November 3, 2017

By Overnight & Email Art.4.1(b) @ec.europa.eu)

Ms. Nele Eichhorn
Member of Cabinet of Commissioner Cecilia Malmström
Trade
European Commission
Rue de la Loi 200
1049 Brussels

RE: Apple Comments on EC's Proposed Communication on SEP Licensing

Dear Mr. Eichhorn:

Apple is concerned by recent rumors and press reports about the content of the European Commission's (the Commission's) proposed communication on the licensing of standard essential patents (SEPs). We especially are troubled by the prospect of <u>any</u> endorsement of royalty fee differentiation for SEPs according to use case. We urge caution before the Commission takes steps that may undercut years of progress in creating a balanced framework, set of expectations and course of conduct for parties – both licensees and licensors – seeking to license SEPs on terms that are fair, reasonable and non-discriminatory (FRAND).[1]

Apple has been a constant in discussions with the Commission about SEPs and SEP licensing. In addition to informal submissions and numerous meetings to explain Apple's policy positions, Apple submitted formal comments in February 2015 to the DG Enterprise and Industry Consultation on Patents and Standards, and again in May of this year to the DG Grow Consultation on a Roadmap for Standard Essential Patents for a European Digitalized Economy.

This submission is an extension of Apple's prior comments, and a response to what we understand to be the draft substance of the Commission's proposed communication. In particular, Apple addresses the "three key ingredients for balanced and efficient SEP licensing" outlined by DG Grow in its June 2017 presentation to ETSI: (i) a transparent environment for negotiations between SEP holders and potential licensees, (ii) common valuation principles for SEPs technology, and (iii) a balanced and predictable enforcement regime.

---

[1] SEPs subject to FRAND licensing obligations should be limited to those patents technically essential to *de jure* standards, but not to *de facto* standards. *De jure* standards subject to FRAND tend to be those standards developed by multiple companies who voluntarily collaborate to develop a technical standard in a formal standards-setting process. In contrast, *de facto* standards tend to be technology developed by a single company that is not intended to be shared with third parties as a standard but that nonetheless drives consumer demand and captures broad market adoption. Market acceptability of a company's proprietary technology, including its ubiquity and commercial success may qualify that technology as a *de facto* standard, but it should <u>not</u> make any essential patents subject to FRAND licensing obligations.

Apple
1 Infinite Loop MS169-3IPL
Cupertino, CA 95014
T 408-996-1010

But first... a few words about Apple.

I. Apple Offers a Unique Perspective – licensee, licensor & new entrant

Apple brings the unique perspective of both a licensee and licensor of SEPs. Although best known for our differentiating products and services, Apple makes significant investments to standardization as both a contributor and an implementer of standards.

Apple pays billions of US dollars each year to voluntarily license SEPs. And Apple pays billions more to purchase standard-compliant components for our products. We also have committed to license Apple's SEPs – well over 1000 worldwide SEPs – on FRAND terms.

Apple's engineers are members of almost 100 different standard setting organizations worldwide; we participate in over 500 diverse standards projects; and, we are frequent project leaders and contributors to standards projects. Apple contributes to new and improved standards for several reasons, most notably to help solve industry-facing technical challenges, and to foster technical interoperability.[2] Unlike many companies who participate in standards development, Apple does not file for and own SEPs for the purpose of charging royalties.

As connectivity evolves and convergence continues, more and more companies (and industries) will face licensing demands from SEP licensors and disputes about FRAND. Among other things, the FRAND licensing promise is intended to ensure open access to SEP licenses for standards. Unfortunately, a history of injunction threats, excessive royalty rates, and onerous contract terms has left that promise at least partially unfulfilled.

Apple's experience illustrates this well. When Apple first launched the iPhone in 2007 and engaged with licensors of cellular SEPs, Apple faced excessive royalty demands, onerous contract terms and the threat of injunctions barring the sale of a revolutionary new product that redefined and grew a market. The SEP license agreements Apple signed then, and the royalties Apple agreed to pay were not FRAND. It took years of re-negotiation, advocacy and litigation, as well as significant resources and faith, to begin to remedy the same.

