Fraunhofer

Munich, 20 August 2018

SUBMISSION

Competition and Consumer Protection in the 21st Century Hearings, Project Number P181201 !

Topic 1: The state of antitrust and consumer protection law and enforcement, and their development, since the Pitofsky hearings

Noting that there are overlapping areas of interest for the FTC:

- **Topic 2: Competition and consumer protection issues in communication, information, and media technology networks;**
- **Topic 7: Evidence and analysis of monopsony power, including but not limited to, in labor markets; and**
- **Topic 8: The role of intellectual property and competition policy in promoting innovation.**

For this reason, we address elements of Topics 2, 7, and 8 within this paper.

A. Opening Remarks

We commend the FTC for its national and international engagement with a broad range of stakeholders in the consideration of whether broad-based changes in the economy, evolving business practices, new technologies or international developments might require adjustments to competition and consumer protection law, enforcement priorities and policy. We take this opportunity to comment on governance in standardization and the link to competition and consumer protection and the appropriate framework for Intellectual Property Policy Development.

The Fraunhofer-Gesellschaft (Fraunhofer)[1] is Germany's and Europe's largest industrial research organisation and has been actively contributing to international dialogue on the relevance of good governance in standardisation and the importance of intellectual property law in the context of high-technology strategies and innovation ecosystems.

[1] Fraunhofer undertakes applied research of direct utility to private and public enterprise and of wide benefit to society. With a workforce of over 25,000 and an annual research budget of €2,2 billion, the Fraunhofer-Gesellschaft is Europe's largest organization for applied research, and currently operates a total of 71 institutes and research units. The organization's research focuses on the needs of people in the areas of healthcare, security, communication, mobility, energy and the environment. Fraunhofer's international sites and its representative offices act as a bridge to the regions of greatest importance to scientific progress and economic development. See also https://www.fraunhofer.org/ for specific details of Fraunhofer's activities in India.

Fraunhofer has very strong cooperation ties with the United States of America, including through its subsidiary Fraunhofer USA. This includes activities as a developer and holder of all types of intellectual property, including standard essential patents and other forms of intellectual property which have the potential for global adoption. From these activities, Fraunhofer has participated in many licensing programs developed to implement world-class, global technology solutions to ultimately serve societal benefit and advancement. Fraunhofer welcomes the opportunity to contribute to this important review and discussion.

B. ! Governance in Standardization and the link to Competition and Consumer Protection

The Federal Trade Commission (FTC) has as its core mission the protection of consumers and the promotion of competition in the US. The FTC in this regard challenges practices that could harm consumers due to breaches of US law, US government policy and reduced rates of innovation.[2]

It is considered that recent developments in the American National Standards Institute (ANSI) and the Institute of Electrical and Electronics Engineers (IEEE) have the potential to impact negatively on participation in standardization and the development of American standards, and in turn on the competitiveness of American industry and the quality of life for American consumers. It is also considered that any breakdown of America's participation in international standardization impacts on its role in international technical cooperation and standing. Undoubtedly, ANSI's role should support and not undermine US innovation, industrial, consumer and trade policies.

ANSI is the umbrella body delegated with responsibility from the US government to accredit American Standards Developers (ASDs) as well as the American National Standards (ANSs) developed by these ASDs. IEEE is an important ASD accredited with the development of ANSs, including standards relating to WIFI.

Topic 7 (Evidence and analysis of monopsony power, including but not limited to, in labor markets) and Topic 8 (the role of intellectual property and competition policy in promoting) both appear relevant when looking at the recent history of ANSI and IEEE. Under Topic 7, the use of monopsony power appears to be directed at soft targets (technical standard setting organizations) for effecting substantive changes to rights arising from (i) intellectual property ownership and (ii) carrying on business using various legitimate business models, as well as dictating market practices so as to disrupt market dynamics and competition through forced change to acceptable commercial business (national and international).

Indeed, changes to the IEEE patent policy in 2015 have led to negative impacts on the fundamental rights of patent owners, to such an extent that the policy operates to effectively devalue Intellectual Property (IP), remove the right to protect intellectual property and alter

[2] https://www.ftc.gov/about-ftc/what-we-do

accepted international commercial practices. The amendments were based on procedures lacking in transparency and did not reflect a consensus outcome. The amendments have fundamentally altered the way in which commercial negotiations are able to take place through (a) endorsing a method of calculating royalties; (b) restricting access to injunctive relief; and (c) wrongly containing an underlying assumption of patent hold up and royalty stacking. Each of these elements separately and collectively create a bias against an IP owner, and seek to impose a particular business model on all market participants.

