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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

INTELLECTUAL PROPERTY AND STANDARD SETTING

-- Note by BIAC --

17-18 December 2014

This document reproduces a written contribution from BIAC submitted for Item VII of the 122nd meeting of the OECD Competition Committee on 17-18 December 2014.

More documents related to this discussion can be found at www.oecd.org/daf/competition/competition-intellectual-property-standard-setting.htm.

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1. The Business and Industry Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its hearing on intellectual property and standard setting.

1. Introduction

2. In June 2010, BIAC submitted detailed comments setting forth its recommendations regarding the appropriate role of antitrust enforcement in the area of standard setting. BIAC continues to support those recommendations, as there have been no significant changes in the marketplace warranting a different approach. As such, and for ease of reference, summarized below are a number of key observations from BIAC's June 2010 submission. In addition, BIAC offers some further observations in light of the more recent debate surrounding this important issue. Here, BIAC believes that the practical realities of the standard-setting and IP licensing processes do not coincide with those theories underlying a call for broad antitrust enforcement in standard setting.

2. Key Observations from BIAC's June 2010 Submission

3. While competition law should deter and provide effective remedies for improper exclusionary conduct, including in the area of standard setting, it is critically important that the OECD Competition Committee's work not endorse or support proposals in the name of competition law that operate effectively as an unbounded and uncertain qualification to intellectual property rights and thereby stifle the very innovation incentives that intellectual property laws (and indeed antitrust laws) were designed to create, stimulate and protect. Competition law only should encroach upon legitimate intellectual property rights in exceptional circumstances, given how central standardization is to many sectors of the economy. The fact that intellectual property rights are invoked when the underlying technology is incorporated into a standard does not of itself constitute such an exceptional circumstance so as to justify interference with the exercise of intellectual property rights.

4. Despite the fact that standard implementers (as opposed to innovators and consumers) sometimes assert that conduct of IP holders in the framework of standard-setting organizations has raised anticompetitive concern, in fact, actual, successful regulatory challenges to those practices are rare and are based on unusual fact situations where abuse is established, rather than theorized.¹

5. The standard setting and development process generally operates effectively and in the interests of consumers, while the number of legitimate concerns and actual findings of antitrust liability are rare, despite the fact that the number of patents reading on standards has increased dramatically over the past decades.² Indeed, the empirical evidence on holdup attempts is weak or entirely lacking and the anecdotal

¹ See Anne Layne-Farrar, *Patent Holdup and Royalty Stacking Theory and Evidence: Where Do We Stand After 15 Years of History?*, OECD COMPETITION COMM, COMPETITION, INTELLECTUAL PROP. & STANDARD SETTING (Nov. 18, 2014), available at [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2014\)84&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2014)84&doclanguage=en).

² See Timothy Simcoe, *Explaining the Increase in Intellectual Property Disclosure* (Dec. 8, 2005), available at www.rotman.utoronto.ca/timothy.simcoe/papers/SSO_IPR_Disclosures.pdf.

evidence is uneven and often contradictory.³ In BIAC's view, it would not be appropriate to formulate broad policies or make general statements of policy (e.g., in guidelines or other documents) based on the few instances where concerns have been cited when, in fact, empirical evidence suggests that the vast majority of standard-setting practices and activities do not raise competition law concerns.

6. BIAC believes there is an important role for antitrust agencies to play in the area of standard setting; however, that role is best confined to a number of narrow and clearly defined areas. Antitrust agencies are better placed to ensure standard-setting activities are not used as a platform for collusive behavior such as group boycotts, price fixing, or collusive output reduction. Antitrust agencies are also well positioned to evaluate whether standard setting organization (SSO) participation rules unduly discriminate against certain parties.

7. To the extent enforcement authorities do intervene in standard-setting activities, any antitrust analysis should take into account the consumer benefits, efficiencies and innovation efforts driven by standard setting.⁴ Standardization, which is a voluntary activity, is generally undertaken because the participating companies believe efficiencies will be achieved that will enhance market demand for the standardized and related products and thereby increase consumer welfare. The efficiency-enhancing function of SSOs is an important starting point for antitrust analysis of standard-setting activities, but is, unfortunately, often overlooked or not properly credited in the evaluation of net competitive effects. In addition, standard-setting activities tend to be looked at from an ex-post perspective. Therefore, the analysis tends to be restricted to standards that have been successfully developed and implemented, usually at considerable risk, and that have successfully gained market acceptance. A proper analysis, however, also must encompass the ex-ante incentives of the parties to invest significant and speculative resources to develop and support the standard, as well as the actual and potential competition that the technology faced at the time the standard was developed and launched.