Apple's experience is a cautionary tale for new entrants. New entrants suffer from information asymmetry and potentially a lack of choice – just as Apple did in 2007. Guidance on FRAND negotiations/valuations -- like the clarifications published by IEEE in its 2015 update of its Patent Policy text[3] -- has the potential to level the playing field, remove the information asymmetry, and better foster an environment for predictable, arms-length negotiations more likely to lead to a FRAND outcome.

---

[2] Many of the improvements built into the USB Type-C Standard were built upon innovations developed by Apple to support its proprietary Lightning connector used in Apple's iPhones and iPads. Rather than maintain this innovative technology as proprietary, Apple chose to support a universal standard and contributed its patented innovations towards developing a universal standard to benefit all.

[3] IEEE-SA Standards Board Bylaws, Section 6, March 15, 2015.

II. Transparent Environment for SEP Licensing Negotiations

Lack of transparency creates artificial barriers that slows or otherwise blocks the efficient negotiation of a FRAND license. Improved information sharing has the potential to lead to more efficient and voluntary FRAND resolutions by reducing the uncertainty that plagues many SEP negotiations. Accordingly, we support the Commission's focus on improving transparency.

a. Early Disclosure Obligations to Standard Setting Organizations

Often well before licensors and implementers negotiate SEP licenses, the standards covered by such licenses are being crafted, modified and approved. During this development process, patent holders should have obligations to disclose with specificity their rights to patents and applications essential (or potentially essential) to the standard. And this early disclosure obligation should continue – and increase with specificity – as both the standard is locked, and the licensor's patent applications mature into SEPs. Apple suggests the following:

First, during the standardization process, contributors and participants should disclose all *individual SEPs* (or pending applications) potentially essential to the developing specification. This type of early disclosure should help potential implementers begin to assess the potential risk/cost of supporting a particular standard. Early disclosure also should give comfort to other licensors that their fellow licensors are acting fairly, and that no single licensor is disadvantaging other licensors by patenting excessively its contributions to the standard.

Second, after adoption of a final specification, all licensors of SEPs should (i) confirm (or otherwise disclose) all known individual SEPs (or pending applications) essential to the final specification, and (ii) identify for each such SEP (or pending application) all corresponding, relevant section(s) of the standard. Further, there should be an express penalty for failing to do so. Apple recommends that any licensors who fail to satisfy these disclosure requirements should, at the very least, be denied the right to seek injunctive relief (if not damages and other monetary relief) on any SEPs that were not disclosed in a sufficient and timely manner.

Third, standard setting organizations (SSOs) should be encouraged to maintain user-friendly, publicly-accessible, searchable, electronic records that are updated periodically to disclose (i) potential SEPs for a standard, (ii) the relevant sections in the standard to which the SEPs allegedly apply, and (iii) the identity of the licensors who claim to hold such SEPs. In addition, patentees who sell or otherwise transfer FRAND-encumbered SEPs should have *ongoing* responsibility – in addition to monitoring the conduct of the SEP purchaser to ensure their compliance with FRAND -- to notify relevant SSOs when a SEP has been transferred, so that the transfer may be documented in the SSO's records. The same requirement to update also should apply to licensors for SEPs challenged in litigation or other administrative proceedings where claims have been construed, narrowed or otherwise invalidated.

Fourth, it would be helpful to SEP licensing negotiations to identify a trusted, independent and competent third party who might serve as a neutral "gate-keeper" to review patents declared to be essential to a particular standard and to provide an objective assessment as to whether each patent meets a threshold for likelihood of essentiality. This might serve as a place where licensors, implementers and other third parties could go to seek input on the essentiality of declared SEPs. The conclusions of any such "gate-keeper" would need to be impartial (e.g., there should be no incentives for the gate-keeper to determine that a declared SEP is or is not essential). And any determination should not (i) result in any legal presumption as to essentiality, (ii) shift any of the traditional burdens of proof, or (iii) take the place of the patentee proving infringement, whether in licensing negotiations or in court.

b. Offers to License on FRAND Terms & the Willing Licensor

SEP licensors should follow an appropriate code of conduct when engaging with potential licensees, including making a FRAND offer, and engaging in good faith FRAND negotiations. These offers also should be clear and transparent to the implementer. Too often, in Apple's experience, licensors hide-the-ball. For this reason, any proposed communication on SEPs should take care to specify (i) the type and extent of information the SEP licensor must provide, and (ii) the manner by which the licensor should negotiate with implementers.

