

No. 14-35393

IN THE
**United States Court of Appeals
for the Ninth Circuit**

MICROSOFT CORPORATION,
A WASHINGTON CORPORATION,

Plaintiff-Appellee,

v.

MOTOROLA, INC.; MOTOROLA MOBILITY, INC.;
AND GENERAL INSTRUMENT CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

**BRIEF OF *AMICUS CURIAE* PUBLIC KNOWLEDGE
IN SUPPORT OF APPELLEE**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Public Knowledge states that it has no parent corporation or publicly held corporation that holds 10% or more of its stock.

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INTEREST OF AMICUS CURIAE

Amicus curiae Public Knowledge is a non-profit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, promoting creativity through balanced intellectual property rights, and upholding and protecting the rights of consumers to use innovative technology lawfully. As part of this mission, Public Knowledge advocates on behalf of the public interest for a balanced patent system, particularly with respect to new and emerging technologies.

Public Knowledge has previously served as *amicus* in key patent cases. *E.g.*, *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014); *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014); *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); *Ultramercial, Inc. v. Hulu, LLC*, No. 10-1544 (Fed. Cir. Nov. 15, 2014).

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief. Pursuant to Rule 29(c)(5), no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The controversy in this case is over a unique type of contract, an agreement between a technology-inventing company that proposed a technology standard and the standard-setting organization that adopted the standard. The contractual subject matter is not performance of services or shipment of goods, but rather a promise by the company to license its patents *to others* on fair, reasonable, and non-discriminatory terms. The beneficiaries are third parties external to the agreement, including the party enforcing that contract today.

Such a contract, called FRAND after the promised licensing terms, strongly implicates the public interest. The promise is made to the public, the beneficiary is the public, and the public is charged with enforcing the terms. It is fully appropriate to interpret that contract in view of the public interest.

This is precisely what the district court did, and insofar as it did so, the district court should be affirmed. In particular, the district court identified two principles that account for this public interest.

First, the court considered the problem of *patent holdup*, which simply describes a species of monopolistic imbalance of market power that occurs with technology standards. Second, it recognized the risk of *royalty stacking*, a problem of overvaluation of a single patent when that patent is but one of many covering a technology standard. Patent holdup and royalty stacking account for

significant public interest concerns at play with FRAND agreements, and it was correct for the district court to account for them.

Certain *amici*, namely the American Intellectual Property Law Association and two companies Qualcomm and Nokia, criticize the decision below. They suggest that the FRAND agreement is nothing more than a contract between two private parties. And they dismiss patent holdup and royalty stacking as “purely theoretical,” relying almost entirely on a single decision from the Eastern District of Texas, *Ericsson Inc. v. D-Link Systems, Inc.*

They are wrong. The FRAND contracts here must be interpreted in view of their public-facing purpose. Patent holdup and royalty stacking rightly account for this public interest. And these three *amici* lean so heavily on just one district court case because they have no other leg to stand on: *every single court* to have considered patent holdup or royalty stacking in light of a FRAND contract—including this Court—has acknowledged them to be real and substantial problems to be addressed by that contract. The only outlier is *Ericsson*—which incidentally is now on appeal.

This Court is not so shortsighted, and should consider the public interest in interpreting the FRAND agreements at issue, as the district court did. This much is mandated by the agreements themselves, and perhaps more importantly by the future of technology that depends on these promises to the public.

ARGUMENT

This Court should consider the public interest, as the district court did, in interpreting FRAND contracts such as the ones at issue. As explained below, public interest considerations apply to FRAND contracts such as the one at issue, and the district court's analysis properly applied those public interest considerations.¹

I. THE FRAND AGREEMENT IS NO ORDINARY CONTRACT, BUT RATHER A PUBLIC PROMISE TO BE CONSTRUED FOR THE PUBLIC INTEREST

A technology standard is an agreement among companies to structure a certain aspect of technology in a common way. The H.264 standard, for example, specifies a way of encoding video into a data file, while the 802.11 standard describes a way for computers to exchange data by radio signals over a wireless network. *See, e.g., Microsoft Corp. v. Motorola, Inc.*, No. 2:10-cv-1823, slip op. ¶ 16 (W.D. Wash. Apr. 25, 2013). The standard is adopted through a multistakeholder process driven by technology companies and shepherded by so-called standard-setting organizations.

