

No. 2025-2015

United States Court of Appeals
for the Federal Circuit

ROKU, INC.,
Plaintiff-Appellant,

v.

ACCESS ADVANCE LLC, DOLBY LABORATORIES, INC. (DELA-
WARE), DOLBY LABORATORIES, INC. (CALIFORNIA), DOLBY IN-
TERNATIONAL AB, DOLBY LABORATORIES LICENSING CORPO-
RATION, DOLBY VIDEO COMPRESSION, LLC, SUN PATENT
TRUST,
Defendants-Appellees

On Appeal from the United States District Court for the District of
Massachusetts in No.1:24-cv-13217-RGS, Judge Richard G.
Stearns

**BRIEF OF ACT | THE APP ASSOCIATION'S MOTION IN SUP-
PORT OF NEITHER PARTY**

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October 27, 2025

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for amici certifies that:

1. The full name of the party that I represent is ACT | The App Association.
2. There are no real parties in interest of the parties that I represent.
3. There are no parent corporations or publicly held companies that own ten percent or more of the stock of the party that I represent.
4. No other law firms, partners, or associates who have not entered an appearance in this appeal either appeared for the parties that I represent in the originating court or are expected to so appear in this Court.
5. I do not know of any case in this or any other court or agency that will directly affect or be directly affected by this Court's decision in this case.
6. No disclosure regarding organizational victims in criminal cases or debtors or trustees in bankruptcy cases is required under Fed. R. App. P. 26.1(b) or (c).

October 27, 2025

/s/ Brian Scarpelli

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<i>Ericsson, Inc. v. D-Link Sys., Inc.</i> , 773 F.3d 1201 (Fed. Cir. 2014) ..	8, 10
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<i>Panasonic Holds. Corp. v. Xiaomi Tech. UK Ltd.</i> , [2024] EWHC 1733 (Pat) ¶ 82 (Eng.)	22
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<i>Tesla Inc. v. Idac Holdings, Inc.</i> , Claim No. HP-2023-0042 [2024] EWHC Pat (oral arg., May 20-22, 2024)	31

Other Authorities

- A. Doug Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 Yale L.J. 2110 (2018). 12
- ACT | The App Association, *Feedback Regarding the Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines* (Apr. 25, 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14478-EU-competition-rules-on-technology-transfer-agreements-revision-/F3538144_en..... 34
- Alex Moss & Michael A. Carrier, *Letter from Former Government Officials, Professors, & Academics to DOJ regarding Avanci Business Review Letter* (October 17, 2022), <https://ssrn.com/abstract=4250512>. 35
- Angela Morris, *Patent Pool Administrator Calling for 3D Audio Licensors*, IAM (Jan. 9, 2025) <https://www.iam-media.com/article/patent-pool-administrator-calling-3d-audio-licensors>..... 30
- Benno Bühler, Dominik Fischer & Bernhard Ganglmair, *Equilibrium Effects of the Availability of Injunctions in Standard-Essential Patent Licensing* (SSRN Working Paper, Jan. 26, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390411. 12
- Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014 O.J. (C 89) 3. 33
- Core Principles and Approaches for Licensing of SEPs*, CEN-CENELEC CWA 95000, <https://tinyurl.com/2wepm8yh>. 7
- David J. Teece & Edward F. Sherry, *A Public Policy Evaluation of RAND Decisions in the U.S. Courts*, 1 CRITERION J. ON INNOVATION 113 (2016), available at <https://tinyurl.com/4mt4xpwn>. 26

European Commission, <i>Commission Staff Working Document – Impact Assessment Report</i> (Apr. 27, 2023, https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en).	4
Expert Report of Friedhelm Hillebrand, C.A. No. 2330-VCS (Del. Ch. May 22, 2008), filed as ECF 359-2 in <i>Nokia Corp. v. Apple Inc.</i> , No. 1:09-cv-00791-GMS (D. Del. May 16, 2011)	10
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Fed. Trade Comm’n., <i>Analysis of Agreement Containing Consent Orders to Aid Public Comment</i> , ‘ <i>In re Robert Bosch GmbH</i> ,’ File No. 121-0081, Dkt. No. C-4377 (Apr. 23, 2013)	21
Joachim Henkel, <i>Licensing Standard-Essential Patents in the IoT</i> , 51 Rsch. Pol’y 1 (2022).	4
John “Jay” Jurrata, Jr. & Emily N. Luken, <i>Glory Days: Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?</i> , 58 SAN DIEGO L. REV. 417 (2021).	35
John Hayes & Assaf Zimring, <i>Injunctions in Litigation Involving SEPs</i> , 6/2024 GRUR Patent 240 (June 20, 2024), https://tinyurl.com/3dajevn4 .	11
John Hayes et al., Charles Rivers Assocs., <i>A Critical Review of 5G SEP Studies</i> at 6 (Nov. 8, 2022)	14
Knutt Blind, <i>Standards and Innovation: What Does the Research Say?</i> , ISO Rsch. & Innovation Papers (Jan. 2022), https://www.iso.org/files/live/sites/isoorg/files/store/en/PUB100466.pdf .	2
Letter from Joel I. Klein, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Carey R. Ramos, Esq., re: DVD 6C Patent Pool (June 10, 1999).	32

