Before the
United States Department of Justice
Washington, DC

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

COMMENTS OF
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

The Computer & Communications Industry (CCIA)[1] submits the following comments in response to the Department of Justice's December 6, 2021 Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments ("2021 Draft Policy").[2]

CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. CCIA members are heavily involved in the development of major standards such as 5G, Open RAN, Bluetooth, and HDMI-HDCP. They are also some of the largest manufacturers of standards-based products in the world.

The 2021 Draft Policy represents a timely and significant improvement over the prior 2019 policy statement. The guidance in the 2021 Draft Policy ensures a level playing field between new entrants and incumbents as well as between innovative manufacturers like CCIA's members and pure licensing entities. The 2021 Draft Policy will thus help expand the ecosystem of manufacturers and suppliers, improving resilience and diversity in the nation's technology supply chain and reducing dependence on manufacturers with limited or no competition.

The 2021 Draft Policy will also provide innovators in the U.S. and elsewhere with confidence that they will be able to obtain licenses for patents that are essential to the standards they use in creating innovative products and services. Absent the 2021 Draft Policy, innovators that use standardized technology will be left with significant uncertainty, deterring investment in standardized technologies and placing the U.S. at a strategic disadvantage in an increasingly competitive global landscape. For these reasons, CCIA strongly supports adoption of the 2021 Draft Policy.

[1] A list of CCIA members is available online at https://www.ccianet.org/about/members.
[2] Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Dec. 6, 2021), https://www.justice.gov/opa/pr/public-comments-welcome-draft-policy-statement-licensing-negotiations-and-remedies-standards.

While CCIA supports adoption of the 2021 Draft Policy, CCIA believes there are three areas in which the 2021 Draft Policy could be further improved.

(1) CCIA believes that the 2021 Draft Policy should emphasize the commonality between the *eBay*[3] decision and the International Trade Commission's public interest obligation.

(2) CCIA believes that the 2021 Draft Policy should explicitly recognize that the presence of F/RAND licensing obligations—and, in particular, the non-discrimination obligation to license anyone who requests a license—mitigates the antitrust harms created by the agreement of competitors on whose patent will be included and whose patents will not.

(3) CCIA believes that the 2021 Draft Policy should not just mention but actually describe at least one additional good-faith bargaining approach. Structures such as licensee-initiated discussions can also represent good-faith attempts to obtain a license.

I. *eBay*, the ITC, and the Public Interest

As noted in the 2021 Draft Policy, while 19 U.S.C. § 1337 only permits exclusion orders as a remedy, the ITC is obligated to consider the "effect of [] exclusion upon 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."[4] This footnote appears in the context of discussing remedies for infringement of a valid and enforceable SEP and the impact of the *eBay* decision. Because ITC exclusion orders on SEPs allow a patent owner to extract not just the value contributed to the standardized product by the patented contribution but the entire value of both standardized and non-standardized features, with no opportunity to design-around the patent without discontinuing use of the standard, ITC exclusion orders should only be available for SEPs in limited circumstances.

CCIA believes that the ITC's public interest inquiry ought to be interpreted to replicate *eBay*'s four-factor test. In ITC cases, "all legal and equitable defenses may be presented."[5] As such, the *eBay* equitable limits on injunctive relief should apply to the ITC as well. Further, Congress wrote such equitable considerations into the ITC's organic statute.[6] These two statutory provisions, taken together with the Supreme Court's instruction in *eBay* that "a major departure from the long tradition of equity practice should not be lightly implied," suggest that Congress intended the ITC to employ the traditional equitable four-factor test prior to granting an exclusion order.

