Comment of Legal Academics, Economists, and Former Government Officials on Draft Policy Statement on the Licensing and Remedies for Standard Essential Patents

February 4, 2022

As legal academics, economists, and former government officials who are experts in antitrust law and intellectual property law, we respectfully submit these comments on the December 6, 2021, Draft Policy Statement issued by the U.S. Department of Justice, Antitrust Division, the U.S. Patent & Trademark Office, and the National Institute of Standards and Technology (Draft Statement). We have dedicated extensive attention in academic and governmental positions to the licensing and enforcement of standard-essential patents (SEPs) relating to wireless communication technologies. These foundational technologies, such as 4G/LTE, 5G and WiFi, support a broad range of mission-critical functions in the private and public sectors. Providing meaningful protection for the intellectual property rights that undergird the development and commercialization of these technologies is essential for sustaining U.S. innovation, protecting U.S. national security, and "preserving America's role as the world's leading economy," as President Joseph Biden stated in his July 9, 2021, Executive Order on Promoting Competition in the American Economy (Executive Order).[1]

We welcome the Draft Statement's commitment to a "balanced, fact-based analysis [that] will facilitate and help to preserve competition and incentives for innovation and continued participation in voluntary, consensus-based standard-setting activity."[2] Regretfully, the Draft Statement's specific proposals contradict its generalized commitment to evidence-based policymaking concerning the licensing and enforcement of SEPs. In substance, the Draft Statement largely reverts to the approach reflected in the January 8, 2013, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitment (2013 Statement).[3] The 2013 Statement relied on untested theories about "patent holdup" and "royalty stacking" that erroneously predicted increased prices, constrained output, and stunted innovation in SEP-intensive technology markets like the smartphone industry. Based on these conjectures, the 2013 Statement proposed—and the Draft Statement would largely reinstate—a special remedies framework that constrains the enforcement of SEPs and favors the narrow interests of implementers over the public interest in a dynamically efficient innovation ecosystem.

The Draft Statement's Proposals Do Not Reflect Evidence-Based Policymaking

Unfortunately the Draft Statement does not conform in substance to its stated goal of promoting a "balanced, fact-based analysis [that] will facilitate and help to preserve competition and incentives for innovation …."[4] Reverting to the speculative arguments of the 2013 Statement, the Draft Statement asserts that "[o]pportunistic conduct by SEP holders to obtain, through the threat of exclusion, higher compensation for SEPs than they would have been able to negotiate prior to standardization, can deter investment in and delay introduction of standardized

[1] The White House, Executive Order on Promoting Competition in the American Economy, July 9, 2021 (hereinafter "Executive Order").

[2] U.S. Patent & Trademark Office, the National Institute of Standards and Technology, and the U.S. Department of Justice, Antitrust Division, Draft Policy Statement on Licensing Negotiations and Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments, Dec. 6, 2021 (hereinafter "Draft Statement"), at 10.

[3] U.S. Patent & Trademark Office and the U.S. Department of Justice, Antitrust Division, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitment, Jan. 8, 2013 (hereinafter "2013 Statement").

[4] Draft Statement, at 10.

products, raise prices, and ultimately harm consumers and small businesses."[5] Since the 2013 Statement was released, an extensive body of empirical research has carefully assessed the factual accuracy of this theoretical claim. These publications, using a variety of statistical methodologies, consistently fail to find support in real-world markets for the patent holdup and royalty-stacking theories. For example, rather than implementers being burdened by double-digit royalty rates, as some commentators initially predicted or claimed existed based on anecdotal reports, these studies consistently estimate that handset manufacturers pay an aggregate royalty burden in the single digits.[6] The Draft Statement does not reference this research. This is a critical omission.

These empirical findings are unsurprising. Patent holdup and royalty stacking theories predict market failure absent regulatory intervention to restrain opportunistic behavior by SEP owners. Yet, over a period of more than three decades, wireless communications markets have failed to conform to these predictions. These markets have exhibited expanding output, continuous innovation, and rapid adoption across a broad range of income segments, benefiting consumers. Most notably, quality-adjusted prices in SEP-intensive device markets have *fallen*.[7] This is not the market failure that the 2013 Statement predicted would occur and motivated its regulatory recommendations.

