Comments of Dolby Laboratories, Inc.
Concerning Draft Revised Horizontal Guidelines

INTRODUCTION

Dolby Laboratories, Inc. (Dolby) respectfully submits these comments in response to the Commission's request, dated March 1, 2022, concerning the draft revised Guidelines on the applicability of Article 101 of the TFEU to horizontal co-operation agreements (the "Revised Guidelines"), and particularly in response to the proposed revisions to Chapter 7 of the Revised Guidelines addressing standardisation agreements.[1]

Dolby appreciates the opportunity to provide these comments and believes it is well-situated to do so given its history as a long-time participant in standardization activities and as an important innovator contributing its technology for the development of standards. Since its founding in London in 1965, Dolby has led the way in inventing, developing, and making available industry-wide innovative audio and imaging technologies. Dolby participates in many organizations in the EU and worldwide that develop standards related to the areas of technology in which Dolby continuously innovates, including major open standards organizations such as the European Telecommunications Standards Institute ("ETSI") and the International Telecommunications Union ("ITU"). Dolby contributes its patented technologies to such organizations regularly. Dolby also broadly and globally licenses its technology – including standards-essential patents ("SEPs"), software, trademarks, know-how, and other intellectual property – through a broad range of licensing practices and activities that are flexibly aligned to support Dolby's core businesses of cinema products, technology licensing, and patent licensing.

Dolby realizes a significant majority of its revenues from its global licensing activities, which depend on strong patent protections and confidence in the enforceability of its license agreements. Dolby's licensing incentives align with those of its partners because the successful commercialization of Dolby's technologies benefits both manufacturers of consumer products that embody Dolby's technologies and Dolby, which is able to realize a reasonable return on its investment in innovation. Historically, this has supported Dolby's reinvestment of nearly 20% of its annual revenue into research and development of new audio and video technologies. This investment has allowed Dolby to develop successive generations of improved technology and to continue to bring its innovations to consumers in a variety of applications.

As Dolby commented previously in response to the Commission's targeted questionnaire on standardization agreements in relation to the Horizontal Guidelines, Dolby believes the overall approach in the current Guidelines is properly directed. This is evidenced by the tremendous success of standards development under current SEP disclosure and licensing practices, which strike an appropriate balance between the interests of SEP holders and standards implementers, which is crucial for promoting advances in technology, innovation and

[1] Press Release, Antitrust: Commission invites comments on draft revised rules on horizontal cooperation agreements between companies (March 1, 2022), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371

competition.[2] This approach also acknowledges and supports the shared objectives of intellectual property laws and competition laws "of promoting consumer welfare and innovation as well as an efficient allocation of resources."[3]

Dolby thus appreciates the Commission's efforts in the Revised Guidelines to provide additional clarity supporting the current approach to SEP disclosures and licensing, especially to further the goal of "mak[ing] it easier for companies to cooperate in ways which are economically desirable and without adverse effects from the point of view of competition policy."[4] Dolby accordingly supports a number of the specific proposed changes that will meet this purpose, and that "promote competition and offer legal certainty to companies in the conception and implementation of their horizontal cooperation agreements."[5] Dolby also appreciates the Commission's efforts to clarify that not all standardization conduct is properly the subject of Article 101 TFEU because it either does not raise competition law concerns at all or is unilateral or vertical in nature. As discussed below, even greater clarity in this regard would be beneficial.

Other proposed changes in the Revised Guidelines, however, risk upsetting the careful balance of interests that underlies effective standardization. These changes, respectfully, are not necessary or properly supported, and are subject to potential misinterpretation that could cause uncertainty and chill procompetitive standardization and the investment in innovation that is necessary to drive it. Further consideration should, therefore, be given to proposed revisions in Chapters 7.3.2 and 7.3.3.2(f) concerning disclosure of most restrictive licensing terms and maximum accumulated royalty rates, and to Chapter 4.1's treatment of joint license negotiations as a type of joint purchasing agreement. Such conduct may pose significant risks of anticompetitive cartel activity, which the Revised Guidelines as proposed may understate.

Other proposed revisions to Chapters 7.3.3.1 and 7.3.3.2(b) addressing licensing commitments and patent disclosures may also be subject to misinterpretation as suggesting that effective access to a standard will only exist for parties within the same value chain if the SEP holder is obliged to give any of those parties a SEP FRAND license.[6] Dolby is also concerned that proposed references to specific valuation methods in Chapter 7.3.3.1 do not reflect commercial realities and could be misinterpreted as expressing preference for untested valuation methodologies over the flexible approaches historically and commonly used by commercial parties and by courts and other tribunals to determine FRAND terms.

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[2] *See* Contribution of Dolby Laboratories, Inc. to the European Commission Targeted Consultation on Standardisation Agreements in the Horizontal Guidelines (September 30, 2021) (Contribution ID ebe039b9-5e32-4132-933b-6ab489c539c0) ("September 30, 2021, Dolby Contribution").

[3] Revised Guidelines ¶470.

[4] Explanatory Note: Revision of the Horizontal Block Exemption Regulations and Horizontal Guidelines – Overview of Main Proposed Changes at ¶¶5-6 ("Explanatory Note"), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1371

[5] *Id.*

[6] Current Guidelines ¶285; Revised Guidelines ¶482.

<u>DISCUSSION</u>

A. Dolby Supports Clarifications in Chapter 7 Recognizing the Need for Flexibility and Balance in Stakeholder Interests to Facilitate Efficient Standards Development.

1. Dolby supports clarification in Chapter 7.3.1. regarding standardization conduct that is not properly the subject of application of Article 101 TFEU.

Proposed clarifications in Chapter 7.3.1 of the Revised Guidelines regarding standardization conduct that is not properly the subject of application of Article 101 TFEU are welcome. These proposed revisions provide clarity regarding the proper scope of the Guidelines and greater legal certainty for companies engaged in procompetitive standardization conduct.

The Commission's proposed new first sentence to paragraph 466,[7] for example, provides important clarification that not all standardization participants are competitors. Indeed, when it comes to standardization agreements involving patented technologies, the relationship between parties is most often vertical in nature where an upstream SEP holder and a downstream implementer are involved, and licensing conduct by SEP holders is typically analyzed as unilateral. It would be useful, therefore, to expressly elaborate and affirm in paragraph 466 that where conduct is essentially vertical in nature, or essentially unilateral, competition law risks may be minimal.

Such additional clarity would be consistent with the proposed revisions to the second sentence of paragraph 466, which helpfully identify that the likelihood of competitive harm arises most when competitors are involved.[8] Paragraph 466 identifies the competitive risks that may arise from competitor conduct, and to be even more explicit it would be beneficial to further explain that such potential risks exist regardless of whether competitors are SEP holders or standards implementers.

