January 24, 2018

Assistant Attorney General Makan Delrahim
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: *Industry Letter to DOJ Regarding Standards, Innovation and Licensing*

Dear Assistant Attorney General Delrahim,

We write regarding your November 10, 2017 remarks addressing the role of antitrust law in the context of standard setting organizations (the "USC Speech"). We agree with your comments that interoperability standards create enormous value for consumers and fuel follow-on innovation. Our signatories, which include a broad mix of industry, academic and small business interests, also share your goal of promoting innovation and consumer welfare through robust competition. However, we write to you because we believe the novel approaches announced in the USC Speech will instead threaten US industry and consumer interests, harm US innovation, and interfere with parties' right to contract.

Collectively, our industry signatories invest over seventy billion dollars annually in research and development. We own more than three hundred thousand patent assets, many of which are standard essential patents. The vast majority of these patents describe internally-created inventions, reflecting those more than seventy billion dollars we collectively spend on fundamental research and development every year. We employ about two million people. Mo than thirty-five of our industry signatories are headquartered in the US, and all of our companie do business domestically. We represent diverse industries. We are not mere implementers of standards. Rather, we contribute technologies to standards and drive research, development, investment and innovation throughout the value chain.

We are concerned that the policy approaches announced in the USC speech may undermine fundamental patent licensing obligations that our companies and our customers rely upon. As you know, when patent holders participate in standards development, they commonly commit to license patents on fair, reasonable and non-discriminatory (FRAND) terms. Enforcement approaches that ignore or undermine these voluntary licensing obligations may harm competition and therefore consumers. In particular, we request that the Department consider the following:

1. SEP patent hold-up is a competition law problem that harms the economy: SEP patent hold-up is real, well documented, and harming US industry and consumers. The competition la problem of patent hold-up in violation of a FRAND undertaking, and the economic issue of a licensee disputing the fairness of licensing terms, are apples and oranges. Where FRAND commitments are violated, the patent holder asserts market power it promised to forego, to the detriment of the industry and of consumers. Similar competition law interests are not implicate when a prospective licensee disputes whether the licensing fees or other terms sought by the patent holder are fair and reasonable. To be sure, we fully support a patent holder's right to reasonable compensation based on the value of the patented technology from those who infring We disagree, however, with the statement made in the USC Speech that US courts provide "no

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As in AAG Delrahim's Nov 10 speech, it is unclear what "undermine" means here. AAG Delrahim said that non-antitrust remedies were "perfectly adequate," so presumably the positiion here is that they are not.

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This is a response to AAG Delrahim's speech, which referred to "so-called patent hold-up" and generally expressed skepticism about the significance of the problem. In some sense, if the industry participants here *think* there's a problem, there is a problem, because that could inhibit investment. It does not seem plausible that they have collectively agreed to misrepresent their perceptions or that they have been duped by academic focus on this issue.

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This is only one interpretation of FRAND licensing. Patentees have arguments that contend their royalty demands are appropriate, and they do not explicitly promise to forgo any source of market power. This is a disagreement that arises from the vagueness of FRAND.

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True, but patentees and AAG Delrahim presumably would say that SSOs implicate *different* competition law interests.

recourse" to SEP holders that seek fair compensation for infringement of their patented inventions.

2. Innovation throughout the value chain drives the economy: Today's complex products involve innovations throughout the value chain. We innovate and invest heavily in *both* "upstream" and "downstream" technologies. We do not agree that inventions that are contributed to standard setting activities merit more protection than downstream innovations contributed by others in the supply chain. Upstream SEP holders subject to a FRAND commitment should not receive unjust enrichment, *e.g.* royalties based on the added value of downstream innovations. In short, competition enforcers should not "pick and choose" betwee innovations, and should not privilege upstream patentees.

3. SSO diversity should be valued, not threatened: The diversity of industry-led standard-setting organizations is an asset that distinguishes standards development in the United States and promotes US economic growth. One aspect of that diversity is the different approaches many SSOs take to the interplay between patented inventions and standardization. While some SSOs use FRAND licensing, other significant SSOs (CableLabs, responsible for cable broadba standards that hundreds of millions of Americans use to access the internet, is one example; Bluetooth is another) have chosen royalty-free (RF) licensing models as their default option. Others, for example OASIS, a leading software industry SSO, offer both RAND and RF optic As membership organizations, SSOs continually reevaluate their choice of IPR licensing mod to choose the model that works best for their members and the fields of innovation in which t want to create standards. Absent anti-competitive conduct and effect, the US government sho value this diversity, and do nothing to discourage SSOs from clarifying IPR policies to provid greater transparency and predictability regarding patent licensing. We support the freedom o SSOs, such as the IEEE, to define their IPR policies in ways that provide both SEP licensors licensees with greater clarity regarding the availability of licenses and the use of fair and reasonable royalty methodologies.