Moreover, the efficient performance of the wireless communications markets is consistent with empirical studies of the role of patents in the innovation economy generally. No empirical study has shown that a patent owner requesting or receiving injunctive relief on a finding of a defendant's infringement of its property rights has resulted either in consumer harm or in slowing the pace of technological innovation. In responding to President Biden's Executive Order and reviewing antitrust policy concerning SEPs, it is imperative that regulators take into account the absence of empirical support for theoretical predictions of consumer harm.

We attach an Appendix of the published research identifying the numerous substantive and methodological flaws in the "patent holdup" theory. We also point to rigorous empirical studies that all directly contradict the predictions of the "patent holdup" theory.

The Draft Statement Almost Entirely Precludes Injunctions for SEPs

The Draft Statement correctly recognizes that the thriving ecosystem in wireless technologies relies on balancing the interests of innovators and implementers through good-faith negotiations of licensing terms based on fair, reasonable, and non-discriminatory (FRAND) royalty rates. Yet the Draft Statement's abstract commitment to the principle of balance is belied by the specific requirements it proposes to implement this principle. Again, the Draft Statement reverts to the 2013 Statement, which had been understood to prescribe special rules

[5] *Id.* at 4.

[6] *See* Alexander Galetovic, Stephen H. Haber and Lew Zaretski, *An Estimate of the Average Cumulative Royalty Yield in the World Mobile Phone Industry: Theory, Measurement and Results*, 42 TELECOMM. POLICY 263 (2018); Jason Dedrick and Kenneth L. Kraemer, *Intangible Assets and Value Capture in Global Value Chains: The Smartphone Industry*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, WORKING PAPER NO. 41 (2017); J. Gregory Sidak, *What Aggregate Royalty Do Manufacturers of Mobile Phones Pay to License Standard-Essential Patents?*, 1 CRITERION J. INNOVATION 701 (2016); Keith Mallinson, *Don't Fix What Isn't Broken: The Extraordinary Record of Innovation and Success in the Cellular Industry under Existing Licensing Practices*, 23 GEORGE MASON L. REV. 967 (2016).

[7] Alexander Galetovic, Stephen H. Haber and Ross Levine, *An Empirical Examination of Patent Holdup*, 11 J. COMP. L. & ECON. 549, 564-69 (2015).

limiting the remedies available for SEP owners, an approach that courts have consistently rejected as inappropriate.[8]

In particular, the Draft Statement proposes a protracted sequence to follow in negotiations between SEP licensors and prospective licensees.[9] Once these extensive steps have been implemented and an implementer explicitly refuses to accept a license on FRAND terms, the Draft Statement dictates that an SEP owner may file a lawsuit, but still may not seek an injunction. According to the Draft Statement, the SEP owner may only seek an injunction if the implementer is deemed to be an "unwilling licensee," but this can only occur once the lawsuit has been fully adjudicated and the implementer "refuses to pay what has been determined by a court or other neutral decision maker to be a F/RAND royalty."[10] This entire process would typically take several years and millions of dollars in legal fees.

Despite disclaiming any "unique set of legal rules for SEPs,"[11] the Draft Statement's micro-management of the negotiation and litigation process makes injunctions, and exclusion orders at the International Trade Commission, a de facto nullity for any SEP owner. If an injunction is not available until protracted negotiations and litigation have concluded after many years and millions in legal fees, it is effectively not available at all. This is not a balanced policy that ensures good-faith negotiations between SEP owners and implementers. Rather, it creates a special legal regime for SEP licensing negotiations and infringement litigation that encourages well-resourced implementers to "hold out" and deprives SEP owners of any legal tool to deter this form of licensee opportunism.

This is further confirmed by the Draft Statement's assertion that "monetary remedies will usually be adequate to fully compensate an SEP holder for infringement."[12] This is contrary to court decisions, including those cited by the Draft Statement allegedly supporting its claim about monetary damages being adequate to compensate SEP owners. In *Apple v. Motorola*, the Court of Appeals for the Federal Circuit stated that "we see no reason to create, as some *amici* urge, a separate rule or analytical framework for addressing injunctions for FRAND-committed patents."[13] Contrary to court precedent, the Draft Statement creates a quasi-compulsory license that makes injunctions effectively unavailable to SEP owners. This is evident from the assertion that monetary remedies are "usually" adequate, the protracted negotiation and litigation sequence, and the requirement that an SEP owner may only seek an injunction if an implementer expressly rejects a court-ordered FRAND royalty rate following a fully adjudicated court case.

