

August 20, 2018

Federal Trade Commission
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Re: *Joint Stakeholder Comments to Topic 8 (The Role of Intellectual Property and Competition Policy in Promoting Innovation): Hearings on Competition and Consumer Protection in the 21st Century*

We thank the FTC for this opportunity to submit comments in advance of the upcoming Hearings on Competition and Consumer Protection in the 21st Century. We write jointly in response to the Commission's request for input on identification of contemporary patent doctrine that substantially affects innovation and raises the greatest challenges for competition policy. More specifically, we would like to address innovation relating to, and utilizing, standard essential patents (SEPs) subject to obligations to license on fair, reasonable and non-discriminatory (FRAND) terms. We believe that abuses related to SEPs can dramatically undermine incentives to innovate, and can harm consumers as well as market-participants in a wide variety of US industries. In short, SEP abuse harms U.S. innovation, U.S. industries and U.S. consumers. To address SEP abuse, we encourage that the FTC continue to pursue established, bi-partisan policy approaches consistent with guidance to date from the U.S. courts.

Our thirty-six signatories include a broad mix of small and large companies, as well as academics and economists deeply engaged on SEP issues. Our industry signatories come from diverse verticals, including telecommunications, automotive, software, semiconductor and technology. Collectively we own in excess of two hundred thousand patents and patent applications, spend more than fifty billion dollars in R&D annually, and employ well more than one million people.

We offer four key points that we believe should be considered and addressed as part of the FTC's analysis.

1. SEP Abuse Harms Innovation and US Economic Competitiveness:

Technical standards are both the product of, and a facilitator for, important innovations. Many of our signatories actively contribute their patented technologies to standards, and actively participate in the standards development process. Our innovations in these "upstream" processes are valuable and important contributions, and we recognize that we must abide by our FRAND commitments to standard-setting bodies.

Likewise, many of our signatories develop "downstream" innovations that incorporate standardized technologies. A car might include a GPS chip to provide real-time mapping capabilities. A warehouse might include a wireless sensor as part of its inventory management processes. A software developer might develop useful apps and other programs reliant on wireless connectivity for updates and bug fixes. In all of these scenarios, the downstream

innovators *create added value* that uses standardized protocols, but which is not within the scope of the SEPs relevant to the standards.

In other words, innovation occurs throughout the value chain, and innovations at each “level” provide their own contributions to the US economy and to consumer welfare. But SEP abuse can damage the value chain by unfairly seeking to co-opt value created by others at other levels of the supply chain. Such usurpation disrupts downstream innovation and harms the US economy.

Under established US law, applicable since at least the 1800s, patent owners are entitled to obtain compensation based on the value of their own inventions.¹ The same is true for SEPs; as the Federal Circuit has noted, “[a]s with all patents, the royalty rate for SEPs must be apportioned to the value of the patented invention.”² But SEP abuse occurs, for example, when SEP owners seek to obtain compensation based *not* on the value of their own invention, but rather based on the *added value* contributed by downstream users and innovators. A patentee’s market power can be significantly increased where a patent is incorporated into a standard, and this can allow the patentee to “extract higher royalties or other licensing terms” than the market would otherwise bear.³ In 2011, the FTC unanimously agreed that such concerns, also referred to as ‘patent holdup’, can “delay innovation” and otherwise harm US consumers.⁴

As reflected in prior agency statements and court decisions, an SEP does not increase in value when a third party develops its own innovative downstream use for the standard; this is simply a corollary to the common sense notion that patents rights do not reward inventors for devices or innovations that were not invented or patented by the patent owner. If an innovator wishes to patent downstream technology, and has developed a patentable invention covering downstream uses of standards, US law permits it to do so. But SEP owners that do *not* patent downstream inventions should not be treated as if they had done so. That would amount to unjust enrichment, and serve only to dis-incentivize innovation.⁵

¹ See *Garretson v. Clark*, 111 U.S. 120, 121, 4 S.Ct. 291, 28 L.Ed. 371 (1884) (patent royalties must be limited to the value of the patented technology).

² *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1231-32 (Fed. Cir. 2014).

