

COMMENTS OF FORMER ADMINISTRATION OFFICIALS  
ON DECEMBER 6, 2021 “DRAFT POLICY STATEMENT ON LICENSING  
NEGOTIATIONS AND REMEDIES FOR STANDARDS-ESSENTIAL PATENTS  
SUBJECT TO VOLUNTARY F/RAND COMMITMENTS”

**I. Introduction**

These comments reflect the joint and consistent policy views of former officials from Democratic and Republican Administrations, who have served in various capacities in the Administrations of Presidents Clinton, Bush, Obama, and Trump. We write to express our shared concerns regarding an apparent pivot in longstanding national intellectual property (IP) policy that threatens our nation’s role as the worldwide leader in innovation, and by extension, our economic success and national security.

The authors<sup>1</sup> include former heads of the U.S. Department of Justice Antitrust Division (DOJ Antitrust), the U.S. Patent and Trademark Office (USPTO), and the National Institute of Standards and Technology (NIST):

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- David J. Kappos served as the Under Secretary of Commerce for Intellectual Property and Director of the USPTO under President Barack Obama from 2009-2013.
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<sup>1</sup> The views expressed herein are personal to the authors, and do not represent the views of firms, companies, institutions, clients, or any others with whom they may be affiliated.

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Our leadership roles at DOJ Antitrust, the USPTO, and NIST spanning multiple Administrations afford us valuable insight regarding the deliberations of the agencies considering the December 6, 2021 *Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (Draft Statement). We also have direct experience with the existing December 19, 2019 *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (2019 Policy Statement), and the prior January 8, 2013 *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments* (2013 Policy Statement). Indeed, several of us were involved in crafting those policy statements, and we draw on that experience, as well as our decades of antitrust and IP expertise, in submitting these joint comments on the Draft Statement.

Standardization plays a fundamental role in the development and implementation of the foundational technologies at the core of critical global infrastructure. Enforceable Standard-Essential Patent (SEP) protection enables the investments necessary to develop and contribute technology to these standards, while commitments to fair, reasonable, and non-discriminatory (FRAND) licensing terms likewise enable the investments necessary to implement these standards at scale. This balance is critical yet fragile. SEP licensing involves complex incentives, highly sophisticated markets, and worldwide portfolio considerations. Balancing the interests at play in the high-stakes negotiations underlying SEP license agreements is treacherous, as even seemingly small policy changes can have outsized impacts. Therefore, SEP policies should not be based on ideology or theory; instead they should be data-driven and should consider the practical impact on industry and relevant geopolitical realities.

We have come together to express concern that the Draft Statement would upset this balance and threaten the standardized technology ecosystem. As currently drafted, it would severely tip the scales against SEP holders who contribute technology to standards development organizations (SDOs). In turn, this would reduce the likelihood of private sector investments in the United States in the research and development that leads to standards-implemented technologies. As a result, fewer standardized technologies would be created in the United States, further strengthening the hand of our international competitors. Indeed, if adopted, the Draft Statement would work great harm to the American innovation economy and send a dangerous message to our global competitors regarding the value and enforceability of intellectual property rights. Moreover, the Draft Statement is a solution in search of a problem. It primarily targets theoretical concerns of “holdup” conduct by SEP owners that have not, in fact, been proven. We urge the Administration to tread carefully before implementing such a significant shift in policy, particularly so closely on the heels of the jointly issued 2019 Policy Statement.