It takes two parties to negotiate a license. And in the context of FRAND-encumbered SEPs, it takes two *willing* parties. Both the patentee (licensor) and the implementer (licensee) share an obligation to negotiate willingly. Based on Apple's experience, whether a party is "willing" or whether its conduct is "willing" is often in dispute. Any proposed communication on SEPs should provide clear guidance on "willingness," especially the obligations of a "willing licensor."

First, a willing licensor of SEPs should make licenses available on FRAND terms to all interested licensees and should not discriminate among implementers. Specifically, a SEP licensor must not be permitted to discriminate by, among other things: (i) refusing to license some or all of its SEPs, (ii) refusing to license particular implementers, or (iii) selectively imposing terms, restrictions, and conditions on different components, products, companies or industries. Doing so violates one of the foundations of FRAND – non-discriminatory access to practice patents essential to a particular standard.

Second, a willing licensor of SEPs should be prohibited from "bundling" or "tying" by, among other things: (i) requiring portfolio or sub-portfolio licenses, (ii) requiring combined licenses of SEPs and non-essential patents, (iii) requiring customers to license SEPs and/or other patents as a condition to purchasing products or services in which the licensor has market power or a monopoly, or (iv) requiring the purchase of its products or services as a condition to obtaining a license to some or all of its SEPs.

In Apple's experience, bundling and tying are strategies most often used by licensors to (i) mask the independent value of their SEPs, (ii) support a higher royalty demand that is unreasonable or discriminatory, (iii) undermine competition in the implementation of standards by excluding rival implementers, and/or (iv) make it difficult for implementers to evaluate the merits of the asserted SEPs and select only those SEPs for licensing that are believed to be infringed, are valid, enforceable and not otherwise licensed or exhausted.

No implementer should be forced to pay for a license to SEPs it does not practice, or that are invalid or unenforceable, or for which the licensor already has received direct or indirect compensation. And no licensor of any type of patent, including SEPs, has a special legal right to collect royalties for a *portfolio-only* license.

c. *FRAND Disclosure Obligations & Burdens of Proof*

A willing licensor of SEPs must satisfy the patentee's traditional burden of proof during the FRAND negotiation process. Each licensor bears the burden of showing that the particular SEPs it seeks to license are actually infringed, and, if challenged, are not otherwise invalid, unenforceable, licensed or exhausted. Moreover, a willing licensor must prove the particular value of the patent(s) it seeks to license. This is true for SEPs, just as it is for *all patents*.

The fact that a particular patent may have been declared "essential" to a standard by the patentee does not mean that any and every implementer of the standard *necessarily infringes* the patent (or that the patent is necessarily valid and enforceable). This may be so for several reasons, including because: (i) the patent may not actually be essential to practice the standard, (ii) the patent may be essential to a portion of the standard that is optional or not required for interoperability with the standard, or (iii) the implementation of the relevant portion of the standard is only embodied or practiced by certain categories of products or parties (e.g., carriers or base stations versus manufacturers of components or mobile handsets).

Merits matter, and *quantity* is not a substitute for *quality*. Many licensors cite their large portfolios as evidence of innovation and investment to support high royalty demands. However, Apple's experience negotiating cellular SEP licenses and litigating cellular SEP patents reveals that only a small percentage of patents declared essential by licensors turn out to be essential, valid, enforceable and infringed. Empirical evidence shows that between 70-90% of declared SEPs that are tested are not actually essential and/or infringed by *any* products supporting the standard in question, let alone *all* such products.[4] Portfolio size cannot be a proxy for proof.