³ Joint Report of U.S. Dep’t of Justice and Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007) (“Joint Report”), at 35-36, available at <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>; see also Federal Trade Commission, Brief of Amicus Curie Federal Trade Commission in Support of Neither Party, U.S. Court of Appeals for the Federal Circuit Case Nos. 2012-1548 and 2012-1549 (Dec. 4, 2012) (“The problem of patent hold-up can be particularly acute in the standard-setting context, where an entire industry may be locked into a standard that cannot be avoided without infringing or obtaining a license for numerous (sometimes thousands) of standard-essential patents.”).

⁴ Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* at 234.2 (2011).

⁵ The US Court’s narrow “Entire Market Value” (EMV) exception has little if any applicability in the context of complex technology products and associated standards. To benefit from the EMV exception “[i]t is not enough to merely show that the [patented technology] is viewed as valuable, important, or even essential to the use of the [product]. Nor is it enough to show that a [product] without [the patented technology] would be commercially unviable.” *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 67-72 (Fed. Cir. 2012). Rather, the EMV exception must not be applied absent evidence that the infringing feature “alone motivates consumers to purchase” the downstream product. *Id.* It is difficult to imagine a scenario where a single patented technology alone is responsible for the EMV of a device implementing a complex, industry-developed standard – many of which

To encourage innovation at all levels of the supply chain, the FRAND promise must be upheld, and FRAND royalties based on the value of the patented invention, not on the added value of new and innovative downstream technologies developed by third parties.

2. Refusals to License Undermine FRAND:

SEP abuse can also occur where a SEP holder refuses to grant licenses to market participants. The US courts have been consistent in rejecting such conduct:

- “To mitigate the risk that a SEP holder will extract more than the fair value of its patented technology, many SSOs require SEP holders to agree to license their patents on ‘reasonable and nondiscriminatory’ or ‘RAND’ terms. Under these agreements, an SEP holder cannot refuse a license to a manufacturer who commits to paying the RAND rate.”⁶
- “[The patent owner], in its declarations to the [SSO], promised to ‘grant a license to an unrestricted number of applicants on a worldwide, non-discriminatory basis and on reasonable terms and conditions to use the patented material necessary’ to practice the [] standards. This language admits of no limitations as to who or how many applicants could receive a license....”⁷
- “[T]he licensor’s established policy and marketing program to maintain his patent monopoly by not licensing others to use the invention [is not relevant for SEPs]. [...] Because of [the patent owner’s] RAND commitment [...] it cannot have that kind of policy for maintaining a patent monopoly.”⁸
- “[The SSO’s] policy, in fact, plainly states that any willing licensee is entitled to license [an SEP declarant’s] intellectual property at a FRAND rate.”⁹

Similar to the U.S. courts’ approach, the FTC previously has recognized that “[b]y making a FRAND commitment, a SEP holder voluntarily chooses to license its SEPs to all implementers of the standard on fair and reasonable terms.”¹⁰

When SEP owners renege on their obligation to license some companies, it can create negative effects throughout the supply chain. For example, suppliers who are the most familiar with the

involve hundreds or thousands of declared SEPs. That a single SEP might “alone motivate consumers to purchase” an automobile, a smartphone or a warehouse would, to put it mildly, seem rather unlikely.

⁶ *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030 (9th Cir. 2015).

⁷ *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012).

⁸ *Ericsson, Inc. v. D-Link Systems, Inc.*, 773 F.3d 1201, 1230 (Fed. Cir. 2014).

⁹ *Apple Inc. v. Qualcomm, Inc.*, U.S. District Court Case No. Case No. 3:17-cv-00108-GPC-MDD (N.D. Cal Sept. 7, 2017), Order Denying Anti-Suit Injunction.

¹⁰ U.S. Federal Trade Commission, *Statement Re In the Matter of Motorola Mobility LLC and Google Inc.*, File No. 121 0120, Docket No. C-4410 (July 23, 2013), available at

<https://www.ftc.gov/sites/default/files/documents/cases/2013/07/130724googlemotorolaletter.pdf>.

relevant standards and who wish to obtain direct licenses, so that their customers are protected (and in some cases, so that they can comply with their indemnity obligations), have been refused licenses by some SEP holders. This can leave downstream customers – in one particularly egregious case, retail shops and hotels¹¹ – to negotiate with the patent owner in an extremely inefficient licensing model. Competition law oversight can protect the supply chain from such abusive practices.

