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# *The Patent Market Power Fallacy: Recalibrating Market Power and Standard-Essential Patents*

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Courts and antitrust enforcement agencies worldwide understand that patents do not necessarily confer market power as that term is understood under the antitrust laws. While a patent gives its owner a bundle of rights over its technology, many patented technologies do not achieve commercial success. Those that do may face competition from substitute technologies that constrain any exercise of market power.

But even for commercially valuable patents, competition from close substitutes is just one determinant of market power. Patent and contractual remedies are at least equally important. While the same general antitrust principles apply to conduct involving tangible and intangible property, as courts and agencies recognize, intellectual property has unique attributes that distinguish it from other forms of property: it is nonexcludable and nonrivalrous. Patented technology is thus far more easily misappropriated than tangible property. In many cases, it is only the realistic threat of an enforceable legal judgment that brings an infringing user to the bargaining table. Negotiations occur in the shadow of the law on available remedies, including reasonable royalties, injunctive relief, and in the case of standard-essential patents (SEPs), voluntary commitments that the original patent owner may have made to standards-development organizations (SDOs).

Despite the unique features of intellectual property, courts sometimes rely on simplistic structural evidence to evaluate market power in upstream technology markets. By neglecting the importance of court-ordered relief where the parties do not reach agreement, courts will often find market power where none exists. In this essay, I look at the question of market power in upstream technology markets, focusing in particular on standard-essential patents subject to a voluntary FRAND commitment.[1] This topic is particularly relevant given the exponential growth of the Internet of Things and connected products that utilize proprietary standardized technology as an input. I review the framework courts use to evaluate market power and consider whether the current emphasis on circumstantial evidence, based on market definition and share, is likely to reflect economic reality for intellectual property rights. I conclude by encouraging courts and agencies to adopt a more realistic approach that emphasizes direct evidence.

## Market Power and Technology Markets

A supplier holds market power under the U.S. antitrust laws if it can demand prices or other terms of trade, for more than a brief period of time, that are more favorable than those it could obtain in a competitive market.[2] Market power is typically shown in court through either direct or circumstantial evidence.[3] Direct evidence could include proof that a firm has profitably raised price above competitive levels or restricted output. However, because direct evidence is not always available, courts often rely on circumstantial evidence of market structure to evaluate market power, where power is "inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers."[4] Even where a plaintiff relies on direct evidence, courts often require that the plaintiff at least define a relevant market and offer proof of the defendant's market share as a starting point for the analysis.[5]

Antitrust scholars and economists have criticized judicial requirements that antitrust plaintiffs plead and prove a relevant market. Many have urged courts and enforcement agencies to focus on direct evidence where it is available. In a letter to the House Antitrust Subcommittee, one antitrust scholar recently recommended that Congress clarify that market power should be measured by the best available technique and eliminate "the error of continuously expressing market power in terms of market share of the relevant market."[6] The House Antitrust Subcommittee Majority Staff adopted this position in a recent report and recommended that Congress clarify that market definition is not required to prove an antitrust violation, particularly when direct evidence of market power is available.[7] Proposed legislation to reform exclusionary conduct standards would also eliminate any judicial requirement that a plaintiff define a relevant market to show market power or an antitrust violation.[8]

Regardless of whether one agrees with the broader antitrust reform agenda, proposals to emphasize direct evidence where possible are consistent with the flexible fact-based approach to antitrust analysis that has evolved over the past several decades.[9] This is true globally. The International Competition Network, in its Recommended Practices on Dominance/Substantial Market Power, concludes that "[m]ost jurisdictions find that a rigorous assessment of whether a firm possesses dominance/substantial market power, going well beyond market shares, is highly desirable."[10]

Where direct evidence shows that a defendant has exercised market power, a battle over market definition and structure is an unnecessary distraction that can cloud the analysis of competitive harm. The converse is also true. Circumstantial evidence can allow a plaintiff to create a prima facie case of market power, forcing a lengthy and unnecessary battle over relevant market, where direct evidence shows that the defendant has no power over price or other terms of trade.