The proposed revision of paragraph 469 is likewise welcome as it recognizes that a broad range of procompetitive business models exist with respect to SEP licensing. These include, as the Revised Guidelines now provide, "***undertakings that acquire technologies with the purpose to licensing these,"*** with the "incentive [ ] to maximise their royalties."[9] Undertakings that pursue such a model are not generally in competition with undertakings "that solely manufacture products or offer services based on technologies developed by others and that do not hold relevant IPR."[10] The Revised Guidelines further helpfully recognize that there are "integrated undertakings that both develop technology ***protected by IPR*** and sell products ***for which they would need a licence,"*** and that **"**these undertakings have mixed incentives."[11]

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[7] Revised Guidelines ¶466 ("***Participants in standardisation are not necessarily competitors. . . .*** "). *Compare with* current Guidelines ¶264. New text proposed in the Revised Guidelines is indicated in bold and italics and proposed deletions from the current Guidelines are indicated in strikethrough.

[8] Revised Guidelines ¶466 ("Standard ~~setting~~ ***development*** can, however, in specific circumstances ***where competitors are involved,*** also give rise to restrictive effects on competition by potentially restricting price competition and limiting or controlling production, markets, innovation or technical development.")

[9] Revised Guidelines ¶469. *Compare with* current Guidelines ¶267.

[10] *Id.*

[11] *Id.*

The Commission's recognition of these many different business models – each creating different incentives with respect to licensing of IPR – reinforces that competition is well-served by the ingenuity of firms and that competition law should not chill this type of innovation. Supporting myriad business models for SEP licensing also properly accommodates commercial outcomes driven by marketplace-determined commercial interests without unnecessary or disproportional regulatory intervention, an approach the Commission has championed[12] and which Dolby believes is essential to effective standardization.

New language proposed to be added to paragraph 470 reinforces the Revised Guidelines' support for a balanced approach in assessing potential competition law concerns arising in SEP licensing. As proposed, paragraph 470 would add recognition that "hold out" by implementers, and not just claimed "hold up" by SEP holders, poses a risk to efficient standards development.[13] Paragraph 470's discussion of "hold up" and "hold out" might be further revised, however, to make clear that such conduct may not implicate Article 101 TFEU because it does not typically involve horizontal conduct, and to the extent any competition law concerns may arise from such conduct they may be more properly addressed under Article 102 TFEU, if at all, or otherwise addressed as a matter of contract or national patent law. Indeed, the Revised Guidelines recognize in footnote 272 to paragraph 470 that "hold up" conduct may qualify as an abuse of dominance under Article 102 TFEU.[14] Dolby further invites the Commission to consider expanding footnote 270 to include a similar recognition that "hold out" conduct as discussed in paragraph 470 is also properly addressed under Article 102 TFEU.

In sum, the proposed revisions to Chapter 7.3.1 provide helpful clarity and guidance. As discussed, however, Dolby invites the Commission to consider making further clarifications to emphasize the points already stated – i.e., that much of the conduct that occurs in connection with standardization agreements is vertical or unilateral in nature and is therefore not properly the subject of Article 101 TFEU or of these Guidelines.

2. Dolby supports clarifications in Chapter 7.3.3.1 that IPR Holders should be permitted to determine licensing strategies that allow reasonable return on investment in R&D.

Chapter 7.3.3.1 of the Revised Guidelines offers welcome confirmation of the balancing that is necessary and appropriate in the valuation of SEPs so SEP holders are able to obtain a fair

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[12] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Setting out the EU approach to Standard Essential Patents, Brussels, 29.11.2017 COM(2017) 712 final ("2017 Communication") at 4 ("proportionality considerations are essential" in determining the proper regulatory approach to standardization; "excessive burdens for stakeholders should be avoided," and the approach should instead aim for "incremental improvements with controlled costs [that] can substantially reduce overall transaction costs during licensing negotiations as well as infringement risks, to benefit both parties in negotiations.")

[13] Revised Guidelines ¶470 (". . . . ***The reverse situation may also arise if licensing negotiations are drawn out for reasons attributable solely to the user of the standard. This could include for example a refusal to pay a FRAND royalty fee or using dilatory strategies ("hold-out")***. *Compare with* current Guidelines ¶267.

[14] *Id.* at ¶470, n. 270.

and reasonable return on their investment in R&D, which incentivizes further innovation and the contribution of technology to standards.

First, the Commission proposes new language in paragraph 484 that recognizes this balance specifically, noting that FRAND commitments should ***"allow IPR holders to monetise their technologies via FRAND royalties and obtain a reasonable return on their investment in R&D which by its nature is risky."*** [15] As paragraph 484 further notes, this is necessary to ***"ensure continued incentives to contribute the best available technology to the standard***."[16]

Second, the Commission confirms in note 287 to paragraph 486 that the valuation methods provided as examples in the Guidelines "***are not exclusive and other methods reflecting the same spirit of the described methods can be used to determine FRAND rates***."[17] This revision is consistent with the Commission's recognition in its 2017 Communication "that the parties are best placed to arrive at a common understanding of what are fair licensing conditions and fair rates, through good faith negotiations," and "there is no one-size-fits-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time."[18]

Third, in note 283 to paragraph 485, the Revised Guidelines recognize that "***[s]tandard development organisations are not involved in the licencing negotiations or resultant agreements."***[19] This revision is consistent with and confirms the existing language in the Guidelines explaining that "[c]ompliance with Article 101 by the standard-setting organization does not require the standard-setting organization to verify whether licensing terms of participants fulfil the FRAND commitment."[20]

Each of these revisions in Chapter 7.3.3.1 addresses the concerns that Dolby raised in response to the Commission's Targeted Consultation on Standardisation Agreements in the Horizontal Guidelines, and Dolby supports their inclusion in the Revised Guidelines.[21] Collectively, the proposed revisions help clarify and confirm that FRAND negotiations should be left, as they are now, to arms-length, market-based bargaining by licensors and licensees, under the control of commercial courts or arbitration tribunals.[22]

3. Dolby supports clarification in Chapter 7.3.3.2(c) that restricted participation in standards development may be procompetitive.

Dolby supports the recognition in paragraph 496 that restricted participation in standards development may be procompetitive in certain circumstances. Specifically, new language included in paragraph 496 explains that restricted participation may be appropriate ***"if the***

[15] Revised Guidelines ¶484.

[16] *Id.*

[17] *Id.* ¶486, n. 287.

[18] 2017 Communication at 6.

[19] Revised Guidelines ¶485

[20] Current Guidelines ¶ 288; *see also* Revised Guidelines ¶485.

[21] *See* September 30, 2021, Dolby Contribution at 13-15.

