



Conservatives
for
Property Rights

February 1, 2022

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

RE: Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Docket No. ATR-2021-0001)

To whom it may concern:

Conservatives for Property Rights (CPR), a coalition of public policy organizations concerned with preserving and protecting private property rights with respect to all forms of property, provides comment on the Department of Justice's (DOJ) December 6, 2021, Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Docket No. ATR-2021-0001).

It is reasonable for government agencies periodically to review current policies and, if needed, to revise them. However, revisions ought to be based on valid, substantial changes of circumstances arising since the current policy became effective. The proffered justification for the dramatic shifts the draft policy statement (DPS) proposes does not warrant displacing the 2019 statement. That is, the DPS falls short of a giving a compelling basis for the proposed modifications to policy regarding standard-essential patents' (SEPs) licensing negotiations and remedies. The 2019 joint policy statement (JPS) needs no changes; we urge that the DPS be scrapped and the 2019 JPS remain in force, undergirded by the New Madison Approach.

Basis for Withdrawal of the 2013 JPS

The 2018 withdrawal of the 2013 SEP policy statement and issuance of the 2019 JPS represent a well-founded, much-needed adjustment to policy at the antitrust-patent nexus. By the time of the 2013 statement's withdrawal, sufficient evidence had mounted, demonstrating an imbalance in antitrust enforcement remained where patents were concerned. Assistant Attorney General for Antitrust Makan Delrahim explained that "[a former view held that] the patent laws grant monopolies and limit competition, while the antitrust laws prohibit monopolies and promote competition. That was overly simplistic.

"Now, the prevailing view is that the increase in innovation spurred on by the patent laws leads to expanded consumer choice and enhanced competition in the long run. These benefits are achieved when innovators try to out-perform one another in order to earn the exclusive business of consumers for some temporary period.

...

“[The 2013] joint statement should not be read as a limitation on the careful balance that patent law strikes to optimize the incentive to innovate. There is no special set of rules for exclusion when patents are part of standards. A FRAND [fair, reasonable and nondiscriminatory] commitment does not and should not create a compulsory licensing scheme.”¹ Yet, that remained the effect under the 2013 JPS.

Despite the 2013 statement’s and Mr. Delrahim’s best efforts at its clarification, an imbalance persisted. Application of that policy diminished patent owners’ incentives for innovation, denied SEP owners access to due remedies, and deprived consumer welfare by antitrust’s disrupting otherwise-resulting dynamic competition. Moreover, as Mr. Delrahim and others explained, the policy the 2013 JPS set forth was tied to erroneous theory regarding antitrust and patents.

Stakeholders, including CPR, expressed strong support for the withdrawal of assent to the 2013 JPS. “The 2013 Joint Policy Statement was a prime example of a policy change that disadvantaged patent holders. While we believe the U.S. Patent and Trademark Office at the time tried hard with some success to make the statement as pro-innovation as possible, we agree with AAG Delrahim that the 2013 Joint Policy Statement was at best confused on how to maintain the incentive to innovate in a standard-development context.”²

Attesting to the adverse practical effect of the 2013 JPS, we stakeholders agreed with an aim of pulling the statement, that “the policy of the U.S. government across all its agencies should be to encourage innovation. This is especially so as the United States increasingly competes against China and other countries in the race for dominance and influence in 5G, artificial intelligence, and other critical technologies that will dominate the future.”³

Thus, withdrawing the 2013 JPS was a necessary, beneficial step because it had led to inappropriate antitrust enforcement while holding back U.S. innovation.

Basis for the 2019 JPS’s Balanced Approach

Issuing the 2019 statement was the next necessary step toward policy correction, along with articulation of and action on Mr. Delrahim’s “New Madison Approach” (NMA).⁴ The bipartisan leaders of the Senate Intellectual Property Subcommittee supported withdrawal of the 2013 JPS and outlined the need for a rebalanced replacement JPS incorporating NMA principles.⁵ Informed by the NMA, the 2019 JPS strikes a properly balanced policy stance.

¹ <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-19th-annual-berkeley-stanford> This and several other speeches AAG Delrahim gave provide detailed explication of the antitrust-patent nexus, patent remedies, SEPs, the New Madison Approach, and shortcomings of the 2013 joint policy statement.

² https://51a636ea-5fb8-4872-a23b-9dad2f2e3762.filesusr.com/ugd/651e0c_94fd09dbd3a74d1a9a6d5503cc281f04.pdf

³ Ibid.

