

Nos. 2012-1548, -1549

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

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APPLE INC. and NEXT SOFTWARE, INC.  
(formerly known as NeXT Computer, Inc.),

*Plaintiffs-Appellants,*

v.

MOTOROLA, INC. (now known as Motorola Solutions, Inc.) and MOTOROLA  
MOBILITY, INC.,

*Defendants-Cross Appellants.*

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Appeals from the United States District Court  
for the Northern District of Illinois in  
case no. 11-cv-8540, Judge Richard A. Posner

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**BRIEF FOR *AMICUS CURIAE* INTEL CORPORATION IN SUPPORT OF  
APPLE INC. AND NEXT SOFTWARE, INC.**

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for *amicus curiae* certify:

1. The full name of every party represented in this case by the undersigned counsel is: Intel Corporation.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by the undersigned counsel is: N/A.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by the undersigned counsel are: None.

4. The names of all the law firms and partners or associates who appeared for the parties now represented by the undersigned counsel in the trial court or are expected to appear in this Court are: Thomas G. Hungar and Matthew D. McGill, of Gibson, Dunn & Crutcher LLP; Tina M. Chappell of Intel Corporation.

DATED: March 20, 2013

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3GPP	Third Generation Partnership Project.
ETSI	European Telecommunications Standards Institute.
FRAND	Fair, Reasonable, And Non-Discriminatory.
FTC	Federal Trade Commission.
IEEE	Institute of Electrical and Electronics Engineers
IPR	Intellectual Property Rights.
RAND	Reasonable and Non-Discriminatory.
SEP	Standard-Essential Patent.
SSO	Standard-Setting Organization.
UMTS	Universal Mobile Telecommunications Standard



## **INTEREST OF *AMICUS CURIAE***

Intel Corporation develops, manufactures, and sells integrated digital technology products. Its products include computing and communications components for server and personal computers, such as microprocessors, chipsets, wireless and wired connectivity products, platforms incorporating these components, and software products, among many other offerings. Intel holds thousands of patents, is a member of a number of standard-setting organizations (“SSOs”), and has contributed technology to a number of important standards. Many of Intel’s products also operate in accordance with industry standards that may incorporate patents held by other companies. Accordingly, Intel has a strong interest in the proper interpretation and reliable enforcement of contractual commitments that patentees make to SSOs.

All parties to this appeal have consented to the filing of this brief. No person other than Intel and its counsel authored this brief in whole or in part or contributed money that was intended to fund the preparation or submission of this brief.

## **INTRODUCTION**

This cross-appeal raises an issue of exceptional importance to the U.S. economy. Computing, networking, and communications products incorporate numerous interoperability standards promulgated by SSOs—technical specifications that

ensure a common format for communicating between devices. These standards are often vital to further innovation and consumer choice, facilitating the rapid adoption of new products and services.

The expanding role of standards may exacerbate an already significant obstacle to innovation in the high-technology sector: the “holdup” problem, which arises when a patentee uses the threat of an injunction as leverage. This problem is particularly acute when compliance with a standard requires the use of standard-essential patents (“SEPs”). Because it is commercially necessary for manufacturers to comply with key interoperability standards that achieve broad acceptance, manufacturers of standard-compliant products are required to practice SEPs, which in turn confers enhanced holdup power upon SEP holders who fail to honor their commitments to license all entities that employ the standard on “reasonable and non-discriminatory” (“RAND”) or “fair, reasonable, and nondiscriminatory” (“FRAND”) terms.<sup>1</sup>

Before a standard’s adoption, the royalties that the patentee could demand from licensees reflect only the value of its patent relative to other methods of achieving the same technological objective. Once an SSO adopts an interoperability standard that incorporates a particular patent, however, substitutes for the tech-

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<sup>1</sup> This brief will refer to FRAND, as the two terms are functionally equivalent.

nology typically lose commercial viability, which—absent FRAND commitments—enables SEP holders to extract supra-competitive royalties from firms that must implement the standard.

The holdup problem is further compounded by the fact that standards typically incorporate numerous SEPs—often thousands—and complex products incorporate hundreds of standards. *See* Mark A. Lemley & Carl Shapiro, *Patent Holdup & Royalty Stacking*, 85 Tex. L. Rev. 1991, 1992 (2007); Brad Biddle et al., *How Many Standards in a Laptop? (And Other Empirical Questions)* 1 (2010), available at [http://www.standardslaw.org/How\\_Many\\_Standards.pdf](http://www.standardslaw.org/How_Many_Standards.pdf) (identifying 251 interoperability standards implemented in modern laptop computer). Thus, numerous patentees may hold SEPs that read on standard-compliant components of a given product. If even a small fraction of them demand unreasonably high royalties, the aggregate royalty burden could far exceed the product's price.

To address this problem, most SSOs ask participating SEP holders to commit to license all entities that employ the standard on FRAND terms. Because the SSOs are not enforcement bodies, it falls to courts to enforce compliance with FRAND commitments under the ordinary rules of contract and patent law.

