

David L. Cohen Response to the US Department of Justice call for Public Comments

On December 6, 2021, the U.S. Department of Justice, Antitrust Division (DOJ) issued a request for public comment on a draft policy statement on licensing negotiations and remedies for standards-essential patents subject to F/RAND commitments. The request also included eleven (11) questions about the draft statement. The December 6 release initially granted 30 days for public comment. On December 13 the DOJ extended the time to respond to February 4, 2022. The following statement comprises the response of David L. Cohen, president of Kidon IP Corporation in his personal capacity.

David L. Cohen has been an expert in the area of standards essential patents for fifteen years. Mr. Cohen has been named world-leading IP strategist in the 2021, 2020, 2016, and 2016 editions of the IAM Strategy 300 and The World's Leading IP Strategists. He writes the Kidon IP blog that provides deep analysis of intellectual property issues including standards essential patents and policies related to them, see <http://www.kidonip.com>

To facilitate the reading of my comments, I have incorporated a table of contents and an executive summary therein.

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Executive Summary

The 2013 statement was a favor to Apple and Google and was widely misinterpreted and misused (often intentionally by opportunistic infringers found by courts and/or the ITC to be “unwilling”). It was used to remove injunctive relief against companies found by courts to be “unwilling”.

The 2019 statement was the result of two years of consultations, and aimed to correct the misinterpretation, capture 2013-2019 developments in US law, take the government’s thumb off the scale.

The proposed 2021 statement is not based on extensive consultation. It appears to be a return to putting the US government’s thumb on the scale in favor of big tech giants. It would perpetuate misrepresentation of U.S. law.

Ironically, while the July 9, 2021, Executive Order focuses on the potential for market abuse by digital platforms, the proposed 2021 statement facilitates abusive hold-out by dominant platforms.

The proposed statement suggests a no-injunctions rule that is inconsistent with black letter U.S. law. If such rule were in place infringers, especially powerful ones like tech giants, will never accept a FRAND license. The main beneficiaries from the proposed policy statement would be big tech and big Chinese phone makers. It would also encourage China’s continue abusive persecution of innovative U.S. companies with which I have had a personal experience. I recommend against adoption of the proposed statement.

General Comments

Before providing a response to the specific questions raised by the DOJ, I thought it important to provide some background to the issue that informs much of my thinking on this topic.

I. The 2019 Policy Statement

In December 2019, the DOJ, the U.S. Patent & Trademark Office (USPTO), and the National Institute of Standards and Technology (NIST) announced a joint U.S. government policy statement (“2019 Statement”) on remedies for standards-essential patents that are subject to voluntary F/RAND commitments.¹ The Statement was the result of over two years of inter-

¹ Department of Justice, *United States Patent and Trademark Office, and National Institute of Standards and Technology Announce Joint Policy Statement on Remedies for Standard-Essential Patents* (Dec. 19, 2019) <https://www.justice.gov/opa/pr/department-justice-united-states-patent-and-trademark-office-and-national-institute-standards> (“DOJ Press Release”); U.S. Patent and Trademark Office, *U.S. Patent and Trademark Office releases policy statement on standards-essential patents subject to voluntary F/RAND commitments: Extensive Discussions Yield Balanced Policy* (Dec. 19, 2019) <https://www.uspto.gov/about-us/news-updates/us-patent-and-trademark-office-releases-policy-statement-standards-essential> (“UPSTO Press Release”).

agency consultations with stakeholders and discussions among its signatory agencies and with others in the U.S. Administration.² the 2019 Statement corrected misunderstandings about a prior 2013 statement and summarized 2013-2019 U.S. case law on remedies for infringement of these patents.³

II. The 2013 Policy Statement – An Obama Era DOJ Favor to Apple and Google

The 2019 Policy Statement succeeded the now-withdrawn January 2013 DOJ-USPTO policy statement (“2013 Statement”) on a similar topic⁴. The 2013 Statement not only had fewer signatories but was also narrower in scope than the Policy Statement. Moreover, it appeared without warning and, as rumor has it, took ostensible colleagues at the Federal Trade Commission (“FTC”) by surprise. The 2013 policy expressed former DOJ-USPTO views on how the International Trade Commission (“ITC”) should consider the existence of F/RAND commitments when considering “injunctive relief...or exclusion orders in investigations under section 337 of the Tariff Act of 1930” where the asserted patents were essential patents subject to such commitments.⁵

The release of 2013 Statement was unusual in that it did not follow any public notice and was not accompanied by any press releases or statements by the heads of its two signatory agencies. This was reflective its private-deal nature. Indeed, the 2013 Statement is widely understood to have been tied to the Obama administration’s effort to support Apple’s positions in extensive U.S. and worldwide patent litigations with Motorola and Samsung Electronics. As part of the Samsung-Apple litigation, Samsung brought a Section 337 case against Apple at the ITC, seeking an exclusionary order against the latter’s alleged infringement of Samsung patents and alleging that Apple failed to negotiate in good faith towards a license. Apple brought similar allegations against Samsung’s negotiation conduct as a defense.⁶ DOJ itself had opened an antitrust investigation into Samsung’s conduct in its battle with Apple, which it later closed without action or any finding that Samsung’s efforts to enforce its standards-essential patent

² See in the title of USPTO Press release (“Extensive Discussions Yield Balanced Policy”) as well as in its second paragraph (“The statement was the product of extensive consultations with stakeholders, including diversely situated business entities and trade groups, in addition to comprehensive discussions among the signatory agencies and others in the Administration”).

³ Available on the UPSTO and DOJ websites, respectively, at <https://www.uspto.gov/sites/default/files/documents/SEP%20policy%20statement%20signed.pdf> or <https://www.justice.gov/atr/page/file/1228016/download>.

⁴ Policy Statement on Remedies for Standards Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013) (withdrawn).

⁵ *Id.* at 1 (“[DOJ and USPTO] provide the following perspectives on a topic of...: whether injunctive relief in judicial proceedings or exclusion orders in investigations under section 337 of the Tariff Act of 1930”). See also Policy Statement at 3 note 6.

⁶ See Inv. 337-TA-794 *In re Certain Electronic Devices, including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers* (public version issued July 5, 2013) <https://essentialpatentblog.lexblogplatform.com/wp-content/uploads/sites/64/2013/07/337-TA-794-Commission-Opinion-Public-Version.pdf>.

rights had violated the antitrust laws. DOJ referenced the 2013 Statement in the press release announcing the close of the Samsung investigation.⁷

In June 2013, five months after the 2013 Statement was released, the ITC determined that Samsung negotiated in good faith while Apple did not prove that Samsung have breached its F/RAND commitment.⁸ Conversely, it found that **Apple has failed to negotiate in good faith through engaging in “reverse patent hold-up”**.⁹ The ITC concluded that Samsung has proven Apple’s violation of section 337, and that the appropriate remedy should be an exclusion order prohibiting Apple from continuing to import its infringing devices into the U.S.¹⁰

In August 2013, in an extremely rare, proactive exercise of the U.S. President’s authority to evaluate ITC decisions to issue exclusion orders,¹¹ then-U.S. Trade Representative, Michael Froman (“USTR”), vetoed the ITC’s June 2013 exclusion order against Apple before it took effect. The USTR repeal of the order was executed through the issuance of a policy letter “disapproving” the issuance of an exclusion order in that matter, which heavily relied on the DOJ’s pro-Apple 2013 Statement.¹² But it should not have been a surprise, as President Obama was known to have very close ties with Silicon Valley in general and Apple in particular¹³ – even singling out Apple for a special mention during a 2013 State of the Union Address.¹⁴

⁷ Department of Justice, Statement of the Department of Justice Antitrust Division on Its Decision to Close Its Investigation of Samsung’s Use of Its Standards-Essential Patents (Febr. 7, 2014) <https://www.justice.gov/opa/pr/statement-department-justice-antitrust-division-its-decision-close-its-investigation-samsung>.

⁸ *In re Certain Electronic Devices*, supra note 7, at 59.

⁹ *In re Certain Electronic Devices*, supra note 7, at 62-63 (“Apple’s submission to the Commission...indicates that Apple has no intention of paying Samsung any royalties until after the conclusion of litigation... Apple’s position illustrates the potential problem of so-called reverse patent hold-up, a concern identified in many of the public comments received by the Commission. In reverse patent hold-up, an implementer utilizes declared-essential technology without compensation to the patent owner under the guise that the patent owner’s offers to license were not fair or reasonable. The patent owner is therefore forced to defend its rights through expensive litigation.”).

¹⁰ See https://www.usitc.gov/secretary/fed_reg_notices/337/337-794_notice06042013sg1.pdf

¹¹ The previous occurrence of such a USTR “veto” of an ITC exclusionary order occurred 26 years earlier, by President Ronald Reagan in 1987, see Angelo Young, Barack Obama Overrides US Global Trade Watchdog’s Ruling on Apple Products; The Last President To Veto ITC Ruling Was Ronald Reagan In 1987, Int’l Business Times (Aug. 4, 2013) <https://www.ibtimes.com/barack-obama-overrides-us-global-trade-watchdogs-ruling-apple-products-last-president-1371073>.

¹² Michael Froman, Disapproval of the U.S. International Trade Commission’s Determination in the Matter of Certain Electronic Devices, Including Wireless Communication Devices, Portable Music and Data Processing Devices, and Tablet Computers, Investigation No. 337-TA-794 (Aug. 3 2013) https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF. The USTR letter clarified that it did not “revisit the [International Trade] Commission’s legal analysis or its findings based on its record.” and that it was “not an endorsement or a criticism of the Commission’s decision or analysis.”

