

Docket No. 19-16122

In the
United States Court of Appeals
For the
Ninth Circuit

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

QUALCOMM INCORPORATED, a Delaware corporation,

Defendant-Appellant.

*Appeal from a Decision of the United States District Court for the Northern District of California,
No. 5:17-cv-00220-LHK · Honorable Lucy H. Koh*

**UNOPPOSED MOTION OF NOKIA TECHNOLOGIES OY
TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY**

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Pursuant to Federal Rule of Appellate Procedure 29(a), Nokia Technologies Oy (“Nokia”) respectfully requests leave to file the attached *amicus curiae* brief in support of neither party. Appellant Qualcomm Incorporated (“Qualcomm”) and Appellee Federal Trade Commission (“FTC”) consent to this motion.

INTEREST OF *AMICUS*

Amicus curiae is Nokia Technologies Oy. Nokia¹ is a leading innovator in the telecommunications industry. Nokia has cumulatively invested approximately \$140 billion in research and development relating to mobile communications over the past two decades, and as a result of this commitment, currently owns around 20,000 patent families. Nokia has also played a prominent role in developing technologies that are incorporated in the 2G, 3G, and 4G mobile cellular standards that have been vital to the success of the global mobile telecoms market. Nokia is a significant owner of cellular standards essential patents (“SEPs”) and has a significant number of licensees to those cellular SEPs. Nokia remains at the forefront of developing cellular technologies, including in emerging 5G standards, and continues to contribute technologies covered by its patented inventions as well as to renew its industry-leading patent portfolio.

¹ References to Nokia in this section include Nokia Technologies Oy and its parent, Nokia Oy, and its affiliates.

Nokia also has been for many years and continues to be one of the largest manufacturers of wireless, fixed, and optical telecommunications network equipment, and continues to invest heavily in related research and development, including around \$5.3 billion in 2018. As part of its ongoing businesses, which employ over 100,000 people and operate in around 130 countries, Nokia has also negotiated and secured licenses to cellular SEPs owned by other industry players.

Nokia has been involved in numerous patent cases in U.S. district courts, both as a plaintiff and a defendant, including cases involving SEPs.

RELEVANCE OF *AMICUS* BRIEF

As a leading innovator in the telecommunications industry and active participant in standards development, Nokia believes that its perspective will assist the Court in evaluating certain of the issues presented in this appeal.

First, Nokia does not believe that there is a legal requirement that global portfolio royalty rates must be set using the concept of a smallest saleable patent-practicing unit. In fact, in Nokia's experience, requiring an SSPPU approach to be used in evaluating global portfolio rates is contrary to established and prevailing industry practice. Additionally, chipsets do not reflect the value of standard-essential technology for a variety of reasons, including that chipset prices do not generally build in IP costs, and that many cellular SEPs read on handset components outside of the chipset, methods of use or systems using a handset, or the complete handsets

themselves. Insisting on an SSPPU approach in this context, therefore, will cause an undervaluing of SEP portfolios, lead to inadequate compensation to SEP owners for the use of their patented innovations, and disincentivize future contributions and development of standardized technologies.

Second, Nokia's understanding is that the various 3GPP and 3GPP2 Organizational Partner IPR Policies have not required SEP owners to license cellular SEPs at the component level. For international standards, like the 3GPP and 3GPP2 standards that govern cellular telecommunications, consistency in F/RAND license obligations across Organizational Partners is necessary to ensure that SEP owners and implementers do not potentially face a patchwork of differing practices across different jurisdictions. Requiring component-level licensing contravenes industry norms, leads to the ATIS and TIA IPR Policies being inconsistent with the ETSI IPR Policy, and could have unintended consequences for other SEP holders and the industry at large.

POSITIONS OF THE PARTIES

On August 30, 2019, Kevin Russell, counsel for Qualcomm, stated that Qualcomm consents to Nokia's participation as *amicus*. On August 30, 2019, Jennifer Milici, counsel for the FTC, stated that the FTC consents to Nokia's participation as *amicus*.

CONCLUSION

For the reasons set forth above, Nokia respectfully requests leave to participate as *amicus curiae* in support of neither party.