In this case, Judge Posner correctly denied injunctive relief to Motorola regarding its '898 patent—which provides for telecommunications between cellular phones and cellular base stations—because such relief is unavailable, except in

limited circumstances, when a SEP is FRAND-encumbered. *See Apple Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913–14 (N.D. Ill. 2012). As Judge Posner explained, “[b]y committing to license its patents on FRAND terms, Motorola committed to license the ‘898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent.” *Id.* at 914. Judge Posner also correctly excluded testimony from Motorola’s damages experts, in part because it did not reliably reflect a proper calculation of a FRAND royalty. *See id.* at 912–13.

As discussed below, enforcement of three important principles that flow from the specific contractual commitments that Motorola undertook will advance the goals of FRAND commitments and mitigate the potential harm to innovation and consumer welfare otherwise engendered by standard-setting. First, a FRAND license must be available to all comers. Second, a patentee that makes a FRAND commitment may not obtain an injunction against an alleged infringer, except in limited circumstances. Third, a “reasonable” royalty rate under such FRAND commitments must be based on the value of the particular component of the product that practices the SEP and the relative contribution of the SEP to that component, taking into account alternatives that were available before the adoption of the standard and the contributions of other patented and non-patented technologies embodied in the component.

These issues are of pressing importance to the U.S. economy and the public interest. As the Federal Trade Commission (“FTC”) has stated in this case, “[t]he problem of patent hold-up can be particularly acute in the standard-setting context, where an entire industry may be locked into a standard that cannot be avoided without infringing or obtaining a license for numerous (sometimes thousands) of standard-essential patents.” *Amicus Curiae Br. of FTC* at 3–4. Accordingly, in reviewing such issues, this Court should enforce the voluntary decisions of FRAND-encumbered SEP holders, who agreed to license all willing licensees and to forego an injunction in exchange for FRAND royalties. The Court should also affirm Judge Posner’s exclusion of Motorola’s damages experts based on their failure to offer a methodology for calculating a reasonable royalty consistent with FRAND principles.

## **ARGUMENT**

### **I. Standard-Setting Creates Opportunities For Patentees To Exploit Unearned Market Power**

#### **A. Standard-Setting Has The Potential To Bestow Undeserved Market Power On SEP Holders**

SSOs play a critical role in the technology field by bringing together industry participants to evaluate competing technologies for inclusion in standards, enabling “companies to agree on common technological standards so that all compliant products will work together.” *Apple, Inc. v. Motorola Mobility, Inc.*, 2011 WL 7324582, at \*1 (W.D. Wis. June 7, 2011). Through this process participants can

“readily make an objective comparison between competing technologies, patent positions, and licensing terms before an industry becomes locked in to a standard.” *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 309 (3d Cir. 2007). The adopted standard then dictates specific protocols that are incorporated into products to enable them to communicate with each other. Such interoperability standards “lower costs by increasing product manufacturing volume” and “increase price competition by eliminating ‘switching costs’ for consumers who desire to switch from products manufactured by one firm to those manufactured by another.” *Id.* Standards also “reduce[] the risk to producers (and end consumers) of investing scarce resources in a technology that ultimately may not gain widespread acceptance.” *Id.*

A “complication with standards,” however, “is that it may be necessary to use patented technology in order to practice them.” *Apple*, 2011 WL 7324582, at \*1. In this case, for example, Motorola asserts that Apple has infringed a patent (the ‘898 patent) essential to the Universal Mobile Telecommunications Standard (“UMTS”).<sup>2</sup> Normally, “a patent does not necessarily confer market power upon

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<sup>2</sup> Motorola also claimed infringement of its ‘559 patent, but Judge Posner held that Apple had not infringed the ‘559 patent, *see* Dkt. 1003, and that it is not a SEP, *see Apple Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 912 (N.D. Ill. 2012).

the patentee.” *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 45 (2006). When SSOs’ interoperability standards attain substantial commercial acceptance, however, substitute technologies are often effectively foreclosed. *Broadcom*, 501 F.3d at 314. This is because compliance with standards becomes commercially necessary, forcing firms to practice SEPs in order to comply with the standard and preventing them from using what otherwise would be alternative technologies. In these circumstances, absent the constraints imposed by FRAND commitments, SEP holders would be empowered to exploit the unearned market power attributable to the commercial attractiveness of the standard, quite apart from any inherent value of the technologies embodied in the SEPs themselves.

Moreover, inclusion in a standard tends to greatly increase the utilization of the particular technologies embodied in SEPs, well beyond what would have been the case in the absence of a standard embodying those SEPs. Widespread adoption of interoperability standards effectively compels implementers to use SEPs in order to compete. Absent enforceable FRAND commitments, therefore, interoperability standards would enable entities participating in standard-setting activities to steer the standard toward their patented technology and then extract unreasonably high royalties from those implementing the finally-adopted standard—royalties based on the commercial attractiveness of the standards rather than the inherent value of the SEPs at issue. *Broadcom*, 501 F.3d at 314. FRAND commitments are

thus necessary to prevent SEP holders from exploiting the unearned market power generated by broad commercial acceptance of standards.