The standard-setting process has important implications for the development of new technologies. Accordingly, it substantially implicates the public interest, for at least the reasons explained below.

¹*Amicus curiae* Public Knowledge expresses no position on issues being appealed but not discussed herein, except to say that the public interest principles described below should apply with equal force.

A. TECHNOLOGY STANDARDS PROMOTE INNOVATION, BUT ONLY WHEN THEY PROMOTE COMPETITION

Technology standards are a double-edged sword. On the one hand, standards promote interoperability, that is, the ability of technological devices to communicate and interact with other devices in a consistent manner; interoperability due to standards has been the hallmark of all modern computer innovation. On the other hand, standards can be abused to produce antitrust problems and monopolistic quagmires. Thus, without proper governance by standard-setting organizations, technology standards will not necessarily benefit the public.

Interoperability is central to the rapid growth of computer technology. Computer components permit interoperability through “interfaces,” that is, rules and syntax for communicating with those components, which other computer elements may use to achieve predictable results. Microsoft Windows famously maintained a consistent interface for many years, allowing for the creation of numerous Windows software programs. See Ian Murdock, *On the Importance of Backward Compatibility*, Ian Murdock’s Weblog (Jan. 14, 2007), <http://ianmurdock.com/platforms/on-the-importance-of-backward-compatibility/>. Furthermore, the success of the Internet has been credited to its “use of a common protocol,” a single language with which all contemporary computers can communicate. Paul E. Ceruzzi, *A History of Modern Computing* 295–96 (2d ed. 2003). Every web page owes its existence to the HyperText Transport Protocol by which computers ob-

tain web pages. See T. Berners-Lee et al., *Hypertext Transfer Protocol—HTTP/1.0* (1996), available at <http://tools.ietf.org/html/rfc1945>. Each of these interfaces—Windows, the Internet, HTTP—served as a springboard for enormous advancement of technology, because each allowed for interoperability.²

“[S]tandards that ensure the interoperability of products,” as one court has said, benefit the public by “enhancing the utility of all products and enlarging the overall consumer market.” *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007); accord *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 876 (9th Cir. 2012). Similarly, the Supreme Court has noted that “private standards can have significant procompetitive advantages,” and the Federal Trade Commission in one proceeding found its record “replete with discussion of the procompetitive role of standard-setting organizations.” *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); *In re Dell Computer Corp.*, 121 F.T.C. 616, 626 (1996).

However, technology standards can also negatively impact the public interest by creating anticompetitive situations, as recognized by all of the authorities cited above. The standard-setting process “can be rife with opportunities for anticompetitive activity.” *Allied Tube & Conduit Corp.*, 486 U.S. at 571. *Broadcom* found more specifically that the holder of a patent on standardized technology

²This paragraph was drawn from Brief of *Amicus Curiae* Public Knowledge in Support of the Petition at 8–9, *Google, Inc. v. Oracle Am., Inc.*, No. 14-410 (Nov. 7, 2014).

is in a “unique position of bargaining power” in which it “may be able to extract supracompetitive royalties from the industry participants.” 501 F.3d at 310; *see also Microsoft Corp.*, 696 F.3d at 876 (“[S]tandards threaten to endow holders of standard-essential patents with disproportionate market power.”); *Dell Computer Corp.*, 121 F.T.C. at 624 n.2 (“[T]he standard effectively conferred market power upon Dell as the patent holder.”).

Accordingly, the challenge for standard-setting organizations, as well as for the courts interpreting the actions of those bodies, is to craft a standard-setting system that achieves the procompetitive interoperability benefits, while avoiding the anticompetitive market power problems arising from patents on the standard.

B. FRAND AGREEMENTS ENSURE THAT STANDARDS DO NOT INTERFERE WITH THE PUBLIC INTEREST IN COMPETITIVE INNOVATION

To ensure that technology standards succeed without creating the anticompetitive concerns described above, standard-setting organizations require companies participating in the standardization process to disclose patents relevant to a standard. *See, e.g., Int’l Electrotechnical Comm’n et al., Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC 2 (2012), available at <http://www.itu.int/oth/T0404000001/en>* (“[A]ny party participating in the work of the Organizations should, from the outset, draw their attention to any known Patent . . .”). Such patents are known as “standards-essential patents” or “SEPs.”