Patent merits cannot and should not be assumed. A willing licensor's FRAND offer should identify *each one* of the SEPs it believes need to be licensed and provide the implementer with information of sufficient specificity to meaningfully (i) analyze essentiality and the merits of the specific SEPs on issues such as infringement and essentiality and respond, as the case will often be, with explanations of non-infringement, unenforceability, invalidity, or other relevant defenses; and (ii) evaluate whether the terms of an offer to license the SEPs comply with the licensor's FRAND obligations.

Specifically, Apple recommends that any proposed communication on SEPs describe the following FRAND licensing disclosure obligations:

1. Proving Merits of the SEPs to be Licensed

A willing licensor should support the ***merits of its SEPs*** by providing each implementer with the following six items of information.

[4] E.g., Goodman, Myers, 3G Cellular Standards and Patents, Fairfield Resources Int'l (2003), at 5; Jurata, Smith, Turning the Page: The Next Chapter of Disputes Involving Standard-Essential Patents, CPI Antitrust Chronicle (Oct. 2013), at 5; RPX Corporation, Standard Essential Patents: How Do They Fare? at 9.

(i) list of the licensor's SEPs (including pending applications) claimed to be essential to a particular standard and the corresponding sections of the standard where each such SEP is alleged to be practiced,
(ii) geographic scope of each such SEP,
(iii) total number of worldwide SEPs know or otherwise believed by the licensor to be essential to a particular standard, as well as the licensor's comparative portion (*pro rata* share) of that total amount,
(iv) date of expiration of each such patent, including any patents already expired and included in the offer,
(v) "infringement charts" that describe how each asserted claim of each asserted SEP is alleged to be practiced and infringed by the implementer, and
(vi) disclosure as to which (if any) of the SEPs are subject to re-examination, litigation or invalidity review by any court or government agency, including the identity of the court or agency, the case number, and initiation date.

2. Proving Merits of the FRAND Offer

A willing licensor also should support the ***merits of its FRAND offer*** by providing each implementer with the following five items of information.

(i) list of the licensor's potentially comparable licenses,
(ii) description of the key terms and royalty rates of each such agreement, including the number of units licensed per agreement and the royalties received for such,[5]
(iii) explanation of how the licensor calculated its royalty demand, including identification of the facts and legal precedent that support its royalty demand and fee calculation methodology,
(iv) explanation as to why the licensor believes the royalty demanded and terms offered satisfy its FRAND obligations, and
(v) assurance that no product, product category, company, technology sector, or country is being treated discriminatorily by virtue of the licensee's industry, its products or services, or otherwise.

Implementers, as willing licensees of SEPs, also have FRAND obligations. After the licensor satisfies its initial disclosure obligations (outlined above), then the implementer should have the obligation to provide the licensor with substantive responses, supported by fact and law, to address the licensor's contentions.

The implementer should respond to the licensor's SEP merits by, among other things, describing whether and how the SEPs to be licensed are not infringed, or are otherwise invalid, unenforceable, licensed or subject to exhaustion. The implementer also should respond to the licensor's FRAND offer merits by, among other things, explaining why the licensor's offer (if not accepted) is not FRAND. As a willing licensee, the implementer further should provide the licensor with a counter-offer that is accompanied and supported by the same type of information described above.

[5] Licensors regularly cite to confidentiality as a reason for failing to provide this type of disclosure, but information can be made anonymous and review can be restricted to selected individuals.

This transparent, *bilateral* exchange of information – to and from both parties – should help promote a transparent dialogue about a mutually acceptable FRAND royalty.

III. Common Valuation Principles for Deciding FRAND Licensing Fees

When crafting any proposed communication on SEPs and valuation, the Commission should take special care to maintain a delicate balance. Under-compensation to standards' contributors could slow development of new and improved standards.[6] Over-compensation of licensors (or under-enforcement against SEP licensing abuses) risks freezing-out new implementers, investments and products – hampering broad adoption of the standard.