Date: August 30, 2019

Respectfully submitted,

By: /s/ Ryan W. Koppelman
Ryan W. Koppelman
ALSTON & BIRD LLP

Attorney for Amicus Curiae
Nokia Technologies Oy

CERTIFICATE OF COMPLIANCE FOR BRIEFS

I hereby certify that the foregoing motion uses a proportionately spaced, 14-point font and contains 643 words according to the count of the word processing system used to compose this brief and thus complies with Federal Rules of Appellate Procedure 27(d)(1)(D) and (E) and (2)(A) and with Circuit Rule 27-1.

/s/ Kirstin E. Largent _____
Counsel Press

CERTIFICATE OF SERVICE

I, Kirstin E. Largent, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by ALSTON & BIRD LLP, counsel for *Amicus Curiae* to print this document. I am an employee of Counsel Press.

On **August 30, 2019** counsel has authorized me to electronically file the foregoing **UNOPPOSED MOTION OF NOKIA TECHNOLOGIES OY TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users.

August 30, 2019

/s/ Kirstin E. Largent
Counsel Press

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), *amicus curiae* Nokia Technologies Oy certifies that Nokia Technologies Oy is wholly-owned by Nokia Corporation, a publicly held corporation. No other publicly held corporation owns 10 percent or more of the stock of Nokia Technologies Oy.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), Nokia Technologies Oy certifies that its counsel authored the brief in whole, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person—other than Nokia Technologies Oy—contributed money that was intended to fund preparing or submitting the brief.

RULE 29 STATEMENT OF INTEREST

Amicus curiae is Nokia Technologies Oy. Nokia¹ is a leading innovator in the telecommunications industry. Nokia has cumulatively invested approximately \$140 billion in research and development relating to mobile communications over the past two decades, and as a result of this commitment, currently owns around 20,000 patent families. Nokia has also played a prominent role in developing technologies that are incorporated in the 2G, 3G, and 4G mobile cellular standards that have been vital to the success of the global mobile telecoms market. Nokia is a significant owner of cellular standards essential patents (“SEPs”) and has a significant number of licensees to those cellular SEPs. Nokia remains at the forefront of developing cellular technologies, including in emerging 5G standards, and continues to contribute technologies covered by its patented inventions as well as to renew its industry-leading patent portfolio.

Nokia also has been for many years and continues to be one of the largest manufacturers of wireless, fixed, and optical telecommunications network equipment, and continues to invest heavily in related research and development, including around \$5.3 billion in 2018. As part of its ongoing businesses, which

¹ References to Nokia in this section include Nokia Technologies Oy and its parent, Nokia Oy, and its affiliates.

employ over 100,000 people and operate in around 130 countries, Nokia has also negotiated and secured licenses to cellular SEPs owned by other industry players.

Nokia has been involved in numerous patent cases in U.S. district courts, both as a plaintiff and a defendant, including cases involving SEPs.

Nokia takes no view on the ultimate merits of the claims against Qualcomm in the litigation below. Nokia submits this *amicus* brief to address certain legal issues that arose in the district court's rulings below that are of interest to SEP owners in future cases.

As a leading innovator in the telecommunications industry and active participant in standards development, Nokia believes that its perspective will assist the Court in evaluating certain of the issues presented in this appeal.

First, Nokia does not believe that there is a legal requirement that global portfolio royalty rates must be set using the concept of a smallest saleable patent-practicing unit. In fact, in Nokia's experience, requiring an SSPPU approach to be used in evaluating global portfolio rates is contrary to established and prevailing industry practice. Additionally, chipsets do not reflect the value of standard-essential technology for a variety of reasons, including that chipset prices do not generally build in IP costs, and that many cellular SEPs read on handset components outside of the chipset, methods of use or systems using a handset, or the complete handsets themselves. Insisting on an SSPPU approach in this context, therefore, will cause an

undervaluing of SEP portfolios, lead to inadequate compensation to SEP owners for the use of their patented innovations, and disincentivize future contributions and development of standardized technologies.