¹³ See, e.g., Siva Vaidhyanathan, Was Obama Silicon Valley’s President? The Nation (Jan 2, 2017) <https://www.thenation.com/article/archive/was-obama-silicon-valleys-president/>; Jenna Wortham, Obama Brought Silicon Valley to Washington, New York Times (Oct 25, 2016) <https://www.nytimes.com/2016/10/30/magazine/barack-obama-brought-silicon-valley-to-washington-is-that-a-good-thing.html>; Seth Fiegerman, Obama’s Staff is Taking Over Silicon Valley, CNN Business (Aug. 11, 2016) <https://money.cnn.com/2016/08/11/technology/obama-staff-silicon-valley/index.html>

¹⁴ See Jim Tanous, Apple Noted During State of the Union for US Manufacturing Push, The Mac Observer (Feb. 12, 2013) <https://www.macobserver.com/tmo/article/apple-noted-during-state-of-the-union-for-us-manufacturing-push>.

Around the same time, the FTC similarly invested vast resources to support Apple in its parallel litigation with Motorola. In that litigation, a federal judge similarly determined that Apple revealed itself as an unwilling licensee. Specifically, the judge wrote: “[Apple’s intentions] became clear only when Apple informed the court . . . that it did not intend to be bound by any rate that the court determined.” The judge further concluded Apple was trying to use the FRAND rate litigation simply to determine “a ceiling on the potential license rate that it could use for negotiating purposes”¹⁵ At the time, the FTC also reached a consent order with Google (that has bought Motorola’s patent portfolio, by-then weakened by the USG campaign against its positions). That consent order supported Google’s anti-patent policy positions.¹⁶ It is therefore no surprise that Apple, Google and other big tech allies like Amazon, Cisco and others support the currently proposed draft statement – it gives them an even better sweetheart deal than the private deal they received through the 2013 statement.

III. Background for The Withdrawal from the 2013 Policy Statement

In December 2018, former Assistant Attorney General for Antitrust Makan Delrahim announced DOJ’s withdrawal from the 2013 Statement.¹⁷ Explaining the reasons behind the withdrawal, he noted that “patent law already strikes a careful balance that optimizes the incentive to innovate, for the benefit of the public. The test was articulated by the Supreme Court in *eBay v. MercExchange*.”

Furthermore, his withdrawal noted that the 2013 Statement created “confusion” as it “should not [have] be[en] read as a limitation on the careful balance that patent law strikes to optimize the incentive to innovate.”

In a September 2019 speech, then Under Secretary of Commerce for Intellectual Property and Director of the USPTO, Andrei Iancu, revealed that “the USPTO [was then] carefully studying the issue and discussing it” nothing that “[u]ltimately, if we are to state a new policy, it should be balanced and structured to incentivize technological development and growth of the standards-based industries. . . . [A]ny policy statement should incentivize good faith negotiations and dis-incentivize threats of either patent hold-up or patent hold-out.”¹⁸

Former Director Iancu further explained at the time that “[g]overnment policy must ensure balance between patent owners and potential licensees, so that patented innovations can continue to contribute to voluntary consensus standards organizations thereby continuing to

¹⁵ *Apple, Inc. v. Motorola Mobility, Inc.*, No. 11-cv-178-bbc, slip op. at 5 (W.D. Wis. Nov. 8, 2012) (dismissing matter after finding that Apple was not willing to accept court’s FRAND rate).

¹⁶ Press Release, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (Jan. 3, 2013) <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc>.

¹⁷ Assistant Attorney General for Antitrust, Makan Delrahim, “Telegraph Road”: Incentivizing Innovation at the Intersection of Patent and Antitrust Law”, Remarks Delivered at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute (Dec. 7, 2018) <https://www.justice.gov/opa/speech/file/1117686/download>

¹⁸ Remarks delivered at the Standard-Essential Patents Strategy Conference, Under Secretary of Commerce for Intellectual Property and Director of the USPTO Andrei Iancu (Sep. 10, 2019) <https://www.uspto.gov/about-us/news-updates/remarks-director-iancu-standard-essential-patents-strategy-conference>

maximize benefits to consumers. To that end, per se rules, or tipped scales, regarding remedies can lead to perverse incentives.”¹⁹

In issuing the December 2019 policy Statement, (the “2019 Statement”) the USPTO formally withdrew from the 2013 Statement;²⁰ NIST was never a signatory to the 2013 Statement.²¹

IV. Key Elements of The 2019 Statement – Correcting Misunderstanding of the 2013 Policy

The 2019 statement²² and accompanying press releases delivered a number of key messages, including the following:

1. **No Special SEP Rules:** No “special set of legal rules” apply to [standard essential patents] and the courts, the U.S. International Trade Commission, and other decision makers are able to assess appropriate remedies based on current law and relevant facts;”²³
2. **All Remedies Available:** All remedies available under national law, including injunctive relief and adequate damages, should be available for infringement of standard-essential patents subject to a F/RAND commitment;”²⁴
3. **Georgia-Pacific Applies.** The Statement cites case law holding that the same set of *Georgia-Pacific* damages factors apply to essential patents and non-essential patents.²⁵
4. **Good Faith Negotiations, by Both Licensees and Licensors, Are Encouraged.** “...to help reduce the costs and other burdens associated with litigation, we encourage both standards-essential patent owners and potential licensees of standards essential patents to engage in good-faith negotiations to reach F/RAND license terms.”²⁶

¹⁹ *Id.*

²⁰ Policy Statement at 4 (“Accordingly, the USPTO and the DOJ withdraw the 2013 policy statement, and together with NIST issue the present statement...”).

²¹ Policy Statement at 4, footnote 8 (“NIST did not join in the 2013 policy statement”).

²² To be clear, I do not believe that the 2019 Statement is perfect. There are quite a few flaws, but it is far superior to what was before. I understand that my friend, colleague, and occasional co-author, Eric Stasik, will be submitting a response to the DOJ that details many of his concerns with the 2019 Statement and how to improve the 2021 Proposal to avoid those concerns.

²³ DOJ Press Release, *supra* note 1, third paragraph.

²⁴ Policy Statement at 4-5.

²⁵ Policy Statement, at 6, citing *Ericsson, Inc. v. D-Link Sys.*, 773 F.3d 1201, 1232 (Fed. Cir. 2014).

²⁶ Policy Statement at 4. See also pages 1 and 5 of the Statement, respectively (“Steps that encourage good-faith licensing negotiations between standards essential patent owners and those who seek to implement technologies subject to F/RAND commitments by the parties will promote technology innovation, further consumer choice, and enable industry competitiveness”; “Similarly, good faith in negotiations involving F/RAND commitments, supported by availability of data and application of best practices, can promote licensing efficiency, just as it can in negotiations involving commitments for patents that are not essential to standards”).

5. **When Applicable, All Remedies Available.** “When licensing negotiations fail, however, appropriate remedies should be available to preserve competition, and incentives for innovation and for continued participation in voluntary, consensus-based, standards-setting activities.”²⁷
6. **Voluntary, Alternative Dispute Resolution Available.** “Further, individual parties may voluntarily contract for or agree to specific dispute resolution mechanisms”²⁸
7. **The U.S. Government was Taking Its Thumb Off the Scale.** The USPTO press release explained: “The new joint statement effectively takes the government’s thumb off the scale”; “The statement is balanced and structured to incentivize technological development and growth of standards-based industries.”²⁹

While the current administration may see things differently, the U.S. Department of Justice should accurately depict U.S. law and should not be putting its thumb on the scale in commercial negotiations, let alone putting its thumb in favor of technology users most of whom are big tech giants with huge countervailing power.

V. The 2021 Proposed Policy Statement and Negotiation Framework

The December 6, 2021 proposed policy statement (the “2021 Proposal” or “2021 draft statement”) includes some positive aspects. First and foremost, unlike the 2013 Statement, which, as noted above, appears to have been issued as a political favor to Apple and Google, the 2021 Proposal was proffered for public comment – albeit initially (though thankfully no longer) with a very short time frame that made quite a few observers suspicious of the DOJ’s motives.³⁰

Timing aside, the 2021 Proposal tries to balance the interests (broadly speaking) of SEP owners or innovators on the one hand, and SEP implementers on the other. Thus, for example, page 4 the 2021 Proposal notes that in the context of SEP licensing “opportunistic behavior by both parties [licensee and licensor] can occur”. But almost as if to show the poverty of the authors’ imagination, the policy statement only recites example of “opportunistic conduct” by SEP owners and does not provide any meaningful discussion of opportunistic conduct by

²⁷ Policy Statement at 1-2.

²⁸ Policy Statement at 7.

²⁹ USPTO Press Release, *supra* note 1, 3rd paragraph.