These changes work for the benefit of a few companies that implement IP related to IEEE standards. The IEEE patent policy gives dominating, singular and short-term interests an unfair advantage in the market. In spite of these outcomes through adoption of the 2015 IEEE patent policy, ANSI reaccredited the IEEE.

We have observed similar conduct in other standardization bodies. In 2018, ANSI's Executive Standards Council (ExSC) issued a decision which fundamentally altered the ANSI patent policy, setting a limitation on the amount of *ex-ante* information disclosure that can be made by a patent holder in the course of standard development.[3] This decision was challenged primarily on account of the due process and governance issues arising from the irregular manner in which it was rendered. Further, concerns were raised that the decision will greatly reduce transparency in the market and would have a wider impact at the international level. ANSI's Appeals Board however determined that no *prima facie* case was raised regarding the irregularity of the process or the decision, meaning that it remains in force.

The United States Trade Representative (USTR) in its Section 301 Report for 2018 has formally recognized that SDOs are being misused as instruments for singular interests, rather than being a forum for international technical cooperation.[4] While the 2018 Special 301 Report has government-sanctioned conduct as its subject matter, it is considered that government-endorsed behaviour (through no accountability to - or inaction of - responsible government agencies and departments) has the same impact regarding dominance and the creation of unfair disadvantage for a monopsony.

B.1. Risk of Cartelist Behavior stifling Innovation

What we are seeing in ANSI and IEEE is a misuse of standardization through dominating participants, by altering IP policies to impose terms which are unfair and disadvantageous to IP owners. The DoJ has specifically recognised the risk that members of Standards Development Organizations (SDOs) could engage in collusive and anticompetitive behavior. The DoJ notes the

---

3 https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ANSI%20Executive%20Standards%20Council%20(ExSC)%20Interpretations/ExSC_087_2017_091417_patent%20policy_022318%20amended.pdf

4 *USTR Special 301 Report 2018*, at page 17. See https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf

probability of cartelist behavior on the part of SDO participants and has publicly stated that it will be sceptical of rules that are likely to shift bargaining leverage from IP creators to implementers, or vice versa.[5] As noted above, the USTR Section 301 Report for 2018 formally recognizes that SDOs are being misused as instruments for singular commercial interests, rather than being a forum for international technical cooperation.[6]

ANSI should be at the forefront in ensuring adherence to good governance and due process. ANSI should not facilitate the creation of loopholes through which such anticompetitive conduct can be perpetrated. Unfortunately, ANSI's patent policy can no longer be said to operate at an umbrella policy level. ANSI Patent Policy now imposes licensing practices sought by dominant players in one sector (telecommunications) on all American Industrial sectors.

B.2. Need to Safeguard Transparency

There is a trend of decreasing transparency in ANSI and IEEE, which is contrary to the WTO Agreement on Technical Barriers to Trade (TBT Agreement). In addition, there remain significant concerns regarding the failure within ANSI and IEEE to adhere to principles of good governance and due process. The concerted effort to push through an unbalanced agenda creates a strong likelihood of interference with accepted market practices, by imposing new licensing practices which risk depreciating the value of patents and which do not support a sustainable innovation system.

Industry participants recognize the importance of transparency with respect to standards in maintaining market competitiveness. ANSI's Vice President in charge of Government Relations and Public Policy has indeed noted that the lack of transparency with respect to changes to standards, regulations, and other requirements in foreign markets is a top US business complaint.

The ExSC Appeal Decision threatens to curtail transparency in the US market. Restricting the ability of patent holders to customize their statements of assurance would lead to reduced transparency. This could expose patent holders to competition law claims, such as patent ambush. This could in turn lead to reduced incentive to participate in standardization activities within SSOs. Ultimately, consumers may be denied access to the best available technology for the market.

SDO Intellectual Property policies should be a product of consensus or a clear majority that includes both patent holders and implementers. A denial of the opportunity to be heard on issues

---

5 Makan Delrahim, 'Take it to the limit: Respecting innovation incentives in the application of antitrust law' (November 2017) available at https://www.wto.org/english/docs_e/legal_e/27-trips.pdf; Roger Alford, 'The Role of Antitrust in Promoting Innovation' (February 2018), available at https://www.justice.gov/opa/speech/file/1038596/download

6 *USTR Special 301 Report 2018*, at page 17. Available at See https://ustr.gov/sites/default/files/files/Press/Reports/2018%20Special%20301.pdf

that touch on SDO patent policy leads to decisions that are not based on consensus and which may very well lead to skewed policy decisions.