Second, Nokia's understanding is that the various 3GPP and 3GPP2 Organizational Partner IPR Policies have not required SEP owners to license cellular SEPs at the component level. For international standards, like the 3GPP and 3GPP2 standards that govern cellular telecommunications, consistency in F/RAND license obligations across Organizational Partners is necessary to ensure that SEP owners and implementers do not potentially face a patchwork of differing practices across different jurisdictions. Requiring component-level licensing contravenes industry norms, leads to the ATIS and TIA IPR Policies being inconsistent with the ETSI IPR Policy, and could have unintended consequences for other SEP holders and the industry at large.

ARGUMENT

I. THERE IS NO LEGAL REQUIREMENT THAT GLOBAL PORTFOLIO ROYALTIES MUST BE SET USING THE SMALLEST SALEABLE PATENT-PRACTICING UNIT

In the Findings of Fact and Conclusions of Law, the district court referred, *inter alia*, to the “smallest salable patent-practicing unit” or “SSPPU” approach in concluding that Qualcomm's royalties were excessive. Because the licenses at issue in the district court were global portfolio licenses, Nokia does not believe that royalty

rates in such global portfolio licenses must be measured using the U.S. SSPPU approach. Nor does Nokia believe that it is improper for such royalty rates to be based on the prices of end-user products, such as handsets.

A. Applicable Case Law Does Not Mandate SSPPU

While the district court took the view that Qualcomm's use of the end-user product (for example, handsets) as a royalty base was inconsistent with the SSPPU approach, the Federal Circuit has made clear that the SSPPU principle is meant to serve as guidance on the admissibility of evidence put before a U.S. jury about damages for infringement of individual U.S. patents. It is not a mandatory cornerstone for all economic methodologies in valuing U.S. patents. As a result, the SSPPU doctrine is certainly not a mandatory or accepted approach when analyzing a portfolio of U.S. patents, and this U.S. evidentiary doctrine is even further removed when the analysis concerns a portfolio of patents including foreign patents from many different countries. SSPPU was created "to help [the] jury system reliably implement the substantive statutory requirement of apportionment," which merely holds that when choosing a royalty base in a U.S. patent infringement case, "care must be taken to avoid misleading the jury by placing undue emphasis on the value of the entire product." *See Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014).

Recent Federal Circuit decisions have expressly rejected a rule, even in U.S. patent infringement cases, requiring “all damages models to begin with the [SSPPU].” *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303 (Fed. Cir. 2015); *see also Exmark Mfg. Co. v. Briggs & Stratton Power Prods. Grp., LLC*, 879 F.3d 1332, 1348-49 (Fed. Cir. 2018) (explaining that “[s]ophisticated parties routinely enter into license agreements that base the value of the patented inventions as a percentage of the commercial products’ sales price,’ and thus ‘[t]here is nothing inherently wrong with using the market value of the entire product.’” (quoting *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1325 (Fed. Cir. 2009) (brackets omitted)). This is consistent with *D-Link’s* holding that “otherwise comparable licenses are not inadmissible solely because they express the royalty rate as a percentage of total revenues, rather than in terms of the [SSPPU].” *D-Link*, 773 F.3d at 1228.

Other U.S. courts have similarly found that an SSPPU approach is not required when evaluating portfolio licenses. In *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, the district court considered whether a F/RAND commitment under the European Telecommunications Standards Institute’s (“ETSI”) IPR Policy requires an SEP holder to license its patents based on an SSPPU approach. No. 6:18-CV-00243-JRG, 2019 U.S. Dist. LEXIS 2872, at *17 (E.D. Tex. Jan. 7, 2019). The court found that it did not. *Id.* (“[T]he parties to the ETSI IPR policy did not intend to

impose a requirement that every FRAND license must be based on the SSPPU.”). The court further found that “[s]everal independent sources confirm that the prevailing industry standard or approach has been to base FRAND licenses on the end-user device and not on the SSPPU.” *Id.* In addition, other courts in this Circuit that have addressed F/RAND royalty rates have done so based upon royalties calculated as a percentage of the net selling price of the end-user devices (e.g., handsets or tablets). *See TCL Commc’ns. Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. 14-341 JVS (DFMx), 2017 U.S. Dist. LEXIS 214003, at *185 (C.D. Cal. Nov. 8, 2017).