³⁰ See *With SEP Politics Eagle Eyes are Needed, or Senator Tillis’ Watchfulness Pays Off and Comments on the Draft Policy Statement Now Due February 4*, Kidon IP Blog (December 13, 2021) <https://www.kidonip.com/news/with-sep-politics-eagle-eyes-are-needed-or-senator-tillis-watchfulness-pays-off-and-comments-on-the-draft-policy-statement-now-due-february-4/>

putative licensees³¹ Indeed, it has been shown time³² and time³³ again,³⁴ that there is very little empirical evidence of holdup but it keeps popping up while examples of holdout keep multiplying. Indeed, while major implementers like Apple like to complain in the press or through their paid academics that the SEP royalty stack hovers between 20-30% of ASP,³⁵ based on testimony under oath, the judge overseeing the Apple-triggered FTC suit against Qualcomm found Apple pays less than \$15/device in SEP royalties or less than 1.88% of the average sales price of its phone.³⁶ Moreover, in the absence of an injunction, there appears to be no penalty whatsoever for holdout and thus there is no incentive for implementers to pursue good faith negotiations— indeed, rational observers might easily conclude that Courts in fact reward holdout.³⁷

Another puzzling aspect of the 2021 Proposal³⁸ is the apparent attempt to create a SEP licensing negotiation framework. The language of the 2021 Proposal hints at the *Huawei v. ZTE* framework³⁹ created by the European Court Justice’s opinion in *Huawei v. ZTE*.⁴⁰ What makes the apparent attempt to follow *Huawei v. ZTE* problematic is that the *Huawei v. ZTE* framework is, at its root a competition (antitrust) law safe harbor created because under EU law, unlike U.S. law, the seeking of an injunction could amount to a violation of Art. 102 of the EU Treaty. In the United States, with very few exceptions, the F/RAND framework is understood to be rooted in

³¹ For an appreciation on implementer holdout see, e.g., Indranath Gupta, Vishwas H Devaiah, Shruti Bhushan, Shifting focus on hold-out in SEP licensing: perspectives from the EU, USA and India *Journal of Intellectual Property Law & Practice*, Volume 14, Issue 1, January 2019, available at <https://academic.oup.com/jiplp/article-abstract/14/1/12/5060533>

³² J. Gregory Sidak, What Aggregate Royalty Do Manufacturers of Mobile Phones Pay to License Standard-Essential Patents? *The Criterion Journal on Innovation*, Vol. 1 (2016) (finding SEP holders collected aggregate royalties in 2013-14 that were between 4 and 5 percent of global handset revenues).

³³ Keith Mallinson, Cumulative mobile-SEP royalty payments no more than around 5% of mobile handset revenues, WiseHarbor, on cumulative mobile-SEP royalties for IP Finance, 19th August 2015 <available at> <https://www.wiseharbor.com/pdfs/Mallinson%20on%20cumulative%20mobile%20SEP%20royalties%20for%20IP%20Finance%202015Aug19.pdf>

³⁴ Alexander Galetovic, Stephen Haber, Lew Zaretski, An estimate of the average cumulative royalty yield in the world mobile phone industry: Theory, measurement and results, *Telecommunications Policy* 42 (2018) 263-276 (finding average cumulative royalties yield on a smartphone in 2016 would not exceed 5.6 percent).

³⁵ Mark A. Lemley & Carl Shapiro, Patent Holdup and Royalty Stacking, *Texas Law Review* vol.86: 1991) at 2226-27; Ann Armstrong, Joseph J. Mueller, Timothy D. Syreet, The Smartphone Royalty Stack: Surveying Royalty Demands for the Components Within Modern Smartphones, available at <https://www.wilmerhale.com/-/media/ed1be41360634d1fa5c3ab08647e8ada.pdf>.

³⁶ *Federal Trade Commission v. Qualcomm Inc.*, Case 5:17-cv-220(LHK) doc.1490 (May 21, 2019) at 85, discussed in David L. Cohen, The SEP Royalty Stacking Myth – Apple Calls its Own Bluff, *Kidon IP Blog* (July 22, 2019) available at <https://www.kidonip.com/standard-essential-patents/the-sep-royalty-stacking-myth-apple-calls-its-own-bluff/>.

³⁷ If courts follow the view of Judge Selna in *TCL v. Ericsson*, 8:14-cv-341 (CD CA 2017) *overturned for other reasons* 943 F.3d 1360 (Fed. Cir. 2019) that implementers who enter a license after six months and implementers who refuse to enter into a license after four years and multiple litigations deserve the same royalty rates, then there is absolutely no incentive for implementers to follow the proposed guidelines. Indeed, “[b]y delaying taking a license, TCL secured one of the best deals without assuming any of the risks that its competitors took in agreeing [to] early terms or lump sums.” Richard Vary, *Dissecting TCL v. Ericsson -what went wrong?* IAM (Sept/Oct 2018) at 14.

³⁸ 2021 Proposal at 5-6.

³⁹ See, e.g., Rainer K Kuhnen, *Huawei v ZTE – ECJ sets framework for injunctive relief regarding SEPs*, IAM (11 April 2016) <https://www.iam-media.com/huawei-v-zte-ecj-sets-framework-injunctive-relief-regarding-seps>

⁴⁰ *Huawei Technologies Co. Ltd v ZTE Corp., ZTE Deutschland GmbH* (Case C-170/13) (CJEU July 16, 2015).

contract.⁴¹ By so closely following the *Huawei* framework rooted in competition law, observers might erroneously conclude that the under US law the seeking an injunction may be a violation of the Sherman Act. Such misunderstanding would be profound because the seeking of judicial remedies is generally immune from antitrust liability under the U.S. Constitution's Noerr-Pennington doctrine.

Being confused about the true intent of the DOJ and/or US official policy as it relates to F/RAND is a real concern. Not the least because, as I and others have documented, certain lobbyists are actively working to encourage foreign (especially Chinese) regulators⁴² to use antitrust law as a weapon⁴³ against foreigners who develop cutting-edge technology. Speaking personally, I never thought that SEP licensing could become a question of my own personal safety and liberty until I was a guest of the China's NDRC⁴⁴ where I was threatened with criminal antitrust prosecution and global extradition such that I would "not be able to leave the United States, ever."⁴⁵ Based on informal discussions with similar situated individuals, this was not an uncommon occurrence.⁴⁶

Leaving aside the legal basis for the proposed framework, the real problem is that, at least for a licensee, it is precatory only. That is, while the statement recites various conceivable remedies for being unwilling licensees or licensors, it makes it seem that injunctions are a very rare, if almost impossible to achieve, remedy (see page 8 of the draft). Given all the defenses already available to licensees under patent law and under anti-trust law, absent a real and present

⁴¹ *F.T.C. v. Qualcomm, Inc.*, 969 F.3d 974, 997 (2020).

⁴² David L Cohen, Anti-Patent Leadership Taking IEEE-SA on The Road to Knowhere? Part I, Kidon IP Blog (Nov 10, 2019) available at <https://www.kidonip.com/standard-essential-patents/changes-to-ieeees-ipr-policy-make-no-sense/>.

⁴³ David L Cohen & Douglas Clark, China's Anti-monopoly Law as a weapon against foreigners, IAM (Nov/Dec 2019)

⁴⁴ Simon Denyer and Ellen Nakashima, U.S. firm alleges China's government colluded with local competitor, Washington Post (Sept. 13, 2015).

⁴⁵ See A Short History of Vringo's Battle with ZTE, Kidon IP Blog (Aug 2, 2018) at footnote 81, available at <https://www.kidonip.com/news/a-short-history-of-vringos-battle-with-zte/>.

⁴⁶ Bill Merritt the CEO of InterDigital was the most vocal, *see, e.g.*, Lance Whiteney, InterDigital execs threatened with arrest in China, C|Net (Dec 16, 2013) available at <https://www.cnet.com/news/interdigital-execs-threatened-with-arrest-in-china/>. But Mr. Merritt was not the only executive so threatened. While many individuals I have spoken to over the years are reticent for personal and business reasons to come forward, I personally know quite a few executives who were similarly threatened with explicit or more subtle threats. Moreover, many individuals involved in SEP licensing in China told me about being followed both inside and outside the country, having their rooms searched (and occasionally ransacked) and the like. Thankfully, I know of no one in SEP licensing that had to suffer like Peter Humphrey, *see, e.g.*, James Griffin, Peter Humphrey was once locked up in China. Now he advises other prisoners and their families how to take on Beijing, CNN.com Dec 14, 2020 <<https://edition.cnn.com/2020/12/13/asia/peter-humphrey-china-prisoners-intl-hnk/index.html>>, but I refuse to take any chances and will no longer travel to any China administered territories, especially since in my counsel's last communication with the NDRC (occurring months after Vringo and ZTE settled) he was informed that the investigation "remains open."

threat of injunction there are few incentives for the licensees to follow the proposed framework.⁴⁷

Responses Specific Questions in DOJ's Call for Public Comment

(1) *Should the 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments be revised?*

No. U.S. law as accurately summarized in the 2019 statement had not changed in the past two year. Revising the 2019 statement will return the USG thumb to the scale in support of big tech.

If this administration wants, nonetheless, to issue a revised statement, which in my view as a mistake, I believe the following modifications the 2021 Proposal would render it complementary to the 2019 Statement:

- a) *On page 2 modifying the following sentence:* Strategies by either SEP holders or implementers to gain undue leverage in licensing negotiations can cause multiple harms, including non-F/RAND patent royalties, increased costs, ~~and~~ delayed introduction of standardized products and services, expensive and disruptive litigations, declining participation by innovators (especially those from smaller organizations with less financial clout) in standardization, and increased distrust amongst the various parties within the SEP licensing ecosystem. This increased distrust has the potential to foster a vicious cycle of increasing harms.
- b) *On page 4 modifying the following sentence:* Without adequate incentives, such as injunctive relief and/or punitive-type damages designed to encourage unwilling licensees to contribute to a consensus-based process, patent holders may opt for closed, proprietary standards that do not offer the same benefits of interoperability and enhanced consumer choice.
- c) *On Page 7, inserting the following sentence:* "... including the IPR holders and those seeking to implement the standard." These clear rules should also account for any timing complexities which may arise due to a temporal mismatch between when the relevant standard has been adopted and when an IPR has taken its final form or complexities from the multinational nature of SDOs and the relevant IPRs. Such an accounting may be as simple as creating a safe harbor where the SDO member unilaterally promises that any IPRs that it owns that are found to be SEPs will be subject to the relevant SDO's IPR policy. Of course, individual parties may voluntarily contract for or agree to specific...