4. Enforcement of a voluntary FRAND commitment is not "compulsory licensing": SE licensors that voluntarily agree to participate in standards development and to commit their patents to FRAND licensing are aware that their decision has consequences, positive and negative, for their ability to enforce their patents. Specifically, some patentees may seek acce to a potentially large and lucrative market for their patents from implementers of a successful standard. In exchange, and as part of this *quid pro quo*, they limit their ability to exclude implementers and agree not to seek unfair or unreasonable royalties. A patentee's voluntary agreement to that bargain is not "compulsory licensing". Rather, it is a common feature of collaboration between industry participants to develop standards.

We thank the Antitrust Division you lead for its engagement on these important matters We look forward to further engagement with the Department to discuss our concerns.

Sincerely,

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This appears to focus on the *Georgia-Pacific* factor that states that royalties should be based only on the contribution of the licensed invention, not on other elements of the final product. It is presumably that factor that AAG Delrahim intended when he referred to "a single *Georgia-Pacific* factor." There appears to be a dispute here regarding whether the factor is only one among many or one that disqualifies a royalty rate.

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This is the key qualifier that gives this paragraph meaning. Some patentees, and perhaps AAG Delrahim, believe that some SSOs behave anticompetitively, so that their approaches would no more be acceptable than would straightfoward price-fixing, which would not be defended as "diversity." Here one has to wonder about the antitrust treatment of collectively-agreed-upon royalty-free licensing.

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Surely this is true, but if FRAND commitments by patentees are not truly voluntary, then the effect may be similar, which was presumably (and only) AAG Delrahim's point.

Aces Health

ACT | The App Association[1]

Adobe Systems Inc.

AirTies Wireless Networks

Apple Inc.

Audi of America, Inc.

Michael A. Carrier
Distinguished Professor
Rutgers Law School[2]

Cisco Systems, Inc.

Computer and
Communications Industry
Association (CCIA)[3]

Colorado Technology
Consultants

Computer Ways

Concentric Sky

Continental Automotive
Systems Inc.

Dell Inc.

Dogtown Media

Fair Standards Alliance (FSA)[4]

[1] ACT | The App Association represents more than 5,000 app companies and information technology firms in the mobile economy. http://actonline.org.
[2] All academic signatories sign in their individual capacities.
[3] CCIA Members include computer and communications companies, equipment manufacturers, software developers, service providers, re-sellers, integrators, and financial service companies. Together they employ almost one million workers and generate more than $540 billion in annual revenue. http://www.ccianet.org.
[4] FSA represents a diverse group of more than 30 companies, including companies in the telecommunications, automotive, semiconductor and wireless industries. Together, FSA members own more than 300,000 patents, and spend more than $100B in annual R&D. http://www.fair-standards.org.

Harry First Charles L. Denison Professor of Law Co-Director, Competition, Innovation, and Information Law Program New York University School of Law	Hacksmith Labs
Happi Papi	Harman International Industries
Higher Learning Technologies	High Tech Inventors Association (HTIA)[5]
Hewlett Packard Enterprise Co.	HP, Inc.
Intel Corporation	Interknowlogy
IP2Innovate (IP2I)[6]	ip.access Ltd.
Jadware	Juniper Networks, Inc.

[5] HTIA members collectively spent $63B on R&D last year, own over 110,000 patents, and have nearly 500,000 employees in the United States. https://www.hightechinventors.com.

[6] IP2I is a coalition of small and large companies that create innovative products and services, and which hold many thousands of patents, along with industry groups representing dozens of additional companies. http://ip2innovate.eu.

Kosmik Koding	Mark A. Lemley William H. Neukom Professor, Stanford Law School Director, Stanford Program in Law, Science, and Technology Senior Fellow, Stanford Institute for Economics
Daryl Lim Associate Professor and Director Center for Intellectual Property, Information and Privacy Law The John Marshall Law School	Microsoft Corporation
MotionMobs	Timothy J. Muris George Mason University Foundation Professor of Law Antonin Scalia Law School George Mason University
Nordic Semiconductor ASA	Christopher L. Sagers James A. Thomas Distinguished Professor of Law Cleveland State University
Samsung Electronics	SAP America, Inc.
SecureHIMs	SentryOne
Sequans Communications S.A.	Sierra Wireless, Inc.
Sigao Studios	Southern DNA

Stroll Health	Technology Safety Council
Telit Wireless Solutions, Inc.	The Mobile Yogi
The Software & Information Industry Association (SIIA)[7]	u-blox AG
Unbuttoned Innovation, Inc.	Volkswagen of America, Inc.
Weiner Family Studios	Wellbeyond
Your App Lady	1564B

[7] SIIA is the principal trade association for the software and digital content industry, representing over 700 companies owning tens of thousands of patents in a variety of industries. SIIA protects the intellectual property of member companies, and advocates a legal and regulatory environment that benefits the entire industry. https://www.siia.net.