The organization will then generally require the patent owner, in exchange for adopting the standard, to agree to license its patent to others on Fair, Reasonable, And Non-Discriminatory terms. *See id.* at 3; Anne Layne-Farrar et al., *Pricing Patents for Licensing in Standard-Setting Organizations: Making Sense of FRAND Commitments*, 74 Antitrust L.J. 671 (2007). This so-called FRAND³ agreement ensures that product manufacturers and other people wishing to use the standard will not be unduly impeded by the patent owner from doing so.

The purpose of the FRAND agreement is to ensure the public interest in allowing access to the standard and avoiding concerns for monopolistic behavior by holders of standards-essential patents. *See, e.g.*, Layne-Farrar et al., *supra*, at 672. Courts have specifically recognized that FRAND commitments “guard against anticompetitive patent hold-up” and that attempting to skirt such commitments can constitute an antitrust violation of § 2 of the Sherman Act, among other things. *E.g.*, *Broadcom*, 501 F.3d at 313, 315. *See generally* note 6 *infra* p. 12 (citing cases). Similarly, two technology standards are at issue in this case, and *both* of the organizations promulgating those standards adopted FRAND agreements to forestall monopolistic behavior and ensure public access.⁴

³Sometimes the “Fair” component is dropped, to refer to a RAND agreement; FRAND and RAND are understood to mean the same thing.

⁴Int’l Telecomm. Union, *Understanding Patents, Competition and Standardization in an Interconnected World* 83 (2014), available at http://www.itu.int/en/ITU-T/Documents/Manual_Patents_Final_E.pdf (“The overriding objective of the

Amici Nokia and others contend that this public interest concern in access to the standard is subordinate to the private interest of “providing a mechanism for patent holders to obtain adequate compensation” on their standard-essential patents. (*E.g.*, Nokia Br. 3.) But this ignores that, by mere adoption of patented technology into the standard, patent holders already receive an enormous economic benefit: every implementer of the standard must purchase licenses, effectively guaranteeing revenue to the patent holders. The purpose of the FRAND agreement is to cabin that revenue to a level that avoids antitrust concerns and promotes competitive implementation of the standard.

C. THE FRAND AGREEMENT MUST BE CONSTRUED IN THE PUBLIC INTEREST BECAUSE IT IS CRAFTED FOR THE PUBLIC INTEREST

Since FRAND agreements are designed to prevent anticompetitive behavior and promote the public interest in access to standards, it is appropriate to construe such agreements in view of the public interest. It is well understood that, when the public is an intended beneficiary of a contract, the contract must be interpreted in favor of the public interest. Williston writes that “contracts or

ITU patent policy is ‘that a patent embodied fully or partly in a Recommendation/deliverable must be accessible to everybody without undue constraints.’); Brief of *Amicus Curiae* the Institute of Electrical and Electronics Engineers, Incorporated in Support of No Party at 22, *Ericsson, Inc. v. D-Link Sys., Inc.*, Nos. 13-1625, -1631, -1632 & -1633 (Fed. Cir. Dec. 20, 2013) (stating IEEE’s commitment to “ensuring that a standard will be genuinely ‘open’ to implementation by all interested parties”).

agreements affecting the public interest . . . are to be liberally construed in favor of the public.” 11 Richard A. Lord, *Williston on Contracts* § 32:18 (4th ed. 2012). Similarly, the Restatement of Contracts states that “a meaning that serves the public interest is generally preferred” when choosing among possible meanings of a contract. Restatement (Second) of Contracts § 207 (1979); *see also Herrera v. Katz Commc’ns, Inc.*, 532 F. Supp. 2d 644, 647 (S.D.N.Y. 2008) (“[A] meaning which serves the public interest . . . is preferred over a meaning which does not.”); Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 Colum. L. Rev. 1358, 1387 (1992) (“[C]ontract law properly may give effect to policy and moral concerns that are independent of the contracting parties’ performance objectives.”).