⁴⁷ This is likely no accident. I have been personally told by multiple high-level regulators around the world that the only recourse for licensee holdout is successfully suing for patent infringement. However, if there are no injunctions, and courts follow the view of Judge Selna in *TCL v. Ericsson*, 8:14-cv-341 (CD CA 2017) *overturned for other reasons* 943 F.3d 1360 (Fed. Cir. 2019) that implementers who enter a license after six months and implementers who refuse to enter into a license after four years and multiple litigations deserve the same royalty rates, then there is absolutely no incentive for implementers to follow the proposed guidelines. Indeed, "[b]y delaying taking a license, TCL secured one of the best deals without assuming any of the risks that its competitors took in agreeing [to] early terms or lump sums." Richard Vary, *Dissecting TCL v. Ericsson -what went wrong?* IAM (Sept/Oct 2018) at 14.

- d) *On page 9, inserting the following sentence: patent after agreeing to a license. However, this right of a licensee, post-agreement, to challenge the validity of essentiality of a licensed patent should not be interpreted as the right to demand fluctuating royalty rates (whether daily, monthly, or quarterly) based on the periodic number of valid and essential SEPs then owned by licensor, or the global adjudication of the validity and essentiality of all licensor SEPs, as a preconditions to entering into a SEP license.*
- e) *On page 10, modifying the following sentence: A F/RAND commitment does not preclude enhanced damages for willful infringement or other equitable relief, as appropriate, if a potential licensee acts in bad faith.*

(2) Does the draft revised statement appropriately balance the interests of patent holders and implementers in the voluntary consensus standards process, consistent with the prevailing legal framework for assessing infringement remedies?

The 2021 Proposal while noting the ways SEP owners can abuse the system, does not adequately explore the many ways licensees can abuse the system nor does it fairly discuss when exclusionary remedies might in fact be permitted if not even in the public interest. The minor edits proposed in my answer to question (1) help remedy this deficiency.

(3) Does the draft revised statement address the competition concerns about the potential for extension of market power beyond appropriate patent scope identified in the July 9, 2021 Executive Order on Promoting Competition in the American Economy?

One irony elided by the above question is that the Executive Order focuses on the potential of market abuse of digital platforms, but most implementers of SEPs are themselves digital platforms with huge countervailing market power or are non-US device manufactures with close ties to foreign governments. To wit, the executive order⁴⁸ states:

This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony — especially as these issues arise in labor markets, agricultural markets, *Internet platform industries*, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by *foreign cartel activity*.

(emphasis added). While the Executive Order contains multiple references to how patents might be used to ill-effect in the pharmaceutical or healthcare industries, notably absent in the order is any discussion of how the F/RAND commitments might impact the policy described in the above quoted paragraph.

The 2021 Proposal serves big tech as is evident from a massive astro-turfing effort by its well-funded lobbying arm SOS, that is funded by Apple, Amazon, Google, Intel Cisco and other

⁴⁸ Order available at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>

lobbying arms owned by same (such as the ACT Apple association of which I've written elsewhere;⁴⁹ CCIA, Engine, and SIIA). Big tech has united for a tweeting campaign supporting the 2021 Proposal,⁵⁰ hiding their financial interest with empty "abuse" slogans.

As explained earlier, the 2013 Policy Statement, which appears to have inspired the 2021 one, was issued as a political favor to Apple and later Google (in the Google MMI "consent") litigation positions. That government thumb on the scale had killed Motorola that was later sold by the pound to China's Lenovo and Google, and helped Apple become a 3 trillion company. It would be a significant error to ignore this big tech boosting aspect of the 2021 Proposal – this is why it should not be issued.

(4) In your experience, has the possibility of injunctive relief been a significant factor in negotiations over SEPs subject to a voluntary F/RAND commitment? If so, how often have you experienced this?

I have been heavily involved in the world of SEP licensing since 2007; first, when at Nokia (2007-2012) as part of the team managing some of their SEP key disputes, then as Chief Legal and IP Officer at Vringo⁵¹ (2012-2017) where I developed and managed all Vringo's SEP activities, and now as president of Kidon IP (2017- to date) where I advise clients on SEP and FRAND issues and provide public commentary through my blog. While there was a time that the fear of an injunction may have in fact motivated potential SEP licensees,⁵² in my experience *the possibility that a SEP owner may be able to enjoin an implementor with an SEP has rarely been an issue, let alone a significant issue in negotiating an SEP license.* I believe that this is so because both SEP owners and licensees are very much aware that for the past decade, against a

⁴⁹ David Cohen, On Deceptive Apps and Practices: Unmasking the ACT App(le) Association (JD Supra, 7 July, 2021) <https://www.jdsupra.com/legalnews/on-deceptive-apps-and-practices-6209031/>.

⁵⁰ <https://www.saveourstandards.com/biden-administration-accepting-comments-to-stop-sep-abuse/>, for the SOS member list see <https://www.saveourstandards.com/get-involved/>.

⁵¹ Vringo changed its name to FORM Holdings in 2016 (see <https://investors.xpresspa.com/news-releases/news-release-details/vringo-announces-2016-q1-earnings-and-name-change-form-holdings>) and later that year, FORM Holdings acquired XpressSpa and changed its name to XpressSpa Group. <https://xpresspagroup.com/portfolio/xpresspa/>. By 2018 Vringo had divested most of its non-wellness-related assets.

⁵² I query whether SEP injunctions were, in fact, a concern a decade ago, given how few were actually enforced, see, e.g., *Microsoft Corp. v. Motorola Inc.*, 696 F.3d 872 (9th Cir. 2012) (affirming anti-suit injunction prohibiting Motorola from enforcing an injunction against Microsoft pending resolution of parallel FRAND litigation). On the other hand, I have witnessed how the real possibility of an injunction from a parallel litigation over non-SEPs can force parties to settlement. See e.g., Nokia wins German patent injunction against all HTC Android devices including the One series, Foss Patents (December 30, 2013) *available at* <http://www.fosspatents.com/2013/12/nokia-wins-german-patent-injunction.html>; HTC wins delay of two Nokia antenna patent suits in Germany: one case stayed, one trial adjourned, Foss Patents (Feb 22, 2013) (final paragraph discusses how likely injunction against the Apple App store with a Nokia non-SEP was a "key" contribution to the 2011 Apple/Nokia settlement) *available at* <http://www.fosspatents.com/2013/02/htc-wins-delay-of-two-nokia-antenna.html>.

determined defendant, it is almost impossible for an SEP owner to acquire an enforceable injunction.

Please note that I do not include as part of “negotiations” the public posturing and chest thumping that often occurs in public SEP disputes prior to the parties meeting face-to-face (or virtually) to, in good faith, ascertain whether negotiations over a license is even feasible. These are not negotiations in any normal sense of the word, but either are preliminaries prior to any negotiation being able to occur or play acting for the benefit of third parties such as regulators. In fact, this play acting has been a major reason as to why SEP injunctions are so hard to obtain.

Because injunctions are so remote, once the parties to a SEP dispute have decided to meet and negotiate, in my experience, the discussion is either technical (e.g., the SEP owner’s assets are irrelevant or not as relevant as they think to the implementer) or financial (e.g., royalty rates, royalty bases, license scope, the impact a possible license on other licensees or potential licensors, etc.). I make these observations as someone who has overseen his employer receiving multiple SEP injunctions against an implementer in multiple jurisdictions around the world.⁵³

There is always a possibility that a party’s chest thumping or play acting will continue in parallel to (a typically confidential) true negotiation process. This chest thumping is “red meat” to motivate the chest thumper’s agents (e.g., lawyers, PR folks) or public shareholders, or to gain an advantage with regulators or sway the courts. But there is never any mistake among the parties in the true negotiations as to the significance of what is being said in the chest thumping: the “fear of an injunction” is a way to get courts and regulators to give implementers an advantage in their litigation positions, not a real business fear.

To be clear, this is a major problem.

Licensing SEPs is very hard.⁵⁴ Attempting to license SEPs absent a genuine potential of an enforceable injunction is extremely hard. It is important to remember that while it is often assumed that a patent creates value for its owner by allowing its owner to exclusively make and use the patented invention, this assumption is demonstrably false. For example, there may be other patents owned by third parties that cover similar subject matter and can potentially block the patent owner from making, using or otherwise practicing the subject matter described in the patent (or, at least, make it prohibitively expensive to do so).

⁵³ Many of these injunctions, including in Brazil, Germany, Holland, India, and Romania are discussed in David L Cohen, A Short History of Vringo’s Battle with ZTE, Kidon IP Blog (Aug 2, 2018) available at <https://www.kidonip.com/news/a-short-history-of-vringos-battle-with-zte/>. One these SEP injunctions was a preliminary injunction upheld by Brazil’s Superior Court of Justice in *ZTE do Comércio, Serviços e Participações Ltda v. Vringo Infrastructure Inc.*, available here <https://drive.google.com/file/d/0B8xYsG-VkgXNNVRXR0RJZzFTdkU/view?resourcekey=0-V0Mb7oiWiaEhvO9Tdx2diA> and translation available at https://drive.google.com/file/d/0B8xYsG-VkgXNZGJ3c0R5a2JSbW8/view?resourcekey=0-0fQ_uwjGQO4Ukwzal4Oe4Q.