Letter from Joel I. Klein, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Garrard R. Beeney, Esq., re: DVD 3C Patent Pool (Dec. 16, 1998).	32
Mark A. Lemley & Timothy S. Simcoe, How Essential are Standard-Essential Patents?, 104 CORNELL L. REV. 607 (2019) available at https://tinyurl.com/y2xs33e5	28
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Nicole-Anne Lagrimas, <i>Via LA’s Licensing Partner ULDAGE Sets Out to Crack Japan’s EV Charging Market</i> , IAM. (Mar. 12, 2025) https://www.iam-media.com/article/las-licensing-partner-uldage-sets-out-crack-japans-ev-charging-market	30
Nisha Shetty, <i>Surge of Recent Lawsuits Filed by SEP Licensors Connected to Patent Pools</i> , IAM (Sept. 27, 2024) https://www.iam-media.com/article/surge-of-recent-lawsuits-filed-sep-licensors-connected-patent-pools	29
Nisha Shetty, <i>Unpacking the Spike in Patent Pool-Related Litigation</i> , IAM (Oct. 4, 2024) https://www.iam-media.com/article/unpacking-the-spike-in-pool-related-litigation	29
Raphael De Coninck, Christoph von Muellern, et al, <i>SEP Royalties, Investment Incentives and Total Welfare</i> , Charles River Associates prepared for Fair Standards Alliance.	3
Robert Pocknell, <i>Buying and Selling Smart Devices: SEP Licenses and Competition Law</i> (Mar. 25, 2024)	15
Rudi Bekkers et al, <i>Disclosure Rules and Declared Essential Patents</i> , 52(1) Res. Pol’y 104618 at 3 (2023).	14
Thomas Cotter, Erik Hovenkamp & Norman Siebrasse, <i>Demystifying Patent Holdup</i> , 76 Wash & Lee L. Rev. 1501, 1527–29 (2019).	5

U.S. Dep’t of Justice, Antitrust Div., Response to the Avanci LLC’s Request for a Business Review Letter (July 28, 2020).....	33
U.S. Dep’t of Justice, <i>Business Review Letter to Messrs. Bruce H. Turnbull & Matthew A. Brigham re: MPEG-2 Patent Pool</i> (June 26, 1997), https://www.justice.gov/atr/response/business-review-letter-mpeg-2-patent-pool	31
World Intell. Prop. Org., Patent Pools and Antitrust – A Comparative Analysis 3 (2014).....	29, 30

INTEREST OF AMICI CURIAE¹

ACT | The App Association (“App Association”) is a not-for-profit policy trade association for the small business technology developer community. Our members are entrepreneurs, innovators, and independent developers within the app ecosystem that engage with verticals across every industry. The value of the ecosystem the App Association represents—which we call the app economy—is approximately \$1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the \$8 trillion internet of things (IoT) revolution. Our members lead in developing innovative applications and products across consumer and enterprise use cases, driving the adoption of IoT.

¹ No counsel for any party wrote any part of this brief. No party other than amicus curiae’s members contributed money that was intended to fund the preparation or submission of this brief. This brief is accompanied by a motion seeking leave to file. Plaintiff-Appellant has consented to this filing, while Defendants-Appellees have indicated they do not oppose this motion.

ARGUMENT

I. Small Businesses Depend on Fair and Predictable SEP Ecosystems

Technical standards allow manufacturers to produce interoperable equipment by defining common protocols and specifications. Standards are ubiquitous in the modern world. In addition to the codecs at issue in this case, they also include technology like 5G, Wi-Fi, and Bluetooth. Standards reduce the need for direct coordination during the product development process because each participant can design products around the agreed-upon specifications. Standards are developed by standard setting organizations (SSOs) which involve broad collaboration from industry stakeholders who work to identify and solve technical challenges necessary to establish uniform interoperability and product compatibility.

Standardization is particularly effective when an industry-wide uniform solution offers greater benefits than rapidly evolving, non-compatible technologies. In situations where the cost of frequent upgrades is high, and the advantages of such upgrades are limited, a stable, standardized foundation tends to serve the market more

effectively.² In such cases, the value of the technology is significantly enhanced by the positive network externalities created through standardization—on its own, a given technology may have little standalone utility.³ By agreeing on these shared specifications, companies can spread the cost of establishing the standard across an industry while mitigating the risk of it not being adopted and reducing redundant development efforts that would arise from parallel development of competing proprietary solutions.⁴

Although the adoption of a standard can slow certain aspects of “upstream” innovation—since radical or non-backward-compatible changes become more cumbersome—it frequently triggers significant “downstream” innovation among manufacturers who compete to utilize that standard.⁵ Lower switching costs for consumers mean that they can more easily compare and migrate to products offering the best mix of quality, features, and price. As a result,

² See Knutt Blind, *Standards and Innovation: What Does the Research Say?*, ISO Rsch. & Innovation Papers at 8 (Jan. 2022), <https://www.iso.org/files/live/sites/iso-org/files/store/en/PUB100466.pdf>.

³ See *id.* at 9.

