

May 27, 2025

The Honorable Andrew N. Ferguson Chairman Federal Trade Commission 600 Pennsylvania Avenue, NW Washington, District of Columbia 20580

### RE: Comments of ACT | The App Association to the Federal Trade Commission on Reducing Anti-Competitive Regulatory Barriers relating to Standard-Essential Patents

Dear Chairman Ferguson:

ACT | The App Association ("App Association") appreciates the opportunity to submit comments regarding reducing anticompetitive regulatory barriers pursuant to Executive Order 14267.

The App Association is a global policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the global app ecosystem that engage with verticals across every industry. We work with and for our members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. App developers like our members also play a critical role in developing entertainment products such as streaming video platforms, video games, and other content portals that rely on intellectual property protections. The value of the ecosystem the App Association represents—which we call the app economy— is worth approximately \$1.8 trillion and responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution.<sup>1</sup>

While we do not identify a particular regulation to be anticompetitive, we acknowledge that key agency guidelines and powers should be targeted towards reducing anticompetitive barriers to innovation created by a minority of large and unchecked standard-essential patent (SEP) holders.

American innovation in emerging technology often involves the inclusion of consensusbased and industry-led technical standards, such as 5G and Wi-Fi. These standards have been applied to critical IoT and artificial intelligence (AI) solutions while impacting a broad range of industries, including automotives and healthcare. The goal of establishing

<sup>&</sup>lt;sup>1</sup> ACT | The App Association, State of the App Economy (2022), https://actonline.org/wpcontent/uploads/APP-Economy-Report-FINAL.pdf.



technical standards is to provide an efficient and interoperable base for technology developers to create new inventions across multiple market sectors. When patent holders choose to contribute their technologies to a technical standard, they understand and agree that their patents may be needed to enable reasonable access to the standard and provide standard-setting organizations (SSOs) with a commitment that they will license their SEPs on fair, reasonable, and non-discriminatory (FRAND) terms to balance the anticompetitive risks associated with standard setting. Therefore, by contributing to the standardization process, a SEP holder understands and agrees not to unduly exclude competitors from a standard past requiring a FRAND license.

The App Association maintains that the following principles underlay a universal understanding of the FRAND commitment:

- 1. **The FRAND Commitment means all can license –** A holder of a FRANDcommitted SEP must license that SEP to all companies, organizations, and individuals who use or wish to use the standard on FRAND terms.
- 2. Prohibitive orders on FRAND-committed SEPs should only be allowed in rare circumstances Prohibitive orders (including federal district court injunctions and U.S. International Trade Commission exclusion orders) should not be sought by SEP holders or allowed for FRAND-committed SEPs except in rare circumstances where monetary remedies are not available.
- 3. **FRAND royalties** A reasonable rate for a valid, infringed, and enforceable FRANDcommitted SEP should be based on the value of the actual patented invention itself to the smallest saleable patent practicing unit, which is separate from purported value due to that patent's inclusion in the standard, hypothetical downstream uses, or other factors unrelated to invention's value.
- 4. **FRAND-committed SEPs should respect patent territoriality** Patents are creatures of national law, and courts should respect the jurisdiction of foreign patent laws to avoid overreach with respect to SEP remedies. Absent agreement by both parties, no court should impose global licensing terms on pain of a national injunction.
- 5. **The FRAND commitment prohibits harmful tying practices –** While some licensees may wish to get broader licenses, a SEP holder that has made a FRAND commitment cannot require licensees to take or grant licenses to other patents not essential to the standard, invalid, unenforceable, and/or not infringed.



6. **The FRAND commitment follows the transfer of a SEP –** As many jurisdictions have recognized, if a FRAND-committed SEP is transferred, the FRAND commitments follow the SEP in that and all subsequent transfers.

#### I. SEP Licensing Abuse Is Harming the United States' Leading Patent System

The United States has the leading global patent system due to its strong emphasis on developing mechanisms that support innovation and foster competition and technological progress. Technical standards provide an alternative path to modern invention that differs from general exclusive patenting. The goal of establishing technical standards is to create an efficient and interoperable foundation for technology development that can be used by any industry participant who is willing and able to fairly compensate the relevant SEP holder. The SEP holder understands and agrees that, by contributing to the standardization process, it cannot unduly exclude competitors from a standard past requiring a FRAND license.