**B. Standards May Exacerbate The Problems Of Holdup And Royalty Stacking**

Standards may aggravate the holdup problem that arises when patentees use the threat of an injunction as “a bargaining tool to charge exorbitant fees.” *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 396 (2006) (Kennedy, J., concurring). Holdup typically occurs when a patentee threatens an injunction as leverage to inflate a royalty rate beyond its true value after an accused infringer has made a substantial investment to develop a product and bring it to market. It enables the patentee to “capture not just the value of the inventive contribution that they have made—something they ought to be entitled to—but also some greater amount of money than their invention is worth.” Mark A. Lemley, *Ten Things To Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L. Rev. 149, 152 (2007). Armed with an injunction or a credible threat of an injunction, a patent holder can refuse to license its patent unless the technology user agrees to pay a royalty that far exceeds design around costs and even the entire value of the component in which the patented technology allegedly is used.

The problem is exacerbated when the patent is a SEP because, in that case, design-around is not an option and the injunction thus enables the patent holder to capture value based on the entire product itself, including value attributable to oth-



er components in the product. Companies that “have invested significant resources developing products and technologies that conform to the standard will find it prohibitively expensive to abandon their investment and switch to another standard” and will “become ‘locked in’ to the standard.” *Broadcom*, 501 F.3d at 310. Patentees thus obtain a “unique position of bargaining power” in which they “may be able to extract supracompetitive royalties from the industry participants.” *Id.* In other words, while holdup can occur even in the absence of standards, “[s]tandard setting makes the holdup problem worse because it leads to the creation of *irreversible* investments.” Lemley, *supra*, at 154 (emphasis added).

The threat from holdup is compounded by the fact that a product often incorporates many standards. Lemley & Shapiro, *supra*, at 1992. One study estimated, for instance, that a modern laptop computer incorporates “*at least* 251 interoperability standards”—with “the actual number” “certainly much higher.” Biddle, *supra*, at 1. Because each standard may, in turn, incorporate hundreds or even thousands of patents, a given product may be subject to vast numbers of SEPs—in addition to numerous other patents and other intellectual property rights. In short, a “modern device can encompass thousands of useful technologies, each of which may be covered by a patent claim.” *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 966 (N.D. Cal. 2009); *see also* S. Rep. No. 110-259, at 12 (2008) (“[M]any products comprise dozens, if not hundreds or even thousands

of patents, and the infringed patent may well be one smaller part of a much larger whole.”).

This multiplicity of standards and SEPs, in conjunction with the threat of holdup, leads to a further problem: “royalty stacking,” whereby numerous patent holders each demand unreasonably high royalties on the same product. Lemley & Shapiro, *supra*, at 1993. This can result in an excessive and unreasonable total royalty burden. Demands by multiple SEP holders for supra-competitive royalties cause “harm based on reduced output, higher prices, and thus deadweight loss.” *Id.* at 2015. Royalty stacking thus hurts consumer welfare by raising prices for goods and preventing some innovative products from reaching the market at all. It “cause[s] prices to be higher than would be set by an integrated monopolist who owned all of the patents and sold the downstream product.” *Id.* at 2014. Economic theory teaches that when different patentees control the price of SEPs, no single patentee has an adequate incentive to ensure that the cost of the product is low enough to make it commercially attractive. Carl Shapiro, *Navigating the Patent Thicket* 123, in 1 *Innovation Policy and the Economy* (eds. Adam B. Jaffe et al. 2001).

An example of such royalty stacking can be seen in patent litigation involving WiFi technology. Many companies who make or use WiFi-compliant products have been repeatedly sued by various plaintiffs alleging infringement of the IEEE

802.11 WiFi standards. WiFi technology, of course, is ubiquitous in a wide array of consumer products, from laptops and printers to medical devices and home appliances. Permitting numerous holders of the thousands of FRAND-encumbered SEPs implicated by the WiFi standards to exploit the vast commercial value attributable to the success of those standards would over-compensate those patent holders, impose undue costs on innovative new products, and create disincentives for widespread adoption of standards in the future, to the detriment of innovation, consumers, and the economy as a whole.

**C. FRAND Commitments Help Mitigate The Anticompetitive Threat From Standards**

SSOs have recognized the power that standards may confer upon SEP holders to exploit the market power created by the incorporation of their patents into standards. *See, e.g., Amicus Curiae Br. of IEEE* at 20. SSOs therefore have attempted to prevent the exploitation of such unearned market power by promulgating rules “to insure that standards do not allow essential patent owners to extort their competitors or prevent them from entering the marketplace.” *Apple*, 2011 WL 7324582, at \*1. Among other measures, most SSOs ask potential SEP holders to commit to offer licenses on “RAND” or “FRAND” terms to implementers of the standard. *Id.*

In this case, Motorola claims that its ‘898 patent is essential to compliance with the UMTS standard, which was promulgated by the Third Generation Partner-

ship Project (“3GPP”), a collaboration of SSOs that includes the European Telecommunications Standards Institute (“ETSI”). *See Apple Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 912 (N.D. Ill. 2012); 3GPP, Legal Matters, <http://www.3gpp.org/Legal-matters> (last visited March 19, 2013). Motorola is a member of ETSI, and its participation in the standard-setting process was therefore subject to ETSI’s rules, pursuant to which Motorola was required to submit “an irrevocable undertaking in writing” to “grant irrevocable licences on [FRAND] terms and conditions” to its claimed SEPs.<sup>3</sup> Thus, pursuant to ETSI’s Intellectual Property Rights (“IPR”) Policy, Motorola irrevocably committed to license any willing licensee to make, sell, and use standard-compliant products on FRAND terms.

