

17 November 2022

**COMMENTS OF APPLE INC. ON THE NEW ZEALAND COMMERCE COMMISSION'S  
DRAFT GUIDELINES ON MISUSE OF MARKET POWER**

Apple Inc. respectfully submits these comments to the New Zealand Commerce Commission. We appreciate the opportunity to present our views on the subjects raised in the Commission's Draft Guidelines on the Misuse of Market Power. We are pleased to see the Commission providing additional clarity on how it will assess anticompetitive acts under the Commerce Amendment Act 2022.

We would like to suggest that the Commission also consider addressing concerns that standard essential patent ("SEP") holders are misusing the market power conferred to them from standardisation to seek royalties on terms that are not fair, reasonable, and non-discriminatory ("FRAND").<sup>1</sup> As a form of competitor cooperation with strong potential for both pro- and anti-competitive effects, the standards-setting process—and in particular the licensing of FRAND-encumbered SEPs that may emerge from this process—is a competition-law issue. The marketplace continues to suffer from a lack of consistent adherence to voluntarily accepted FRAND licensing principles for SEPs, particularly in cellular standards. This deficiency has a broad impact across industries, from consumer electronics like smartphones, to automobile safety and convenience features, to green technologies such as smart electric meters—all of which depend on cellular connectivity.

As covered in more detail below, forms of SEP misuse include seeking or threatening injunctions despite the commitment to license those who use the standard, pressuring SEP licensees into accepting excessive and non-FRAND royalty demands that are far beyond the value of the underlying patented technology, and not making SEPs available on FRAND terms to all interested parties that request a licence. Competition law has a crucial role to play in preventing these abuses that distort competition in the downstream product markets, increase costs to consumers, raise supply chain resilience concerns, and negatively impact innovation.

**Competition Law Considerations for SEP Licensing Practices**

In developing a standard, competitors collaborate to select amongst competing technology alternatives to include in the standard. Because an entire industry agrees to use the resulting standardised technology, an interested licensee cannot "invent around" a truly essential and valid SEP or shop around for a lower priced or non-patented solution. Put differently, standardisation confers market power and forecloses alternatives. Holders of patents that may be essential to the standard accordingly have strongly enhanced leverage to demand non-FRAND terms from interested licensees and engage in "holdup."

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<sup>1</sup> See *Realtek Semiconductor Corp. v. LSI Corp.*, No. 12-CV-03451, 2014 U.S. Dist. LEXIS 81673, at \*23 (N.D. Cal. June 16, 2014) (finding that royalties sought by LSI were around 500 times the appropriate FRAND royalty rate); see also *In re Innovatio IP Ventures LLC*, No. 11-CV-09308, 2013 U.S. Dist. LEXIS 144061, at \*141 (N.D. Ill. Sept. 27, 2013) (finding that Innovatio sought royalties from various third parties between 35 and 386 times higher than the adjudicated FRAND royalty rate).

Holdup can take different forms, from seeking injunctions to obtain leverage<sup>2</sup> to seeking excessive royalty demands.<sup>3</sup> This leverage is notably asymmetric as “the holdup problem and accompanying lock-in value exist only on one side of the exchange.”<sup>4</sup> Consequently, competition regulators in both the U.S. and abroad have recognized harm to the competitive process and innovation that stems from holdup.<sup>5</sup>

Most standards-setting organizations (“SSOs”) require companies that participate in the standards-setting process to, in return for the benefit of having their patents included in the standard, make a voluntary commitment to license those SEPs on FRAND terms. Voluntary commitments to license SEPs on FRAND terms are an essential counterweight to the elimination of competition inherent in competitors agreeing on a single technological solution. These commitments help to foster adoption of the standard by providing assurance that licences to any patents needed to use the standard will be available to anyone who wants to license the standard. Failure to abide by these FRAND commitments results in SEP holders misusing their market power, distorting competition and harming consumers.