Doing so would not render ITC relief unavailable although it might limit its availability in the case of SEP-based ITC litigation. However, as the ITC has not to date issued any exclusion orders based on standard-essential patents, it is questionable whether such exclusion orders are necessary to encourage good faith license negotiation and promote licensing efficiency. Especially given that ITC litigation of SEP patents nearly always has a parallel district court litigation associated with it, actively emphasizing that the ITC's public interest inquiry will only rarely permit exclusion absent exacerbating factors would improve licensing efficiency by narrowing litigation forums and focusing the parties on the monetary value of the

[3] *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).
[4] 2021 Draft Policy at 7, n. 15 (citing 19 U.S.C. § 1337(d)(1).
[5] 19 U.S.C. § 1337(c).
[6] 19 U.S.C. § 1337(d)(1).

patented technology, rather than on the *in terrorem* impact of the threat of exclusion from the U.S. market.[7]

II. The Importance of the Non-Discrimination Prong of FRAND

All too often, discussion of the FRAND obligation focuses on the "fair and reasonable" portion of the obligation. While obtaining a fair and reasonable license price is important to an efficient and effective SEP licensing ecosystem, the "non-discriminatory" component is of equal or even greater importance. In particular, the 2021 Draft Policy should explicitly note that "non-discriminatory" licensing does not permit rejection of a license request purely because of the identity of the licensee—anyone who requests a license is entitled to the patent holder's provision of a good faith license offer.

This prong of the obligation is of particular importance in the context of the Department's work because it represents the obligation that most directly mitigates potential antitrust harms in the standardization process. Standard-setting is, in practice, a group of competitors agreeing with one another on what technology they will and won't use and pay for. Such an agreement would ordinarily be an anti-competitive horizontal agreement. Because standardization provides significant pro-consumer and pro-competition benefits, we permit standard-essential patents. The non-discrimination prong can mitigate the potential antitrust harms created by such a horizontal agreement. To mitigate these harms, non-discrimination requires offering a license to anyone who requests a license.

This interpretation complies with the admonition of the District Court in *Microsoft v. Motorola* that standard-setting organization policies "do not allow essential patent owners . . . to prevent competitors from entering the marketplace."[8] Absent such an obligation, an SEP holder could choose to license only OEMs, blocking potential competitors from obtaining the licenses they need to operate as plausible suppliers to the SEP holder's customers.

CCIA suggests that the 2021 Draft Policy include a statement that a FRAND obligation that either does not impose a 'license to all requestors' policy or that is interpreted not to do so may trigger antitrust concerns. Doing so would help avoid antitrust harms by ensuring that licensors offer the required licenses.

III. Recognize That Good-Faith Negotiations Happen in Many Ways

While the 2021 Draft Policy does note that "good-faith negotiation can be accomplished in more than one way" and that the description provided in the statement is not intended to be exhaustive, the description provided focuses on an SEP owner going to a potential licensee and making them a good-faith offer. It would be helpful for the 2021 Draft Policy to explicitly recognize that the reverse situation, with a potential licensee seeking out an SEP holder and requesting a license, may occur. This is particularly true given the antitrust implications of an

[7] Denial of ITC exclusion orders does not deny all remedy. The vast majority of ITC litigations—79%—include parallel district court litigation between the same parties over the same patents. *See* Charles Duan, *The U.S. International Trade Commission: An Empirical Study of Section 337 Investigations*, R Street Policy Study No. 246 at 9 (Nov. 2021), https://www.rstreet.org/wp-content/uploads/2021/11/REALFINAL_22Nov21_RSTREET246-1.pdf.

[8] *Microsoft Corp. v. Motorola, Inc.*, 871 F. Supp. 2d 1089, 1093 (W.D. Wash. 2012).

SEP holder refusing to license potential competitors, described *supra*—a refusal to license a supplier should be treated as evidence of bad faith on the part of the patent holder.

In order to help emphasize this aspect of potential good-faith license negotiations, it would be helpful for the 2021 Draft Policy to explicitly note that licensing negotiations can be initiated by the licensee, not just the licensor, and that good faith requires the licensor to respond to such a request with a fair, reasonable, and non-discriminatory license offer.

IV. Conclusion

CCIA thanks the Department of Justice, U.S. Patent and Trademark Office, National Institute of Standards and Technology, and Federal Trade Commission for their hard work in developing the 2021 Draft Policy. The 2021 Draft Policy represents a significant improvement in U.S. government policy regarding standard-essential patents and should be adopted. CCIA believes that the suggestions above would strengthen the 2021 Draft Policy, and we would be happy to work with DOJ, USPTO, NIST, and the FTC on these or any other proposed changes.

Respectfully submitted,

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February 4, 2022