Some abusive SEP holders have distorted this system by taking advantage of SSO policies that have ambiguous definitions of FRAND to manipulate a fair licensing negotiation process by, for example, overcharging or refusing to license to certain entities in a supply chain. Since SSOs facilitate access to technical standards that touch various industries, these abusive SEP holders plague many verticals, always looking for the next market to extract additional and unrelated value for their SEP. The anticompetitive harms experienced in the SEP licensing ecosystem disrupt fair usage of technical standards that support efficient innovation.

#### II. Foreign Companies Use Their SEPs Against U.S. Companies

It has become increasingly evident that foreign SEP holders are able to harm U.S. businesses and U.S. consumers through SEP licensing disputes, extracting billions of dollars out of the U.S. economy. Companies such as Huawei, Nokia, Ericsson, and Abu Dhabi-backed Fortress Investment Group continue to use the U.S. International Trade Commission (ITC) and foreign courts against U.S. businesses that are locked-in to key technical standards (e.g., 5G and Wi-Fi).

The ITC provides foreign entities that hold U.S. patents with the opportunity to bypass equitable tests in U.S. courts that determine if an injunction is appropriate by providing an exclusion order as the sole remedy. Ericsson and Nokia are avid users of the ITC to initiate SEP disputes against American companies, including Amazon and Apple. Similarly, these entities have used foreign courts, including the newly established Unified Patent Court (UPC), to seek injunctions and apply pressure to U.S. companies that are willing to conclude a FRAND-encumbered SEP license.



Some of these foreign companies stack their SEPs for key technical standards in foreign patent pools that shield its members from individual FRAND obligations and disincentivize its members from licensing outside the highly inflated pool royalty rate. For example, Huawei holds a majority of the SEPs covering the 5G standard, which are licensed through the patent pool Sisvel. This pool often uses German courts, known to award injunctions prior to determining a patent's validity, to litigate their SEP disputes. These decisions have enabled (and emboldened) some foreign SEP holders to systematically abuse their dominant market position as a gatekeeper to the use of the standard to attain supra-FRAND terms (a practice known as hold-up<sup>2</sup>).

Where hold-up practices are stronger, U.S. inventors have less of an incentive to invest significant resources into patentable developments that are likely to be targeted by monetization schemes enforcing older, broader, and potentially invalid patents. While the U.S. patent landscape includes important mechanisms to combat issuing expansive patent claims and enables entities to challenge such patents post-issuance, many overly broad patents still exist and are ripe for abuse.<sup>3</sup> One recent example of this was revealed in a case between the State of Washington and patent troll Landmark Technology A, where internal litigation communications revealed bad faith licensing tactics, such as the targeting of nearly 1,200 different companies across 18 months using an extremely broad and likely enforceable patent, demanding \$65,000 in licenses fees.<sup>4</sup> Even without a credible threat of an injunction, many of the targeted small companies across diverse industries ultimately settled to avoid costly litigation fees.<sup>5</sup>

SEP licensing abuse is often supported by third-party litigation funding (TPLF), a mechanism used to abuse patent processes in the United States and internationally against U.S. companies. Non-practicing entities (NPEs) initiate a majority of the abusive and frivolous patent infringement suits in the United States<sup>6</sup> and many NPE suits are financially backed by unnamed investors hidden through shell corporations or wealth funds that may have a real interest in the outcome of litigation.<sup>7</sup> TPLF has affected critical U.S. technology industries, including telecommunication, automotives, and

<sup>&</sup>lt;sup>2</sup> Lemley, Mark A. and Shapiro, Carl, Patent Holdup and Royalty Stacking. 85 Texas Law Review 1991 (2007). <sup>3</sup> See 35 U.S.C. 101; see Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat.(2011).

