Apple Inc.'s Submission on the New Zealand Commerce Commission's Draft Guidelines on the Application of Competition Law to Intellectual Property Rights

I. INTRODUCTION

Apple appreciates the opportunity to comment on the New Zealand Commerce Commission's Draft Guidelines on the Application of Competition Law to Intellectual Property Rights (Draft IP Guidelines).[1] As a company that has both extensive experience as a licensor of standard-essential patents (SEPs) and as an SEP licensee and active contributor to standards, Apple values innovation and respects intellectual property. Apple invests over $26 billion a year in research and development, and patents are critical to protecting the innovations embodied in Apple's products and services.[2]

We recognize that we are not alone in investing in and valuing innovation. To this end, our company follows fair, reasonable, and nondiscriminatory (FRAND) principles in licensing our own substantial SEP portfolio. We also have a long history of respecting the intellectual property rights of others and taking voluntary SEP licenses on reasonable and fair terms. As a result, we have a strong interest in the balanced adjudication of SEP disputes and in ensuring that competition law continues to play a role in such disputes when appropriate.

We appreciate that the Draft IP Guidelines recognize that standardization can implicate competitive issues and, in particular, that refusals to license SEPs that are essential to effectively compete may harm competition.[3] We applaud the Commerce Commission for its inclusion of the Example (on page 10 of the draft) analyzing how SEP licensors' conduct may violate the competition laws when, among other factors, the "fees and rates set by [a SEP licensor] are so high that no competitor would be reasonably willing to accept the terms," as opposed to rates and fees set on "FRAND" terms.[4]

The issue of excessive rates demanded by SEP licensors is one of the most pressing problems facing the standards ecosystem today. *We, therefore, urge the Commerce Commission to both maintain and expand upon its guidance by further clarifying when fees and rates are unreasonably high, and by addressing the substance of its Example in the numbered paragraphs of the text.* In short, compensation must be tied to the actual patented invention, and should not include the value of market power obtained from standardization. Compensation beyond the value of the patented technology in FRAND-committed SEPs is a form of unjust enrichment to be closely guarded against harming product innovation.

We also urge the Commerce Commission to expressly address an issue of equal or more importance: the persistent threat of injunctions by SEP owners to obtain leverage to extract excessive rates or exclude goods from the market. Seeking injunctions on FRAND-committed SEPs can be viewed through the lens of a refusal to license: SEP owners are quite literally seeking exclusion rather than licensing. Or it can also be classed as conduct substantially lessening competition. Standard setting involves collective action—usually among competing firms—to determine what technology will be used in a standard and what technology will not. The FRAND commitment is intended to mitigate the improper exercise of market

---

[1] *Draft Guidelines on the Application of Competition Law to Intellectual Property Rights*, Commerce Commission New Zealand (Dec. 19, 2022), https://comcom.govt.nz/__data/assets/pdf_file/0018/302508/Draft-Guidelines-on-Application-of-Competition-Law-to-Intellectual-Property-Rights-December-2022.pdf (hereinafter Draft IP Guidelines).

[2] In its fiscal year 2022, Apple invested US $26.25 billion in research and development. *See* Apple Inc., Annual Report (Form 10-K) at 23 (Oct 28, 2022). Apple also refers the Commerce Commission to its submission on 17 November 2022.

[3] *See* Draft IP Guidelines, *supra* note 1, ¶¶ 38.1, 52.

[4] *See id.* at 10.

power by requiring SEP holders to grant licences to any interested party and not block the use of the standard. When a SEP owner abuses that market power by seeking exclusion, despite having made the FRAND commitment to accept money for the use of their SEPs, the procompetitive benefits of standardization no longer outweigh the anticompetitive harms.

As the Draft IP Guidelines note, conduct is less likely to harm competition where firms agree to license on FRAND terms "and do so[.]"[5] Guidance from the Commerce Commission as to what constitutes abusive non-FRAND conduct will better enable firms to evaluate whether their conduct comports with their obligations. Specifically, as delineated in suggested text in Section IV, the Commerce Commission should explicitly state that non-FRAND SEP abuse can take several forms, including but not limited to:

- Threatening injunctions despite the commitment to license on FRAND terms, except in rare circumstances.

