

## Hearings on Competition & Consumer Protection in the 21ST Century

### **PUBLIC COMMENT TOPICS by IP Europe :**

7. Evidence and analysis of monopsony power, including but not limited to, in labor markets;
8. The role of intellectual property and competition policy in promoting innovation;

### **IP Europe Comments to the FTC**

IP Europe is delighted to offer comments in response to the FTC hearings on competition and consumer protection in the 21<sup>st</sup> century. IP Europe brings together R&D intensive European companies and research institutes committed to innovation, from small and medium size enterprises (SMEs) to global enterprises and non-profit research entities operating in a variety of industrial sectors. They all share a common goal: to maintain, at all policy levels, strong patent protection for innovators and support recognized fair, reasonable and non-discriminatory standardisation policies adopted by consensus that preserve fair compensation for innovators. IP Europe supports the use of Injunctive Relief against patent infringers and free riders that rely on R&D investments made by others to earn higher profits. More information about IP Europe is available on its website at <https://www.iptalks.eu/>.

### **Question #7: Evidence and analysis of monopsony power, including but not limited to, in labor markets;**

The question asks for “evidence regarding the existence and exercise of buyer monopsony or market power in properly defined markets”

Over the years, antitrust enforcers have not paid much attention to the problem of anticompetitive exercise of monopsony (buyer) power, focusing instead almost exclusively on monopoly (seller) power. The exercise of monopsony power can, however, have an equally negative impact on competition as the exercise of monopoly power.

One example of evidence of anticompetitive exercise of buyer power involves the 2015 revision of the patent policy of patent development organizations called IEEE-SA. The revision was initiated and dominated by a group of buyers-users of standardized technology. The process and the Business Review Letter that followed were criticized heavily by many<sup>1</sup>.

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<sup>1</sup> See e.g. Roy E. Hoffinger, THE 2015 DOJ IEEE BUSINESS REVIEW LETTER: THE TRIUMPH OF INDUSTRIAL POLICY PREFERENCES OVER LAW AND EVIDENCE, Competition Policy International (CPI) Antitrust Chronicle March 2015 (2) available at <https://www.competitionpolicyinternational.com/assets/Uploads/HoffingerMar-152.pdf>; Lisa Kimmel, STANDARDS, PATENT POLICIES, AND ANTITRUST: A CRITIQUE OF IEEE-II, the American Bar Association (ABA) Antitrust Magazine (Summer 2015) available at <https://www.crowell.com/files/Standards-Patent-Policies-and-Antitrust-A-Critique-of-IEEE-II.pdf>; Stuart M. Chemtob, CARTE BLANCHE FOR SSOS? THE ANTITRUST DIVISION'S BUSINESS REVIEW LETTER ON THE IEEE'S PATENT POLICY UPDATE, (CPI) Antitrust Chronicle March 2015 (1) available at

It resulted in a policy that significantly favors the interests of technology users and significantly reduces prices for standard essential patents.

The interesting aspect is the evidence that has built up in the 3 years since the new policy took effect. Since the policy change, statistics show that a growing number of patent holders, i.e. sellers of standardized technology, have submitted negative patent statements (known as letters of assurance of LOAs) to IEEE, informing that they do not intent to offer F/RAND access to any of patent claims that would be essential to IEEE standards under the new policy.<sup>2</sup> The majority of letters of assurance submitted for WiFi standards between 1/1/2016 and 6/30/2018 is negative. This means that the voluntary F/RAND commitment that has been repeatedly recognized by antitrust courts and agencies as a tool to prevent anticompetitive exercise of market power where such exists, is disappearing in the context of IEEE.

This is an empirical example of anticompetitive effects resulting from the exercise of monopsony power. A U.S. Department of Justice Antitrust Division Deputy Assistant Attorney General has recently acknowledged this problem. It is therefore suggested that the hearings explore the potential for exercise of buyer power by users of standardized technology.<sup>3</sup>

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<https://www.wsgr.com/publications/PDFSearch/chemtob-0315.pdf>; Hugh M. Hollman, IEEE BUSINESS REVIEW LETTER: THE DOJ REVEALS ITS HAND, Competition Policy International (CPI) Antitrust Chronicle March 2015 (2) available at <https://ideas.repec.org/a/cpi/atchrn/3.2.2015i=17540.html>; Luke Froeb and Mikhael Shor, INNOVATORS, IMPLEMENTERS, AND TWO-SIDED HOLD-UP, the American Bar Association (ABA) Antitrust Source (August 2015) available at [http://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/aug15\\_froeb\\_7\\_21f.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug15_froeb_7_21f.authcheckdam.pdf); J. Gregory Sidak, THE ANTITRUST DIVISION'S DEVALUATION OF STANDARD-ESSENTIAL PATENTS, 104 Georgetown Law Journal Online 48 (2015) available at <https://www.criterioneconomics.com/docs/antitrust-divisions-devaluation-of-standard-essential-patents.pdf>; Gregory Sidak Letter to DOJ, available at [https://www.criterioneconomics.com/docs/proposed\\_ieee\\_bylaw\\_amendments\\_affecting\\_frand\\_licensing\\_of\\_seps.pdf](https://www.criterioneconomics.com/docs/proposed_ieee_bylaw_amendments_affecting_frand_licensing_of_seps.pdf) (pp 1-2); Gregory Sidak, TESTING FOR BIAS TO SUPPRESS ROYALTIES FOR STANDARD-ESSENTIAL PATENTS, 1 Criterion J. on Innovation 301 (2016) available at <https://www.criterioneconomics.com/bias-to-suppress-royalties-for-standard-essential-patents.html>; Nicolas Petit, THE IEEE-SA REVISED PATENT POLICY AND ITS DEFINITION OF 'REASONABLE' RATES: A TRANSATLANTIC ANTITRUST DIVIDE? Fordham Intellectual Property, Media & Entertainment Law Journal, Vol. XXVII (March 2016) available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2742492](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2742492); Kanevskaia, Olia and Zingales, Nicolo, IEEE IP POLICY UPDATE UNDER THE SCRUTINY OF THE EC GUIDELINES ON HORIZONTAL COOPERATION, (April 24, 2016), available at SSRN: <http://ssrn.com/abstract=2804729>; Marco Lo Bue, ARE THESE CARTELS? PRICE GUIDELINES ADOPTED BY STANDARD SETTING ORGANISATIONS (US, INSTITUTE OF ELECTRICAL AND ELECTRONICS ENGINEERS, Journal of European Competition Law and Practice: (29 July 2016) available at <http://jeclap.oxfordjournals.org/content/early/2016/07/29/jeclap.lpw050.extract>

