January 12, 2022

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

The Honorable Jonathan Kanter
Assistant Attorney General
Antitrust Division
U.S. Department of Justice
950 Pennsylvania Ave., 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

Dear Attorney General Garland and Assistant Attorney General Kanter:

We write in regard to the draft policy statement referenced above, which the Department of Justice (DOJ) issued December 6, 2021, for comment with which the U.S. Patent & Trademark Office (USPTO) and the National Institute of Standards and Technology (NIST) are expected to join. The undersigned have grave concerns about the dubious process and the dangerous substance of the course reversal taken in this revised policy statement.

The signatories represent property rights and allied advocates of U.S. innovation. They are well versed in intellectual property, national security, and/or competition issues.

Hovering above our many problems with the proposed statement, the overarching concern is how the joint policy statement gives China a tremendous gift that harms U.S. national security. This dangerous, disturbing consequence should serve as a warning bell to the administration, and prompt its withdrawing immediately the draft joint policy statement.

The draft statement treats standard-essential patents (SEPs) as though the battle lies between conventional antitrust on one hand and intellectual property on the other hand, and that this extends no farther than the confines of the United States. At best, this is myopic thinking.

In fact, the actual contest is between the United States and China as to which nation will lead the world in emerging technologies for the foreseeable future.[1] The outcome of the latter contest is far and away more vital than the outcome of the former insular, domestic one.

The 2019 Justice-USPTO-NIST joint statement advanced U.S. interests by clarifying appropriate access to injunctions and other available patent assertion remedies for SEPs subject to fair, reasonable and nondiscriminatory (FRAND) licensing commitments. That policy serves the national interest because, in the most important emerging technologies such as 5G wireless, artificial intelligence, biopharmaceuticals, and robotics, U.S. research-and-development (R&D) companies presently hold the global innovation edge — though China's "military-civil fusion" strategy is making steady gains for China in the zero-sum contest. Our economic and national security hang in the balance, as the recent National Security Commission on Artificial Intelligence (NSCAI) final report makes clear.[2]

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[1] James Edwards, "Achieving Economic Security Depends on Assuring National Security," The Economic Standard, October 25, 2019.

[2] National Security Commission on Artificial Intelligence (NSCAI) final report, March 2021.

Regrettably, the July 2021 executive order directs federal agencies to reverse course on the constructive, pro-innovation direction of the 2019 joint policy statement regarding their policy stance on SEP remedies and to bias antitrust enforcement against exercising patent exclusivity of SEPs. This change rests upon a foundation of sand, "theoretical worries but never actual evidence" of SEP owner holdup.[3] We view the policy reversal, both in the executive order and in the proposed joint policy statement, as misguided, unfounded, and dangerous.

As the Center for Strategic and International Studies (CSIS) explains, ". . . some recommendations contained in the executive order expressly contradict and undermine these priorities — specifically, recommendations that are directed toward devaluing American patents through the regulation of standard-essential patents . . . . Worse, the order supports China's 5G leadership and, in doing so, creates an unnecessary national security risk by putting American leadership in this space in a vulnerable position. At the same time, China is recognizing both the power of bolstering intellectual property (IP) rights to encourage its inventors and the power of antitrust as an industrial policy tool, but not to attack its own domestic powerhouses."[4] DOJ's draft joint policy statement promises exactly what CSIS and many others warn against.

An approach more closely aligned with the 2013 joint policy statement — as is the proposed statement — effectively turns a FRAND commitment into a compulsory licensing clause. It shifts the advantage from innovator to implementer. Weakening IP rights in this way for SEPs harms both U.S. industrial competitiveness and innovation. The prime beneficiaries are a determined China and Big Tech implementers, which are predatory patent infringers.