FRAND commitments, such as ETSI’s, help to prevent holdup by establishing *ex ante* ground rules for licensing SEPs—before entities are locked into a standard. They are intended to reduce “the potential for the exercise of *ex post*

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<sup>3</sup> ETSI Rules of Procedure § 6.1 (2011), <http://www.etsi.org/WebSite/document/Legal/ETSI%20IPR%20Policy%20November%202011.pdf>; *see* 3GPP, Working Procedures § K, art. 55 (2012), [http://www.3gpp.org/ftp/Information/Working\\_Procedures/3GPP\\_WP.pdf](http://www.3gpp.org/ftp/Information/Working_Procedures/3GPP_WP.pdf) (“Individual Members shall be bound by the IPR Policy of their respective Organizational Partner.”); 3GPP, Call for IPR (Meetings), <http://www.3gpp.org/Call-for-IPR-Meetings> (last visited Mar. 19, 2013); 3GPP, Partnership Project Description 46 (1998), [http://www.3gpp.org/ftp/Inbox/2008\\_web\\_files/3GPP.ppt](http://www.3gpp.org/ftp/Inbox/2008_web_files/3GPP.ppt).

market power,”<sup>4</sup> by constraining the ability of SEP holders to make unreasonable license demands using injunction threats and other sharp tactics to extract unreasonably high royalties after a standard is adopted. But because ETSI, like other SSOs, does not have the capacity to enforce those commitments, it falls upon the courts to do so.

## **II. SEP Holders Are Entitled To A Royalty Assessed At The Component Level And Are Not Entitled To Injunctive Relief Except In Limited Circumstances**

Motorola’s FRAND commitments require Motorola to offer reasonable license terms to all parties implementing the standard and to refrain from seeking injunctions against parties except in limited circumstances. Practically speaking, permitting Motorola to seek injunctions based on its FRAND-encumbered SEPs would give Motorola powerful leverage to demand excessive royalties. This is precisely the exploitation of unearned market power that FRAND commitments were designed to prevent.

In reaching that conclusion, this Court should recognize three principles that follow directly from the text and purpose of FRAND commitments. First, FRAND licenses must be offered to all comers; this follows directly from the plain text of

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<sup>4</sup> Richard J. Gilbert, *Deal or No Deal? Licensing Negotiations in Standard-Setting Organizations*, 77 Antitrust L.J. 855, 856 (2011).

the commitment. Second, patentees that make FRAND commitments may not seek an injunction, except in limited circumstances, because they have committed to license their SEPs on reasonable terms. Third, in order that the royalty be “reasonable,” FRAND royalty-setting must be based only on the value of the component that implements the standard; reflect the *ex ante* value of the SEPs (*i.e.*, their value before they were incorporated into the standard); and take into account all the other technologies (patented or otherwise) incorporated into the component.

**A. A FRAND Commitment Requires A SEP Holder To License All Comers, Including Component Makers**

The foremost command of the FRAND contractual obligation is that a SEP holder must grant a reasonable license to *all* comers—both sellers of completed products to consumers, such as Apple, and manufacturers of the components that go into those products. The plain text of the ETSI Policy states that a SEP holder must “grant irrevocable licences on [FRAND] terms and conditions” to its claimed SEPs. *See* ETSI Rules, *supra* note 3, § 6.1. In addition, the ETSI policy requires owners of essential IPR to undertake to grant licenses “to at least” “MANUFACTURE”; “sell, lease, or otherwise dispose of EQUIPMENT so MANUFACTURED”; “use” “EQUIPMENT”; “and” “use METHODS.” *Id.*

The obligation to grant “at least” the rights specified in a list joined by the conjunctive word “and” is most naturally read as obligating Motorola to make the full array of specified rights available to *any* prospective licensee upon request.

So, too, does the obligation to license on “nondiscriminatory” terms, which requires equal treatment for all. Thus, pursuant to ETSI’s IPR Policy, Motorola committed to license on FRAND terms any willing licensee to the full range of patent rights essential to implement the standard. Accordingly, Motorola must grant FRAND licenses to any willing party.

**B. Injunctions Are Inappropriate To Enforce A SEP Except In Limited Circumstances**

A straightforward application of traditional equitable principles compels the conclusion that a patentee that has contractually committed to license its SEPs to all applicants on FRAND terms is precluded from obtaining an injunction to enforce those SEPs, except in limited circumstances. Such exceptions include when a U.S. court with competent jurisdiction or a binding arbitrator previously determined in a final, non-appealable judgment that the SEP holder has made an offer to the alleged infringer that satisfied its FRAND obligations and the alleged infringer rejected the offer.