⁴ <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university>

⁵ <https://www.ipwatchdog.com/2019/10/23/tillis-coons-nudge-doj-provide-revised-joint-statement-seps/id=115254/>

The 2019 statement clarifies that FRAND commitments “need not act as a bar to any particular remedy.” Instead, “[a]ll the remedies that may apply in a given patent case include injunctive relief, reasonable royalties, lost profits, enhanced damages for willful infringement, and exclusion orders issued by the U.S. International Trade Commission. These remedies are equally available in patent litigation involving standards-essential patents.”⁶ That is, the 2019 JPS states that a FRAND commitment does not amount to a compulsory licensing commitment by a SEP owner, which had been the effect under the 2013 JPS.

There are several reasons for the 2019 JPS’s placement of the fulcrum. One is proper appreciation for the long, uncertain trailblazing pursued by intrepid innovators. Innovators invest huge sums into technology-leading research and development with no “money-back guarantee” in case their inventions are not selected as part of a standard. This arduous path is long-horizon and highly uncertain. FRAND commitments are made on the front end of the standards-development process.

The 2019 DOJ-PTO-NIST JPS takes into account the long, uncertain standards-development process that follows long invention and patenting stages, and the process’s effects on innovation, dynamic competition, and consumer welfare.⁷ Standards-development organizations (SDOs) use consensus-based, engineering-focused processes to select superior technologies for standardization. SDOs are voluntary collaborative bodies that arrive at industry standards. Such technological standards enable multiple firms’ devices and products to interoperate smoothly. Participating parties assume certain licensing rules: innovators agree to license their SEPs on FRAND terms, and implementers pledge to license SEPs and negotiate licenses in good faith. This contractual balance sets conditions on SDO participants.

How the SDO stage promotes innovation and dynamic competition, as well as a related ex post timing element, was explained by Deputy Assistant Attorney General Alexander Okuliar. “. . . [T]he standards development process itself is a form of competition that should be recognized. As the Division noted in its Statement [in *Continental v. Avanci*], the ‘reduction in consumer choice that occurs when a winning technology is selected for inclusion in a standard can be offset by the standard’s many procompetitive benefits, including enhanced interoperability of products and services and follow-on innovation. Standardization sacrifices marketplace competition in favor of these benefits, achieved through an ex ante process in which rival technologies compete for inclusion in the standard. ***It shifts the timing and dimensions of competition; it does not eliminate competition.*** It would therefore be improper to infer harm to the competitive process from the lack of competitive constraints ex post, at the time of individual purchasing decisions”⁸ (emphasis added).

Moreover, “[the 2019 JPS’s] principles are important in ensuring that collective action by patent holders and standards implementers does not harm competition. In many contexts, a collaborative, consensus-based standard-development process that is open and balanced can produce substantial benefits, like improving product interoperability or health and safety.

⁶ <https://www.justice.gov/atr/page/file/1228016/download>

⁷ See <https://www.realclearmarkets.com/articles/2021/01/26/getting-antitrust-right-without-suffocating-technological-progress-657856.html>

⁸ <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-alexander-okuliar-delivers-remarks-intellectual>

Therefore, consumer welfare improves even if competition to adopt a standard after the fact decreases when one standard or technology is chosen over several other ones.”⁹

As for helping lead courts and antitrust enforcers away from improperly reading antitrust considerations related to FRAND commitments well after the fact (as misinterpretations under the 2013 JPS did), “generalized commitments to license at a ‘fair’ and ‘reasonable’ rate are too indefinite to be capable of being misrepresented in a way that can materially harm the competitive process [such as by the time of SEP licensing negotiations based on multiple details unknowable to either party when embarking on relevant standards development].”¹⁰

Thus, the 2019 JPS and the New Madison Approach strike a wise, prudent balance that shows due respect for both innovators and implementers in their complementary roles. They reflect a neutrality that promotes appropriate application of intellectual property, antitrust, and contract jurisprudence where the important interests of innovation policy and competition policy cross paths.

Flaws With the DPS

The proposed replacement policy statement suffers from a number of problems. In short, it turns the clock back to the misalignment that the 2013 JPS wrought. The draft tilts the government’s interpretation of FRAND commitments in favor of implementers and against innovators, who bore the risks. Further, the DPS dictates what licensing negotiations may and may not entail, approached through a distorted lens. In addition, the negotiation dictates empower implementers and patent holdout while disadvantaging innovators.

It is easy to predict where this policy would lead: Implementers will practice patent holdout while innovators see their patent rights weakened, SEPs devalued, and royalties (i.e., R&D funds) fall. Dynamic competition will lose its dynamism and cutting-edge innovation will stall. SEP licensing negotiations will be unduly constrained, the negotiating parties fettered by notions concocted in an ivory tower. The reason the DPS will cause such extensive damage is because the proposal sets antitrust to outweigh innovation.