- Pressuring SEP licensees into accepting excessive and non-FRAND royalty demands that capture value beyond the footprint of the underlying patented technology, or that are greater than the value of the patented technology before its inclusion in the standard.

II. STANDARDIZATION CONFERS MARKET POWER AND FORECLOSES ALTERNATIVES

A. Background on Standard Development

Standardization helps enable interoperability among competitor products. The use of technical interoperability standards is common across a broad variety of industries, including the electronics and communications sectors. With the emergence of Internet of Things (IoT) applications, the adoption of wireless communication standards in new sectors is growing. Sectors that have embraced communication standards relatively recently include agriculture and infrastructure, clean energy, the automotive industry, health and medical equipment, smart homes, e-health, manufacturing, and asset tracking. Availability of licenses to SEPs on predictable, transparent, and reasonable commercial terms is thus critical for the commercialization of competitive products and creation of new markets.

The process behind standardization is typically facilitated by a standard-setting organization (SSO), which offers rules, processes, and other mechanisms to facilitate the development and ongoing maintenance of the standard.[6] Individuals and firms, often competitors or potential competitors, collaborate to select amongst competing technology alternatives to include in the standard. When an entire industry agrees to use a standard, a potential licensee cannot "invent around" a truly essential and valid SEP or shop around for a lower priced or non-patented solution.

SSOs typically require that patent holders declare whether they will commit to license any SEPs on FRAND terms as a condition for contribution to standards development.[7] The commitment to license on

---

[5] *See id.* ¶ 55.

[6] *How Are Standards Made?*, IEEE, https://standards.ieee.org/develop/develop-standards/process/#:~:text=The%20development%20of%20a%20new,the%20process%20for%20standards%20development (last visited Feb. 9, 2023).

[7] Jay P. Kesan & Carol M. Hayes, *FRAND's Forever: Standards, Patent Transfers, and Licensing Commitments*, 89 Ind. L.J. 231, 233-35 (2014) ("During the creation of a standard, the standard-setting organization (SSO) will typically require members who hold standard essential patents (SEPs) to make a commitment to license these patents on fair, reasonable, and non-discriminatory (FRAND) terms.")

FRAND terms is meant to act as a preemptive remedy to the elimination of competition inherent in the standardization process, and to foster adoption. Specifically, the FRAND commitment aims to minimize the risk that a SEP holder withholds a license from a potential licensee or attempts to extract supra-competitive royalties after the standard has been adopted by an industry. As a consequence of agreeing to abide by an SSO's policies regarding FRAND licensing, SEP holders voluntarily limit the scope of their patent rights to license broadly rather than exclude.[8]

B. Anticompetitive Effects

Standards are meant to offer many potential procompetitive benefits, including promoting innovation, increasing competition, lowering barriers to entry, and decreasing prices. At the same time, standardization can create opportunities for abuse by conferring market power to SEP holders and foreclosing alternative technologies. The Draft IP Guidelines acknowledge this principle in noting that intellectual property that is incorporated into an industry standard may become essential to effectively compete.[9] In the United States, courts have similarly recognized that, "[a] standard, by definition, eliminates alternative technologies."[10] When SEP holders attempt to exploit the market power conferred to them through standardization, the anticompetitive effects of foreclosure materialize—a practice often referred to as "holdup."

Holdup is based on well-established economic theory regarding bargaining and transaction costs. It occurs when SEP holders seek to extract royalties not merely by relying on the intrinsic value of its patented contributions to a standard over alternative technologies, but by taking advantage of the monopoly power conferred by the SSO's decision to incorporate the SEP holder's patents into the standard, the substantial sunk investment of the implementer into developing a standard-compliant product, and the impractically high switching costs that lock the implementer into an infringing position (assuming, of course, that the asserted patent is valid and essential).[11] Based on these investments and the high cost of switching, SEP holders will be "in a position to demand more for a license than the patented technology, had it not been adopted by the [standard], would be worth."[12]

This SEP holder threat is notably asymmetric as "the holdup problem and accompanying lock-in value exist only on one side of the exchange."[13] The SEP holders are in a fundamentally different position than

---

[8] *See* A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, 127 Yale L.J. 2110, 2115(2018) ("To address this common problem [of ex post monopoly power] and limit ex post opportunism by SEP holders, SSOs typically require participants that own SEPs to make certain FRAND commitments."); John "Jay" Jurata & Emily N. Luken, *Glory Days: Do the Anticompetitive Risks of Standards-Essential Patent Pools Outweigh Their Procompetitive Benefits?*, 58 San Diego L. Rev. 417, 421 (2021).