<sup>&</sup>lt;sup>4</sup>See Declaration, State of Washington v. Landmark Technology A LLC, NO. 2:21-cv-00728-RSM (W.D. Wash 2022), ECF No. 97; see also Dani Kass, Law360, Wash. Urges Federal Court To Set Bad Faith Test For IP Cases (April 23, 2024), <u>https://www.law360.com/articles/1827562/wash-urges-federal-court-to-set-bad-faith-test-for-ip-cases</u>.

<sup>&</sup>lt;sup>5</sup> Office of the Attorney General of Washington, *AG Ferguson files lawsuit against "patent troll" targeting small businesses* (May 14, 2021), <u>https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-against-patent-troll-targeting-small-businesses</u>.

<sup>&</sup>lt;sup>6</sup> Love, Brian J. and Lefouili, Yassine and Helmers, Christian, *Do Standard-Essential Patent Owners Behave Opportunistically? Evidence from U.S. District Court Dockets* (November 8, 2020), 17, <u>https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/wp/2020/wp\_tse\_1160.pdf/</u>.

<sup>&</sup>lt;sup>7</sup> See In re Nimitz Technologies LLC, No. 23-103 (Fed. Cir. 2022); see also <u>https://www.unifiedpatents.com/insights/2023/2/21/litigation-investment-entities-the-investors-behind-the-curtain</u>.



semiconductors. Funders may be individual entities seeking economic gain or competing countries strategically undermining essential U.S. industries and U.S. national security. The availability of anonymous investment sources enables bad actors to flood adjudicating bodies with potentially illegitimate claims. Abu Dhabi-backed Fortress Investment Group has been identified numerous times as an undisclosed funder of patent holders initiating frivolous disputes in the United States.<sup>8</sup>

# III. China Has Empowered Its Domestic Businesses to Weaponize SEP Licensing Against American Companies

China has already demonstrated its willingness to weaponize the standards and intellectual property (IP) systems to disadvantage the American economy, national security, and American companies (e.g., its mandating the use of the WLAN Authentication and Privacy Infrastructure [WAPI] Chinese national standard to undermine Wi-Fi and restrict access to the Chinese market<sup>9</sup>). Recognizing how easily a SEP holder can make FRAND promises and then later obfuscate and disregard them, a growing number of companies—including those controlled by foreign adversaries, namely China—have turned SEP licensing into a business that, at its base, is predation of good faith American innovators and small companies who simply need to use standardized solutions to interoperate and compete. Unfortunately, many of their efforts have been successful. Today's framework of SEP laws and policies, both in the United States and abroad, allow foreign adversaries and their proxies that hold key SEPs to abuse their market position by, for example, enabling the locking out of U.S. competitors from entering entire markets.

The SEP licensor abuse playbook is well-practiced. SEP abuses that have taken place in telecommunications markets for well over 20 years are now finding their way into new verticals where connectivity is being built into consumer and enterprise products, such as automotive and medical. Such unchecked practices already translate to limited availability and higher prices for Americans (to the benefit of foreign adversaries and their proxies), undermining a core goal for the Trump-Vance Administration.

SEP abuses also represent one of the most glaring vulnerabilities to U.S. supply chains for critical and emerging technologies, presenting an economic and national security imperative. As a prime example, SEP licensing abuses are occurring in automotive supply chains where some SEP holders in wireless communication standards refuse requests for FRAND licenses from reasonable and willing licensees. Instead, the SEP abusers are arbitrarily insisting on licenses from the end product (the vehicle) in order to extract

<sup>&</sup>lt;sup>8</sup> https://news.bloomberglaw.com/business-and-practice/fortress-billions-quietly-power-americas-biggest-legal-fights.

<sup>&</sup>lt;sup>9</sup> https://actonline.org/2016/03/17/mobile-mythbusting-wifi-wapi-and-the-encryption-debate/.



unrelated value beyond the components that function from the SEP, leaving suppliers in supply chains unable to license their components and indemnify their customers against SEP infringement claims. The net result has been to introduce preventable uncertainties and disruptions to these supply chains, undercutting important safety and sustainability goals, as well as U.S. economic and national security interests. This result has forced manufacturers in mature supply chains, such as in the automotive industry, to revert to using earlier versions of wireless communications standards (e.g., 3G or 4G for telematic control units) and limit the number of alternative suppliers to choose from to support a resilient supply chain. Due to inaction by the Biden-Harris Administration, foreign adversaries and their proxies (such as state-controlled enterprises and strawman SEP pools) are well positioned to exploit and shut down U.S. supply chains.

