

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.

SAMSUNG ELECTRONICS COMPANY, LTD.;
SAMSUNG SEMICONDUCTOR INC.; INTEL CORPORATION; ERICSSON, INC.;
SAMSUNG ELECTRONICS AMERICA, INC.; MEDIATEK INC.,
Intervenors,

NOKIA TECHNOLOGIES OY,
Intervenor.

On Appeal from the United States District Court for
the Northern District of California,
The Honorable Lucy H. Koh
District Court Case No. 5:17-cv-00220-LHK

**BRIEF OF *AMICUS CURIAE* OF INTERDIGITAL, INC. IN SUPPORT OF
NEITHER PARTY**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, InterDigital, Inc., a publicly held company, states that it has no parent corporation, and, as of December 31, 2018, BlackRock, Inc., a publicly-held company, beneficially owned 12% of the common stock of InterDigital, Inc., as reported on a Schedule 13G/A filed by BlackRock, Inc. with the Securities and Exchange Commission on January 28, 2019. As of February 28, 2019, The Vanguard Group beneficially owned 10.12% of the common stock of InterDigital, Inc., as reported on a Schedule 13G/A filed by The Vanguard Group with the Securities and Exchange Commission on March 11, 2019.

/s/ Andrew G. Isztwan

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InterDigital, Inc.

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INTEREST OF AMICUS CURIAE

InterDigital, Inc. is an American technology company that is incorporated in Pennsylvania and headquartered in Wilmington, Delaware. It was founded in 1972 with the objective of developing new and innovative wireless technologies. It became a publicly traded company in 1981 and is now a significant commercial research and engineering organization, with research centers in numerous locations including Pennsylvania, New York, New Jersey, and California. InterDigital, Inc. and its affiliates (hereinafter “InterDigital”) employ over 250 engineers, many of whom hold advanced degrees.

For over four decades, InterDigital has been a pioneer in mobile technology and a key contributor to global wireless standards. InterDigital does not manufacture devices; instead it has chosen to focus on innovation through advanced research, often collaborating or partnering with other research-focused organizations on specific projects. Since 2005, InterDigital has invested more than \$1 billion in research and development. InterDigital’s R&D efforts have resulted in the company owning a portfolio of thousands of patents and patent applications worldwide. The primary source of InterDigital’s revenue comes from the royalties received from licensing its worldwide portfolio of patents developed by the company’s scientists and engineers. InterDigital has entered into dozens of patent licenses. Among its current and past licensees are prominent companies in the mobile wireless space, such as Apple, Samsung, Sony, Panasonic, RIM/Blackberry, HTC, LG Electronics, ASUS, Sanyo, NEC, and Sharp. InterDigital’s constant

commitment to innovation and its particular focus on developing new and innovative wireless telecommunication standards have benefitted markets, technology, and consumers around the globe.

For more than twenty years, InterDigital has participated in technology standardization efforts by standards development organizations (SDOs), including development of successive generations of cellular standards, through its membership in the European Telecommunications Standards Institute (ETSI). InterDigital is currently a leading participant in the efforts to standardize 5G (fifth generation) cellular technology. For example, in 2018, InterDigital won the Global Telecoms Award in the “Advancing the Road to 5G” category and was shortlisted for a World Communications Award in the “5G Leadership” category. Accordingly, InterDigital believes that its perspective on the issues related to this appeal, informed by longstanding industry experience, may be of assistance to the Court in considering the questions before it.¹

All parties have consented to submission of this brief.

¹ No party or party’s counsel contributed money to fund preparation or submission of this brief; no person other than InterDigital contributed money to fund the preparation or submission of this brief; and no counsel representing a party authored this brief in whole or in part, with the clarification that attorneys from one of the law firms representing Qualcomm in this matter (Wilson Sonsini Goodrich & Rosati), who themselves do not represent and have not represented Qualcomm, contributed to authoring this brief.

