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The Political Pendulum Relating to the Enforcement of FRAND-Encumbered Standard Essential Patents – Part I

By Tony Pezzano

To probably nobody's surprise, the policy issued by each of the current and prior two presidential administrations relating to the enforcement of FRAND-encumbered standard essential patents (SEPs)[1] has been subject to what can best be described as a political pendulum. The policy issued under the Obama Administration on January 8, 2013 has been criticized as favoring SDOs and implementers of the asserted patent technology because it focused on the antitrust concerns caused by the danger of SEP holders/innovators disregarding their FRAND commitment and demanding increased royalties from implementers under threat of injunction, known as "hold-up." This policy has been criticized as discouraging SEP holders from seeking injunctive relief based on the threat of an antitrust claim and treble damages, and causing implementers to not accept or delay in agreeing to a license to drive down the price of a royalty, known as "hold-out," thereby stifling innovation.

On December 19, 2019, the Trump Administration withdrew the Obama Administration's policy and issued its own policy that recognized that hold-out, including collusion among implementers to drive down the price of a royalty, what economists call "monopsony" effect, may also violate the antitrust laws, because there is harm to competition even though it results in lower prices. For that reason, the policy under the Trump Administration found that the issue relating to the enforcement of FRAND-encumbered SEPs is best addressed by contract and patent law, and not antitrust law. The policy issued by the Trump Administration found that the SEP holder's FRAND commitment is a relevant factor in determining appropriate remedies, but need not act as a bar to any remedy. The Trump Administration's policy permitted an SEP holder to assert all remedies, including injunctive relief to be determined under the eBay factors established by the Supreme Court[2] in the federal district courts and the public interest factors applied in International Trade Commission (ITC) investigations pursuant to 19 U.S.C. §1337 (Section 337),[3] both of which can adequately address the issues of hold-up and hold-out.

Without reinstating the Obama Administration's January 8, 2013 policy or issuing its own policy

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statement, the Biden Administration issued a withdrawal of the Trump Administration's policy on June 8, 2022. However, based on the language in the Biden Administration's withdrawal and actions by the Department of Justice (DOJ), Antitrust Division, and certain Federal Trade Commission (FTC) commissioners under the Biden Administration, it appears that the case-by-case approach to reviewing conduct by SEP holders and standards implementers taken by the Biden Administration may return to the Obama Administration's antitrust policy scrutinizing the conduct of SEP holders/innovators.

The first part of this article is directed to the flip-flopping of policies issued by the Obama, Trump and Biden Administrations and the positions of the DOJ and FTC under each administration relating to FRAND-encumbered SEPs.

The second part of this article, to appear in an upcoming issue of the *Intellectual Property & Technology Law Journal*, is directed to:

(i) The importance of the policy relating to FRAND-encumbered SEPs moving forward to facilitate and not hinder incentive for innovation afforded by strong patent rights;

(ii) The current state of the controlling precedent of the U.S. Court of Appeals for the Federal Circuit (Federal Circuit) as well as an update of ITC Section 337 case authority relating to FRAND-encumbered SEPs; and

(iii) Two proposals – one for the ITC and the other for federal district court disputes involving FRAND-encumbered SEP enforcement that embrace a balanced approach addressing both hold-up and hold-out and provide a safe harbor from antitrust liability.

Consistent with these proposals, this author encourages that the policy moving forward should be to safeguard innovation and the full complement of a patentee's remedies, including injunctive relief, through careful consideration of the issues of hold-up and hold-out applying the eBay factors in the federal district courts and the ITC's public interest factors. This is what the Founding Fathers advocated and what the Constitution provides to benefit and secure a strong American economy.

THE POLICY RELATING TO ENFORCEMENT OF FRAND-ENCUMBERED SEPS BY PRESIDENTIAL ADMINISTRATION

The Obama Administration 2013 Policy Statement Focused on Antitrust Concerns Based on SEP Holder/Innovator Industry Hold-Up

Under the Obama Administration, the Antitrust Division of the DOJ[4] and the U.S. Patent & Trademark Office (USPTO)[5] issued a Policy On Remedies For Standards-Essential Patents Subject To Voluntary F/RAND Commitments on January 8, 2013 (hereinafter Obama Administration's 2013 Policy Statement).[6] The Obama Administration's 2013 Policy Statement made a point of addressing the issue of patent hold-up and the harm to competition it can cause: "the owner of . . . patented technology may gain market power and potentially take advantage of it by engaging in patent hold-up, which entails asserting the patent to exclude a competitor from a market or obtain a higher price for its use than would have been possible before the standard was set, when alternative technologies could have been chosen. This type of patent hold-up can cause other problems as well. For example, it may induce prospective implementers to postpone or avoid making commitments to a standardized technology or to make inefficient investments in developing and implementing a standard in an effort to protect themselves. Consumers of products implementing the standard could also be harmed to the extent that the hold-up generates unwarranted higher royalties and those royalties are passed on to consumers in the form of higher prices."

The Obama Administration's 2013 Policy Statement made a point of addressing the issue of patent hold-up and the harm to competition it can cause.

The Obama policy statement then went on to address the concern that an SEP holder's/innovator's remedy of an injunction or an ITC exclusion order may be inconsistent with the public interest: "This concern is particularly acute in cases where an exclusion order based on a F/RAND-encumbered patent appears to be incompatible with the terms of a patent holder's existing F/RAND licensing commitment to an SDO. A decision maker could conclude that the holder of a F/RAND-encumbered, standards-essential patent had attempted to use an exclusion order to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment – in essence concluding that the patent holder had sought to reclaim some of its enhanced market power over firms that relied on the assurance that F/RAND-encumbered patents included in the standard would be available on reasonable licensing terms under the SDO's policy. Such an order may harm competition and consumers by degrading one of the tools SDOs employ to mitigate the threat of such opportunistic actions by the holders of F/RAND-encumbered patents that are essential to their standards."

While noting that its list was not exhaustive, the Obama policy statement addressed a limited number of circumstances when an exclusion order may be appropriate: "such as where the putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND terms. For example, if a putative licensee refuses to pay what has been determined to be a F/RAND royalty, or refuses to engage in a negotiation to determine F/RAND terms, an exclusion order could be appropriate. Such a refusal could take the form of a constructive refusal to negotiate, such as by insisting on terms clearly outside the bounds of what could reasonably be considered to be F/RAND terms in an attempt to evade the putative licensee's obligation to fairly compensate the patent holder. An exclusion order also could be appropriate if a putative licensee is not subject to the jurisdiction of a court that could award damages."

