdles, as well as globalization and weak enforcement regimes in some foreign jurisdictions, have led to an increase in global long-term patent infringement. Although a patent owner may have the right to exclude in theory, in practice that right is far from absolute. Patent rights are not self-executing and have become more difficult to enforce after the Supreme Court's decision in *eBay v. MercExchange*.<sup>7</sup> Additional Supreme Court decisions have weakened patent subject matter eligibility<sup>8</sup> and expanded the patent exhaustion doctrine.<sup>9</sup> In addition, the 2011 America Invents Act, has paved the way for an extensive post-grant opposition procedure known as the *inter partes* review procedure via the Patent Trial and Appeal Board ("PTAB"), which took effect on September 16, 2012.<sup>10</sup> This procedure is being broadly used, and has been characterized by Randall Rader—former Chief Judge of the Federal Circuit Appeals Court—as "acting as death squads, killing property rights" or as simply the "patent death squad."<sup>11</sup> Note that the PTAB does not presume that a patent is valid in reviewing *inter partes* applications. The presumption of validity that has characterized U.S. patent law for many years is significantly weaker today.

The resulting ease of infringement and other limits on the scope of patent rights not only harm innovative companies and research institutions, which may be unable to earn a reasonable return on their R&D investments, but also distorts product market competition. Efficient, lower-cost competitors (taking all input costs into account) which are law abiding, may be forced out of the market by strategic infringers. This unfair dynamic almost forces others to infringe to compete, which ultimately depresses incentives to innovate and harms consumers. We encourage the Commission to use both its policy and enforcement tools to bolster appropriability and help strengthen the patent system. As the U.S. antitrust agencies have repeatedly recognized, patents foster innovation and, thus, dynamic competition.<sup>12</sup> We recommend that the Commission consider ways that it can use its Section 5 authority to challenge unfair methods of competition and unfair or deceptive acts or practices that involve the theft or infringement of intellectual property. This type of theft harms the competitive process. It is also likely to harm a variety of stakeholders, including small business owners and start-ups,<sup>13</sup> as well as consumers

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<sup>7</sup> 547 U.S. 388 (2006).

<sup>8</sup> *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014).

<sup>9</sup> *Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017).

<sup>10</sup> 35 U.S.C. § 311.

<sup>11</sup> See Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, BLOOMBERG LAW (Oct. 29, 2013), <https://www.bna.com/rader-regrets-cls-n17179879684/>.

<sup>12</sup> U.S. DEP'T OF JUSTICE AND THE FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 1–2 (2007) [hereinafter 2007 ANTITRUST/IP REPORT], <http://www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf>.

<sup>13</sup> We note that the Commission has used its UDAP authority to challenge the deceptive *assertion* of IP rights, as well as cases where companies misrepresent the origin of products. See, e.g., *In re MPHJ Technology Investments*,



who may be deceived into believing that products they buy are licensed, and likely do not understand how their buying decisions may impact U.S. companies.<sup>14</sup> Competing in the marketplace on the basis of long-term infringement is not competition on the merits. Rather, it is a form of fraud, which, over time, reduces dynamic competition and harms consumers.

Ericsson also suggests that the Commission consider the competitive implications of patent indemnification agreements. Though indemnification agreements are common and typically efficient, Ericsson suggests that the Commission consider whether there are circumstances where a dominant upstream supplier could use indemnification clauses to exercise market power over downstream licensing negotiations. Such conduct can depress returns to innovation to sub-competitive levels, markedly reduce efficiency in the technology licensing market, and facilitate long term infringement. This topic can also be addressed in connection with Topic 7, which focuses on buyer power.

## **TOPIC 2: COMPETITION AND CONSUMER PROTECTION ISSUES IN COMMUNICATION, INFORMATION, AND MEDIA TECHNOLOGY NETWORKS**

### ***De facto standards as a threat to competition and innovation; copyright and patent contexts equally important.***

Although the Commission has devoted much attention in recent years to collaborative industry standards developed in standards development organizations (“SDOs”), it has devoted very little attention to de facto industry standards developed and disseminated by industry players outside SDOs (“de facto standards”). However, de facto standards likely pose a greater threat to competition than collaborative standards for a number of reasons.

First and foremost, unlike collaborative standards, access to proprietary technology is less reliable for de facto standards, which do not typically have established IPR policies that include seeking FRAND assurances from technology contributors. This means patents that cover a proprietary standard have greater exclusionary potential under today’s patent enforcement standards. Weighing the costs and benefits of de facto versus open standards, the procompetitive benefits of de facto standards are likely to be smaller, because the closed nature of the system limits entry and tends to create market dominance. Furthermore, de facto standards are not based on the combined innovative efforts of multiple companies. De facto standards thus lack the synergies that are such an important part of the consensus standard process and are therefore likely be less innovative.<sup>15</sup>

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LLC, Docket No. C-4513 (Nov. 6, 2014), <https://www.ftc.gov/enforcement/cases-proceedings/142-3003/mphj-technology-investments-llc-matter>.

<sup>14</sup> The Commission routinely challenges sales based on false or misleading statements or omissions of fact as to whether a product was “Made in the USA,” because such claims may impact informed consumer choice. FTC, *Made in the USA: Made in the USA Claims*, <https://www.ftc.gov/news-events/media-resources/tools-consumers/made-usa>.

<sup>15</sup> For a comparison of collaborative standards and de facto standards, see, e.g., Jorge Padilla, John Davies & Aleksandra Boutin, *Economic Impact of Technology Standards*, COMPASS LEXECON (Sept. 24, 2017), <http://www.compasslexecon.com/highlights/economic-impact-of-technology-standards/>.



Second, even where owners of proprietary de facto standards choose to openly offer access to the marketplace, it can be more difficult for implementers to later prevent the owner from reversing course and attempting to block access to the technology after they have developed products in reliance on the original open access policy.

These concerns are not merely theoretical. In the past few years, we have seen several cases that illustrate the kinds of competitive risks associated with de facto standards covered by both patents and copyright.<sup>16</sup> And although the concerns the FTC expressed regarding *ex post* patent transactions in its 2011 Evolving IP Marketplace Report (“2011 IP Report”) applied to all patents, including patents that cover de facto standards,<sup>17</sup> the Commission’s policy, advocacy, and enforcement work in recent years has all but ignored de facto standards. We urge the Commission to begin to focus both its policy and enforcement attention to the important less-developed analysis of the competitive risks associated with proprietary de facto standards. We believe it deserves attention because the harm to competition and consumers from abuses associated with such standards is significant and continues to grow.