ARGUMENT

I. LEADERSHIP BY AMERICAN COMPANIES IN CELLULAR TECHNOLOGIES SERVES IMPORTANT PUBLIC POLICIES

A. The Standardization Process

New generations of technology do not appear spontaneously. They are created through sustained research and development efforts, which require years of painstaking work and significant and risky investments of resources. That is particularly true of technologies that require interoperability, such as cellular handsets and carrier base stations. SDOs involve many industry participants working together to include the best technology in industry standards. With each new generation of technology, the scientific and engineering work contributed by the SDO members enables improvements like higher data speed, lower latency, power savings leading to longer battery life, and increased reliability. Thanks to the technical specifications developed by SDOs, manufacturing companies have access to a wealth of innovative technology to be used in their products, which are also able to interoperate because they are designed to comply with the consensus-based standards.

Companies that prioritize investment in research toward advancing standardized technologies are incentivized to do so by the prospect of earning a fair reward on their inventions. Because standards would not exist without the technologies of innovators, SDOs have sought to enact policies that equitably reward those who contribute technology. Technology developers can obtain intellectual property rights (IPRs) such as patents, and SDO policies concerning

IPRs have sought to ensure that patents that read on standards (“standards-essential patents,” or “SEPs”) can be reasonably enforced. In this way, SDOs can achieve a balanced, level playing field between SEP owners who provide technology, and manufacturers who utilize that technology in their products.

One of the primary SDOs for cellular technology is 3GPP (Third Generation Partnership Project), which has been instrumental in standardizing 3G, 4G, and now 5G cellular technology specifications. Companies participate in 3GPP through their membership in 3GPP’s organizational partners, such as ETSI. Section 3.1 of the ETSI IPR Policy states that its objective is to adopt “solutions which best meet the technical objectives” of the telecommunications sector, and that:

In achieving this objective, the ETSI IPR POLICY **seeks a balance** between the needs of standardization for public use in the field of telecommunications and the rights of the owners of IPRs.

ETSI IPR Policy § 3.1 (emphasis added). The next section of the Policy expressly provides that:

IPR holders . . . should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.

Id. at § 3.2 (emphasis added).

In order to “reduce the risk” (*id.* § 3.1) that patents are unavailable to those using the standard, but at the same time provide a mechanism for patent owners to be adequately and fairly compensated for the use of their IPR, ETSI may ask the owner of “Essential IPR” to provide an “undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory [FRAND]

terms and conditions under such IPR” *Id.* at § 6.1. Thus, the ETSI IPR Policy and its FRAND commitment are not concerned only with making essential IPRs available to manufacturers of standards-compliant products, or with protecting such manufacturers from “hold-up.” Instead, the ETSI IPR Policy provides that the interests of patent owners are equally to be protected in order to achieve a balanced result that fosters continued investment in the standards development process.

Failure to recognize the crucial balance between patent owners and manufacturers of standards-compliant products in implementing and interpreting the ETSI IPR Policy would lead to damaging consequences in industries that rely on standardized technologies. If interpretations of FRAND licensing commitments are tilted entirely in favor of manufacturers with a goal of minimizing royalty payments to SEP owners, incentives to innovate will be greatly diminished. That is clearly not the intention of the SDOs such as ETSI that have established FRAND-based policies. Any analytical approach adopted by the Court in reviewing the questions presented on appeal related to standards-based licensing should take into account the goals of standardization and the critical need to protect and promote innovation.

B. The Cellular Technology Landscape

Cellular wireless technology has advanced to incredible levels of speed, quality, and ubiquitous adoption. It is no exaggeration to say that the advent of cellular devices has been revolutionary, changing countless aspects of how people experience their daily lives.

Cellular adoption began with the first widespread 2G (second generation) cellular phones in the 1990s. Companies like InterDigital and others made enormous investments of time and engineering work to enable steady improvements in technology via the development of 3G standards that became available in the 2000s and 4G standards that became available in the 2010s. Over time, these efforts led to improved stability and data throughput to the point where it is now commonplace to stream high quality video over wireless networks.