Courts outside the U.S. have not applied the U.S. concept of SSPPU in their approach to similar issues. For example, in *Unwired Planet Int’l Ltd. v. Huawei Techs. Co.*, the U.K. court considered as evidence all of Ericsson’s comparable licenses, including those with royalties measured as a percent of the end-user product’s net selling price. *See* [2017] EWHC 2988 (Pat) (Nov. 30, 2017). The U.K. court then determined benchmark F/RAND rates to be a percentage royalty based on the net selling price of the applicable end-products (such as handsets). *See also Huawei Techs. Co. Ltd v. Samsung (China) Inv. Co., Ltd. et al.*, Y03 MC No. 840 (2016).

Moreover, there is no basis for concluding that the SSPPU for all cellular SEPs in a large global portfolio is the baseband chipset. Although the district court reached

that conclusion in *GPNE Corp. v. Apple, Inc.*, No. 12-CV-02885-LHK, 2014 WL 1494247, at *10 (N.D. Cal. Apr. 16, 2014), *aff'd*, 830 F.3d 1365 (Fed. Cir. 2016), that case dealt with only a handful of U.S. patents—not an entire global portfolio of SEPs. In short, the great weight of authority, both at the Federal Circuit and elsewhere, instructs that SSPPU is a U.S. evidentiary principle intended to be used in connection with damages issued for individual U.S. patents to avoid misleading a U.S. jury; it is not required, nor should it be applied, in this or similar cases where global portfolio rates are being evaluated.

B. SSPPU Is Contrary To Global Industry Practice

F/RAND licenses, like those that were at issue below, are generally global in nature and the royalty rates are effectively global blended rates. The SSPPU evidentiary concept used by U.S. courts to avoid jury confusion is not recognized anywhere else in the world. There is no basis for a U.S. court to insist that global blended F/RAND rates must be based on an improper application of a U.S. patent damages evidentiary rule. The net effect would destroy comity as it could require application of SSPPU to foreign patents and foreign jurisdictions, making U.S. evidentiary rules—intended to apply to avoid jury confusion in certain U.S. patent infringement cases—potentially applicable in foreign actions not involving juries, but with the effect of potentially superseding or nullifying the applicable patent laws of local jurisdictions around the globe.

Moreover, evidence presented below established that the prevailing industry practice has been to license at the end-user product (e.g., handset) level, and when licensing portfolios of cellular SEPs using a running royalty approach, prevailing practice is to set royalties using either a dollar-per-unit rate or a percent of the net selling price of an end-user product, such as a handset. And this is, in fact, consistent with Nokia's experience both as a licensor and licensee in the telecommunications industry. Ad valorem royalty rates based on the price of end-user products are common and have been fully accepted by the industry in a substantial body of license agreements.

While Nokia offers no opinion or argument on the merits of the antitrust claims asserted against Qualcomm in this case, Nokia does believe that requiring an SSPPU approach to be used in evaluating Qualcomm's global portfolio rates is contrary to established industry practice (as observed by numerous other courts) and has no basis in U.S. law.

C. Chipsets Do Not Reflect The Value Of The Standard Essential Technology

Nor is it the case that chipsets encompass all the IP at issue in global portfolio licenses because many cellular SEP claims read on more than just the chipset. For example, they may include other handset components outside of the chipset, methods of use or systems using a handset, or the complete handsets themselves. *See* Jonathan D. Putnam & Tim A. Williams, *The Smallest Salable Patent-Practicing*

Unit (SSPPU): Theory and Evidence 35 (2016). A recent study analyzing over 120 Ericsson cellular SEPs with user-equipment claims found that **none** of the SEPs contained claims reciting **only a baseband processor**, meaning that 100 percent of the sampled SEPs recited elements **outside of the baseband processor**. *Id.* Similarly, in considering whether the baseband processor was the SSPPU for a global portfolio of Ericsson SEPs, the Eastern District of Texas found that:

Ericsson presented credible evidence (i) that the profit margin, or even the cost, of the baseband processor is not reflective of the value conferred by Ericsson's cellular essential patents, (ii) that Ericsson's patents are not limited in claim scope to a baseband processor, and as a result, even if one were to indulge HTC's approach, the baseband processor is not the proper SSPPU, and (iii) that the market evidence, in the form of comparable licenses, has failed to embrace HTC's preferred SSPPU methodology.