### ***Understanding dominance in technology platforms and ecosystems.***

Ericsson supports the Commission’s efforts to evaluate the competitive risks that may be associated with media and technology platform business models and ecosystems, particularly the role that consumer data and network effects may have in creating long-term dominance. We support the Commission’s efforts to develop a more sophisticated understanding of the economics of platform business models and ecosystems. We urge the Commission to focus in particular on the competition and consumer protection implications of business models that rely heavily on consumer data, rather than traditional cash, as a form of currency.

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<sup>16</sup> Order Denying Plaintiff’s Motion for Partial Summary Judgment and Granting in Part, Denying in Part, Defendant’s Motion for Summary Judgment, *Arista Networks, Inc. v. Cisco Systems*, No. 5:16-cv-00923 (N.D. Cal. May 21, 2018). Cisco also obtained an exclusionary order against Arista at the ITC, *In the Matter of Certain Network Devices, Related Software and Components Thereof (1)*, Investigation 337-TA-944 (Jun. 23, 2016), <https://newsroom.cisco.com/documents/10157/0/Cisco+V+Arista+ITC+%27944+Final+Determination+Exclusion+Order/6733d232-0d48-448d-bf43-7f859793fc9a>. In the copyright context, the long running dispute between Oracle and Google raises similar issues. Some antitrust commentators have called for a broad and robust fair use defense in computer software markets in such contexts. See, e.g., Press Release, American Antitrust Institute, AAI Urges Federal Circuit to Prevent Copyright Overreaching in Software Markets (*Oracle v. Google*) (June 6, 2017), <https://www.antitrustinstitute.org/content/aai-asks-federal-circuit-prevent-copyright-overreaching-software-markets-oracle-v-google>; Brief for American Antitrust Institute, as Amici Curiae Supporting Defendant-Appellee, *Oracle America, Inc., v. Google Inc.*, Nos. 17-1118, 17-1202 at 19–20, <https://www.antitrustinstitute.org/sites/default/files/AAIAmicusBrief.5.30.17.pdf> (explaining that theoretical “lock in” considerations in de facto standards are the same as those in collaborative industry standards). Similar allegations have been raised against in a matter relating to Microsoft’s Exchange ActiveSync mobile messaging synchronization protocol. See John D. Harkrider, *REPs Not SEPs: A Reasonable and Non Discriminatory Approach to Licensing Commitments*, COMPETITION POLICY INT’L 7–8 (Oct. 2013), <https://www.competitionpolicyinternational.com/assets/Uploads/HarkriderOct-131.pdf>.

<sup>17</sup> FED. TRADE COMM’N, THE EVOLVING IP MARKETPLACE: ALIGNING PATENT NOTICE AND REMEDIES WITH COMPETITION 49–53 (Mar. 2011) [hereinafter 2011 IP REPORT], <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf>.



## TOPIC 7: THE EVIDENCE AND ANALYSIS OF MONOPSONY POWER

In the United States, the Sherman Act prohibits anticompetitive agreements and exclusionary conduct on both the seller *and* buyer sides of markets. Buyer cartels can be *per se* unlawful and subject to criminal prosecution. Other collaborations among competing buyers may be unlawful if they create anticompetitive harm on the buying side of the market. Unilateral exclusionary conduct that maintains, creates, or threatens to create monopsony power may also violate U.S. antitrust law.<sup>18</sup> This attention to anticompetitive buyer-side conduct is not universal. Many, if not most antitrust regimes around the globe focus almost exclusively on monopolies, collusion among sellers, and market power on the seller side, and tend to ignore the anticompetitive exercise of buyer power. It is therefore especially useful and important for the Commission to take the lead in developing an analytic framework for understanding and identifying the anticompetitive exercise of buyer power.

The Commission also noted in announcing these hearings that it is particularly interested in “evidence regarding the existence and exercise of buyer monopsony or market power in properly defined markets” and in “the exercise of monopsony power through collusion.”<sup>19</sup> One area in which such evidence seems apparent is among the buyers (i.e. technology users, also known as “licensees”) of standardized technology. More specifically, in 2013, a group of such users of proprietary technology reading on the WiFi standard got together behind closed doors to revise the patent policy of IEEE-SA, the SDO developing WiFi standards.<sup>20</sup> It is undisputed that the goal and outcome of the group’s work was to revise the IEEE-SA patent policy in a manner that significantly reduced royalty income for patents essential to IEEE-SA standards and voluntarily committed under the new policy.<sup>21</sup> Multiple commentators warned of the potential

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<sup>18</sup> See DAF/COMP/WD(2008)79 OECD ROUNDTABLE ON MONOPSONY AND BUYER POWER - NOTE BY THE UNITED STATES at § 2 (Oct. 13, 2008), <https://www.ftc.gov/sites/default/files/attachments/us-submissions-occd-and-other-international-competition-fora/monopsony.pdf>.

<sup>19</sup> See FTC, *Public Comment Topics and Process: Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century*, <https://www.ftc.gov/policy/advocacy/public-comment-topics-process#7>.

<sup>20</sup> See Dr. Ron Katznelson, Member, Intellectual Property Committee, IEEE-USA, *Concerns Regarding Unvetted Major Impending Change in IEEE-SA’s Patent Policy That May Put IEEE At Risk* 6, *et seq.* (Aug. 13, 2014), <https://works.bepress.com/rkatznelson/78/1/download/>.