It is considered arguable that the ANSI ExSC Decision goes so far as to operate at licensing practice level, rather than policy – so much so that it is dictating market practices for all American industrial sectors.

B.3. Considerations for the FTC

Although SDOs are generally established as 'private' bodies in a legal sense (such as a private associations), SDOs engage in voluntary, industry-driven, consensus-based standards development which is for the benefit, or in the interests, of government, industry and society. In substance, an SDO's mandate always extends beyond that of truly private associations, such as swimming or running clubs. Indeed, the mandate of SDOs, by virtue of its members, can span across governments, industries and sectors, and has an impact on society and the economy as a whole. SDOs should therefore not be able to hide behind a veil of 'private membership' or being 'industry-led'. There are higher purposes which must be served and met.

It is of deep concern, therefore, when other entities with societal mandates lack any overarching governance structure, which includes a system of accountability or responsibility. Many SDOs appear to be in that situation, and thus susceptible to being dominated by members promoting their own interests, either individually or in concert with members having similar interests. As noted above, we are indeed experiencing what could be considered a trend of SDOs being misused for singular interests that do not reflect the broader requirements of SDOs.

ANSI maintains its primary goal as '*the enhancement of global competitiveness of U.S. business and the American quality of life by promoting and facilitating voluntary consensus standards and conformity assessment systems and promoting their integrity*.'

This means that ANSI should strive to ensure that the best technology is adopted as an ANS. The ExSC Appeal Decision has the potential to disincentivize innovators from contributing their best technology to the development of ANSs, with the potential beneficiary of such technology being other SDOs that do strive to ensure openness, balance, consensus and due process in the development of their standards.

One should also consider the role of ANSI in promoting the use of U.S. standards internationally. As noted by ANSI, US standards are often taken forward to ISO and IEC where they become part of international standard development. The ExSC Appeal Decision, unless removed, appears to result in inconsistency between the now restrictive ANSI Patent Policy and the more permissive ISO patent policy, thus possibly hindering the international acceptance of ANSs. A potential consequence is fragmentation of international markets and international technology. The result of the ExSC Appeal Decision thus runs counter to statements made by ANSI's Vice President for Government Relations and Public Policy, that U.S. Government trade-related activities aim at ensuring "*free, fair and reciprocal trade relations*".

ANSI as the umbrella body charged with the accreditation of American Standard Developers as well as American National Standards has a very broad mandate. ANSI's Patent Policy and Essential Requirements should cater for a diverse range of stakeholders in a variety of situations and sectors, with due regard to the international context within which standardization takes place. Unnecessary and improperly pursued changes specifically targeted at a particular sector should not be allowed to affect the numerous other sectors under ANSI's umbrella. By taking away the flexibility with which the ANSI Patent Policy and Essential Requirements are interpreted, ANSI not only interferes with the ICT sector but with nearly every other sector of the U.S. market. This consequently leads to an interference with market dynamics and competitiveness in the U.S., with the ripple effects felt in international standardization.

C. Further Comments – Assessing the framework for Intellectual Property Policy Development

C.1. *Anticipating the 21st Century* – US and Global Perspectives

In the report on *Anticipating the 21st Century,* the FTC highlighted the fact that increasing globalization and rapid innovation are profoundly altering the marketplace, noting that the changes create new possibilities and raise new problems for consumers, businesses and government agencies. A rapidly changing international marketplace is now the norm. 22 years later, the FTC is again considering whether this increasingly changing marketplace where broad-based changes in the economy, evolving business practices, new technologies or international developments call for policy adjustments.

There is certainly an interrelationship between government policies, business models used by entities of all sizes, and the funding of sustainable, long-term innovation systems. To this end, any policies applicable to both domestic and foreign companies should also be carefully considered.

However, as society as a whole moves towards the digital era, it is the foundations of our current legal systems and commercial frameworks which are crucial for moving towards the common goals. To remove these foundations could lead to fragmentations which will create grave risk and uncertainty.

C.2. Legal and Governance Framework for International Business in the ICT Sector

The rapidly changing international marketplace means that it is now more than ever important to focus on the existing international framework that supports international trade.

There are indeed several international instruments and conventions which support international trade. The principles contained in these instruments should guide the contextual framework for any policy considerations. These instruments incorporate long-standing and established principles and norms which form the basis for international business and global innovation. It is these core international principles that are adopted into national law.