**II. The Draft Policy Statement Is Disconnected from the Realities of SEP Licensing and Contrary to U.S. and European Consensus Regarding Holdout.**

The Draft Statement appears tailored primarily to address alleged “opportunistic conduct by SEP holders to obtain, through the threat of exclusion, higher compensation,”<sup>2</sup> often referred to as “holdup” by implementers and potential licensees. In a significant departure from the 2019 Policy Statement, the Draft Statement purports to remediate holdup concerns by broadly declaring that “monetary remedies will usually be adequate to fully compensate a SEP holder for infringement.”<sup>3</sup> The Draft Statement does not cite data supporting this pronouncement; nor are we aware of meaningful supportive evidence. To the contrary, removing the realistic possibility of an injunction incentivizes dilatory “holdout” behavior by unwilling licensees that often leads to sub-FRAND compensation to SEP holders. The Draft Statement’s new pronouncement also runs counter to its own immediately preceding statement declining to “adopt[] a unique set of legal rules for SEPs subject to F/RAND commitments.”<sup>4</sup>

The Draft Statement seemingly acknowledges the risk of holdout, describing potential problems “when standard implementers are unwilling to accept a F/RAND license or delay licensing negotiations in bad faith.”<sup>5</sup> Yet the Draft Statement does nothing to curb such opportunistic behavior. Quite the opposite, in fact. Despite recognizing the competing interests involved, the Draft Statement embraces a policy of constricted remedies that would exacerbate the demonstrated problem of holdout. Without the backstop of injunctive relief, SEP holders have little leverage to bring unwilling licensees to the bargaining table, much less secure royalties. After all, if the only likely consequence of delay amounts to no more than the FRAND terms already on the table, opportunistic implementers (especially those with large legal budgets) can draw out negotiations and litigation, depriving SEP holders of revenue and saddling them with enormous legal expenses, with particularly harmful consequences to small innovators.<sup>6</sup> The net effect of this policy shift tilts the scales significantly in favor of those who seek to evade royalty obligations.

To avoid such unintended consequences, the Administration should employ an evidence-based approach to balancing competing allegations of holdup and holdout. Despite academic and theoretical speculation to the contrary, decades of experience with licensing have failed to generate meaningful data to support allegations of “holdup” on non-FRAND terms.<sup>7</sup> The Draft

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<sup>2</sup> Draft Statement at 4.

<sup>3</sup> *Id.* at 8.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 4.

<sup>6</sup> The former head of patent licensing at one well-known standards implementer explained that “‘efficient infringement,’ where the benefits outweigh the legal costs of defending against a suit, could almost be viewed as a ‘fiduciary responsibility,’ at least for cash-rich firms that can afford to litigate without end.” *The Trouble with Patent-Troll Hunting*, THE ECONOMIST (Dec. 14, 2019), <https://www.economist.com/business/2019/12/14/the-trouble-with-patent-troll-hunting>.

<sup>7</sup> See, e.g., Alexander Galetovic & Kirti Gupta, *The Case of the Missing Royalty Stacking in the World Mobile Wireless Industry*, 29 IND. & CORP. CHANGE 827 (2020); Alexander Galetovic, Stephen Haber & Lew Zaretski, *An Estimate of the Average Cumulative Royalty Yield in the*

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Statement itself does not cite evidence to support assertions that SEP owners are leveraging patent remedies to extort implementers on unfair terms.<sup>8</sup> If current policies are in fact creating the problems the Draft Statement purports to solve, then those seeking to alter the policies should provide actual evidence of harmful behavior in the marketplace.<sup>9</sup>

On the other hand, courts actually are finding examples of “holdout” behavior by implementers, designed to depress royalties while withholding critical revenue streams from SEP innovators. For example, the German Federal Court of Justice ruled against a Chinese implementer that failed to clearly and unambiguously declare its willingness to enter a license agreement on F/RAND terms and to expediently engage in actual licensing negotiations.<sup>10</sup> In another case, a UK court granted an injunction against an implementer that engaged in a “strategy of hold-out,” including years of “blow[ing] hot and cold as to whether they will accept whatever license is considered by the Court to be [F/RAND].”<sup>11</sup> The Draft Statement does not address these rulings.<sup>12</sup>

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*World Mobile Phone Industry: Theory, Measurement and Results*, 42 TELECOM. POL’Y 263 (2018); Alexander Galetovic, Stephen Haber & Lew Zaretski, *Is There an Anti-Commons Tragedy in the World Smartphone Industry?*, 32 BERKELEY TECH. L.J. 1529 (2017); J. Gregory Sidak, *What Aggregate Royalty Do Manufacturers of Mobile Phones Pay to License Standard-Essential Patents?*, 1 CRITERION J. INNOVATION 701 (2016); Keith Mallinson, *Cumulative Mobile SEP Royalty Payments No More Than Around 5% of Mobile Handset Revenues for IP Finance*, WISE HARBOR (2015).