The Obama policy statement concluded that "[a]lthough, as described above, an exclusion order for infringement of F/RAND-encumbered patents essential to a standard may be appropriate in some circumstances, we believe that, depending on the facts of individual cases, the public interest may preclude the issuance of an exclusion order in cases where the infringer is acting within the scope of the patent holder's F/RAND commitment and is able, and has not refused, to license on F/RAND terms."

The Obama policy statement "urge[d] the USITC to consider whether a patent holder has acknowledged voluntarily through a commitment to license its patents on F/RAND terms that money damages, rather than injunctive or exclusionary relief, is the appropriate remedy for infringement" and, pursuant to Section 337(b)(2), directed the ITC to consult with the DOJ and other departments and agencies at it considers appropriate. Finally, the Obama policy statement advised that the ITC may conclude, after applying the public interest factors, that exclusion orders are inappropriate, and alternatively, if appropriate "delay the effective date of an exclusion order for a limited period of time to provide parties the opportunity to conclude a F/RAND license."

Under Section 337(j), the president is required to engage in a policy evaluation of the ITC's determinations to issue exclusion and cease and desist orders.

Subsequent actions by the United States Trade Representative (USTR) and the DOJ under the Obama Administration took further affirmative steps restricting the right of SEP holders/innovators to seek injunctive relief for FRAND-encumbered SEPs. On August 3, 2013, less than a year after the issuance of the Obama Administration's 2013 Policy Statement, USTR undertook the highly unusual[7] procedure of disapproving an ITC exclusion order enforcing a FRAND-encumbered asserted patent issued in Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Inv. No. 337-TA-794 (the 794 Investigation).[8]

On June 4, 2013, the ITC determined that Apple Inc. (Apple) had violated Section 337 in the importation of certain smartphones and tablet computers that infringed a U.S. patent owned by Samsung Electronics Co., Ltd. and Samsung Telecommunications America Inc. (collectively, Samsung) in the 794 Investigation. Following this determination, the ITC issued both a limited exclusion order prohibiting the unlicensed importation of infringing devices manufactured for and on behalf of Apple and a cease and desist order that prevents

Apple from engaging in certain activities, such as the sale of these products in the United States.

Under Section 337(j), the president is required to engage in a policy evaluation of the ITC's determinations to issue exclusion and cease and desist orders. The president may disapprove an order on policy grounds, approve an order, or take no action and allow the order to come into force upon the expiration of the 60-day review period. This authority has been assigned to the USTR. The policy review of the impact of the ITC's determination to issue an exclusion order considers the public interest factors.

USTR's decision to disapprove the ITC's exclusion order and cease and desist order followed the Obama Administration's 2013 Policy Statement that "expressed substantial concerns, which I strongly share, about the potential harms that can result from owners of standard-essential patents (SEPs) who have made a voluntary commitment to offer to license SEPs on terms that are fair, reasonable, and non-discriminatory (FRAND), gaining undue leverage and engaging in "patent hold-up," i.e., asserting the patent to exclude an implementer of the standard from a market to obtain a higher price for use of the patent than would have been possible before the standard was set, when alternative technologies could have been chosen." The USTR decision also emphasized that the Obama policy statement restricted the exclusionary relief from the ITC based on FRAND-encumbered SEPs to only the relevant factors described in the policy statement in order to mitigate against patent hold-up.

The USTR decision to disapprove the ITC's exclusion order and cease and desist order was made after "extensive consultations with the agencies of the Trade Policy Staff Committee and the Trade Policy Review Group, as well as other interested agencies and persons" and underscored that "in any future cases involving SEPs that are subject to voluntary FRAND commitments, the Commission should be certain to (1) [sic] examine thoroughly and carefully on its own initiative the public interest issues presented both at the outset of its proceeding and when determining whether a particular remedy is in the public interest and (2) seek proactively to have the parties develop a comprehensive factual record related to these issues in the proceedings before the Administrative Law Judge and during the formal remedy phase of the investigation before the Commission, including information on the standards-essential nature of the patent at issue if contested by the patent holder and the presence or absence of patent hold-up or reverse hold-up. In addition, the Commission should make explicit findings on these issues to the maximum extent possible. I will look for these elements in any future decisions involving FRAND-encumbered SEPs that are presented for policy review. The Commission is well-positioned to consider these issues in its public interest determinations."

The Update required any holder of potentially essential patent claims to submit a Letter of Assurance.

On February 2, 2015, Renata B. Hesse, Acting Assistant Attorney General of the DOJ under the Obama Administration, issued a Business Review Letter (BRL) in response to the Institute of Electrical and Electronics Engineers, Incorporated's (IEEE) request to approve a proposed Update to the IEEE Standards Association's (IEEE-SA) Patent Policy that restricts SEP holders/innovators right to seek prohibitive orders, i.e., injunctive relief, and limits the reasonable royalty rate sought by such SEP holders/innovators, and sanction such Update as not subject to an antitrust enforcement action. The DOJ analyzed, inter alia, whether the Update's provisions on injunctive relief and a reasonable royalty will harm competition by anticompetitively reducing royalties and thereby diminishing incentives to innovate. The DOJ found that "the Update's provisions also may further help to mitigate hold up."

The Update required any holder of potentially essential patent claims to submit a Letter of Assurance (LOA), in which the holder chooses one of four options for licensing those claims.

The Update required any holder of potentially essential patent claims to submit a Letter of Assurance (LOA), in which the holder chooses one of four options for licensing those claims:

(1) It will make a license available, without compensation, for its essential patent claims, to an unrestricted number of applicants for uses implementing the standard;

(2) It will make a license available for its essential patent claims "under reasonable rates, with reasonable terms and conditions that are demonstrably free of any unfair discrimination," to an unrestricted number of applicants for uses implementing the standard (IEEE FRAND Commitment);

(3) It will not enforce its essential patent claims against any person (or entity) complying with the standard; or

(4) It is unwilling or unable to license its essential patent claims without compensation or under reasonable rates, or to agree that it will not enforce those patent claims.[9]

The Update provides that companies agreeing to the IEEE FRAND commitment "shall neither seek nor seek to enforce a Prohibitive Order . . . unless the implementer fails to participate in, or to comply with the outcome of, an adjudication, including an affirming first-level appellate review . . . by one or more courts that have the authority to determine Reasonable Rates and other reasonable terms and conditions; adjudicate patent validity, enforceability, essentiality, and infringement; award monetary damages; and resolve any defenses and counterclaims." The DOJ found that a patent holder that makes such a FRAND commitment "agrees that licensing its essential patent claims on reasonable rates and other reasonable terms and conditions is appropriate compensation for their use in implementing the standard. Inherent in such a F/RAND commitment is a pledge . . . not to exclude these implementers from using the standard unless they refuse to take a F/RAND license. Over the past several years, U.S. patent courts have recognized this principle, making it unlikely that a patent holder bound by a F/RAND commitment, even one that does not address explicitly the availability of injunctive relief, can secure an injunction (in addition to monetary damages) in an infringement action."