Take for instance, the 1980 *United Nations' Convention on Contracts for the International Sale of Goods* and the UNIDROIT *Principles of International Commercial Contracts* (2010). Both of these instruments set out basic criteria for international contract formation – including what constitutes an offer, a count-offer or rejection of an offer, as well as recognised international commercial norms.

In relation to intellectual property rights, a minimum degree of protection is to be afforded by members of the World Trade Organisation by virtue of the Agreement on Trade-Related Aspects on Intellectual Property,[7] and the requirement that these protections be enshrined in each Member State's national law. Holding a patent grants a fixed-term monopoly right under intellectual property law which is recognised under the TRIPs Agreement,[8] as is the underlying social contract which is formed in order to have that fixed-term monopoly intellectual property right.

The existence of intellectual property rights goes beyond the set of criteria identified in the TRIPs Agreement to obtain protection for patents, copyright, trademarks or other forms of intellectual property. Article 1 of the *Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* ensures that '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions' and that 'no one shall be deprived of their possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

If one has regard to the European Union level, the *Charter of Fundamental Rights of the European Union*[9] provides that intellectual property is property, and is afforded all guarantees of the right to the property set out in paragraph one of Article 17 of the European Charter. The second paragraph of Article 17 of the European Charter specifically deals with the protection of intellectual property, 'taking into consideration an increasing importance of the protection of intellectual property in general, and in the EC law in particular'[10], highlighting the special importance that these instruments accord to intellectual property as property.

National and regional laws have consistently held that there should be no differentiation between intellectual property and other property rights, and there should be no interference with the

---

7 ! Hereinafter referred to as the TRIPs Agreement.

8 ! See, for example, Articles 33 and 41 of the *Agreement on Trade-Related Aspects on Intellectual Property Rights* (TRIPs), which are among mandatory commitments for WTO members. It is further noted that TRIPs is the most important multilateral agreement for the globalization of intellectual property laws, with its stated objective being that '(t)he protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations'. See Article 7 of the TRIPs Agreement.

9 ! Herein referred to as the European Charter.

10 ! See *Commentary of the Charter of Fundamental Rights of the European Union,* at page 168, available at http://llet-131-198.uab.es/CATEDRA/images/experts/COMMENTARY%20OF%20THE%20CHARTER.pdf.

protection of property. In the United States, for example, the unanimous decision of the US Supreme Court in *eBay Inc. et al, Petitioners v. Mercexchange LLC* confirms that the general law applies to patents.[11] In Europe, the Court of Justice of the European Union decision in *Huawei Technologies Co. Ltd v. ZTE Corp. and ZTE Deutschland GmbH*[12] confirms that patents are subject to the normal general (civil) and intellectual property laws of the relevant jurisdiction.[13]

National laws and policies deriving from international agreements and conventions, are in this regard sufficiently sound and flexible to cater for new business models and societal advancement locally and globally. To draw an analogy to help illustrate this, we know that much of our communications technology as we know it today relies on Maxwell's equations. These equations, developed by the Scottish Physicist James Clerk Maxwell around the 1860s, continue to hold strong, and are the basis for advances in areas such as understanding electromagnetics, the development of television and the development of wi-fi as we know it today. It is these solid mathematical foundations which have enabled future development with certainty and in a coherent and stable manner. It is considered that society's legal touchstones also operate in this way – foundational elements which provide certainty for rights and obligations, and thus stability in application for dynamic and competitive markets.

If businesses know the framework in which they operate they are able to factor this into their cost of doing business. Uncertainty means higher risk for business which ultimately translates to higher cost for consumers. Further, cost savings on the part of consumers should be based on sustainable business models which factor in appropriate remuneration of innovators

C.3. Considerations for the FTC

In order to retain the flexibility to cater for new business models and societal advancement, national laws and policies need to avoid being overly prescriptive. The FTC acknowledges this and reflects it in the preference for the rule of reason approach in the assessment of competition and consumer protection concerns. In the *2017 Antitrust Guidelines for the Licensing of Intellectual Property*, both the DoJ and FTC undertake to evaluate each case in light of its own facts and to apply the guidelines reasonably and flexibly.

---

11 ! 547 US 388 (2006); available at https://supreme.justia.com/cases/federal/us/547/388/opinion.html. See also 35 USC 154(a)(1), 261, and 283. Refer also to *Weinberger v. Romero-Barcelo* 456 US 305 (1982). Hereinafter referred to as the *eBay Decision*.

