U.S. Chamber of Commerce

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U.S. Patent and Trademark Office
600 Dulany Street
Alexandria, VA 22314

Department of Justice, Antitrust Division
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

National Institute of Standards and Technology
U.S. Department of Commerce
100 Bureau Drive
Gaithersburg, MD 20899

Re: Public Comment on Draft Policy Statement on Licensing Negotiations and Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce ("the Chamber"), we are pleased to submit these comments to the U.S. Patent and Trademark Office, Department of Justice's Antitrust Division, and National Institute of Standards and Technology ("the agencies") in response to the solicitation for Public Comments on a Draft Policy Statement ("DPS") concerning Licensing Negotiations and Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments.[1]

The Chamber believes that guidance is useful to patent holder, implementers, and to the courts on licensing and remedies. To the extent that the agencies have decided to revise the 2019 Policy Statement ("2019 Statement"), the Chamber applauds the numerous ways in which the DPS mirrors the current statement.

Balancing the Interests of Patent Holders and Implementers

The 2019 Statement recognizes the need to provide patent holders with adequate incentives to innovate and licensees with the proper incentives to implement new technologies. The Statement encourages "good-faith licensing negotiations" to "promote technology innovation, further consumer choice, and enable industry competitiveness." It agrees that SDOs "play a vital role in the economy." It also

[1] U.S. Dep't of Just., Public Comments Welcome on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to F/RAND Commitments, December 6, 2021 (available at https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards).

recognizes that, when negotiations fall through, "appropriate remedies should be available to preserve competition," consistent with guidance from the Supreme Court and "depending on the facts and forum."

While a reason for issuing new guidance is not clearly provided by the agencies, the Chamber applauds the numerous ways in which the DPS is consistent with the current statement. For example, both the current and draft statements recognize that standard-essential patents ("SEPs") and SDOs promote licensing efficiency, innovation, and competition. Both statements leave the standard setting process to the private sector, rather than attempt to direct policy on behalf of the government. Both statements encourage patent holders and implementers to negotiate licenses in good faith and to resolve disputes through good-faith negotiations and alternate dispute resolution, with the courts as a last resort. As importantly, both statements recognize that F/RAND related disputes are highly fact specific.

Moreover, both statements properly recognize the role of remedies. Both the current and draft statements recognize that both patent holders and implementers can engage in opportunistic conduct, that such conduct can damage the competitive process, and that both patent holders and implementers must have effective paths to protect their legitimate interests. In particular, both the DPS and the current statement recognize that F/RAND disputes depend heavily on the facts and, citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006), that traditional principles of equity apply in determining whether an injunction should issue in any patent case in federal court. In other words, and most importantly according to both statements, injunctive relief, given the right fact set, may be an appropriate remedy. Similarly, neither statement provides a safe harbor for bad faith negotiations, and neither statement calls for an outsized role for antitrust law to play in resolving such disputes.

We also urge the agencies to be mindful of unfolding developments on F/RAND licensing in foreign jurisdictions. In several instances industrial policy motivations or extraterritorial remedies drive F/RAND outcomes that undermine U.S. competitiveness and national security. Extraterritorial remedies have been a problem in the UK and South Korea, but there is particular concern in China where the Chinese courts, led by the Supreme People's Court under the instruction of the Chinese Communist Party, are threatening to set global royalty rates for U.S. and other foreign companies that would misappropriate their intellectual property, unfairly benefit Chinese licensees, and ultimately erode the competitiveness of U.S. innovation that directly supports U.S. national security.

The Supreme People's Court has upheld the jurisdiction of Chinese courts to force foreign SEP holders into such F/RAND rate-setting proceedings and has prohibited foreign IP holders from enforcing their patents in other jurisdictions under threat of significant monetary fines. The Chinese government has not been transparent about its use of its courts to misappropriate the technologies of foreign SEP holders. The European Union last year requested that the Chinese government provide more information on the SEP licensing decisions of its courts to the World Trade Organization (WTO), but the Chinese government is refusing to provide the WTO with such information.

The Chamber appreciates the opportunity to share these views.

Sincerely,

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