Statements by *amici* directly conflict with these principles of contract law and thus should be disregarded. For example, Qualcomm argues that “generalized policy concerns cannot be used to rewrite an otherwise clear and lawful contract.”⁵ (Qualcomm Br. 11.) This is certainly at odds with the public interest principles laid out above. Qualcomm strenuously relies on the “parties’ expectations at the time the contract was made.” (*E.g., id.* at 5.) But “[t]he rule favoring the public springs from a different rationale from that underlying the ordinary rules of interpretation. There is no reason to suppose that the parties in fact intended to

⁵This statement of law also is inapplicable here where, as Qualcomm itself acknowledges, the contract is not entirely clear. (*See* Qualcomm Br. 27–29 (arguing that the FRAND contract does not unambiguously specify a royalty rate).)

favor the public, and when a court so assumes, it does so because it is in the public interest to do so.” 11 *Williston on Contracts, supra*, § 32:18; accord Restatement (Second) of Contracts § 207, cmt. a.

Accordingly, FRAND contracts should be interpreted with public considerations in mind. As explained below, the district court’s application of such concerns in two such ways, namely consideration of patent holdup and royalty stacking, were thus correct and should be affirmed.

II. PATENT HOLDUP AND ROYALTY STACKING APPROPRIATELY ACCOUNT FOR THE UNIQUE PUBLIC INTEREST IN STANDARDS AND PATENTS

The district court computed its reasonable royalty rate in part based on two principles that it called “patent holdup” and “royalty stacking.” Application of these principles was appropriate, despite opposition from *amici* AIPLA, Qualcomm, and Nokia. The principles appropriately account for important public considerations relevant to FRAND agreements on standards-essential patents, and they are widely accepted by virtually every court to have considered them.

A. PATENT HOLDUP IS SIMPLY THE POTENTIAL ANTICOMPETITIVE CONCERN THAT THE FRAND OBLIGATION AIMS TO ALLEVIATE

Patent holdup, as used by the district court, is nothing more than the concept that the holder of a standard-essential patent gains undue market power as a result of the patent being incorporated into the standard, absent a check on the

patent holder in the form of a FRAND commitment. *See Microsoft*, slip op. ¶ 109. Although AIPLA and other *amici* attempt to portray this concept of holdup as unsubstantiated theory (*e.g.*, AIPLA Br. 20), in fact patent holdup is a well-accepted direct corollary of basic principles of antitrust and competition law, and the district court applied it correctly.

As explained previously, serious anticompetitive concerns arise where a party holds patents covering a technology standard. *See Allied Tube & Conduit Corp.*, 486 U.S. at 571; *Broadcom*, 501 F.3d at 310. As this Court clearly explained:

As a result, standards threaten to endow holders of standards-essential patents with disproportionate market power. In theory, once a standard has gained such widespread acceptance that compliance is effectively required to compete in a particular market, anyone holding a standard-essential patent could extract unreasonably high royalties from suppliers of standard-compliant products and services. This problem is a form of “patent holdup.”

Microsoft Corp. (citing Mark A. Lemley, *Ten Things to Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L. Rev. 149 (2007)).

Indeed, *every single court* to have considered patent holdup in the context of a FRAND patent has concluded it is a real and problematic concern of anticompetitive market power, with but one exception.⁶ The Federal Trade Commission, an

⁶*See Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286, 1332 (Fed. Cir. 2014) (“In addition, the public has an interest in encouraging participation in standard-setting organizations but also in ensuring that SEPs are not overvalued.”); *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 400 (2d Cir. 2014) (“Technical