⁴ See *id.*

⁵ See *id.* at 8

manufacturers must continuously innovate in non-standardized features to differentiate themselves from rivals. This competitive dynamic drives substantial innovation in areas such as product design, user experience, and cost efficiency—outweighing the potential (and acceptable) impact on innovation of the technology underlying the standard.⁶ Over time, the result is a healthier market ecosystem where interoperability, consumer choice, and sustained innovation all thrive.

Small businesses, including those the App Association represents, are particularly dependent on the widespread availability of standards on reasonable terms for implementation. These entrepreneurs, innovators, and developers can incorporate standardized features in their products by purchasing off-the-shelf modules without the need to design these components themselves or develop internal expertise in these technologies. Instead, they can dedicate their R&D resources to developing the unique features that set their

⁶ Raphael De Coninck, Christoph von Muellern, et al, *SEP Royalties, Investment Incentives and Total Welfare* at 3-4, Charles River Associates *prepared for* Fair Standards Alliance.

products apart and bring them to market more swiftly.⁷

This is particularly true in the context of IoT products, which are typically specialized devices designed to focus on one or two distinctive and innovative features.⁸ Small business developers often have a competitive advantage in this area because they can develop these specialized and innovative products without the costly overhead and infrastructure of larger organizations.

A. The Importance of the FRAND Commitment in Standardization

Despite the benefits of standardization, adopting standardized technology creates risks. Once a company develops and begins to sell a product with a standardized feature, it typically becomes costly to abandon the standard. This is especially true if the standard has been widely adopted by an industry, leaving no alternative solutions, as is the case with communications standards

⁷ European Comm’n., *Commission Staff Working Document – Impact Assessment Report* at 20 (Apr. 27, 2023), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en. (hereinafter *Impact Assessment Report*).

⁸ See Joachim Henkel, *Licensing Standard-Essential Patents in the IoT*, 51 Rsch. Pol’y 1, 2 (2022).

such as cellular and Wi-Fi.⁹ This phenomenon, known as “lock-in,” can make companies that market standard compliant products susceptible to “hold-up.” Hold-up occurs when owners of the patented technologies essential to the standard—SEPs—use the threat of injunctive or exclusionary relief against locked-in manufacturers to extract unreasonable and excessive royalties. The risk of SEP hold-up can not only discourage companies from adopting standards but can also undermine many of the benefits standardization is intended to provide: it can increase costs for consumers, hinder innovation, and disadvantage small businesses.

To address this risk, many SSOs have developed intellectual property rights (“IPR”) policies that require patent holders that voluntarily participate in the standard-setting process to make a binding commitment to license their SEPs on terms that are fair, reasonable, and non-discriminatory (FRAND).¹⁰ Many standards,

⁹ Thomas Cotter, Erik Hovenkamp, & Norman Siebrasse, *Demystifying Patent Holdup*, 76 Wash & Lee L. Rev. 1501, 1527–29 (2019).

¹⁰ Some standard setting development—like the International Telecommunications Union, which developed the standards at issue use in this case—use reasonable and non-discriminatory, or RAND, as the basis of their intellectual property policy. Despite the difference in terminology, they are considered functionally equivalent.

like USB and Bluetooth, operate under royalty-free frameworks, where manufacturers either pay nothing or a flat administrative fee to use the features of the standard in their devices. For other standards, SEP holders may charge royalties for use of their patented technology under the condition that their licenses comply with their FRAND commitments.

Ensuring the integrity of the FRAND commitment is paramount as industries implement connectivity technologies like 5G and Wi-Fi into their products. “According to recent ... estimates, some 25–30 billion devices in the home and workplace will be equipped with sensors, processors and embedded software....”¹¹ “For proper market functioning as the connected economy develops, it will be critical to all market actors that FRAND licensing practices are followed and that abusive assertions are prevented.”¹²

The FRAND commitment is particularly important for businesses developing new products. These companies must assess the costs and benefits of incorporating a particular standard early

¹¹ *Core Principles and Approaches for Licensing of SEPs* at 19, CEN-CENELEC CWA 95000, <https://tinyurl.com/2wepm8yh>.

¹² *Id.* at 20.

in the product development cycle, and it is critical that they have a sense of what their SEP licensing costs will be. The FRAND commitment is meant to give some foreseeability by providing a promise that the ultimate terms will be fair, reasonable, and non-discriminatory and not be extracted under the existential threat of market exclusion. However, in practice, that is not the case.

B. The Imbalances in SEP Licensing

The FRAND commitment, as its name specifies, requires SEP holders to license their patents on terms that are fair, reasonable, and non-discriminatory. A FRAND rate “should reflect the approximate value of [the SEP’s] technological contribution, not the value of its widespread adoption due to standardization.”¹³ The “royalty rate must reflect the value attributable to the infringing features of the product, and no more.”¹⁴

¹³ *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1233 (Fed. Cir. 2014); see also Eur. Comm’n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (Jul. 21, 2023), at ¶ 460 (“The economic value of the IPR could be based on the present value added of the covered IPR and should be irrespective of the market success of the products, which is unrelated to the patented technology.”).

¹⁴ *Id.*

Despite this, some SEP holders demand royalties many times higher than the rates that courts ultimately adjudicate to be FRAND.¹⁵ Their ability to pursue these royalties is due to significant asymmetries that give licensors a significant advantage in negotiations, which allow them to extract above-FRAND royalties. Notably, the power to threaten and obtain injunctions gives SEP holders significant coercive power over potential licensees. Moreover, the informational asymmetry between licensors and licensees amplifies this risk by making it exceedingly costly to negotiate with an aggressive SEP licensor.