12 ! Case C-170/13 dated 16 July 2015 (*Huawei v. ZTE*), available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d56dcb57f245c14a50b55394be437b2660.e34KaxiLc3eQc40LaxqMbN4ObN8Te0?text=&docid=165911&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=129069. See a summary of findings in Paragraph 77 of the judgment.

13 ! Case C-170/13 dated 16 July 2015, available at http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d56dcb57f245c14a50b55394be437b2660.e34KaxiLc3eQc40LaxqMbN4ObN8Te0?text=&docid=165911&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=129069. Hereinafter referred to as 'the judgment'. See in particular paragraphs 1– 8, and paragraphs 46 – 67, of the judgment.

The US courts have also adopted a flexible position in the consideration of what can be regarded as fair, reasonable and non-discriminatory (FRAND) in the licensing of standard essential patents. According to the US courts, the assessment of FRAND must be done on a case-by-case basis, based upon cogent evidence presented regarding the FRAND commitment at issue and the specific technology in question.[14]

D. Closing Comments

In light of our observations set out in Section B above, the FTC is respectfully requested to use its regulatory and oversight mandate on competition and consumer protection to ensure that competition and the competitiveness of US industry are not negatively impacted by the developments in ANSI and the IEEE. Without action, ultimately it is the US consumer which will be negatively impacted. Regulatory interference is indeed sometimes necessary, as evidenced by the 2007 financial crisis where the free rein given to industry led catastrophic effects in the US and globally.[15]

In relation to our observations set out in Section C; we also respectfully request that the FTC should take into consideration the international framework as well as the guideposts put in place by the US jurisprudence and current US policy which fosters innovation - and therefore the international competitiveness of US industry and benefits to US society generally. The rule of reason allows the FTC to assess each case based on its own merits and with regard to the specific circumstances surrounding the case. Therefore, any policy adjustments should be considered cautiously to ensure that this flexibility is maintained. It is considered prudent that cross-departmental or –government agency discussions take place, so that the US Government's initiatives are consolidated in a synergistic manner. For example, this could entail bringing together discussions on both the objectives and initiatives being led by the FTC, and should be

---

14 ! *Ericsson Inc. v. D-Link Inc. et al*, 773 F.3d 1201 (2014), at *56. Allegations of hold-up, hold-out and royalty stacking should be backed by cogent evidence. Regarding the determination of reasonable royalties, the US Courts have highlighted the need to look at comparable licenses in order to determine the market's actual valuation of the patent. Further, that adoption of a rule for all royalty payments to be based on the "smallest saleable practicing unit" is untenable. Available at http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/13-1625.Opinion.12-2-2014.1.PDF. See also *Commonwealth Scientific and Industrial Research Organisation v Cisco Systems, Inc*, 809 F.3d 1295 (2015); available at http://www.cafc.uscourts.gov/sites/default/files/opinions-orders/15-1066.Opinion.12-1-2015.1.PDF.
It has been expressly stated that there is no set of factors that serve as a talisman for royalty rate calculations (*Ericsson Inc. v. D-Link Inc*. et al, at *47 - 50.) It has further noted that factors for consideration 'may also need to be adapted on a case-by-case basis depending on the technology at issue.' (*Ericsson Inc. v. D-Link Inc*. et al, at *48.) The discretion of the courts in this regard should remain unfettered. One of the considerations for the courts in determining a reasonable royalty should be the cost of participation in standardization, which has risen substantially especially in respect of policy.

15 ! Stephen K. Aikins, 'Global Financial Crisis and Government Intervention: A Case for Effective Regulatory Governance', 2009, *International Public Management Review*.

considered in consultation with the Department of Justice, the International Trade Commission, the United States Patent and Trade Mark Office, the United States Trade Representative, and other relevant sections of the Department of Commerce such as the National Institute of Standards and Technology.

Fraunhofer considers that there exist established principles and norms creating the basis for international business and global innovation. Fraunhofer encourages continual broad engagement between standard setting organisations, patent offices, international IP and trade organisations, along with business and research organisations, and competition law regulators. This multi-disciplinary engagement assists in providing the appropriate contextual framework when aiming towards a fair and competitive environment for a sustainable and thriving innovation system for the benefit of society as a whole.

We would welcome the opportunity to continue engaging on these important matters with the FTC.

Stefanie Mielert
Legal Corporate Governance