<sup>8</sup> See Kirti Gupta & David Kappos, *For ‘Patent Wars’ Alarmists, Time to Make Peace with the Empirical Data* (forthcoming 2022) (providing empirical research demonstrating that normalized smartphone patent litigation rates are actually declining and that a handful of smartphone manufacturers—and one highly successful implementer in particular—drove the vast majority of patent litigation during recent spikes in such matters.).

<sup>9</sup> See, e.g., Jonathan M. Barnett, *Patent Groupthink Unravels*, 34 HARV. J.L. & TECH. 419, 444 (2021) (observing that, “counter to what has become conventional wisdom on SEP policy,” the “best available evidence indicates that this risk [of patent holdup and royalty stacking] does not appear to have been realized yet in any readily observable form”).

<sup>10</sup> *Sisvel v. Haier*, Bundesgerichtshof [BGH] [Federal Court of Justice] May 5, 2020 docket no. KZR 36/17 (Ger.).

<sup>11</sup> *TQ Delta LLC v ZyXEL Commc’ns Ltd.* [2019] EWHC (Pat) 745 (Eng.).

<sup>12</sup> The Draft Statement also fails to address various other types of tactics implementers have been using to put downward pressure on the value of SEPs. For example, implementer HTC unsuccessfully sued Ericsson, the SEP holder, because Ericsson would not accept a 96 percent reduction in royalty rate from \$2.50 per handset to 10 cents per handset. See *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476 (5th Cir. 2021). And implementers Xiaomi and Samsung have asserted so-called antisuit injunctions against SEP holders, purporting to restrict their ability to litigate their patent rights anywhere other than China. See *Ericsson Inc. v. Samsung Elecs. Co.*, No. 2:20-CV-00380-JRG, 2021 WL 89980 (E.D. Tex. Jan. 11, 2021); *InterDigital Tech. Corp. v. Xiaomi Commc’ns Co.*, Landgericht München [Munich Regional Court I], Feb. 25, 2021, 7 O 14276/20 (Ger.).

Moreover, the Draft Statement’s limitation on remedies runs counter to the U.S.-European consensus that holdout conduct is driving SEP litigation on the ground,<sup>13</sup> and that the availability of injunctive relief is often necessary to compel unwilling licensees to negotiate in good faith.<sup>14</sup> The Supreme Court of the United Kingdom, for example, recently held that the “possibility of the grant of an injunction . . . is a necessary component of the balance which the [SDO’s policy] seeks to strike, in that it is this which ensures that an implementer has a strong incentive to negotiate and accept FRAND terms for use of the owner’s SEP portfolio.”<sup>15</sup> Because SEP licensing negotiations typically address worldwide rights, the Draft Statement should acknowledge and explain any divergence from this pan-Atlantic consensus.

### **III. The Draft Statement Should Not Attempt to Define the Contours of Good-Faith Negotiations.**

Unlike the 2013 and 2019 Policy Statements, the Draft Statement attempts to set forth a framework for good-faith negotiations of SEP licensing disputes.<sup>16</sup> From our perspective, the government is poorly situated to dictate worldwide licensing negotiation strategies to the private sector. This is particularly true in the SEP context, which involves a highly dynamic marketplace filled with sophisticated players wielding significant resources and expertise. That is one reason why the 2013 and 2019 Policy Statements did not attempt to establish good-faith negotiation protocols regarding SEPs. Each case is unique and highly dependent on the facts and circumstances pertinent to that specific negotiation, including the technology and patents at issue, the relevant market, prior existing licenses, course of conduct between the parties, and much more. Private parties are best situated to determine how to conduct their negotiations. If disputes arise, the courts are well equipped to address the unique circumstances of each individual case.