1. How Injunctions Allow SEP Holders to Extract Above-FRAND Royalties

Injunctions can present an acute problem in the context of SEP licensing. “When a technology is incorporated into a standard,

¹⁵ See, e.g., *In re Innovatio IP Ventures, LLC Patent Litig.* 11-C-9308, 2013 WL 5593609, at *43 (N.D. Ill. Oct. 3, 2013) (finding a RAND royalty of \$0.0956 per unit as compared to the demand of \$16.17 per unit for tablet computers); *Microsoft Corp. v. Motorola Inc.*, C10-1823JLR, 2013 WL 2111217, at *99–100 (W.D. Wash. Apr. 25, 2013) (finding a FRAND rate of \$0.03471 per unit compared to initial demands of \$6–8 per unit); *Optis Cellular Tech. LLC v. Apple Inc.* [2023] EWHC 1095 (Ch) ¶¶ 342, 467(iv), 494 (May 10, 2023) (finding the FRAND rate was less than 2% of the rate demanded).

it is typically chosen from among different options.”¹⁶ Once a patent becomes essential to a standard, those alternatives become unavailable for manufacturers seeking to adopt the standard. The inability of manufacturers to walk away means that injunctions and the threat of injunctions give SEP holders significant leverage.

Given that standards are frequently used in multi-functional devices and that standards frequently contain thousands or tens of thousands of patent families that have been declared essential, the cost of market exclusion can be orders of magnitude greater than the value attributable to the SEP. As a result, potential licensees faced with the prospect of an injunction are under substantial pressure to enter into licenses at above-FRAND royalties.¹⁷ This pressure is particularly acute for smaller companies who cannot afford to engage in costly litigation. Above FRAND royalties paid for SEPs

¹⁶ *D-Link*, 773 F.3d at 1233; see also Expert Report of Friedhelm Hillebrand at 7 ¶ 11, C.A. No. 2330-VCS (Del. Ch. May 22, 2008), filed as ECF 359-2 in *Nokia Corp. v. Apple Inc.*, No. 1:09-cv-00791-GMS (D. Del. May 16, 2011) (noting that in “nearly all cases,” the European Telecommunications Standards Institute (ETSI) had choices during the development of the GSM and UMTS standards).

¹⁷ John Hayes & Assaf Zimring, *Injunctions in Litigation Involving SEPs*, 6/2024 GRUR Patent 240, 242–43 (June 20, 2024), <https://tinyurl.com/3dajevn4>.

may ultimately be passed on to consumers through higher prices or reduced investment in R&D.¹⁸

Despite the prohibition of injunctive relief, many SEP holders frequently pursue the remedy and, in certain foreign jurisdictions, frequently obtain it. SEP injunctions are routinely used to pressure implementers into accepting supra-FRAND terms.¹⁹ This reality makes the role of courts in enforcing FRAND remedies indispensable to neutralize hold-up and preserve competitive access to standards across jurisdictions.

2. How the Information Asymmetry in SEP Negotiations Advantages Licensors

¹⁸ See, e.g., Fed. Trade Comm’n., *Analysis of Agreement Containing Consent Order to Aid Public Comment*, at 3 (June 10, 2005), <https://tinyurl.com/y5b53m6e>. (“According to Unocal’s own expert, approximately 90 percent of this royalty charge is likely to be passed on to California consumers” in a case involving SEP ambush); A. Doug Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 Yale L.J. 2110, 2114 (2018).

¹⁹ Benno Bühler, Dominik Fischer & Bernhard Ganglmair, *Equilibrium Effects of the Availability of Injunctions in Standard-Essential Patent Licensing* (SSRN Working Paper, Jan. 26, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4390411.

In addition to the problem of injunctions, SEP licensing faces significant problems arising from an informational asymmetry. The asymmetry affords licensors a significant advantage that is ripe for and frequently abused. Licensors are well situated to assess the value of their portfolios, while licensees are not.²⁰ And this asymmetry is a global problem. As the Commission has found, 100% of licensees reported insufficient information about FRAND royalties and 97% reported insufficient information about the SEP landscape, while only a small fraction of SEP licensors claimed the same.²¹

This asymmetry is amplified by several factors:

- The SSOs that develop many standards, including Wi-Fi, do not require SEP holders that commit to FRAND licensing to disclose which of their patents they believe are essential.²² This lack of disclosure makes it difficult for licensees to estimate the share of

²⁰ Impact Assessment Report, at 36.

²¹ *Id.*

²² Rudi Bekkers *et al*, *Disclosure Rules and Declared Essential Patents*, 52(1) Res. Pol'y 104618 at 3 (2023).

the standard held in a licensor's portfolio or their potential total licensing liability for using the standard.