Market definition and circumstantial evidence are especially poor tools for assessing market power in technology markets. A technology market consists of intellectual property that is licensed or sold and any technologies that are reasonable substitutes for a specific downstream product.[11] Courts have also defined upstream technology markets for patents essential to making or selling products that implement a technical standard.[12]

Both courts and enforcement agencies recognize that patents do not necessarily confer market power as that term is understood under the antitrust laws.[13] In 1995, the U.S. Department of Justice and Federal Trade Commission first issued *Antitrust Guidelines for the Licensing of Intellectual Property*.[14] The IP Guidelines were based on an economic understanding of the relationships between competition and intellectual property rights. The Agencies incorporated the economic foundations and core principles of the IP Guidelines in the 2017 update with minimal change. One of the three core principles is that "the Agencies do not presume that intellectual property creates market power."[15] Relying on both established economic literature and the Agencies' IP Guidelines, the Supreme Court held, in 2006, that patents do not create a presumption of market power.[16] Instead, market power must be evaluated on a case-by-case basis. Like the United States, the European Commission also recognizes that patents do not necessarily confer economic market power.[17]

Multiple jurisdictions have expressly rejected any presumption of market power for patents because they recognize that most patents have little commercial value and those that do may face competition from alternative technologies, both patented and unpatented, that constrain any exercise of market power.[18] But competition from substitutes is not the only constraint on the exercise of market power in technology markets, particularly since licensing typically occurs later in the product development cycle after infringement begins. Unlike tangible property, patented technology is easily misappropriated, and it is difficult and costly for patent owners to stop the infringing use.[19] Thus, akin to adverse possession[20], infringement is typically the status quo that patent holders need to overcome in court—an increasing challenge as courts have raised the bar for injunctive relief in the aftermath of the U.S. Supreme Court's decision in *eBay v. MercExchange*.[21] Because patent owners cannot use the same tools that sellers of physical property use to end unauthorized use, the actual product being traded is the license, rather than the technology. A technology user may view infringement or strategic delay as a good alternative to a license, at least for some period of time.[22] The ease and low cost of infringement significantly constrains a patent owner's pricing power in licensing negotiations. And, of course, negotiations occur in the shadow of the law and are constrained by the remedies that would be available if the owner was forced to seek relief in court, often in jurisdictions around the globe.

## Standard-Essential Patents

Circumstantial evidence is even less useful for assessing market power for SEPs, especially where those patents are subject to a voluntary commitment to be prepared to grant licenses on fair, reasonable, and nondiscriminatory (FRAND) terms. Circumstantial evidence will almost always be conclusory. Unless a manufacturer can choose among competing technical standards, SEPs in a successful standard by definition have no close substitutes. SEP owners will always be the sole supplier in a relevant technology market with barriers to entry. But that says nothing about pricing power. The contractual FRAND commitment curtails the SEP holder's power over price, giving technology users the power to protect themselves from any exercise of market power by seeking a FRAND determination. U.S. courts, the Federal Trade Commission, and the International Trade Commission have repeatedly confirmed that FRAND commitments are enforceable,[23] thus demonstrating their efficacy in restraining potential market power. Moreover, court systems around the world have created additional safeguards that make it difficult for patent owners to use injunctive relief to circumvent a FRAND commitment.[24]

In the context of regulated industries, courts treat market share as just a starting point, recognizing that the defendant's ability to control price ultimately "requires close scrutiny of the regulatory scheme in question."[25] While regulated industries are not necessarily immune from antitrust scrutiny, courts recognize that regulation is a relevant fact that affects a court's analysis of market power. Market share is not sufficient to establish market power if the regulatory structure prevents the defendant from having the power to control prices.[26]

FRAND commitments are a form of voluntary self-regulation and should play a similar role in evaluating market power in technology markets. Courts, however, have not applied the same scrutiny to legal constraints where FRAND-committed SEPs are involved. Instead they often rely on a simplistic structural analysis to allow parties to at least successfully allege antitrust claims even where there is no risk that the patentee can exercise market power. In *Broadcom v. Qualcomm*, the plaintiff alleged that Qualcomm held a dominant share of a relevant market comprising its own patented technology incorporated into the WCDMA standard.[27] The Third Circuit found those allegations sufficient to create an inference that "Qualcomm had the power to extract supracompetitive prices [because] it possessed a dominant share and the market had entry barriers." For purposes of a motion to dismiss, the court found the allegations sufficient to "satisfy the first element of a § 2 claim."[28]

