19-16122

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,
v.

QUALCOMM INCORPORATED,
Defendant-Appellant.

Appeal from the U.S. District Court
for the Northern District of California
The Honorable Lucy H. Koh (No. 5:17-cv-00220-LHK)

AMICUS CURIAE BRIEF OF THE HONORABLE PAUL R. MICHEL (RET.) IN SUPPORT OF QUALCOMM INCORPORATED'S MOTION FOR PARTIAL STAY OF THE INJUNCTION

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INTEREST OF AMICUS CURIAE

Judge Michel served on the Federal Circuit for over twenty-two years. From 2004 until his retirement in May 2010, he was the chief judge of the court. During his twenty-two years of judicial service, he heard thousands of appeals and authored over 800 opinions, touching on all aspects of the court's jurisdiction, including patent law.[1]

While Judge Michel's work on the Federal Circuit is frequently linked to patent law, the Federal Circuit has regularly confronted complex antitrust issues. *See, e.g.*, *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323 (Fed. Cir. 2008); *In re Indep. Serv. Orgs. Litig.*, 203 F.3d 1322 (Fed. Cir. 2000); *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998). From its inception, the Federal Circuit has tackled issues at the interface between antitrust and patent law. *See, e.g.*, *Am. Hoist & Derrick Co. v. Sowa & Sons*, 725 F.2d 1350 (Fed. Cir. 1984).

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no person or entity, other than Judge Michel and his counsel, contributed monetarily to this brief; and all parties have consented to its filing.

Since he retired from the Federal Circuit, Judge Michel has maintained an active role in the public dialogue about optimal policies governing intellectual property and U.S. innovation. *See, e.g.*, David Kappos & Hon. Paul R. Michel, *The Smallest Salable Patent-Practicing Unite: Observations on its Origins, Development, and Future*, 32 Berkeley Tech. L.J. 1433 (2018); Paul R. Michel & Matthew J. Dowd, *The Need for "Innovation Certainty" at the Crossroads of Patent and Antitrust Law*, CPI Antitrust Chronicle (Apr. 2017). Judge Michel has also been invited to testify before Congress on substantive patent law issues that are critical to the Nation's economic health, most recently on June 4, 2019.

Judge Michel is one of the nation's leading patent law experts, having a unique combination of judicial experience, legal expertise, and total absence of any financial conflicts of interest. His sole objective is to respectfully share his perspective as a true friend of the court to ensure that the U.S. patent system creates the optimal incentives for inventors, innovators, and investors—as it has traditionally done.

ARGUMENT

This Court should grant Qualcomm's motion if: (1) the appeal has a "fair prospect of success"; (2) there is a fair probability that the appellant will otherwise be irreparably harmed; and (3) the public interest favors a stay. *Leiva-Perez v. Holder*, 640 F.3d 962, 970–71 (9th Cir. 2011) (per curiam). Here, the public interest prong strongly favors granting Qualcomm's motion for a partial stay.[2]

I. The Public Interest Favors a Strong Patent System with Reliable, Predictable, Exclusive Rights for Inventors

The public—and our Nation as a whole—have an exceedingly important interest in ensuring that the U.S. patent system grants strong, reliable, predictable rights upon which sophisticated parties can rely. Patent rights are the best way of equitably rewarding inventors and investors for their efforts of bringing new innovation to the public sphere.

The exclusive right secured by a patent is indeed a critical driving force for U.S. innovation and technological progress. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) ("The patent laws promote this

[2] Judge Michel takes no current position on the ultimate merits of the appeal, which is yet to be briefed. His amicus brief focuses solely on the public interest prong, recognizing possible overlap between the public interest prong and the other two prongs of the analysis.

progress by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development."). The Founding Fathers recognized its importance by including the exclusive right as the Constitution's only personal right granted. *See* U.S. Const., art. I, § 8, cl. 8. Thomas Jefferson later remarked that "issuing patents for new discoveries has given a spring to invention beyond my conception."[3]

For these and other reasons, a patent owner traditionally had the right to exclude others from infringing his or her patent. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., concurring) ("From at least the early 19th century, courts have granted injunctive relief upon a finding of infringement in the vast majority of patent cases."). A patent owner could exclude one from using the invention even if the patent owner did not use it. *See Cont'l Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405, 424–25 (1908).