- For many standards, the vast majority of patents declared essential to the standard are not actually essential. Essentiality rates can vary significantly from portfolio to portfolio, and the cost of evaluating large portfolios can be prohibitively expensive.²³
- SEP portfolios often have significant rates of invalid patents when actually litigated.²⁴
- Royalty demands by SEP licensors often exceed the actual market rate, and smaller companies typically lack both access to the licensor's other licenses agreements and adequate experience to make their own FRAND estimations.²⁵

²³ See John Hayes et al., Charles Rivers Assocs., *A Critical Review of 5G SEP Studies*, at 6 (Nov. 8, 2022) (noting studies have found SEP essentiality range from 8–33%), https://media.crai.com/wp-content/uploads/2022/11/09132755/Critical-Reviewof-5G-SEP-Studies_Nov-2022.pdf.

²⁴ Matthew Rose, Jay Jurata, & Emily Luken, “*Between a Rock and a Hard Place*”: *Unwired Planet v. Huawei and Dangerous Implications of Worldwide FRAND Licenses*, Concurrences No. 84684 at 6 (2017).

²⁵ See Robert Pocknell, *Buying and Selling Smart Devices: SEP Licenses and Competition Law* (Mar. 25, 2024), <https://www.keystonelaw.com/keynotes/buying-and-selling-smart-devices-sep-licenses-and-competition-law>.)

As a result of these factors, licensees' ability to estimate the aggregate royalty burden from using a standard and evaluate the value of an individual SEP portfolio can be incredibly expensive. Licensees typically do not need to make the former investment, while companies seeking to use the standard do. And while SEP holders only need to make the upfront investment cost in evaluating the value (and weaknesses) of their portfolio once, potential licensees are required to make this expenditure for every license negotiation. "[I]f a company (even a large one) is implementing the standard by using a component supplied by a third party, it will most likely have no knowledge of the relevant technology and must engage external experts to assist in the assessment of the royalty demand."²⁶ This ultimately affords SEP more leverage in negotiations by driving up the costs for licensees.

C. The Impact of Power Imbalances in SEP Licensing on Small Businesses and Emerging Industries

These asymmetries pose a particularly significant problem for the SMEs (such as the App Association's members) who typically

²⁶ Impact Assessment Report at 20.

source their standard implementing components from third parties and lack both the resources and experience needed to negotiate or litigate for FRAND terms. Indeed, 38% of SEP users reported that the “costs involved in licensing SEPs (search, negotiation and litigation costs)” for SMEs was enough to make them “go out of business/change business.”²⁷ In a recent study based on interviews with small and medium sized companies utilizing standards, participants reported how these transaction costs make SEP licensing negotiations unaffordable:²⁸

- “[I]t is for startups ... impossible to find one’s way in this jungle. Because for example I completely lack transparency as to which patents the technology of [the] modem in my device actually uses.”
- “[A]s a startup, ... as a small company, I have no way really of evaluating the legal validity of what [licensors] say or not. I have no way of knowing is this reasonable, or not reasonable when they actually say how much money they want, I have no idea

²⁷ *Id.* at 15.

²⁸ Joachim Henkel, *Licensing Standard-Essential Patents in the IoT*, 51 *Rsch Pol’y* 1, 6–7 (2022).

whether it is the same as anybody else or it's specific to me, is that fair, there is no way of judging. So I have no way of actually evaluating their request on any kind of merit.”

- “[By trying to evaluate a licensing offer] I would only delay my own innovation of the time to market and add a lot of cost I cannot afford to pay.”
- “[F]or a startup, it's a substantial expense to get educated, because they'll have to reach out for expertise.... It's a cost that you didn't plan for. It's also a liability that your financier may not appreciate....”
- “[C]ourt arbitration and legal proceedings are not an option for small companies . . .
- “[T]here is no way for us to fight it, we are too small to take on a large organization....”

Avoiding the cost of meaningful negotiations and litigation by acceding to SEP holders' demands can be detrimental to both the targeted small business and the market as a whole. Without the ability to meaningfully negotiate or litigate, small businesses often pay significantly more (on a per unit basis) than large licensees who have the resources and expertise to engage with SEP holders. In a

recent case decided in the United Kingdom, the court observed that the only companies who paid the licensor’s published “program rate” were “the smallest and least sophisticated licensees.”²⁹ Another UK judge commented that “no implementer could stay in business paying [the licensor’s] rates.”³⁰

In many cases, SEP holders target smaller companies for reasons other than generating revenue, given that the transaction costs “dwarf[]” the licensing revenue generated by the agreement.³¹ For example, in *Koninklijke KPN N.V. v. Bullitt Group Ltd.*, KPN engaged one of the most profitable law firms in the United States on a per-lawyer basis to assert its SEPs in federal court, even though the amount in controversy at its demanded rate was no more than \$1,080.³² Instead, the likely purpose of these endeavors is to obtain agreements at above-FRAND rates to “produce comparable [license

²⁹ *InterDigital Tech. Corp. v. Lenovo Group Ltd.* [2023] EWHC 539 (Pat) ¶ 516 (Mar. 16, 2023).

³⁰ *Optis Cellular Tech. LLC v. Apple Inc.* ¶ 467(iv) [2023] EWHC 1095 (Ch) (May 10, 2023).

³¹ *Id.* at ¶ 398(iii)(b)(iv).