The Draft Statement Conflicts with a European Consensus on SEP Injunctive Remedies

The Draft Statement's de facto special rule almost entirely prohibiting injunctions for ongoing infringing uses of SEPs departs from international norms that have evolved since the hypothesized predictions in the 2013 Statement. In *Huawei v. ZTE*, the Court of Justice of the European Union held that an SEP owner may seek an injunction against ongoing infringement by an implementer unless the implementer responds to the SEP owner's royalty offer by submitting a specified FRAND-compliant counter-offer and provides appropriate security

[8] *Cf.* Ericsson v. D-Link, 773 F.3d 1201, 1232 (Fed. Cir. 2014) ("We believe it unwise to create a new set of Georgia–Pacific–like factors for all cases involving RAND-encumbered patents.").

[9] Draft Statement, at 5-6.

[10] *Id.* at 9.

[11] *Id.* at 8.

[12] *Id.*

[13] Apple Inc. v. Motorola Inc., 757 F.3d 1286, 1331-32 (Fed. Cir. 2014).

pending resolution of the dispute.[14] In announcing this rule, the *Huawei* Court recognized and reflected in its holding the fundamental asymmetry in licensing negotiations between an SEP owner and an implementer: the implementer has access to the innovator's technology, deriving revenues from the products and services that embody that technology, while, during the negotiations and litigation, the innovator earns nothing from the same technology that it developed at great cost and risk. In contrast to the *Huawei* Court, the Draft Statement does not take into account these marketplace realities of SEP licensing negotiations.

More recent decisions by European courts have adopted the same balanced and market-informed approach. Following the 2015 decision in *Huawei v. ZTE*, the UK High Court of Justice and the UK Supreme Court respectively reaffirmed the right of SEP owners to receive injunctions when facing an "unwilling licensee" who engages in classic stalling tactics.[15] As a result of these decisions, SEP owners who file lawsuits in European jurisdictions can request—and, if validity and infringement are demonstrated, can reasonably expect to receive—injunctive relief without first having to traverse the lengthy and protracted negotiation and litigation gauntlet set forth in the Draft Statement. Operating under the *Huawei v. ZTE* framework, British, Dutch and German courts have issued injunctions to SEP owners based on a finding that the infringer had engaged in "holdout" behavior.[16] Even prior to these decisions, the European Commission had already recognized concerns that "limiting SEP holders' right to seek injunctions would increase the risk that SEP holders receive sub-FRAND royalties, something that has been called . . . 'hold-out'."[17]

The Draft Statement Undermines U.S. Global Leadership

President Biden's Executive Order emphasizes the importance of preserving U.S. economic leadership in the face of economic and strategic competitors, such as China. Leadership by U.S. firms in wireless communications technologies was secured over several decades through licensing-based business models predicated on the ability to obtain injunctions against continuing and deliberate patent infringement. This made it possible for these technology pioneers to challenge incumbents and recoup billions of dollars of investment in research and development and to continue funding ongoing research and development over multiple wireless technology generations.

In its specific proposals on negotiations and legal remedies, the Draft Statement disadvantages U.S. innovators by establishing a de facto special rule that largely precludes those firms from seeking injunctions against implementers who engage in holdout practices. The Draft Statement reconfirms this special rule for SEP owners by proposing that the International Trade Commission, a legal forum that cannot even grant the monetary damages that the Draft Statement asserts are generally sufficient, exercise restraint in granting exclusion orders even

[14] Huawei Technologies Co. Ltd. v. ZTE Corp. and ZTE Deutschland GmbH, Court of Justice of the European Union, judgment dated 16 July 2015, Case No. C-170/13.

[15] *See* Unwired Planet International Ltd. et al. v. Huawei Technologies (UK) Co. Ltd. et al., [2020] UKSC 37; Unwired Planet International Ltd. et al. v. Huawei Technologies (UK) Co. Ltd. et al.,[2017] EWHC 2988 (Pat).