Uncertainty can lead to both. At present, there is no universally accepted methodology for determining FRAND royalties. Apple shared previously with the European Commission Apple's perspectives on SEPs and FRAND negotiations, including a set of principles we try to use to guide our SEP negotiations to a FRAND outcome.[7] As the European Commission considers SEP valuation and licensing principles, Apple's "FRAND Framework" is an approach worthy of emulation. It provides consistency and predictability, instructed by contemporary law and recent guidance from courts and regulatory authorities. And it has worked in practice.

What does <u>not</u> work in practice are ASP- or use-based methodologies for determining FRAND royalties. Such methodologies are inherently discriminatory and harm competition by charging some implementers more than others for a license to the exact same set of SEPs. Licensors who push these creative royalty methodologies are taxing value beyond their patented contributions to the standard. In this way, "use-based" licensing is a back-door to *discriminate* between implementers, to charge *different* royalties for the same set of SEPs, and to capture value attributable to *implementer* innovations.

a. Protection Against Unjust Enrichment

Fundamentally, when determining a FRAND licensing fee, special attention must be given to <u>exclude</u> among other things: (i) any value attributable to standardization itself and inclusion of the patented functionality in the standard, (ii) the value of all other functionality in the standard beyond the SEPs the licensor seeks to license, and (iii) all components, materials, manufacturing and distribution costs and other value added by implementers who bring the standard to market in various embodiments, products, services or industries.

---

[6] It is notable that some successful communications standards have been developed and adopted with royalty-free IPR commitments, such as the Bluetooth standard.

[7] In short, Apple's FRAND Framework follows two steps. *First*, Apple calculates a "royalty reference point" by multiplying (a) the licensors *pro rata* ownership of relevant SEPs by (b) a portion of the smallest salable unit where all or substantially all of the inventive aspects of the patented standard technology is practiced (in the case of cellular standards this is the baseband chip). *Second*, Apple adjusts the royalty reference point – up and down through negotiation with the patentee – to accommodate other comparative factors, including the patent merits, licensor's contributions to the standard, litigation history, comparable licenses, exhaustion, etc.

If these factors are not excluded when determining a FRAND licensing fee, the licensor will be permitted to capture value beyond both (i) its patented contributions to the standard, and (ii) the scope of claimed invention. Such a *misuse of patents* hijacks value that is attributable to the contributions and investments of others, including implementers and other licensors.

b. Selecting a Common Royalty Base and Appropriate Royalty Rate

DG Grow's June 2017 presentation highlights the importance of selecting the proper royalty base when calculating a FRAND royalty. This is true. And one of the key elements in selecting the proper base is to ensure that the base is common among implementers. Doing so protects against discrimination and promotes *equal access* to the standardized technology.

The best royalty base to be considered when assessing a SEP royalty should be *no more than the smallest salable unit* where all or substantially all of the inventive aspects of the patented standard technology is practiced. In many cases the smallest salable unit will need to be further apportioned to arrive at a royalty base that best corresponds to the claimed invention. For cellular standards, the smallest salable unit should be *at most the baseband chipset.*[8]

As Apple's previous submissions to the Commission further detail, the use of a single, common royalty base across all implementers – regardless of end product, company, technology sector or country – helps to ensure no implementer is treated discriminatorily.

Once the proper base is selected, it should apply equally to all licensors and implementers of a particular standard. The royalty base should <u>not</u> change whether the licensee makes chips, chipsets, handsets, refrigerators or automobiles. The royalty base should <u>not</u> change on account of different product selling prices, the implementer's revenues or its profit margins (especially as to products incorporating the *same* smallest patent practicing component). It is not FRAND to ask "*how much can a particular implementer afford to pay?*"

In Apple's experience, we have found that applying a common base ensures consistency in the application of FRAND among both licensors and implementers. This approach is furthered in Apple's own FRAND Framework by selecting a unique royalty rate that reflects each licensor's *pro rata* holdings of SEPs as compared to other licensors. The application of a licensor's *pro rata* share of SEPs to a common royalty base protects *implementers* from cumulative, excessive royalties (royalty stacking), but also ensures that each *licensor* receives an objectively just share – and only its just share – of any royalties owed.[9]

---

[8] The price of the baseband chip should be further apportioned to reflect the value attributable to the patented inventions over the prior art, separate and apart from non-patented features, standardization itself and unrelated costs or technology. Moreover, the overall royalties to practice all SEPs relevant to a particular standard should be compared with the cost or profit of the smallest salable unit that implements the standard, as well as the other standards and non-standardized technology implemented in the component to protect against unreasonable and excessive "royalty stacking."