[9] Draft IP Guidelines, *supra* note1, ¶ 38.1.

[10] *See Broadcom Corp. v. Qualcomm Inc.,* 501 F.3d 297, 314 (3d Cir. 2007).

[11] *See* Joseph Farrell *et al., Standard Setting, Patents, and Hold-up*, 74 Antitrust L.J. 603, 604-605, 607, 611, 620 (2007).

[12] *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1030-31 (9th Cir. 2015) (citing *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1209 (Fed. Cir. 2014)).

[13] Letter from 77 Former Government Enforcement Officials and Professors to Makan Delrahim, Assistant Att'y Gen., U.S. Dep't of Just., regarding *Patents and Holdup*, at 2 (May 17, 2018), https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/DOJ-patent-holdup-letter.pdf. In contrast to demonstrated harms of holdup, the premise of holdout is that SEP holders are vulnerable to parties who use the standard underpaying for licenses after SEP holders have already invested in developing their patented technologies. But this concern is not unique to SEPs. This concern also is greatly overstated. First, the chance that a patent holder will not recoup its investment in developing patented technology is a normal aspect of a market economy where investment in innovation—including in the form of patents—is risky because it is rewarded after the fact based on its demonstrated worth. *Id*.; *In re Innovatio IP Ventures, LLC Patent Litig.*, 2013 WL 5593609, at *11 (N.D. Ill. Oct. 3, 2013). Second, SEP holders have recourse to the legal system to pursue monetary damages if they cannot reach agreement with potential

licensees because they can leverage the market power of the standard to tilt a negotiation to their advantage. By contrast, a potential licensee in a bilateral negotiation with a SEP holder cannot call on the same market power to aid it.

The Draft IP Guidelines helpfully recognize that if offered terms for licensing patents required by a standard "are sufficiently high as to constitute a constructive refusal to license" such conduct has the potential to harm competition.[14] This conclusion that excessive rate demands for FRAND-committed SEPs may be anticompetitive is supported by extensive evidence of holdup. For example:

- In *Microsoft v. Motorola*, the court found that the portfolio was worth over 100 times less than what was initially sought.[15] This reduced the claimed royalty rates for the SEP from about US $4 billion per year to a FRAND-compliant rate of less than US $2 million annually.[16]

- In *Innovatio*, a patent assertion entity demanded a royalty rate of over $16 per unit for tablets. After trial, the court determined that an appropriate royalty should be less than $0.10 per unit (and based on the component chip), amounting to a difference of over 160 times less than the royalty rate demanded.[17]

- In *Realtek v. LSI*, LSI initiated an ITC proceeding seeking an exclusion order against Realtek. According to Realtek, LSI demanded "a royalty exceed[ing] the selling price of Realtek's products."[18] The court affirmed that an appropriate FRAND rate was 0.19% of the price of the chips implementing LSI's SEPs, a difference of over 500 times less than what was sought.[19]

- In *TCL v. Ericsson*, the rates that TCL would have been required to pay Ericsson for mobile phones, for some technologies, would have been over ten times higher than what the court ultimately found.[20]

- The European Commission has found that Motorola had abused its dominant position when it sought and enforced an injunction against a willing licensee.[21] The Commission noted that "[s]tandards bodies generally require members to commit to license on FRAND terms the patents that they have declared essential for a standard. This commitment is designed to ensure effective access to a standard for all market players and to prevent 'hold-up' by a single SEP holder."[22]

---

licensees, and so SEP holders can obtain the FRAND royalties they voluntarily promised to accept for use of their SEPs. Third, there has been little to no empirical evidence indicating that holdout is a widespread problem for SEP holders. *See* Brian J. Helmers & Christian Love, *An Empirical Test of Patent Hold-Out Theory: Evidence from Litigation of Standard Essential Patents* 3 (Santa Clara Univ. Legal Studies Research Paper Oct. 26, 2021), https://ssrn.com/abstract=3950060.