The DOJ further found that "[t]he Update's express limitation on the availability of exclusionary relief may reduce any remaining uncertainty among implementers of IEEE-SA standards by limiting the ability of patent holders who have made an IEEE F/RAND Commitment to seek prohibitive orders that would prevent those willing to license from making, using, or selling products that comply with the standard." The DOJ went on to conclude that "[i]n sum, this provision furthers the procompetitive goal of providing greater clarity regarding the IEEE F/RAND Commitment concerning the availability of prohibitive orders, which could facilitate licensing negotiations, limit patent infringement litigation, and enable parties to reach mutually beneficial bargains that appropriately value patented technology. Moreover, because the provision is consistent with the direction of U.S. case law and patent holders can avoid its requirements by declining to submit an LOA, the Department concludes that it is unlikely to result in competitive harm."

On December 19, 2019, the USPTO, National Institute of Standards and Technology (NIST) and the DOJ under the Trump Administration withdrew the Obama Administration 2013 Policy Statement.

The DOJ also approved as not anticompetitive the Update's limitation of the reasonable royalty rate subject to a FRAND commitment which unreasonably diminished the reasonable royalty rate to which the SEP holder/innovator is entitled. Specifically the Update required that a Reasonable Rate "shall mean appropriate compensation . . . excluding the value, if any, resulting from the inclusion of [the patent claim's] technology in the IEEE standard." This approach assumes that the patented feature did not increase the value of the standard, even though SDOs are required to choose the best solution from an operability standpoint, as well as to facilitate the interoperability among complementary products, or if the patented feature did improve the value of the standard, that value should be ignored. Contrary to the DOJ's position, this requirement is not consistent with Federal Circuit precedent which requires that a reasonable royalty to which a patent holder is entitled "must be premised on the value of the patented feature, not any value added by the standard's adoption of the patented technology."[10] The Federal Circuit clarified this means that "the royalty award is based on the incremental value that the patented invention adds to the product, not any value added by the standardization of the technology." To put it more succinctly, the Federal Circuit stated:

> Just as we apportion damages for a patent that covers a small part of a device, we must apportion damages for SEPs that cover only a small part of a standard. In other words, a royalty award for a SEP must be apportioned to the value of the patented invention (or at least the approximate value thereof), not the value of the standard as a whole. A jury must be instructed accordingly. Our decision does not suggest that all SEPs make up only a small part of the technology in the standard. Indeed, if a patentee can show that his invention make up "the entire value of the" standard, an apportionment instruction probably would not be appropriate.

Thus, the SEP holder/innovator should be awarded for the value of the standard that can be apportioned to the patented technology.

The Trump Administration Withdrew the 2013 Policy Statement and Issued a New 2019 Policy Statement Focused on the Concern of Considering Hold-Up in Isolation Without Considering Hold-Out and Making All Remedies Available to SEP Holders/Innovators for Infringement Of FRAND-Encumbered SEPs

On December 19, 2019, the USPTO, National Institute of Standards and Technology (NIST)[11] and the DOJ under the Trump Administration withdrew the Obama Administration 2013 Policy Statement, stating:

> In the years since the 2013 policy statement issued, the USPTO, NIST, and the DOJ, along with other agencies and courts in the United States and internationally, have developed additional experience with disputes concerning standards-essential patents. In that time, the agencies have heard concerns that the 2013 policy statement has been misinterpreted to suggest that a unique set of legal rules should be applied to disputes concerning patents subject to a F/RAND commitment that are essential to standards (as distinct from patents that are not essential), and that injunctions and other exclusionary remedies should not be available in actions for infringement of standards-essential patents. Such an approach would be detrimental to a carefully balanced patent system, ultimately resulting in harm to innovation and dynamic competition.

Consistent with the prevailing law and depending on the facts and forum, 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.

The USPTO, NIST and DOJ issued a new Policy Statement On Remedies For Standards-Essential Patents Subject To Voluntary F/RAND Commitments (hereinafter Trump Administration's 2019 Policy Statement) clarifying "that, in their view, a patent owner's F/RAND commitment is a relevant factor in determining appropriate remedies, but need not act as a bar to any particular remedy." The Trump Administration's 2019 Policy Statement made clear that "[a]ll remedies available under national law, including injunctive relief and adequate damages, should be available for infringement of standards-essential patents subject to a F/RAND commitment, if the facts of a given case warrant them. Consistent with the prevailing law and depending on the facts and forum, 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. While the existence of F/RAND or similar commitments, and conduct of the parties, are relevant and may inform the determination of appropriate remedies, the general framework for deciding these issues remains the same as in other patent cases."

The Trump Administration's 2019 Policy Statement also rejected the misinterpretation of the Obama Administration 2013 Policy Statement to suggest that antitrust law is applicable to FRAND disputes.

The Trump Administration's 2019 Policy Statement also rejected the misinterpretation of the Obama Administration 2013 Policy Statement to suggest that antitrust law is applicable to FRAND disputes, and further rejected a specific set of legal rules that limit remedies for infringement of FRAND-encumbered SEPs. The Trump policy statement recognized that the Federal Circuit has found that the availability of injunctive relief for infringement of FRAND-encumbered SEPs should be analyzed under eBay's framework like all other patents, and, with respect to damages, that a new set of Georgia-Pacific-like factors should not be created for FRAND-encumbered patents.

The Trump Administration's 2019 Policy Statement followed The "New Madison" Approach to Antitrust and Intellectual Property Law advocated by Makan Delrahim, Assistant Attorney General, DOJ Antitrust Division, under the Trump Administration. The New Madison Approach presented on March 16, 2018 by Mr. Delrahim to the University of Pennsylvania Law School celebrates James Madison as the founding father of U.S. patent law. Madison understood that replacing monarchy with democracy reversed the threat of the misapplication of power, creating a risk that patent holders might suffer from the tyranny of the majority seeking to benefit unfairly from their invention. Madison's view prevailed as the exclusive right granted in a patent for an invention has its genesis in the original Constitution where the word "right" appears only once in Article I, Section 8:

> To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. . . .