⁵⁴ For a discussion of some of the challenges in SEP licensing, and how implementers are trying to make it even harder, see David L. Cohen, A Compulsory “License to All” World: A Counterfactual Exercise, *The Licensing Journal* 13, Vol.41 no.1 (Jan 2021).

Instead, patents are simply a right to exclude others from making, using or otherwise practicing the subject matter described in the patent (e.g., a right to sue and receive an injunction and/or damages upon victory) but a patent does not confer a positive right to make, use or otherwise practice the invention described in the patent itself. Since the patent simply confers a right to exclude, the value of a patent to a potential licensee is tied to the fiscal cost to the licensee of that exclusion. Stated another way, a patent's licensing value is virtually non-existent until such a time that the right to exclude would cause financial pain to the licensee. This is true even when licensing is conducted on the friendliest of terms. Simply, patent licenses from a licensee's perspective are all about mitigating risk. Or put differently, a patent value is closely tied to its *in terrorem value*. If there is no risk to a licensee, the patent will be assigned no value by the licensee. When the complicated FRAND superstructure is added to any attempt to receive royalties on a patent, any risk to the licensee from the patent is mitigated even further. Indeed, as a result of the FRAND superstructure, as discussed throughout this response, even if a US trial court might award large damages in an SEP dispute, an implementer has multiple ways to appeal or collaterally attack the award. This stands in sharp contrast to how the law is evolving elsewhere.⁵⁵

Recent events neatly illustrate this point. Apple, the world's first three trillion-dollar company⁵⁶ has long complained about the allegedly unfair advantage and high damages awards that patent plaintiffs receive in the Eastern District of Texas. Apple was so committed to this position that they closed all stores in the Eastern District to be able to minimize the risk of being sued there.⁵⁷ Yet, when faced with a global⁵⁸ litigation with Ericsson over SEPs and non-SEPs, Apple proposed⁵⁹ that the parties withdraw all litigation and let the courts of the Eastern District of Texas determine an appropriate FRAND royalty for Ericsson's SEPs.⁶⁰

Why would Apple be willing to subject itself to the "hated" Eastern District and its large damages awards? While many excuses will likely be proffered⁶¹, most likely Apple did this as a

⁵⁵ Most prominently is the approach taken by the UK Supreme Court in *Unwired Planet International Ltd & Anor v Huawei Technologies (UK) Co Ltd & Anor* [2020] UKSC 37 (26 August 2020).

⁵⁶ Apple becomes first U.S. company to reach \$3 trillion market cap, Published Mon, Jan 3 2022 1:46 PM EST Updated Mon, Jan 3 2022 6:46 PM EST, available at <https://www.cnn.com/2022/01/03/apple-becomes-first-us-company-to-reach-3-trillion-market-cap.html>

⁵⁷ Charlotte Henry, Apple to Close Stores in Texas' Eastern District in Bid to Fight Off Patent Trolls, The MacObserver (Feb 22, 2019) available at <https://www.macobserver.com/news/apple-stores-texas-eastern-district-patent-trolls/>.

⁵⁸ Florian Mueller, Ericsson sues Apple in three German courts, the Netherlands, and Brazil over 5G and other patents (in addition to handful of U.S. cases), FOSS Patents (January 21, 2022), available at <http://www.fosspatents.com/2022/01/ericsson-sues-apple-in-three-german.html>.

⁵⁹ Joff Wild, We should fight it out with Ericsson in Texas, Apple tells the ITC, IAM 20 January 2022, available at <https://www.iam-media.com/frand/apple-ericsson-edtx-itc>

⁶⁰ Florian Mueller, Apple countersues Ericsson, seeks U.S. import ban against mobile base stations, and proposes that both parties withdraw all patent infringement actions, let Texas court set license fee, (Jan 20, 2022) available at <http://www.fosspatents.com/2022/01/apple-countersues-ericsson-seeks-us.html>

⁶¹ I anticipate "cost savings" will be the primary argument Apple will proffer for consolidation in East Texas. If costs were truly the issue, as the Unwired Planet line of cases in UK illustrates, the British courts can quite quickly and, compared to the US, quite cheaply, find a global FRAND rate. However, the UK courts are also quite willing to issue injunctions should the parties not agree to the found rate – which likely made the UK a non-starter for Apple.

part of some “hail mary” play to avoid ITC and other injunctions thinking East Texas damages would be preferable.

Historically⁶² (but in a recent development, no longer⁶³) courts and regulators around the world looked to the United States court for guidance on US competition and patent law issues. Indeed, the 2013 Statement seems to have been the apotheosis of the pro-implementer position that (no thanks to US influence) quickly became conventional, regulatory wisdom. As a result, the challenges SEP owners faced in licensing and achieving injunctions, when warranted became all that much harder.

To be fair and accurate, it is important to note, that as a general matter, it is well known that outside the United States⁶⁴ there are precious few SEPs that have been found valid by the courts.⁶⁵ That being said because of the change in regulatory climate with respect to SEPs, implementers became quite emboldened, such that even where there was a possibility of an injunction, that possibility rarely cause any significant damage to the implementer beyond additional counsel fees. This is because, SEP injunctions have been quite often, avoidable.

For example, in Germany it was⁶⁶ often said that when a judge finds an SEP infringed there is no discretion not to award an injunction. Enforcement prior to resolution of any appeals, requires posting a bond, which is typically a function of “Litigation Value” assigned to the case when filed. While a judge might increase the “Litigation Value” as the case progresses, it is literally a textbook statement that “EUR 30 million is a maximum value and is a ceiling for the fees.”⁶⁷ That said, in high profile SEP cases a judge apparently has the discretion to significantly increase the Litigation Value. For example, when Nokia received an injunction against Mercedes, the judge set the Litigation Value and the amount required for a bond at seven billion Euros.⁶⁸ Most likely the amount was set that high because of Daimler was very good at chest thumping to

⁶² See, e.g., Spencert Weber Waller, *The United States as Antitrust Courtroom to the World: Jurisdiction and Standing Issues in Transnational Litigation*, Loyola Consumer Law View vol. 14, (2002).

⁶³ See, e.g., *Breakingviews - Guest view: Europe beating U.S. in antitrust race*, Reuters (Nov 26, 2019).

⁶⁴ Mark A. Lemley & Timothy Simcoe, *How Essential are Standard-Essential Patents* 104 *Cornell L. Rev.* 604, 627(2019) (finding SEP and non-SEP infringement rates to be similar in the reviewed cases but the SEP validity rate was 83.7% as opposed to 60.8% for non-SEPs).

⁶⁵ For example, while in the past few years in the UK there have been a handful of SEPs found valid, as recently as 2015, Vringo’s EP919 was the first telecom SEP found there to be valid, infringed and non-design-around-able. See Sixteenth Witness Statement of Ari Pekka Laakkonen, *Vringo Infrastructure, Inc. v. ZTE (UK) Ltd.* HC-20012-000076 (Nov. 13, 2015) available at <https://www.scribd.com/document/349037075/2015-11-13-16th-Witness-Statement-of-Ari-Laakkonen-Signed>. This accords with the findings of Peter Hess and Tilman Muller-Stoy in their study, *Are Patents merely “Paper Tigers”?*, that the overall invalidation rate for software and telecom patents (both SEP and non-SEP) in Germany is 88.11% available at <https://www.bardehle.com/en/ip-news-knowledge/publication/detail/are-patents-merely-paper-tigers>.

⁶⁶ I am ignoring any possible impact from the recent changes to German patent law, which are likely, in any event, to be minimal. See Mathieu Klos, *German patent judges predict few changes to automatic injunction*, *Juve Patent* (June 23, 2021) available at <https://www.juve-patent.com/news-and-stories/legal-commentary/german-patent-judges-predict-few-changes-to-automatic-injunction/>

⁶⁷ Alexander Harguth & Steven Carlson, *Patents in Germany In Europe, Procurement, Enforcement and Defense An International Handbook*, Second Edition, at 174 (Wolter Kluwer 2017).

⁶⁸ Mannheim Regional Court orders Germany-wide Mercedes sales ban over Nokia patent despite Nokia having violated EU competition law, *Foss Patents* (Aug 18, 2020) available at <http://www.fosspatents.com/2020/08/mannheim-regional-court-orders-germany.html>.

courts already primed to be receptive to arguments about SEP owner abuse about how much damage an injunction would cause. It is no wonder that Nokia chose not to enforce the injunction.

Another way SEP injunctions are avoidable is that in most civil law countries (e.g., Germany) injunctions are not self-enforcing. Absent an infringing device that is easy to detect, if a plaintiff receives an order granting an injunction⁶⁹ a defendant can claim a “zero accounting.” In other words, a defendant can claim that it does not sell any infringing product subject to the injunction – even when the Court previously found that products offered for sale in Germany infringed.⁷⁰ The reasoning is that the defendant still contests the infringement (i.e., it is not a final judgment) and thus is entitled to claim no sales.⁷¹ In such a circumstance, a patent owner must then sue the defendant a second time to force the defendant to provide an oath to the effect that it does not sell infringing product.⁷² Yet, even if such an “affidavit suit” is won by the patent owner, it is effectively meaningless until such time as there is a final judgment in the underlying infringement case, where if infringement is finally found the defendant can be found in contempt. And then, this matters only if the attesting individual cares about being found in contempt by a foreign court⁷³ and fined (or put in prison) if the judge so orders.⁷⁴ However, in my experience, determined implementers will not put their people at risk and happily ignore multiple orders and sanction threats.⁷⁵ It is only the possibility of case terminating sanctions (i.e., an injunction by another name) and massive damages that might put a defendant into a settling mood.⁷⁶ Another way a licensee can avoid the bite of equitable relief is to simply obfuscate and under-report to the court its infringing sale – sometimes to the tune of hundreds of millions of dollars.⁷⁷

In other words, the lack of meaningful injunctions encouraged bad behavior by implementers, who continue to behave badly (and rack up SEP owner costs) until an SEP owner can finally find a court that will tire of the implementer’s games and presents the implementer with a meaningful threat.