standardization also creates ‘lock-in’ effects and raises the specter of ‘patent hold-ups.’”); *Broadcom*, 501 F.3d at 310 (“Inefficiency may be injected into the standard-setting process by what is known as ‘patent hold-up.’”); *Jaffé v. Samsung Elecs. Co.*, 737 F.3d 14, 30–31 (4th Cir. 2013) (justifying refusal to excuse bankruptcy party from terminating patent licenses because of threat of holdup); *Rambus Inc. v. Fed. Trade Comm’n*, 522 F.3d 456, 459 (D.C. Cir. 2008) (“[T]he technologies adopted in those standards—including those over which Rambus claims patent rights—enjoy a similar level of dominance over their alternatives”); *Interdigital Commc’ns, Inc. v. ZTE Corp.*, No. 1:13-cv-9, 2014 U.S. Dist. LEXIS 72389, at *2 (D. Del. May 28, 2014) (describing practices “to prevent patent holdup”); *Golden Bridge Tech. v. Apple Inc.*, No. 5:12-cv-4882, 2014 U.S. Dist. LEXIS 68564, at *12 (N.D. Cal. May 18, 2014) (describing both holdup and royalty stacking); *GPNE Corp. v. Apple, Inc.*, No. 12-cv-2885, 2014 U.S. Dist. LEXIS 53234, at *31 (N.D. Cal. Apr. 16, 2014) (patentee had “superior bargaining position by virtue of its patents being essential to the standard”); *In re Innovatio IP Ventures, LLC Patent Litig.*, 956 F. Supp. 2d 925, 932 (N.D. Ill. 2013) (standard-essential patent “allows the company to charge inflated prices”); *SK Hynix Inc. v. Rambus Inc.*, No. C-00-20905, 2013 U.S. Dist. LEXIS 66554, at *68–69 (N.D. Cal. May 8, 2013) (“Requiring that the patent be licensed to all on FRAND terms prevents this type of patent ‘hold-up.’”); *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (“The purpose of the FRAND requirements . . . is to confine the patentee’s royalty demand to the value conferred by the patent itself as distinct from the additional value—the hold-up value—conferred by the patent’s being designated as standard-essential.”), *rev’d in part sub nom. Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014); *Apple, Inc. v. Motorola Mobility, Inc.*, 886 F. Supp. 2d 1061, 1067 (W.D. Wis. 2012) (FRAND policies “help to insure that standards do not allow the owners of essential patents to abuse their market power”); *Honeywell Int’l Inc. v. United States*, 107 Fed. Cl. 659, 696 (2012) (standard-setting “carries the risk of creating a degree of market power”); *Multimedia Patent Trust v. Apple Inc.*, No. 10-CV-2618-H, 2012 U.S. Dist. LEXIS 167479, at *79 (S.D. Cal. Nov. 9, 2012) (describing “policy-based desire to prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right”); *Realtek Semiconductor Corp. v. LSI Corp.*, 104 U.S.P.Q.2d (BNA) 1468, 1470 (N.D. Cal. 2012) (“At the same time, technical standardization creates a ‘lock-in’ effect and the risk of ‘patent hold-up.’”); *Apple Inc. v. Samsung Elecs. Co.*, 101 U.S.P.Q.2d (BNA) 1125, 1128 (N.D. Cal. 2011) (“Establishing industry technical

expert in the field of anticompetitive practices, has also repeatedly highlighted the potential for patent holdup, and has several times taken action against holders of standards-essential patents in response.⁷ The Department of Justice and

standards can create a ‘lock-in’ effect and the risk of ‘patent hold-up.’”); *In re Quimonda AG*, 462 B.R. 165, 182 (E.D. Va. 2011) (“RAND requirements do provide at least some comfort against the hold-up risk that would otherwise exist in an ‘ex post’ licensing negotiation.”), *aff’d sub nom. Jaffé v. Samsung Elecs. Co.*, 737 F.3d 14 (4th Cir. 2013); *Broadcom Corp. v. Qualcomm Inc.*, No. 08-cv-1607, 2009 U.S. Dist. LEXIS 21012, at *6 (S.D. Cal. Mar. 11, 2009) (“If not constrained, the adoption of a patent holder’s technology into a standard can then enable the patent holder to extract monopoly rents”); *Zoran Corp. v. DTS, Inc.*, No. C 08-4655, 2009 U.S. Dist. LEXIS 6675, at *14 (N.D. Cal. Jan. 20, 2009) (noting that false promise to license standard-essential patent on FRAND terms “is actionable anti-competitive conduct under the Sherman Act”); *Research in Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 791 (N.D. Tex. Dec. 11, 2008) (“Thus, the owners of essential patents gain market power.”); *Broadcom Corp. v. Qualcomm Inc.*, No. 05-3350, 2006 U.S. Dist. LEXIS 62090, at *3 (D.N.J. Aug. 31, 2006) (describing FRAND obligation as “designed to prevent a patent-holder from acquiring an unfair advantage when a patent is incorporated into the standard”), *rev’d in part on other grounds*, 501 F.3d 297 (3d Cir. 2007).