[22] *Id.* at 15.

restriction on the participants is limited in time and with a view to progressing quickly (for example at the start of the standardisation effort) and as long as at major milestones all competitors have an opportunity to be involved in order to continue the development of the standard."[23] New language added to paragraph 497 provides additional positive clarification by making clear that any potential negative effects from restricted participation can be mitigated by providing for ***"collective representation of stakeholders (e.g. consumers)"*** in the process.[24]

Such practices benefit the standards process because they often permit reliance on subject matter expertise directed to specific technologies, allowing existing marketplace demand to be most effectively met. Dolby's experience is that such practices do not, and should not, raise competitive concerns. In each instance, contributions become subject to a SDO's consensus-based procedures and are thus subject to SDO structural safeguards that ensure due process and consideration of all participant interests. While a contribution may result from a joint collaborative effort or from a single firm that holds rights in fundamental underlying technologies, standardization will be subject to the relevant SDO's consensus-based rules and procedures such that all interested parties may participate in the development of a standard, even when it is based on the collaboration of a limited number of participants.

These proposed changes to paragraphs 496 and 497 are consistent with Dolby's previous feedback to the Commission,[25] and Dolby appreciates the Commission's attention to these matters.

B. The Revised Guidelines' Discussion of Ex Ante Disclosure of Most Restrictive Terms and Maximum Accumulated Royalty Rates in Chapter 7, and of Joint Licensing Groups in Chapter 4, Raise Concerns and Reconsideration and Additional Revisions are Suggested.

Paragraph 473, note 273 and paragraph 500 address ex ante disclosure of most restrictive licensing terms and maximum accumulated royalty rates. Paragraph 312 includes licensing negotiation groups in the discussion of joint purchasing agreements.

As more specifically discussed below, Dolby respectfully submits that these paragraphs warrant further consideration to ensure that they do not understate competition law risks that may arise from joint competitor conduct, and so they reflect practical and commercial realities involving the subject conduct.

1. The Revised Guidelines should unambiguously establish that ex ante disclosure of most restrictive terms and maximum accumulated royalty rates, as well as joint license negotiating groups, may create unjustified risks of anticompetitive cartel behavior.

a. Most restrictive licensing terms and maximum accumulated royalty rates.

Paragraph 473 of the Revised Guidelines (currently paragraph 274) rightly provides that any agreement to reduce competition by requiring the ex ante disclosure of most restrictive licensing terms as a cover "to jointly fix prices either of downstream products or of substitute

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[23] Revised Guidelines ¶496. *Compare with* current Guidelines ¶295.

[24] Revised Guidelines ¶497. *Compare with* current Guidelines ¶295.

[25] *See* September 30, 2021, Dolby Contribution at 11.

IPR or technology" will be a restriction of competition by object. Newly proposed footnote 273 then would amend existing footnote 1 by providing that revised paragraph 473 should not prevent ex ante disclosures of most restrictive terms for SEPs *"**by individual IPR holders or of a maximum accumulated royalty rate by all IPR holders as described in paragraph 500.**"* Paragraph 500 of the Revised Guidelines then further endorses the ex ante disclosure of a "***maximum accumulated royalty rate by all IPR holders"*** by saying that it is conduct that "will not, in principle, restrict competition within the meaning of Article 101(1)." Footnote 298 to paragraph 500, however, again recognizes that any such disclosures "should not serve as a cover to jointly fix prices either of downstream products or of substitute IPR/technologies which is a restriction of competition by object."[26]

Dolby submits that the Commission should reconsider these aspects of the Revised Guidelines to avoid what could be seen as contradictory guidance lacking clear boundaries for procompetitive and anticompetitive conduct, and to ensure that competition law risks that could arise from agreements concerning ex ante disclosure of most restrictive licensing terms and maximum accumulated royalty rates are not understated.

First, the proposed revision of current footnote 1 to current paragraph 274 to delete the term "unilateral" from the sentence that currently reads "[t]his paragraph should not prevent unilateral ex ante disclosure of most restrictive licensing terms . . .," significantly alters the meaning of the footnote. The term "unilateral" should be retained. It provides clearer guidance than stating that such disclosure should not be prevented by "***individual IPR holders***," as proposed in revised footnote 273. "Unilateral" disclosure suggests that a party is acting independently, while disclosure by an "***individual IPR holder***" may occur pursuant to an agreement among competitors compelling such disclosure – e.g., an agreement of standard implementers that requires ex ante disclosure of most restrictive terms as a condition for having technology considered for inclusion in a standard. Dolby, therefore, suggests that the language of existing footnote 1 to paragraph 274 be retained in place of what is proposed for revised footnote 273.

Second, the ex ante disclosure of a ***"maximum accumulated royalty rate by all IPR holders"*** necessarily implicates, at least potentially, competitor agreements that will have the effect of fixing royalty rates that individual SEP holders could seek. Such an effect will occur because there will have to be a mechanism to determine the maximum accumulated royalty rate permitted in connection with any particular standard, and also a mechanism that will allocate the maximum rate among all SEP holders for the particular standard based on some methodology for establishing proportionality. The Revised Guidelines do not provide for any such mechanisms. Further the Revised Guidelines do not contemplate that the likely steps will involve agreements among standards implementers, who can be seen as competitors in obtaining licenses for SEPs and in producing downstream standard-compliant products. This distinguishes such joint conduct from patent pools, where a royalty for the aggregated licensed portfolio of SEPs is determined by the SEP holders in the pool – while individual SEP holders retain the freedom to set royalties for their individual portfolios bilaterally. Conversely, implementers establishing a maximum accumulated royalty would involve the following steps: (i) jointly setting the maximum accumulated royalty available for a standard, and (ii) agreeing upon a methodology to allocate percentages to each SEP holder. Each aspect of such agreements will have the effect of setting a

[26] Revised Guidelines ¶500, n.298; current Guidelines ¶299, n.1.

critical component of the "price" (i.e., the royalty rate) a SEP holder would be able to charge, and thus will be the equivalent of an agreement that jointly sets an ultimate price, conduct that the current and Revised Guidelines identify as potential restrictions by object.[27] Although it may be feasible to use safeguards to mitigate risks associated with certain joint conduct that occurs in connection with standardization,[28] there are no established safeguards that could mitigate the risks of joint price setting that would be implicated by agreements to establish maximum accumulated royalty rates and allocate percentages to individual SEP holders.

Accordingly, Dolby urges the Commission to reconsider including the discussion of maximum accumulated royalty rates in the Revised Guidelines in either paragraph 473, n. 273 or paragraph 500.

b. Joint licensing negotiations.

Dolby is likewise concerned with the proposed inclusion in paragraph 312, which is part of Chapter 4.1 addressing purchasing agreements generally, of "licensing negotiation groups" as an activity that may constitute a legitimate joint purchasing arrangement.[29]

Joint licensee negotiating groups, like any joint buying groups, present the risk of collective dominance which, when involving the fixing of "prices" – here royalties – or exploitative conduct, may give rise to restrictions by object or effect under Article 101 and/or an abuse of dominance under Article 102.[30] Such joint licensee groups, depending on their market power, could also be seen as engaging in collective group boycotts or other exclusionary conduct that may give rise to competition law concerns.

