

COMMENT OF UNITED STATES FEDERAL TRADE COMMISSIONER JOSHUA D. WRIGHT AND JUDGE DOUGLAS H. GINSBURG ON THE JAPAN FAIR TRADE COMMISSION'S DRAFT PARTIAL AMENDMENT TO THE GUIDELINES FOR THE USE OF INTELLECTUAL PROPERTY UNDER THE ANTIMONOPOLY ACT

This comment is submitted in response to the Japan Fair Trade Commission's (JFTC's) request for public comments on the Draft Partial Amendment to the Guidelines for the Use of Intellectual Property under the Antimonopoly Act (Draft Amendment).¹ We appreciate the opportunity to comment and commend the JFTC for its transparency. We submit this comment based upon our extensive experience and expertise in antitrust law and economics generally, and specifically with respect to the intersection of intellectual property and antitrust.²

The Draft Amendment specifies that seeking injunctive relief to enforce a standard-essential patent (SEP) encumbered by a commitment to license on fair, reasonable, and non-discriminatory (FRAND) terms against a party that is willing to take a license on FRAND terms "may" constitute an unlawful exclusion of business activities in violation of Article 3 of Japan's Antimonopoly Act (AMA) (Draft Amendment Part 3(1)(e)) or an unfair trade practice in violation of Article 19 of the AMA (Draft Amendment Part 4(2)(iv)). The Draft Amendment further specifies that liability may attach regardless of whether the act is taken by a patent holder that makes the FRAND commitment, by a party that accepts assignment of the FRAND-encumbered SEP, or by a party who is "entrusted to manage" the FRAND-encumbered SEP.

The Draft Amendment is premised upon the assumption that seeking injunctive relief "generally makes it difficult to research & develop . . . products adopting the standards," which in turn deters widespread adoption of standards.³ This assumption lacks empirical support. Further, as we explain below, ordinary contract law makes an AMA sanction unnecessary to deter any instances of anticompetitive patent holdup that might arise; indeed, an AMA sanction is likely to reduce incentives to innovate and deter participation in standard setting, thereby depriving consumers of the substantial procompetitive benefits of standardized technologies. For these reasons, we respectfully recommend that Parts 3(1)(e) and 4(2)(iv) be deleted in their entirety. Should the JFTC decide to retain these provisions, however, they should at the very least be amended to limit liability to situations when there is proof that a FRAND-encumbered SEP holder has engaged in patent "holdup," i.e., that the patent holder used the threat of injunctive relief to demand supra-competitive royalties.

¹ The views reflected in this statement are our own and do not necessarily represent the views of the United States Federal Trade Commission or of any other Commissioner.

² One of us is a United States Federal Trade Commissioner, antitrust law professor, and Ph.D. economist. The other is a

I. AN AMA SANCTION IS LIKELY TO REDUCE INCENTIVES TO INNOVATE AND DETER PARTICIPATION IN STANDARD SETTING

A FRAND commitment is, of course,

licensing “includes an obligation to negotiate in good faith,” and that obligation is “a two-way street.”⁹ Similarly, the failure of a successor in interest to abide by a FRAND commitment is also properly a contract and not an antitrust law violation.¹⁰

AMA remedies prohibiting or limiting the ability of a FRAND-encumbered SEP holder

is likely to deter procompetitive conduct including participation in standard setting—requires that there be a probability, not a mere possibility, of higher prices, reduced output, and lower rates of innovation.

In fact, evidence from the smartphone market, which is both patent and standard intensive, is to the contrary. Output has grown exponentially, while market concentration has fallen, and wireless service prices have dropped relative to the overall consumer price index (CPI).¹⁸ A recent study by the Boston Consulting Group found that globally the cost per megabyte of data declined 99% from 2005 to 2013 (demonstrating both innovation to make data transmission more cost efficient as well as the healthy state of competition); the dollar per megabyte fell 95% in the transition from 2G to 3G, and 67% in the transition from 3G to 4G; and the global average selling prices for smartphones decreased 23% from 2007 through 2014, while prices for low-end phones fell 63% over the same period.¹⁹ In Japan alone, mobile telephone charges and cellular phone prices have dropped 15% and 14%, respectively, relative to the overall CPI between 2005 and 2014.²⁰ A recent study of the United States revealed that

was focused upon the various ways that market actors use reputation, contracts, and other institutions to mitigate the inefficiencies associated with opportunism in the real property setting.²²

Recognizing the theoretical nature of holdup concerns, the United States Court of Appeals for the Federal Circuit (which has nationwide jurisdiction over patent disputes) has held that claims of holdup must be substantiated with “actual evidence” of holdup, and that the burden is on accused infringers to show that the patent holder used injunctive relief to gain undue leverage with which to demand supra-FRAND royalties.²³

By deleting Parts 3(1)(e) and 4(2)(iv) of the Draft Amendment, the JFTC would protect incentives to participate in standard setting by allowing SEP holders to seek and obtain exclusion orders when permitted by the SSO agreement at issue