As an innovator, and both a SEP licensor and licensee, Apple has a deep interest in ensuring that SEPs are licensed on FRAND terms. We recognize and value that standardisation can lead to interoperability that benefits consumers. Yet, we have experience that some licensors misuse the power conferred by standardisation for voluntary FRAND-committed SEPs to engage in behavior that harms or eliminates competition, including:

- (1) seeking or threatening injunctions for alleged infringement of FRAND-committed SEPs;
- (2) seeking excessive, non-FRAND royalty demands;
- (3) not making SEPs available on FRAND terms to all interested parties that seek a licence; and

#### *Harm to Competition from Misuse*

Threats of injunctions, excessive royalty demands, and refusals to license hinder the growth and success of interested licensees that need to license SEPs to compete. One of the most significant concerns

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<sup>2</sup> See *In re Robert Bosch GmbH*, 155 F.T.C. 713, 829 (2013), 2013 WL 8364914, at \*51 (“Seeking injunctions against willing licensees of FRAND-encumbered [SEPs] . . . is a form of FRAND evasion and can reinstate the risk of patent hold-up that FRAND commitments are intended to ameliorate.”).

<sup>3</sup> See, e.g., *Ericsson, Inc. v. D-Link Sys. Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014) (“Patent hold-up exists when the holder of a SEP demands excessive royalties after companies are locked into using a standard.”); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 310 (3d Cir. 2007) (“In this unique position of bargaining power, the patent holder may be able to extract supracompetitive royalties from the industry participants.”); *Apple Inc. v. Qualcomm Inc.*, No. 17-cv-00108, 2017 U.S. Dist. LEXIS 145835, at \*8 (S.D. Cal. Sept. 7, 2017) (“The FRAND commitment, therefore, is designed to prevent patent holdup.”).

<sup>4</sup> Letter from 77 Former Gov’t Enf’t Offs. and Professors to Makan Delrahim, Assistant Att’y Gen., U.S. Dep’t of Just. 2 (May 17, 2018), <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/DOJ-patent-holdup-letter.pdf> (regarding *Patents and Holdup*).

<sup>5</sup> Remarks of F.T.C. Comm’r Rebecca Kelly Slaughter, SEPs, Antitrust, and the FTC, FED. TRADE COMM’N (Oct. 29, 2021), [https://www.ftc.gov/system/files/documents/public\\_statements/1598103/commissioner\\_slaughter\\_ansi\\_102921\\_final\\_to\\_pdf.pdf](https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf) [hereinafter Remarks of Comm’r Slaughter]; Memorandum from the Eur. Comm’n, Antitrust Decisions on Standard Essential Patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently Asked Questions (Apr. 29, 2014), [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_14\\_322](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_322) [hereinafter Memorandum from the Eur. Comm’n].

is the threat of injunctions for FRAND-committed SEPs, as competition regulators across the globe have recognized.

For example, in 2012, the U.S. Federal Trade Commission (“FTC”) charged Robert Bosch GmbH with engaging in anticompetitive conduct by seeking injunctions against companies that were willing to license on FRAND terms, a practice that “had the tendency of harming competition and undermining the standard setting process.”<sup>6</sup> Shortly after, the FTC announced a settlement with Google for charges stemming from similar conduct involving cellular SEPs. The FTC stated that “companies may pay higher royalties . . . because of the threat of an injunction, and then pass those higher prices on to consumers. This may cause companies in technology industries to abandon the standard-setting process and limit or forgo investment in new technologies . . . .”<sup>7</sup> Similarly, the European Commission brought enforcement actions aimed at “prevent[ing] SEP holders from using SEP-based injunctions in an anticompetitive way, in order to extract licensing conditions that may restrict competition and ultimately harm consumers.”<sup>8</sup> The Korea Fair Trade Commission, in an investigation of SEP licensing and chipset sales practices, also concluded that “[i]f a SEP holder who has made the FRAND commitments files for injunction on sale against a potential licensee, which is engaged in negotiations in good faith to obtain a licence, such goes against the FRAND principle and is likely to constitute an unlawful act.”<sup>9</sup>