The DPS’s highly prescriptive patent licensing considerations interfere with the functioning of the free market. They propound inappropriate constraints on the parties. They may well conflict with contractual commitments, FRAND or otherwise, the parties have entered. The new negotiating constraints will cause SEP licensing negotiations to be terribly inefficient. Moreover, the dictates are biased in favor of implementers; the respective rights and duties of innovators and implementers are asymmetrical and lack reciprocity.

For instance, the DPS regards “exercis[ing] any market power obtained through standardization” as “[o]pportunistic conduct.” This targets SEP owners only. IP experts Curtis Dodd and Chris Dubuc highlight serious problems with this construct. This presumption ignores the fact of “any agreement or requirement that standard related patents be priced on an ex-ante basis, or that remedies for infringement in the absence of a license be somehow limited”¹¹

Messrs. Dodd’s and Dubuc’s analysis illuminates the implementer-friendly nature of the DPS. The DPS provides that “a potential licensee [i.e., implementer] should not be deemed

⁹ Ibid.

¹⁰ Ibid.

¹¹ <https://www.ipwatchdog.com/2022/01/18/return-hold-bogeyman-analyzing-2021-draft-policy-statement-seps-subject-voluntary-f-rand-commitments-part-iii/id=144569/>

unwilling to take a F/RAND license . . . if it reserves the right to challenge the validity, enforceability **or essentiality** of the standards-essential patent in the context of an arbitration or F/RAND determination; or if it **reserves the right to challenge the validity or essentiality of a patent after agreeing to a license**” (first emphasis in the original, second emphasis added). This “self-conflicting and nonsensical” language “wrongfully assumes that all patents for which a licensing commitment has been submitted are to be considered essential for purposes creating an obligation on the patent holder to licensing on FRAND, but not for purposes of whether or not an implementer needs a license.”¹² The authors note the DPS’s flimsy foundation in the observation that “the **notion of contesting essentiality not being an act of bad faith** (such that entitlement to FRAND licenses would not be lost by doing so, *i.e.* no injunction or supra-FRAND damages would be awarded for infringement in the absence of a license) **is not supported** by language of the licensing commitment made to ETSI, the IPR Policy or Guide on IPR, nor any legal pronouncements . . . ”¹³ (emphasis added).

In yet another example, the bias in the DPS licensing negotiation rules reflects a “significant misunderstanding of F/RAND licensing and the judicial process” by “encourag[ing] the parties to resolve contested issues by agreeing to seek alternative dispute resolution or a judicial resolution of F/RAND-related disputes in a mutually agreeable jurisdiction.” Dodd and Dubuc debunk the dubious underlying assumptions. “For starters, this statement ignores the obvious benefits realized by implementers holding out, such that they are incentivized not to agree to ADR. Next, the statement overlooks that there are no such courts patent owners can turn to, to seek redress for unlicensed use of their technology, other than to sue for infringement on a patent-by-patent basis. To the extent suing for infringement is what the agencies had in mind when referring to seeking a judicial resolution, which is not clear, this further plays into the **unsupported notion** that an **implementer maintains entitlement to licenses** on FRAND terms and conditions **even if arguing against essentiality and requiring a patent owner to prove the need for a license**” (emphasis added).¹⁴

The DPS, by limiting remedies available to SEP owners, fails to grasp how patent remedies, particularly injunctions, incentivize implementers to negotiate fairly and in good faith. Patent rights and remedies help level the playing field. By contrast, heightened antitrust exposure (including against the exercise of one’s patent exclusivity and patent rights for SEPs) puts a thumb on the scales for implementers, who already have disparate advantages. The DPS deprives innovators of exclusive rights under their patents while bringing antitrust to favor those who would not have an emerging market to enter without an innovator having created it via IP-produced dynamic competition.

Furthermore, patent infringers already have many ways of challenging patents. Infringers and holdout implementers can get multiple bites at the apple of the same patents and on the same patent claims. Surrogates file repeated, parallel, and serial challenges in Article III courts and the quasijudicial administrative tribunal, the Patent Trial & Appeal Board (PTAB). PTAB employs lax rules, such as not requiring standing, that differ dramatically from the Federal Rules of Civil Procedure that constrain federal courts.

Courts, beginning with misapplication of the Supreme Court’s *eBay v. MercExchange* decision, have already made it more difficult for patent owners who have proven patent validity and patent infringement to get injunctive relief; the DPS exacerbates this situation regarding a

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

playing field that already favors implementers. Former Chief Judge Paul Michel and coauthor Matthew Dowd note, “Justice Anthony Kennedy’s concurrence in *eBay* has ironically become the majority view by the lower courts. . . . [His] reasoning rested on . . . assumptions about patent enforcement, few of which are supported by any evidence.”¹⁵ Implementer holdouts and infringers leverage this imbalance.