No finding has been made here that Motorola offered, and Apple declined, a license on terms that satisfy Motorola’s FRAND obligations.<sup>5</sup> Accordingly, an injunction in this case would amount to the exploitation of market power (which was

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<sup>5</sup> Motorola claims that “Apple refused to pay (or even be bound by) a court-determined FRAND rate” (Motorola Cross-Appeal Br. at 71), but no court has yet determined a FRAND rate for the ‘898 patent.

created by an industry standard, not by the individual SEPs) to deny producers and consumers the benefits of industry standard-setting, after the patentee voluntarily and publicly agreed to give up its right to exclude willing licensees from practicing the SEPs in exchange for FRAND royalties. Injunctions with respect to FRAND-encumbered SEPs create a risk of coerced windfall settlements that would distort competition, undermine the standard-setting process, and injure consumers. Indeed, because SEPs are incorporated into a variety of products (*e.g.*, the IEEE 802.11 WiFi standard is used in laptops, tablets, mobile phones, printers, medical devices, network equipment, televisions, bluray players, home appliances, etc.), granting an injunction for a FRAND-encumbered SEP could enable a party to effectively shut down multiple U.S. industries, after having voluntarily committed to license their SEPs on FRAND terms to all implementers.

In many cases, moreover, SEP holders threaten or seek injunctive relief merely as a tool for extracting larger royalties, not because they actually desire to enjoin the manufacture and sale of standard-compliant products. Taken to its extreme, the issuance of injunctions against standards implementers would in fact be contrary to the interests of all SEP holders because it would undermine the widespread adoption and utilization of interoperability standards in furtherance of which the SEP holders made the FRAND commitments. Increased acceptance of such standards by industries and consumers benefits SEP holders by increasing the



volume of sales subject to FRAND royalties.

In this case, Motorola claims that its ‘898 patent is essential to compliance with the UMTS, and that the accused devices practice that standard and therefore infringe Motorola’s SEP. As explained above, because 3GPP—a collaboration of SSOs that includes the ETSI—promulgated the UMTS standard, Motorola is subject to the IPR Policy of the ETSI. *See* 3GPP, Legal Matters, <http://www.3gpp.org/Legal-matters> (last visited Mar. 19, 2013). That policy states that among its goals is “to reduce the risk” “that investment in the preparation, adoption and application of STANDARDS could be wasted as a result of an ESSENTIAL IPR for a STANDARD” being “unavailable.”<sup>6</sup> As the former Chairman of ETSI’s Technical Committee Special Mobile Group from 1996 to 2000 has explained, “[t]he intention in ETSI was that once the undertaking is given, the owner would have *no possibility* to use his blocking rights as long as the licensee is prepared to accept FRAND terms and conditions. . . . This was commonly understood, and is very much at the heart of the IPR Policy.”<sup>7</sup>

In accordance with these requirements, Motorola accepted that FRAND roy-

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<sup>6</sup> ETSI Rules, *supra* note 3, § 3.1.

<sup>7</sup> Pls.’ Opening Pre-Trial Brief at 45 & n.132, *Nokia Corp. v. Qualcomm Inc.*, C.A. No. 2330-VCS (Del. Ch. July 15, 2008) (quoting Expert Report of Friedheim Hillebrand at 9, ¶ 19 (May 22, 2008)) (emphasis added).

alties would sufficiently compensate it for the use of its SEP by *any* implementer of the standard. In other words, to make it possible for its technologies to be incorporated into the standard, Motorola agreed to forgo the right to exclude parties willing and able to pay FRAND royalties from practicing its SEP.

Because Motorola's FRAND commitments constitute promises to license its SEPs to all parties that incorporate the standard into their products, those commitments effectively modified the scope of Motorola's patent rights. A patent confers "a property right," *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 730 (2002), that ordinarily entitles the holder to exclude others from practicing the patent. But "[a]s with other property rights, patent-related rights can be contracted away." *Deprenyl Animal Health, Inc. v. Univ. of Toronto Innov. Found.*, 297 F.3d 1343, 1357 (Fed. Cir. 2002). Once the patentee commits to license its SEPs, the scope of its property right is modified and it may no longer seek an injunction, except in limited circumstances as discussed above. *Cf. Tessera, Inc. v. ITC*, 646 F.3d 1357, 1369–71 (Fed. Cir. 2011), *cert. denied*, 132 S. Ct. 2707 (2012).

Like other SSO participants, Motorola made a voluntary, business decision to forego the unfettered right to an injunction in exchange for the benefits of participation in the standard-setting process and incorporation of its patent into ETSI's standard. Thus, when Judge Posner held that Motorola's contractual promises to

accept compensation from *all* users of the standard leave no room in this case for barring Apple from selling standard-compliant products, he was not taking a right away from Motorola. Instead, he was merely enforcing the voluntary decision that Motorola had already chosen to make. *Apple*, 869 F. Supp. 2d at 914.

To reverse Judge Posner and grant an injunction in these circumstances would set a dangerous precedent with far-reaching consequences for standard-setting activities. To give just one example, “3G wireless technology was subject to more than 7000 claimed ‘essential’ patents as of 2004; the number is doubtless much higher now. WiFi is subject to hundreds and probably thousands of claimed essential patents.” Mark A. Lemley, *Software Patents and the Return of Functional Claiming* 24 (Stanford Public Law Working Paper No. 2117302, 2012), *available at* <http://ssrn.com/abstract=2117302>. If each of those thousands of patents could serve as a gateway to blocking wireless products, it would have the potential to destroy the usefulness of the standard-setting processes that play such a vital role in our innovation-based economy.