But a single court’s threat is not always enough. Yet a further way an adjudged SEP infringer can avoid an injunction is to file multiple appeals (in some jurisdictions there is no limit on the

⁶⁹ <https://www.scribd.com/document/548666126/2013-12-17-Judgment-English>

⁷⁰ Florian Mueller, *After more than 12 years, HTC and Fortress's IPCOM settle standard-essential patent dispute over former Bosch and Hitachi patents*, FOSS Patents blog, January 18, 2022 (“In the merits proceeding [in SEP litigation in Germany], you can base your infringement theory on the specification of the standard. At the enforcement stage, you have to prove an actual infringement.”) available at <http://www.fosspatents.com/2022/01/after-more-than-12-years-htc-and.html>

⁷¹ <https://www.scribd.com/document/549630505/2014-07-16-Vringo-Replica-Affidavit-Suit-English>

⁷² <https://www.scribd.com/document/548665674/2014-12-19-Judgment-Affidavit-Suit-English>

⁷³ Something that is not always a guarantee, see, e.g. *Vringo v. ZTE*, 14-cv-4988 (SDNY) document 218.

⁷⁴ Alexander Harguth & Steven Carlson, *Patents in Germany In Europe, Procurement, Enforcement and Defense An International Handbook*, Second Edition, at 163 (Wolter Kluwer 2017).

⁷⁵ *Vringo v. ZTE*, 1:14-cv-4988, doc 218 (Aug 11, 2015) (reciting the multiple times ZTE ignored magistrate and court orders).

⁷⁶ *Vringo v. ZTE*, 1:14-cv-4988, doc 256 (9/8/2015).

⁷⁷ See, e.g., *Vringo’s contempt motion against ZTE in India*, where Vringo alleged that there was an eight to nine figure discrepancy in sales information provided by ZTE to the court and the information provided by ZTE’s customers to the court. <https://www.scribd.com/document/549637428/2014-08-11-Contempt-Rejoinder-as-Filed>

numbers of appeals and collateral attacks, e.g., injunctions against enforcement of an injunction which can be filed) and while so doing seeking stays of enforcement pending resolution, which has the added incentive of forcing the SEP owner to spend significant funds to simply maintain any award.⁷⁸ Additional techniques used include getting any injunction stayed pending a referral to a different court or regulator to examine competition law issues⁷⁹ or the fad of ever-multiplying anti-anti-etc. suit injunctions.⁸⁰

Thus, for many years ultimately enforcing an injunction on SEPs is an almost impossible task.

Finally, it should be noted, that even where a SEP owner is lucky enough to be allowed to enforce the injunction it obtained and the injunction impacts the infringer (perhaps making it subject to liquidated damages for the infringers' inability due to the injunction to deliver product to its suppliers⁸¹) more often than not the infringer has reserved or insured against this possibility – and if the subject of the injunction is a Chinese company it also may have been insured by the Chinese State against any damages suffered from an injunction.⁸²

It is for this reason that the innovative approach first proffered by Judge Birss in the *Unwired Planet* line of cases is so significant. Here, finally⁸³, a court was willing – after determining that at least one asserted SEP is valid, infringed, and non-design-around-able – to determine a global, SEP portfolio license as between the parties and offer that license to the implementer as an alternative to an injunction on the infringed SEP.⁸⁴

⁷⁸ Well over ten in *Vringo*'s litigation against ZTE in Romania, for example

<https://finance.yahoo.com/news/romanian-court-upholds-preliminary-injunction-124601546.html>

⁷⁹ See, e.g., Lorenzo Battarino, *Breaking News: Nokia v. Daimler referred to the CJEU*, Italy Intellectual Property Blog (Nov 26, 2020) available at <https://www.ipitalia.com/cjeu/breaking-news-nokia-v-daimler-referred-to-the-cjeu-questions-raised-by-the-dusseldorf-regional-court-translated/>.

⁸⁰ See, e.g., *Anti-anti-anti-antisuit injunctions (no kidding) widely available now in Munich: InterDigital v. Xiaomi decision lays out criteria*, Foss Patents (Mar 10, 2021) available at <http://www.fosspatents.com/2021/03/anti-anti-anti-antisuit-injunctions-no.html>.

⁸¹ See *Vringo v. ZTE*, Case no. 29437/3/2015, Civil Decision No. 507A (Bucharest Court of Appeal 4th Civil Division Oct 28, 2015) available in translation at https://drive.google.com/file/d/0B8xYsG-VkgXNMEJKQUFCRURueTA/view?resourcekey=0-icMum8F6RNIibV_y1dEYmg

⁸² At the time *Vringo* was made aware of many rumors to that effect as I noted here <https://www.kidonip.com/news/a-short-history-of-vringos-battle-with-zte/>. It is also likely that the Chinese state was willing to insure against SEP injunctions because the chance that it would have to in fact pay was quite low.

⁸³ After years (first raised here: <https://www.scribd.com/document/348967387/Vringo-v-ZTE-UK-CMC-Transcript-05-06-13>) of worrying about the *Vringo* problem. See *Unwired Planet International Ltd v Huawei Technologies Co. Ltd & Anor* [2017] EWHC 711 (Pat) (05 April 2017) at ¶143.

⁸⁴ See a brief discussion here of the line of cases at *BREAKING: UKSC upholds decision in Unwired Planet*, confirms English courts have jurisdiction to set global FRAND rates (and much more), *The IPKat Blog* (Agu 26, 2020) available at <https://ipkitten.blogspot.com/2020/08/breaking-uksc-upholds-decision-in.html>.

Indeed, Apple was supposedly so spooked by the threatened injunction or global license, that it threatened⁸⁵ to leave the UK -in a threat to holdup millions of UK users tied to its closed-garden.⁸⁶ The courts in the UK, however, did not feel threatened by Apple hyperventilating about the unfairness of injunctions, and the case continues to proceed.⁸⁷ Indeed, Apple ultimately backed down and will accept the court-imposed license.⁸⁸ The ONLY reason I believe Apple stopped its usual opportunistic unwilling behavior in this one matter was because it was afraid of being enjoined.

(5) Are other challenges typically present in negotiating a SEP license? If so, what information should be provided or exchanged as a practical matter to make negotiation more efficient and transparent?

In negotiations there are four primary challenges facing SEP owners. First, it is extremely rare for an implementer to reach out to potential SEP licensors and commence licensing negotiations (to be clear, many implementers who already took a license do reach out to licensors to commence discussions about license renewals). Accordingly, a SEP owner needs to spend significant resources simply trying to figure out whether it is worth reaching out to possible implementers to discuss licensing.⁸⁹ This is an information asymmetry problem that the Draft Proposal ignores.

Second, many implementers refuse to enter into a non-disclosure agreement, and instead engage in multi-year discussions about discussions over NDAs, addressing little or nothing of substance.⁹⁰ This is a form of constructive unwillingness to take a license that should be mentioned.

Third, implementers rarely give SEP licensors information about sales of infringing products and/or revenues other than to say there is very little and the SEP owner would be better served by focusing their efforts elsewhere. Implementers may point SEP licensors to third party (expensive) sources of information and give some sense of those sources' accuracy.

⁸⁵ Joff Wild, Apple's threat to leave UK market over SEP dispute should not be dismissed as a bluff, IAM 19 July 2021, available at <https://www.iam-media.com/frandseps/optis-apple-willing-licensee-injunction-policy>.

⁸⁶ Apple Threatens to Leave UK Market Due to \$7 Billion Patent Dispute, MacRumors (July 12, 2021) available at <https://www.macrumors.com/2021/07/12/apple-threatens-to-leave-uk-market/>.

⁸⁷ Optis Puts Apple's Feet to the UK Fire: Commit to FRAND or Be Snuffed Out, The National Law Review (Oct 4, 2021).

⁸⁸ Apple Backs Down: Commits to Take Global FRAND License to Avoid Exile from UK Market, The National Law Review (Nov 5, 2021) available at: <https://www.natlawreview.com/article/apple-backs-down-commits-to-take-global-frand-license-to-avoid-exile-uk-market>

⁸⁹ For a discussion of some of the many costs involved in licensing SEPs see David L Cohen, Licensing Standard-Essential Patents on FRAND Terms, presented at AIPLA Spring Meeting 2017, available at https://kidonip.com/wp-content/uploads/2017/07/Cohen_Paper.pdf.

⁹⁰ See for example the long history of Nokia's attempts at licensing with ZTE, recited in Vringo's response to ZTE's DG Comp Complaint at ¶¶4.7 -4.17 available at <https://www.scribd.com/document/348791248/Vringo-Response-to-ZTE-DGCOMP-Complaint>.

Nevertheless, for SEP owners figuring out potential licensing models is extremely challenging. The proposed negotiation framework can facilitated such gamesmanship.

The fourth challenge is that by merely reaching out to potential licensees, SEP owners put themselves at grave risk of IPRs, nullity suits, declaratory judgment actions for non-infringement, suits for failure to abide by IPR policies (contract) and/or suits for violations of antitrust law, not to mention regulatory investigations, and personal harassment by fanboys⁹¹. Unless an SEP owner is legally sophisticated and possesses sufficient funds to handle expensive litigations, they can easily find themselves stuck in meaningless discussions with prospective licensees that go nowhere for a very long time.