Assessing the competitive implications of joint licensing groups negotiating terms of SEP licenses involves myriad variables. Such an assessment must consider whether joint licensee negotiating groups have sufficient procompetitive potential that outweighs the anticompetitive risks just mentioned. Dolby respectfully submits that it is doubtful that they do, and it is questionable whether risks of anticompetitive harms arising from joint licensee negotiating groups can be mitigated by rules or guidelines. For example, a mechanism would have to exist in order to assess whether a joint licensee negotiating group is collectively dominant when formed or becomes such over time. Otherwise, the risk of abusive conduct, as well as anticompetitive agreements, vis-à-vis licensors or potential participants to the joint licensee negotiating group would be heightened.

[27] Current Guidelines ¶274; Revised Guidelines ¶473.

[28] *See, e.g.,* Guidelines on the application of Article 101 of the TFEU to technology transfer agreements, 28 March 2014 ("Technology Transfer Guidelines") at Chapter 4.4, ¶¶248-265 (identifying safeguards for the formation and operation of a "technology pool" that can "reduce the risk of it having the object or effect of restricting competition and provide assurance to the effect that the arrangement is pro-competitive.")

[29] Revised Guidelines ¶312 ("***Joint purchasing arrangements can be found in a variety of economic sectors and involve the pooling of purchasing activities. . . . Groups of potential licensees can also jointly negotiate licencing agreements for standard essential patents with licensors in view of incorporating that technology in their products (sometimes referred to as licensing negotiation groups). . . .*"**).** There is no equivalent to this paragraph in Chapter 4.1 of the Current Guidelines.

[30] Revised Guidelines ¶331 ("If the parties to the joint purchasing arrangement have a significant degree of buying power on the purchasing market, there is a risk that they may harm competition upstream, which may ultimately also cause competitive harm to consumers further downstream.").

Mechanisms would also be necessary to ensure that the exercise of "buyer power" did not result in discrimination between or among joint licensee groups. It is difficult to imagine how rules or guidelines supporting such mechanisms could be enforced; neither the Commission nor SDOs are equipped to manage such ongoing commercial arrangements. Rather, a case-specific approach is necessary that permits joint licensee groups where it can be shown that procompetitive outcomes outweigh anticompetitive outcomes (and also accommodates those instances where an IPR owner may make a commercial decision that it is more efficient to jointly negotiate with licensees). Although there may be such circumstances where joint license negotiations are competitively justifiable, it is more likely risks of anticompetitive harm will exist.

The proposed revision to paragraph 312 could be interpreted as an endorsement of licensing negotiation groups, which may understate the risks of anticompetitive harms, and is inconsistent with the case-by-case approach that is necessary to evaluate competitive harms and benefits of a specific arrangement based on available evidence. Dolby therefore suggests that the reference to "joint negotiation group" activities in paragraph 312 be deleted.

2. **Practicalities reveal that anticompetitive risks outweigh any potential justification for the revisions concerning most restrictive terms and maximum accumulated royalty rates**

Dolby further submits that the anticipated benefits offered to justify the proposed revisions concerning most restrictive terms and maximum accumulated royalties are unlikely to be realized for practical reasons.

For example, Paragraph 500 of the Revised Guidelines provides that ex ante disclosure of most restrictive terms and maximum accumulated royalty terms "would . . . enable the parties involved in the development of a standard to take an informed decision based on the disadvantages and advantages of different alternative technologies." In theory this may be a potential benefit, but marketplace experience suggests it is not realistic. Developments since the time the current Guidelines were first published suggest that ex ante disclosure requirement of most restrictive licensing terms would raise significant impracticalities.

With respect to most restrictive terms, such disclosure would cause patent holders to define license terms before there is any certainty whether their IPRs will be included in a standard and restrict their ability to negotiate based on market-based circumstances. Instead, IPR owners would be required to define an arbitrary cap on the value of their IPRs, distorting market pricing and thereby risking undervaluing their IPRs and undermining their ability to realize a market-based return on their inventive investments. Such an impact will be particularly hard felt if IPRs are ultimately not essential; such IPRs would be subject to an imposed royalty cap even though they would not be subject to any FRAND obligation. Consequently, the owner of such IPRs would be constrained in realizing the market-based value of its IPRs.

Different, but equally significant impracticalities exist with respect to the likelihood that ex ante disclosure of maximum accumulated royalty rates will better inform decisions regarding selection of technologies for a standard. As mentioned, establishing and implementing a maximum accumulated royalty rate will necessarily require mechanisms whereby competitors or potential competitors agree on the maximum royalty rate for a standard, as well as the methodology for proportionally allocating that rate. Such agreements may in fact *preclude* price competition if the price of each SEP is fixed as a mathematical function of a collective royalty cap and an allocation methodology that is based on the number of SEPs included in the standard. How such determinations can be made ex ante (if at all) is also inherently uncertain. Putting aside the risks of anticompetitive cartel-type conduct with respect to such agreements, the fact that a standard is still in a formative stage and whether a particular patented technology is essential to what will ultimately be defined as a standard, makes it impossible to objectively establish a maximum accumulated royalty rate for all SEPs (which may not be identifiable ex ante) or what the value of each potential SEP should be relative to the yet to be defined standard. As courts have recognized, in practice, standards participants often do not – and cannot – disclose specific IPR that is essential to a standard until "after the standard has been established and it is clear what technology is included in it."[31]

Second, the exercise of agreeing ex ante upon a maximum accumulated royalty rate and an allocation methodology is even more arbitrary because it would involve imposing a singular approach for valuing specific patents relative to each other before they conceivably could be determined to be SEPs. To do so runs counter to the growing recognition that determining the value of SEPs should be case-by-case, fact-specific, and flexible.[32]

Yet, establishing maximum accumulated royalty rates and an allocation scheme ex ante suggests that only a "top down" approach to patent valuation would be appropriate. While some courts have relied on a "top down" approach, typically in conjunction with a comparison to comparable licenses,[33] other SEP valuation methodologies may be equally if not more

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[31] *Koninklijke Philips N.V. v. Asustek Computers Inc.,* Court of Appeal of The Hague, judgment dated 7 May 2019, Case No. 200.221.250/01 at 4.159 (rejecting argument that disclosure of specific patent after standard had been finalized was not "timely" under ETSI rules); *see also Optis Wireless Technology v. Apple Inc.*, Civil Action No. 2:19-cv-00066-JRG (E.D. Tex. February 9, 2021) at 24-25 (rejecting argument that disclosure of patent after "freeze" date for release of standard was not "timely" under ETSI policy and noting that "the vast majority of ETSI participants disclose their intellectual property rights after" the freeze date).