8. BIAC submits that to the extent antitrust agencies do intervene in standard-setting activities, they should apply particular analytical rigor with a view to avoiding over-enforcement and false positive findings of antitrust liability. In particular, the mere fact that a specific technology has competed for

³ See, e.g., Joshua D. Wright, Comm'r, U.S. Fed. Trade Comm'n, SSOs, FRAND, and Antitrust: Lessons from the Economics of Incomplete Contracts, Remarks Before the Center for the Protection of Intellectual Property (Sept. 12, 2013), available at www.ftc.gov/sites/default/files/documents/public_statements/ssos-frand-and-antitrust-lessons-economics-incomplete-contracts/130912cpip.pdf (describing the empirical evidence of patent holdup as "unremarkable" and "absent").

⁴ Today there is widespread consensus that standardization agreements generally have positive effects. See, e.g., Eur. Comm'n, *Competition Policy Brief: Standard Essential Patents* (June 2014), available at http://ec.europa.eu/competition/publications/cpb/2014/008_en.pdf, at 3 ("Given their positive economic effects, standardisation agreements are generally compatible with Article 101 TFEU, even if they are agreements between competitors to adopt a single technology in favour of others."); Edith Ramirez, Chairwoman, U.S. Fed. Trade Comm'n, *Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective*, Address Before the 8th Annual Global Antitrust Enforcement Symposium (Sept. 10, 2014), available at www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf, at 4 ("Standards benefit consumers by making it possible for products and technologies to work together reliably within systems and networks. They permit markets to develop without the cost and delay that can be associated with a standards war. Predictability tends to increase the demand for standardized products and encourages entry and competition, leading to more choice and lower prices for consumers."); *Economists Roundtable on Hot Patent-Related Antitrust Issues*, ANTITRUST, Summer 2013, at 10, 11 [hereinafter *Economists Roundtable*] (Christine Meyer: "[Standards] are thought to be efficiency and welfare enhancing for the economy as a whole. . . . Interoperability among different components within a larger system or among various types of hardware or software benefits consumers.")

inclusion in a standard, but has not been chosen and the standard has been set, does not by any means necessarily imply that that technology is actually or potentially excluded from the market or that the SSO or participants in the standard discussions have violated antitrust law. Indeed, the choice of any particular technical specification necessarily means that other technical solutions were not chosen.

3. Theories of Antitrust Harm Often Do Not Align with the Practical Realities of the Standard-Setting and Licensing Processes

9. Standard-setting and IP policies have a significant impact on innovation and technological choices. They influence incentives to innovate *ex ante* and *ex post*, affect the adoption of technologies by end users, and allow the efficient development of new goods. The economic issues related to standardization are particularly important in industries characterized by externalities, with direct network effects making a good increasingly valuable as more users adopt the same or comparable goods (e.g., mobile phones). Because of the goods' interdependent utility functions, users must anticipate which technology will be widely used by others, creating coordination problems: consumers may wait too long to adopt a new technology, a situation known as "excess inertia" in the economic literature, or they may act too quickly and adopt inferior technology, a situation known as "excess momentum". Standardization has an important impact on the way technologies are chosen and promoted, helping to avoid excess inertia and to reduce search and coordination costs. Moreover, the protection of IP rights associated with standards can deliver additional consumer benefits. Fully open technologies do not deliver the same incentives for price competition among suppliers. This type of tradeoff should be taken into account by antitrust authorities when assessing the impact of proprietary technologies and compatibility choices.

10. Many of the potential abuses attributed to standard setting, including patent ambush and holdup, seldom take place, in part because the dynamics of standards development and IP licensing discourage such conduct. Furthermore, even where such conduct is present, it does not automatically follow that the conduct results in competitive harm. The overbroad application of antitrust laws—and the resulting deterrence of innovation and efficiencies—should be avoided, and any enforcement mechanisms in the standard-setting arena should reflect the realities of the standards development and licensing processes.