In support of his position that hold-up is not an antitrust problem, Mr. Delrahim makes the point that consumer welfare is not synonymous with a policy always favoring lower prices.

Mr. Delrahim was concerned by a recent shift in a view of patents as conferring too much power that advocates were asserting should be curbed, either through reinterpreting antitrust law or establishing patent policies of implementers who practice patents when they build new technologies. These advocates cite the so-called hold-up problem in the context of FRAND-encumbered SEPs. Mr. Delrahim believes this approach is misplaced and favors what he calls the "New Madison" approach that has four basic premises:

- First, hold-up is fundamentally not an antitrust problem, and therefore antitrust law should not be used as a tool to police FRAND commitments that patent-holders make to SDOs.
- Second, SDOs should be responsible for choosing the best technology for a standard, not vehicles for concerted actions by market participants to skew conditions for patented technologies' incorporation into a standard in favor of implementers because this can reduce incentives to innovate and encourage patent hold-out.
- Third, because a key feature of patent rights is the right to exclude, SDOs and courts should have a very high burden before they adopt rules that severely restrict that right or – even worse – amount to a de facto compulsory licensing scheme.
- Fourth, consistent with the fundamental right to exclude, from the perspective of the antitrust laws, a unilateral and unconditional right to license a patent should be considered per se legal.

In support of his position that hold-up is not an antitrust problem, Mr. Delrahim makes the point that consumer welfare is not synonymous with a policy always favoring lower prices. For example, high demand for an exciting new product may drive up its price, but that simply reflects consumer preference for a superior product relative to alternatives. Antitrust law is designed to protect this behavior, not punish it, so that others will have incentives to innovate and compete themselves, all for the benefit of consumers.

The pharmaceutical industry is another example of where higher priced brand products are not the per se result of anticompetitive conduct, but rather, the result of millions of dollars of investment in research and development by innovator companies that saves lives. The incentives to innovate and invest in such innovation should be encouraged by our enforcement policies. Moreover, the Hatch-Waxman Act and Biologics Price Competition and Innovation Act were enacted to balance the protection to the investments made by brand pharmaceutical drug product and biologics innovators in the development of new drug products through patent enforcement and the ability of lower priced generic and biosimilar products to enter the market. The eBay factors in the federal district courts and public interest factors in the ITC are also similarly designed to determine whether injunctive relief is equitable and justifiable for any patents, including FRAND-encumbered SEPs. Restricting a patent holder's remedies, by any means, including through antitrust enforcement, in all of these types of actions is unnecessary.

The pharmaceutical industry is another example of where higher priced brand products are not the per se result of anticompetitive conduct.

Moreover, focusing only on hold-up and the threat of antitrust violations to SEP holders/innovators will not only chill innovation but also encourage implementers to hold-out. Collusion among implementers to lower the royalty rate, called the monopsony effect, may violate the antitrust laws because there is harm to competition even though it results in lower prices. As Mr. Delrahim points out, condemning hold-up, in isolation, as an antitrust violation, while ignoring equal incentives of implementers to hold-out, risks creating over-enforcement that would discourage valuable innovation.

Finally, Mr. Delrahim cautioned that if a patent holder effectively loses his right to an injunction whenever a licensing dispute arises, or is deterred from seeking an injunction due to the prospect of antitrust treble damages, an implementer can freely infringe, knowing that the most he or she will eventually have to pay is a reasonable royalty rate.

The Supplement criticized the IEEE Updated Patent Policy for limiting the full scope of a patentee's remedies for FRAND-encumbered standard-essential patents.

On September 10, 2020, Mr. Delrahim, as Assistant Attorney General of the DOJ Antitrust Division under the Trump Administration, took the extraordinary step of sending a Letter to Sophia A. Muirhead, General Counsel and Chief Compliance Officer of IEEE, supplementing the February 2, 2015 BRL sent by Renata Hesse providing the DOJ's antitrust enforcement intentions with respect to the Update to the IEEE Standard Association's Patent Policy. This is the first time the DOJ Antitrust Division had issued such a Supplement.[12] The Supplement corrects the 2015 BRL's citation as the DOJ's endorsement of the IEEE Updated Patent Policy and aligns the outdated analysis in the 2015 BRL with current U.S. law and policy.

The Supplement states that the 2015 BRL simply indicated that there is no intention at that time to challenge IEEE's Updated Patent Policy, but is not an endorsement of that policy and any representation by IEEE – or other stakeholders, government enforcers, or commentators – that the DOJ has endorsed the policy "is wrong, causes confusion, and must stop." The Supplement further cautioned that "the misinterpretation of the 2015 Letter appears to extend around the world and may have influenced foreign enforcement activity. Over the last several years, some foreign competition authorities have misapplied the 2015 Letter in support of enforcement actions against essential patent holders that have no basis under U.S. law, raising the prospect that the business review process could be subject to intentional manipulation abroad."

The Supplement criticized the IEEE Updated Patent Policy for limiting the full scope of a patentee's remedies for FRAND-encumbered standard-essential patents, particularly injunctive relief, "unless a potential licensee refuses to comply with the outcome of infringement litigation, 'including an affirming first-level appellate review.'" The Supplement emphasized that:

> The recent Trump Administration's 2019 Policy Statement and jurisprudential positions declining to infer diminished rights for essential patent holders as part of a FRAND commitment flow from the consensus view of the United States that seeking an injunction is an 'exclusive right' conferred by the U.S. Constitution. This important right promotes dynamic competition by ensuring that there are strong incentives to invest in new technologies. Injunctive relief is a critical enforcement mechanism and bargaining tool – subject to traditional principles of equity – that may allow a patent holder (including an essential patent holder) to obtain the appropriate value for its invention when a licensee is unwilling to negotiate reasonable terms. Denying essential patent holders access to injunctive relief has the potential to lessen returns for inventors and thereby to harm incentives for future innovation.

The Supplement further criticized the IEEE Updated Patent Policy for limiting the scope of available royalties more narrowly than current case law or policy would endorse. Besides, as discussed above, misapplying Federal Circuit precedent which requires that a reasonable royalty to which a patent holder is entitled "must be premised on the value of the patented feature," the Supplement further points out IEEE's policy "recommended the use of the smallest saleable patent practicing unit (SSPPU) as the appropriate royalty base for SEPs." The Federal Circuit has emphasized that there are "a variety of ways" parties might value patented technology, including "using the accused [end-product] as a royalty base and apportioning through the royalty rate."[13] The Supplement pointed out that "[o]ne key risk in relying solely on the smallest saleable unit method, to the exclusion of others, is that real-world licenses often set royalties based on end-product revenue. Parties should not be discouraged from relying on these licenses – particularly since this sort of market-based evidence is often 'the most effective method of estimating [an] asserted patent's value.'"