[32] 2017 Communication at 6 ("the parties are best placed to arrive at a common understanding of what are fair licensing conditions and fair rates, through good faith negotiations," and "there is there is no one-size-fit-all solution to what FRAND is: what can be considered fair and reasonable differs from sector to sector and over time"); *see also HTC Corporation v. Telefonaktiebolaget LM Ericsson,* 12 F.4th 476, 483 (5th Cir. 2021) (whether a license is FRAND depends on "totality of the particular facts and circumstances existing during the negotiations and leading up to the license."); *Microsoft Corp. v. Motorola, Inc.,* 795 F.3d 1024, 1040-44 (9th Cir. 2015) (recognizing need for flexibility and endorsing district court's application of *Georgia-Pacific* factors to hypothetical negotiation); *Commonwealth Scientific and Industrial Research Organisation v. Cisco Systems, Inc.*, 809 F.3d 1295, 1302-03, 1305 (Fed. Cir. 2015) ("there may be more than one reliable method for estimating a reasonable royalty" and "different cases present different facts.")

[33] *Unwired Planet v Huawei,* [2020] UKSC 37, 26 August 2020, on appeals from: [2018] EWCA Civ 2344 and [2019] EWCA Civ 38, at ¶¶42-46 (trial court relied "principally on the analysis of comparable licenses and used the 'top down' method as a cross-check," which involved determining the total aggregate royalty burden for all the intellectual property relating" to the standardized technology in the end product, and then "shar[ing] out the aggregate royalty . . . across all licensors in proportion to the value of each licensor's patent portfolio as a share . . . of the total relevant patent portfolio essential to the standard."); *see also TCL Commc'n Tech. Holdings, Ltd. v. Telefonaktiebolaget LM Ericsson*, No. CV 15-2370 JVS(DFMX), 2018 WL 4488286, at *8-9, 14 (C.D. Cal. Sept. 14, 2018) (employing a "top down" approach by identifying the aggregate royalty for all patents encompassed in a standard, and then

appropriate depending on the circumstances of each case. Courts have used other valuation methodologies, including:

- The incremental value that the patented invention adds to the end product, determined by apportioning the value attributable to the "'patented feature and the unpatented features,' using 'reliable and tangible evidence.'"[34]

- Assessment of comparable licenses, as determined by experts and accounting for differences in circumstances of the contracting parties.[35]

- Application of relevant *Georgia-Pacific* factors to determine value based on a hypothetical negotiation between a patent owner and a potential licensee.[36]

For these reasons, Dolby suggests that the Commission omit reference to maximum accumulated royalty rates from the Revised Guidelines altogether.

C. The Revised Guidelines Should Further Clarify the Meaning of "Effective Access" to Standardized Technologies.

The proposed new emphasis in paragraph 482 of the Revised Guidelines properly highlights that one of the important goals of FRAND licensing is "to ***ensure effective access*** to the standard." This broadly-stated goal provides SEP holders the freedom to determine the most efficient licensing strategies to best support their incentives to invest further in innovation and contribute those inventions to standards, including the freedom to determine the level at which they will license their SEPs. The proposed addition of footnote 278 to paragraph 482, however, creates ambiguity in the paragraph and is a missed opportunity to clarify that the paragraph does not require offering a license at every level of the value chain.

More specifically, as currently proposed, paragraph 482 could be read to mean that effective access to a standard will only exist for parties in a vertical distribution chain if the SEP holder is obliged to give any of those parties a SEP FRAND license upon demand. Such a

determining a firm's portion of that aggregate based on a "simple patent counting system which treats every patent [incorporated in the standard] as possessing identical value . . . ." and acknowledging that "top down" approach was "not necessarily a substitute for a market-based approach that considers comparable licenses"), *rev'd in part, vacated in part*, 943 F.3d 1360 (Fed. Cir. 2019), *cert. denied*, 141 S. Ct. 239 (2020).

[34] *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226, 1231 (Fed. Cir. 2014) (also noting determination must be based on "the patentee's actual [F]RAND commitment," which can "vary from case to case,").

[35] *Unwired Planet v Huawei, supra* at ¶43 (trial court relied "principally on the analysis of comparable licenses," based on expert testimony, to determine FRAND terms); *see also Commonwealth Scientific and Industrial Research Organisation v. Cisco Systems, Inc.*, 809 F.3d 1295, 1302-03, 1305 (Fed. Cir. 2015) (recognizing use of comparable licenses and also recognizing "there may be more than one reliable method for estimating a reasonable royalty" and "different cases present different facts."), citing *Finjan, Inc. v. Secure Computing Corp.*, 626 F.3d 1197, 1211 (Fed. Cir. 2010).

[36] *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1040-44 (9th Cir. 2015) (also recognizing need for flexibility and endorsing district court's application of *Georgia-Pacific* factors to hypothetical negotiation).

limitation is inconsistent with industry practice and current case law. Courts in the EU that have addressed this issue directly have confirmed that what is required is to ensure *access* at every level, and not necessarily to grant licenses to everyone in the value chain. For example, in *Sharp v Daimler,* District Court of Munich, judgment dated 10 September 2020, Case-No. 7 O 8818/19, the court rejected the defendant's argument that a SEP holder was obligated by a licensing commitment made pursuant to the ETSI IPR Policy "to grant a license to every willing licensee."[37] More specifically, the IPR holder was *not* required to offer licenses at the component level; it was required only to provide "access to the standards affected by its SEPs." [38] The court also confirmed that "EU antitrust law does not force SEP holders to license at all levels," and that a "patent holder is in principle allowed to choose the licensing level."[39]

United States case law is in accord. Most recently, for example, the United States Court of Appeals for the Fifth Circuit held that a plaintiff-component manufacturer lacked standing to assert antitrust claims based on a SEP holder's failure to license it, where the plaintiff did not need a license to make standard compliant components. *Continental Auto. Systems v. Avanci, LLC,* 27 F.4th 326, 334-35 (5th Cir. 2022). Likewise, in *FTC v. Qualcomm,* 969 F.3d 974, 1002 (9th Cir. 2020), the Ninth Circuit Court of Appeals held that competition law does not generally restrict a SEP holder's ability to determine what it believes to be the most efficient licensing strategies to best support its incentives to invest further in innovation and contribute its inventions to standards, including the level at which it will license its SEPs.[40] The U.S. Federal Circuit Court of Appeals in *Commonwealth Scientific and Industrial Research Organisation v. Cisco Systems, Inc. ("CSIRO"),* also has rejected the notion that licensing an upstream component manufacture is required to afford effective access to a standard, explaining that such a requirement would be "untenable," including because it would make reference to comparable licenses for valuation purposes effectively impossible.[41]

Any suggestion in paragraph 282 that ensuring effective access to a standard requires a SEP license should thus be avoided because it would restrict a SEP holder's ability to determine the most efficient licensing strategies or alternative structures to support its innovation incentives. Ensuring effective access does not require granting a license to multiple parties in a

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[37] *Sharp v Daimler,* District Court of Munich, judgment dated 10 September 2020, Case-No. 7 O 8818/19, at III2(c).

