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January 28, 2015

The Honorable Renata B. Hesse
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Re Business Review Letter for the Institute of Electrical and Electronics Engineers (IEEE) Concerning Proposed Bylaw Amendments Affecting FRAND Licensing of Standard-Essential Patents

Dear Deputy Assistant Attorney General Hesse:

I understand that the Institute of Electrical and Electronics Engineers (IEEE) has requested the Antitrust Division to issue a business review letter saying that the IEEE's proposed amendments to its bylaws do not threaten competition and consumer welfare. I urge the Division not to issue such an opinion, for it is clear that the amendments do pose such a threat.

I am the chairman of Criterion Economics and the founding co-editor of the *Journal of Competition Law & Economics*, published by the Oxford University Press. I have also served as Judge Richard Posner's court-appointed neutral economic expert on patent damages. I have consulted and published extensively on matters concerning standard-essential patents (SEPs) and fair, reasonable, and nondiscriminatory (FRAND) royalties. I have advised members of the IEEE that hold valuable portfolios of SEPs for mobile telecommunications devices. Although these clients have encouraged me to write to you, they have also asked that I express strictly my own views, which I do in this letter.

Let me briefly mention the range of my concerns before discussing one aspect of the IEEE's proposed amendments in greater detail. I enclose links for articles of mine that analyze at length the legal and economic dimensions of these relevant issues:

1. The evident lack of adherence to procedural safeguards in the formation of the IEEE's proposed amendments raises serious antitrust concerns of oligopsonistic collusion. Implementers, particularly those that have a weak or nonexistent SEP portfolio, may have the incentive to collude to reduce licensing fees for SEPs. Implementers can reduce the fees for SEPs directly, by collectively agreeing to reduce the royalties that they will pay a specific SEP holder, or indirectly, by collectively imposing rules that would make the enforcement of SEPs particularly onerous. The Antitrust Division and

the Federal Trade Commission have properly considered buyer cartels to be so egregious and to be so unlikely to benefit the long-run interests of consumers as to be treated *per se* illegal. Oligopsonistic collusion within standard-setting organizations (SSOs) should be no different. Collusion among implementers would harm the standardization process, innovation, and consumers. The IEEE's proposed amendments are an agreement in restraint of trade that would coordinate the actions of buyers to reduce the price they pay for a valuable input. Far from deserving a positive business review letter, collusion within SSOs regarding the licensing of SEPs should be *per se* illegal under section 1 of the Sherman Act. In the alternative, if the Antitrust Division preferred to evaluate the IEEE's proposed amendments under the rule of reason, it would still be implausible that the hypothetical benefits of averting the purely theoretical risk of patent holdup could outweigh the very real social costs from permitting implementers to suppress, through their collective action, the royalties that they pay to an SEP owner for using its standard-essential technology.[1] Under the rule of reason, the IEEE's proposed amendments still would constitute price fixing in violation of section 1 of the Sherman Act.

2. The IEEE's proposed bylaws make it exceedingly difficult for an SEP holder to obtain a timely injunction against an unlicensed implementer (even when that implementer is unwilling to negotiate in good faith for a FRAND license). The IEEE's proposed amendments would allow an SEP holder to seek an injunction only after it had successfully litigated claims against the unlicensed implementer to conclusion in a court of appeals[2]—a process that could take years. The IEEE's proposed bylaws would thus reduce the value of SEPs to below their current market-disciplined level and ultimately harm investment in R&D and contributions to the IEEE.[3] Whatever static benefits from lower prices might flow to consumers from downstream manufacturers in the short run surely would be more than offset by forgone consumer surplus in future periods because of reduced innovation and diminished dynamic efficiency.[4]

3. The proposed amendment to preclude an SEP holder and an implementer from relying on comparable licenses to set a FRAND rate if such licenses were supposedly obtained

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1. *See* J. Gregory Sidak, *Patent Holdup and Oligopsonistic Collusion in Standard-Setting Organizations*, 5 J. COMPETITION L. & ECON. 123 (2009), *available at* http://www.criterioneconomics.com/patent-holdup-oligopolistic-collusion-frand-standard-setting.html.

2. Draft 39 IEEE Standards Board Bylaws § 6.1, at 1 (2014) [hereinafter Draft 39 IEEE Standards Board Bylaws], *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/SBBylaws_100614_redline_current.pdf.