Notably, courts in foreign markets are being leveraged to solidify controlling roles in critical U.S. supply chains. Disruptions to supply chains caused by SEP licensor abuse are being perpetuated by foreign courts, including in China, that have concluded that they can force a standards user to accept global FRAND terms on pain of a national injunction. The precedent set by such decisions has (1) emboldened Huawei to abuse their dominant market position in key telecommunication standards; and (2) encouraged other foreign SEP holders to similarly harm American economic and national security interests by excluding competitors and disrupting mature supply chains.

### IV. Government-Backed Chinese Enterprise Huawei Deploys Strategic Efforts to Corner and Exploit the Market for SEPs in Connectivity Standards

Founded in 1987, Huawei is a prominent company in the global telecommunications market for its sale of network equipment and devices, with demonstrated links to the Chinese government and military. Since 2000, Huawei's origins and behavior have given rise to serious national and economic security concerns for the U.S. government.<sup>10</sup> In 2019, the U.S. Department of Commerce added Huawei to its Entity List, a decision that effectively banned the company from buying parts and components from U.S. companies without U.S. government approval. As also noted by CRS, the first Trump Administration imposed, and the Biden Administration upheld, Huawei-related restrictions and tightened restrictions on sales of semiconductors for 5G devices.

Already holding more than 22,000 granted patents in the United States, Huawei has positioned itself as prominent aggressor against U.S. companies, including leading American telecommunications company Verizon. Notably, Huawei has transferred 766 3GPP-related patent assets to a new non-practicing entity that is publicly noting its intent to

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https://crsreports.congress.gov/product/pdf/R/R47012/2#:~:text=For%20more%20than%20two%20decades, its%20expansion%20globally%2C%20and%20the



target U.S. companies.<sup>11</sup> Huawei is a longtime abuser of the standards system by way of anticompetitive SEP licensing practices leveraged directly by the SEP holder or through patent pools. Huawei has demonstrated its willingness to target and pack critical standards like 5G (where it is the clear leading holder of claimed SEPs), positioning itself to exert disproportionate control over significant industries that incorporate connectivity into products.

Huawei has been front and center for many major international SEP disputes, including the United States:

- Huawei has targeted Tesla in SEP lawsuits in the United Kingdom where it has sought to have the UK courts impose global terms (including for the United States), even though only 7 percent of the relevant patents were UK patents.<sup>12</sup>
- Since 2022, Huawei has sued the Stellantis automotive group (Fiat, Opel, Peugeot, and Citroën) in the German court system alleging SEP infringement, significantly disrupting automotive supply chains.<sup>13</sup> Auto manufacturer Continental has detailed the impacts of SEP abuses on the industry.<sup>14</sup>
- Huawei has utilized the Munich division of the EU's newly-established Uniform Patent Court (UPC) to pressure American companies NETGEAR and Amazon into excessive licensing fees. The Munich division is particularly attractive to opportunistic SEP holders like Huawei for its tendency to apply a German approach to SEP disputes with the power to award an injunction that applies across 18 EU Member States.<sup>15</sup> NETGEAR was forced to sue Huawei in California federal court under a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim in response to Huawei's UPC suit weaponizing its SEPs to obstruct U.S.-based NETGEAR from complying with international standard.
- Huawei's established strategy includes weaponizing jurisdictions abroad where injunctions on SEPs can be improperly attained, <sup>16</sup> including Brazil where Huawei has already made 1,794 patent applications since 2018.<sup>17</sup>

The above examples are only what is known from public reporting, and Huawei's activities, emboldened by a lack of U.S. leadership in SEP/FRAND licensing policy, reach far deeper and wider. They are not publicly disclosed, however, because of the high percentage of

<sup>&</sup>lt;sup>11</sup> <u>https://www.iam-media.com/article/huawei-transfers-766-3gpp-related-patent-assets-new-npe.</u>

<sup>&</sup>lt;sup>12</sup> https://www.law360.co.uk/articles/2267824.