(6) Are small business owners and small inventors impacted by perceived licensing inefficiencies involving SEPs? If so, how can licensing be made more efficient and transparent for small businesses and small inventors that either own, or seek to license, SEPs?

Small businesses who try to license SEPs are impacted by licensing inefficiencies involving SEPs. The many regulatory hurdles to licensing of SEPs effectively prevent SMEs from playing in the SEP national league. This is exactly why large players such as big tech advocate (often through astroturfing organization like the ACT App(le) Association) for antitrust advocacy to get involved in SEP policy. It is a shame that antitrust agencies get played this way.

Trying to generate return on investment from any SEPs is extremely onerous and expensive. Accordingly, many smaller companies turn away from involvement in standardization efforts or chose to forego licensing revenue from their SEPs. A streamlined SEP licensing process and clear IPR rules that cannot be used as snares by implementers to rack up enforcement expenses for SEP owners would be most welcome.

It is also important to point out that many implementers are engaged in large scale astroturfing around this issue to generate support for the proposition that SEP licensing is disastrous to small business owners.⁹² It is not.

⁹¹ For a definition of fanboy see, e.g., the Urban Dictionary available at <https://www.urbandictionary.com/define.php?term=Apple%20Fanboy> .

⁹² See, e.g., Florian Mueller, Not a class ACT: the so-called App Association is simply an Apple Association and does NOT represent app developers' interests in fair distribution terms, FOSS Patents (Oct 1, 2021) available at <http://www.fosspatents.com/2021/10/not-class-act-so-called-app-association.html>

(7) Will the licensing considerations set forth in the draft revised Statement promote a useful framework for good-faith F/RAND licensing negotiations? In what ways could the framework be improved? How can any framework for good-faith negotiations, and this framework in particular, better support the intellectual property rights policies of standards-setting organizations?

See the answer to question (1) above. Additionally, it is important to stress, in agreement with the DOJ's 2015 Business Review Letter to the IEEE,⁹³ that "[i]t is unlikely that there is a one-size-fits-all approach for all SSOs, and, indeed, variation among SSOs' patent policies could be beneficial to the overall standards-setting process."

The proposed negotiation framework is mistaken because it is a one-size-fits-all exercise.

(8) What other impacts, if any, would the draft revised statement have on standards-setting organizations and contributors to the standards development process?

The revised draft threatens the viability of collaborative open standardization (as opposed to proprietary standards). We have a natural experience at play. In 2015, the IEEE used a corrupt closed door process led by Apple, Intel and Microsoft to adopt a patent policy that effectively prohibits the use of injunctions against SEPs for those who give RAND commitments under its policy.

I have written extensively about the hugely negative anticompetitive results of this exercise in my blog⁹⁴. They included

1. **Delay and chaos in standard development.** Engineers working on IEEE-SA's flagship Wi-Fi standard have described⁹⁵ the effects of new patent policy as "delay and chaos," "loss of momentum", and as causing "delay in progress" and a "broken" process" through a policy that "appears to be not enforceable or implementable."

2. **Wi-Fi lost its quality approval as an American National Standard.** In what seems to be a result of the negative LoA situation (a negative LoA⁹⁶ is when the member declines to offer to license relevant SEPs under the relevant IPR policy), in March 2019 the American National Standards Institute has decided not to approve⁹⁷ two recent Wi-Fi standard amendments from being accredited as American National Standards. In other words, the quality and reputation of Wi-Fi standards is been impaired.

⁹³ Available here <https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated>

⁹⁴ David Cohen, The IEEE 2015 Patent Policy - A Natural Experience in Devaluing Technology (Aug. 12, 2019) <https://www.kidonip.com/news/the-ieee-2015-patent-policy-a-natural-experiment-in-devaluing-technology/>

⁹⁵ MINUTES IEEE 802 LMSC EXECUTIVE COMMITTEE MEETING, Revision 0, Friday, January 22, 2016 – 13:00.

Available at www.ieee802.org/minutes/2016_01/2016-01-22-minutes-v0.pdf

⁹⁶ Konstantinos Karachalios, IEEE-SA Managing Director, Patents in Telecom (5 November 2015), available at https://www.ucl.ac.uk/laws/patents-in-telecoms-2015/docs/01_01_0905_karachalios-slides.pdf

⁹⁷ Electrical engineer institute's new WiFi measures won't get American national standard designation, MLEX (11 March 2019).

3. **Delays in disclosure of licensing intentions.** The changes to the IEEE-SA policy and forms have caused significant delays in disclosure of licensing intentions by IEEE-SA participants. For example Huawei,⁹⁸ one of the biggest contributors to Wi-Fi, went over 4 years (2015-2019) without submitting any patent assurance forms, a strategy sometimes referred to as “patent ambush”. The delays mean a reduced clarity of the patent landscape surrounding IEEE-SA standards.

4. **RAND assurances are significantly declining.** An unprecedented number of negative Letters of Assurance (LoAs) reflecting patent holders that choose not to give RAND assurances under new IEEE-SA policy. From January 2016 to the end of June 2019, a whopping 77% (1)⁹⁹ of Wi-Fi LoAs have been negative (including eight recent negative LoA from Huawei¹⁰⁰). This means that a majority of new LoAs are for patents whose owners are refusing to assure that they will license the SEPs on reasonable and non-discriminatory (RAND) terms. RAND assurances are viewed as an important safety valve to ensure that implementers of the standard are not prevented from utilizing it.

5. **The new policy and DOJ BRL have been misrepresented overseas.** IEEE-SA has engaged in aggressive advocacy of its failed new policy overseas, especially in Asian jurisdictions, alleging US Government support for the new IEEE-SA policy and encouraging enforcement against U.S. patent holders. A May 2016 press¹⁰¹ release¹⁰² and picture¹⁰³ by China’s National Development and Reform Commission (NDRC), depicts IEEE-SA officials “explaining” U.S. antitrust and DOJ positions to NDRC officials. The visit encouraged NDRC in its line of “investigations” against U.S. and Western essential patent holders such as Qualcomm, InterDigital, Dolby, Vringo, Nokia, Sisvel, HDMI, and Ericsson. These “investigations” are a well known Chinese weapon¹⁰⁴ to obtain Western technology for Chinese companies to use at cheaper or near-free rates.

7. **IEEE-SA is behaving at odds with statutory language that SDO policy developments be made in a transparent manner by a balanced decision-making.** Section 103 of the U.S. Standards Development Organization Advancement Act¹⁰⁵ defines ‘standards development activity’ as “including actions relating to the intellectual property policies of the standards

⁹⁸ Richard Lloyd, Huawei joins IEEE patent refuseniks four years since controversial policy change, IAM (17 May 2019)

⁹⁹ Table Generated by author available at <https://www.scribd.com/document/421506720/WiFi-LoAs-Submitted-1-1-2016-to-6-30-2019>

¹⁰⁰ Ben Remaly, Huawei rejects IEEE policy for some ethernet patents, GCR (20 May 2019).

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<https://www.scribd.com/document/421587496/%E4%BB%B7%E7%9B%91%E5%B1%80%E5%BC%A0%E6%B1%89%E4%B8%9C%E5%B1%80%E9%95%BF%E4%BC%9A%E8%A7%81%E7%94%B5%E6%B0%94%E7%94%B5%E5%AD%90%E5%B7%A5%E7%A8%8B%E5%B8%88%E5%AD%A6%E4%BC%9A%E9%A6%96%E5%B8%AD%E6%89%A7%E8%A1%8C%E5%AE%98Karachalios%E4%B8%80%E8%A1%8C-1>

¹⁰² <https://www.scribd.com/document/421587986/Google-Translate-of-Ndrc-Press-Release>

¹⁰³ <https://www.scribd.com/document/421639126/May-2016-IEEE-SA-Wright-Wennblohm-Karachalios-Ringle-Meeting-With-China-s-NDRC>

¹⁰⁴ China’s anti-monopoly law as a weapon against foreigners, Kidon IP Blog (Jan 13, 2019).

¹⁰⁵ Available at <https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%7D>

development organization.” IEEE-SA has embraced this definition when it filed two¹⁰⁶ notices¹⁰⁷ with the DOJ under the National Cooperative Research and Production Act of 1993 re “disclosing additions or changes to its standards development activities” that include “a [2015] update of the IEEE patent policy for standards development.

In a 2021 follow-up piece I explained how 93%(!) of submitters of letters of assurance chose not to follow this no-injunction policy¹⁰⁸

More recently, a few weeks ago we learned that IEEE-SA standards have lost their international status as a result of their imbalance policy¹⁰⁹

In other words, the 2021 Proposal has been proven to break down open standards, in the IEEE experiment that was led by Apple, Microsoft and Google. It is unclear why an administration that understands the Big Tech realities and has seen the IEEE natural experiment would such a policy. This would be a grave mistake fueled by Big Tech astro-turfing lobbying.

(9). The draft revised statement discusses fact patterns intended to indicate when a potential licensee is willing or unwilling to take a F/RAND license. Are there other examples of willingness or unwillingness that should be included in the statement?

