COMMENTS IN OPPOSITION TO BIDEN ADMINISTRATION'S DRAFT POLICY STATEMENT ON STANDARD-ESSENTIAL PATENTS

Former Government Leaders of DOJ Antitrust, USPTO and NIST
https://www.regulations.gov/comment/ATR-2021-0001-0086

Christine A. Varney, Former Assistant Attorney General for DOJ Antitrust (2009-2011)
Makan Delrahim, Former Assistant Attorney General for DOJ Antitrust (2017-2021, 2003-2005)
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Patrick D. Gallagher, Ph.D., Former Director of NIST (2009-2014)
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"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."

Defense and National Security Experts
Center for Strategic & International Studies – Renewing American Innovation Project
https://www.regulations.gov/comment/ATR-2021-0001-0106

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"Upon review, it is apparent that this draft policy will disincentivize innovation in the United States, particularly by small and medium enterprises. By denying standard essential patents (SEPs) critical remedies (such as seeking injunctions) that are available to other types of patents, the draft's proposal reduces the ability of SEP owners to negotiate licenses for their patents on reasonable terms or enforce them against a growing number of implementers who are refusing to negotiate. By weakening the American intellectual property system, the 2021 Draft Policy Statement will harm U.S. national security and competitiveness.

"What is more, the largest short-term and long-term beneficiaries of the 2021 Draft Policy Statement are firms based in China. Currently, China is the world's largest consumer of SEP-based technology, so weakening protection of American owned patents directly benefits Chinese manufacturers. The unintended effect of the 2021 Draft Policy Statement will be to support Chinese efforts to dominate critical technology standards and other advanced technologies, such as 5G. Put simply, devaluing U.S. patents is akin to a subsidized tech transfer to China…

"China has strong ambitions and a growing investment in leading in critical technology standards. Although U.S. companies are currently leading in several key areas, numerous reports have confirmed that China is rapidly closing the gap. This is because China has recognized the strategic importance of standards in key technological sectors. In 2015, President Xi Jinping observed that "standards are the commanding heights, the right to speak, and the right to control. Therefore, the one who obtains the standards gains the world." China has accordingly embarked on an expansive and well-coordinated strategy to strengthen its role in technology standards. Most recently, in 2020, it announced its "China Standards 2035 Plan" to set global standards for emerging technologies such as 5G, Internet of Things (IoT), Artificial Intelligence (AI), and clean energy."

Senators Chris Coons (D-DE), Mazie Hirono (D-HI) and Thom Tillis (R-NC)
https://www.regulations.gov/omment/ATR-2021-0001-0144

"We have significant concerns about the process and substance of the ongoing effort to revise this policy that is central to protecting and encouraging standards-setting activity by U.S. corporations… In our view, the existing guidance issued in 2019 properly balances incentivizing SEP research and development with our domestic and global interests. The proposed revision to that guidance, published on December 6, 2021, returns U.S. policy to its harmful prior position of favoring standards implementers over SEP owners in license negotiations. The unbalanced posture struck by the revision will embolden strategic infringers and disincentivize U.S. research and development in these critical technologies. In turn, that risks disadvantaging the ability of U.S. industry to compete with domestic and global rivals, and weakening our national ability to compete with countries like China that are actively seeking to dominate the next generation of technological standards. If any changes to existing policy are to occur, the draft revision should be set aside to permit a process that provides meaningful evaluation of these complex issues. That process should await Senate-confirmed leadership at the USPTO and NIST before beginning, and solicit the valuable perspectives of government and public stakeholders. That process must include assessing the interplay between policy here and national security interests…

"Given the significance of the issue, concern has been repeatedly expressed that any policy revision be carefully considered and subject to a fair process. At a minimum, fair process here requires that any revision wait for Senate-confirmed leadership at DOJ Antitrust, USPTO, and NIST, to permit input from politically accountable officials with policy experience in this area. Similarly, any revision process must include adequate opportunity for interested stakeholders to offer their views on the wisdom and direction of any changes. These concerns were raised by members with Attorney General Garland, Deputy Attorney General Monaco, White House officials, Assistant Attorney General Kanter, and Kathi Vidal (President Biden's nominee for USPTO Director). The collective response was that these concerns were valid and that a fair process would be afforded.