<sup>21</sup> See, e.g., Gregory Sidak, *The Antitrust Division’s Devaluation of Standard-Essential Patents*, 104 GEORGETOWN L. J. ONLINE 48 (2015), <https://www.criterioneconomics.com/docs/antitrust-divisions-devaluation-of-standard-essential-patents.pdf>; Mark Chandler, *Why We Support IEEE’s Patent Policy*, EE TIMES (Apr. 3, 2015), [https://www.eetimes.com/author.asp?section\\_id=36&doc\\_id=1326225](https://www.eetimes.com/author.asp?section_id=36&doc_id=1326225) (describing support for the patent policy revisions by a group of standardized technology buyers, and explaining revisions were needed to prevent what Cisco viewed as a “super-monetiz[ation]” of patents).



anticompetitive effects of that development at the time,<sup>22</sup> which some have described as the exercise of collusive buyer power.<sup>23</sup>

Three years after the patent policy change, its anticompetitive effects are evident. First, there is a significant and unprecedented increase in the numbers of negative patent statements to IEEE-SA submitted under the new policy. Between January 2016 and May 2018, 64% of the patent statements submitted with respect to the WiFi standard have been negative statements.<sup>24</sup> Positive FRAND assurances have long been recognized by antitrust agencies as a safeguard to prevent the potential exercise of market power where it might otherwise exist. A negative patent statement facilitates exclusion since no FRAND access assurance is available for those wishing to implement the standard. Second, empirical work shows a decline in innovation in IEEE-SA.<sup>25</sup> Finally, the chilling effect of the revised patent policy is evident. Engineers developing standards at IEEE-SA have noted after the new policy was adopted that they are witnessing a “delay in progress” and “loss of momentum” in the development of the standard and have expressed concern due to the growing number of negative patent statements.<sup>26</sup>

The episode described above is a textbook example of the exercise of market power on the buyer side, complete with evidence of its anticompetitive effects. We urge the Commission to keep this example in mind in its enforcement, policy, and advocacy in this area, as well as to join the DOJ in recognizing the real dangers of technology buyer cartels in markets for standard-essential patents.

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<sup>22</sup> See, e.g., Luke Froeb & Mikhael Shor, *Innovators, Implementers, and Two-Sided Hold-Up*, ANTITRUST SOURCE (2015), <https://www.mikeshor.com/research/antitrust/antitrustsource.pdf>; Alden Abbott, *IEEE Policy Change Would Undermine Property Rights and Innovation*, TRUTH ON THE MARKET BLOG (Feb. 4, 2015), <http://truthonthemarket.com/2015/02/04/ieee-patent-policy-change-would-undermine-property-rights-and-innovation/>; Adam Mossoff, *Reality Check: Weakening Wireless Technology Patents Hurts Everyone*, RCR WIRELESS NEWS (Jan. 28, 2015), <http://www.rcrwireless.com/20150128/opinion/reality-check-weakening-wireless-technology-patents-hurts-everyone-tag10>.

<sup>23</sup> Marco Lo Bue, *Are These Cartels? Price Guidelines Adopted by Standard Setting Organisations (US, Institute of Electrical and Electronics Engineers)*, J. EUROPEAN COMPETITION L. AND PRACTICE (2016), <http://jeclap.oxfordjournals.org/content/early/2016/07/29/jeclap.lpw050.extract>; Nicolas Petit, *The IEEE-SA Revised Patent Policy and its Definition of ‘Reasonable’ Rates: A Transatlantic Antitrust Divide?*, FORDHAM INTELLECTUAL PROP., MEDIA & ENTMT’L J. (2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2742492](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742492).

<sup>24</sup> IEEE-Sa Records of IEEE Standards-Related Patent Letters of Assurance. IEEE 802.11™ and Amendments, <http://standards.ieee.org/about/sasb/patcom/ieee-802.11-amendments.xlsx>. See also Ron Katznelson, *The IEEE Controversial Policy on Standard Essential Patents – The Empirical Record since Adoption* (Oct. 2016, updated March 2018), <http://bit.ly/IEEE-LOAs>; Keith Mallinson, *Development of Innovative New Standards Jeopardized by IEEE Patent Policy*, 4IP COUNCIL (2017), [http://www.4ipcouncil.com/application/files/6015/0479/2147/Mallinson\\_IEEE\\_LOA\\_report.pdf](http://www.4ipcouncil.com/application/files/6015/0479/2147/Mallinson_IEEE_LOA_report.pdf).

<sup>25</sup> Ian Corden, Tim Miller, Sarongrat Wongsaroj & Sam Wood, *Commercial & Economic Impacts from IPR Policy Changes*, PLUM (2017), <http://plumconsulting.co.uk/commercial-economic-impacts-ipr-policy-changes/>.

<sup>26</sup> See Minutes IEEE 802 LMSC (Jan. 22, 2016), [http://ieee802.org/minutes/2016\\_01/2016-01-22-minutes-v1.pdf](http://ieee802.org/minutes/2016_01/2016-01-22-minutes-v1.pdf).



## TOPIC 8: THE ROLE OF INTELLECTUAL PROPERTY AND COMPETITION POLICY IN PROMOTING INNOVATION

### *Antitrust enforcement: a realistic framework for analyzing market power in technology markets.*

Ericsson suggests that the Commission use these hearings as an opportunity to reconsider its analysis of market definition and market power in technology markets, or at a minimum, consider further refinement of its analysis. In 1995, the DOJ and FTC first issued Antitrust Guidelines for the Licensing of Intellectual Property.<sup>27</sup> The Guidelines were based on a modern economic understanding of the relationships between competition and intellectual property rights. The Agencies incorporated the economic foundations and core principles of the Guidelines in the 2017 update with minimal change.<sup>28</sup>

One of the three core principles of the Guidelines is that “the Agencies do not presume that intellectual property creates market power.”<sup>29</sup> Relying on both established economic literature and the 1995 Licensing Guidelines, the Supreme Court held in 2006 that patents do not create a presumption of market power.<sup>30</sup> Instead, market power must be evaluated on a case-by-case basis. Although these principles remain sound today, they could benefit from further refinement.

When it comes to technology markets, the framework courts and agencies use to analyze market power will too often be misunderstood to suggest market power where none exists. The agencies define technology markets as consisting of “the intellectual property that is licensed . . . and its close substitutes—that is, the technologies or goods that are close enough substitutes to constrain significantly the exercise of market power with respect to the intellectual property that is licensed.”<sup>31</sup> Following the court’s definition in *United States v.*

<sup>27</sup> U.S. DEP’T OF JUSTICE AND THE FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (1995), <https://www.justice.gov/atr/archived-1995-antitrust-guidelines-licensing-intellectual-property>.

<sup>28</sup> U.S. DEP’T OF JUSTICE AND THE FED. TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017), <https://www.justice.gov/atr/IPguidelines/download> [hereinafter 2017 IP LICENSING GUIDELINES].