3.1 Standard-Setting

11. Some antitrust enforcers and commentators have expressed concerns about patent ambush where IP owners deliberately fail to disclose standard-essential patents (SEPs) in order to gain and abuse market power once the industry has spent significant resources to implement the technology and is therefore "locked in" to the standard.⁵ In BIAC's view, the dynamics of the standard-setting process and rules changes within standards organizations render such conduct unlikely, as reflected by the paucity of enforcement actions or private litigation in this area.

12. During the standard-setting process, the participating companies work together to define the technical requirements and desired functionalities of the new product. These discussions are often of a highly technical nature and may involve comparing the potential advantages of multiple possible

⁵ See, e.g., Ramirez, *supra* note 0, at 6; Neelie Kroes, (former) Comm'r for Competition, Eur. Comm'n, Commission Accepts Commitments From Rambus Lowering Memory Chip Royalty Rates, Opening Remarks at Press Conference (Dec. 9, 2009), available at http://europa.eu/rapid/press-release_SPEECH-09-575_en.pdf at 2 ("A company that engages in such deception can exclude potentially competing technologies from the market. Moreover a successful patent ambush can artificially inflate prices for intellectual property rights because the rights holder knows everyone must use that technology. In some cases, it can even allow companies to charge a royalty which, in the absence of the industry standard, they would not have been able to charge at all. *This type of behaviour goes against EU antitrust rules that require standard setting to be open and transparent.*" (emphasis added)).

approaches to a particular technical problem. Considerations include the respective quality, durability, efficiency, and implementation costs of the potential solutions. The incentives of the participating companies typically are aligned to identify the most efficient and functionally successful specification because doing so optimizes the chances of market acceptance. As such, the standard-setting process generally is geared towards the optimal outcome for consumers.

13. The standard-setting process is frequently complex and lengthy.⁶ Often the participants decide upon the general direction of the technical solution at the onset, however, the full process may take several years. During this time, the technical specifications are further clarified and developed, and additional features may be incorporated into the standard. Many of today's standards implicate several hundred patents by the time the standard is finalized.

14. As a result of this complexity and uncertainty, IP owners are not always in a position to provide timely notice that they hold a patent that might be essential to the proposed standard.⁷ This can occur, for example, where the IP owner does not have a full understanding of every aspect of the standard, which may be extremely complicated; a failure to disclose also could result from the difficulty of tracking and identifying all potentially relevant information within a large, multinational organization.⁸

15. On the other side of the equation, because many SSOs require participants to disclose whether they hold patents that may be essential to a proposed standard, SSO databases often reflect "over-disclosure."⁹ This, in turn, leads to uncertainty for implementers attempting to assess their potential licensing obligations.¹⁰

16. Given the complex and dynamic nature of the standard-setting process, it is possible for IP owners to fail to disclose patents that may read on a proposed standard, even where required to do so by the SSO. Oversight or lack of clarity, however, does not constitute anticompetitive conduct. Instances of *deceptive* failure to disclose are very infrequent, as underscored by the dearth of government enforcement actions and private litigation alleging such conduct. Moreover, even where such deception does take place, it does not necessarily result in competitive harm.¹¹

17. Certain market forces further discourage deceptive conduct in the standard-setting context. Namely, the IP owner risks seeing their technology contributions not accepted by other industry participants in the future. End products are ever-evolving, thus standards development will continue beyond the adoption of any one particular standard. An IP owner that engages in misleading or abusive conduct hazards being shut out of future standards.

⁶ See, Maurits Dolmans, EC Competition Law and IP Licensing in a Standard-Setting Context, Presentation Before the ABA Section of Antitrust Law, IP Committee Brown Bag on Standards and IP (June 22, 2007), available at www.americanbar.org/content/dam/aba/directories/antitrust/maurits_dolmans1.authcheckdam.pdf (describing the complicated nature of the standard-setting process and the need for FRAND obligations to prevent abuse of lock-in). at

⁷ Maurits Dolmans, *Standards For Standards*, 26 FORDHAM INT'L L.J. 185 (2002).

