

Comments on Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments

The draft policy statement presents a welcome return to the bipartisan balanced treatment of standard essential patents that—with the exception of the period from 2017 to 2020—has applied for the past two decades. Three central benefits of the statement are its balance, negotiation framework, and approach to remedies.

First, the statement is balanced. It explains how both sides of the negotiating table can engage in “opportunistic behavior.” P. 4. In particular, patentees can “seek[] injunctive relief in lieu of good-faith negotiation” and implementers can be “unwilling to accept a F/RAND license or delay licensing negotiations in bad faith.” *Id.*

The statement also discusses the harm from such bad faith: on the one side, “higher compensation for SEPs . . . can deter investment in and delay introduction of standardized products, raise prices, and ultimately harm consumers and small business.” *Id.* On the other side, “patent holders’ incentives to participate in the development process or contribute technologies to standards voluntarily” could be “lessen[ed],” which could result in “closed, proprietary standards that do not offer the same benefits of interoperability and enhanced consumer choice.” *Id.*

Such recognition of the harms on both sides presents a balanced perspective missing from the 2019 statement. That statement neglected the benefits of F/RAND rules and downplayed the opportunistic behavior in which patent holders could engage.

Second, the statement provides a helpful framework for negotiation. The 2019 statement asserted that the parties should “engage in good-faith negotiations” but did not elaborate on the concept. The proposed statement does just that, shedding light on a process that benefits from additional detail. While being clear that the examples provided are not exhaustive, p. 5 n.7, the statement sets forth a reasonable framework that imposes obligations on each side. The analysis also bears some similarity to the thoughtful frameworks offered by the European Court of Justice in *Huawei v. ZTE*, Case No. C-170/13, 16 July 2015, and Jorge Contreras in *A Framework for Evaluating Willingness of FRAND Licensees*, LAW 360, Mar. 16, 2021.

Third, the statement offers an approach to remedies that reflects the caselaw. At the core of the analysis is the *eBay* case, one of the most important patent-law decisions in the past generation. The statement sets forth what should be an uncontroversial default position under *eBay*: that “monetary remedies will usually be adequate to fully compensate a SEP holder for infringement.” *Id.* at 8.

The statement includes the Federal Circuit’s guidance that a party’s “FRAND commitments are certainly criteria relevant to its entitlement to an injunction.” *Id.* (citation omitted). That court—not known for insufficient protection of patent rights—also had explained that a F/RAND commitment would lead to the availability of monetary damages and to “difficulty establishing irreparable harm.” *Id.* at 8-9. And the statement appropriately explains that a F/RAND commitment will result in the *eBay* factors “generally militat[ing] against an injunction.” *Id.* at 9. But the statement also makes clear that injunctions *are* appropriate when

“an implementer is unwilling or unable to enter into a F/RAND license,” such as where a potential licensee “refuses to pay what has been determined by a court or another neutral decision maker to be a F/RAND royalty.” *Id.*

The statement’s discussion of remedies is consistent with the caselaw and sensible in light of patentholders’ promises. Along those lines, it resembles the 2013 statement, which was so reasonable that the Federal Circuit relied on it in determining when “an injunction may be justified” and overturning a district court that had “applied a *per se* rule that injunctions are unavailable for SEPs.” *Apple v. Motorola*, 757 F.3d 1286, 1331-32 (Fed. Cir. 2015).

In the past 15 years of bipartisan recognition of the potential harms of patent holdup, the period from 2017 to 2020 marked a radical detour. The 2019 statement was one of the most egregious examples of that misguided approach. See Michael A. Carrier, *New Statement on Standard-Essential Patents Relies on Omissions, Strawmen, Generalities*, BLOOMBERG LAW, Jan. 13, 2020.

The proposed statement promises a return to reasonableness. It offers a balanced approach that considers the potential abuses on both sides of the table, offers an elaborate framework for good-faith negotiation, and sets forth a strongly supported approach to remedies. The statement promises to play a crucial role in forging more robust standards development, with benefits for the U.S. economy and consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael A. Carrier". The signature is fluid and cursive, with the first name being the most prominent.

Michael A. Carrier
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