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 44 (2006) (“[A] patent does not necessarily confer market power upon the patentee.”). Like the United States, the European Commission also recognizes that IP does not necessarily confer economic market power. Communication from the Commission: Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements, 2014/C 89/03 at ¶¶ 88, 162 (Mar. 28, 2014), [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328(01)&from=EN); joined Cases C-241/91 P and C-242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities*, 1995 E.C.R. I-00743 at ¶ 46, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61991CJ0241&from=EN> (“So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.”); Opinion of Advocate General Mischo, Case 238/87 *AB Volvo v Erik Veng (UK) Ltd.*, 1988 E.C.R. 06211 at ¶ 13, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61987CC0238> (“[I]t is apparent from previous decisions of the Court that the mere possession of an industrial property right does not automatically imply that the holder thereof occupies a dominant position within the meaning of Article 86.”).

<sup>31</sup> 2017 IP LICENSING GUIDELINES at § 3.2.2.



*Grinnell*, the agencies define market power as “the ability to profitably maintain prices above, or output below, competitive levels for a significant period of time.”<sup>32</sup>

Monopoly power is typically shown in court through either direct or circumstantial evidence.<sup>33</sup> Direct evidence of monopoly power would include proof that a firm has profitably raised price above competitive levels or restricted output. However, because direct evidence is not always available, courts also rely on circumstantial evidence of market structure to evaluate monopoly power. “Under this structural approach, monopoly power may be inferred from a firm’s possession of a dominant share of a relevant market that is protected by entry barriers.”<sup>34</sup>

Although some question the value of market structure as evidence of market power even in markets for tangible goods, circumstantial evidence is even less reliable for predicting power in technology markets. Unlike tangible property, it is difficult and costly for patent owners to stop infringing use of their technology. Patent rights are not self-executing and, as reality proves, their non-rivalrous nature makes long-term infringement easy, especially in certain jurisdictions outside the United States.<sup>35</sup> In most technology market transactions, the actual product being traded is not the technology, it is the license.<sup>36</sup> In those situations, a technology user may view infringement or strategic delay, often referred to as “hold-out,” as good alternatives to a license, at least for some period of time. And that threat alone constrains the patent owner’s pricing power in licensing negotiations. For these reasons, courts should treat traditional circumstantial evidence of market power with skepticism for technology markets.

Circumstantial evidence of market power in the technology market context is even less reliable for standard-essential patents subject to a FRAND assurance. However, some decisions are being misunderstood to suggest that a simplistic relevant market analysis can provide evidence of market power for essential patents. In *Broadcom v. Qualcomm*, the plaintiff alleged that Qualcomm held a dominant share of a relevant market comprising its own patented technology incorporated into the WCDMA standard.<sup>37</sup> The Third Circuit found these allegations sufficient to create an inference that “Qualcomm had the power to extract supracompetitive prices [because] it possessed a dominant market share [and] the market had entry barriers.”<sup>38</sup> Although the decision recognized that the “FRAND commitment . . . were intended as a bulwark against unlawful monopoly,” and “measures such as FRAND commitments [are] important safeguards against monopoly power,” for purposes of a motion to

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<sup>32</sup> *Id.* at § 2.2.

<sup>33</sup> *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001).

<sup>34</sup> *Id.*

<sup>35</sup> As the Agencies recognize, “Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property.” 2017 IP LICENSING GUIDELINES at § 2.1.

<sup>36</sup> In some cases, technology transfer will require the transfer of associated know-how in addition to a license, making misappropriation more difficult.

<sup>37</sup> 501 F.3d 297, 315 (3d Cir. 2007).

<sup>38</sup> *Id.* at 315.



dismiss, the court found the complaint “adequately alleged that [defendant] possessed monopoly power in the relevant market.”<sup>39</sup>

Although the Third Circuit did not adopt an express presumption of market power for essential patents, some have mischaracterized this decision to non-U.S. audiences, representing that the case stands for more than it does. Furthermore, others have erroneously relied on the court’s language to argue that essential patents confer market power.<sup>40</sup> While one district court has expressly held essential patents do not necessarily confer market power, another misunderstood the Third Circuit’s language and used it to mistakenly conclude that that standard-essential patents will almost always confer monopoly power.<sup>41</sup> Such a presumption-leaning *per se* approach is puzzling and inconsistent with the general U.S. antitrust law framework. Furthermore, even European competition law, which is generally more prone to structural presumptions, has made it clear that “there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power.”<sup>42</sup> However, given misunderstandings, clarification on this point is warranted.

Note that even in cases where it would be costly for an implementer to switch to an alternative technology, the FRAND assurance gives implementers the power to protect themselves from exclusion or monopoly pricing by seeking a FRAND determination. Even courts that could be misunderstood to suggest that standard-essential patents tend to confer market power have been clear that a FRAND assurance ameliorates that power.<sup>43</sup> *EBay Inc. v.*

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<sup>39</sup> *Id.* at 305, 314–15.

<sup>40</sup> The United Kingdom High Court of Justice considered these same issues in *Unwired Planet Int’l Ltd. v. Huawei Techs. Ltd.* [2017] EWHC (Pat) 711, <https://www.judiciary.gov.uk/wp-content/uploads/2017/04/unwired-planet-v-huawei-20170405.pdf>. Here, too, the court could be misunderstood to suggest that market structure was sufficient to create a rebuttable presumption of market power. The court also indicated that FRAND created countervailing buyer power evidenced by hold-out, which could be sufficient to rebut that presumption, but that *Huawei* had not provided the court with sufficient rebuttal evidence in this particular case. *Id.* at ¶ 670 (“The market is covered by the FRAND undertaking which does weaken the SEP owner’s position. It is a market in which licensees can engage in holding out and there is some evidence that they do, particularly given the relative weakness of Unwired Planet. If a proper economic analysis had been done into this market then the issue might be more finely balanced but as it stands, and without that analysis, I am not satisfied either of these points alone or together is sufficient to justify not drawing the inference that the holder of 100% market share is likely to be dominant.”).