Traditional equitable principles confirm the impropriety of injunctive relief for SEP holders in these circumstances. In *eBay Inc. v. MercExchange, L.L.C.*, the Supreme Court held that in order to obtain an injunction a patent holder must demonstrate “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that inju-

ry; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” 547 U.S. 388, 391 (2006).<sup>8</sup>

In most circumstances, a SEP holder cannot satisfy *eBay*’s factors. A SEP holder that makes a FRAND commitment is not expressing a mere “willingness to license its patents,” 547 U.S. at 393 (quotation marks omitted), but rather pledging to license the patents to *all* parties on FRAND terms. By committing to license its SEP to *all* parties, the SEP holder has “implicitly acknowledged that a royalty is adequate compensation for a license to use that patent.” *Apple*, 869 F. Supp. 2d at 914. It has *already* agreed that “monetary damages” are “[a]dequate . . . compensat[ion],” and it thus cannot show “irreparable injury” or that “remedies available at law, such as monetary damages, are inadequate to compensate for that injury.” *eBay*, 547 U.S. at 391; *see also Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 884 (9th Cir. 2012) (“Implicit in such a sweeping [FRAND] promise is, at least arguably, a guarantee that the [present] patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunc-

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<sup>8</sup> Motorola errs in accusing Judge Posner of not applying the *eBay* factors to Motorola’s request for injunctive relief. He expressly cited *eBay* and denied injunctive relief precisely because *eBay*’s standard “means, with immaterial exceptions, that the alternative of monetary relief must be inadequate.” *Apple*, 869 F. Supp. 2d at 915.

tion, but will instead proffer licenses consistent with the commitment made.”); *ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d 1312, 1339 (Fed. Cir. 2012) (“In light of the record evidence including ActiveVideo’s past licensing of this technology and its pursuit of Verizon as a licensee, no fact finder could reasonably conclude that ActiveVideo would be irreparably harmed by the payment of a royalty (a licensing fee).”); *Apple*, 869 F. Supp. 2d at 915 (“A FRAND royalty would provide all the relief to which Motorola would be entitled if it proved infringement,” and “thus it is not entitled to an injunction.”).

Motorola also cannot satisfy *eBay*’s “balance of hardships” and “public interest” factors. Because of the commercial infeasibility of designing around standards, allowing an SEP holder to obtain an injunction (except in limited circumstances, as discussed above) would empower SEP holders to extract a disproportionate share of the value of accused products, making an unreasonably high settlement the only plausible outcome, and thereby raising prices to consumers. Even more troubling, issuance of an injunction in the face of unfulfilled FRAND commitments would undermine the standard-setting process that is so vital to U.S. innovation, economic growth, and consumer welfare, because companies will become reluctant to agree on standards and to incorporate them into their products if SEP holders can unfairly exploit the resulting standard-derived market power through injunctions. That will ultimately hurt consumers, who have benefited tre-

mendously from the interoperability of high-technology products.

The very purpose of the FRAND commitment is to thwart this sort of exploitation of unearned market power. If there are any circumstances in which it is inappropriate for a party to use “an injunction” as a “bargaining tool,” *eBay*, 547 U.S. at 396 (Kennedy, J., concurring), it is the standard-setting context, where there is little possibility of design-around and the patent holder has already agreed that a royalty is sufficient compensation for its SEPs.

**C. For A Multi-Component Product, A FRAND Commitment Generally Requires A Royalty To Be Assessed At The Component Level And To Take Account Of Other Patents That Read On The Component**

Courts must consider FRAND principles when assessing reasonable royalties for FRAND-encumbered SEPs, because the owner of a FRAND-encumbered patent has agreed contractually to surrender some of the rights that it would otherwise have as a patentee in exchange for the prospect that incorporation of its patent into a standard would lead to higher revenues based on the necessity of employing its technology in order to comply with the standard.

Two key principles for calculating FRAND royalties flow directly from the text and objective of the FRAND commitments required by the ETSI Policy. First, a FRAND royalty must be set at the smallest saleable component that embodies the relevant SEPs. *See LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 68 (Fed. Cir. 2012) (“[P]roof that consumers would not want a laptop computer

without such features is not tantamount to proof that any one of those features alone drives the market for laptop computers.”). Second, in deriving a royalty rate, a court must take account of the contribution of the patent to the component—and it can *only* do so by considering the context of that patent in relation to other patented (both SEP and non-SEP) and non-patented technology embodied in that component.

These basic requirements are fundamental elements of a “reasonable” royalty rate because they ensure that the rate reflects only the incremental economic contribution of the SEP and not the exercise of unearned market power that FRAND commitments are designed to prevent. As one SSO has explained in this case, SSOs “seek[] to produce standards that any willing implementer can use” and require a “patent holder’s commitment that it will grant licenses to implementers on reasonable and non-discriminatory terms” in order to “protect implementers of a standard against patent hold-up.” *Amicus Curiae* Br. of IEEE at 11–12, 15.