<sup>2</sup> See e.g. Development of Innovative New Standards Jeopardized by IEEE patent Policy / Keith Mallinson (September 2017), available at [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); The IEEE controversial policy on Standard Essential Patents – the empirical record since adoption /

Ron Katznelson (October 2016, updated September 2017) available at <http://bit.ly/IEEE-LOAs>; Commercial & Economic impacts from IPR Policy Changes / Ian Corden, Tim Miller, Sarongrat Wongsaroj, Sam Wood (March 2017) available at <http://plumconsulting.co.uk/commercial-economic-impacts-ipr-policy-changes/>.

<sup>3</sup> Andrew Finch, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, Remarks Delivered at The Heritage Foundation: "TRUMP ANTITRUST POLICY AFTER ONE YEAR" (February 23, 2018) available at <https://www.justice.gov/opa/speech/file/1028906/download> ("The Division has begun scrutinizing what may appear to be buyer's cartel or seller's cartel behavior that's designed to artificially shift bargaining leverage from IP creators to implementers, or vice-versa. In particular, the Division is focused on rules of SSOs that purport to clarify the meaning of "reasonable and nondiscriminatory," but that may instead serve to skew the bargain clearly in the direction of implementers. In this regard, I would underscore Assistant Attorney General Delrahim's suggestion that standard-setting organizations should proactively evaluate their own rules and maintain internal antitrust compliance programs).

## **Topic #8: The role of intellectual property and competition policy in promoting innovation;**

There is ample empirical data on both sides of the Atlantic that enforceable intellectual property rights promote innovation and economic performance<sup>4</sup>

The past decade has witnessed an ongoing erosion of patent rights in the U.S., of two types. First, from the intellectual property angle, we have witnessed an ongoing weakening of the ability to enforce patent rights both in the U.S. and globally. In the U.S., this has transpired through multiple court cases as well as the 2011 enactment of the America Invents Act and the patent opposition system that followed it in 2012.<sup>5</sup> Furthermore, as world markets are becoming global, in some jurisdictions it appears exceedingly difficult to enforce patent rights.

Second, from the antitrust enforcement and advocacy angle, at least between 2009 – 2017 increasingly hostile and aggressive approaches towards IP rights appeared, for example in enforcement actions and sustained advocacy in the area of standard essential patents.

Given that the intellectual property landscape has changed dramatically over the past 12 years, IP Europe recommends that the Commission revisit some of its thinking in this area in order to restore the antitrust-IP interface balance, given that intellectual property protection has significantly weakened.

Thank you very much for the opportunity to comment. We look forward to continuing our dialogue with the Federal Trade Commission through future comment opportunities.

Yours faithfully,

Francisco Mingorance

General Secretary – IP Europe Alliance

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<sup>4</sup> See e.g. European Union Intellectual Property Office, Impact of intellectual property rights intensive industries in the European Union available at <https://euipo.europa.eu/ohimportal/en/web/observatory/ip-contribution>; Paul Maier, Intellectual Property Rights Intensive Industries and Economic Performance in the European Union (Presentation to TRIPs Council, 27-28 February 2018) available at [https://eeas.europa.eu/sites/eeas/files/glow\\_eu\\_presentation\\_euipo\\_eu\\_observatory\\_paul\\_maier\\_trips\\_council\\_2702.pdf](https://eeas.europa.eu/sites/eeas/files/glow_eu_presentation_euipo_eu_observatory_paul_maier_trips_council_2702.pdf); Economics & Statistics Administration and U.S. Patents and Trademarks Office, Intellectual Property and the U.S. Economy: 2016 Update, available at <https://www.uspto.gov/sites/default/files/documents/IPandtheUSEconomySept2016.pdf>.

<sup>5</sup> See e.g. Alden Abbott, Erosion of Patent Rights Is a Threat to Innovation and American Prosperity, The Daily Signal, (October 6 2017); U.S. Chamber of Commerce Global Innovation Policy Center (CIPC), International IP Index (6<sup>th</sup> Edition, February 2018) at 157, available at [http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC\\_IP\\_Index\\_2018.pdf](http://www.theglobalipcenter.com/wp-content/uploads/2018/02/GIPC_IP_Index_2018.pdf); Gene Quinn, The Top 3 Reasons the U.S. Patent System is in Decline (April 26, 2017) available at <http://www.ipwatchdog.com/2017/04/26/top-3-reasons-u-s-patent-system-decline/id=82571/>.