The Federal Circuit has emphasized that there are "a variety of ways" parties might value patented technology, including "using the accused [end-product] as a royalty base and apportioning through the royalty rate."

Finally, the Supplement criticized the Obama Administration's 2015 Policy Statement and the IEEE Updated Patent Policy because they do not consider implementer hold-out. Both "did not dedicate attention to potentially harmful implementer conduct seeking to undermine the bargaining position of patent owners in the standards development process. The 2015 Letter focused on the risk of so-called 'hold up' by patent-holders without considering the possibility of 'hold out' by patent implementers or the Policy's effect on patent holders' innovation incentives." The DOJ since under the Trump Administration recognized that "[c]ondemning [hold-up], in isolation, as an antitrust violation, while ignoring equal incentives of implementers to 'hold out,' risks creating 'false positive' errors of over-enforcement that would discourage valuable innovation."

On June 8, 2022, the Biden Administration Withdrew the 2019 Policy Statement Without Further Clarification But All Signs Point to a Return to the Pre-Trump Antitrust Policy of the Obama Administration

President Biden's Executive Order on July 9, 2021 on Promoting Competition in the American Economy called for "the Attorney General and the Secretary of Commerce . . . to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including considering whether to revise the Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/FRAND Commitments" issued under the Trump Administration on December 19, 2019.[14] Following this Executive Order, the USPTO, NIST and DOJ, Antitrust Division issued a detailed Draft Policy Statement On Licensing Negotiations And Remedies For Standards-Essential Patents Subject To Voluntary F/RAND Commitments on December 6, 2021 (Draft Policy Statement).

The Draft Policy Statement considered both hold-up by patent holders/innovators and hold-out by standards implementers:

> Where a potential licensee is willing to license and is able to compensate a SEP holder for past infringement and future use of SEPs subject to a voluntary F/RAND commitment, seeking injunctive relief in lieu of good-faith negotiation is inconsistent with the goals of the F/RAND commitment. Opportunistic 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 products, raise prices, and ultimately harm consumers and small businesses.
>
> At the same time, when standards implementers are unwilling to accept a F/RAND license or delay licensing negotiations in bad faith, these strategies can lessen patent holders' incentives to participate in the development process or contribute technologies to standards voluntarily. Without adequate incentives to contribute to a consensus-based process, patent holders may opt for closed, proprietary standards that do not offer the same benefits of interoperability and enhanced consumer choice.

The Draft Policy Statement also provided guidance on good faith negotiation between SEP holders and potential SEP licensees to reach FRAND license terms and encouraged parties to consider these guidelines. Specifically, an SEP holder "should alert a potential licensee of the specific SEPs it believes will be or that are being infringed, provide information as to how the SEPs, to the extent practicable, or a representative set of the SEPs are being infringed, and make a good-faith F/RAND offer."

On June 8, 2022, the USPTO, NIST and DOJ, Antitrust Division under the Biden Administration issued a Withdrawal Of 2019 Policy Statement On Remedies For Standard-Essential Patents Subject To Voluntary F/RAND Commitments (Biden Withdrawal), without adopting a new policy statement.

A standards implementer should "respond within a commercially reasonable amount of time in a manner that advances the negotiation or results in a license … by (1) accepting the offer; (2) making a good-faith F/RAND counteroffer; (3) raising specific concerns about the offer's terms, including with respect to validity and infringement of the patents; (4) proposing that contested issues be resolved by a neutral party; or (5) requesting that the SEP holder provide more specific information reasonably needed to evaluate the offer."

An SEP holder should respond "within a commercially reasonable amount of time in a manner that advances the negotiation or results in a license . . . by (1) accepting the counteroffer; (2) addressing specific concerns about the original offer's terms and making a new good-faith F/RAND offer; (3) responding to a request for information so that the potential licensee can better assess the F/RAND offer; or (4) proposing that contested issues be resolved by a neutral party."

If the licensing negotiations break down, the Draft Policy Statement encourages "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 … and make a good-faith attempt to reach agreement on a license or a path for resolution before unilaterally seeking a resolution in a preferred forum."

The Draft Policy Statement further advocated, like the Trump Administration's 2019 Policy Statement, that "[r]ather than adopting a unique set of legal rules for SEPs subject to F/RAND commitments, courts and other neutral decision makers take into account the F/RAND commitment and other relevant facts of a particular case," that the Federal Circuit "has held that the availability of injunctive relief for infringement of SEPs subject to F/RAND licensing commitments should be analyzed under eBay's equitable framework like all other patents" and that "injunctive relief may be justified where an implementer is unwilling or unable to enter into a F/RAND license."

However, the example given in the Draft Policy Statement for when an injunction may be justified is narrower than the broader language for when an injunction may be justified held by the Federal Circuit in Apple, Inc. v. Motorola, Inc.,[15] i.e., "where an infringer unilaterally refuses a FRAND royalty or unreasonably delays negotiations to the same effect."

There is already a split among the FTC Commissioners regarding the availability of injunctive relief for SEP holders/innovators enforcing FRAND-encumbered SEPs.

On June 8, 2022, the USPTO, NIST and DOJ, Antitrust Division under the Biden Administration issued a Withdrawal Of 2019 Policy Statement On Remedies For Standard-Essential Patents Subject To Voluntary F/RAND Commitments (Biden Withdrawal), without adopting a new policy statement. In doing so, the USPTO, NIST and DOJ, Antitrust Division did not adopt their prior Draft Policy Statement and stated that the withdrawal does not reinstate the Obama 2013 Policy Statement. Rather than adopting a new policy statement, the Biden Withdrawal states only that the "DOJ will review conduct by SEP holders or standards implementers on a case-by-case basis to determine if either party is engaging in practices that result in anticompetitive use of market power or other abusive processes that harm competition."

While the "transparency"[16] sought by the DOJ's Antitrust Division was not achieved by the Biden Withdrawal without a new policy, all indications are that the Biden Administration is "quietly walk[ing] back"[17] the Trump Administration's support of SEP holders/innovators and reinstating the Obama Administration's antitrust policy discouraging SEP holders from seeking injunctive relief based on the threat of an antitrust claim and treble damages, thereby stifling innovation.