Looking forward to the 2020s, the move toward 5G standards is now well underway, the culmination of many years of research and development. 5G represents the next widespread deployment of even faster and more robust cellular technology. 5G standards will deliver these improvements through numerous innovations, including expansion into the millimeter wave spectrum and advanced spectrum sharing techniques. The use cases that can be enabled by 5G go far beyond those that have been implemented with current 4G technology. For example, new uses of 5G technology are expected to include:

- Virtual reality (VR) and augmented reality (AR) applications via cellular-enabled devices;
- Broad expansion of the capabilities of self-driving and autonomous vehicles;
- Interconnection of household and commercial products such as large appliances and smart home devices;
- Telehealth applications, such as remote surgery;

- Remote control of critical infrastructure for businesses and governmental users;
- Smart city initiatives to integrate traffic, public safety, first response, and more; and
- Options for home internet beyond those offered by legacy providers.

Rollouts of 5G cellular networks in the United States are currently underway, with a handful of 5G-compatible phones available on the market and infrastructure in place in a few large cities. Within the next one to two years, 5G adoption is expected to quickly accelerate.

C. Importance of US Leadership in 5G

As an American company that has actively participated in the development of 5G standards since the beginning, InterDigital has a firsthand view of the current landscape of 5G implementation. As many commentators have noted, there are acute risks to US interests raised by 5G technology deployment. *See, e.g.*, ER325 (United States Statement of Interest); ER312-24 (supporting declarations from Department of Defense and Department of Energy). While US consumers will be greatly affected by how 5G is ultimately implemented, 5G remains an international standard that is simultaneously being disseminated in the United States and throughout the world. Accordingly, if US companies do not maintain leadership in establishing the direction of both the underlying technological standards and the physical infrastructure, these will be dictated by foreign companies, often supported by their governments, whose interests may not be aligned with those of the United States.

As compared to some other countries, the United States has traditionally provided strong protection for intellectual property rights, with the goal of encouraging innovation. Further, “[t]he patent and antitrust laws are complementary in purpose in that they each promote innovation and competition” *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1352 (Fed. Cir. 1999). Promotion of innovation and consequent enhancement of consumer welfare requires striking an appropriate balance between intellectual property and antitrust in order to serve their common goals. Permitting antitrust theories with inadequate foundations to undermine intellectual property rights would not only decrease innovation, but has the potential to disable innovative US companies from effectively competing on a global scale. Particularly against the backdrop of the incipient rollout of 5G cellular technology, which promises to transform industries and significantly affect consumers, as well as the investments currently occurring in anticipation of the next generation of cellular standards, the Court should be mindful of whether and to what extent the antitrust theories asserted in this action can or should be used to prevent or limit the enforcement of intellectual property rights.

II. CONTRACTUAL SEP LICENSING COMMITMENTS DO NOT FORM A BASIS FOR ANTITRUST LIABILITY

A Sherman Act claim requires a showing of harm to competition, not merely harm to a competitor. *Gorlick Distrib. Ctrs., LLC v. Car Sound Exhaust Sys. Inc.*, 723 F.3d 1019, 1024 (9th Cir. 2013). However, obtaining relatively high royalties is not sufficient to demonstrate harm to the competitive process. The Court should

not adopt or affirm any interpretation of the district court's ruling that suggests that an SEP owner's receipt of purportedly "unreasonable" royalties by itself is enough to demonstrate anticompetitive harm as a predicate for a Sherman Act violation.