HTC Corp. et al. v. Telefonaktiebolaget LM Ericsson et al., No. 6:18-cv-00243-JRG, Dkt. No. 538, at 10-11 (E.D. Tex. May 23, 2019).

It is not breaking new ground to recognize that “[t]he benefit of the patent lies in the idea, not in the small amount of silicon that happens to be where that idea is physically implemented.” *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, No. 6:11-cv-343, 2014 U.S. Dist. LEXIS 107612, at *37-38 (E.D. Tex. July 23, 2014). “Basing a royalty solely on chip price is like valuing a copyrighted book based only on the costs of the binding, paper, and ink needed to actually produce the physical product. While such a calculation captures the cost of the physical product, it provides no indication of its actual value.” *Id.*

The fact is the price of a chipset is essentially the cost of manufacture plus a margin. But the cost of manufacture is irrelevant to the value of the inventions incorporated on the chip—the true “benefit of the patent.” *Id.* Thus, using the chipset price incorrectly as the royalty base could grossly shortchange SEP holders from receiving adequate compensation for the value of their patented inventions; the end result of such a requirement would be to curb future investment in technological development and undermine the value of standards in general.

II. THERE IS NO GLOBAL REQUIREMENT THAT SEPS MUST BE LICENSED AT THE COMPONENT LEVEL.

A. The F/RAND Commitment Does Not Mandate Licensing SEPs To “All Comers”

In the context of a refusal to deal claim against Qualcomm under the U.S. antitrust laws, the district court concluded that Qualcomm was obligated to offer licenses to its chipset competitors. Ninth Circuit precedent does not state, however, that F/RAND-committed SEPs must be licensed to “all comers” regardless of the SSO to which the patents were declared essential, or the language of that SSO’s IPR Policy. That is because F/RAND commitments are creatures of contract. And correspondingly, the scope of such commitments is determined from the language of the IPR Policy at issue and other appropriate evidence (e.g., industry practice). In *Microsoft Corp. v. Motorola, Inc.*, Motorola had made promises to the International Telecommunications Union (“ITU”) and Institute of Electrical and Electronics

Engineers (“IEEE”),² and its commitments were thus rooted in ITU’s and IEEE’s IPR Policies. 696 F.3d 872, 876 (9th Cir. 2012). But the Ninth Circuit’s general statement about the language in certain IPR policies from other SSOs does not (and cannot) lead to the conclusion that all SEPs for any standard must be licensed to any party that simply requests a license without resort to the language of the commitment the SEP owner actually signed onto. In looking at the relevant Ninth Circuit precedent, one thing becomes clear—in none of those cases did the Ninth Circuit even have to deal with identifying the parties that were entitled to a license to SEPs on F/RAND terms under the SSO IPR Policies relevant in those cases. In every case, the parties agreed that the licensee was entitled to a license from the SEP owner under the relevant SSO IPR policy. The debates then were simply about whether offered license terms or enforcement activities complied with the requisite F/RAND commitment. *See Microsoft*, 696 F.3d at 885 (considering Motorola’s specific contractual commitments to ITU by referring to the ITU Patent Policy); *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1031 (9th Cir. 2015) (same); *see also D-Link*, 773 F.3d at 1231 (“Trial courts should also consider the patentee’s actual RAND commitment in crafting the jury instruction” because “‘RAND’ terms vary from case to case.”); *Microsoft Corp. v. Motorola, Inc.*, 864 F. Supp. 2d 1023, 1031-

² Neither ITU nor IEEE are the relevant SSOs for standards at issue in this case because they are not 3GPP or 3GPP2 organizational partners.

32 (W.D. Wash. 2012), *aff'd*, 696 F.3d 872. The general language in those cases should not be relied upon to conclude that all F/RAND commitments require licensing to all comers.