⁸ *Id.*

⁹ Dina Kallay & Greg Sivinski, *Head to Head: Hold-Up v. Hold-Out*, PUBLIC DOMAIN (ABA Section of Antitrust Law Intellectual Prop. Comm.) Summer 2014 at 3.

¹⁰ *Id.*

¹¹ See, *Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

3.2 *SEP Licensing*

18. Absent deception, there is concern that IP owners might violate antitrust laws where incorporation of their IP into a standard results in them having market power, allowing them to abuse their now-dominant position. Specifically, the concern is that the owner of a patent essential to the implementation of a standard can unfairly hold up implementers by excluding competitors from the market, extracting excessive royalty rates, or requiring other terms and conditions that the licensee would not agree to absent the standard. To avoid such problems and to ensure the benefits of standards are realized, many SSOs require those participating in standards development voluntarily to commit to license their SEPs on fair, reasonable and non-discriminatory (FRAND) terms.¹²

19. While many SSO policies require a FRAND commitment, those policies often provide little guidance as to what this entails, leaving the details to be worked out through bilateral arms-length negotiations.¹³ As a result, disputes can and do arise between SEP holders and implementers regarding whether the licensing terms offered meet FRAND commitments. There has been a great deal of focus on what role antitrust agencies should play in these disputes and whether these are commercial matters or raise issues for public enforcement.

20. Some advocate that FRAND disputes are an appropriate area for active antitrust enforcement. This approach is based on the conclusion that breach of a FRAND commitment reintroduces the problem of holdup and therefore falls squarely within the purview of antitrust laws prohibiting unfair competition and abuse of dominance.¹⁴

21. Others believe that while disputes between SEP holders and implementers regarding royalty rates or other licensing terms can be resolved by a court determination of FRAND terms, it is the seeking of an injunction or exclusion order against implementers which constitutes a FRAND breach with serious antitrust implications.¹⁵ In addition to the risk of outright exclusion, another concern surrounding injunctions is that SEP holders can use the threat of injunction as leverage during licensing negotiations to secure royalty rates that are excessive, as opposed to reasonable.¹⁶

¹² See, e.g., Ramirez, *supra* note 4 (observing that if a patent owner refuses to commit to license on FRAND terms, the SSO can avoid holdup by selecting an alternative technology). Note that while this submission uses the term “FRAND” throughout, the discussion applies equally to reasonable and non-discriminatory (RAND) terms.

¹³ See, e.g., Mark A. Lemley & Carl Shapiro, *A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents*, 28 Berkeley Tech. L.J. 1135, 1136-37 (2013) (noting that litigation surrounding FRAND commitments is “largely the function of ambiguities and omissions in the FRAND systems used by most SSOs”); Wright, *supra* note 3 (discussing the “incompleteness and ambiguity in SSO contracts”).

¹⁴ See, e.g., Kallay & Sivinski, *supra* note 9 (Greg Sivinski: arguing that antitrust agencies may pursue a case where the SEP holder is alleged to be in violation of its commitment to license on FRAND terms).

¹⁵ See, e.g., Ramirez, *supra* note 4 (contending that contractual disputes over licensing terms do not in themselves raise antitrust concerns, whereas injunctions do merit antitrust scrutiny); see also *Economists Roundtable*, *supra* note 4, at 12 (Cal Shapiro: maintaining that injunctions necessarily constitute a FRAND violation and should be prohibited except in circumstances where the implementer refuses to pay a FRAND rate determined by a court or arbitrator).

¹⁶ See, e.g., *Economists Roundtable*, *supra* note 4, at 12 (Carl Shapiro: arguing that the potential for injunctions and exclusion orders tips the balance of power in favor of SEP holders, allowing them to negotiate excessive royalty rates).

22. BIAC agrees that where parties are unable to agree on FRAND licensing terms, the appropriate resolution is to seek a FRAND determination from a court or third-party arbitrator. These types of disputes, which are actually quite rare, are commercial in nature and therefore subject to resolution as common law contractual disputes, not antitrust violations.¹⁷ Moreover, it is not the role of antitrust agencies to decide whether the price charged for use of a particular technology is “unfair” or “unreasonable”; antitrust enforcement does not extend to setting or second-guessing prices.¹⁸ With respect to injunctions, BIAC acknowledges the potential for abuse whereby SEP holders use the threat of injunctions against willing licensees to leverage excessive rates. However, the record would show that as relates to SEPs at least, injunctions are granted in the rarest of instances.¹⁹ BIAC notes, however, that FRAND commitments are not intended to prohibit SEP holders from enforcing their IP rights,²⁰ and in circumstances where implementers are holding out, seeking redress through an injunction or exclusion order should not be characterized as an antitrust violation.