While we understand the presumed goal of providing stakeholders with increased clarity and predictability, we respectfully find this effort misguided and unrealistic. It is misguided because the parties negotiating these agreements are frequently among the most sophisticated patent licensing experts. They do not need a government-imposed framework to circumscribe their negotiations, and they are likely to exploit any such framework against less sophisticated, often times smaller, parties. Attempting to define a one-size-fits-all negotiation framework is also unrealistic. The particular disputes and information asymmetries will present different challenges in each specific licensing negotiation, and parties inclined towards bad-faith tactics will find

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<sup>13</sup> See, e.g., European Commission, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE: SETTING OUT THE EU APPROACH TO STANDARD ESSENTIAL PATENTS 9-10 (Nov. 29, 2017) (recognizing that SEP holders may seek injunctions against unwilling licensees to discourage patent hold-out strategies); Case C-170/13, *Huawei Techs. Co. Ltd. v. ZTE Corp.*, ECLI:EU:C:2015:477 (July 16, 2015); *Sisvel v. Haier*, BGH [FCJ] May 5, 2020, KZR 36/17 (Ger.).

<sup>14</sup> See, e.g., Barnett, *supra* note 9, at 439 (documenting the “global shift” on remedies for SEP patents, trending towards the availability of injunctions against “unwilling licensees”).

<sup>15</sup> *Unwired Planet Int’l Ltd. v. Huawei Techs. (UK) Ltd.*, [2020] UKSC 37.

<sup>16</sup> Draft Statement at 5-7.

ways to exploit the suggested negotiation requirements against opponents while delaying meaningful advancement towards compromise.

Should the Administration nonetheless seek to define the contours of good-faith negotiations, we urge a more even-handed approach that recognizes and addresses evidence-based risks of opportunistic behavior from all corners. As currently drafted, the proposed framework is unbalanced because it imposes uneven burdens on SEP holders and implementers. For example, the Draft Statement suggests that SEP holders should provide significant disclosures to potential licensees at the outset of any licensing discussion, including information such as competitive licensing data that may be more readily available to the implementer.<sup>17</sup> Moreover, according to the Draft Statement, the potential licensee can respond simply by requesting additional information from the SEP holder.<sup>18</sup> In fact, the proposed framework does not contemplate any affirmative implementer disclosure requirements. As such, the Draft Statement provides little incentive to resolve licensing disputes. Indeed, the proposed framework would appear to tolerate an endless cycle of implementer requests for additional information and analyses from SEP holders without assuming any additional liability risk or exposure to injunctive remedies.

#### **IV. The Draft Policy Statement Is Unbalanced.**

As noted above, any SEP policy statement should be very carefully balanced to deter gamesmanship and promote widespread and efficient licensing of standardized technologies. The Draft Statement states that unreasonable royalty demands could stifle standards adoption and raise prices for consumers.<sup>19</sup> On the other hand, the Draft Statement recognizes that bad-faith delays in licensing negotiations can deter SEP holders from participating in the standards development process, potentially leading to closed, proprietary standards that limit interoperability and consumer choice.<sup>20</sup> But the potential downsides are far more significant than that. Those who have voluntarily contributed technology may simply decide that the hurdles to recouping their investments cannot be justified from a business perspective, resulting in capital being diverted away from technology destined for contribution to standards, or from technology-based innovation altogether. Decreased investments in research and development will necessarily lead to decreased innovation, which harms not only consumers but also our nation's global competitiveness. As discussed below, China is determined to overtake the United States in standards-implemented innovation, and that fact should inform any SEP policy debate.