<sup>&</sup>lt;sup>13</sup> https://www.lexology.com/library/detail.aspx?g=b6466f6d-b998-4e85-a96c-de3e06da7719.

<sup>&</sup>lt;sup>14</sup> https://www.regulations.gov/comment/USTR-2023-0014-0040.

<sup>&</sup>lt;sup>15</sup> https://ipfray.com/new-huawei-v-netgear-filings-discovered-in-munich-and-upc-interim-conference-to-take-place-next-week-wifi-6-seps/.

<sup>&</sup>lt;sup>16</sup> <u>https://www.iam-media.com/article/inside-huaweis-americas-ipr-department.</u>

<sup>&</sup>lt;sup>17</sup> <u>https://www.iam-media.com/article/the-top-chinese-patent-holders-adding-brazil-their-strategic-maps.</u>



legal disputes that settle and because Huawei, like many other foreign SEP licensors, insist on overly broad non-disclosure agreements that prohibit revealing their abusive terms. Further, to shield itself from SEP abuses, Huawei has committed thousands of its SEPs to Sisvel SEP patent pools for key technology areas including Wi-Fi, cellular IoT, and others.<sup>18</sup> Sisvel, an EU-based patent pool operator, enables Huawei to separate itself from notorious SEP licensor abuses.

*Further background/critical information:* "From sanctions to success: Huawei's novel strategy – IP licensing" <u>https://www.fierce-network.com/wireless/sanctions-success-huaweis-novel-strategy-ip-licensing</u>.

V. The Federal Trade Commission Should Protect American Economic and National Security Interests Against Foreign Adversaries Like Huawei, Which Are Increasingly Abusing Their SEP Holder Positions to Exclude Competitors and Disrupt Key Supply Chains in Order to Further the Interests of Foreign Adversaries

The Federal Trade Commission (FTC) has the means to deter SEP-related threats to American economic and national security, and should take the following steps:

- 1. Enforce the Agency's Section 5 Authority against anticompetitive SEP licensing practices. The FTC has used its stand-alone Section 5 authority in the past to challenge anticompetitive demands for exclusion orders and injunctive relief by the holders of FRAND-committed SEPs. In particular, the FTC has noted the imbalanced power dynamic between a SEP holder and potential licensee when prohibitive orders are sought and the downstream impact of increased royalty demands on American consumers.<sup>19</sup> FRAND royalties are based on the intrinsic value of the patented technology, not the cost of market exclusion. The FTC should use Section 5 to reinforce key case law, such as the U.S. Supreme Court's *eBay v*. *MercExchange* ruling, which limits injunctions to protect U.S. innovation from badfaith patent holders. Therefore, a SEP holder's refusal to license a voluntarily FRAND-committed SEP to a willing licensee may violate Section 5 of the FTC Act. The FTC has an important role to invoke Section 5 against competition abuses that threaten U.S. business' participation in technology standards and consumer welfare. In this context, such examples include:
  - a. A SEP holder intentionally deceiving a SSO by promising to license on FRAND terms and then refusing to comply with that obligation violates Section 2 of the Sherman Act. For example, in *Broadcom Corp. v. Qualcomm Inc.*, allegations of "the intentional false promise that Qualcomm would license its WCDMA technology on FRAND terms, on which promise the relevant SDOs

<sup>&</sup>lt;sup>18</sup> <u>https://www.sisvel.com/news/huawei-joins-sisvel-cellular-iot-patent-pool/</u>.