Bipartisan former Patent & Trademark Office directors elaborate: "Weakening IP laws would only reduce the number of competitors willing to invest to create new technologies and in the long run will make it more likely that the technology is not developed in the United States at all. The beneficiaries of enfeebled SEP enforcement aren't American start-ups or consumers; they are nations like China, with centrally controlled economies that funnel enormous resources toward technologies like AI, 5G, and quantum computing. China is also the world's largest consumer of SEP-based technology, so weakening America's protection of its own patents directly benefits Chinese manufacturers."[5]

Thus, the direction of the latest proposed joint policy statement provides Chinese and other rogue nations' state-owned or state-backed firms, as well as Big Tech,[6] a powerful opening to infringe SEPs with, at best, delayed and partial accountability. They will surely take the ball the statement hands them and run with it. They will infringe first and pay a pittance later.

Meanwhile, competitive adversaries will have had months or even years to make commercial use of the stolen SEP technology that is central to making cutting-edge technological devices interoperate on the newly standardized foundation for a new technology. That translates into national champions of our adversaries, such as Huawei and ZTE in wireless technology, commanding lucrative earnings for their products and devices, while displacing the true American inventors and stealing their deserved financial returns on R&D investments. And

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[3] Andrei Iancu and David J. Kappos, "Biden Administration Should Preserve Strong Patent Protection for Standardized Technology," CSIS, November 9, 2021.

[4] Alexander Kersten and Gabrielle Athanasia, "Promoting Competition in the American Economy,", CSIS, November 29, 2021.

[5] Iancu and Kappos, op.cit.

[6] See Judge Paul R. Michel, "Time to Fight Back Against Big Tech's IP Assault," Newsweek, October 25, 2021.

most definitely will the Chinese government take a share of such earnings from the state-backed firms it has protected against market forces. In the same way, this statement extends the same type of protection for patent holdout and infringement to "efficient infringers."

For U.S. innovators, SEP licensing helps to fund next-generation, long-horizon, risk-laden R&D. If American technology is standard-essential, this promotes robust U.S. R&D, which translates into continued U.S. leadership in technological innovation in emerging technical fields. It is far better when SEP owners can vigorously enforce their IP rights against SEP-infringing competitors and infringers. Not only is this right and just, from a property rights perspective, but also from a national security perspective because many infringers are likely to be Chinese or from another industrial competitor nation.

In addition, the payments implementers pay innovators owning SEP patents to use their technology promote American innovation leadership in the very areas the U.S. Senate has passed legislation to ensure that U.S. companies hold an edge over competitors.

Importantly, standards-development organizations (SDOs) weigh technological contributions from leading innovators and usually adhere to consensus-based standardization. SDOs typically adopt technologically superior alternatives that merit inclusion in the specifications of a new standard. The Committee on Foreign Investment in the United States (CFIUS), whose sole focus is U.S. national security, has noted how diminished participation by U.S. innovators in, for example, 5G standards-setting bodies "would leave an opening for China to expand its influence on the 5G standard-setting process," which "would have substantial negative national security consequences for the United States."[7] A likely outcome of DOJ's proposed joint statement is to reduce U.S. innovation and U.S. innovators' critical roles in SDOs in all manner of technologies, particularly technologically significant, emerging areas.

In these ways does the proposed joint policy statement on SEPs reduce U.S. innovation and advantage China and its national champions.[8] In these ways does our economic insecurity become our national insecurity — all due to asserting a tin-eared antitrust theory over what counts most where intellectual property and antitrust intersect.

Therefore, we urge that DOJ, and insofar as they are involved USPTO and NIST, withdraw this proposed joint policy statement on SEPs. We urge that the administration reaffirm the 2019 statement. Only these actions will protect American innovators and their intrepid innovation, promote American leadership in emerging technologies, and send a strong, clear signal to China and other competitors and predatory patent infringers that the United States remains committed to the secure, meaningful intellectual property rights necessary to ensure our continued global innovation edge for the sake of our national security.

Respectfully,

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[7] CFIUS review letter of potential Broadcom-Qualcomm merger, March 5, 2018.

[8] See James Edwards, "Combating China's technological ambitions requires strong property rights," Washington Times, December 1, 2021.

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*Organization names appear for identification purposes only.