⁷See, e.g., *Dell Computer Corp.*, 121 F.T.C. at 624 n.2 (“[O]nce [the] standard had become widely accepted, the standard effectively conferred market power upon Dell as the patent holder. This market power was not inevitable”); *In re Rambus, Inc.*, No. 9302, at 4 (Fed. Trade Comm’n Aug. 2, 2006) (“Once lock-in occurs, the owner of the standardized technology may be able to ‘hold up’ the industry and charge supracompetitive rates.”), *vacated on other grounds sub nom. Rambus Inc. v. Fed. Trade Comm’n*, 522 F.3d 456 (D.C. Cir. 2008); Third Party United States Federal Trade Commission’s Statement on the Public Interest at 3, *In re Certain Wireless Commc’n Devices, Portable Music & Data Processing Devices, Computers & Components Thereof*, Inv. No. 337-TA-745 (Int’l Trade Comm’n June 6, 2012), http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-united-states-international-trade-commission-concerning-certain-wireless-communication/1206ftcwirelesscom.pdf (“Hold-up and the threat of hold-up can deter innovation by increasing costs and uncertainty for other in-

U.S. Patent and Trademark Office concurred, in a joint statement saying that “[c]onsumers of products implementing the standard could also be harmed to the extent that the hold-up generates unwarranted higher royalties.”⁸ The United States Trade Representative has also expressed concern that holders of standard-essential patents could be “gaining undue leverage and engaging in ‘patent hold-up.’”⁹ Thus, there is widespread agreement that patent holdup is a real, tangible problem of an anticompetitive nature, that FRAND agreements were intended to reduce.

The sole outlier is a single decision from the district court of the Eastern District of Texas. *See Ericsson Inc. v. D-Link Sys., Inc.*, No. 6:10-cv-473, 2013 U.S. Dist. LEXIS 110585 (E.D. Tex. Aug. 6, 2013), *appeal filed sub nom. Ericsson, Inc. v. D-Link Sys., Inc.*, Nos. 13-1625, -1631, -1632 & -1633 (Fed. Cir. Sept. 6, 2013). *Amici* AIPLA, Qualcomm, and Nokia all heavily rely on the *Ericsson* decision in arguing against patent holdup. (*See, e.g.*, AIPLA Br. 20; Qualcomm Br. 24–27; Nokia Br. 6–9.) But

dustry participants . . .”).

⁸Dep’t of Justice & U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments* 4 (Jan. 8, 2013), <http://www.justice.gov/atr/public/guidelines/290994.pdf>.

⁹Letter from Michael B.G. Froman, U.S. Trade Representative, to Irving A. Williamson, U.S. International Trade Commission, *Disapproval of the U.S. International Trade Commission’s Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Table Computers, Investigation No. 337-TA-794*, at 2 (Aug. 3, 2013), available at http://www.ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

as the extensive citations above show, the weight of authority is strongly in the other direction.

Besides just recognizing patent holdup as a problem, many of the above authorities agree that resolving the problem requires adjustment of the traditional factors for computing patent damages. Traditionally, patent infringement damages may be based on a “reasonable royalty” computed based on a list of fifteen factors. *See* 35 U.S.C. § 284 (2012); *Ga.-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1121 (S.D.N.Y. 1970); *see also Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324–25 (Fed. Cir. 2009).

But many authorities have agreed with the district court’s view that while value of the technology itself may be awarded, the increased value due to adoption of the technology into a standard—the holdup value—may not be awarded. *See Microsoft*, slip op. ¶ 109; *see, e.g., In re Innovatio IP Ventures, LLC Patent Litig.*, 956 F. Supp. 2d 925, 932 (N.D. Ill. 2013); *Apple, Inc. v. Motorola, Inc.*, 869 F. Supp. 2d 901, 913 (N.D. Ill. 2012) (citing Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection, and Control of Market Power*, 73 *Antitrust L.J.* 1, 7–11 (2005)), *rev’d in part sub nom. Apple Inc. v. Motorola, Inc.*, 757 F.3d 1286 (Fed. Cir. 2014).

Indeed, even the Eastern District of Texas decisions approved of modifying damages computations in light of FRAND agreements. *See Ericsson*, 2013 U.S. Dist.