<sup>41</sup> *ChriMar Sys. v. Cisco Sys.*, 72 F. Supp. 3d 1012 (N.D. Cal. 2014). See generally *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 314 (3d Cir. 2007) (stating, on a motion to dismiss, that “[a] standard, by definition, eliminates alternative technologies”); *Apple Inc. v. Samsung Elecs. Co.*, 2012 U.S. Dist. LEXIS 67102, \*22 (N.D. Cal. May 14, 2012); *Research in Motion*, 644 F. Supp. 2d 788, 793 (N.D. Tex. 2008). The court in *Rambus v. FTC* did not address the issue, noting that, “[i]n this case, Rambus [the SEP holder] does not dispute the nature of the relevant markets or that its patent rights in the four relevant technologies give it monopoly power in each of those markets. The critical question is whether Rambus engaged in exclusionary conduct, and thereby acquired its monopoly power in the relevant markets unlawfully.” 522 F.3d 456, 463 (D.C. Cir. 2008) (internal citations omitted).

<sup>42</sup> Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011/C 11/01 at ¶ 269, [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN) (“However, even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis.”).

<sup>43</sup> *Broadcom*, 501 F.3d at 305, 314 (noting that the District court failed to “discuss the possibility that the FRAND commitments that SDOs required of vendors were intended as a bulwark against unlawful monopoly . . .” and



*MercExchange, L.L.C.* provides additional safeguards by limiting the availability of injunctive relief in the United States where, among other things, a court determines that monetary relief is adequate.<sup>44</sup> “A patentee subject to FRAND commitments may have difficulty establishing irreparable harm,” at least where an implementer is not engaged in overt bad faith behavior or other gamesmanship.<sup>45</sup> These very real constraints on the exercise of market power necessarily affect bargaining positions in licensing negotiations, even if the parties never seek relief in court.

We are not suggesting that market power can never exist in a technology market, or that a FRAND-assured standard-essential patent can never give rise to market power. But we are suggesting that it is probably rare, and that the reality today is that intellectual property rights are unlikely to confer market power in a technology market. We are also not suggesting that courts or agencies should apply special antitrust rules for IP, but merely that they take the unique properties of IP meaningfully into account, on a case-by-case basis, in any analysis of market power,<sup>46</sup> thus considering circumstances beyond the availability of substitutes, such as today’s ease of infringement and contractual commitments. While the Licensing Guidelines properly recognize that IP does not necessarily confer market power, the agencies focus solely on the issue of substitute technologies as a constraint, stating that they will not presume that IP confers market power because “[a]lthough the intellectual property right confers the power to exclude with respect to the specific product, process, or work . . . there will often be sufficient actual or potential close substitutes for such product, process, or work to prevent the exercise of market power.”<sup>47</sup> As discussed above, although it may have once been the case that IP reliably provided the power to exclude, that does not accurately describe the IP landscape today. Thus, the agencies should take considerations beyond the existence of substitute technologies into account.

These theoretical issues have serious practical implications. Jurisdictions around the globe follow and routinely incorporate language from U.S. policy guidance and case law into their own decisions and policy documents. In its 2016 decision in the *Qualcomm* matter, the Korea Fair Trade Commission also appears to have erroneously concluded that standard-

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stating that “The patent holder’s IPRs, if unconstrained, may permit it to demand supracompetitive royalties. It is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power.”); *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012) (“[S]tandards threaten to endow holders of standard-essential patents with disproportionate market power. In theory, once a standard has gained such widespread acceptance that compliance is effectively required to compete in a particular market, anyone holding a standard-essential patent could extract unreasonably high royalties . . . . Many SSOs try to mitigate the threat . . . by requiring members who hold IP rights in standard-essential patents to agree to license those patents . . . [on RAND terms].”).

<sup>44</sup> 547 U.S. 388 (2006).

<sup>45</sup> *Apple Inc. et al v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014).

<sup>46</sup> Although the agencies do not apply special antitrust rules to IP, they also understand “that is not to say that intellectual property is in all respects the same as any other form of property. Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property. These characteristics can be taken into account by standard antitrust analysis, however, and do not require the application of fundamentally different principles.” 2017 IP LICENSING GUIDELINES at § 2.1.

<sup>47</sup> *Id.* at § 2.2.



essential patents necessarily confer market power, stating that “[a]s SEPs cannot be replaced by other technologies, a SEP holder gains complete monopolistic power by holding even a single SEP.”<sup>48</sup> The Competition Commission of India, a jurisdiction where Ericsson has been trying to get long-term strategic infringer Intex to take a license for nearly a decade now, has also ironically concluded that a standard-essential patent necessarily creates market dominance.<sup>49</sup> As these cases demonstrate, a presumption of monopoly power creates a particular threat to innovation in jurisdictions outside the United States where abuse of a dominant position can give rise to antitrust liability even without anticompetitive exclusion. Therefore, it is especially important for U.S. agencies to provide guidance in this area.

The same fact-based analysis of market power at the technology market level, which takes the ease of misappropriation seriously, should apply whether analyzing a single patent or a portfolio. Portfolio licensing is common in the information and communications technology (“ICT”) sector, particularly for licensing that includes essential patents. In Ericsson’s vast experience, essential patent licenses are nearly always structured as portfolio licenses, usually at the request of the licensee and in the common interest of both parties to establish patent peace and ensure freedom to operate. The efficiency benefits of portfolio licensing inure not only to the IPR holders, but also to the licensees. The vast majority of licensees strongly prefer to take a license to an entire essential patent portfolio for the term—even as to patents not owned or granted at the time of agreement—because this provides them the legal and business certainty necessary to make investments and practice the standard free from the risk of litigation. Portfolio cross licenses are a commonly used industry practice for those seeking to reduce transaction costs and avoid unnecessary infringement litigation. Portfolio licensing thus encourages long-term investments by allowing the parties to focus on their respective businesses without fearing unforeseen, and unforeseeable, infringement actions, and without having to spend resources on renegotiating licenses for other essential patents that may come up. The pro-competitive benefits of portfolio licensing that Ericsson has experienced are also widely recognized in the law and agency enforcement policy.<sup>50</sup> Courts have also rejected claims of patent misuse based on portfolio licensing.<sup>51</sup>

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<sup>48</sup> Press Release, Korea Fair Trade Commission, Strict Sanctions on Qualcomm’s Abuse of Cellular SEPs (Dec. 28, 2016), [http://www.ftc.go.kr/solution/skin/doc.html?fn=50ba93a6149acc5be3cae03dc2f4de97e254681689def7a42b2e4ae6caaf1924&rs=/fileupload/data/result/BBSMSTR\\_000000002402/](http://www.ftc.go.kr/solution/skin/doc.html?fn=50ba93a6149acc5be3cae03dc2f4de97e254681689def7a42b2e4ae6caaf1924&rs=/fileupload/data/result/BBSMSTR_000000002402/).