The decision sends a mixed message. While the court found that the plaintiff had successfully alleged market power, it went on to explain that the defendant's FRAND commitment provided "important safeguards against monopoly power."[29] The same contradiction is evident in *Microsoft Corp. v. Motorola, Inc.*, a breach of contract matter where the court adjudicated a FRAND rate. Responding to a motion to exclude expert testimony, the court found the testimony reliable and admissible in part because the expert's framework sought to address the risk of "hold-up," which, according to the court, "exists because each standard essential patent holder has monopoly power [over] the implementers of the standard . . . the implementer is compelled to pay a higher rate to gain the benefits of interoperability with complementary products and recoup investments. . . ."[30] The court's monopoly power label is hard to square with the task it faced—adjudicating a FRAND rate where the parties failed to reach agreement. Indeed, the Ninth Circuit's opinion on appeal explicitly recognized that "[m]any SSOs try to mitigate the threat [of hold-up]…by requiring members who hold IP rights in standard-essential patents to agree to license those patents… [on] RAND" terms).[31]

Yet facile structural analysis continues in litigation involving SEPs. In *Research in Motion v. Motorola*, a district court held (in denying a motion to dismiss a monopolization claim) that the ordinary presumption that a patent does not confer market power should not apply to an SEP because, by definition, the standard eliminates alternative technologies.[32] In *Apple v. Samsung*, a district court also held that a plaintiff can successfully allege market power to support an antitrust claim by merely asserting that a patent is essential to a standard.[33] Most recently, the court in *Continental Automotive Systems v. Avanci* accepted the allegation that the defendant SEP owners held market power as "inevitable as a very frequent consequence of standard setting," although the court dismissed the antitrust claims because the plaintiff failed to allege anticompetitive exclusion.[34]

## Conclusion

I am not suggesting that a patent, including an SEP, can never confer market power. But I am suggesting that genuine market power will be rare, particularly where a contractual FRAND commitment is in place. In the context of a breach of FRAND dispute, implementers will and often do file an associated monopolization claim, alleging that the patentee made a deceptive commitment to license its essential patents on FRAND terms—never intending to keep the promise it had made. Following the *Broadcom v. Qualcomm* roadmap, plaintiffs often try to squeeze these so-called "false FRAND" claims into a monopolization cause of action by alleging that absent the false promise, the SDO would have adopted an alternative technology. These claims ultimately fail because the alleged injury flows solely from protected litigation activity, or the infringer is unable to show deception or anticompetitive exclusion.[35] Monopoly power, however, is often almost taken as given, allowing some plaintiffs to at least successfully plead the claim and survive a motion to dismiss, increasing litigation costs for the patentee and the burden to the judicial system, even though all parties agree that the SEP owner made an enforceable FRAND commitment. In fact, the breach of contract or FRAND determination claim may be part of the same action before the same court.[36]

A more realistic appraisal of market power for SEPs is especially important given the global nature of standards and licensing. Judgment enforceability and an independent judiciary are not a given in all jurisdictions; antitrust investigations based on industrial policy rather than antitrust merits can be used to weaken patent rights.[37] Market power is an important gating factor for antitrust complaints, especially those based on exploitative abuse of dominance theories that do not always require a full showing of anticompetitive exclusion. While some global enforcement agencies recognize that SEPs do not necessarily confer market power, that is not universally so. In its Horizontal Cooperation Guidelines, the European Commission expressly disclaims any presumption of market power for SEPs. It explains that "even if the establishment of a standard can create or increase the market power of IPR holders possessing IPR essential to the standard, there is no presumption that holding or exercising IPR essential to a standard equates to the possession or exercise of market power. The question of market power can only be assessed on a case by case basis."[38] The Guidelines also recognized FRAND commitments' restraining effect on market power.[39] But, the Korean Fair Trade Commission focuses narrowly on potential substitutes, taking the position that because a standard essential patent "cannot be replaced for a period of time" the owner is "highly likely to have market dominance in the relevant market."[40]

Market power is a question of fact. A plaintiff should therefore be required to provide more than conclusory allegations based on market share and entry barriers to pursue an antitrust claim based on a dispute over FRAND terms. A cursory view of market power for SEPs encourages implementers to pursue antitrust claims, often globally, where the SEP owner lacks any ability to exercise market power, using an antitrust claim as a negotiation tool to reduce rates rather than protect themselves or the market from anticompetitive harm. As this paper demonstrates, a recalibration of market power analysis in SEP market contexts is warranted and overdue to eliminate this market power fallacy.

