

October 26, 2021

Mark A. Lemley  
William H. Neukom Professor of Law  
Director, Program in Law, Science  
& Technology

Crown Quadrangle  
559 Nathan Abbott Way  
Stanford, CA 94305-8610  
Tel 650 723.4605  
mlemley@law.stanford.edu

The Honorable Dick Durbin  
Chairman Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Chuck Grassley  
Ranking Member  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Durbin & Senator Grassley:

We are scholars of antitrust law and economics. Many of us have also served in leadership positions in the Federal Trade Commission or the Antitrust Division of the United States Department of Justice. We write to support the appointment of Judge Lucy Koh of the Northern District of California to the United States Court of Appeals for the Ninth Circuit.

Judge Koh is an outstanding district court judge with a wealth of knowledge and experience about several important areas of law. We write to emphasize her knowledge and background in one area of growing importance to the law: antitrust law. Judge Koh has written a number of important antitrust opinions, including the first decisions challenging “no poach” agreements among Silicon Valley companies.

One of those opinions is her decision in *Federal Trade Commission v. Qualcomm*. In a thoughtful, careful decision that was over 200 pages in length, Judge Koh carefully evaluated a complex series of claims by the Federal Trade Commission and found that Qualcomm’s “no license, no chips” policy was designed to undermine its commitment to license its standard-essential patents at a reasonable price and to discriminate against its competitors. That decision was well-reasoned, careful, and correct. Unfortunately, the Ninth Circuit reversed Judge Koh’s decision. But that is no reason to doubt Judge Koh’s reasoning or her knowledge in this area. To the contrary, we believe it is the Ninth Circuit that erred, both by rewriting the law and by ignoring Judge Koh’s careful work. As one leading treatise puts it,

The Ninth Circuit’s premise is a fundamental misreading of antitrust law, which has always been about promoting consumer welfare by protecting consumers from the harmful effects of restrictions on competition. The court erred by treating the district court’s detailed findings of competitive harm in the OEM market as irrelevant.

...

With respect, we think that the Ninth Circuit simply misunderstood the district court's findings regarding Qualcomm's no-license, no-chips policy. The issue that the policy raised was not whether Qualcomm charged different license rates to different OEMs but whether its policy effectively allowed Qualcomm to bypass its FRAND commitment by reallocating how it charged the royalty, raising the costs to its chip rivals. The fact that Qualcomm's patent licenses had value does not resolve the question of whether Qualcomm improperly reallocated rates in a way that avoided the FRAND commitment to make it more costly to use a rival's chips. The Ninth Circuit ignored the district court's detailed factual findings on this issue, in part because it wrongly concluded that competitive harm to downstream purchasers didn't count for antitrust purposes.

2 Herbert Hovenkamp et al., IP and Antitrust sec. 35.5(B)(1)(b).

The Ninth Circuit decision in *FTC v. Qualcomm* shows the importance of having a judge like Judge Koh, who understands antitrust law and is willing to dig into complex cases with care, on the Ninth Circuit.

Very truly yours,



Mark A. Lemley

On behalf of:<sup>1</sup>

Professor Jonathan Baker  
American University Washington College of Law

Professor Stephen Calkins  
Wayne State University Law School

Professor Peter Carstensen  
University of Wisconsin Law School

Professor William Comanor  
University of California – Los Angeles

---

<sup>1</sup> All of us sign as individuals; institutions are listed for identification purposes only.

The Honorable Dick Durbin  
The Honorable Chuck Grassley  
October 26, 2021  
Page 3

Professor Thomas Cotter  
University of Minnesota School of Law

Professor Stacey L. Dogan  
Boston University School of Law

Professor Nicholas Economides  
NYU School of Management

Professor Florian Ederer  
Yale University School of Management

Professor Aaron Edlin  
Berkeley Law School

Professor Robin Feldman  
Hastings Law School

Professor Harry First  
NYU School of Law

Professor Eleanor Fox  
NYU School of Law

Professor Andrew I. Gavil  
Howard University School of Law

Professor Rich Gilbert  
University of California at Berkeley

Professor Warren Grimes  
Southwestern Law School

Professor Thomas J. Horton  
University of South Dakota School of Law

Professor Erik Hovenkamp  
USC School of Law

Professor Herbert Hovenkamp  
University of Pennsylvania Law School

The Honorable Dick Durbin  
The Honorable Chuck Grassley  
October 26, 2021  
Page 4

Professor Robert H. Lande  
University of Baltimore School of Law

Professor Marina Lao  
Seton Hall University School of Law

Professor Mark A. Lemley  
Stanford Law School

Professor Christopher Leslie  
University of California-Irvine School of Law

Professor Yvette Joy Liebesman  
St. Louis University School of Law

Professor A. Douglas Melamed  
Stanford Law School

Professor Robert P. Merges  
Berkeley Law School

Professor Fiona Scott Morton  
Yale University

Professor Roger Noll  
Stanford University

Professor Stephen Salop  
Georgetown University Law Center

Professor Pamela Samuelson  
Berkeley Law School

Professor Joshua Sarnoff  
DePaul University College of Law

Professor Maurice Stucke  
University of Tennessee College of Law

Professor Spencer Weber Waller  
Loyola University Chicago Law School

The Honorable Dick Durbin  
The Honorable Chuck Grassley  
October 26, 2021  
Page 5

Professor Lawrence J. White  
NYU School of Management

Professor Ramsi Woodcock  
University of Kentucky School of Law