3. Competition Law Provides an Important Bulwark Against SEP Abuse:

The FRAND promise plays a central role in protecting the public interest.¹² As the Third Circuit has noted, the FRAND commitment stands as “a bulwark against unlawful monopoly.”¹³ U.S. courts repeatedly have endorsed the viability of FRAND-based competition law actions.¹⁴

Competition law has long played an important role in addressing patents relating to technical standards. As the FTC has recognized, standardization can create competition law risks, where companies may choose “winning” and “losing” technologies by agreeing to include or exclude them from the standard, and jointly agreeing to use only the winning technologies.¹⁵ To address the anti-competitive risks of standardization (e.g., the use of patents covering standards to exclude competitors from the market), competition agencies have pointed to the FRAND promise as a critical check on abuse of SEP-associated market power.

The FTC (and DOJ) have enunciated their policy that competition laws are implicated where FRAND promises are broken. As the FTC stated in the *Bosch* matter:

While not every breach of a FRAND licensing obligation will give rise to [U.S. competition law] concerns, when such a breach tends to undermine the standard-setting

¹¹ *In re Innovatio IP Ventures, LLC Patent Litig.*, Case No. 11-C-9308, 2013 WL 5593609 (N.D. Ill. Oct. 3, 2013).

¹² *Microsoft v. Motorola*, 795 F.3d 1024, 1052 (9th Cir. 2015) (“a RAND commitment ‘must be construed in the public interest because it is crafted for the public interest.’”).

¹³ *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297, 305 (3d Cir. 2007); see also *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 588 795-96 (N.D. Tex. 2008).

¹⁴ *Broadcom v. Qualcomm*, 501 F.3d 297, 314 (3d Cir. 2007) (denying motion to dismiss antitrust claims based on FRAND violations); *Microsoft Mobile v. Interdigital*, 2016 WL 1464545, at *2 (D. Del. Apr. 13, 2016) (denying motion to dismiss antitrust claims based on FRAND violations); *FTC v. Qualcomm*, Case No. 17-CV-00220-LHK, Order Denying Motion to Dismiss (Dkt. No. 69) (June 26, 2017) (denying motion to dismiss antitrust claims based on FRAND violations).

¹⁵ See, e.g., Joint Report of U.S. Dep’t of Justice and Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007) (“Joint Report”), available at <http://www.justice.gov/atr/public/hearings/ip/222655.pdf>; Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (2011); see also *In re Innovatio IP Ventures, LLC Patent Litigation*, MDL Docket No. 2303, Case No. 11 C 9308 (December 27, 2013, United States District Court, Northern District of Illinois) (“Although the standard-setting process has many potential benefits for consumers, there are dangers. After a standard is established, for example, every manufacturer of compliant products must use the technology stated in the standard. If one particular company owns a patent covering that technology, however, the standard will effectively force all others to buy that company’s technology if they want to practice the standard. This requirement allows the company to charge inflated prices that reflect not only the intrinsic value of its technology, but also the inflated value attributable to its technology’s designation as the industry standard.”).

process and risks harming American consumers, the public interest demands action rather than inaction from the Commission.”¹⁶

U.S. courts have raised similar issues, stating, for example, that patent holdup “is a substantial problem that [F]RAND is designed to prevent.”¹⁷

On the other hand, the issue of “hold out” or “reverse hold up” – where a potential licensee avoids or delays taking a license to a valid, infringed SEP – have been treated by the courts as an *economic* issue that is readily addressable by the courts. Unlike the competition law interests associated with SEP abuse, “hold out” concerns can be viewed as economic issues that may be addressed between negotiating parties, and for which – where negotiations fail – redress can readily be obtained via the US courts.¹⁸

4. Mainstream US Industry and Expert Stakeholders Support the Long-Standing US Approach to Competition Issues Involving SEPs:

Concerns over SEP abuse are well-established and supported by major US stakeholders. Recently, views supporting the established FTC, DOJ and court approaches to SEP abuse have been submitted from a broad cross-section of the US economy:

- In January of this year, more than 40 companies, representing 70 billion in annual R&D and who own more than 300,000 patents, wrote to the DOJ expressing

¹⁶ Statement of the Federal Trade Commission, *In the Matter of Robert Bosch GmbH*, FTC File Number 121-0081; see also Former FTC Commissioner Terrell McSweeney, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters*, Mar. 21, 2018, available at https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeney_-_the_reality_of_patent_hold-up_3-21-18.pdf; Former FTC Chairwoman Edith Ramirez, *Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective*, Address at 8th Annual Global Antitrust Enforcement Symposium 8-9 (Sept. 10, 2014), available at www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf (“[W]hen a patentee voluntarily agrees to license its technology on FRAND terms as a condition of winning a place in the standard, antitrust enforcers are legitimately concerned with a breach that reintroduces the risk of patent hold-up. In particular, a breach may raise antitrust concerns if it threatens to deprive consumers of the procompetitive benefits that legitimize the standard-setting enterprise under the antitrust laws.”).