1. While I focus primarily on patent rights, these same principles are relevant for understanding market power for other forms of intellectual property rights where licensing occurs in the shadow of the law.
2. *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109 n.38 (1984), *accord Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 n.46 (1984) ("[M]arket power exists whenever prices can be raised above the levels that would be charged in a competitive market. ").
3. *United States v. Microsoft Corp*., 253 F.3d 34, 51 (D.C. Cir. 2001).
4. *Id.*
5. *See e.g.*, *Ohio v. American Express*, 138 S. Ct. 2274, 2285 (2018); *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U. S. 172, 177 (1965).
6. Letter from Herbert Hovenkamp to Chairman David N. Cicilline and Ranking Member F. James Sensenbrenner, Jr., Subcommittee on Antitrust, Commercial, and Administrative Law, Committee on the Judiciary, U.S. House of Representatives, April 17, 2020 at 3–4. While noting that Courts cannot always avoid traditional market definition approaches, "when they can direct measurement will provide a better solution." *https://judiciary.house.gov/uploadedfiles/submission_from_herbert_hovenkamp.pdf*.
7. Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, Investigation of Competition in Digital Markets (Oct. 6, 2020), *https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf*.
8. Anticompetitive Exclusionary Conduct Prevention Act of 2020, S. 3426, 116th Cong. (2d. Sess. 2020) at Sec. 6. (Prohibiting courts from requiring an antitrust plaintiff to provide evidence of relevant market or market shares to prove a claim.)
9. In their 2010 revisions to the Horizontal Merger Guidelines, the agencies clarified that market definition is a tool for evaluating competitive effects and should be used as just one part of a broader factual analysis. U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines (2010) at 7 ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects. The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.")
10. International Competition Network Recommended Practices on Dominance/Substantial Market Power in unilateral conduct contexts *https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_DomMarPower.pdf* ("Although each jurisdiction has chosen its own specific wording for the legal definition of dominance/substantial market power, there is increasing convergence toward the principle that the analysis reaches well beyond market shares").
11. U.S. Dep't of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.2 (Jan. 12, 2017) ("IP Guidelines"). *https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf*, *Bio-Rad Labs., Inc. v. 10X Genomics, Inc.*, 2020 U.S. Dist. LEXIS 157332, *25 (D. Mass, Aug. 31, 2020).
12. *Broadcom Corp. v. Qualcomm Inc*., 501 F.3d 297, 315 (3rd. Cir. 2007).
13. IP Guidelines at § 2.2, *https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf*, *Ill. Tool Works Inc. v. Indep. Ink, Inc*. 547 U.S. 28, 45–46 ("Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion.").
14. *Id* at § 1.0 n.1. While conduct involving the acquisition or assertion of IP rights is not immune from antitrust scrutiny, merely seeking relief in court and litigation-related activity such as issuing demand letters, is protected by the First Amendment and immune from antitrust liability unless the underlying infringement claim is both objectively and subjectively baseless. *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus., Inc*., 508 U.S. 49, 56 (1993) (finding that unless the underlying claim is

both objectively and subjectively baseless, antitrust liability cannot be premised on merely asking a court for relief).