[38] *Id.* (emphasis added.)

[39] *Id.*

[40] The Court in *Qualcomm* also recognized that industry practice is to license at the end-product level, and that forcing SEP holders to license at the component level would interfere with historical precedents and disrupt established industry practices. *Id.* at 984, n. 5 citing Br. of Amicus Curiae Dolby Laboratories, Inc. at 16 ("The consistent experience of Dolby, a licensor to thousands of licenses under SEPs, is that FRAND licensing of SEPs takes place at the end-product level."); *see also* 969 F.3d at 996, n.17, citing Br. of Amicus Curiae Dolby Laboratories, Inc. at 28 ("Forcing SEP holders to license component suppliers would interfere with historical precedents and established practices, and produce significant inefficiencies and lack of transparency regarding whether products in the stream of commerce are in fact licensed.").

[41] 809 F.3d at 1303-04; *see also* Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Mark H. Hamer, Partner, Baker & McKenzie, at 20 (July 28, 2020) , available at https://www.justice.gov/atr/page/file/1298626/download.

vertical relationship in the same value chain, and the Revised Guidelines should avoid expressing a preference for one particular means of access over others.

Nor do the cases cited in paragraph 482, footnote 278 justify imposing an obligation to license all third parties. Footnote 278 cites the CJEU's judgment in *Huawei Technologies Co. Ltd v ZTE Corp.*, and the Commission's decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents.* Neither of these authorities, however, establishes that a SEP license is the only means for ensuring effective access to a standard. Neither decision addressed that issue, or any issues arising under Article 101 TFEU.

In *Huawei v. ZTE,* the CJEU addressed the circumstances in which seeking an injunction with respect to patents subject to a FRAND commitment could constitute abuse of dominant position in violation of Article 102 TFEU.[42] The question put to the CJEU by the referring court did not address the question of whether the SEP holder was required to offer a license to a supplier of the party against whom an injunction was sought,[43] and the CJEU expressly limited its judgment to the questions referred to it, noting that "the questions posed by the referring court relate only to the existence of an abuse, the analysis must be confined to the latter criterion."[44]

In *Motorola*, the Commission also addressed whether a SEP holder that had given a commitment "to license [its] patent on FRAND terms and conditions, abuses a dominant position when it seeks and enforces an injunction on the basis of that SEP against a potential licensee that is not unwilling to enter into a licence agreement on FRAND terms and conditions."[45] There were no issues before the Commission concerning whether Motorola had failed to afford effective access to its SEPs by not offering a license to a third party. Moreover, the Commission reinforced that the purpose of a FRAND commitment – as recognized by the Guidelines – is "to ensure that essential IPR protected technology incorporated in a standard is accessible to the users of that standard on fair, reasonable and non-discriminatory terms and conditions."[46] No mention was made that a license is the only means for so doing.

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[42] *See Huawei Technologies Co. Ltd v ZTE Corp. and ZTE Deutschland GmbH,* C-170/13, EU:C:2015:477, judgment of 16 July 2015 ¶76.

[43] *Id.* ¶39.

[44] *Id.* ¶43. For similar reasons, the proposed citation to *Huawei v. ZTE* in note 282 to paragraph 484 addressing circumstances in which "an action for infringement may constitute an abuse of a dominant position within the meaning of Article 102" is also overstated and subject to misinterpretation and should be omitted. (Revised Guidelines ¶484, n.282). It is unsupported because the CJEU in *Huawei v. ZTE* recognized that a SEP holder <u>may</u> request an injunction if it has offered a FRAND license and an alleged infringer has not diligently responded in good faith and without delaying tactics. This is consistent with the recognition by other courts that injunctions must remain available to ensure an infringer has incentives to negotiate and ultimately accept a FRAND license. *Unwired Planet Int'l v. Huawei Technologies Ltd.*, [2020] UKSC 33, ¶¶ 166, 167. The conduct at issue in *Huawei v. ZTE* is also not properly addressed in the Revised Guidelines because the CJEU in that case was analyzing unilateral conduct under Article 102 TFEU, rather than horizontal co-operation agreements subject to Article 101 TFEU.

[45] Commission Decision in Case AT.39985 - *Motorola - Enforcement of GPRS standard essential patents*, ¶561.

[46] *Id.* ¶78, quoting current Guidelines ¶287.

Indeed, the decisions in *Huawei v. ZTE* and *Motorola* establish that third parties – such as component manufacturers – that have *not* been offered a FRAND license by a SEP holder already have effective access to that technology because the SEP owner cannot seek an injunction against such parties unless it has first offered them a FRAND license.

For these reasons, Dolby submits that the proposed amendments to paragraph 482 do not adequately clarify that SDO IPR policies should ensure that a SEP holder can retain the freedom to determine how – and to whom – to license its SEPs so long as it does so in a manner that "ensures effective access to the standard." Ensuring effective access is on par with the equally important goal of affording SEP holders incentives to invest in developing new technologies and contributing them to standards with the assurance that they will be fairly and reasonably compensated for their investments in innovation. A FRAND SEP license is one way for parties across the value chain to obtain effective access, but not the only way, and the Commission would be well-served if it explains or clarifies that allowing flexibility for other means of effective access may, as effectively or even more so, reduce transaction costs and avoid inefficiencies such as duplicative royalties. Further, Dolby suggests that footnote 278 be deleted because it does not clarify the specific issue at hand.

D. The Revised Guidelines Should Avoid Endorsement of a Valuation Method Based on the Next Best Alternative *Ex Ante.*

Although the Commission has consistently and properly recognized that there is no "one-size-fits-all" approach to determining FRAND licensing terms,[47] paragraph 486 would add as a specific example of a valuation methodology "compar[ing] the licensing fee charged . . . with ***"the value/royalty of the next best available alternative (ex-ante)."*** Dolby is concerned that this revision endorses a methodology for determining FRAND royalties that – while promoted by some commentators – lacks any actual use by commercial parties, and which, to Dolby's knowledge, has not been imposed by any court. Although the discussion of FRAND methodologies "are not exclusive," describing this methodology specifically gives the appearance of elevating it above other methodologies.