LEXIS 110585, at *77–78 (“The Court also modified the traditional *Georgia-Pacific* factors in its instructions to include Ericsson’s obligation to license its patents on RAND terms.”); *Commonwealth Scientific & Indus. Research Organisation v. Cisco Sys., Inc.*, No. 6:11-cv-343, slip op. at 26–27 (E.D. Tex. July 23, 2014) (“Further, under its RAND obligation, CSIRO had a binding commitment to license the ’069 Patent [T]his factor favors a downward adjustment of the baseline rates.”).¹⁰ It is curious that both AIPLA and Qualcomm claim that plural “courts” support their view (AIPLA Br. 18; Qualcomm Br. 6), when in fact only a single court does so, and not even wholeheartedly.

Accordingly, the district court’s interpretation of the FRAND agreement in light of patent holdup correctly accounted for substantial public interest principles. It should be affirmed.

B. ROYALTY STACKING FOLLOWS DIRECTLY FROM WELL-ESTABLISHED PRINCIPLES OF APPORTIONMENT OF PATENT ROYALTIES

Just like patent holdup, the concept of royalty stacking as applied by the district court is a direct consequence of well-established and accepted law, despite arguments by Qualcomm and other *amici*. (E.g., Qualcomm Br. 19–23.) The dis-

¹⁰Qualcomm cites *CSIRO* to support the proposition that the *Georgia-Pacific* framework requires no modification for FRAND patents. (See Qualcomm Br. 7 n.2.) But *CSIRO* came to that conclusion not as a general matter, as Qualcomm suggests, but because in that particular case “an incredibly small percentage of the total products at issue” implicated the standard, *see* slip op. at 26.

strict court explained royalty stacking as the problem that arises when multiple patents are essential to implementation of a standard and each holder of such a patent demands royalties such that the total is excessive. *Microsoft*, slip op. ¶¶ 62–66. Consequently, royalty stacking flows from longstanding law on apportionment of product value for patent damages.

Particularly with regard to modern technology, it is often the case that a single device may incorporate myriad features, only one or a few of which may be implicated by a particular patent. *See, e.g., LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 1255, 66 (Fed. Cir. 2012) (“This is especially true for electronic devices, which may include dozens of distinct components, many of which may be separately patented”); *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 966 (N.D. Cal. 2009) (citing Mark A. Lemley & Carl Shapiro, *Patent Holdup and Royalty Stacking*, 85 Tex. L. Rev. 1991, 1992 (2007)); *see also eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 396–97 (2006) (Kennedy, J., concurring) (expressing concern where “the patented invention is but a small component of the product the companies seek to produce”).

In such cases, the reasonable royalty award can only be based on the patented features, not the entire value of the product. “No matter what the form of the royalty, a patentee must take care to seek only those damages attributable to the infringing features.” *VirnetX, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir.

2014). Courts thus must “separate or apportion . . . between the patented feature and the unpatented features.” *Garretson v. Clark*, 111 U.S. 120, 121 (1884), *quoted in VirnetX*, 767 F.3d at 1326; *accord LaserDynamics*, 694 F.3d at 67 (“Where small elements of multi-component products are accused of infringement, calculating a royalty on the entire product carries a considerable risk that the patentee will be improperly compensated for non-infringing components of that product.”); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (courts must “carefully tie proof of damages to the claimed invention’s footprint in the market-place”); *Lucent*, 580 F.3d at 1332–33 (royalty cannot be based on entire software program when patented feature was “but a tiny feature of one part of a much larger software program”).

The royalty stacking principle applied by the district court is a direct consequence of this doctrine of apportionment. The sum value of the features of a product obviously cannot exceed the value of the product as a whole. Thus, if a court finds that a proposed royalty award, in conjunction with other patent royalties that a product manufacturer might face, would result in a purported valuation of the product’s features that exceeds the product’s actual value, then the court can be certain that the proposed royalty is too high, in view of *Garretson*, *VirnetX*, *LaserDynamics*, *ResQNet*, *Lucent*, and other authorities in accord.

And indeed, as with patent holdup, *every court to have considered royalty stacking has recognized it as a real problem* to be remedied by FRAND obligations,¹¹ the sole exception being *Ericsson*.

This analysis is what the district court here did when it applied the concept of royalty stacking. *E.g.*, *Microsoft*, slip op. ¶ 456 (“If each of these 92 entities sought royalties similar to motorola’s request . . . , the aggregate royalty . . . would exceed the total product price.”); *id.* ¶¶ 538–541 (“[T]he implementer must ask herself, as a rational business-person, ‘What is the most I can pay for a license . . . while still maintaining a viable business?’”). It is correct by law and should be affirmed.