15. *Id.* at § 2.2.
16. *Ill. Tool Works*, 547 U.S. at 44. ("[A] patent does not necessarily confer market power upon the patentee."). This case was added to the IP Guidelines as part of their 2017 update. IP Guidelines at § 2.2 n.16.
17. EC Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements also takes the position that "the licensor does not necessarily have market power on the technology market." (2014/C 89/03) § 88 (March 28, 2014), *http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014XC0328(01)&from=EN and § 162*; joined cases C-241/91 P and C-242/91 Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission of the European Communities (6 April 1995) § 46, *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61991CJ0241&from=EN* ("So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.").
18. *Ill. Tool Works*, 547 U.S. at 43, IP Guidelines at § 2.2.
19. IP Guidelines at § 2.1. ("Intellectual property has important characteristics, such as ease of misappropriation, that distinguish it from many other forms of property.").
20. Constance E. Bagley and Gavin Clarkson, *Adverse Possession for Intellectual Property: Adapting an Ancient Concept To Resolve Conflicts Between Antitrust And Intellectual Property Laws In The Information Age*, 16 Harvard J.L & Technology 327 (2003).
21. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006).
22. In some cases, a user will need access to associated know-how, making misappropriation more difficult. However, where standards essential patents are concerned, the publicly available technical standards typically provide this detailed know-how and blue-prints for implementation/infringement.
23. Fed. Trade Comm'n, Statement of Public Interest in Connection with ITC Investigation No. 337-TA-1089 at 7 (Dec. 11, 2019) *https://www.ftc.gov/system/files/documents/advocacy_documents/federal-trade-commissions-statement-public-interest/itccertainmemorymodulesstatementpublicinterest.pdf* ("Consistent with the foregoing, courts across the United States have repeatedly concluded that RAND commitments are enforceable…. The FTC respectfully urges the ITC, in its consideration of the public interest, to take into account the foregoing when deciding how to treat the ID's dicta on the enforceability of the JEDEC RAND commitment"); U.S. Int'l Trade Comm'n, *In the Matter of Certain Memory Modules and Components Thereof - Inv. No. 337-TA-1089* at 26 (Apr. 21, 2020) ("The Commission has determined to reverse the ID's finding that the JEDEC Patent Policy is unenforceable. …The Commission finds that the ALJ erred by not assessing whether the frequent use of "reasonable and nondiscriminatory" terms by standard-setting organizations shows that the phrase is reasonably certain in commercial practice or trade usage, particularly in light of the numerous court cases that have found such agreements enforceable… The use of these terms by numerous standard setting organizations in similar agreements and the decisions of courts to interpret the provisions suggests that this agreement is enforceable").
24. *eBay*, 547 U.S. at 393; Case C-170/13—*Huawei Technologies Co. Ltd. v. ZTE Corp*. (Fifth Chamber, 16 July 2015).
25. *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081, 1107 (7th Cir. 1983) (requiring scrutiny of regulatory scheme because "heavy reliance on market share statistics is likely to be an inaccurate or misleading indicator of 'monopoly power' in regulated setting"); *Southern Pac. Commc'ns Co. v. AT&T*, 740 F.2d 980, 1000 (D.C. Cir. 1984) ("Reliance on statistical market share is a questionable approach in cases involving regulated industries. . . . [I]n such cases, market share should be at most a point of departure in determining whether monopoly power exists.").
26. *MCI Commc'ns*, 708 F.2d at 1107. (Jury instructions affirmed on appeal state that "[defendant] may have had the largest share or the entire share of the …business in certain areas would not be sufficient to establish that [it] possessed monopoly power if in fact regulation by regulatory agencies prevented [it] from having the power to restrict entry or control prices.").
27. 501 F.3d 297, 315 (3rd. Cir. 2007).
28. *Id.*
29. *Id.* at 314 ("When a patented technology is incorporated in a standard, adoption of the standard eliminates alternatives to the patented technology…Firms may become locked in to a standard requiring use of the competitor's patented technology. The patent holder's IPRs, if unconstrained, may permit it to demand supracompetitive royalties. It is in such circumstances that measures such as FRAND commitments become important safeguards against monopoly power."); *Id.* at 305 (noting the District court failed to "discuss the possibility that the FRAND commitments that SDOs required of vendors were intended as a bulwark against unlawful monopoly"), Broadcom had not alleged that Qualcomm had evaded its FRAND commitment or that it was unenforceable.
30. 904 F. Supp. 2d 1109, 1122 (W.D. Wash. 2012). The language is ironic for a court charged with adjudicating a FRAND rate. However, the court's language, which is often taken out of context, was not addressed to an antitrust claim, but whether an expert opinion on a FRAND rate was admissible.