[16] *See* TQ Delta v. ZyXEL Communications, Case No. HP-2017-000045-[2019] EWHC 745 (Pat); Koninklijke Philips N.V. v. Asustek Computers Inc., Court of Appeal of The Hague, Case No. 200.221.250/01 (May 7, 2019); Tagivan (MPEG LA) v. Huawei, District Court of Dusseldorf, Case No. 4a O 17/17 (Nov. 15, 2018). This is a representative, rather than a comprehensive, list of decisions in which European courts have granted injunctions to SEP owners.

[17] Intellectual Property and Standard Setting, Note by the European Union, submitted to the Organization for Economic Cooperation and Development, Directorate for Financial and Enterprise Affairs, Competition Committee, Dec. 2, 2014, https://one.oecd.org/document/DAF/COMP/WD(2014)117/en/pdf.

to SEP owners who demonstrate validity and infringement.[18] Contrary to the Executive Order's expressly stated goals, the Draft Statement undermines U.S. innovators' ability to continue investing in the development and commercialization of the foundational wireless technologies that have enabled transformative innovations in markets as disparate as transportation, finance, and healthcare.

The Draft Statement recognizes that the wireless communications ecosystem relies on the voluntary, consensus-based standard-development process. But in its negotiation and remedies rules, it incentivizes licensee holdout and de facto prohibits injunctive remedies for SEPS as the proper counterbalance to this threat. The Draft Statement thus does not account how this particular innovation ecosystem and its supporting institutions, such as standard-development organizations (SDOs), are based on reliable licensing structures to promote technological dissemination to implementers—and ultimately to consumers in the marketplace. Reliable and effective patent rights are the legal platform that incentivizes innovators to participate in SDOs and promote and make possible the subsequent FRAND licensing negotiations that occur in the marketplace.

Global economic and strategic competitors will certainly take advantage of the U.S. undermining its patent system, what former USPTO Director David Kappos identified in 2013 as "the greatest innovation engine the world has ever known."[19] China, in particular, is deliberately working to position itself as a global contender for technological leadership in mobile communications technologies and in other next-generation technologies.[20] Accordingly, Chinese firms have significantly increased their participation in several SDOs, including those that create the standards for WiFi and for smartphone transmission technologies like 5G. Through strategic participation in SDO processes and recruitment of SDO veterans, for example, Huawei has become a significant competitor for leadership positions in these SDOs.[21] The Draft Statement proposals undermine the reliable and effective patent rights that provide the incentives to invest the billions required by American innovators to create the technologies contributed to these standards and to deploy them efficiently via licensing-based business models in the global innovation economy. By weakening the innovation engine driving U.S. technological and economic leadership, global competitors like China will step in to replace the U.S., which it is already positioning itself to do.

In sum, it is difficult to overstate the risks to the U.S. innovation economy, as well as to U.S. economic leadership and its national security, by the Draft Statement's proposed special rules for SEP owners that would incentivize strategic holdout by implementers and de facto prohibit injunctive relief for ongoing infringement by an unwilling licensee. This is not evidence-based policymaking that promotes the public interest in ensuring efficient competition in dynamic wireless communications markets that have benefited consumers in historically unprecedented ways for the past several decades.

For the foregoing reasons, the Draft Statement is inconsistent with the principles expressed in President Biden's Executive Order, does not account for relevant empirical evidence, runs

[18] Draft Statement, at 7 n.15.

[19] Innovation Act of 2013: Hearing on H.R. 3309 Before the Comm. on the Judiciary, 113th Cong. (Oct. 29, 2013) (statement of David J. Kappos, Partner, Cravath, Swaine & Moore LLP), at 2.

[20] *See, e.g.*, Danny Russel & Blake Berger, *Is China Stacking the Technology Deck by Setting International Standards?*, THE DIPLOMAT (Dec. 2, 2021), https://thediplomat.com/2021/12/is-china-stacking-the-technology-deck-by-setting-international-standards/.

[21] *Id.*

counter to recent and historical case law in both the U.S. and Europe, and places at risk the "innovation engine" that is a primary source of U.S. economic competitiveness.

Respectfully, we urge a reconsideration of the Draft Statement in this review of the evidence-based policies governing the licensing and enforcement of SEPs in wireless communications and other industries.

Sincerely,[*]

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APPENDIX

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