23. BIAC notes that by imposing obligations on SEP holders, antitrust agencies may be preventing courts from hearing and deciding cases appropriately. Indeed, given that implementers typically adopt technology and market products long before any royalties are paid, actual “hold up” can occur only when a court issues a ruling in favor of the SEP holder. Presumably, a finding by a court in favor of an SEP holder should be entitled to some presumption that the ruling is legitimate and appropriate, including in consideration of potential competition considerations. From this vantage, it could be observed that an SEP holder can “unilaterally” set prices only if a court agrees with the SEP holder and is willing to impose those pricing terms. BIAC notes with concern that there has been insufficient attention paid on the relation between antitrust law and judicial proceedings, which risks shifting the balance away from an adjudicatory structure and into a regulatory regime, a concern that has been expressed regarding the reach of antitrust into other areas of the legal system.²¹

¹⁷ See, Wright, *supra* note 3 (stating that antitrust laws are not well-suited to govern contract disputes and that appropriate remedies are available under contract or patent law).

¹⁸ See, *Interview with Joshua D. Wright, Comm’r, U.S. Fed. Trade Comm’n*, ANTITRUST SOURCE, Aug. 2014, at 9, available at www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug14_full_source.authcheckdam.pdf (remarking that, absent cases involving deception, extending antitrust law to allegations of FRAND breach “threatens to convert antitrust law—a body of law designed to govern the competitive process—into one forced into micro-managing negotiations and regulating prices”); Press Release, Eur. Comm’n, Antitrust: Commission sends Statement of Objections to Motorola Mobility on potential misuse of mobile phone standard-essential patents- Questions and Answers (May 6, 2013) (MEMO/13/403), available at http://europa.eu/rapid/press-release_MEMO-13-403_en.htm (declining to take a position on what constitutes a reasonable royalty rate and stating that “[n]ational courts or arbitrators are generally well equipped to do this.”).

¹⁹ See, Peter Camesasca, Gregor Langus, Damien Neven & Pat Treacy, *Injunctions for Standard-Essential Patents: Justice is not Blind*, 9(2) J. COMPETITION L. & ECON. 285 (2013); and Kirti Gupta & Mark Snyder, *Smart Phone Litigation and Standard Essential Patents* (Hoover IP Working Paper Series No. 14006, 2014), available at <http://ssrn.com/abstract=2492331>.

²⁰ Lemley & Shapiro, *supra* note 13 (noting that that goal of FRAND commitments is twofold: (1) to ensure willing licensees are not blocked from bringing their products to market; and (2) to provide reasonable rewards to IP owners that have invested in the standard-essential technology).

²¹ See, e.g., Bo Vesterdorf, *IP Rights and Competition Law Enforcement Questions*, 4(2) J. EUR. COMPETITION L. & PRAC. 109 (2013) (“Thus, while IP rights holders evidently must respect the competition rules, it is also evident that the application of the competition rules must not curtail the fundamental right of access to court, unless wholly exceptional circumstances may warrant it, as held by the General Court in *ITT Promedia* and *Protege International*.”); Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Robert Bosch GmbH*, FTC File No. 121-0081 (Nov. 26, 2012), available at

3.2.1 *Balancing the Divergent Interests of SEP Holders and Implementers*

24. Firms involved in standard setting have a common desire to develop a successful standard that gains widespread market acceptance. Beyond that common goal, however, they often have competing interests, depending on their activities and business models.²² First, pure innovators earn their revenues solely by licensing their technology and therefore seek to maximize returns on their R&D investments through royalties. Second, manufacturers that do not own intellectual property tend to consider royalties as a cost of production and therefore have an incentive to reduce or even eliminate them. Third, vertically integrated firms active in technology markets as well as downstream product markets may have mixed incentives since they both pay and receive royalties. These various diverging interests and motivations come into play when disputing royalty rates and should be taken into account when evaluating complaints by firms that they are being forced to pay non-FRAND royalties for the use of other companies' intellectual property.