"Thus, we were disappointed by the DOJ's December 6, 2021 request for public comments ("DOJ comment request") that provided for a small input window on an already drafted revision shared the same day ("2021 Draft Revision"). First, undertaking such a significant policy revision when neither USPTO nor NIST have confirmed leadership undermines the accountability and transparency of the process. That nominations for leadership at USPTO and NIST were pending at the time the 2021 Draft Revision and DOJ comment request were issued makes the rush to revise the policy even more concerning. That is particularly true for Ms. Vidal's nomination to lead the USPTO, which is moving forward and should be completed in short order. Second, affording a short 60-day comment window—half of which was consumed by the end-of-year 2021 holiday period—on an already drafted revision, when the Executive Order merely instructed the relevant bodies to consider whether a revision was appropriate, leaves stakeholders with the clear impression that the issue has been prejudged. These critical defects in the policy process appear designed to discourage meaningful participation and debate, and raise serious questions about the legitimacy of any resulting policy product."

Scholars of Law, Economics and Business
https://www.regulations.gov/comment/ATR-2021-0001-0115

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"While the Draft Policy Statement may seem even-handed at first sight, its implementation would have far-reaching consequences that would significantly tilt the balance of power in SEP-reliant industries, in favor of implementers and to the detriment of inventors. In turn, this imbalance is liable to harm consumers through reduced innovation, resulting from higher contract-enforcement costs and lower returns to groundbreaking innovations. More fundamentally, by making it harder for U.S. tech firms to enforce their intellectual property (IP) rights against foreign companies, the Draft Policy Statement threatens to erode America's tech-sector leadership."

Legal Academics, Economists and Former Government Officials
https://www.regulations.gov/comment/ATR-2021-0001-0136

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"In sum, it is difficult to overstate the risks to the U.S. innovation economy, as well as to U.S. economic leadership and its national security, by the Draft Statement's proposed special rules for SEP owners that would incentivize strategic holdout by implementers and de facto prohibit injunctive relief for ongoing infringement by an unwilling licensee. This is not evidence-based policymaking that promotes the public interest in ensuring efficient competition in dynamic wireless communications markets that have benefited consumers in historically unprecedented ways for the past several decades.

"For the foregoing reasons, the Draft Statement is inconsistent with the principles expressed in President Biden's Executive Order, does not account for relevant empirical evidence, runs counter to recent and historical case law in both the U.S. and Europe, and places at risk the "innovation engine" that is a primary source of U.S. economic competitiveness.

"Respectfully, we urge a reconsideration of the Draft Statement in this review of the evidence-based policies governing the licensing and enforcement of SEPs in wireless communications and other industries."

Deanna Tanner Okun, Former Commissioner and Chair of the U.S. International Trade Commission
https://www.regulations.gov/comment/ATR-2021-0001-0149

"Robust enforcement of Standards-Essential Patents ("SEPs") supports U.S. participation and leadership in global Standard Setting Organizations ("SSOs") by incentivizing U.S. industries to recoup their investments in the technologies they contribute to the SSOs. The Draft Statement's current direction, unfortunately, would instead support efforts by foreign technology developers to dominate technology standards like 5G by adopting a de facto special rule that largely precludes U.S. innovators from seeking exclusion orders against implementers who engage in holdout practices. For example, companies in China are the largest implementers of SEPs in products that they sell throughout the world. Removing the threat of an exclusion order will free these Chinese and other foreign implementers to pursue their preferred path as infringing implementers.

"I am particularly concerned that the Draft Statement devalues the rights of an SEP holder at the ITC. It is my understanding that SSOs take years- sometimes a decade - to develop and promulgate their standards. To use a Policy Statement, rather than the legislative process, to diminish an SEP holder's enforcement rights once those standards are finally agreed upon and implemented will discourage U.S. leadership in the standard-setting process for critical technologies such as 5G, which, in turn will harm our national security and economic security."