³² Defendant’s Motion for Separate Trial Pursuant to Fed. R. Civ. P. 42, Exhibit 1 at 2, Case No. 21-CV-44, ECF No. 22-1 (D. Del. Aug. 26, 2021).

agreements] that would assist” in licensing disputes with larger companies.³³

II. The Need to Stop FRAND Evasion

“[T]he concept of FRAND has been developed in an attempt to limit the ability of SEP holders to abuse their market power and to provide effective access to the standard for all interested third parties.”³⁴ However it is not self-enforcing.³⁵ Companies bound by FRAND commitments still have the incentive to seek to evade their obligations to maximize their revenue. FRAND evasion “reinstate[s] the risk of patent hold-up that FRAND commitments are intended to ameliorate.”³⁶

One way which SEP holders evade FRAND commitments they have made is to seek “injunctions against willing licensees of

³³ *Optis*, [2023] EWHC 1095 at ¶ 398(iii)(b)(iv).

³⁴ Case COMP/M.6381 –*Google/Motorola Mobility*, Commission Decision at ¶ 107 (Feb. 13, 2012).

³⁵ *Id.* at ¶ 113.

³⁶ Fed. Trade Comm’n., *Analysis of Agreement Containing Consent Orders to Aid Public Comment, ‘In re Robert Bosch GmbH,’* File No. 121-0081, Dkt. No. C-4377, at 4 (Apr. 23, 2013)

FRAND-encumbered standard essential patents.”³⁷ Where a potential licensee has committed to taking a license on FRAND terms, the only reason “to use the exclusionary power of injunctions . . . [is] to try to force the [licensee] to pay more than [a court would adjudicate to be FRAND]”.³⁸ As such seeking an injunction without negotiating in good faith constitutes a breach of the FRAND commitment.³⁹

Ultimately, the ability of the FRAND commitment in constraining anticompetitive conduct rests on courts and competition agencies to stop FRAND evasion. Robust judicial enforcement of the FRAND commitment is thus necessary to prevent SEP holders from circumventing and exploiting their unearned market power to extract above FRAND royalties.

³⁷ *Id.*

³⁸ *Panasonic Holds. Corp. v. Xiaomi Tech. UK Ltd.*, [2024] EWHC 1733 (Pat) ¶ 82 (Eng.).

³⁹ *Telefonaktiebolaget LM Ericsson v. Lenovo (United States), Inc.*, 120 F.4th 864, 876 (Fed. Cir. 2024) (“if the FRAND commitment means anything of substance, it must mean that an SEP holder that has made such a commitment cannot just spring injunctive actions against other standard implementers without having first complied with *some* standard of conduct”).

A. Judicial Review of FRAND Terms and Preventing FRAND Evasion

Key to safeguarding the FRAND commitment is judicial review of FRAND terms. Judicial review is needed to ensure that the rates commanded by patent owners for standard essential patents are consistent with their FRAND commitments. When there is no judicial review of patent owners' initial FRAND offers, the result often is that much higher licensing rates are charged to small companies, which lack the resources to challenge a patent owner's so-called "published rates."

The recent findings of the United Kingdom's High Court of Justice in *Interdigital v. Lenovo*⁴⁰ are illustrative. The court examined the public "program" rates for SEP licenses that InterDigital, a major holder of 3GPP SEPs, published on its website. The court found that the seven largest manufactures of cellular handsets, which accounted for almost 98% of InterDigital's licensing,⁴¹ were offered steep discounts that were not made available to 15 small handset

⁴⁰ [2023] EWHC 539 (Pat) (Mar. 16, 2023), available at <https://www.judiciary.uk/judgments/interdigital-v-lenovo/>.

⁴¹ See *id.* at ¶ 579.

makers.⁴² As the court noted, for these smaller businesses, their volume of licensing simply was not large enough to justify the expensive litigation that was required to discover the rates that were actually paid to InterDigital by larger companies.⁴³ The result was that while large entities paid a rate of just \$0.175 per unit,⁴⁴ small manufacturers were charged licensing fees of up to \$1.31 per unit—a rate **7 times** higher than that paid by large companies.⁴⁵ The U.K. court concluded that “the sizes of the volume discounts said to be used by InterDigital plainly discriminate against smaller licensees, which is exactly what FRAND is supposed to avoid.”⁴⁶

⁴² See *id.* at ¶ 495 (“I have reached the clear conclusion that the volume discounts said to have been applied to the largest InterDigital licensees (i.e. in the range of 60%-80%) do not have any economic or other justification. Instead, their primary purpose is to attempt to shore up InterDigital’s chosen ‘program rates’. Their primary effect is discrimination against smaller licensees.”).

⁴³ See *id.* at ¶ 609 (“[T]hese much smaller licensees were at much greater risk of their licence rates being driven by the fear of litigation costs, as opposed to a rigorous valuation of the portfolio in question. In some cases (Wistron and Fairphone), the evidence established that the licensees took the deal on offer with no negotiation at all.”).

⁴⁴ See *id.* at ¶ 813.

⁴⁵ See *id.* at ¶ 583.

⁴⁶ *Id.* at ¶ 499.

Similarly, in *TCL v. Ericsson* in the Central District of California, the patent owner demanded a 3% royalty rate. The court ultimately determined that the appropriate FRAND rate was 0.45%—less than one sixth of the patent owner’s initial “FRAND” offer.⁴⁷ Had the court granted the patent owner an injunction and thus compelled acceptance of the initial offer, the defendant—and ultimately consumers—would have paid **six times** the FRAND rate for the patents.