25. Just as a rational IP owner will want to maximize its returns on R&D, a rational implementer will want to minimize its costs, including royalty costs for using other companies' proprietary technology. As a result, essentially all licensing discussions are initiated by the IP owner as opposed to the implementer, because the implementer has the incentive to delay the onset of royalty payments for as long as possible.²³ This may result in a scenario in which the implementer uses another firm's SEP without payment under the guise that the SEP holder has refused to offer terms that are fair and reasonable.²⁴ The risk that the implementer refuses to take a license increases where the worst that can happen is for a court to order the implementer to pay a FRAND rate it should have been paying all along.²⁵ To put it another way, "[t]here is no risk to the exploiter of the technology in not taking a license before they exhaust their litigation options if the only risk to them for violating the agreement is to pay a FRAND based royalty or fee. This puts the risks of loss entirely on the side of the patent holder, and encourages patent hold-out, which is as unsettling to a fair solution as any patent hold up might be."²⁶

www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-ohlhausen/121126boschohlhausenstatement.pdf.

²² Eur. Comm'n, *Communication from the Commission – Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements*, 2011 O.J. (C 11) 1 (describing the types of standard-setting participants and their divergent interests).

²³ See, Kallay & Sivinski, *supra* note 9, at 7 (Dina Kallay: addressing the incentives for patent holdout).

²⁴ See, Certain Elec. Devices, Including Wireless Commc'n Devices, Portable Music & Data Processing Devices, & Tablet Computers, Inv. No. 337-TA-794 (Int'l Trade Comm'n June 4, 2013) (Final), *available at* www.usitc.gov/sites/default/files/secretary/fed_reg_notices/337/337-794_notice06042013sgl_0.pdf at 63 (finding that an exclusion order is appropriate where the implementer is an unwilling licensee). Samsung's right to enjoin Apple from importing certain smartphones was quickly overturned following a veto by the United States Trade Representative based on "public policy considerations" relating to holdup, although the veto made clear that Samsung was free pursue its rights in court. (Letter from Ambassador Michael B. G. Froman, U.S. Trade Rep., to The Honorable Irving A. Williamson, Chairman, U.S. Trade Comm'n (Aug. 3, 2013), *available at* www.ustr.gov/sites/default/files/08032013%20Letter_0.PDF).

²⁵ U.S. Dep't of Justice & U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitment*, (Jan. 8, 2013), *available at* www.justice.gov/atr/public/guidelines/290994.pdf, at 7 n.15 (explaining that the risk of holdout "increases where the putative licensee believes its worst-case outcome after litigation is to pay the same amount it would have paid earlier for a license").

²⁶ Initial Determination, *Certain Wireless Devices with 3G and/or 4G Capabilities & Components Thereof*, Inv. No. 337-TA-868 (June 13, 2014) (Initial Determination), at 114.

26. Thus, if the potential for injunctive relief is unavailable, it may reduce the incentive for implementers to engage in good faith negotiations and increase the likelihood of patent holdout. Moreover, an ex-post interpretation of FRAND commitments to exclude injunctive relief can deprive the parties the benefit of their bargain and undercompensate SEP holders relative to ex-ante expectations.²⁷ This would chill incentives to innovate and commercialize intellectual property to the detriment of consumers.

3.2.2 Actual Market Dynamics

27. Actual market dynamics do not support the theory that IP holders can extract excessive, non-FRAND rates by using the threat of injunction as leverage. In fact, injunctions and exclusion orders relating to SEPs are extremely rare. Injunctions involving FRAND-encumbered SEPs have been limited to the following circumstances:

