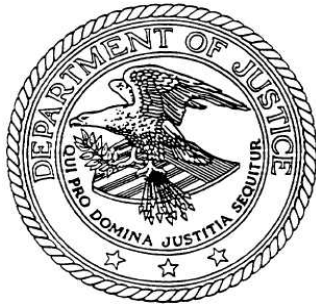


# EXHIBIT 2

# ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: Promoting Innovation and Competition



ISSUED BY THE  
**U.S. DEPARTMENT OF JUSTICE**  
AND THE  
**FEDERAL TRADE COMMISSION**

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licenses also can reduce transaction costs to licensors by allowing firms to license multiple patents at once.<sup>13</sup>

A portfolio cross-licensing arrangement among multiple patent holders may also mitigate the problem of stacking royalties.<sup>14</sup> Royalty stacking occurs when access to multiple patents is required to produce an end product, forcing the manufacturer's products "to bear multiple patent burdens," usually in the form of multiple licensing fees.<sup>15</sup> Royalty stacking can make production unprofitable and retard innovation. But when a rights holder enters into a portfolio cross-licensing arrangement, it may acquire access to all the blocking technologies required for production at a lower royalty rate than if each input were independently priced.<sup>16</sup> As one economist has stated, a portfolio license can alleviate the "drag on innovation and commercialization of new technologies"

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incumbents, they could discourage R&D by entrants who lack portfolios of patents to license).

<sup>13</sup> Grindley Presentation at 10; *see also* Feb. 26 Tr. at 208-09 (Teece) ("[W]hen you have a portfolio . . . you don't necessarily know which patents read on which products, and that if in fact you force unbundling of a portfolio . . . you require the owner of the intellectual property to incur a tremendous amount of transaction costs."); Grindley & Teece, *Cross-Licensing in Semiconductors* at 9 ("It is simply too cumbersome and costly to license only the specific patents you need for specific products. The portfolio approach reduces transaction costs and allows licensees freedom to design and manufacture without infringement."). *But see* Grindley Presentation at 9 (noting that negotiating a portfolio cross license is intense, with negotiations typically lasting eighteen to twenty-four months).

<sup>14</sup> Shapiro, *Navigating the Patent Thicket* at 123-24.

<sup>15</sup> *Id.* at 124.

<sup>16</sup> *Id.* at 123-24.

that royalty stacking creates.<sup>17</sup>

One panelist questioned whether patent thickets are much of a problem and suggested that, if a patent holder will not license a patent or tries to extract a royalty that is too high, other firms may respond by designing around the technology covered by the patent.<sup>18</sup> He argued that when firms design around each other's intellectual property rights, they avoid royalties, and may be able to offer newer, less expensive products to consumers.<sup>19</sup> Others were skeptical that design-around attempts would be successful.<sup>20</sup>

## B. Competitive Concerns

Portfolio cross licenses with provisions that may facilitate the

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<sup>17</sup> *Id.* at 124. Royalty-free portfolio cross licenses can reduce production costs, which may allow licensees to offer lower prices to consumers because they do not have to account for per-unit royalties in the final price of the product. *See* Nov. 6 Tr. at 98 (Shapiro). Typically, however, these cross-licensing agreements are not royalty-free. *See* Grindley Presentation at 6. The returns on a portfolio cross license vary. Returns can be based on fixed fees or running royalties. In the former case, there may be "balancing payments at the outset to reflect differences in the strength of the two companies' patent portfolios." Shapiro, *Navigating the Patent Thicket* at 130; *see also* Nov. 6 Tr. at 102 (Fromm); Grindley Presentation at 9.

<sup>18</sup> Feb. 28 Tr. at 758-60 (Telecky).

<sup>19</sup> Fredrick J. Telecky, Jr., *Statement* (Feb. 28, 2002 Hr'g R.) at 3 (stating that a product created by design-around activity may cost the manufacturer less because the payment of royalties is avoided), <http://www.ftc.gov/opp/intellect/020228telecky.pdf> [hereinafter Telecky Submission].

<sup>20</sup> *E.g.*, Feb. 28 Tr. at 676 (Barr) ("[D]esign-around is very expensive . . . [and] is worse in industries where a large number of patents have potentially read on a given product because the likelihood of stepping on a landmine is so great.").