<sup>49</sup> “Since the [Ericsson] holds SEPs and there is no other alternate technology in the market, [Ericsson] enjoys complete dominance over its present and prospective licensees in the relevant product market. As such, [Ericsson] can be said to be dominant” *Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 50 of 2013 (CCI, Nov. 11, 2013) at ¶ 16, [http://www.cci.gov.in/sites/default/files/502013\\_0.pdf](http://www.cci.gov.in/sites/default/files/502013_0.pdf); *Intex Techs. (India) Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 76 of 2013 (CCI, Jan. 16, 2014) at ¶ 16, [http://www.cci.gov.in/sites/default/files/762013\\_0.pdf](http://www.cci.gov.in/sites/default/files/762013_0.pdf); *Best IT World (India) Private Ltd. (iBall) v. Telefonaktiebolaget LM Ericsson, et al.*, (CCI, May 4, 2015) at ¶ 13, [http://www.cci.gov.in/sites/default/files/042015\\_0.pdf](http://www.cci.gov.in/sites/default/files/042015_0.pdf).

<sup>50</sup> *Broadcast Music, Inc. v. CBS*, 441 US 1, 20 (1979); 2007 ANTITRUST/IP REPORT at 59–60.

<sup>51</sup> In *U.S. Phillips Corp. International v. ITC*, the court examined Phillips’s practice of offering essential patents for certain compact discs exclusively through package licenses that allegedly also included certain patents not essential to practice the standard. 424 F.3d 1179, 1192 (Fed. Cir. 2005). On appeal from the ITC’s determination that Phillips had committed patent misuse through unlawful tying, the Federal Circuit Court of Appeals reversed citing



Nothing about portfolio licensing alone should create any presumption or inference of market power, for either standard-essential or nonessential patents. There is no magical relationship between the size of a portfolio and appropriability. In *Intellectual Ventures I LLC v. Capital One Financial Corp.*, the Eastern District of Virginia dismissed Capital One’s monopolization counterclaim against Intellectual Ventures (“IV”). In that case, Capital One relied exclusively on allegations of direct evidence of market power, but at the motion to dismiss stage, was unable to allege facts showing that IV’s fees were “supracompetitive” or “higher than other patent holders.” However, Capital One survived a very similar motion to dismiss monopolization counterclaims against IV in a subsequent infringement action by alleging that IV held a 100% share of a market defined by its own portfolio. Though both counterclaims were decided at the motion to dismiss stage, these cases illustrate how clever framing of circumstantial evidence has the potential to lead to erroneous inferences about market power in the technology market context.

***Competition advocacy and intellectual property: Recalibrating a now-flawed narrative due to changes in the intellectual property landscape.***

Although Ericsson commends the Commission for its efforts to bring an economic lens and consumer welfare focus to its competition policy work on the patent system, in our view, some of its work in this area incorporates the same faulty assumptions regarding appropriability that can lead to a misunderstanding of the concept of market power in technology markets more broadly.

We encourage the Commission to use these hearings as an opportunity to reconsider some of its patent policy work, and look for ways to bring greater balance to its analysis and recommendations. In Ericsson’s view, some of the Commission’s policy work, including in particular its 2011 IP Report, has focused too narrowly on the risk of so-called patent “hold-up,” particularly in the ICT sector. This policy focus has fueled a false narrative regarding the power that patent owners have to successfully demand royalties that reflect infringer lock-in rather than the value the IP adds to the product or service.

As discussed above, in Ericsson’s experience, just the opposite is true. Even in cases where an implementer has made dedicated investments (sunk costs) to implement a technology without seeking an *ex ante* license, *eBay* has reduced the likelihood that by merely seeking an injunction, a patent owner can bring a recalcitrant infringer to the bargaining table or extract the value of the implementer’s own investments in product development through hold-up. Instead, innovators like Ericsson that own large portfolios have a much weaker hand and face increasing challenges combatting infringement and earning a reasonable reward for the use of their IP. As noted in response to Topic 1 above, the significant weakening of patent rights between 2006 and

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the efficiencies of portfolio licensing and absence of competitive harm. The court explained how “extremely expensive and time-consuming” it is for parties to license and manage the licensing of technology by using individual patents and how it is preferable to employ a patent portfolio. *See also Intellectual Ventures I LLC v. Capital One Financial Corp.*, 2013 U.S. Dist. LEXIS 177836, 33 (E.D. Va. Dec. 18, 2013) (“But even if IV were requiring, by way of settlement, the licensing of its entire portfolio . . . that policy would not appear to constitute patent misuse [because] ‘including additional patents in the package was the functional equivalent of promising not to sue licensees on any of the patent in the group, which had the advantages of minimizing transaction costs and ensuring against the risk of post-agreement disputes as to whether those additional patents were required to practice the patented technology.’”) (internal citations omitted).



2017 means that patent rights today are very different from the rights analyzed in the Commission's 2003, 2007, and 2011 competition policy and antitrust reports.<sup>52</sup>

The hold-up narrative risks particular damage to innovation and consumer welfare in the context of standardization and standard-essential patents. The ICT sector has thrived under the current voluntary consensus standard system and the FRAND licensing framework. Over the last 25 years, FRAND has fostered innovation and widespread deployment of standards. Consumers have reaped the benefits from the rapid introduction of new and improved products, greater choice, and lower prices.

The system has worked because it has provided all the necessary stakeholders with sufficient incentives to continue their *voluntary* participation. Patent owners have been able to rely on earning a reasonable reward for investing to develop and contribute patented technology to standards, and implementers have moved forward with product development with the assurance that they will have access to essential patented technology on reasonable and nondiscriminatory terms. Today, however, this delicate balance is under attack by companies trying to maximize short-term profits to the detriment of the ecosystem, and ultimately consumers. Bolstered in part by the hold-up narrative, and as discussed in our response to Topic 7 above, we see widespread collaborative standards, such as the WiFi standard, threatened by a breakdown of the FRAND assurance ecosystem at IEEE-SA.