There are numerous other example of how licensees can be unwilling, that the 2021 Proposal is missing including: refusal to be bound by a court order or jurisdiction or requiring complete adjudication of every subject SEP prior to agreeing to a pricing discussion;¹¹⁰ spending billions of dollars on lobbying/astroturfing¹¹¹; creating patent nullification NPEs¹¹²; attempts at regulatory capture and creating a revolving door with the regulators¹¹³; engaging in long term

¹⁰⁶ Available at <https://www.govinfo.gov/content/pkg/FR-2015-04-02/pdf/2015-07525.pdf>

¹⁰⁷ Available at <https://www.govinfo.gov/content/pkg/FR-2015-05-27/pdf/2015-12673.pdf>

¹⁰⁸ David Cohen, The IEEE Ill-Advised 2015 IP Policy Continues to Fail (May 6, 2021) <https://www.kidonip.com/standard-essential-patents/the-ieee-ill-advised-2015-ip-policy-continues-to-fail/>

¹⁰⁹ Khushita Vasant, IEEE’s bid to get wireless standards adopted internationally faces headwinds (MLEX, Dec. 27, 2021) (describing unprecedented failed ballots to fast-track IEEE W-Fi standards at ISO, with IEEE describing upcoming standards as being “blocked at the starting gate!”)

¹¹⁰ See, e.g., Vringo’s second response to ZTE’s submissions to DGComp at <https://www.scribd.com/document/549649446/1-Response-to-ZTE-s-Submissions-of-7-August-2014>

¹¹¹ David L. Cohen, Tech’s Frightful Five and Their Allies Come to Brussels, Kidon IP Blog (Feb 25, 2019) <https://www.kidonip.com/frightful-five/techs-frightful-five-come-to-brussels/> (for examples of lobbying); The ACT|Apple Association Charade, Kidon IP Blog (Aug 17, 2020) <https://www.kidonip.com/frightful-five/the-act-apple-association-charade/> (for astroturfing).

¹¹² See, e.g., David L. Cohen, Unified Patent’s UnFRANDly Jihad or Trolling at the PTAB, Kidon IP Blog (Mar 21, 2019) <https://www.kidonip.com/standard-essential-patents/unified-patents-unfrandly-jihad-or-trolling-at-the-ptab/>; The Real Empty Suit? Unified Patent’s Reverse Trolling Take 2, Kidon IP Blog (July 29, 2020) <https://www.kidonip.com/standard-essential-patents/the-real-empty-suit-unified-patents-reverse-trolling-take-2/>.

¹¹³ David L. Cohen, The DOJ Antitrust Division: Regulatory Capture at the Expense of U.S. Interests, IP Watchdog (June 10, 2021) available at <https://www.ipwatchdog.com/2021/06/10/doj-antitrust-division-regulatory-capture-expense-u-s-interests/id=134441/>

plays to eviscerate royalty rates;¹¹⁴ lying about sales; demanding impossible-to-agree-to royalty rate structures like daily fluctuating royalty rates; claiming SEPs are unenforceable because of late disclosure when the party claiming late disclosure has unclean hands,¹¹⁵ and willfully ignoring how standardization works and the meaning of umbrella FRAND declarations.¹¹⁶

Note also that in 2013, the ITC has found Apple to be an unwilling licensee by¹¹⁷ i.e. engaging in reverse holdup by taking the position that Apple would stand ready to pay FRAND royalties only “[i]f the Commission were to determine that the ... patent is valid, infringed and enforceable.... and if that judgement were affirmed on appeal”.¹¹⁸ The Commission explained that such

“position illustrates the potential problem of so-called reverse hold-up, a concern identified in many of the public comments received by the Commission. In reverse patent hold-up, an implementer utilizes declared-essential technology without compensation to the patent owner under the guise that the patent owner’s offers to license were not fair or reasonable. The patent owner is therefore forced to defend its rights through expensive litigation. In the meantime, the patent owner is deprived of the exclusionary remedy that should normally flow when a party refuses to pay for the use of a patented invention”¹¹⁹

The 2021 Proposal fails to account for this type of constructive refusal to deal. DOJ, USPTO and NIST should not be adopting a policy that is inconsistent with the ITC position.

Worse yet, the 2021 Proposal cites Apple’s litigation positions almost verbatim (“valid, infringed and enforceable”), revealing how regrettably Apple is, still (!) controlling administration positions.

(10). *Have prior executive branch policy statements on SEPs been used by courts, other authorities, or in licensing negotiations? If so, what effect has the use of those statements had on the licensing process, outcomes, or resolutions?*

¹¹⁴ See, e.g., David L Cohen, Apple’s CORE Hypocrisy – Setting a Record in Late Disclosure, Kidon IP Blog (June 23, 2020) <https://www.kidonip.com/frightful-five/apple-throws-an-ally-under-the-bus-again-the-case-of-the-ieee/> (citing Qualcomm’s opening statement in its FRAND trial with Apple, available at <https://www.scribd.com/document/457922809/407463620-Qualcomm-Opening-Statement>).

¹¹⁵ David L Cohen, Apple’s CORE Hypocrisy – Setting a Record in Late Disclosure, Kidon IP Blog (June 23, 2020) <https://www.kidonip.com/frightful-five/apple-throws-an-ally-under-the-bus-again-the-case-of-the-ieee/> (illustrating Apples late disclosures)

¹¹⁶ David L. Cohen, Disclosures and Enforceability of Standard Essential Patents: An Overview, *The Licensing Journal* (2022) *forthcoming*.

¹¹⁷ See ITC July 5 2013 decision at pages 62-63 <https://www.itcblog.com/5979-its-issues-public-version-of-opinion-in-certain-electronic-devices-including-wireless-communication-devices-portable-music-and-data-processing-devices-and-tablet-computers-337-ta-794>

¹¹⁸ USITC, In re Certain Electronic Devices, including Wireless Communication Devices, Portable Music and Data Processing Devices and Tablet Computers (Jul. 5 2013) at 62 <https://www.itcblog.com/5979-its-issues-public-version-of-opinion-in-certain-electronic-devices-including-wireless-communication-devices-portable-music-and-data-processing-devices-and-tablet-computers-337-ta-794>.

¹¹⁹ *Id.* at 63.

Prior government pronouncements have been used by foreign regulators as a basis for many of their more questionable activities vis-à-vis US SEP holders as discussed above.¹²⁰

In addition, the 2013 Statement was relied on the USTR to veto an exclusion order issued by the ITC against an infringer it has found to be an unwilling licensee after examining all the evidence (Apple). Regrettably, this demonstrates how such a statement was used (and likely will be used again) to shield unwilling licensees, including the world first 3 trillion dollar company. This is very bad policy. Again, I urge the DOJ not to issue the 2021 Proposal for this reason. If the Division feels strongly, it may withdraw the 2019 statement and not replace it. But, replacing it would be placing the federal governments thumb on the scale in favor of Apple, Google, Amazon, Intel, Cisco etc. – indeed this is why they are eagerly advocating for issuance of the 2021 Proposal. I hope the administration understands this reality.

(11). Are there resources or information that the U.S. government could provide/develop to help inform businesses about licensing SEPs subject to a voluntary F/RAND commitment?

Perhaps the most important thing that the US government could do is to make it clear that it does not take sides in SEP disputes in all but the most egregious circumstances. The best way to signal that would be to refrain from issuing the 2021 Proposal.

For example, if a legitimate SEP owner pursues its remedies against an unwilling licensee¹²¹ and secures various court orders or injunctions in a parallel US litigation requiring discovery of a foreign defendant,¹²² if the antitrust representatives from the unwilling licensee's home country¹²³ accompanying their President's visit to the United States¹²⁴ scold their US counterparts during a high-level delegation meeting, it would be extremely helpful if the US counterparts politely say nothing. It is definitely NOT helpful to have the Deputy Undersecretary of Commerce¹²⁵ try to allay the foreign delegates by telling them, something to the effect of not to worry, the offending US company is merely a patent troll who will be taken care of in due course.

I would also encourage the administration to study who would benefit from the 2021 Proposal. Aside from Apple – the 9 largest phone makers in the world today are Asian, 8 of whom are

¹²⁰ See for example, Don Wright's uses of the 2015 Statement in China, discussed at *Apple Throws an Ally under the Bus Again – The Case of the IEEE*, Kidon IP Blog (Sept 30, 2020) available at <https://www.kidonip.com/frightful-five/apple-throws-an-ally-under-the-bus-again-the-case-of-the-ieee/> and *The DOJ Antitrust Division: Regulatory Capture at the Expense of U.S. Interests*, Kidon IP Blog (June 11, 2021) available at <https://www.kidonip.com/frightful-five/the-doj-antitrust-division-regulatory-capture-at-the-expense-of-u-s-interests-2/>

¹²¹ *Vringo Germany GmbH v. ZTE Deutschland GmbH*, Docket No. 2 O 41/13, (Mannheim, Germany 17 December 2013) available at <https://www.scribd.com/document/548666126/2013-12-17-Judgment-English>

¹²² See, e.g., *Vringo, Inc. v. ZTE Corp*, 14-cv-4988, doc 118 (June 3, 2015).

¹²³ See e.g., 2015 Report to Congress on China's WTO Compliance at 33 available at <https://ustr.gov/sites/default/files/2015-Report-to-Congress-China-WTO-Compliance.pdf>

¹²⁴ See, e.g., https://en.wikipedia.org/wiki/State_visit_by_Xi_Jinping_to_the_United_States; <https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states>

¹²⁵ <https://www.uspto.gov/about-us/michelle-k-lee>

from China. They include Samsung, Xiaomi, Oppo, Vivo, Huawei, Lenovo, ZTE and TCL (brand name Alcatel).¹²⁶

¹²⁶ See e.g. <https://www.gartner.com/en/newsroom/press-releases/2021-09-01-2q21-smartphone-market-share>