<sup>&</sup>lt;sup>19</sup> <u>https://www.law360.com/articles/2323832/unpacking-ftc-s-new-stance-on-standard-essential-patents</u>.



relied in choosing the WCDMA technology for inclusion in the UMTS standard, followed by Qualcomm's insistence on non-FRAND licensing terms" satisfied a claim under Section 2 of the Sherman Act.<sup>20</sup>

- b. A SEP holder's refusal to license a voluntarily FRAND-committed SEP to a willing licensee may violate Section 5 of the FTC Act. Applying Section 5 to licensing practices is not a novel concept. The 2017 IP Licensing Guidelines already reference other practices that may constitute Section 5 violations.<sup>21</sup>
- c. A SEP holder demanding licenses without providing necessary information for the potential licensee to evaluate patent validity, essentiality, and enforceability of a voluntarily FRAND-committed SEP may violate Section 5. Providing necessary information to a potential licensee is particularly important because recent studies show that SEP owners over-declare their patent portfolio's essentiality and validity to increase royalty rates. For example, a 2022 study of SEPs noted that because large portfolios tend to command larger royalties, "[p]atent owners...have an incentive to over-declare, and it is widely accepted that many declared essential patents are not, in fact, essential." <sup>22</sup> In addition, several studies of patents tested for validity in court found that a substantial number of patents were invalidated.<sup>23</sup> Not providing necessary information to evaluate validity, essentiality, and enforceability may lead to

 <sup>&</sup>lt;sup>20</sup> 501 F.3d 297, 315–16 (3d Cir. 2007; see also *Microsoft Mobile Inc. v. Interdigital, Inc.*, No. CV 15-723-RGA, 2016 WL 1464545, at \*2 (D. Del. Apr. 13, 2016); *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 793, 796 (N.D. Tex. 2008); *Apple Inc. v. Samsung Elecs. Co.*, 2012 WL 1672493, at \*4–7 (N.D. Cal. May 14, 2012).

<sup>&</sup>lt;sup>21</sup> See Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property, at 35 (2017).

<sup>&</sup>lt;sup>22</sup> See Hayes et al., *A Critical Review of 5G SEP Studies*, Charles River Associates, at 1 (2022), <u>https://media.crai.com/wp-content/uploads/2022/11/09132755/Critical-Review-of-5G-SEP-Studies\_Nov-2022.pdf</u>.

<sup>&</sup>lt;sup>23</sup> See Joachim Henkel & Hans Zischka, *How Many Patents are Truly Valid?* 48 European J. L. and Econ. 195, 228 (2019). See also Matthew G. Rose, Jay Jurata, & Emily Luken, *"Between a Rock and a Hard Place"*: *Unwired Planet v. Huawei and the Dangerous Implications of Worldwide FRAND Licenses*, E-COMPETITIONS, NO. 84684, at 6 (Aug. 2017) (finding only 11% of SEPs asserted in the U.S. were found to be valid and infringed); Jay Jurata & David Smith, *Turning the Page: The Next Chapter of Disputes Involving Standard-Essential Patents*, CPI Antitrust Chron., at 5 (Oct. 2013) (finding "only 1 of every 8 SEPs tested in court has, in fact, been valid and technically essential to practice the standard.").



hold-up during negotiations due to asymmetries in knowledge about the patents.<sup>24</sup>

- d. Seeking an injunction or other exclusionary relief (e.g., an ITC exclusion order) under a voluntarily FRAND-committed SEP against a willing licensee may violate Section 5 of the FTC Act. SEP injunction threats against willing licensees by patent holders who have voluntarily committed to license their SEPs on FRAND terms may harm competition. Settlements made under threat of injunction lead to above-FRAND royalties, which may result in increased cost to consumers, decreased innovation, and market exit. And uncertainty about the possibility of injunctive relief distorts the competitive process by increasing the risk of product development and standards adoption.<sup>25</sup>
- 2. Update the Department of Justice and FTC (collectively the Agencies) Antitrust Guidelines for the Licensing of Intellectual Property to ensure SEP holders' voluntary FRAND commitments to SSOs have a real and practical effect on SEP licensing practices, thus avoiding the significant competition concerns that arise when competitors collaborate during the standard-setting process, thereby reducing competition from alternative technologies and providing SEP holders with