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https://www.regulations.gov/comment/ATR-2021-0001-0092

"I am concerned that the Draft Statement risks damaging the carefully balanced system of technology standardization. This policy change would endanger economic incentives for invention, innovation, and technology standardization for United States companies. The result would be impairment of economic development and economic growth in the United States and reductions in international trade and investment opportunities for United States companies…

"The major policy shifts in Draft Statement will have sweeping economic effects but are not motivated by any economic necessity. There are no specific economic events or considerations that justify policy changes represented by the Draft Statement. There is no pressing need to revise the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments. There are no specific problems or issues that call for revision of the 2019 Statement. The 2019 Statement represents a careful and measured approach with coordination and contributions by the USPTO, NIST, and the DOJ. Given the economic concerns about the proposed policy changes, I would recommend continuation of the policies contained in the 2019 Statement."

Gary Clyde Hufbauer, Peterson Institute for International Economics
https://www.regulations.gov/comment/ATR-2021-0001-0044

"No consideration is given to the dynamic impact on American innovation of weakening patent protection, nor the relative role of US versus foreign firms, particularly Chinese firms. The core defect of the 2021 Draft Statement is the complete absence of empirical data that might support a policy reversal. In modern times, economists and others have insisted on data-driven justification for major policy changes. But the 2021 Draft Statement is nothing more than ideological argumentation for a predetermined result. Among the missing evidentiary elements are these: No data on the frequency of injunctive relief, or the character of plaintiffs and defendants. No data supporting the view that injunctive relief leads to 'excessive' F/RAND license fees... No review of Chinese license fees paid to US innovators, nor any mention of Chinese state policy (inadvertently supported by the 2021 Draft Statement) of driving down SEP license fees."

Information Technology and Innovation Foundation (ITIF)
https://www.regulations.gov/comment/ATR-2021-0001-0050

"In short, in the global race for technological leadership where patent protection determines entrepreneurial competitiveness, the Draft Policy Statement represents a considerable policy gift from the Agencies in favor of, say, Chinese patent infringers who now know that, at worst, they may pay royalties that they would have paid had they complied with FRAND terms. Therefore, the Draft Policy Statement contributes to making American ingenuity an engine of patent infringement, a place prone to patent violations favoring foreign competing powers."

Dan Mahaffee, Center for the Study of the Presidency & Congress
https://thehill.com/opinion/technology/592292-counterproductive-patent-policies-threaten-us-tech-leadership

"This policy change would discourage U.S. leadership in international technology standards, devalue U.S. intellectual property and set a poor example for partners and competitors on the global stage… At a time when we are moving more taxpayer and investor dollars to encourage R&D and innovation leadership, why pursue a policy that devalues IP and chokes the resources available for future breakthroughs and job growth?... If the priority is U.S. technology leadership and national security, our policymakers should steer away from these counterproductive, poorly made policies and focus on strengthening and valuing American intellectual property."

Innovation Alliance
https://innovationalliance.net/from-the-alliance/innovation-alliance-comment-letter-on-biden-administrations-draft-policy-statement-on-standard-essential-patents/

"We oppose the draft policy statement because it would:

- Cause uncertainty about the ability to protect intellectual property and so undermine incentives to engage in risky research and development.
- Undermine U.S. leadership in emerging and strategic technologies.
- Violate current law by treating standards-essential patents different than other patents.
- Create more licensing disputes and litigation.

- Encourage delay and other bad-faith tactics in licensing negotiations.
- Unravel existing business relationships and agreed to licensing arrangements.

"If adopted as written, the policy draft statement threatens U.S. national security by undermining American innovation and ceding global technological leadership to China. It also permits Big Tech companies to maintain their market dominance by squashing competition from smaller inventors and entrepreneurial businesses."

Alliance for U.S. Startups and Inventors for Jobs (USIJ)
https://www.regulations.gov/comment/ATR-2021-0001-0166

"A particularly troublesome aspect of the 2021 Draft is the lack of any discussion of the impact that yet another IP policy statement about injunctions and exclusion orders is likely to have on international competition and the relative advantages that other countries provide to patents owned by their own companies as contrasted with what is done in our country… China's IP practices have a great deal to do with that country's growing prowess in a number of critical strategic technologies... USIJ submits that any formal statements of U.S. IP policies regarding SEPs should at least reflect an awareness of how other countries are addressing the issue of SEP policies, particularly injunctive type relief. The absence of any such discussion in the 2021 Draft, in our view, is disappointing and turns a blind eye to the long-term implications of such policies."