The use of exclusionary relief in the form of injunctions by SEP holders undermines the benefits of standardisation and is contrary to the voluntary commitments made to license those SEPs, rather than to exclude. Although seeking injunctions may be appropriate in extraordinary cases such as where the licensee is unable to pay the FRAND rate or is outside the jurisdiction of the courts, injunctions should be sought with caution because they can have the effect of harming competition.<sup>10</sup> In recent years, SEP holders have successfully leveraged the threat of an injunction to coerce licensees to accept a licence rather than litigate.<sup>11</sup> When a SEP licence holder inappropriately seeks an injunction, licensees—

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<sup>6</sup> FTC Press Release, *FTC Order Restores Competition in U.S. Market for Equipment Used to Recharge Vehicle Air Conditioning Systems* (Nov. 26, 2012), <https://www.ftc.gov/news-events/press-releases/2012/11/ftc-order-restores-competition-us-market-equipment-used-recharge> [hereinafter *FTC Order Restores Competition*].

<sup>7</sup> FTC Press Release, *Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search* (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

<sup>8</sup> Memorandum from the Eur. Comm’n, *supra* note 5.

<sup>9</sup> Decision and Order ¶ 387, Decision No. 2017-0-25, *In re Alleged Abuse of Market Dominance of Qualcomm Inc.*, Case No. 2015SiGam2118 (Korea Fair Trade Comm’n Jan. 20, 2017), *unofficial English translation available at* [http://www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20\\_KFTC-Decision\\_2017-0-25.pdf](http://www.theamericanconsumer.org/wp-content/uploads/2017/03/2017-01-20_KFTC-Decision_2017-0-25.pdf).

<sup>10</sup> *See, e.g.*, Remarks of Comm’r Slaughter, *supra* note 5, at 4 (“Therefore, it is my strong belief that SEP holders should not be able to seek exclusionary remedies against a willing licensee. Negotiating a licensing rate in the shadow of the threat of exclusion from the market gives SEP holders the leverage to extract supra-FRAND rates and encompass the value of standardization, downstream innovation, or other aspects of the end product that incorporates the standardized technology”); *FTC Order Restores Competition*, *supra* note 6; Case AT.39985, *Motorola - Enforcement of GPRS Standard Essential Patents* (Eur. Comm’n Apr. 29, 2014), [https://ec.europa.eu/competition/antitrust/cases/dec\\_docs/39985/39985\\_928\\_16.pdf](https://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf) (finding that Motorola’s seeking and enforcement of an injunction against Apple was an abuse of a dominant position).

<sup>11</sup> For example, in May 2022, Ford accepted an Avanci patent pool licence after six Avanci members filed multiple lawsuits against Ford in the United States, Germany, Italy, and Spain. *See* Amy Sandys, *Ford Takes Avanci Licence in Wake of Munich Judgment*, JUVÉ Patent (May 31, 2022), <https://www.juve-patent.com/news-and-stories/people-and-business/ford-takes-avanci-licence-in-wake-of-munich-judgment/>; *see also* L2 Mobil Techs. LLC v. Ford Motor Co., No. 21-cv-01409 (D. Del. filed Oct. 1, 2021); *Sisvel Int’l S.A. v. Ford Motor Co.*, No. 21-cv-1745 (D. Del. filed Dec. 13, 2021). Similarly, Huawei has filed patent infringement actions against the Stellantis automotive group in Germany, where

particularly smaller enterprises, but even large enterprises as well—may opt to give in to these threats and pay non-FRAND rates rather than risking the exclusion of their products.

Standards users have also been confronted with demands for payment not based on the value of the SEPs themselves, but on the contributions and inventions of others. For example, in a smartphone, most if not all inventive aspect of cellular SEPs cover just one component: the cellular modem chip. But some SEP owners have sought payment based on the added value of standardisation, the leverage of an injunction, or the value of the end-product (such as a smartphone) that incorporates a vast array of other non-standardised technologies. These efforts are improper.