Moreover, although discussed as a theoretical approach, a methodology to value SEPs based on an ex ante comparison to the next best alternative has rarely been employed in practice, and for good reason. In many if not most cases there is no "next best available alternative" technology under consideration ex ante in the standards development process. Rather, typically, participants contribute complementary technologies for consideration, the scope of a standard is iterated, and this determines whether a contributed technology is essential to the standard ultimately approved. It is also the case, and not unusual, that a single participant may contribute its technology and the standard is built around that technology.[48]

Courts in Europe and the U.S. also have not embraced an ex ante next best alternative valuation methodology. Rather, courts have recognized that the valuation of SEPs must be case-by-case, fact-specific, and flexible,[49] and must also be based on "the patentee's actual [F]RAND

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[47] 2017 Communication at 6; *see also* Revised Guidelines ¶486, n.287.

[48] *See supra* Part A(3).

[49] *HTC Corporation v. Telefonaktiebolaget LM Ericsson,* 12 F.4th 476, 483 (5th Cir. 2021) (whether a license is FRAND depends on "totality of the particular facts and circumstances existing during the negotiations and leading up to the license."); *Microsoft Corp. v. Motorola, Inc.*, 795 F.3d 1024, 1040-44

commitment," which can "vary from case to case."[50] This is the approach not only in Europe and in the U.S., but also in China and Japan.[51]

For these reasons Dolby suggests that paragraph 486 should not include the additional reference to a valuation methodology based on the next best available alternative ex ante, and instead reinforce the Commission's prior guidance that "[p]arties to a SEP licensing agreement, negotiating in good faith, are in the best position to determine the FRAND terms most appropriate to their specific situation," and that there is no "one-size-fits-all" approach.[52]

E. The Revised Guidelines Should Not Reveal a Preference for a Specific Form of Patent Disclosure.

Paragraph 483 of the Revised Guidelines expresses a clear preference for specific information to be included in a disclosure of potential SEPs, including at least the patent or patent application number, and further suggests a duty "***to update the disclosure as the standard develops***."[53] Paragraph 483 provides further that such disclosure would enable industry to make informed choices of technologies to be included in a standard and to achieve effective access to a standard. "Blanket disclosures," paragraph 483 states, would be less likely to accomplish these goals, and should be sufficient only where specific information is not public.[54]

Several issues arise from the preference reflected in paragraph 483, which Dolby submits warrant reconsideration.

First, the proposed preference for disclosure of specific patent information and against blanket disclosures would discourage SDOs and their members from adopting disclosure rules best suited to their specific circumstances. As the Commission recognized in its 2017 Communication, determining disclosure requirements requires a balancing of interests: "[w]hile there are clear benefits to such increased transparency, the related burden needs to remain

(9th Cir. 2015) (recognizing need for flexibility and endorsing district court's application of *Georgia-Pacific* factors to hypothetical negotiation); *Commonwealth Scientific and Industrial Research Organisation v. Cisco Systems, Inc.*, 809 F.3d 1295, 1302-03, 1305 (Fed. Cir. 2015) ("there may be more than one reliable method for estimating a reasonable royalty" and "different cases present different facts.") *Unwired Planet v Huawei*, [2020] UKSC 33, ¶43 (trial court relied "principally on the analysis of comparable licenses," based on expert testimony, to determine FRAND terms, but also relied on other methods as a "cross-check").

[50] *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226, 1231 (Fed. Cir. 2014).

[51] *Unwired Planet v Huawei*, [2017] EWHC 711, judgment dated 5 April 2017, ¶474 (adopting case-specific approach using comparable licenses adjusted based on expert testimony, and noting that courts in Japan and in China "have approached the determination of FRAND rates using the same techniques as have been addressed in this case.").

[52] 2017 Communication at 6.

[53] Revised Guidelines ¶483.

[54] *Id.; see also* Explanatory Note ¶19(b) (explaining that the proposed revisions in paragraph 483 are to introduce "a requirement of more specific disclosure and accepting blanket disclosure as an exception/less effective way to achieve the two objectives of ensuring (i) an informed choice of the technology to be included in the standard and (ii) an effective access to the result of the standard.")

proportionate. . . ."[55] Dolby's experience from its participation in many SDOs is that IPR policies take varied approaches to achieving this balance, and each approach is calculated to provide standardization participants with useful information and effective access to essential technology, while avoiding undue costs and burdens on IPR owners that would disincentivize participation of such firms and the contribution of their IPRs to standardization.

For example, ETSI's IPR policy provides in clause 4.1 that members should use reasonable endeavors to inform ETSI of essential IPRs in a timely fashion,[56] but does not require members to conduct IPR searches or to identify specific patents that are potentially essential.[57] In addition, Clause 6 of the ETSI policy, which concerns licensing declarations, permits the option of providing a general commitment to make licenses available.[58]

Similarly, the common IPR policy of ISO/IEC/ITU provides in paragraph 1 that participants should from the outset draw attention to any *known* patents and patent applications,[59] but such information is provided on a best efforts basis and there is no requirement for patent searches.[60] The policy also does not require the identification of specific claims, or of linking IPR to specific parts of the standard.[61] Participants may also use a General Patent Statement and Licensing Declaration, which provides for a blanket licensing commitment with respect to IPRs that will be essential, but without identification of specific patent information.[62]

Other organizations, such as the DVB project, have found it more efficient to avoid affirmative disclosure obligations entirely in favor of a negative disclosure model. Article 14.1 of the DVB project Memorandum of Understanding, for example, provides for the submission of a list of all IPRs, to the extent known, that will be necessarily infringed, only in the event that the patent

[55] *Id.*

[56] *ETSI Intellectual Property Rights Policy* ¶ 4.1 ("Subject to Clause 4.2 below, each MEMBER shall use its reasonable endeavours, in particular during the development of a STANDARD or TECHNICAL SPECIFICATION where it participates, to inform ETSI of ESSENTIAL IPRs in a timely fashion. In particular, a MEMBER submitting a technical proposal for a STANDARD or TECHNICAL SPECIFICATION shall, on a bona fide basis, draw the attention of ETSI to any of that MEMBER's IPR which might be ESSENTIAL if that proposal is adopted.").

[57] *Id.* ¶¶ 4.1, 4.2.

[58] *Id.* ¶6.

[59] *Common Patent Policy for ITU-T/ITU-R/ISO/IEC* ¶ 1 ("Therefore, any party participating in the work of ITU, ISO or IEC should, from the outset, draw the attention of the Director of ITU-TSB, the Director of ITU-BR, or the offices of the CEOs of ISO or IEC, respectively, to any known patent or to any known pending patent application, either their own or of other organizations...."), available at: https://www.itu.int/en/ITU-T/ipr/Pages/policy.aspx

[60] *Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/ISO/IEC* § 3 ("Moreover, that information should be provided in good faith and on a best effort basis, but there is no requirement for patent searches."), available at: https://www.itu.int/dms_pub/itu-t/oth/04/04/T04040000010005PDFE.pdf

[61] *Id.* § 4.1.