B. The Viability Of International Standards Depends On The Compatibility Of Organizational Partners

The SSOs that serve as 3GPP and 3GPP2 Organizational Partners relevant to this case have not historically required licensing at the component level. In particular, Nokia has been heavily involved in 3GPP through the European Telecommunications Standards Institute (“ETSI”). The prevailing view at ETSI since the creation of its IPR Policy is that licensing occurs at the end-user product level, rather than the component level. This view has been confirmed by Dirk Weiler, Nokia employee and Chairman of the ETSI Board and ETSI Special Committee, in sworn testimony.³ It is also consistent with the express language of the ETSI IPR Policy:

To the extent that the IPR(s) disclosed in the attached IPR Information Statement Annex are or become, and remain ESSENTIAL in respect of the ETSI Work Item, STANDARD and/or TECHNICAL SPECIFICATION identified in the attached IPR Information Statement Annex, the Declarant and/or its AFFILIATES are (1) prepared to grant irrevocable licences under this/these IPR(s) on terms and conditions which are in accordance with Clause 6.1 of the ETSI IPR Policy

³ *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK, Dkt. No. 909-6 (Qualcomm Opp. Ex. 27) at 43:3-45:1 (N.D. Cal. Oct. 17, 2018).

Clause 6.1 of the ETSI IPR Policy in turn states that ETSI should seek from an IPR owner that discloses a patent to ETSI:

an irrevocable undertaking in writing that it is prepared to grant irrevocable licences on fair, reasonable and non-discriminatory (“FRAND”) terms and conditions under such IPR to at least the following extent:

- MANUFACTURE, including the right to make or have made customized components and sub-systems to the licensee's own design for use in MANUFACTURE;
- sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED;
- repair, use, or operate EQUIPMENT; and
- use METHODS.

The above undertaking may be made subject to the condition that those who seek licences agree to reciprocate.

“MANUFACTURE” is defined in the ETSI IPR Policy to mean production of EQUIPMENT. And “EQUIPMENT” is, in turn, defined in the ETSI IPR Policy to mean any system, or device *fully conforming* to a STANDARD.

Nokia’s understanding of the ETSI IPR Policy is that the commitment to License on F/RAND terms is given for the activities identified in Section 6.1 in relation to EQUIPMENT as that term is defined in the ETSI IPR Policy, and that EQUIPMENT must be a system or device that *fully conforms* to a standard. Accordingly, Nokia’s licensing commitments to ETSI have been made with this understanding of the ETSI IPR Policy.

Prior to the district court’s ruling below, Nokia was not aware of any positions taken that the ATIS or TIA IPR Policies were incompatible with the ETSI IPR

Policy. In contrast, when the IEEE IPR Policy was specifically amended to effectively require SEP owners to license at the component level, ETSI expressly concluded that the changed IEEE IPR Policy was in fact incompatible with the ETSI IPR Policy.⁴ No similar express changes have been made to the ATIS or TIA IPR Policies.

3GPP and 3GPP2 are collaborative partnerships of the various Organizational Partners, including ATIS and TIA, having the goal of developing technical specifications for adoption around the world. These Organizational Partners adopt IPR Policies governing F/RAND license commitments that are mandated to be consistent across all Organizational Partners in 3GPP and 3GPP2. The district court's finding on summary judgment, however, that the ATIS and TIA IPR policies require component-level licensing leads to inconsistencies between these two standards organizations and other Organizational Partners, such as ETSI. Such an interpretation of the ATIS and TIA IPR Policies directly contradicts the actual terms of the ETSI IPR Policy and the industry's long-term understanding of its meaning. If affirmed, this discord could lead to conflicting licensing obligations across various jurisdictions, which impedes the collaborative goals of 3GPP and 3GPP2.

⁴ *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK, Dkt. No. 909-6 (Qualcomm Opp. Ex. 27) at 93:4-94:11, 103:16-105:18 (N.D. Cal. Oct. 17, 2018).

C. A Finding That ATIS And TIA Require Component-Level Licensing Disrupts Industry Norms And Expectations

A finding that SSO IPR policies mandate licensing of cellular SEPs at the component level is inconsistent with the prevailing and longstanding industry understanding.⁵ Since the adoption of the ETSI IPR Policy, industry members—