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[3] Justin Hughes, *Copyright and Incomplete Historiographies: Of Piracy, Propertization, and Thomas Jefferson*, 79 S. Cal. L. Rev. 993, 1030–32 (2006) (citing Letter from Thomas Jefferson to Benjamin Vaughan (June 27, 1790), in 16 *The Papers of Thomas Jefferson* 579 (Julian P. Boyd ed., 1959)).

It should come as no surprise, then, that "the public interest nearly always weighs in favor of protecting property rights in the absence of countervailing factors, especially when the patentee practices his inventions." *Apple Inc. v. Samsung Elecs. Co.*, 809 F.3d 633, 647 (Fed. Cir. 2015). Strong, reliable, predictable patent rights also form the foundation of an efficient intellectual property licensing marketplace. In fact, our legal system affords great respect to private contractual arrangements governing the sale and licensing of property rights, including patents.

But when that respect and deference are supplanted by novel and questionable theories of antitrust law, the private marketplace loses and the public as a whole suffers. Private firms lose confidence when the aggressive application of antitrust law completely undercuts settled licensing expectations and practices. This is all the more true when the licensing parties are some of the most sophisticated companies in the world.

The public needs judicial outcomes that respect valid patent rights and settled licensing practices. This strong public interest extends beyond the parties to any particular case, and it should be a primary

consideration when deciding to stay an injunction when antitrust claims are asserted against a leading technology company that could unravel complex contracts involving thousands of presumptively valid U.S. patents. *See* 35 U.S.C. § 282.

II. The Injunction Against Qualcomm Threatens to Undermine the Public Interest in a Robust Patent System and Predictable Licensing Environments

In the present case, the district court enjoined Qualcomm from using many of its standard licensing practices, which Qualcomm employed for years to negotiate access to its patented cellular phone technologies. The injunction is extraordinary in its breadth and in its unprecedented interpretation of antitrust obligations in the FRAND and SEP setting. The district court's injunction creates many concerns, but even the two provisions Qualcomm seeks to stay will harm the public interest if not enjoined.[4]

[4] The two injunction provisions are:

> (1) "Qualcomm must make exhaustive SEP licenses available to modem-chip suppliers"; and
>
> (2) "Qualcomm must not condition the supply of modem chips on a customer's patent license status," and in that respect must "negotiate or renegotiate license terms with customers."

The injunction forces Qualcomm to license its patent portfolio to rival chipmakers, but the record suggests that this requirement will interfere with settled patent licensing practices. As Qualcomm's motion explains, all major licensors of cellular patents license their patents not to rival chipmakers but to original equipment manufacturers ("OEMs").

The licensing programs of Qualcomm and its rival chipmakers appear to be rational approaches to capture the true value of the patented technology and to address the potentially negative effects of patent exhaustion. *See generally Impression Prods., Inc. v. Lexmark Int'l, Inc.*, 137 S. Ct. 1523 (2017); *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008). With patent exhaustion, "the initial authorized sale of a patented item terminates all patent rights to that item." *Quanta*, 553 U.S. at 625.

Once patent exhaustion attaches, a downstream user of the patented technology has no obligation to compensate the patent owner. Once that happens, the patent owner may not realize the full value of the patented technology. But rational marketplace participants, like Qualcomm and other chipmakers, have determined that their patents are best licensed to OEMs, not to rival chipmakers. Before this licensing

system is completely dismantled by injunction, the district court's decision should be tested on appeal.

The injunction will also unravel numerous licensing agreements. In the usual context, patent licensing is frequently extraordinarily complex. Requiring Qualcomm to undo existing license agreements will create uncertainty and unpredictability in the patent licensing marketplace—a result that is plainly against the public interest.