[9] Apple uses a *pro rata* approach as a guide rather than an absolute. From our experience, it establishes an important reference point for licensing negotiations as the parties engage in portfolio presentations, claim chart vetting and the exchange of other information, including but not limited to licensing history, standards contribution, etc.

c. *Use-Based Licensing Is Not FRAND Licensing*

Special attention should be given to ensure that the Commission's consideration of "endors(ing) differentiation according to use case of the implemented technology" is not taken by licensors as an invitation to charge discriminatory licensing fees based on "a quantum of use" of a standard, "the need for wide-area connectivity and mobility," the "amount of use" or the "required bandwidth" used by a standard-compliant product. Differentiation is antithetical to standardization.

To the extent SEP licensing fees vary at all, this should be based on *the SEPs being practiced by an implementer and embodied by the smallest salable unit.* SEP royalties may, in fact, differ in application product-to-product, company-to-company or country-to-country; however, the inquiry always should focus on what SEPs are being practiced by the smallest saleable unit, <u>not</u> how the standard is being implemented by implementers or used by consumers.[10]

In short, "use-based" licensing is a land-grab. It is a re-packaged form of ASP-based licensing, and the latest attempt by SEP licensors to improperly tax product features and functions, component and materials choices, manufacturing and marketing costs (among other costs) unrelated to scope of the SEPs being licensed and the component practicing those SEPs.

FRAND licensing fees should be determined based on *ex ante* value – i.e., value *prior* to adoption of a standard and without the inherent *lock-in value* that accrues after a standard is adopted. Any argument for valuing a SEP license based on developments that take place *after* adoption of a standard – and *after* the commercialization by various implementers of diverse products and services – cannot be FRAND.[11]

"Use based" licensing also is inherently discriminatory. It is not FRAND to charge a higher SEP royalty for a medical device, as compared to a non-medical device, merely because the medical device relates to health and safety. It cannot be FRAND to charge a higher SEP royalty for a car, as compared to a smart meter, simply because the car costs more. Likewise, royalties on an

---

[10] Take for example the LTE standard practiced by a smartphone. It is possible that the products of various component suppliers (i.e., baseband chip) may practice some LTE SEPs, the end products of various manufacturers (mobile phones, base stations) may practice other LTE SEPs, and the services of some connectivity providers (i.e., network equipment providers and carriers) may practice different LTE SEPs. Given such, different implementers may need licenses of different scopes and access to different SEPs relevant to the same LTE standard (or portions thereof), mindful that the scope/value of any such licenses should not be duplicative and should not violate the doctrine of patent exhaustion. In the end, this may lead to different licensing fees charged to parties within the same product/supply chain, which may not be discriminatory so long as the value is based on valid and enforceable SEPs not otherwise licensed or exhausted that are actually infringed... and <u>not</u> based on use of a particular product or practice of a particular standard, which necessarily is dictated by differentiating product decisions.

[11] Even within a single product category, use of the end product price leads to irrational results. For example, the Apple iPhone 7 is sold with different memory configurations resulting in a difference of ~$200 in the adjusted net selling price as between an iPhone 7 with 32GB of memory and one with 256GB of memory. Application of a rate that varies with the end product price would lead to an irrational difference in royalty rate for devices that provide exactly the same standardized cellular functionality using the same component.

iPhone should not be higher than other smartphones merely because the iPhone costs more, or because iPhone users may do more with their phones or spend more minutes connected to a cellular network.

