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Department of Justice

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Justice Department, U.S. Patent and Trademark Office and National Institute of Standards and Technology Withdraw 2019 Standards-Essential Patents (SEP) Policy Statement

The Withdrawal “Best Serves the Interests of Innovation and Competition,” Conclude the Three Agencies

The Department of Justice, U.S. Patent and Trademark Office (USPTO) and the National Institute of Standards and Technology (NIST) (the Agencies) announced today the withdrawal of the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2019 Statement). After considering public input on the 2019 Statement and possible revisions, the Agencies have concluded that withdrawal of the 2019 Statement is the best course of action for promoting both competition and innovation in the standards ecosystem.

On Jan. 8, 2013, the Antitrust Division of the Department of Justice and the U.S. Patent and Trademark Office (USPTO) issued a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (2013 Statement). On Dec. 19, 2019, the Agencies withdrew the 2013 Statement and issued the 2019 Statement, which offered the views of the Agencies and expressly recognized that it had “no force or effect of law.”

In July 2021, President Biden issued an Executive Order on Promoting Competition in the American Economy, noting that, “[a] fair, open, and competitive marketplace has long been a cornerstone of the American economy.” He encouraged the Agencies to review the 2019 Statement to ensure that it adequately promoted competition.

In response to the Executive Order, on Dec. 6, 2021, the Agencies issued a Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments and a request for public comments through a Dec. 6, 2021 news release, extending the deadline for comments in a Dec. 13, 2021 news release. The Agencies thank the wide range of individuals, organizations and other stakeholders who submitted comments, all of which have been considered.

After a review of those comments and a collaborative deliberation on how best to proceed, the Agencies are announcing the withdrawal of the 2019 Statement. As noted in the Withdrawal of the 2019 Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, “[a]fter considering potential revisions to that statement, the Agencies have concluded that withdrawal best serves the interests of innovation and competition.”

“The U.S. Patent and Trademark Office is focused on creating incentives to generate more innovation, especially in underserved communities and in key technology areas, and maximizing that innovation’s widespread impact,” said Under Secretary of Commerce for Intellectual Property and USPTO Director Kathi Vidal. “Forging our global leadership in new industries cannot happen without greater investment in research and development in technologies that may become international standards. We also need greater U.S. engagement in global standards-setting organizations from our large multi-national companies, as well as from small- to medium-sized businesses and start-ups. I stand behind any measure that will enable innovation that will drive sustainable, long term growth in the U.S. economy.”

“The withdrawal of the 2019 Statement will strengthen the ability of U.S. companies to engage and influence international standards that are essential to our nation’s technology leadership and that will enable the global technology markets of today and tomorrow,” said Under Secretary of Commerce for Standards and Technology and NIST Director Laurie E. Locascio. “A common thread in so many of the thoughtful stakeholder comments we received is a commitment to America’s industry-led, voluntary, consensus-based approach to standards development. This approach consistently delivers the best technical solutions, and I wholeheartedly support it.”

“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,” said Assistant Attorney General Jonathan Kanter of the Justice Department’s Antitrust Division. “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.”

In exercising its law enforcement role, the Justice Department will review conduct by standards essential patent (SEP) holders or standards implementers on a case-by-case basis to determine if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition. In addition, in accord with President Biden’s Executive Order, the Agencies plan to continue to cooperate as appropriate on matters that affect the intersection of competition, standards development and intellectual property rights.

Standards-developing organizations (SDOs) and the widespread and efficient licensing of SEPs on reasonable and non-discriminatory (RAND) or fair, reasonable and non-discriminatory (FRAND) terms (collectively F/RAND) help to promote technological innovation, further consumer choice, and enable industry competitiveness, including in emerging technologies and by new and small-to medium-sized market entrants.

SDOs may require parties participating in the standards development process to voluntarily commit to making patents essential to the standard available on F/RAND terms. The specific F/RAND commitments are contractual obligations that vary by SDO. U.S. laws and regulations govern the interpretation of those contractual obligations and otherwise govern the conduct of parties participating in SDOs.

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