Given these significant consequences of the district court's injunction, it is near impossible to see how the public will benefit from the immediate implementation of the injunction when that implementation will create confusion in the patent licensing marketplace.

III. The FTC's Enforcement Action Against Qualcomm Rests on a Controversial Effort to Use Antitrust Law to Police and Restrict Intellectual Property Rights

The public interest supports a stay also in view of the existing controversy about the proper role of antitrust law in restricting the patent rights of inventors.

Respected scholars even express disagreement about the respective roles of antitrust and patent law. Many see antitrust law as focusing on

reducing costs to consumers in the short term, whereas patent law allows higher short-term pricing to encourage long-term social gains by increased innovation. Put another way, "patent and antitrust laws are complementary." *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 877 (Fed. Cir. 1985). Indeed, patents serve "a very positive function in our system of competition" by encouraging investors to risk the capital needed to develop innovation. *Id.*

Others, however, suggest that this distinction is incorrect because "antitrust policy has always been concerned with performance over both the short and long runs and often considers effects on innovation." Herbert Hovenkamp, *Antitrust and the Patent System: A Reexamination*, 76 Ohio St. L.J. 467, 471 (2015). While the former view seems more widely accepted, what matters is the lack of consensus about even the basic role of antitrust law vis-à-vis patent-incentivized innovation.

Antitrust law certainly has a proper place in the patent space, mainly to prevent patent misuse, a well-defined wrong. *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140 (1971). But that is not what the FTC charges here. Rather, it sued to force the renegotiation of private contractual agreements and to devalue patents,

a form of private property. Given that the license fees were agreed to by extremely sophisticated, highly successful, cash-rich companies who understand the value of the patented technology, these private contracts should not have been subjected to an unprecedented FTC enforcement action based on unsupported legal theories.

All this urges caution before imposing any court-ordered change in established business practices. Leading antitrust scholars have warned against the harm that will be caused by the overreach of antitrust law in the SEP and FRAND contexts. *See, e.g.*, Douglas H. Ginsburg, Taylor M. Ownings, & Joshua D. Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, The Antitrust Source, Oct. 14, 2014, at 1 (explaining that "the application of antitrust law in this situation could, by undermining the ability of courts to tailor appropriate remedies, diminish the incentives for companies to innovate and for industries to adopt standards").

IV. The So-Called "Patent Holdup" Argument Lacks Evidentiary Support and Should Not Trump the Exclusive Right Enshrined in the Constitution

Consideration of another element is warranted when assessing the public interest vis-à-vis patent rights and possible antitrust liability. It is the alleged problem of the "patent holdup." In short, no evidence supports the oft-repeated claims that predictable patent rights lead to a holdup problem that, in turns, leads to antitrust violations.

Respected legal scholars have repeatedly explored the fallacy associated with the patent holdup argument. *See* Alexander Galetovic & Stephen Haber, *The Fallacies of Patent Holdup Theory*, 13 J. Competition L. & Econ. 1 (2017); Jonathan M. Barnett, *Has the Academy Led Patent Law Astray?*, 32 Berkeley Tech. L.J. 1316, 1344 (2017) (detailing the lack of empirical evidence for the patent holdup theory); Damien Geradin, *The Meaning of "Fair and Reasonable" in the Context of Third Party Determinations of FRAND Terms*, 21 Geo. Mason. L. Rev. 919, 940 (2014) ("[A]lthough holdup and royalty stacking could occur in theory, there is little evidence that they regularly occur in the real world."); J. Gregory Sidak, *Holdup, Royalty Stacking, and the Presumption of Injunctive Relief for Patent Infringement: A Reply to Lemley & Shapiro*, 82 Minn. L.

Rev. 714, 718–19 (2008) (discussing studies that expose the infirmities in the patent holdup and royalty stacking theories).

Nevertheless, and without specific evidence, commentators continue to assert that patent holdup is a real-world problem. The present case rests on the FTC's implication that Qualcomm, as the leading modem chip innovator, could create an anticompetitive patent holdup. But the facts show otherwise. Ultimately, it is contrary to the public interest to impose potentially devastating business-altering obligations on a leading U.S. company when those obligations rest on, at least in part, controversial and ultimately unsupported legal theories about patent holdup.