[14] *Draft IP Guidelines*, *supra* note 1, at 10.

[15] *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *65, *72, *95, *99 (W.D. Wash. Apr. 25, 2013).

[16] *Id.*

[17] *In re Innovatio IP Ventures, LLC Patent Litig.*, MDL No. 2303, 2013 WL 5593609 at *12, *45 (N.D. Ill. Oct. 3, 2013).

[18] *Realtek Semiconductor Corp. v. LSI Corp.*, 946 F. Supp. 2d 998, 1002 (N.D. Cal. 2013).

[19] *Realtek Semiconductor Corp. v. LSI Corp.*, 2014 WL 2738216, No. C-12-3451-RMW, at *2 (N.D. Cal. June 16, 2014).

[20] *TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. CV 15-2370 JVS(DFMx), 2017 WL 6611635 (C.D. Cal. Dec. 21, 2017), *vacated on other grounds*, 943 F.3d 1360 (Fed. Cir. 2019).

[21] *See* European Commission Press Release IP/13/406, Antitrust: Commission sends Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents (May 6, 2013), https://ec.europa.eu/commission/presscorner/detail/en/IP_13_406.

[22] *Id.*

The anticompetitive effects of holdup strategies include products with fewer non-standardized features, deterred entry, suspended sales in certain markets, suppressed innovation, and increased costs to consumers.[23] As one U.S. District Court put it, "because a prospective licensee has no alternative to licensing the patent[,] he is at the patentee's mercy."[24] Importantly, this holdup power, and the anticompetitive effects that flow from it, often occur based on initial choices made by SSOs when they must select one of several well-suited technical alternatives.[25] If the holdup power is exercised, the procompetitive benefits of the standardization agreement no longer outweigh the anticompetitive effects.

As the world becomes more connected, implementation of standards for wireless connectivity will become even more prevalent across industries. Unless SEP abuse is proactively addressed, opportunities for SEP holdup are likely to increase. In turn, the impact of SEP holdup will be felt by and passed on to consumers. Recognizing the need for clear guidance on SEP licensing, jurisdictions like Singapore, for example, have expressly outlined the risks and considerations taken into account when evaluating the impact on competition from SEP abuse.[26] Those guidelines make clear that seeking injunctions may harm competition for such SEPs, and that refusals to license voluntarily committed, dominant SEPs on FRAND terms, irrespective of an applicant's position in the supply chain, may harm competition.[27]

Relatedly, it is not enough to rely on private contract enforcement of FRAND commitments. While FRAND adjudication may be sufficient to resolve good-faith disputes over appropriate FRAND royalties, it does little to stop SEP holders that seek to abuse their market power. Many SEP licensors repeatedly engage in global, multifront, abusive licensing campaigns using threats of injunctions and exclusion orders to extort supra-competitive royalties from their targets. Those actions create negotiation dynamics that do not allow contractual disputes about FRAND to be fairly adjudicated. The impact on small and medium enterprises is especially acute, as they may opt to give into supra-competitive licensing royalties instead of engaging in costly and prolonged litigation. Stopping SEP abuse before a SEP holder engages in holdup would help minimize FRAND disputes and the resulting anticompetitive effects.

At the same time, those same SEP holders wield their influence within SSOs to block efforts to clarify and strengthen FRAND policies.[28] These efforts intentionally blur the meaning of the FRAND commitment itself, which undermines efforts to use licensors' FRAND commitments to curb SEP holdup.[29] Moreover, SEP licensors rely on licenses procured through holdup as evidence of FRAND licensing terms. Holdup

---

[23] For example, Chinese smartphone maker Oppo chose to suspend sales in Germany following patent litigation with Nokia. *See* James Vincent, *Oppo and OnePlus halt phone sales in Germany following Nokia lawsuit*, THEVERGE (Aug. 9, 2022), https://www.theverge.com/2022/8/9/23297947/oppo-oneplus-halt-sales-germany-nokia-patent-lawsuit.

[24] *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012).