By characterizing monetary damages as presumptively adequate, the Draft Statement ignores the impact of tactical delay on ongoing research and development budgets, the systemic costs of protracted litigation, and the limited statute of limitations. All of these factors raise the cost of participation in the standards ecosystem for SEP innovators, and as a result, will tend to depress innovation contributed to standards by U.S. companies.

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<sup>17</sup> Draft Statement at 5 & n.8.

<sup>18</sup> *Id.* at 5-6.

<sup>19</sup> *Id.* at 4.

<sup>20</sup> *Id.*

More specifically, because the Draft Statement imposes asymmetrical burdens that disadvantage SEP holders, and because it simultaneously limits the scope of remedies available against unwilling licensees, it will facilitate delay tactics frequently employed by implementers with monopolistic tendencies and foreign state-sponsored entities negotiating in bad faith. Indeed, the Draft Statement provides greater latitude and incentives to potential licensees to drag out negotiations and litigation as long as possible, inflicting maximum transactional costs and cash-flow pressure on SEP owners while effectively negotiating down from FRAND terms. Especially for small and medium-sized enterprise (SME) innovators (e.g., startups), these costs may prove unbearable, resulting in bankruptcy or industry exit long before any royalty realization.

#### V. The Draft Statement Would Disadvantage the United States on the Global Stage.

The Draft Statement also implicates national competitiveness concerns. China has made no secret of its determination to dominate standards-implemented technologies, and it has taken steps to bolster its intellectual property system in parallel with the Made in China 2025, Belt and Road, and Digital Silk Road Initiatives.<sup>21</sup> According to senior Chinese Communist Party officials: “Standards are the commanding heights, discourse power, and the power to control. Therefore, the one who obtains the standards gains the world.”<sup>22</sup> China’s efforts to dominate standardized technologies have extended to stacking international SDOs with national loyalists and enforcing block voting by Chinese companies,<sup>23</sup> attempting to buy loyalties through subsidized infrastructure,<sup>24</sup> and systematically depressing the value of non-domestic IP rights through tactics such as anti-suit injunctions.<sup>25</sup>

China does not view patent remedies in isolation. Neither should the United States. We need a holistic policy approach to innovation that incentivizes U.S. innovators to participate in the standards development process and protects our innovators from predatory holdout behavior. The Draft Statement would unfortunately do the opposite, implicitly condoning holdout tactics and providing cover for those seeking to use American technology without compensation. IP is one

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<sup>21</sup> See, e.g., Danny Russel & Blake Berger, *Is China Stacking the Technology Deck by Setting International Standards?*, THE DIPLOMAT (Dec. 2, 2021) (describing China’s “state-directed two-track strategy to gain a strategic and structural advantage by setting international technology standards”); see also U.S. House of Representatives, CHINA TASK FORCE REPORT 80-88 (Sept. 2020), which notes that the Chinese Communist Party “is pursuing an agenda to overtake the U.S. in innovation through massive subsidies, state-directed industrial policy, and theft of U.S. knowledge and research,” *id.* at 80, and “has taken steps over the past decade to rapidly modernize and strengthen its patent system to better compete with the U.S.,” *id.* at 82.

<sup>22</sup> Rush Doshi et al., *China as a “Cyber Great Power”: Beijing’s Two Voices in Telecommunications* 16 (Brookings Institution Apr. 2021), <https://www.brookings.edu/research/chinaas-a-cyber-great-power-beijings-two-voices-in-telecommunications/>.

<sup>23</sup> See, e.g., Russel & Berger, *supra* note 21.

<sup>24</sup> See, e.g., Philip Heijmans, *China’s Plan to Buy Influence and Undermine Democracy*, THE ATLANTIC, Oct. 18, 2017.

