February 12, 2020

Dear Sir or Madam:

Dolby Laboratories, Inc. ("*Dolby*") respectfully submits these comments in connection with the public consultation on the Review of the Guidelines on horizontal cooperation agreements (the "*Horizontal Guidelines*") and the Horizontal Block Exemption Regulations No 1217/2010 and 1218/2010 (collectively the "*Regulations*"). In sum, and as explained in greater detail below, Dolby urges the Commission not to amend the Horizontal Guidelines or the Regulations in any way to provide or suggest that patent holders who have assured standard development organizations ("*SDOs*") that they will license their standard essential patents ("*SEPs*") on fair, reasonable, and non-discriminatory ("*FRAND*") terms would be required to license their SEPs at any particular level of the product distribution chain, or that SEP licensing at the end-product level is more likely to raise competition concerns than licensing at an upstream level.[1]

A departure from the current practice, in which the choice as to whom to license is left to the discretion of market participants, would greatly damage the standard development and licensing ecosystem by, among other things, (i) upsetting long-standing licensing practices and expectations, (ii) raising licensing transactional costs, (iii) unfairly devaluating intellectual property, (iv) discouraging participation in standard development organizations, and (v) increasing conflict over how to apply legal doctrines such as infringement and exhaustion. All of these effects will result in additional licensing disputes and uncertainty, which will delay the adoption of standards by industry.

[1] While Dolby recognizes that the Commission has provided a public questionnaire for the public consultation, Dolby's submission is limited to the issue addressed above and, therefore, Dolby respectfully requests that the Commission consider Dolby's comments in this format.

Dolby also notes that this issue likely falls outside the scope of the current review which is based on Article 101 TFEU. Rather, the Commission and the EU courts generally address obligations to supply under Article 102 TFEU.[2]

The Interests of Dolby in the Review

Founded in 1965, Dolby has a long history of innovation, delivering a series of new and superior products in numerous technologies, including audio and video compression, cinema experiences, and noise reduction, to market participants and consumers around the globe. Dolby relies on legal protections for its intellectual property to further fuel its cutting-edge research. One means by which Dolby shares its innovations and technologies with market participants is through robust participation in SDOs and widespread licensing through patent pools and well-respected Dolby bilateral licensing programs. For decades and for most of Dolby's history, these licensing programs involved granting a license to the manufacturers of consumer products implementing its technologies. As a result, Dolby has a wealth of experience and knowledge in patent licensing, including licensing SEPs, and historically has provided licensing terms and conditions that are well-accepted by technology implementers in multiple industries.

Licensing Standard Essential Patents

As noted above, Dolby is deeply concerned that any requirement or expressed general preference for licensing at any particular level of a product distribution chain would

[2] See for instance European Commission, "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*" at para. 75 and following (Feb. 24, 2009), https://eur lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=EN. Please also refer for instance to Case T 851/14 *Slovak Telekom v Commission*, Case C 123/16 P *Orange Polska v Commission* and Joined Cases C 241/91 P and C 242/91 *Radio Telefis Eireann (RTE) and Independent Television Publications (ITP)* v Commission.

cause great harm not just to industry participants who rely on long-standing licensing practices, but to consumers who benefit from research and new product development. Dolby urges the Commission not to alter the Horizontal Guidelines or the Regulations in any way that would create a requirement or suggest a preference for licensing at any particular level of the supply chain. Those determinations have successfully been left to market participants and they should continue to be matters that licensors and licensees discuss and resolve in ways that address their particular needs in a particular situation.

This historical flexibility which market participants rely on – and which forms a basis for the determinations of patent holders like Dolby to participate in SDOs – has not only enabled widespread distribution of new technologies to consumers, but also encouraged innovation and sharing intellectual property through participation in SDOs and licensing on FRAND terms. A suggestion that licensing must take place at the component or chipset level is at odds with the long-held understanding of thousands of market participants based on sound legal and practical principles.

The benefits of market freedom to make these determinations are reflected in the Commission's general caution about imposing any obligation to supply particular market participants:

> "*When setting its enforcement priorities, the Commission starts from the position that, generally speaking, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. The Commission therefore considers that intervention on competition law grounds requires careful consideration where the application of Article 82* [Article 102 TFEU] *would lead to the imposition of an obligation to supply on the dominant undertaking. The existence of such an obligation — even for a fair remuneration — may undermine undertakings' incentives to invest and innovate and, thereby, possibly harm consumers. The knowledge that they may*

> *have a duty to supply against their will may lead dominant undertakings — or undertakings who anticipate that they may become dominant — not to invest, or to invest less, in the activity in question. Also, competitors may be tempted to free ride on investments made by the dominant undertaking instead of investing themselves. Neither of these consequences would, in the long run, be in the interest of consumers.*"[3]

As things currently stand, licensing programs generally seek to obtain royalties at only one point in the product manufacturing chain. Any practice to the contrary would raise transactional problems and costs as well as legal uncertainty and disputes. By way of example, a communications SEP owner could enter into a royalty-bearing license with (i) the manufacturer of a chipset that incorporates the patented technology, (ii) the manufacturer of a component that incorporates the chipset, or (iii) the vendor that sells end-user products in which the component and chipset are embedded, but generally not with more than one of these. Any rule that would require or prefer that all three parties be able to obtain a license to the same patent would, among other harms, raise transaction costs, add uncertainties, and create conflict as noted below.