[25] These anticompetitive effects are the same whether or not the SEP holder is shown to have acted deceptively during the standard-setting process.

[26] CCCS Guidelines on the Treatment of Intellectual Property Rights, Competition & Consumer Commission Singapore, ¶¶ 4.9-4.11 (Feb. 1, 2022), https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/ccs-guidelines/revised-guidelines-jan-2022/9-cccs-guidelines-on-the-treatment-of-ip.pdf?la=en&hash=4B788CFD35E23E6E6D680F898C3A339FD3B43E0A.

[27] *Id*.

[28] In 2015, a group of SEP holders sought to block IEEE from updating its patent policy and went so far as trying to "directly influence IEEE directors by slipping content under hotel room doors." Email from Gil Ohana to PP-DIALOG@xxxxxxxxxxxxxxxxx (Dec. 3, 2018, 4:44 PM), https://grouper.ieee.org/groups/pp-dialog/email/msg00523.html.

[29] *See* Michael Carrier & Brian Scarpelli, *How Standard-Setting Orgs Can Curb Patent Litigation*, LAW360 (June 15, 2021), https://www.law360.com/articles/1392222/how-standard-setting-orgs-can-curb-patent-litigation ("According to a newly released study, cellular standards, which are governed by more ambiguous FRAND rules…are responsible for roughly 75% of all SEP litigation. IEEE standards, on the other hand, are responsible for approximately only 2% of SEP litigation.") (hereinafter *How Standard-Setting Orgs Can Curb Patent Litigation*).

thus inoculates certain SEP licensors from fair adjudication regarding FRAND disputes. This is an important consideration when analyzing whether FRAND terms align with industry practice.

The Draft IP Guidelines note that if an offer amounts to FRAND based on industry practice, such conduct is unlikely to harm competition.[30] Yet industry practice will vary based on whether the standards are governed by ambiguous FRAND rules.[31] As provided in Section IV below, Apple suggests striking this language from the IP Guidelines.

To mitigate anticompetitive harm stemming from SEP abuse, it is important for competition authorities to ensure that the marketplace adheres to clear FRAND licensing principles for SEPs.

III. CONDUCT BY SEP HOLDERS THAT LEADS TO A SUBSTANTIAL LESSENING OF COMPETITION

A. Threatening or Seeking Injunctive or Similar Relief

Refusing to license on FRAND terms, and instead seeking an injunction to exclude those who support the standard, is often anticompetitive and is inconsistent with FRAND obligations. Threats of injunctions can undermine the standardization process and tilt negotiating leverage toward the SEP holder, which may result in anticompetitive harm if the licensee accepts an above-FRAND license to avoid litigation that may lead to market exclusion. As the U.S. Department of Justice has recognized, the ability to limit such injunction threats 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."[32]

Competition enforcers have repeatedly recognized the anticompetitive harm that can materialize from SEP holders seeking injunctive relief. For example, the European Commission in *Motorola*[33] and *Samsung*[34] found that seeking injunctions can constitute an abuse of a dominant position. Likewise, the U.S. Federal Trade Commission (FTC) has recognized that seeking exclusionary relief can have "the tendency of harming competition and undermining the standard setting process."[35] In a statement regarding its settlement with Google to resolve conduct involving cellular SEPs, the FTC explained 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 . . . ."[36]

---

[30] *See Draft IP Guidelines*, *supra* note 1, at 10.

[31] *See How Standard-Setting Orgs Can Curb Patent Litigation, supra* note 29.

[32] Response to Institute of Electrical and Electronics Engineers, Incorporated, U.S. DEP'T OF JUST. (Feb. 2, 2015), https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated.

[33] Commission Decision of 29 April 2014 in Case AT.39985 – Motorola – Enforcement of GPRS Standard Essential Patents.

[34] Commission Decision of 29 April 2014 in Case AT.39939 – Samsung – Enforcement of UMTS Standard Essential Patents.