What is considered patent-eligible subject matter has fallen into a shambles. As CPR told the Patent & Trademark Office: “In *Bilski v. Kappos*, *Mayo Collaborative Services v. Prometheus Laboratories*, *Association for Molecular Pathology v. Myriad Genetics*, and *Alice Corp. v. CLS Bank* between 2010 and 2014, the Supreme Court’s ‘*Mayo-Alice* Framework’ has resulted in an untenable level of unpredictability and uncertainty for inventors and patent owners. Judicially created exceptions to patent eligibility continue to stray from the straightforward language of section 101 of the patent statute, leading to conflicting, unresolvable outcomes. Former Chief Judge of the Federal Circuit Paul Michel and attorney Matthew Dowd call the status quo ‘a quagmire.’¹⁶ Former PTO Director David Kappos calls it an ‘unworkable situation.’¹⁷ Then-PTO Director Andrei Iancu told a U.S. House subcommittee that 101 is ‘the most important substantive issue of patent law right now.’¹⁸ The result of this situation is unstable property rights.”¹⁹ This also amounts to another arrow in the quiver of unscrupulous implementers and patent infringers, rendered more powerful by the DPS.

The DPS fails to take any of this into account.

Another flaw of the DPS is how it threatens to undercut innovation. Mr. Delrahim illustrates this risk in discussing innovation effects. “When it comes to innovation effects, . . . the cost of under- and over-enforcement [of antitrust] may be much more pronounced. That is because innovation is cumulative; one new innovation can unlock an entire array of new innovations. Thus, if antitrust enforcers get an enforcement decision wrong and stifle or delay innovation, consumers not only will miss out on that particular product improvement, they also could lose the opportunity to enjoy dozens of additional new products or services.”²⁰ By diminishing innovators’ access to the array of remedies for SEPs and by micromanaging licensing negotiations, the DPS is very likely to curb innovation and dynamic competition, and harm consumer welfare.

¹⁵ Paul R. Michel & Matthew J. Dowd, “Understanding the Errors of *eBay*,” *Criterion Journal on Innovation* (Vol. 2, 2017), p. 20.

¹⁶ Paul R. Michel and Matthew J. Dowd, “From a Strong Property Right to a Fickle Government Franchise: The Transformation of the U.S. Patent System in 15 Years.” *Drake Law Review*, Vol. 69 (June 2021), p. 24.

¹⁷ David Kappos, “Section 101 Is Not Fixing Itself: A Look At Patent System Stats.” *Law 360* (May 7, 2020).

¹⁸ Steve Brachmann, “House IP Subcommittee Discusses Section 101, Fraudulent Chinese Trademark Applications During USPTO Oversight Hearing.” *IPWatchdog* (May 15, 2019).

¹⁹ Request for Information Regarding Patent Eligibility Jurisprudence Study (Docket No. PTO-P-2021-0032), pp. 1-2.

²⁰ <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-abas-2019-antitrust-fall-forum>

Finally, former Federal Trade Commission General Counsel Alden Abbott has filed comments that expose other fundamental flaws of the DPS. CPR associates itself with Mr. Abbott's analysis and the recommendations he puts forward. In particular, we highlight one of his vitally important insights with respect to the DPS's prescriptive negotiation framework: "The DPS's approach ignores [economist Friedrich] Hayek's knowledge problem -- government does not possess the market-specific knowledge available to private negotiators. As such, the government's efforts to micromanage the steps of private licensing negotiations may be expected, as a general matter, to generate outcomes that are economic welfare-inferior to those arrived at through purely private negotiations."²¹ No government agency can divine all the relevant, complicated, highly diverse, case-specific factors involved in private negotiations and thus is not in a position to exceed the performance of efficient, mutually beneficial private negotiations by prescriptive rules. As Mr. Abbott points out, regulatory intervention more likely produces inferior results. The stakes from disruptive regulatory interference are far greater in negotiations where SEP licensing is involved, due to the ramifications for dynamic competition and future innovation arising from government constraints on licensing negotiations. If the government gets it wrong, dynamic competition, future innovation, and consumer welfare suffer tremendously.

Therefore, the DPS's flaws discussed in the analysis above, of antitrust-IP nexus experts, innovators, and other commercial parties potentially adversely affected by the DPS demonstrate that the DPS should be shelved and the 2019 JPS should be reaffirmed.

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In closing, DPS falls short of achieving the proper balance, neutrality, and respect for both innovators and implementers in their complementary roles related to innovation, SEPs, and licensing. Therefore, CPR urges that the proffered DPS be withdrawn, the 2019 JPS be reaffirmed, and the New Madison Approach be the government's guide at the intersection of IP and antitrust.

Respectfully,

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²¹ Alden Abbott, comments filed on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Docket No. ATR-2021-0001), pp. 10-11.