[62] *Id.* § II.1.

holder will *not* commit to grant a license.[63] In the event that no disclosure is made, Article 14.2 specifies that participants are deemed to commit to license on FRAND terms.[64] This is similar to the model illustrated in Example 3 of paragraph 327 of the current Guidelines, which expressly recognizes the benefits this model can provide, and the costs and inefficiencies that can result from specific disclosure requirements:

> IPR disclosure would be unlikely to contribute to guaranteeing effective access to the standard which in this scenario is sufficiently guaranteed by the blanket commitment to license any IPR that might read on the future standard on FRAND terms. On the contrary, an IPR disclosure obligation might in this context lead to additional costs for the participants. The absence of IPR disclosure might also, in those circumstances, lead to a quicker adoption of the standard which might be important if there are several competing standard-setting organisations.[65]

The discussion of Example 3 in paragraph 515 of the Revised Guidelines, however, omits this language, and thus fails to recognize the full procompetitive benefits of this model.[66]

Such approaches should not normally raise any competition law concerns because a blanket disclosure or blanket license commitment suffices to afford effective knowledge to standards participants and effective access to standards, and may also give the benefit of avoiding undue and unnecessary costs.[67] These approaches also allow SDOs to adopt disclosure policies consistent with their specific circumstances that strike the right balance between promoting investment and technological development and protecting competition. This accommodating approach also allows for what Dolby respectfully submits is the proper recognition that optimally effective and efficient standardization must be market driven. By expressing a clear preference for specific disclosure requirements, however, the proposed revisions to paragraph 483 would impede the ability of SDOs to adopt disclosure requirements best suited to their specific circumstances.

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[63] *DVB Memorandum of Understanding* § 14.1 ("Within 90 days from notification of approval of a specification by the Technical Module, each Member shall... submit to the chairman of the Steering Board a list of all the IPRs owned or controlled by the Member..., to the extent that the Member knows that such IPRs will be necessarily infringed when implementing such specification and for which it will not or has no free right to make licences available."), available at https://dvb.org/wp-content/uploads/2019/12/dvb_mou.pdf.

[64] *Id.* § 14.2 ("With respect to any IPRs, owned or controlled by the Member or any of its affiliated companies, ... other than those that are notified under clause 14.1 hereof, each Member hereby undertakes, ... that it is willing to grant or to cause the grant of non-exclusive, non-transferable, world-wide licences on fair, reasonable and nondiscriminatory terms and conditions under any of such IPRs for use in or of equipment fully complying with such ....").

[65] Current Guidelines ¶327, Example 3.

[66] Revised Guidelines ¶515, Example 3.

[67] Current Guidelines ¶327, Example 3; Revised Guidelines ¶515, Example 3 (recognizing that when technologies potentially relevant for a standard "are covered by many IPR," specific disclosure requirements may impose significant costs in analyzing whether a patent is potentially essential to a future standard, without offering any countervailing benefits to the standardization process.).

Second, for a company with thousands of patents (and an equal number of applications at various stages of development), clear limitations on specific disclosure requirements are important because continuously monitoring every standard under development and how any of the patents or patent applications in a large portfolio may read on each of those standards would be a monumental, and inherently speculative, job.

In addition, more stringent timing requirements for disclosing potentially essential IPRs, and requirements that such disclosure must be made ex ante, could have the opposite of the intended effect of disclosure. Such requirements would incentivize IPR owners to disclose all IPRs that may conceivably be related in any way to a standard in order to avoid later claims that the IPR owner failed to abide by SDO disclosure rules. Such broad disclosure may reduce the value of the information available because the question whether the disclosed IPRs are even potentially essential would not be easily determined, and narrower disclosures would not be discernible from broader, preemptive disclosures made to avoid potential claims.

Suggesting that specific disclosure requirements should be adopted where they do not currently exist could also favor delaying tactics in potential litigation and resulting externalities for innovators contributing their technology to standardization. Potential licensees, for example, might be more likely to assert failures by IPR owners to comply with the specific requirements for the purpose of delaying or foregoing completely good faith negotiations of FRAND licenses. Alleged violations of such requirements could also be grounds for lawsuits challenging the rights of SEP owners and their ability to enforce their IPRs. Either outcome would potentially further increase costs of standards participation and disincentivize the contribution of innovative technologies to standardization.

Third, the proposed language in paragraph 486 suggesting a duty "***to update the disclosure as the standard develops,"*** creates additional uncertainty regarding the timeliness of disclosures. As explained in Part B above, specific information regarding potential SEPs is not typically ascertainable "as the standard develops," and it is often impossible to determine (and thus to disclose) what specific patents will be essential to a standard until the technical specification has been finalized and "frozen."[68] Moreover, as at least one court has observed, the disclosure of specific patents does not "have any influence on the technical decision-making process" during standards development.[69] Thus, it is not clear when – or how – standards participants would be expected to comply with any duty to update specific disclosures "as the standard develops," or what benefit such updates would provide for the further development of the standard. Nor is it clear whether the obvious costs of such a requirement could ever be justified by any benefits to standardization.

Finally, Dolby is unaware of any concrete basis for concluding that imposing the type of disclosure requirements contemplated by paragraph 483 would make the standardization process more efficient or otherwise eliminate competitive distortions, if any, that exist under the current

[68] *Koninklijke Philips N.V. v. Asustek Computers Inc., supra*, at 4.159.

[69] *Id.* at 4.158 ("Within ETSI, the existence of technical alternatives to a specific patented technology needs to be explored only if a certain technology is unavailable (e.g., because of a refusal to grant FRAND licenses discussed in Clause 8 of the ETSI IPR Policy)," and as a result if a "general undertaking has already been provided," the disclosure of specific patent information will not "have any influence on the technical decision-making process").

conditions. Proposed revisions to paragraph 492 suggest that "***the disclosure of information regarding characteristics and value-added of each IPR to a standard"*** will increase ***"transparency to parties involved in the development of a standard. . . .***"[70] But as the Commission recognized in its 2017 Communication, the current flexible approach to patent disclosures already "supports the technical standard setting process."[71] It is not clear what type of information is contemplated by this language, or how any such "value-added" should be calculated or assessed.

For these reasons, Dolby submits that the proposed language in paragraphs 483 and 492 regarding specific patent disclosures and updates to such disclosures should not be included in the Revised Guidelines, and that the deleted language in Example 3 of paragraph 515 should be retained. Dolby also suggests that the Commission consider whether additional clarifications are appropriate to emphasize the established efficiencies and procompetitive benefits provided by blanket disclosures and blanket licensing commitments.

CONCLUSION

Dolby appreciates the opportunity to submit these comments concerning the draft Revised Guidelines and respectfully requests that the Commission consider the modifications proposed above for incorporation in the final Revised Guidelines.

April 2022

[70] Revised Guidelines ¶492. *Compare with* current Guidelines ¶298.

[71] 2017 Communication at 3-4 (recognizing that the "current declaration system in SDOs supports the technical standard setting process").