¹¹See *Golden Bridge Tech. v. Apple Inc.*, No. 5:12-cv-4882, 2014 U.S. Dist. LEXIS 68564, at *12 (N.D. Cal. May 18, 2014); *NetAirus Techs., LLC v. Apple, Inc.*, No. CV10-3257, 2013 U.S. Dist. LEXIS 184514, at 18–19 n.7 (C.D. Cal. Oct. 23, 2013) (“That both the plaintiffs here and VirnetX seek a large portion of FaceTime profits highlights the problem of royalty stacking that occurs when multiple patents read on a single product.”); *In re Innovatio IP Ventures, LLC Patent Litig.*, No. 11-C-9308, 2013 U.S. Dist. LEXIS 144061, at *66 (N.D. Ill. Sept. 27, 2013) (“Another concern of the RAND obligation is to prevent ‘royalty stacking.’”); *Paymaster Techs., Inc. v. United States*, 61 Fed. Cl. 593, 613 (2004) (considering effect of “stacked royalty” as relevant to *Georgia-Pacific* factor 12), *vacated on other grounds*, 180 Fed. Appx. 942 (Fed. Cir. 2006); see also *GPNE Corp. v. Apple, Inc.*, No. 12-cv-2885, 2014 U.S. Dist. LEXIS 53234 (N.D. Cal. Apr. 16, 2014) (permitting expert testimony on “Royalty Stack” theory as admissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)); *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs., Inc.*, No. CV-03-597, 2010 U.S. Dist. LEXIS 144259, at *27–28 (D. Ariz. Sept. 9, 2010) (lowering royalty rate, in response to infringer Gore’s royalty stacking argument, in order to allow Gore “to remain slightly more profitable on its two most popular products, which . . . Gore has added significant value.”), *rev’d in part on other grounds*, 682 F.3d 1003 (Fed. Cir. 2012); *Integra Lifesciences I, Ltd. v. Merck KGaA*, 331 F.3d 860, 871 (Fed. Cir. 2003) (“The cumulative effect of such stacking royalties can be substantial . . .”).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court on the points of law as described above.

Respectfully submitted,

Dated: November 21, 2014

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **5331** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using the *xelatex* typesetting system, version 3.14159265-2.6-0.99991, in the typeface Linux Libertine.

Dated: November 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Brief of *Amicus Curiae* Public Knowledge in Support of Appellee** 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 **November 21, 2014**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 21, 2014

s/Charles Duan

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14-35393

MICROSOFT CORPORATION,
A WASHINGTON CORPORATION,

Plaintiff-Appellee,

v.

MOTOROLA, INC.; MOTOROLA MOBILITY, INC.;
AND GENERAL INSTRUMENT CORPORATION,

Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

**UNOPPOSED MOTION OF PUBLIC KNOWLEDGE
FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Public Knowledge respectfully moves for leave to file an *amicus curiae* brief in the above-identified appeal, pursuant to Federal Rule of Appellate Procedure 29(a). The brief has been tendered herewith, and both parties to the appeal have consented to its filing.

Public Knowledge is a nonprofit technology policy organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. As part of that mission, Public Knowledge advocates for policy on behalf of consumer interests, by filing *amicus curiae* briefs in cases of significance in relevant areas of law.

The proper interpretation of patentee commitments made in standards-setting organizations is an issue of critical importance to patent law and the public interest. As explained in the tendered brief, technology standards are central to innovation today. Thus, the public has a strong interest in ensuring that the legal treatment of those standards fits properly within an ecosystem of competitive innovation and technology development.

Public Knowledge's brief presents that perspective, considering how technology standards and patents can affect the broader community beyond the particular parties. These are considerations that go beyond the arguments presented by the parties themselves. Accordingly, Public Knowledge's brief provides a unique and important public interest perspective on the present. Leave to file is respectfully requested.

Respectfully submitted,

Dated: November 21, 2014

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **Unopposed Motion of Public Knowledge for Leave to File *Amicus Curiae* Brief** 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 **November 21, 2014**.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 21, 2014

s/Charles Duan

Charles Duan

Counsel for amicus curiae