⁵ See, e.g., *In the Matter of Certain Electronic Devices, Commission Opinion*, Inv. No. 337-TA-794, at n. 19 (Int’l Trade Comm’n July 5, 2013) (“[T]he record supports a conclusion that a common industry practice is to use the end user device as a royalty base.”); *Unwired Planet Int’l Ltd. v. Huawei Techs. Co.*, [2017] EWHC 711 (Pat.) (May 4, 2017) (“The royalty base is the sum to which the percentage is applied to give the royalty due. It will largely correspond to the price paid for goods and the definition is largely agreed in the draft contract as something called ‘Selling Price’ for ‘End User Devices’ (i.e. handsets) and ‘Infrastructure Revenue’ for infrastructure.”); *D-Link*, 773 F.3d at 1227 (discussing licenses in which royalties were based on the price of the end user product rather than the price of a component); Jonathan D. Putnam & Tim A. Williams, *The Smallest Salable Patent-Practicing Unit (SSPPU): Theory and Evidence* 35 (2016) (concluding, based on publicly available information regarding more than two dozen licenses, that in the “vast majority of cases, we can rule out the use of a component or combination of components as the metering device; in no case can we confirm such use.”); David J. Teece & Edward F. Sherry, *On the “Smallest Saleable Patent Practicing Unit” Doctrine: An Economic and Public Policy Analysis* 11 (2016) (“In the cellular communications industry, it is common practice to license at the device level (cellphones and base stations), rather than at either the chipset or cellular service provider levels.”); Keith Mallinson, *Busting Smartphone Patent Licensing Myths*, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY, GEORGE MASON UNIVERSITY SCHOOL OF LAW 4 (2015) (“Virtually every IP rightholder in the cellular communications industry that publicly reveals information about its licensing requirements, including EU companies (Alcatel-Lucent, Ericsson, Nokia, Siemens), North American companies (InterDigital, Motorola, Nortel, Qualcomm), and Chinese companies (Huawei, ZTE), has publicly stated in recent years that its mobile standard-essential patent (SEP) licensing rates are based on a percentage of the entire handset price, as illustrated with LTE. Samsung, the largest company in South Korea, justified a licensing offer for its 3G standard-essential patents in recent litigation with Apple in the U.S. International Trade Commission on the basis that

including Nokia—have viewed licensing only at the end-user product level as being permitted.⁶ In the course of the litigation below, the FTC cited prior litigation between Nokia and Qualcomm to suggest that Nokia previously thought

royalties calculated on the price of the end-user product are consistent with industry practice. Licensing on this basis is a long-standing practice and was widely recognized since the introduction of 2G GSM, as noted by the International Telecommunications Standards User Group in 1998 and in 2G and 3G standards by several other observers including PA Consulting Group (2005), Credit Suisse First Boston (2005), and ABI Research (2007). European antitrust authorities and the U.S. courts also endorse this approach. The Chinese courts used this royalty base for determining a royalty rate in the Huawei-InterDigital case.”); Erik Stasik, *Royalty Rates and Licensing Strategies for Essential Patents on LTE (4G) Telecommunications Standards*, LES NOUVELLES 114-119 (2010) (finding that every publicly announced 4G licensing rate was expressed as a percentage of the sales price of the end user product, including rates announced by Huawei, Ericsson, and Nokia); see also Devlin Hartline, *Letter to Antitrust Chief Applauds DOJ’s New Evidence-Based Approach to IP Enforcement*, CENTER FOR THE PROTECTION OF INTELLECTUAL PROPERTY, GEORGE MASON UNIVERSITY SCHOOL OF LAW (Feb. 13, 2018), <https://cpip.gmu.edu/2018/02/13/letter-to-antitrust-chief-applauds-dojs-new-evidence-based-approach-to-ip-enforcement/>.

⁶ The UMTS IPR Association, for example, previously stated that:

The royalty “collection point” shall be the last manufacturer in the manufacturing “chain.” This means that chip and subsystem manufacturers shall be indemnified for sales made to Licensees of certified Essential Patents who are the last manufacturers in the “chain.” Licensees shall not include those manufacturers of component products which are incorporated into final assembled products for which royalties are paid to their respective Licensor(s).