V. The Controversial Nature of This Antitrust Action Further Weighs Against the Public Interest

The American public undoubtedly has a significant interest in maintaining a predictable legal regime that governs social and economic conduct based on empirically rational rules. The injunction risks creating the opposite. The public interest thus weighs in favor of staying the injunction so as to avoid likely economic and legal disruptions extending beyond this case, especially given the extraordinary circumstances surrounding the FTC's decision to bring this action.

Qualcomm is one of the Nation's leading innovators. As Qualcomm's motion explains, Qualcomm scientists have invented critical aspects of cellular phone technology, protected by 140,000 domestic and foreign patents and pending patent applications.

Rapidly gaining ground, however, are Huawei and other Chinese-based companies that want to dominate the international marketplace. The Chinese government financially supports Huawei and others, including with China's recently announced "Made in China 2025"—a government-led industrial policy that hopes to make China the dominant player in global high-tech manufacturing.

The concern with China rests not on xenophobia but on the rational objective of maintaining the United States' important global leadership role in innovation, as well as protecting our national security. The United States has been the global economic leader for decades, attributable in no small part to its patent system. But the international marketplace is changing, with China aggressively seeking to dominate critical technological fields—often by theft of intellectual property from the

United States. *See* Erik Sherman, *One in Five U.S. Companies Say China Has Stolen Their Intellectual Property*, Fortune (Mar. 1, 2019).[5]

Notwithstanding Qualcomm's importance to the U.S. economy and national security, and notwithstanding the Chinese government's continuing efforts to gain an economic advantage, the FTC voted 2–1 to commence the present enforcement action, over a rare written dissent by Commissioner Maureen K. Ohlhausen. It was a controversial decision, to say the least. *See* Dissenting Statement of Commissioner Maureen K. Ohlhausen, *In the Matter of Qualcomm, Inc.*, No. 141-0199 (Jan. 17, 2017) (describing "an enforcement action based on a flawed legal theory . . . that lacks economic and evidentiary support, that was brought on the eve of a new presidential administration, and that, by its mere issuance, will undermine U.S. intellectual property rights in Asia and worldwide").

Other events have added to the extraordinary discord that warrants a stay to protect the public interest. In March 2018, President Trump, upon recommendation by the Committee on Foreign Investment in the United States ("CFIUS"), blocked the proposed takeover of

[5] https://fortune.com/2019/03/01/china-ip-theft/.

Qualcomm by Singapore-based Broadcom Ltd.[6] That decision recognizes Qualcomm's critical technological leadership. CFIUS was concerned because "a weakening of Qualcomm's position would leave an opening for China to expand its influence on the 5G standard-setting process." A252.

Another manifestation of the controversy was the Department of Justice's submission to the district court, cautioning that an injunction may harm "competition and consumers" and explaining that "the obligations courts impose often have far-reaching effects and can reshape entire industries." A258. The conflicting views of FTC and DOJ warrant extreme caution before imposing any remedy that might irreparably harm Qualcomm, its employees, and U.S. national security.

All this leads to very probable harms to the public interest if the injunction is not stayed. It is not just harm to Qualcomm, but harm to the American public and the U.S. economy because harming Qualcomm contravenes the public interest. *See* David Teece, *The 'Naked Tax' in* FTC

[6] Exec. Order, *Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited*, 83 Fed. Reg. 11631 (Mar. 15, 2018).

v. Qualcomm *is Patently Absurd*, Law360 (Feb. 1, 2019) ("The FTC risks existential harm to an important American technology developer.").[7]

VI. Conclusion

For these reasons, the public interest prong favors a stay of the injunction.

Date: July 15, 2019

Respectfully submitted,

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[7] https://www.law360.com/articles/1124762/the-naked-tax-in-ftc-v-qualcomm-is-patently-absurd.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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