As the European Commission noted, “[l]icensing terms have to bear a clear relationship to the economic value of the patented technology. That value primarily needs to focus on the technology itself and in principle should not include any element resulting from the decision to include the technology in the standard”.<sup>12</sup> This approach is also consistent with the approach of the courts, both in Europe and elsewhere. In *Microsoft*, the General Court found that a dominant technology licensor is entitled to recover only the ‘intrinsic value’ of the technology, as distinct from its ‘strategic value’.<sup>13</sup>

To that end, Apple recommends that royalties for a voluntarily FRAND-committed SEP be considered excessive when licensed on financial terms that: (1) are greater than the value of the patented technology prior to the relevant standard’s adoption; (2) do not apportion between the value of the patented invention and the other patented and unpatented features of a multi-component product; (3) are greater than terms reasonably calculated from a royalty based on the smallest saleable unit where all or substantially all of the inventive aspects of the SEP are practiced; or (4) do not account for the aggregate royalties that would result if other SEP holders for the relevant standard made royalty demands.

These valuation criteria reflect the innovative character of the patented invention itself, as distinct, in particular, from any value later conferred by SSOs as a result of the decision to include the patented invention in the standard. In addition, valuation at the smallest component where all or substantially all of the inventive aspects of the SEP are practiced offers the most fair, reasonable, and representative value base for this purpose. It is unfair and overly disproportionate if, for example, the common base related to the end product, or even some arbitrary percentage of the end product value, as this would reward licensors for features or technologies they have not developed. It also makes the most economic sense and follows the objective of the patent laws to reward the invention claimed in the patent.

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injunctions are commonly granted. See Nele Husmann, *Huawei startet Klagewelle wegen Mobilfunk- und Wlan-Patenten* [Huawei Launches Wave of Lawsuits Over Cell Phone and WiFi Patents], *Wirtschafts Woche* (Nov. 9, 2022) (Ger.), <https://www.wiwo.de/unternehmen/it/vor-deutschen-gerichten-huawei-startet-klagewelle-wegen-mobilfunk-und-wlan-patenten-/28797176.html>.

<sup>12</sup> *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Setting out the EU Approach to Standard Essential Patents*, COM (2017) 712 final (Nov. 29, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52017DC0712&rid=9>.

<sup>13</sup> Case T-167/08, *Microsoft v. Comm’n*, (Eur. Comm’n June 27, 2012), ¶ 138 (“[T]he distinction between the strategic value and the intrinsic value of the technologies covered by the contested decision is a basic premise of the assessment of the reasonableness of any remuneration charged by Microsoft for allowing access to, and use of, the interoperability information.”).

Other opportunistic or abusive conduct concerning SEPs include failures to license SEPs to those who seek licences, thereby placing interested licensees at a distinct disadvantage. Refusals to license on FRAND terms can result in a company deciding not to enter a market, to exit the market, or to increase prices—all of which reduce output in downstream product markets.

Increased clarity addressing competitive concerns arising from excessive and non-FRAND licensing may also benefit competitive supply chains, especially for critical technologies, which have been weakened by aggressive SEP licensing practices. Fair enforcement of FRAND licensing principles can play a critical role in making supply chains more resilient by increasing the number of suppliers and reducing reliance on foreign suppliers who may pose security threats. Hardened and trusted supply chains can be best achieved with a diversity of suppliers. Yet, without greater certainty on SEP and FRAND licensing, many of these new manufacturers will struggle to grow large enough to become viable to be effective in the supply chains.

### **Draft Language**

In view of these concerns, Apple urges the Commission to consider including in its Misuse of Market Power Guidelines a new provision clarifying the SEP licensing practices that constitute a misuse of market power and a violation of New Zealand's competition law. We offer below specific suggestions reflecting the above comments and welcome the opportunity to discuss further.

### **Other Conduct**

**114.7 Licensing of voluntarily FRAND-committed SEPs:** It is a misuse of market power when a SEP licence holder that has voluntarily agreed to license on FRAND terms: (1) seeks or threatens injunctions absent exceptional circumstances, like lack of in personam jurisdiction or inability to pay FRAND rates; (2) seeks excessive, non-FRAND royalty demands; and (3) does not make SEPs available on FRAND terms to all interested parties that request a licence, regardless of the party's position in the supply chain. These acts constitute misuse of market power because they can hinder the ability of interested parties to innovate and compete.