31. *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012). Note that FRAND commitments are voluntary, not mandatory. SDOs often require a patentee to indicate whether it will offer FRAND access to technology essential to the standard.
32. 644 F. Supp. 2d 788, 793 (N. Dist. Tex., 2008) ("Essential patents are very different from normal patents, as the Third Circuit explains in *Broadcom Corporation v. Qualcomm Incorporated* . . . . *Broadcom* states that non-essential patents do not confer monopoly power upon the owner because the value of the patent "is limited when alternative technologies exist . . . . A standard, however, by definition, eliminates alternative technologies . . . . Motorola's offhand argument that it does not have a monopoly just because it has a patent . . . fails to address the key fact that Motorola owns an *essential* patent") (emphasis in original).
33. 2012 U.S. Dist. LEXIS 67102, *22 (N.D. CA May 14, 2012) (Moreover, a number of courts have recognized a legal distinction between a normal patent—to which antitrust market power is generally not conferred on the patent owner, and a patent incorporated into a standard—to which antitrust market power may be conferred on the patent owner. In so doing, these courts have found similar allegations of market power conferred as a result of a patent incorporated into a standard to be sufficient to state a claim upon which relief can be granted").
34. 2020 U.S. Dist. LEXIS 173799, *32 (N.D. Tex. Sept. 10, 2020).
35. *TCL Communs. Tech. Holdings, Ltd. v. Telefonaktienbolaget LM Ericsson*, 2016 U.S. Dist. LEXIS 140566 (C.D. Cal. Aug. 9, 2016) (granting defense motion for summary judgment on deception antitrust claim because defendant's injury flowed from solely from the defendant's protected patent enforcement activity); *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1076 (W.D. Wis. 2012) (plaintiff's injury flowed solely from patent owners protected litigation activity). *But cf. Microsoft Mobile, Inc. v. InterDigital, Inc.*, 2016 U.S. Dist. LEXIS 49498, *9 (D. Del. Apr. 13, 2016) (motion to dismiss denied where plaintiff alleged injury to business interests beyond litigation costs.).
36. *See e.g.*, *Research in Motion*, 644 F. Supp. 2d at 791; *Apple*, 2012 U.S. Dist. LEXIS at *9. This kind of "false FRAND" claim differs from the FTC's allegations against Rambus, where the agency alleged that Rambus had concealed its patent applications from the standards body and evaded the FRAND constraint. The case nevertheless ultimately failed because the court held that evasion of a FRAND commitment did not constitute anticompetitive exclusion and the FTC failed to argue that, absent deception, the standards group would have selected an alternative technology. The case thus failed on the element of exclusionary conduct, not market power, which was not in dispute. Rambus Inc., v. FTC, 522 F.3d 456, 463 (D.C. Cir. 2008).
37. See for example KZR 36/17 *SISVEL International S.A. v. Haier Deutschland GmbH* (May 5, 2020), Section 101 ("The Court of Appeal did not consider whether the plaintiff's submissions made it possible to establish that the plaintiff was forced to grant preferential conditions to the third party licensing company through intimidation or pressure from a foreign authority. It erred in law in assuming that this could not in itself constitute an objective justification for the unequal treatment"). The opinion was upheld on appeal by the German Federal Supreme Court (BGH), *see* Business Wire, *Last and Final Victory for Sisvel Before the German Federal Supreme Court (BGH) In the Sisvel vs Haier Cases* (Nov. 25. 2020), *https://www.businesswire.com/news/home/20201125005606/en/Last-and-Final-Victory-for-Sisvel-Before-the-German-Federal-Supreme-Court-BGH-In-the-Sisvel-vs-Haier-Cases*.
38. C 11/14 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, Article 269 (Jan. 14, 2011), *https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN*.
39. *Id.* at 288. Acknowledging that a FRAND commitment constrains pricing power by noting: "Therefore, when deciding whether to commit to FRAND for a particular IPR, participants [in the standards development process] will need to anticipate the implications of the FRAND commitment, notably on their ability to freely set the level of their fees."
40. Korean Fair Trade Commission, Review Guidelines on Unfair Exercise of Intellectual Property Rights, (2016) at Sect. II(2)(c) ("In terms of Standard Essential Patents which cannot be replaced for a certain period and shall be licensed to produce related goods, the holder of the patent is highly likely to have market dominance in the relevant market."), *https://www.ftc.go.kr/eng/cop/bbs/selectBoardList.do?key=2855*. The United States did not address the issue specifically when it revised its IP licensing guidelines in 2017, but takes the position generally that patents do not necessarily confer market power. IP Guidelines at § 2.2.