Other cases have uncovered even greater disparities. In the *Microsoft v. Motorola* litigation, the FRAND rate was found by the court to be \$0.03972 per unit. The patent owner had initially demanded \$8.50 per unit⁴⁸—a royalty rate that would have been **214 times** the FRAND rate. And in *In re Innovatio*, the court determined that the

⁴⁷ See *TCL Commc’n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. SACV 14–341 JVS (DFMx), 2017 WL 6611635, at *3, *57 (C.D. Cal. Dec. 21, 2017), *amended and superseded by TCL Commc’n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, 2018 WL 4488286 (C.D. Cal. Sep. 14, 2018), *reversed in part and vacated in part by TCL Commc’n Tech. Holdings Limited v. Telefonaktiebolaget LM Ericsson*, 943 F.3d 1360 (Fed. Cir. 2019).

⁴⁸ See *Microsoft Corp. v. Motorola, Inc.*, No. C10–1823JLR, 2013 WL 2111217, at *4, *86, *100 (W.D. Wash. Apr. 25, 2013); David J. Teece & Edward F. Sherry, *A Public Policy Evaluation of RAND Decisions in the U.S. Courts*, 1 CRITERION J. ON INNOVATION 113, 119 n. 42 (2016), available at <https://tinyurl.com/4mt4xpwn>.

asserted patents made only a minor contribution to the technical standard and awarded a rate of \$0.0956 per unit. The patent owner's initial demand had been \$36.90 per unit⁴⁹—**386 times** the FRAND rate.

The problem of excessive initial rate demands is compounded by the growing number of entities that seek to extract patent royalties for a technical standard without making any meaningful contribution to the standard. Increasingly, these claimants patent every minor feature of a standard and demand royalties based on the sheer volume of their patents. But many of the SEPs asserted by patent assertion entities, in particular, are not actually essential to the standard. A 2019 study of patents that were declared essential to standard-setting organizations and asserted in court, for example, found that when these patents were litigated to a judgment by a patent-assertion

⁴⁹ See *In re Innovatio IP Ventures, LLC Patent Litig.* 11-C-9308, 2013 WL 5593609, at *3, *12 (N.D. Ill. Oct. 3, 2013).

entity, only **6%** of the patents were determined to be valid and essential.⁵⁰ The same study also found that PAEs accounted for about three-fourths of all SEPs litigation.⁵¹

In addition, even when patents are valid and essential to a technical standard, many standards have optional features that not every standard-compliant product will implement. In the experience of amicus's members, when there is no adjudication of a FRAND rate, there is no opportunity to adjust the rate to account for features and patents that some products or applications do not invoke. The result is that manufacturers pay for expensive patented features that they do not actually use.

B. Patent Pools and FRAND Evasion

Patent pools are agreements between two or more patent holders to license certain patents to each other, to third parties, or both.⁵² The number of patents involved can range from a handful

⁵⁰ See Mark A. Lemley & Timothy S. Simcoe, How Essential are Standard-Essential Patents?, 104 CORNELL L. REV. 607, 625 (2019) available at <https://tinyurl.com/y2xs33e5>.

⁵¹ See *id.* at 620.

⁵² World Intell. Prop. Org., Patent Pools and Antitrust – A Comparative Analysis 3 (2014).

to potentially tens of thousands. Patent pools have become increasingly active in SEP licensing and instigators of litigation.⁵³ Existing pools have been expanding their programs into new standards, such as charging technologies and new codecs, and targeting new technology areas, such as IoT devices and electric vehicle infrastructure.⁵⁴

A “patent pool may be regarded as a cartel” that “may provide an opportunity for possible anticompetitive behavior.”⁵⁵ A SEP pool is typically made of a “group of SEP-holders bundling their patents into a SEP-holder priced pool with the SEP-holders then using their

⁵³ See, e.g., Nisha Shetty, *Unpacking the Spike in Patent Pool-Related Litigation*, IAM (Oct. 4, 2024) <https://www.iam-media.com/article/unpacking-the-spike-in-pool-related-litigation>; Nisha Shetty, *Surge of Recent Lawsuits Filed by SEP Licensors Connected to Patent Pools*, IAM (Sept. 27, 2024) <https://www.iam-media.com/article/surge-of-recent-lawsuits-filed-sep-licensors-connected-patent-pools>.

⁵⁴ Angela Morris, *Patent Pool Administrator Calling for 3D Audio Licensors*, IAM (Jan. 9, 2025) <https://www.iam-media.com/article/patent-pool-administrator-calling-3d-audio-licensors>; Nicole-Anne Lagrimas, *Via LA’s Licensing Partner ULDAGE Sets Out to Crack Japan’s EV Charging Market*, IAM. (Mar. 12, 2025) <https://www.iam-media.com/article/las-licensing-partner-uldage-sets-out-crack-japans-ev-charging-market>.