AUTM
https://www.regulations.gov/comment/ATR-2021-0001-0138

"The Draft Revised Statement does not appropriately balance the interests of patent holders (innovators) and implementers in the voluntary consensus standards process. The 2019 Statement does.

"Readily available injunctions, consistent with the prevailing legal framework, are necessary for the proper balance between innovators and implementers. Without the threat of an injunction, the system is out of balance in favor of the implementers. Taking away such an important enforcement mechanism, creates a disincentive for implementers to negotiate a license because, if they are found to infringe, they are no worse off than if they had voluntarily taken a license.

"In other words, if found to infringe in the absence of readily available injunctions, the implementers may continue making, using and/or selling the patented good or service. They can continue generating revenue. They merely have to pay a small percentage of said revenue to the innovators which is what they would be doing if they had taken a license in the first place. They are no worse off for not taking a license. In fact, they are better off for having delayed the payments. But, if they are not found to infringe or the suit is never brought for any one of myriad reasons, the implementers pay nothing. Thus, when injunctions are not readily available, the expected value of implementers' license payouts is significantly lower.

"This "ask for forgiveness" or "let's wait and see if we get caught" approach harms the innovators. If forced to sue, the innovators will have had to go through a costly litigation in order to get

compensated. However, innovators are typically much smaller entities (e.g., startups, small/medium entities) with not nearly the resources that the implementers have so the innovators are disproportionally harmed by the cost of the litigation. So much so that they often forgo it which is just what the implementers are hoping for."

Licensing Executives Society (USA & Canada)
https://www.regulations.gov/comment/ATR-2021-0001-0091

"By failing to recognize the impact of standards contributors to society, and their right to recoup their investments, the Draft 2021 Statement risks a chilling effect on investment by the U.S. industry in the development of fundamental and strategic technology standards. Such a chilling effect can negatively affect U.S. leadership in standards development, and will work to the advantage of other countries who are aggressively promoting investment in the standardization of high-tech areas such as 5G and artificial intelligence."

American Intellectual Property Law Association
https://www.regulations.gov/comment/ATR-2021-0001-0119

"AIPLA is concerned that revising the 2019 policy statement as indicated in the draft may hinder rather than advance the agency's worthy goals…

"Rather than reduce the costs of licensing, the draft is likely to increase the existing challenge of enforcing SEPs, discouraging investment to advance future generations of critical information and communications technology ("ICT") standards. The impact will be most acute for small- and medium-sized enterprises dependent on limited funding and with no resources to mount or follow through with litigation to defend their patents…

"AIPLA respectfully recommends the agencies leave the 2019 statement in place. The 2019 statement accurately describes Supreme Court and Federal Circuit law on patent remedies for infringement of SEPs subject to a F/RAND commitment and, importantly, clarifies the misunderstanding associated with the 2013 statement. Withdrawing the 2019 statement will signal that the document is inaccurate, which it is not.

Fraunhofer Institute
https://www.regulations.gov/comment/ATR-2021-0001-0101

"The Draft DoJ Policy Statement does not appear consistent with the international framework for standards development or the licensing and protection of standard essential patents…

"A policy that encourages a default no-injunctions rule for standard essential patents (or any intellectual property) liberalizes patent infringement, devalues IP assets and places barriers to the efficient conclusion of international technology transactions. On its face, such a policy appears to amount to a non-tariff barrier to trade…

"[I]t has been observed that injunctive relief is indispensable and, as a rule, 'damages in lieu [of injunctive relief] would not be an adequate substitute.' With respect, Fraunhofer does not agree with conclusions drawn in the Draft DoJ Policy Statement from the sources cited therein. Injunctive relief is and should be assessed by the courts on a case-by-case basis. Any award of exemplary or treble damages against an unwilling licensee appears to come too late, placing an owner of standard essential patents at significant disadvantage in the market for ongoing revenue streams, expansion, venture capital or other investment, or for undertaking future or further R&D)…

"Fraunhofer again notes that no empirical evidence has demonstrated that there are systemic problems to be addressed vis-à-vis the international licensing of standard essential patents which merit fundamental changes to the 2019 Joint Policy Statement."