<sup>24</sup> See Bekkers et. al, Overcoming inefficiencies in patent licensing: A method to assess patent essentiality for technical standards, 51 Res. Pol'y 104590, at 5 (2022), <a href="https://doi.org/10.1016/j.respol.2022.104590">https://doi.org/10.1016/j.respol.2022.104590</a> ("The widespread occurrence of SEP over-declaration creates significant inefficiencies in the market for SEPs. This seems at least partially driven by information asymmetry: owners of (potential) SEPs usually have intimate knowledge about their own patented inventions and whether they are likely to be essential or not. Implementors, on the other hand, are confronted with dozens of SEP holders with thousands of patents, and typically have limited or no knowledge about the details of individual patents claiming to be SEP.... Asymmetric information and associated uncertainties hamper licensing negotiations for SEPs and invite opportunistic behaviour.").

<sup>25</sup> See also Fed. Trade Comm'n, Statement of the Federal Trade Commission In the Matter of Robert Bosch GmbH, at 2 (2013),

https://www.ftc.gov/sites/default/files/documents/cases/2013/04/121126boschcommissionstate ment.pdf (expressly noting that "SPX committed to license its SEPs on FRAND terms. In doing so, we have reason to believe SPX voluntarily gave up the right to seek an injunction against a willing licensee."); Fed. Trade Comm'n, *Statement of the Federal Trade Commission In the Matter of Google Inc.*, at 2 (2013),

https://www.ftc.gov/sites/default/files/documents/cases/2013/01/130103googlemotorolastmtofc omm.pdf (explaining how threats of exclusion may harm innovation and lead to higher prices for consumers).





hold-up leverage in subsequent licensing negotiations. These guidelines were last updated in 2017, and since then the SEP licensing landscape has seen new competition concerns. By publishing revised IP licensing guidelines providing more clarity on licensing practices for FRAND-committed SEPs:

- a. The agencies could clarify that injunctive relief (including in the form of ITC exclusion orders) should be the exception and not the default remedy in SEP/FRAND disputes involving patent holders who have voluntarily but irrevocably agreed to accept FRAND royalties for their SEPs rather than seek to exclude market participants.<sup>26</sup>
- b. The agencies could also clarify the competition standards that apply to SEP patent pools, thus contextualizing and cautioning against an overreading of the DOJ's Business Review Letter regarding Avanci's 5G licensing program.<sup>27</sup>
- c. The agencies could emphasize that standards with royalty-free IPR policies can provide a welcome alternative to royalty-bearing standards, increasing competition amongst standards and lowering consumer costs.

#### VI. Conclusion

We appreciate the opportunity to provide detailed comments to the FTC regarding anticompetitive regulatory barriers. There is an urgency in addressing anticompetitive SEP licensing tactics now as much of the global economy now depends on wireless technologies, and anticompetitive behaviors have real consequences from lost revenue to stalled innovation for U.S. businesses.

Sincerely,

<sup>&</sup>lt;sup>26</sup> As DOJ recognized in 2015, limiting injunction threats as to voluntarily FRAND-committed SEPs decreases "the possibility that a patent holder will take advantage of the inclusion of its patent in a standard to engage in patent hold up and provides comfort to implementers in developing their products." See Letter from The Hon. William J. Baer, Assistant Att'y Gen., U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP, at 9 (Feb. 2, 2015) <a href="https://www.justice.gov/atr/page/file/1386871/dl?inline">https://www.justice.gov/atr/page/file/1386871/dl?inline</a> (Business Review Letter response on IEEE's proposed update regarding commitments on SEPs).

<sup>&</sup>lt;sup>27</sup> The FTC and DOJ have also stated that patent pools are less likely to be anticompetitive if they enable pool owners to license individually outside of the pool. See, e.g., Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div. U.S. Dep't of Justice, to Mark H. Hamer, Partner, Baker & McKenzie, at 12 (July 28, 2020) ("Pooling or platform licensing has the potential to harm competition in a number of ways, for example, by facilitating price-fixing, market division, or creating unlawful tying arrangements. Certain safeguards can minimize these risks. They include ... permitting independent licensing outside the pool....").



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