In general, courts reject the premise that higher prices necessarily equate to harm to the competitive process for purposes of an antitrust claim. *See Harrison Aire, Inc. v. Aerostar Int'l, Inc.*, 423 F.3d 374, 381 (3d Cir. 2005) ("Competitive markets are characterized by both price and quality competition, and a firm's comparatively high price may simply reflect a superior product."). To the contrary, "mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system." *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

In particular, in a case addressing alleged monopolization via standards-essential patents, the D.C. Circuit held that under Supreme Court precedent, a monopolization claim cannot exist where the alleged exclusionary behavior caused increased royalties but had no effect on competitive structure. *Rambus Inc. v. FTC*, 522 F.3d 456, 466 (D.C. Cir. 2008) (finding that "supposition that there is a cognizable violation of the Sherman Act when a lawful monopolist's deceit has the effect of raising prices (without an effect on competitive structure)" is improper because it "conflicts with *NYNEX*"); *see also NYNEX Corp. v. Discon*, 525 U.S. 128 (1998) (fraud that raised prices cannot be Sherman Act Section 2 violation in absence of effect on competition). A theory that rests solely on obtaining higher prices does not explain in any coherent manner how the competitive structure of a

market is affected, and therefore does not make out a Sherman Act Section 2 violation. *Rambus*, 522 F.3d at 466 (“[A]n otherwise lawful monopolist’s end-run around price constraints, even when deceptive or fraudulent, does not alone present a harm to competition in the monopolized market.”).

Antitrust law is also ill-suited to address claimed breaches of FRAND commitments based on allegedly excessive royalties, where plaintiffs can instead seek to enforce the commitments as a contractual matter to the extent any breaches have actually occurred.² Transforming simple breaches of contract into treble-damages antitrust violations would serve only to enable hold-out by implementers who refuse to pay adequate and fair compensation for the patented technology they use in their products. This, in turn, would strongly deter standards participation and reduce investments in innovation, undermining the progress of standards development, ultimately to the detriment of consumers.

Increasingly, the most intractable FRAND disputes are not based on genuine disagreements raised by a potential licensee about the appropriate and fair value to be paid as royalties in return for use of patented technologies. Instead, implementers may opportunistically threaten (and even assert) antitrust claims seeking injunctions and treble damages as part of a hold-out strategy to gain unwarranted leverage in license negotiations. Implementers thereby seek to coerce patent owners into accepting minimal, sub-FRAND royalties that are not nearly

² Further, such contractually-based arrangements do not, by themselves, create an antitrust duty to deal. *See Trinko*, 540 U.S. at 408, citing *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

sufficient to provide an adequate and fair reward for use of the intellectual property. Under a threat of treble damages, the patent owner is faced with a tremendously outsized risk, which inappropriately tilts the balance of negotiating power far in favor of the implementer asserting the claim. Often the intellectual property in question has been developed over many years as a result of the investment of enormous sums in research and development. Yet the prospects of obtaining an adequate and fair return on this investment are significantly reduced to the extent unwilling licensees are able to use strategic antitrust claims to force royalty terms far below FRAND levels—or even to avoid payment of royalties completely.

CONCLUSION

For these reasons, InterDigital respectfully requests that the Court take into consideration the matters set forth herein in its deliberations on this appeal. In particular, in assessing the antitrust claims at issue in this action insofar as they relate to claims of allegedly “unreasonable” royalties, the Court should take into account the potential consequences for FRAND licensing regimes and the industries that rely on them. That includes technology industries of critical importance for US interests, in which incentives for US companies to innovate would be drastically reduced if an appropriate balance between antitrust law and intellectual property is not carefully preserved.

Dated: August 30, 2019

Respectfully submitted,

By: /s/ Andrew G. Isztwan

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CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by Circuit Rule 32-1 and Fed. R. App. P. 29(a)(5). The brief is 2,619 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: August 30, 2019

By: /s/ Andrew G. Isztwan
Andrew G. Isztwan

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 30, 2019, which will serve a notice of electronic filing on all registered users, including counsel for the parties.

Dated: August 30, 2019

By: /s/ Andrew G. Isztwan
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