⁵⁵ World Intell. Prop. Org., *Patent Pools and Antitrust – A Comparative Analysis* 3 (2014).

patent rights to force implementers to accept the pool licence.”⁵⁶

Despite these concerns, SEP pools have been permitted as long as the pro-competitive benefits associated with reducing transaction costs outweigh the anticompetitive harms.⁵⁷

Patent pools that require fair, reasonable, and non-discriminatory (FRAND) rates are generally pro-competitive because they reduce transaction costs, mitigate royalty stacking, and facilitate efficient access to standard-essential technologies. Notably, in its MPEG-2 Business Review Letter,⁵⁸ DOJ endorsed a pool limited to technically essential and complementary patents vetted by an independent expert and licensed non-exclusively and on nondiscriminatory terms at reasonable royalties, concluding the arrangement was

⁵⁶ *Tesla Inc. v. Idac Holdings, Inc.*, Claim No. HP-2023-0042 [2024] EWHC Pat (oral arg., May 20-22, 2024) at 133:4-6.

⁵⁷ World Intell. Prop. Org., *Patent Pools and Antitrust – A Comparative Analysis* 3 (2014).

⁵⁸ U.S. Dep’t of Justice, *Business Review Letter to Messrs. Bruce H. Turnbull & Matthew A. Brigham re: MPEG-2 Patent Pool* (June 26, 1997), <https://www.justice.gov/atr/response/business-review-letter-mpeg-2-patent-pool>.

pro-competitive; DOJ's subsequent DVD 3C⁵⁹ and 6C⁶⁰ letters followed the same logic and criteria focused on essentiality and reasonable, nondiscriminatory licensing. Even more recently, DOJ's 2020 Avanci letter endorsed pool/platform models that ensure open, non-discriminatory access with robust safeguards as unlikely to harm competition, underscoring FRAND-anchored pricing as a key pro-competitive feature.⁶¹ Further, the EU's Technology Transfer Guidelines⁶² accompanying the TTBER explicitly state that properly constituted pools should license out to all potential licensees on FRAND terms, among other safeguards (*e.g.*, open participation, essentiality checks, and limited information exchange).

⁵⁹ Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Garrard R. Beeney, Esq., re: DVD 3C Patent Pool (Dec. 16, 1998).

⁶⁰ Letter from Joel I. Klein, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Carey R. Ramos, Esq., re: DVD 6C Patent Pool (June 10, 1999).

⁶¹ U.S. Dep't of Justice, Antitrust Div., Response to the Avanci LLC's Request for a Business Review Letter (July 28, 2020).

⁶² Communication from the Commission — Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements, 2014 O.J. (C 89) 3.

Pool FRAND commitments are only effective to the extent that courts can actually enforce them. If potential licensees cannot enforce the FRAND commitment through rate setting to vindicate contract rights or in order to prevent abusive injunction tactics, they are merely aspirational rights without any effective remedies. U.S. courts have been clear that FRAND promises are judicially enforceable, with courts determining FRAND ranges and damages for breach to prevent injunction threats and supra-FRAND demands from hollowing out the commitment.⁶³

The theoretical availability of bilateral licenses with the patent owners do not mitigate these problems. Coordinated assertion behavior by pool participants or platforms can lead to a “pack hunting” dynamic can make bilateral licenses effectively unavailable.⁶⁴

⁶³ *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024 (9th Cir. 2015).

⁶⁴ See ACT | The App Association, *Feedback Regarding the Revision of the Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines*, Appendix 1 (Apr. 25, 2025), https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/14478-EU-competition-rules-on-technology-transfer-agreements-revision-/F3538144_en (modeling the impact of coordinated litigation campaigns on settlement); Alex Moss & Michael A. Carrier, *Letter from Former Government Officials, Professors, & Academics to DOJ regarding Avanci Business Review Letter* (October 17, 2022), <https://ssrn.com/abstract=4250512>.

“Without the ability to enforce the FRAND commitments of the pool’s membership against the pool itself, there is no way for potential licensees to test the ‘FRAND-lyness’ of the pool’s royalties”⁶⁵ It is thus incumbent on courts to subject pools to the same judicial review of with regards to licensing practices—whether through rate-setting adjudications or their role in encouraging members to pursue anticompetitive exclusionary relief—as their members to prevent pools from becoming a vehicle for FRAND evasion.

If the owners of FRAND-committed patents are permitted to use patent pools to evade judicial review of their licensing demands, the inevitable result will be that American manufacturers and ultimately consumers are forced to pay excessive rates for patents that are supposed to be available on FRAND terms.

⁶⁵ See John “Jay” Jurrata, Jr. & Emily N. Luken, *Glory Days: Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?*, 58 SAN DIEGO L. REV. 417, 438 (2021).

CONCLUSION

For the reasons stated above, Amicus Curiae respectfully submits that this Court should consider the profound impact of its ruling on the ecosystem of small businesses and innovators who rely on predictable and balanced FRAND licensing principles. A clear and stable legal framework is essential to foster the downstream innovation, consumer choice, and healthy market competition that standardization is intended to promote.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for amici curiae certifies that this brief:

(1) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(b)(4) and Federal Circuit Rule 40(i)(3) because it contains 5,359 words, including footnotes and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b); and

(2) complies with the typeface and style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because this document has been prepared using Microsoft Office Word and is set in the Bookman Old Style font in a size equivalent to 14 points or larger.

Dated: October 27, 2025

/s/ Brian Scarpelli