First, licensing at the chipset or component level would require keeping track of what is licensed on a component-by-component basis in order to determine which end-user devices are licensed. The chipset in every device would have to be identified and a determination whether that particular chipset is licensed would have to be made. Assuming the source of the chipset could be determined with any acceptable level of certainty, a likely result of this costly analysis is that some devices from a single vendor may be licensed while others are not. This fact by itself would result in increased uncertainty and risk for end-product

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[3] European Commission, "*Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings*" at para. 75 (Feb. 24, 2009).

suppliers and would lead to disputes in negotiation over topics such as which products are in fact licensed.

Second, licensing at the chipset or component level creates complex and costly determinations of infringement that would give rise to additional conflicts, disputes, and litigations that generally are obviated by end-product licensing. For example, in mobile communications, the patented standardized functionality regularly results from the interaction of hardware, software, and firmware that is often obtained from complex supply networks around the globe and not combined together until production of the end device. This example is typical of many licensed products. It is thus difficult and costly to determine whether – and to what extent – any chipset or component may actually on its own infringe one or more of the different claims set forth in a particular SEP. Licensing at the chipset or component level would frequently give rise to countless disputes about which patent claims are infringed by which chipsets or components, and whether some SEP claims may be licensed at the finished product level even though the chipset or component is licensed to other claims of the same SEP. Such questions would only add to the already complex task of determining whether a patent is essential to a standard. Furthermore, component manufacturers who have not historically included the cost of standardized technology in pricing their products would likely suggest that licenses be obtained not from them, but from other component suppliers or finished product vendors, further complicating and delaying conclusion of licenses. Thus, it is best for industry to decide in each case how to best address these challenges, as opposed to the adoption of one-size-fits-all approaches.

If the chipsets do not practice all of the SEPs that are practiced by the end-user device, then some patent licensors may license to the chipset manufacturer only those patent

claims actually infringed by the chipset, and license other patent claims infringed only by finished products to others. This may create a situation where end products would require multiple licenses and potentially stacked royalties. Conversely, it is far less burdensome – frequently by simply looking at the functionality of a device or even its associated advertising – to determine whether a fully-assembled end product practices the standard at issue and infringes patents essential to that standard.

Third, licensing at the chipset or component level is sure to give rise to endless disputes about the value of the patented technology to the relevant component. While licensors and licensees no doubt discuss the appropriate fair rate of an end product licensing program, licensing at different levels of the distribution chain will raise additional disputes about issues such as the extent to which the patented technology has similar value in the chipset as it does in the finished product. In practice, it is more accurate to determine this value through negotiation between the patent holder and the manufacturer of end-products, as the fair value of a technology can be determined with reference to the actual benefits it provides to consumers.

For these and other reasons, SEP owners typically license at the end product level. That is true for Dolby's bilateral licensing programs as well as most patent pools administered by agents such as Via Licensing, MPEG LA, Sisvel, and HEVC Advance. These pools and licensing programs license end-products across numerous industries and applications for a multitude of licenses. Dolby has licensed consumer electronics manufacturers in this manner for decades. We urge the Commission not to upset a system of established practices that has worked well and created widespread pro-competitive market expectations and pro-competitive licensing practices. Any other rule threatens to deter innovation and participation in SDOs.

In sum, introducing a requirement or suggestion that would restrict the current flexibility that private parties have to determine where in the value to chain to license would only serve to complicate and delay the adoption of standardized technologies in the market. The Commission has previously recognized the importance of SDO participation by innovators and the significance of encouraging "smooth licensing practices" that reduce conflict, uncertainty and transactional costs in licensing:

> "*Smooth licensing practices are therefore essential to guarantee fair, reasonable and non-discriminatory access to standardized technologies and to reward patent holders so they continue to invest in R&D and standardization activities.*" [4]

In accordance with its stated policy, any intervention by the Commission should not create unnecessary confusion and uncertainty in the licensing environment which would ultimately hamper the "smooth and wide dissemination of standardised technologies" and the "wide availability of technologies:"

> *"The Commission therefore considers that there is an urgent need to set out key principles that foster a balanced, smooth and predictable framework for SEPs. These key principles reflect two main objectives: incentivising the development and inclusion of top technologies in standards, by preserving fair and adequate return for these contributions, and ensuring smooth and wide dissemination of standardised technologies based on fair access conditions."*[5]
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> "*A balanced policy should take into account a variety of needs: fair return on investment to incentivise R&D and innovation, a sustainable standardisation process, wide availability of*

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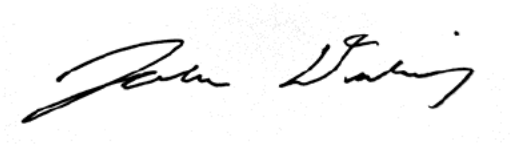
[4] European Commission, *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Setting out the EU Approach to Standard Essential Patents"* at p. 12 (Nov. 29, 2017), https://eur lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52017DC0712&from=GA.

[5] European Commission, *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"* at p. 2 (Nov. 29, 2017).

technologies in an open and competitive market, and the difficulty for SMEs to participate."[6]

Any suggestion or requirement that SEP licensing should or must occur at the component or chipset level would cause conflict and result in additional cost and uncertainties, thereby undermining the Commission's goal of furthering smooth licensing practices. We respectfully request that you take these concerns into account when conducting your review of the Regulations and Guidelines and would be happy to answer any questions that you may have regarding our concerns.

Respectfully submitted,



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[6] European Commission, *Communication on ICT Standardisation Priorities for the Digital Single Market* at p. 13 (Apr. 19, 2016), http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=15265