The theory of hold-up is based on the assumption that patent owners can reliably exclude infringers from using their patented technology, which as discussed above, is not typically the case. Given that the theory does not reflect the relevant facts or the realities of patent law, the absence of empirical evidence showing a meaningful risk of hold-up in the standards ecosystem is really not surprising. One leading scholar who studies the economics of intellectual property rights has stated that “[d]espite the 15 years proponents of the theories have had to amass evidence, the empirical studies conducted thus far have not shown that holdup or royalty stacking is a common problem in practice.”<sup>53</sup> Further, as reported, “cumulative Mobile SEP-royalty payments [are] no more than around 5% of mobile handset revenues.”<sup>54</sup> Faced with evidence of thriving investment in the implementation of standards, proponents of the hold-up theory typically point to a few FRAND determination cases, where the adjudicated rates were set lower than a patent owner's initial offer.<sup>55</sup> However, while Ericsson may disagree with some of

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<sup>52</sup> FTC, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (Oct. 2003), <https://www.ftc.gov/sites/default/files/documents/reports/promote-innovation-proper-balance-competition-and-patent-law-and-policy/innovationrpt.pdf> [hereinafter 2003 IP REPORT]; 2007 ANTITRUST/IP REPORT, 2011 IP REPORT.

<sup>53</sup> Anne Lynne Farrar, *Patent Hold Up and Royalty Stacking Theory and Evidence: Where do We Stand After 15 Years of History?*, OECD INTELLECTUAL PROP. AND STANDARD SETTING, at 7 (Nov. 8, 2014); see also Alexander Galetovic & Stephen Haber, *The Fallacies of Patent Holdup Theory*, 13 J. COMP. L. & ECON 1, 36–41 (2017).

<sup>54</sup> Keith Mallison, Wiseharbor, *On Cumulative Mobile-SEP Royalties*, IP FINANCE (Aug. 19, 2015) <http://www.wiseharbor.com/pdfs/Mallinson%20on%20cumulative%20mobile%20SEP%20royalties%20for%20IP%20Finance%202015Aug19.pdf>.

<sup>55</sup> Terrell McSweeney, former Commissioner, FTC, Statement, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters* 5 (Mar. 21, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1350033/mcsweeney\\_-\\_the\\_reality\\_of\\_patent\\_hold-](https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeney_-_the_reality_of_patent_hold-)



the methodologies used by the courts in adjudicating FRAND rates, it should be clear that far from providing evidence of hold-up, these cited cases in fact show that essential patent owners that have provided a FRAND assurance lack any real power to dictate royalty rates or other licensing terms, or otherwise exercise market power, as that term is properly understood under U.S. antitrust law or fundamental economic principles.

***Need to ensure business model neutral policies and enforcement so as to safeguard competition rather than specific competitors.***

Ericsson also encourages the Commission to consider how the hold-up narrative tends to favor one group of stakeholders over another, and how that bias risks discouraging efficient organizational forms such as specialized R&D shops and the consensus standardization ecosystem itself. Commission competition and antitrust enforcement policy should maintain an inclusive, business model-neutral approach towards standardization and technology licensing: all types of technology contributors should be incentivized to take part in standardization including universities, SMEs, research institutes, and large national and multinational companies. This enables development of the best standards.

Promoting policies that are biased against technology contributors, as the Commission has done in recent years, discourages wide participation in the open standards ecosystem. Ericsson is concerned that further disruption to the necessary balance of incentives will only encourage the rise of proprietary, non-standardized, non-interoperable ecosystems, dominated by a few companies that are less likely to provide reliable access to their proprietary technology on FRAND terms or at all. As discussed in more detail in response to Topic 2 above, policies that discourage participation in the consensus standardization process will eventually cause the ecosystem to shift towards a world of de facto standards, which is likely to result in inefficient standards wars, and less innovation, choice, and competition for consumers.

***Withdrawing Commission positions that have now been rejected by federal courts, e.g. 2011 IP Report position on “incremental value;” consents re seeking injunctions for infringement of standard-essential patents.***

The Commission may also wish to use this opportunity to revisit some of its specific recommendations and other positions in light of developments in the federal courts. The following are two examples of such developments:

**Recommendation on incremental value**

In its 2011 IP Report, the Commission recommended that in setting reasonable royalty rates in infringement cases, courts should not award reasonable royalty damages that exceed “the incremental value of the patented invention over the next-best alternative,” and that the incremental value should be determined at an early stage of the infringer’s product development before it has sunk costs into developing the patented technology.<sup>56</sup> Applying that same framework to essential patents subject to a [F]RAND assurance, the Commission recommended that courts limit a reasonable royalty for a FRAND-assured essential patent to the “incremental

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[up\\_3-21-18.pdf](#); Letter from Renata B. Hesse, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP 6 n.28 (Feb. 2, 2015), [www.justice.gov/atr/public/busreview/311470.docx](http://www.justice.gov/atr/public/busreview/311470.docx).

<sup>56</sup> 2011 IP REPORT at 185–91.



value of the patented technology over alternatives available at the time the standard was defined.”<sup>57</sup>

The Federal Circuit has since plainly shown that the Commission’s recommendation is inconsistent with federal law.<sup>58</sup> In *Ericsson v. D-Link*, the Federal Circuit held that reasonable royalties for infringement of FRAND-assured essential patents must follow the same general principles of apportionment that always apply to the determination of reasonable royalties.<sup>59</sup> For essential patents, apportionment requires that the royalty reflect the value that the patented feature adds to the final product, not the value of other standardized features or of standardization itself.<sup>60</sup> It does not, however, require consideration of the incremental value over alternatives. The court in *Ericsson* also cautioned that apportionment for essential patents “does not suggest that all SEPs make up only a small part of the technology in the standard. Indeed, if a patentee can show that his invention makes up ‘the entire value of the’ standard, an apportionment instruction probably would not be appropriate.”<sup>61</sup>

The Federal Circuit’s apportionment analysis is markedly different from the suggestion in the 2011 IP Report that the [F]RAND value of a standard-essential patent should be the “ex ante value of the patented technology at the time the standard is set” and recommendation that “Courts should cap the royalty at the incremental value of the patented technology over alternatives available at the time the standard was defined.”<sup>62</sup> Because the Federal Circuit has rejected the Commission’s 2011 recommendation, it is perhaps time for it to be withdrawn.