When hundreds or thousands of patents are incorporated into a standard, it would take only a handful of SEP holders demanding unreasonable royalties to render the standard commercially unviable. In interpreting FRAND commitments, therefore, courts must ensure that each SEP holder receives a royalty that reflects only the contribution of its patent to the accused product, and not the unearned market power that it agreed through its FRAND commitment to forego. That re-

quires a determination of the *ex ante* value of a SEP—that is, the royalty that the SEP holder could have obtained from the manufacturer in arms-length bargaining before the SEP was incorporated into the standard. See FTC, *The Evolving IP Marketplace* 23 (2011), available at <http://www.ftc.gov/os/2011/03/110307patentreport.pdf> (“Courts should cap the royalty at the incremental value of the [FRAND-encumbered] patented technology over alternatives available at the time the standard was chosen.”). That determination must account for the fact that, when a standard is incorporated into only one component of a multi-component product, royalties based on the value of the entire product tend to compensate SEP holders for numerous technologies and features beyond those covered by their patents, thereby overcompensating them and leading to royalty stacking. See *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318–19 (Fed. Cir. 2011).

Motorola itself has recognized that a FRAND royalty should take into account the overall licensing burden for all the relevant technologies in the end product. See Ericsson, Motorola, and Nokia, *Expanded Proposal for IPR Policy Reform* 3 (ETSI GA/IPRR02(06)05, Feb. 4, 2006). According to Motorola, this requires examining “the *overall cumulative royalty costs* for a given standard and not



just to assess whether the terms being offered by one particular licensor are fair and reasonable *in vacuo*.” *Id.* at 4 (emphasis added).<sup>9</sup>

Important SEP licensors have implemented these principles in their licenses. Consider, for example, that the royalty rate advertised by MPEG LA, a patent pool that licenses 2,339 H.264 SEPs, is \$0.10 per unit for an operating system such as Microsoft’s Windows, and that is further capped at \$6.5 million. *See* Mot. for Summ. J., Dkt. 237, at 1–2, *Microsoft Corp. v. Motorola, Inc.*, No. 2:10-cv-01823 (W.D. Wash. Mar. 30, 2012); [http://www.mpegla.com/main/programs/avc/Documents/AVC\\_TermsSummary.pdf](http://www.mpegla.com/main/programs/avc/Documents/AVC_TermsSummary.pdf). This practice of charging a tiny fraction of the price of a standard-compliant product for a large number of SEPs confirms the industry-wide expectation that FRAND requires a royalty that accounts for the total royalty burden on the standard-compliant product to ensure its commercial viability.

Industry practice thus informs two key elements of FRAND royalties, each of which helps to achieve the objective of avoiding holdup and royalty stacking: the royalty base should be set at the component level, and the royalty should ac-

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<sup>9</sup> Intel does not endorse the overall approach urged by Motorola in this statement, but merely notes Motorola’s recognition of the need for FRAND royalties to be proportionate in light of all the other patents that read on a given product or component.

count for all of the patents that read on that component. Those elements, in fact, have long been applied by U.S. courts in establishing a “reasonable royalty” in ordinary patent-infringement suits—a background legal practice that undoubtedly informed Motorola’s commitments here.

It is well-settled that in setting a reasonable royalty in a patent-infringement lawsuit, a court may utilize a royalty base equal to the entire value of an infringing product *only* “to the extent that the patent owner proves that the patent-related feature is *the* basis for customer demand” for the entire product. *Marine Polymer Techs., Inc. v. HemCon, Inc.*, 672 F.3d 1350, 1360 (Fed. Cir. 2012) (en banc) (emphasis added; quotation marks omitted). If the patented feature is not the basis for customer demand for the entire product, the royalty base must equal an apportioned share of the total value of the product reflecting the contribution of the relevant component to consumer demand. *Uniloc*, 632 F.3d at 1318–19.<sup>10</sup> Then, once a component is isolated and its value apportioned, the FRAND royalty *rate* applied

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<sup>10</sup> Under this rule, it is not sufficient for a patentee to assert a purportedly low royalty *rate* applied to the entire market value to reflect the minor role played by the patented feature in the product. As this Court has explained, “[t]he Supreme Court and this court’s precedents do not allow consideration of the entire market value of accused products for minor patent improvements simply by asserting a low enough royalty rate.” *Uniloc*, 632 F.3d at 1320. The danger is that royalties based on the value of the entire product will be set systematically at rates that are too high based on the contribution of the patented technology, precisely the problem that leads to royalty stacking. *Id.*

to that royalty base should reflect the total number of patents that read on the component and the other cost inputs that are built into it. As this Court has explained, courts must identify the “portion of the realizable profit that should be credited to the invention as distinguished from non-patented elements [or patents held by others], the manufacturing process, business risks, or significant features or improvements added by the infringer.” *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1332 (Fed. Cir. 2009) (quotation marks omitted).