3. *See* J. Gregory Sidak, *The Meaning of FRAND, Part II: Injunctions*, 11 J. COMPETITION L. & ECON. (forthcoming 2015), *available at* http://www.criterioneconomics.com/the-meaning-of-frand-part-ii-injunctions.html; J. Gregory Sidak, *The Meaning of FRAND, Part I: Royalties*, 9 J. COMPETITION L. & ECON. 931 (2013), *available at* http://www.criterioneconomics.com/meaning-of-frand-royalties-for-standard-essential-patents.html; J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley and Shapiro*, 92 MINN. L. REV. 714 (2008), *available at* http://www.criterioneconomics.com/lemley-shapiro-holdup-royalty-stacking-injunctive-relief.html; J. Gregory Sidak, *Mandating Final-Offer Arbitration of FRAND Royalties for Standard-Essential Patents*, 18 STAN. TECH. L. REV. (forthcoming 2015), *available at* http://www.criterioneconomics.com/lemley-shapiro-baseball-arbitration-frand-royalties-seps.html.

4. *See* J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. COMPETITION L. & ECON. 581 (2009), *available at* http://www.criterioneconomics.com/dynamic-competition-in-antitrust-law.html.

"under an explicit or implicit threat"[5] of an injunction would exclude relevant market-based data for the valuation of patents.[6]

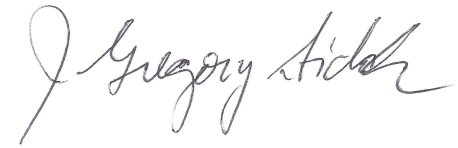
4. The proposed requirement that a reasonable royalty rate be measured against the "smallest saleable compliant implementation that practices an Essential Patent Claim"[7] is unsound on both legal and economic grounds.[8]

5. The proposed accounting for all SEPs so as to set a proportional cap on the value of a single SEP or a single portfolio of SEPs[9] would arbitrarily limit the value of patents that contribute disproportionately greater value to a given IEEE standard.[10]

Based on the above writings, I believe that the IEEE's proposed bylaw amendments would invite opportunism by implementers. Absent the meaningful threat of an injunction, implementers would have little incentive to negotiate sincerely and to agree promptly to FRAND licensing terms. Limiting an SEP holder's ability to obtain an injunction would encourage free riding on the SEP holder's invention and decrease the implementer's incentives to negotiate licensing terms in good faith. Limiting an SEP holder's ability to obtain an injunction could also prolong litigation, rather than facilitate voluntary licensing agreements between the parties. This result alone would reduce the SEP holder's willingness to invest in innovation and contribute its future inventions to SSOs, but when taken in conjunction with the additional, arbitrary limitations on determining FRAND royalties for SEPs, the problem of opportunism by implementers will manifest itself further. If holdup is the purported concern of these policy changes, they are unnecessary, given that courts already can prevent opportunism by SEP holders by conditioning an injunction on the implementer's actual or constructive rejection of a FRAND offer.

For the foregoing reasons, the IEEE's proposed amendments to its bylaws would harm competition and consumer welfare. I urge the Antitrust Division not to give the IEEE a business review letter that would conclude otherwise.

Sincerely,



J. Gregory Sidak
Chairman

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5. Draft 39 IEEE Standards Board Bylaws, *supra* note 2, § 6.1, at 2; Draft IEEE-SA Patent Policy FAQs: Understanding Patent Issues During IEEE Standards Development, Draft 14, ¶ 47, at 13–14 (Dec. 3, 2014), *available at* http://grouper.ieee.org/groups/pp-dialog/drafts_comments/Patent_Policy_FAQ_031214_redline.pdf.
6. *See* Sidak, *The Meaning of FRAND, Part I: Royalties*, *supra* note 3, at 1000–09.
7. Draft 39 IEEE Standards Board Bylaws, *supra* note 2, § 6.1, at 2.
8. *See* J. Gregory Sidak, *The Proper Royalty Base for Patent Damages*, 10 J. COMPETITION L. & ECON. 989 (2014), *available at* http://www.criterioneconomics.com/the-proper-royalty-base-for-patent-damages.html.
9. Draft 39 IEEE Standards Board Bylaws, *supra* note 2, § 6.1, at 2.
10. *See* Sidak, *The Meaning of FRAND, Part I: Royalties*, *supra* note 3, at 964–66.