- In the United States, there have been no injunctions and only one exclusion order granted of patents that were determined to be SEPs, and the single exclusion order was overturned on public policy grounds.²⁸ The International Trade Commission granted an exclusion order based on Samsung's allegations that Apple was not a willing licensee. While the United States Trade Representative vetoed the decision in light of public policy considerations associated with FRAND-encumbered patents, the veto explicitly stated that Samsung was free pursue its rights in court.
- In Europe, Motorola secured three injunctions against Apple in Germany, only one of which was enforced, and only for an extremely short period.²⁹ In April 2014, the European Commission ruled that seeking and enforcing the injunction was an abuse of dominance where Motorola had committed to license on FRAND terms and Apple had agreed to be bound by a court's determination of the FRAND royalties.³⁰ The decision provides a "safe harbor" for SEP implementers willing to be bound by a FRAND rate adjudicated by a court or third-party arbitrator.³¹

28. While these cases are highly publicized and the focus of much debate, that does not change the fact that injunctions and exclusion orders for SEPs are very infrequent. In order for SEP holders to extract non-FRAND rates through the threat of injunction, the threat that an injunction will be inappropriately granted has to be credible. This credibility is lacking where injunctions and exclusions orders for SEPs are so rarely sought or granted.

²⁷ See Wright, *supra* note 3 (citing F. Scott Kieff, *Coordination, Property, And Intellectual Property: An Unconventional Approach to Anticompetitive Effects And Downstream Access*, 56 EMORY L.J. 327 (2006)).

²⁸ See *infra* note 24.

²⁹ See *Apple, Motorola in Patent Duel in Germany*, CBS NEWS (Feb. 3, 2012), available at www.cbsnews.com/news/apple-motorola-in-patent-duel-in-germany; Karin Matussek, *Apple Wins Temporary Ruling on German iPad, iPhone Sales*, BLOOMBERG (Feb. 27, 2012), available at www.bloomberg.com/news/2012-02-27/apple-wins-temporary-ruling-on-german-ipad-iphone-sales-1.html.

³⁰ Case AT.39985—Motorola—Enforcement of GPRS Standard Essential Patents, Comm'n Decision (Apr. 29, 2014) (summary at 2014 O.J. (C 344) 6, available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf).

³¹ Press Release, Eur. Comm'n, *Antitrust Decisions on Standard Essential Patents (SEPs) - Motorola Mobility and Samsung Electronics - Frequently Asked Questions* (Apr. 29, 2014) (MEMO/14/322), available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm.

29. Further reducing the risk that injunctions will be abused are market dynamics that pressure IP owners not to engage in holdup practices. In particular, the owner of intellectual property may be only one party among a number of owners of complementary and essential (i.e., “blocking”) IP, and therefore must take into account the possibility of similar conduct by those parties, as well as the negative effect that its own conduct may have on the willingness of such parties to engage in complementary practices, such as cross-licensing. In addition, the IP owner’s incentives to engage in holdup strategies may be reduced, or eliminated altogether, not only because of the existence of courts, but because excessive royalty rates or overly aggressive terms could have a negative impact on the downstream market demand for the standardized product. Also, licensing negotiations typically are far broader than a discussion of SEPs,³² and IP owners do not want to threaten their ability to monetize their non-essential technology developments. Thus, for holdup to occur, the party engaging in that practice must have a rare combination of factors to create the economic incentive to do this, including a potential patentee that does not wish to seek judicial intervention. As a result, as part of the theory of harm, antitrust agencies and courts should evaluate whether the party at hand indeed had those incentives in the first place.

4. Concluding Observations Regarding the Role of Antitrust Enforcement in the Standard-Setting Context

30. Antitrust law should be invoked in the standard-setting process to resolve disputes over intellectual property rights only in the most exceptional of circumstances. The mere fact that an intellectual property right is necessarily infringed upon when implementing a standard and is thus “essential” does not in and of itself constitute such an exceptional circumstance to warrant antitrust scrutiny, even if it is claimed that royalties are “excessive.”

31. Antitrust enforcers should carefully consider actual market dynamics when analyzing the competitive impact of SEP licensing rather than relying primarily on theoretical harms.

32. FRAND commitments are largely successful and evidence suggests that the vast majority of standard-setting practices do not raise competition law concerns. It would be inappropriate and inaccurate to suggest that the rare examples of abuse necessitate the broad application of antitrust law to standard setting.

³² Anne Layne-Farrar, *Moving Past the SEP RAND Obsession: Some Thoughts on the Economic Principles of Unilateral Commitment and the Complexities of Patent Licensing*, 21 GEO. MASON L. REV. 1093 (2014).