¹⁷ *In re Innovatio IP Ventures*, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013); see also *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030 (9th Cir. 2015) (“[O]nce a standard becomes widely adopted, SEP holders obtain substantial leverage over new product developers, who have little choice but to incorporate SEP technologies into their products. Using that standard-development leverage, the SEP holders are in a position to demand more for a license than the patented technology, had it not been adopted by the SSO, would be worth. The tactic of withholding a license unless and until a manufacturer agrees to pay an unduly high royalty rate for an SEP is referred to as ‘hold-up.’”); *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014).

¹⁸ *In re Innovatio IP Ventures, LLC Patent Litig.*, Case No. 11-C-9308, 2013 WL 5593609 at *11 (N.D. Ill. Oct. 3, 2013). (“[T]he court is not persuaded that reverse hold-up is a significant concern in general, as it is not unique to standard-essential patents. Attempts to enforce any patent involve the risk that the alleged infringer will choose to contest some issue in court, forcing a patent holder to engage in expensive litigation. The question of whether a license offer complies with the RAND obligation merely gives the parties one more potential issue to contest. When the parties disagree over a RAND rate, they may litigate the question, just as they may litigate any issue related to liability for infringement.”)

concerns that competition agencies continue to support established legal approaches to SEPs.¹⁹

- In May, 77 economic and antitrust scholars and former agency officials (from both-sides of the aisle) likewise wrote to the DOJ expressing similar views and concerns.²⁰
- Also in May, trade associations from the *retail* (National Retail Foundation), *automotive* (Alliance of Automobile Manufacturers), *technology* (High Tech Inventors Association; Computer & Communications Industry Association) and *software* (ACT | The App Association; Software & Information Industry Association) industries representing more than 40 million employees and contributing more than \$2 trillion in annual GDP argued that suggestions to break with the established U.S. approach to SEPs should be met with great caution. In addition, they noted that while hold-up is well documented, including in caselaw, there is no evidence of pervasive hold-out, and much of what critics label “hold-out” is merely the appropriate refusal of potential licensees to accede to SEP holders’ non-FRAND royalty demands.²¹

All of these important U.S. stakeholders are aligned with the U.S. courts and prior agency statements when considering that competition law has an important role to play in deterring SEP abuses and thereby promoting innovation and US economic interests.

Again, we thank the FTC for considering our views and perspectives, and hope that we can assist the FTC’s analysis and deliberations as the process proceeds.

Sincerely,

ACT | The App Association²²

Adobe Systems Inc.

¹⁹ See *Industry Letter to DOJ Regarding Standards, Innovation and Licensing* (Jan. 24, 2018), available at <http://www.ccianet.org/wp-content/uploads/2018/01/Industry-Letter-to-DOJ-AAG.pdf>.

²⁰ See *Academic and Economists Letter to DOJ* (May 17, 2018), available at <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/DOJ-patent-holdup-letter.pdf>.

²¹ See *Multi-Association White Paper, Standards, Licensing, and Innovation: A Response to DOJ AAG’s Comments on Antitrust Law and Standard-Setting* (May 30, 2018), available at <http://www.ccianet.org/wp-content/uploads/2018/05/Multi-Assn-DOJ-White-Paper-053018.pdf>.

²² ACT | The App Association represents more than 5,000 app companies and information technology firms in the mobile economy. <http://actonline.org>.

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For All Abilities

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Hewlett Packard Enterprise
Co.

HP Inc.

Intel Corporation

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²³ All academic signatories sign in their individual capacities.

²⁴ FSA represents a diverse group of more than 30 companies, including companies in the telecommunications, automotive, semiconductor and wireless industries. Together, FSA members own more than 300,000 patents, and spend more than \$100B in annual R&D. <http://www.fair-standards.org>.

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