In April 2021, the DOJ Antitrust Division under the Biden Administration reclassified the 2020 Supplement to the 2015 BRL that provided the DOJ's antitrust enforcement intentions with respect to the IEEE's Updated Patent Policy restricting the injunctive relief and royalties available to SEP patent holders/innovators. As previously discussed, the DOJ's 2020 Supplement corrected the DOJ's 2015 BRL and advised that the 2015 BRL is not an endorsement of that policy and any representation by IEEE that the DOJ has endorsed the policy is wrong, causes confusion, and must stop. The DOJ Antitrust Division under the Biden Administration reclassified the 2020 Supplement by removing it from IEEE's 2015 review file to the DOJ's "comments and advocacy" Antitrust Division webpage. This effectively reinstated the 2015 BRL and the DOJ's business review that it does not intend to bring an enforcement action against the conduct addressed in IEEE's Updated Patent Policy.[18]

On July 20, 2021, the Biden Administration announced the nomination of Jonathan Kanter for Assistant Attorney General of the DOJ Antitrust Division. The announcement by the White House Briefing Room states that Mr. Kanter "is a distinguished antitrust lawyer with over 20 years of experience. Throughout his career, Kanter has also been a leading advocate and expert in the effort to promote strong and meaningful antitrust enforcement and competition policy." This could be a signal that the DOJ is positioning itself to apply the antitrust laws more aggressively to challenge SEP patent holders'/innovators' conduct in seeking injunctive relief to enforce their patents. Indeed, Mr. Kanter is already on record as stating: "The Antitrust Division will carefully scrutinize opportunistic conduct by any market player that threatens to stifle competition in violation of the law, with a particular focus on abusive practices that disproportionately affect small and medium sized businesses or highly concentrated markets. . . . I am hopeful our case-by-case approach will encourage good-faith efforts to reach F/RAND licenses and create consistency for antitrust enforcement policy so that competition may flourish in this important sector of the U.S. economy."[19]

The DOJ Under the Biden Administration and Split Opinions Among FTC Commissioners Are Already Weighing in After the Withdrawal of the Trump Administration's 2019 Policy Statement

Contrary to the Trump Administration's 2019 policy that antitrust law should not be used as a tool to police FRAND commitments, the DOJ Antitrust Division under the Biden Administration has already made it clear that it will bring antitrust enforcement actions to police FRAND commitments. Jeffrey Wilder, DOJ Antitrust Division Economics Director of Enforcement, made the case for antitrust enforcement at the IAM and GCR Connect SEP Summit on September 29, 2021:

> First, the Antitrust Division will open investigations and bring enforcement actions when anticompetitive conduct – by SEP holders or any other participants in the standards development process – harms competition. That does not mean that every licensing dispute invites an antitrust challenge. Antitrust claims are not a panacea for failed bilateral negotiation. But antitrust can and should play a role when the standards-setting process is used to thwart competition and harm consumers.[20]

Mr. Wilder pointed out that "[t]he Antitrust Division plans to work in partnership with USPTO and NIST and consult with the FTC on how best to respond to the Executive Order's call for a more procompetitive and balanced policy."[21]

However, there is already a split among the FTC Commissioners regarding the availability of injunctive relief for SEP holders/innovators enforcing FRAND-encumbered SEPs. Certain FTC Commissioners recognize that only hold-up may be an antitrust issue and encourage the broad use of the FTC's Section 5[22] authority to target SEP holders/innovators. These same FTC Commissioners promote the restriction of injunctive relief as a remedy for SEP holders/innovators with respect to the enforcement of FRAND-encumbered SEPS. This approach targeting SEP holders/innovators and limiting the full scope of their remedies stifles innovation and can have serious implications for the U.S. economy.

By way of example, on May 17, 2022, FTC Chair Lina M. Khan and FTC Commissioner Rebecca Kelly Slaughter filed a corrected (re-submitted with signatures) Written Submission On The Public Interest Of Federal Trade Commission Chair Lina M. Khan And Commissioner Rebecca Kelly Slaughter (Khan and Slaughter Public Interest Statement) in Certain UMTS and LTE Cellular Communication Modules and Products Containing the Same, Inv. No. 337-TA-1240. The statement "was not subject to a Commission vote and therefore did not represent the views of the Federal Trade Commission, and omitted the standard disclaimer that '[t]he views reflected in [the] statement are [their] own and do not necessarily reflect the view of the Commission or of any other Commissioner.'"[23] FTC Chairman Khan and FTC Commissioner Slaughter advised that they "take no position on the facts of Investigation No. 1240" and their public interest statement "does not address whether seeking an exclusion order for FRAND-encumbered SEPs would violate" Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, or Sections 1 or 2 of the Sherman Act, 15 U.S.C. §§1-2."[24]

FTC Chair Khan and Commissioner Slaughter focused solely on their concern regarding the issue of hold-up with respect to SEP patent holders/innovators assertion of FRAND-encumbered standard essential patents in addressing the following important issue: "Is it in the public interest to issue an ITC exclusion order based on a standard essential patent (SEP) where a United States district court has been asked to determine fair, reasonable, and non-discriminatory (FRAND) licensing terms?"[25] They stated: "We are increasingly concerned that SEP holders who have committed to license SEPS on fair, reasonable, and non-discriminatory (FRAND) terms are seeking exclusionary orders to ban products from the marketplace for the purpose of gaining leverage over existing or potential licensees."[26] Based on this concern, they made several broad statements that an ITC exclusion order in such circumstances would be contrary to the public interest:

> In our view, where a complainant seeks to license and can be made whole through remedies in a different U.S. forum, an exclusion order barring standardized products from the United States will harm consumers and other

market participants without providing commensurate benefits.[27]

* * *

Particularly where the standard implementer is a willing licensee – including cases where the implementer commits to be bound by terms that either the parties themselves will determine are FRAND or that will be determined by a neutral adjudication in a court proceeding – an exclusion order would be contrary to the public interest.[28]

* * *

As a general matter, exclusionary relief is incongruent and against the public interest where a court has been asked to resolve FRAND terms and can make the SEP holder whole.[29]

* * *

When a District Court can make a complainant whole, both for past royalties with prejudgment interest and by establishing a future royalty rate, even a limited exclusion order is not in public interest.[30]

The foregoing "pro-implementer" policy was soundly criticized by FTC Commissioner Christine S. Wilson in her Remarks entitled "SEPs and FRAND at the FTC and ITC: Current Policy Proposals and Respect for IP Rights" for the "IP & Antitrust: Hot Issues" Conference by Concurrences Review dated June 8, 2022. The Wilson Remarks start by including a footnote stating that "[t]he views expressed in these remarks are my own and do not reflect the views of the Federal Trade Commission or any other Commissioner."