**Seeking relief in court, including seeking an injunction, is protected by the Noerr-Pennington doctrine**

Ericsson also respectfully recommends that the Commission take this opportunity to clarify that, contrary to the allegations underlying two prior negotiated consent agreements, merely asking a court for relief, including an injunction, is protected from antitrust liability under the *Noerr-Pennington* doctrine unless the underlying claims are both objectively and subjectively baseless.<sup>63</sup>

In 2012, the Commission entered into a negotiated settlement with Robert Bosch GmbH (“Bosch”).<sup>64</sup> At the time, Bosch was seeking to acquire its competitor, SPX Service Solutions (“SPX”). The settlement resolved charges that SPX had engaged in unfair methods of

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<sup>57</sup> *Id.* at 194.

<sup>58</sup> Dina Kallay, *F/RANDly Judicial Advice to the Rescue: Ericsson v. D-Link*, CPI ANTITRUST CHRONICLE 6 (Mar. 2015).

<sup>59</sup> 773 F.3d 1201, 1232–34 (Fed. Cir. 2014).

<sup>60</sup> *Id.* at 1232.

<sup>61</sup> *Id.* at 1233.

<sup>62</sup> 2011 IP REPORT at 23.

<sup>63</sup> *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993) (finding that unless the underlying claim is both objectively and subjectively baseless, antitrust liability cannot be premised on merely asking a court for relief).

<sup>64</sup> *In re Robert Bosch GmbH*, FTC Docket No. C-4377 (Complaint filed Nov. 26, 2012) <https://www.ftc.gov/sites/default/files/documents/cases/2012/11/121126boschcmpt.pdf>.



competition by seeking injunctions for infringement of FRAND-assured patents essential to implement certain motor vehicle air conditioning systems. The following year, the Commission entered into a negotiated settlement with Google, which had recently acquired Motorola Mobility, for allegedly continuing to pursue injunctions for infringement of patents essential to cellular wireless communications, WiFi, and video compression standards.<sup>65</sup>

The Commission challenged the conduct in both *Bosch* and *Google/Motorola* under its standalone Section 5 authority.<sup>66</sup> The central allegation in both cases was that the essential patent owner had breached a prior FRAND agreement by pursuing injunctions against firms that were willing to accept a license on FRAND terms.<sup>67</sup> Both matters were resolved through negotiated consent agreements at the same time the parties were working to close unrelated matters pending with the Commission. In particular, Bosch agreed to resolve the patent-related claims as part of a larger settlement that cleared the way for its acquisition of SPX, and the Commission announced its settlement with Google on the essential patent issues on the same day it issued a statement closing its investigation of Google's search engine business.<sup>68</sup>

Although it was clear long before these two settlements issued that merely asking a court for relief cannot form the basis for an antitrust claim, more recent decisions have only confirmed that *Noerr* immunity applies equally to seeking injunctive relief for infringement of essential patents subject to a FRAND assurance. In *Apple v. Motorola Mobility*, the court granted summary judgment in favor of Motorola on antitrust and state unfair competition law claims based on seeking injunctive relief for infringement of essential patents subject to a FRAND assurance.<sup>69</sup> Similarly, in *TCL Communications v. Ericsson*, the court affirmed that an essential patent owner is immune from liability under the antitrust or unfair competition laws for merely seeking relief in court for infringement of its essential patents because “[t]he Noerr-Pennington doctrine provides absolute immunity for statutory liability for conduct when petitioning the government for redress.”<sup>70</sup>

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<sup>65</sup> *In re Motorola Mobility LLC and Google Inc.*, FTC Docket No. C-4410, (Complaint filed July 24, 2013), <https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolacmpt.pdf>.

<sup>66</sup> *Bosch* Complaint at ¶ 23, *Google/Motorola* Complaint at ¶ 31.

<sup>67</sup> *Bosch*, Complaint at ¶¶ 16–20, *Google/Motorola*, Complaint at ¶ 25.

<sup>68</sup> Press Release, FTC, FTC Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems (Nov. 26, 2012), <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge>; Press Release, FTC, Google Agrees to Change its Business Practices to Resolve Competition Concerns in the Markets for Devices Like Smartphones, Games, and Tablets, and in Online Search (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

<sup>69</sup> *Apple Inc. v. Motorola Mobility Inc.*, 886 F. Supp. 2d 1061, 1066–67 (W.D. Wis. 2012) (“[T]he Noerr–Pennington doctrine provides Motorola immunity from Apple’s antitrust and unfair competition claims premised on Motorola’s patent infringement litigation . . . to the extent that those claims are premised on a theory of antitrust or unfair competition.”).

<sup>70</sup> No. 14-03412016 U.S. Dist. LEXIS 140566, at \*7 (C.D. Cal. Aug. 9, 2016). In particular, the court found that the plaintiff lacked standing to pursue its antitrust and unfair competition claims because the cost of defending against lawsuits seeking an injunction or an exclusion order provided the sole basis for its alleged economic injury. According to the court, “such injury cannot be the basis for TCL’s ‘economic injury’ due to the Noerr-Pennington doctrine . . . which provides absolute immunity for statutory liability for conduct when petitioning the government for redress. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006).”



There are other serious flaws in the allegations supporting these two complaints, including failure to allege harm to competition or the competitive process, as those concepts are understood under established antitrust law principles, or to grapple with the real limits on the power to exclude following *eBay*.<sup>71</sup> These two negotiated consent agreements have generated global confusion regarding the state of U.S. antitrust law and are routinely misused in advocacy filings and complaints across the globe to further degrade the strength and value of IP rights. We respectfully urge that the Commission use these hearings as an opportunity to correct the record on the *Bosch* and *Google/Motorola* matters.

## CONCLUSION

We appreciate the opportunity to provide these comments in connection with the hearings and thank the Commission for its kind consideration.

Sincerely,

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<sup>71</sup> See e.g. James Rill, James Kress, Dina Kallay & Hugh Hollman, *Antitrust & FRAND Bargaining: Rejecting the Invitation For Antitrust Overreach Into Royalty Disputes*, ANTITRUST, Fall 2015, at 72.