<sup>25</sup> See, e.g., Josh Zumbrun, *China Wields New Legal Weapon to Fight Claims of Intellectual Property Theft*, WALL ST. J., Sept. 26, 2021.

of the few U.S. exports that enjoys a favorable trade balance vis-à-vis China. It makes no sense as a matter of trade policy for the U.S. to decrease input costs for Chinese SEP infringers by weakening our own IP enforcement regime. Moreover, because SEP licenses are typically negotiated on a worldwide and portfolio-wide basis, holdout behavior by Chinese entities seeking depressed royalty rates impacts international license agreements as well. Gratuitously weakening patent rights in the United States not only gives state-sponsored Chinese entities a free pass, it also sends a message to allies who look to the U.S. for IP leadership.

Any revisions to U.S. policy involving SEPs should comport with the longstanding policy priority of Administrations across the political spectrum of promoting strong IP laws. This should not be controversial. Weakening enforcement mechanisms without evidence of SEP-holder misconduct serves only to advance the interests of those who seek to steal our intellectual property and minimize our role in developing and standardizing next-generation technologies.

## **VI. The Draft Statement Would Benefit from Additional Process.**

Barely two years have passed since DOJ, NIST, and the USPTO jointly issued the 2019 Policy Statement. Despite our combined expertise and engagement on intellectual property and antitrust matters, we are not aware of any evidence emerging in this limited intervening time establishing problematic behavior tied to that statement. The Draft Statement certainly does not identify any.

The 2019 Policy Statement was issued in large part to correct the misapplication of the prior 2013 Policy Statement in the ensuing years. The 2019 Policy Statement recognized that the 2013 Policy Statement “ha[d] been misinterpreted to suggest that a unique set of legal rules should be applied in disputes concerning patents subject to a F/RAND commitment that are essential to standards . . . and that injunctions and other exclusionary remedies should not be available in action for infringement of standards-essential patents.”<sup>26</sup> In other words, the 2013 Policy Statement came to be misinterpreted as creating a de facto prohibition on injunctive relief for SEP owners regardless of implementer behavior. This distorted the balance in the patent system, leading to less enforceability of SEPs, more litigation, and reduced standardized technology innovation in the United States.

The Draft Statement re-imposes the same restrictions on SEP owners that some had drawn incorrectly from the 2013 Statement. The Draft Statement poses a significantly worse problem than before, however, because now the intent is clear and the restrictions on injunctive relief are explicit and purposeful. Further upsetting the balance, the Draft Statement provides even fewer safeguards against holdout than the 2013 Statement. For example, the Draft Statement omits the 2013 Policy Statement’s recognition and discussion of certain types of delay and obstructionist conduct by implementers that could amount to a “constructive refusal to negotiate.”<sup>27</sup>

Furthermore, frequent swings in important policy positions disrupt the standardization process and SEP landscape, confusing stakeholders and depressing long-term research and development investment. They also politicize this area of policy, which should be—and historically has been—non-political. Such politicization again invites other countries to abandon good policy in favor of political whim in setting patent, antitrust, and standards policy.

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<sup>26</sup> 2019 Policy Statement at 4.

<sup>27</sup> 2013 Policy Statement at 7.

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For all of these reasons, we respectfully urge the Administration to tread carefully, verifying evidentiary predicates for any proposed revisions and considering the full spectrum of stakeholder interests before moving forward.

Given the complexity and geopolitical dimension of the issues addressed in the Draft Statement, the Administration should also fully engage the expertise of the relevant agencies. As of now, the next NIST and USPTO Directors have not yet been confirmed, much less had an opportunity to consider whether significant policy changes are called for, as well as the ramifications of a revised policy statement on such a consequential issue. The Draft Statement should not be presented as a *fait accompli* to the NIST and USPTO Director nominees, who did not have the opportunity to advise on the language or necessity of a revised policy statement.

### **VII. Conclusion**

We appreciate the opportunity to submit these comments on issues of such critical importance to our nation's sustained leadership in the enterprise of innovation. We stand ready to assist the Administration as it considers the concerns raised herein and charts the path forward for U.S. policy at the intersection of patent law, antitrust law and standards.

Respectfully,

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