The foregoing "pro-implementer" policy was soundly criticized by FTC Commissioner Christine S. Wilson in her Remarks.

FTC Commissioner Wilson first points out that a "pro-implementer" policy places "too little emphasis on the incentives for innovation afforded by strong IP rights, which could have serious implications for the U.S. economy."[31] The pro-implementer policy further views only hold-up as an antitrust issue, and that the actions of patent implementers are immune from scrutiny under those same laws. FTC Commissioner Wilson criticized her colleagues, FTC Chair Khan and FTC Commissioner Slaughter, for applauding the broad use of the FTC's Section 5 authority to target SEP holders/innovators and citing the FTC's action against Qualcomm[32] for support.

On the one hand, pro-implementers claim that implementers are "small and mid sized entities" incapable of defending when SEP holders/innovators leverage their market power.[33]

Judge Rodney Gilstrap held that there was no justification for requiring Apple to accept Ericsson's offer even if it is determined to be FRAND.

However, on the other hand, implementers are often large, well-financed companies that can handle their market disputes just fine on their own. For example, in the FTC's case against Qualcomm, "the District Court spent the bulk of its time on anticompetitive practices in patent license negotiations involving large and sophisticated OEMs like Sony, Samsung, Huawei, Motorola, Lenovo, Blackberry, Apple, and ZTE. It spent relatively little time discussing patent license negotiations involving smaller companies, including 'smaller Chinese OEMs.'"[34] FTC Commissioner Wilson expressed her concern "that if the FTC inserts itself into FRAND licensing disagreements, the cases will look a lot like Qualcomm, where the FTC put its thumb on the scale to benefit large and sophisticated implementers like Apple and Huawei."[35]

Second, just as the eBay factors in the federal district courts can address the unique aspects of FRAND-encumbered SEPs and industry standards, FTC Commissioner Wilson points out that the "ITC's public interest analysis already accounts for" the pro-implementer concerns, including that "even firms that are willing and able to take FRAND licenses can be excluded from the market" and a "royalty negotiation that occurs under threat of an exclusion order may be weighted heavily in favor of the patentee in a way that is in tension with the FRAND commitment because a licensee may agree to pay supra-FRAND royalties to avoid being excluded from the market."[36]

FTC Commissioner Wilson further points out that the policy proposal advocated by FTC Chair Khan and FTC Commissioner Slaughter extends beyond "willing licensees" and a "royalty negotiation that occurs under the threat of an exclusion order," which both can be addressed by the ITC public interest factors. FTC Chair Khan and FTC Commissioner Slaughter advocate "a per se proposition that '[a]s a general matter, exclusionary relief is incongruent and against the public interest where a court has been *asked* to resolve FRAND terms and can make the SEP holder whole.'"[37] FTC Commissioner Wilson's response is that the ongoing FRAND-encumbered SEP infringement dispute, Ericsson Inc. v. Apple Inc.,[38] "provides a handy vehicle" for considering the consequences of this approach.

FTC Commissioner Wilson stated that this decision underscores the problem with the pro-implementer approach taken by FTC Chair Khan and FTC Commissioner Slaughter that an injunction at the ITC should not be available if "a court has been asked to resolve FRAND terms and can make the SEP holder whole."

Ericsson requested that Apple be ordered to confirm that "Apple has committed to accept and perform under the terms of Ericsson's offer if it is found to be FRAND."[39] The Honorable Judge Rodney Gilstrap held that there was no justification for requiring Apple to accept Ericsson's offer even if it is determined to be FRAND[40]:

> if Ericsson's offer is found to be FRAND, then Apple may accept it and create a binding contract; Apple may reject it and not implement Ericsson's patented technology; or Apple may reject the FRAND offer, implement Ericsson's technology without the benefit of a license and subject itself to actions for infringement. The Court knows of nothing unique to the SEP scenario that alters these principles of black letter contract law.

Without addressing or drawing any conclusions regarding Apple's conduct in this case, FTC Commissioner Wilson stated that this decision underscores the problem with the pro-implementer approach taken by FTC Chair Khan and FTC Commissioner Slaughter that an injunction at the ITC should not be available if "a court has been asked to resolve FRAND terms and can make the SEP holder whole."[41] FTC Commissioner Wilson explained that the delay caused by implementers who hold-out, and are not required to accept an offer even after a district court concludes it is a FRAND offer, can "disincentivize innovation[42]:

FTC Commissioner Wilson concluded that a mere request for an injunction, absent sham litigation or Walker Process Fraud, including fraud on an SDO by failing to disclose SEPs to the SDO during the standard development process, should not trigger antitrust liability.

> In light of Judge Gilstrap's ruling, one might be tempted to ask how long it will take for the SEP holder to be made whole, and to inquire about the consequences in the interim. This approach interferes with timely royalty payments, which fund future research and further innovation. It compromises pro-competitive standards development. It also harms the implementers that paid FRAND rates on a timely basis and must compete with implementers that engage in holdout. If the companies that engage in holdout are large companies like Apple that can fund ongoing litigation, then favoring implementers in FRAND disputes will help large companies over small competitors.

Thus, according to this Order issued by Judge Gilstrap, even if a federal district court finds that an SEP holder's/innovator's offer is FRAND, an implementer does not need to accept that offer and take a license.

Finally, FTC Commissioner Wilson concluded that a mere request for an injunction, absent sham litigation or Walker Process Fraud, including fraud on an SDO by failing to disclose SEPs to the SDO during the standard development process, should not trigger antitrust liability. In her view, contract law and patent law, applying the eBay factors in federal district courts and public interest factors in the ITC, as discussed above, "are better suited to resolving these disputes."[43]