The same LTE cellular modem in a car, motorcycle, mobile phone, or smart meter that performs the same standard and is practicing the same SEPs should bear the same royalty, *regardless of the implementer's unique implementation or the user's preferred use.*

IV. Enforcement if Voluntary Agreement Cannot Be Reached

A willing licensor of SEPs should be prohibited from seeking an injunction (preliminary or permanent) on its SEPs, except in rare circumstances against implementers who (i) fail to comply with a final court order to pay royalties, (ii) are bankrupt, (iii) are beyond the jurisdiction of a court, or (iv) demonstrate unwillingness by repeatedly failing to respond in good faith and in a timely manner to a SEP licensor's *bona fide* offer. Absent these exceptional circumstances, the award of damages and future royalties should be sufficient to compensate the patentee.

DG Grow's June 2017 presentation does not include the word "willingness" or the term "willing licensee" but it does reference the *Huawei*-process. Apple believes that both patentees and implementers would benefit from clarity when determining whether a licensee should or should not be considered "willing."

In Apple's experience, patentees (licensors) often are not willing *licensors*, and instead go to great lengths to paint an otherwise willing *licensee* as "unwilling." The motivation is clear. Licensors are eager to unlock the "hold-up" power of injunctions by triggering an exception to the general rule barring SEP injunctions. This is most often attempted by licensors: (i) offering objectively unreasonable rates and terms, (ii) refusing to provide information sufficient to permit implementers to evaluate the patents to be licensed and the fees demanded, or (iii) requiring implementers to negotiate in an unreasonable amount of time given, among other things, the number of patents to be evaluated.

Any proposed communication from the European Commission should prohibit this sort of gamesmanship by adopting the following requirements pertaining to enforcement:

First, an implementer should not be considered an "unwilling licensee" for refusing to accept a licensor's offer where the licensor has failed to satisfy its primary obligations as a "willing licensor" to disclose the information listed above (*see* Section II(c)) and to satisfy its initial burden of proving both the merits of the SEPs to be licensed and that its offer is FRAND.

Second, an implementer should not be considered an "unwilling licensee" where the implementer has a *bona fide*, reasonable basis for rejecting the licensor's offer – such as the good faith belief that the SEPs to be licensed are not infringed, or are invalid, unenforceable, licensed or exhausted or that the royalty demand is not FRAND.

Third, an implementer should not be considered an "unwilling licensee" for refusing to arbitrate. In Apple's experience, some licensors also try to use unreasonable offers to arbitrate as a means to cast a licensee as "unwilling." Such offers are often intended to pressure implementers into a one-sided ADR process that is effectively a rate-setting exercise for a broad portfolio license.

This forces implementers into a *Hobson's choice* – either agree to forego due process rights and traditional burdens of proofs, or refuse and risk being denounced as "unwilling" and potentially subject to injunctive remedies.

DG Grow's June 2017 presentation references "enhancing the role of arbitration." Apple agrees, but to a point. ADR can be a resolution tool, but it should not be used as a negotiation tactic. And ADR should always be *voluntary*. Parties have a fundamental right of access to the national courts and due process protections. If an implementer chooses not to engage in binding arbitration (*i.e.*, chooses not to waive its right of access to the courts), this choice should not be used against the implementer as evidence of alleged "unwillingness."

We thank the European Commission for another opportunity to provide Apple's perspectives on SEP licensing, and we remain available to discuss these issues as the European Commission continues debate and refine its proposed communication.

Art.4.1(b)

cc:

Mr. Nikolaus von Peter
Member of Cabinet of Commissioner Violeta Bulc
Transport
European Commission
Rue de la Loi 200
1049 Brussels

Mr. Max Strotmann
Member of Cabinet of Vice President Andrus Ansip
Digital Single Market
European Commission
Rue de la Loi 200
1049 Brussels

Mr. Carl Buhr
Member of Cabinet of Commissioner Mariya Gabriel
Digital Economy and Society
European Commission
Rue de la Loi 200
1049 Brussels

Fabrice Comptour
Member of Cabinet of Commissioner Elżbieta Bieńkowska
Internal Market, Industry, Entrepreneurship and SMEs
European Commission
Rue de la Loi 200
1049 Brussels

Mr. Friedrich Wenzel Bulst
Member of Cabinet of Commissioner Margrethe Vestager
Competition
European Commission
Rue de la Loi 200
1049 Brussels