These basic precepts of patent law provide clear standards for courts to employ in enforcing the principle that a FRAND royalty must reflect only the contribution of the SEP to the value of a multi-component product. To evaluate whether a license meets the FRAND requirement, a court must ensure that the royalty base is equal to the economic contribution of the smallest component that incorporates the standard and that the royalty rate reflects the total royalty burden on that component.<sup>11</sup>

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<sup>11</sup> The royalty base should never include more than the “smallest salable unit[]” that incorporates the patented technology, unless the patentee can satisfy the entire market value rule with respect to a larger unit or product. *Cornell Univ. v. Hewlett-Packard Co.*, 609 F. Supp. 2d 279, 283–88 (N.D.N.Y. 2009) (Rader, C.J., sitting by designation). In some circumstances, such as integrated high-technology products that do not incorporate separately marketable components but practice numerous patented technologies, a more granular approach may be required, if the patented technology is not “the basis for customer demand for

[Footnote continued on next page]

The methodology to calculate a license fee in this case that was proposed by one of Motorola’s damages experts, Charles Donohoe, failed to meet these requirements. Donohoe opined that the license fee for a single patent, if licensed on its own, would be either “up to” or “at least” 40 to 50 percent of the royalty for the entire portfolio of which the patent was a part. *Apple*, 869 F. Supp. 2d at 912. For example, if a patent is part of a portfolio of 100 patents, and if the portfolio is allegedly worth 2.25 percent of the sales of Apple devices that allegedly infringe the patent (which Motorola claimed to be the case), then the patent would be worth “up to” or “at least” 1.125 percent of the total sales. *Id.* That license fee “would have exceeded the product of the percentage of the portfolio represented by the patent and the value of the entire portfolio.” *Id.*

The license fee proposed by Motorola was inconsistent with the FRAND royalty principles explained above for at least two reasons. First, it did not sufficiently take account of the other patents that read on the component in question. As Judge Posner found, Donohoe “admitted that he knows nothing about the portfolio that includes the ‘898 patent” and did not answer the “essential question” of

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[Footnote continued from previous page]  
the entire [product] including the parts beyond the claimed invention.” *Id.* at 286.

how to determine the value of the allegedly infringed patent relative to the value of the portfolio. *Apple*, 869 F. Supp. 2d at 912.

Second, “Motorola . . . provided no evidence for calculating a reasonable royalty rate” based on “what the cost to the licensee would have been of obtaining, just *before* the patented invention was declared essential to compliance with the industry standard, a license for the function performed by the patent. That cost would be a measure of the value of the patent qua patent.” *Apple*, 869 F. Supp. 2d at 913 (emphasis added). Motorola’s failure in that regard was “decisive,” and accordingly its expert’s testimony was properly excluded. *See id.*

### **III. This Court Should Affirm The District Court’s Effective Gatekeeping Of Unreliable Testimony Regarding Damages**

Even aside from the impact of Motorola’s FRAND commitments, which compel rejection of proffered damages evidence, Judge Posner’s exclusion of Motorola’s damages experts should be affirmed as a textbook example of proper gate-keeping by a trial judge. “As a recent handbook for federal district court judges explained, ‘no issue in a patent trial cries out for strict application of a district court’s gatekeeping tools more than damages.’” *Amici Curiae Br. of Altera Corp. et al.* at 21 (quoting Federal Judicial Center, *Compensatory Damages Issues in Patent Infringement Cases: A Pocket Guide for Federal District Court Judges* at 28 (2011); *see generally Amici Curiae Br. of Altera Corp.*, sec. IV., at 21–23.

This Court has looked in the past to the list of fifteen factors proposed by a New York trial court over forty years ago in *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), but that outmoded and unworkable approach produces economically unsound results, confuses juries, and distorts reasonable royalty calculations, to the detriment of the patent system and the economy as a whole. *See generally Amici Curiae Br. of the Altera Corp., supra*, at 5; *see also id.* sec. I.A., at 4–6; *Apple Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 911 (N.D. Ill. 2012) (doubting whether “a judge or a jury [can] really balance 15 or more factors and come up with anything resembling an objective assessment”). *Georgia-Pacific* should have no application in the FRAND context, and this Court should insist on damages models that better reflect actual business decisions and market realities.

Among those models is the next-best-alternative methodology, which Judge Posner properly adopted and applied when he excluded testimony from one of Motorola’s damages experts, Carla Mulhern. *See Apple Inc. v. Motorola, Inc.*, 2012 WL 1959560, at \*11 (N.D. Ill. May 22, 2012). Mulhern failed to determine the difference between the value to Apple of Motorola’s patent and the value to Apple of the next-best alternative—*i.e.*, the difference between the value to Apple of communicating with AT&T’s network, which Motorola’s patent made possible, and the value to Apple of communicating with Verizon’s network instead. *Id.* By

reflecting the added value the market would place on the patented technology as compared to the next-best alternative, the approach is faithful to the underlying rationale of patent damages, which are intended to compensate patent holders, not punish infringers. *See generally Amici Curiae Br. of Altera Corp., supra*, sec. III.A., at 12–15.

### **CONCLUSION**

Important policies of nationwide significance would be frustrated if SEP holders were permitted to evade their FRAND commitments by demanding unreasonable royalties backed up by threats of injunctive relief. Properly construed, FRAND commitments mean that royalties must be assessed at the component level and that injunctive relief is inappropriate, except in limited circumstances. This Court should affirm Judge Posner’s denial of injunctive and monetary relief to Motorola, including his effective gatekeeping with regard to unreliable evidence of damages.

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