Notes

1. A patent is FRAND-encumbered where a patent holder has voluntarily agreed to license the patent on fair, reasonable and non-discriminatory (FRAND) terms while participating in standards-setting activities at a standards-developing organization (SDO).
2. eBay Inc. v. MercExchange, LLC, 547 U.S. 388, 391-93 (2006) ("According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.").
3. While a U.S. federal district court can award remedies in the form of damages or an injunction, the only remedy available in an ITC Section 337 proceeding is an injunction in the form of a limited exclusion order (Section 337(d)(1) directing U.S. Customs and Border Protection to exclude imported infringing articles of named respondent(s) in the investigation), a general exclusion order (Section 337(d)(2) directing U.S. Customs and Border Protection to exclude all imported infringing articles, regardless of source), a cease desist order (Section 337(f) prohibiting named respondent(s) from selling, marketing, or advertising infringing articles from inventory in the U.S.) and a consent order (respondent(s) consent to cease importing and selling infringing product). The ITC determines whether to issue an exclusion order by considering its effect on the following public interest factors (Section 337 (d)(1), (e)(1), (f)(1) and (g)(1)): the public health and welfare; competitive conditions in the United States economy; the production of like or directly competitive articles in the United States; and United States consumers. The legislative history of Section 337 also lists U.S. foreign relations, economic and political as another public interest factor. S. Rep. No. 93-1298, 93rd Cong. 2d Sess. 199 (1974).
4. The DOJ is the executive-branch agency charged with promoting and protecting competition for the benefit of American consumers.
5. The USPTO is the executive-branch agency charged with examining patent and trademark applications, issuing patents and registering trademarks, and – through the Secretary of Commerce – advising the president on domestic and certain international issues of intellectual property policy. See 35 U.S.C. §§1, 2.
6. The Obama Administration's 2013 Policy Statement states that "a patent is RAND- or FRAND-encumbered where a patent holder has voluntarily agreed to license the patent on reasonable and non-discriminatory (RAND) terms or fair, reasonable, and non-discriminatory (FRAND) terms while participating in standards-setting activities at a standards-developing organization (SDO). . . . For purposes of this letter, F/RAND refers to both types of licensing commitments." For purposes of this article, the author uses the term FRAND to refer to both types of licensing commitments.
7. The president disapproved the ITC's issuance of an exclusion order on public interest grounds only five times previously, and not since 1987. See Welded Stainless Steel Pipe and Tube, Inv. No. 337-TA-29 (Feb. 1978); Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof, Inv. No. 337-TA-82 (Nov. 1981); Molded-In Sandwich Panel Inserts and Methods for their Installation, Inv. No. 337-TA-99 (May 1982); Alkaline Batteries, Inv. No. 337-TA-165 (Nov. 1984), aff'd, Duracell Inc. v. U.S. Int'l Trade Comm'n, 778 F.2d 1578 (Fed. Cir. 1985); Dynamic Random Access Memories, Inv. No. 337-TA-242 (Nov. 1987).
8. Letter dated August 3, 2013 from Ambassador Michael B. G. Froman, The United States Trade Representative, Executive Office of the President, to The Honorable Irving A. Williamson, Chairman, United States International Trade Commission.
9. IEEE does not require that a patent holder provide an LOA. However, it considers the absence of an LOA when deciding whether to approve a draft standard that includes patented technology.
10. Ericsson, Inc. v. D_Link Systems, Inc., 773 F.3d 1201, 1232 (Fed. Cir. 2014).
11. NIST is the executive-branch agency charged with facilitating standards-related information sharing and cooperation among federal agencies and with

coordinating federal agency participation in, and use of, private sector standards, emphasizing where possible the use of standards developed by private, consensus organizations, and – through the Secretary of Commerce – advising the president on standards policy pertaining to the nation's technological competitiveness and innovation ability. See 15 U.S.C. §272(b). NIST did not join in the Obama Administration 2013 Policy Statement.

12. Kathryn Jordan Mims and Jaclyn Phillips, DOJ Antitrust Division quietly walks back prior administration-era support of Standard Essential Patent Holders (May 26, 2021).
13. Exmark Mfg. Co. v. Briggs & Stratton Power Prod. Grp., 879 F.3d 1332, 1348 (Fed. Cir. 2018).
14. Executive Order No. 14,036, 86 Fed. Reg. 36987 §5(d) (July 9, 2021).
15. Apple, Inc. v. Motorola, Inc., 757 F.3d 1286, 1332 (Fed. Cir. 2104).
16. Jeffrey Wilder, "Leveling the Playing Field in the Standards Ecosystem: Principles for A Balanced Antitrust Enforcement Approach to Standards-Essential Patents," Remarks as Prepared by Antitrust Division Economics Director of Enforcement Jeffrey Wilder at the IAM and GCR Connect SEP Summit, DOJ News (September 29, 2021) at 5/7 ("*The Importance of Transparency* Finally, a few words about transparency. I believe the Division should strive to be transparent about our enforcement priorities in the SEP area. Transparency is important to ensure that firms participating in the standards ecosystem understand the Division's approach and avoid violating the antitrust laws. Our hope is that this speech and others to come will provide greater transparency into the Division's policy.").
17. Supra n.12.
18. Supra n. 15 at 4/7-5/7.
19. "Justice Department, U.S. Patent and Trademark Office and National Institute of Standards and Technology Withdraw 2019 Standards-Essential Patents (SEP) Policy Statement," DOJ News (June 8, 2022).
20. Supra n. 15 at 2/7.
21. Supra n. 15 at 4/7.
22. 15 U.S.C. § 45.
23. Christine S. Wilson, FTC Commissioner, "SEPs and FRAND at the FTC and ITC: Current Policy Proposals and Respect for IP Rights," Remarks for the "IP & Antitrust: Hot Issues" Conference Organized by Concurrences Review (June 8, 2022) (Wilson Remarks).
24. Khan and Slaughter Public Interest Statement at 1, n.1.
25. Id. at 1.
26. Id.
27. Id.
28. Id. at 5.
29. Id.
30. Id. at 6.
31. Wilson Remarks at 3.
32. FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019), rev'd and vacated, 969 F.3d 974 (9th Cir. 2020).
33. Rebecca Kelly Slaughter, FTC Commissioner, "SEPs, Antitrust, and the FTC," Remarks Prepared for Delivery for ANSI World Standards Week: Intellectual Property Rights Policy Advisory Group Meeting (October 29, 2021) at 4 ("As I noted at the start, competition and innovation from small and medium sized entities is most at risk of being inhibited or completely lost when SEP holders anti-competitively leverage their market power.").
34. Wilson Remarks at 4-5.
35. Wilson Remarks at 5.
36. Wilson Remarks at 5-6.
37. Wilson Remarks at 7. (Emphasis in original.)
38. Ericsson Inc. v. Apple Inc., Civil Action No. 2:21-cv-00376-JRG (E.D. Tex.).
39. Order at 1, Ericsson Inc. v. Apple Inc., Civil Action No. 2:21-cv-00376-JRG (E.D. Tex. May 2, 2022).
40. Id. at 4.
41. Khan and Slaughter Public Interest Statement at 5.
42. Wilson Remarks at 8-9.
43. Wilson Remarks at 10.