3G Patent Platform for 3G Mobile Communication Systems – Definition, Function, Structure, Operation, Governance, UMTS IPR ASSOCIATION, Section 8.2.6 (June 15, 2000), <http://www.atiss.org/gsc/gsc-5/ipr-03.pdf>.

component-level licensing for “all comers” was required by the ETSI IPR Policy.⁷ But the FTC’s arguments did not take into account the full context or surrounding circumstances of Nokia’s position in the prior Qualcomm litigation. In a complaint filed in 2006 by Nokia against Qualcomm with the European Commission, Nokia argued that Qualcomm breached its F/RAND commitments when it attempted to terminate an *existing license* that Qualcomm had *already voluntarily granted* to chipset manufacturer and Nokia-supplier, Texas Instruments, because the justifications for such a termination were already deemed insufficient and pretextual by numerous courts.⁸ If Nokia had believed that component licensing was required for “all comers” or “all applicants” as the FTC tried to argue was Nokia’s position based on selected phrases in Nokia’s 2006 complaint, Nokia could have simply argued that position directly, as it would have allowed Nokia greater flexibility in obtaining chipsets from various suppliers at a time when Nokia was the number one handset maker in the world. Nokia did not make that argument.

There are good reasons for SEP owners to structure their licensing programs to license end-user products. This prevailing industry practice reduces transaction costs and complexities associated with negotiating and executing licenses at multiple points in the supply chain. It also avoids overlapping and duplicative licensing.

⁷ See *FTC v. Qualcomm Inc.*, No. 5:17-cv-00220-LHK, Dkt. No. 897-1 (FTC Response to Nokia *Amicus* Brief) (N.D. Cal. Oct. 11, 2018).

⁸ See *id.* at Dkt. No. 893-2 (FTC Reply Ex. 25).

Additionally, it expedites access to SEPs for the entire supply chain, while also providing greater visibility to what products are actually licensed, for example, for auditing purposes. End-product level licensing thereby avoids potentially overlapping and duplicative licensing at different levels of the supply chain.

While the general industry practice of licensing at the end-user product level developed well before issues of U.S. patent exhaustion came to the fore, the industry practice also accounts for any such concerns.⁹ With component-level licensing, licensees may contend that SEP owners need to splinter their portfolios and license subsets of their relevant SEP claims to various component suppliers at different levels, and then contend that alleged U.S. patent exhaustion alleviates any need for a license to other SEP claims at their point in the supply chain. If licenses must be issued at the component level, then component vendors may also argue that additional SEP claims are exhausted at other points in the supply chain (e.g., the end-user product level). End-user product licensing addresses these issues by providing a single point of license at the downstream end of the chain with rights covering both end-user products and component suppliers without conflicting claims of exhaustion at various levels.

⁹ SEP owners are, of course, free to voluntarily license SEPs to component manufacturers and suppliers. The question presented here is whether SEP owners are *required* to license such component manufacturers and suppliers. Nokia believes they are not.

Moreover, incompatible licensing obligations would create a patchwork of confusing requirements for SEP owners and implementers across various jurisdictions, and even among SEP owners depending on the member organizations through which they have participated in 3GPP and 3GPP2. Such a regime would lead to widescale confusion, higher transaction costs, and uncertainty, at best.¹⁰ And at worst, inconsistent licensing obligations could result in lower participation in standards-related activities and implementation worldwide, particularly as related to new technologies.

SEP licensing has been highly successful in practice: the current industry approach has minimized complexities, while maintaining efficiencies. Parties correspondingly have engaged in bilateral negotiations, leading to hundreds of licenses covering cellular SEPs and widespread implementation of the cellular standards. And consumers—who now have more access to new technologies—have benefited greatly. Novel interpretations of the ATIS and TIA IPR Policies to require component-level licensing in certain jurisdictions, however, may have negative

¹⁰ In its November 2017 guidelines on SEP licensing, the European Commission expressly recognized the potential value and efficiencies in global, portfolio licensing of SEPs, which would require consistent obligations across jurisdictions. *See* 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 (Nov. 29, 2017).

effects on the continued success of standards development and, relatedly, SEP licensing.

CONCLUSION

For the reasons set forth above, *amicus* respectfully submits that (1) there is no legal requirement that global portfolio royalty rates must be set using the smallest saleable patent-practicing unit, and in fact, such an approach is contrary to the prevailing industry practice and does not fairly reflect the value of a global portfolio of SEPs; and (2) the various 3GPP and 3GPP2 partners have not required component-level licensing, and inconsistency among the IPR Policies could have unintended negative consequences for SEP holders and future standards development.

Date: August 30, 2019

Respectfully submitted,

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