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

[36] 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, Fed. Trade Comm'n (Jan. 3, 2013), https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc. *See also* Remarks of F.T.C. Comm'r Rebecca Kelly Slaughter, SEPs, Antitrust, and the FTC, Fed. Trade. Comm'n (Oct. 29, 2021), at 4, https://www.ftc.gov/system/files/documents/public_statements/1598103/commissioner_slaughter_ansi_102921_final_to_pdf.pdf

The use of exclusionary relief in the form of injunctions is also contrary to the voluntary FRAND commitments made by SEP holders. It is inherent in the SEP holder's FRAND commitment not to exclude any interested party from implementing the standard. Where a SEP holder has made a voluntary FRAND commitment, it has indicated a willingness to accept monetary compensation as an adequate remedy. Threats or attempts to seek injunctions should be prohibited except for circumstances where money damages are inadequate to compensate the SEP owner such as when a potential licensee: (i) fails to comply with a final judgment from a court of competent jurisdiction, (ii) is bankrupt, or (iii) is beyond the jurisdiction of a court in the jurisdiction in which the SEPs were issued.

B. Demands for Payments Not Based on the Value of SEPs Themselves

As noted previously, the Draft IP Guidelines recognize that offering licensing terms to potential licensees that are "so high that no competitor would be reasonably willing to accept" them can harm competition.[37] Apple agrees that seeking excessive, non-FRAND royalty demands, which can increase costs to consumers, can harm competition. To that end, as provided in Section IV below, we recommend that the IP Guidelines introduce and expand upon this principle in text before illustrating it in an example. We also suggest that the IP Guidelines provide more guidance on considerations for evaluating what constitutes a non-FRAND, excessive rate. Specifically, the payments sought for SEPs should be based on the value inherent to the patented invention and not based on the value added by standardization.[38]

For valuation to reflect the innovative character of the patented invention itself, royalties for a voluntarily FRAND-committed SEP should 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 multicomponent 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.

Valuation at the smallest component level where all or substantially all of the inventive aspects of the SEP are practiced, with further apportionment where appropriate, offers the most fair, reasonable, and representative value base for this purpose. It is unfair and disproportionate if, for example, the common

---

("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.")

[37] *Draft IP Guidelines*, *supra* note 1, at 10.

[38] As the European Commission has stated, "[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." European Commission, "Communication from the Commission: Setting out the EU approach to Standard Essential Patents", COM (2017) 712 final (Nov. 29, 2017), https://ec.europa.eu/docsroom/documents/26583/attachments/1/translations/en/renditions/native. 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". Case T-167/08, *Microsoft Corp. v. European Commission*, EU:T:2012:323, ¶ 138.

base is 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.

IV. Draft Language for Guidelines

In light of the above discussion regarding SEPs and licensing on FRAND terms, we propose adding the following text, identified in red, to the New Zealand Commerce Commission's Draft IP Guidelines:

Page 8:

52. However, in some circumstances, a refusal to license may harm competition. This typically occurs when ownership of an intellectual property right gives rise to substantial market power. For example, where intellectual property rights are incorporated into a government or industry standard, the ability to obtain a license to use those intellectual property rights may become essential to effectively compete.[Footnote 25]

> 52.1 Where an owner of intellectual property rights that have been incorporated into an industry standard has a dominant position in a market and has voluntarily committed to licensing its standard essential patents on FRAND terms, various actions may substantially lessen competition, for example because they constitute constructive or actual refusals to license. Such conduct includes:
>
> > (1) seeking or threatening injunctions (or similar exclusion remedies), unless the potential licensee (i) fails to comply with a final judgment from a court of competent jurisdiction, (ii) is bankrupt, or (iii) is beyond the jurisdiction of a court in the jurisdiction in which the SEPs were issued.
> >
> > (2) seeking excessive, non-FRAND royalty demands, such as by demanding royalties on the inventions or contributions of others that capture value beyond the footprint of the underlying patented technology, or that are greater than the value of the patented technology before its inclusion in the standard.[39]

Page 10:

On the other hand, if the terms offered by Firm A to its competitors broadly amounted to FRAND terms that are based on the value inherent to the patented invention ~~having regard to industry practice~~, they would be unlikely to harm competition.

---

[39] As further examples, royalties for SEPs may be considered excessive when licensed on financial terms that: (i) 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 (ii) do not account for the aggregate royalties that would result if other SEP holders for the relevant standard made royalty demands.