



The American Antitrust Institute

July 26, 2013

The Honorable Amy Klobuchar
302 Hart Senate Office Building
2nd & C Streets, NE
Washington, DC 20510

The Honorable Mike Lee
316 Hart Senate Office Building
2nd & C Streets, NE
Washington, DC 20510

Re: Standard Essential Patent Disputes and Antitrust Law

Dear Senators Klobuchar and Lee:

The American Antitrust Institute (“AAI”)¹ applauds the decision of the Subcommittee on Antitrust, Competition Policy and Consumer Rights of the Senate Judiciary Committee, under your leadership, to hold a hearing next Tuesday on Standard Essential Patent Disputes and Antitrust Law. AAI has on several occasions over the past two years urged the enforcement agencies, courts and Congress to address anticompetitive abuses of a vastly proliferating array of standard essential patents (“SEPs”) and, in particular, the many ways in which SEP owners evade weak and ineffectual patent policies of standard-setting organizations (“SSOs”). These SEP owners thereby acquire market power over major parts of the information technology and communications sectors and defeat the whole purpose of open standards efforts.

Our perspectives in that regard are delineated in the attached submissions that we respectfully ask you to incorporate into the record of next Tuesday’s hearing:

1. Letter of June 14, 2011, to the FTC in response to its invitation for comments on “the practical and legal issues arising from the incorporation of patented technologies in collaborative standards” with particular reference to “the risk of patent ‘hold-up’ and its effect on competition and consumers.”

2. Letter of June 14, 2012, to the Acting Assistant Attorney General in charge of the Antitrust Division commenting upon positions the Division announced earlier that year in connection with acquisitions of major patent portfolios that include SEPs by Google and by the Rockstar Consortium and urging a variety of “follow-up initiatives that could thereby enhance protections against patent holdup outcomes from ownership transfers” of SEPs.

3. Statement of July 18, 2012, on behalf of AAI before the Subcommittee on Intellectual Property, Competition, and the Internet of the House Judiciary Committee at a hearing on “The International Trade Commission and Patent Disputes” urging in particular that SEP

¹ The AAI is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. For more information, see www.antitrustinstitute.org.

owners should not be allowed to seek ITC exclusion orders based on SEPs subject to FRAND (fair, reasonable and non-discriminatory) license commitments.

4. AAI's December 4, 2012, amicus brief to the U.S. Court of Appeals for the Federal Circuit in *Apple, Inc. v. Motorola, Inc.*, arguing in particular that (a) allowing a SEP owner subject to a FRAND commitment to seek injunctive relief against a competitor's use of it to implement the affected standard "invites anticompetitive patent holdup conduct"; and (b) allowing a SEP owner "effectively to repudiate" that FRAND commitment by seeking injunctive relief could "bless and encourage monopolization and attempted monopolization of affected product markets in violation of Section 2 of the Sherman Act."

5. AAI's May 23, 2013, "Request for Joint Enforcement Guidelines on the Patent Policies of Standard Setting Organizations," a petition to the Department of Justice and FTC submitted to both agencies on that day. It rests on the premises that (a) SSOs need to adopt and enforce much more meaningful policies to prevent patent holdup conduct from undermining their open standards efforts; and (b) the agencies can incent the SSOs to move in that direction by appropriate admonitions with regard to the exposure of SSOs themselves to antitrust liability for allowing their processes to be misused in anticompetitive ways and through guidance regarding the kinds of policies that would protect them against any such liability. AAI has yet to receive any feedback from either agency regarding that petition. We would welcome your Subcommittee's encouragement to the agencies to give it appropriate consideration.

Finally, we would like to call attention to a close connection between abusive SEP practices and growing concerns over the tactics and strategies of patent assertion entities ("PAEs") as highlighted by FTC Chairman Ramirez at an event that AAI co-sponsored last month.² Many SEPs subject to FRAND commitments may be included within the massive patent portfolios that PAEs accumulate, typically in collaboration with the original SEP owners that induced SSOs to incorporate the patented technologies in question into their standards by agreeing to the FRAND commitments. The subsequent transfers to the PAEs facilitate evasion of the FRAND commitments and thereby arm the PAEs with the power to raise rivals' costs and otherwise suppress competition generally in affected product markets.³ Thus, persuading SSOs to implement patent policies that would more effectively prevent evasions of this kind can be seen as among the solutions to the PAE problem that is now receiving increasing attention at both enforcement agencies, the PTO, the White House and Congress.

² See Opening Remarks of Chairwoman Edith Ramirez, Competition Law & Patent Assertion Entities: What Antitrust Enforcers Can Do, Computer & Communications Industry Association and American Antitrust Institute Program, Washington, DC, June 20, 2013.

³ See Comments of the American Antitrust Institute on Patent Assertion Entities, submitted to the FTC and Antitrust Division on February 21, 2013, at 6-7: "[I]n the course of amassing huge portfolios in the information technology and communications fields, a PAE will almost surely obtain at least some F/RAND-encumbered SEPs. . . . If any SEP is within the portfolio, a portfolio-wide license demand may make the entire portfolio a *de facto* standard-essential portfolio."

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Our thanks to you for receiving AAI's input on this subject. We would be pleased to provide additional perspectives and any other assistance that may be requested in the aftermath of next Tuesday's hearing.

Sincerely,

A handwritten signature in black ink that reads "Albert A. Foer". The signature is written in a cursive, flowing style.

Albert Foer
President
American Antitrust Institute

Enclosures

cc (with enclosures):

The Honorable Patrick Leahy
The Honorable Charles Schumer
The Honorable Al Franken
The Honorable Chris Coons
The Honorable Richard Blumenthal
The Honorable Lindsay Graham
The Honorable Charles Grassley
The Honorable Jeff Flake

Craig Kalkut
Bryson Bachman
Caroline Holland
Robert Porter