December 17, 2024

The Honorable Darrell Issa
Chairman
House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
2138 Rayburn House Building
Washington, DC 20515

The Honorable Henry C. "Hank" Johnson, Jr.
Ranking Member
House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
2138 Rayburn House Building
Washington, DC 20515

Dear Chairman Issa and Ranking Member Johnson:

In advance of the Subcommittee's December 18, 2024, hearing on "IP and Strategic Competition with China: Part IV — Patents, Standards, and Lawfare," we are writing to underscore the critical role standard essential patents (SEPs) play in fueling America's innovation leadership and our economy. To maintain this strategic technological edge over our competitors and adversaries, we need a SEP licensing system that properly values innovation, thereby fueling the next generation of improvements and advances. This can only be achieved by strengthening the current patent system and avoiding the type of heavy-handed government regulation other jurisdictions are considering.

The Council for Innovation Promotion (C4IP) is a bipartisan coalition dedicated to promoting strong and effective intellectual property rights that drive innovation, boost economic competitiveness, and improve lives everywhere. C4IP is chaired by two former directors of the U.S. Patent and Trademark Office (USPTO), Andrei Iancu and David Kappos, who served under Presidents Trump and Obama, respectively. Our board also includes two retired judges from the Court of Appeals for the Federal Circuit, former Chief Judge Paul Michel and Judge Kathleen O'Malley.

SEPs are crucial to the world's innovation economy. They protect shared technological standards — like 5G connectivity, Wi-Fi, Bluetooth, and USB ports — that ensure products made by different manufacturers are interoperable.[1] Competition in these technological fields is now global. Experts have warned that whichever nation leads in the development of new standards in cutting-edge fields — like artificial intelligence and quantum computing — will enjoy key strategic and geopolitical advantages in the decades ahead.

[1] World Intellectual Property Organization, *Standard Essential Patents*, https://www.wipo.int/en/web/patents/topics/sep.

Under the existing framework of laws that apply to standards, SEP owners are required to license their technologies to all comers on fair, reasonable, and non-discriminatory (FRAND) terms. Companies that want to incorporate industry standards into their products are free to use those standards, to the benefit of consumers, but are obligated to obtain licenses from SEP owners. This market-based framework balances access to novel technologies with the need to preserve incentives for ongoing and future standards development. By enabling innovators and implementors to arrive at mutually beneficial agreements without government involvement, the FRAND system has successfully driven revolutionary innovation for decades.[2]

In recent years, some nations have attempted to replace the proven FRAND system with government-controlled SEP licensing regimes. In February 2024, for example, the European Parliament approved a plan that would assign an entirely new function to an EU government agency, empowering it with the authority to set SEP licensing fees unilaterally.[3] The department that would be in charge of the new agency, the European Union Intellectual Property Office, has no experience with SEPs or patents and is thus likely to set licensing rates that do not reflect the true value of inventors' IP.[4] Critics fear that the true impact of this new regime will be to add at least an extra year and expense to the otherwise market-based process, allowing implementors to use others' patented technology without a license to do so, and without paying for the privilege. Under this process, innovators will have fewer resources to pursue ongoing R&D.

[2] Jorge L. Contreras, *Origins of FRAND Licensing Commitments in the United States and Europe*, The Cambridge Handbook of Technical Standardization Law, 149–169 (2017), https://core-prod.cambridgecore.org/core/books/abs/cambridge-handbook-of-technical-standardization-law/origins-of-frand-licensing-commitments-in-the-united-states-and-europe1/C19C5A2E35EB83B41844ECCCB813CEA7.

[3] POLITICO Research and Analysis Division, *Standards at Stake: The EU's plan to balance SEP licensing and innovation*, POLITICO (2024), https://www.politico.eu/research-and-analysis/standards-at-stake-the-eus-plan-to-balance-sep-licensing-and-innovation-pdf/; Matthias Sonntag et al., *European Parliament gives green light for regulation on standard essential patents*, Gleiss Lutz (May 3, 2024), https://www.gleisslutz.com/en/news-events/know-how/european-parliament-gives-green-light-regulation-standard-essential-patents.

[4] POLITICO, *Standards at Stake, supra* note 3.

Worse yet, finalizing the EU proposal would legitimize China's norms-breaking attempts to exert global control over SEP licensing. China's aim is to favor its own domestic industries by devaluing patents granted in foreign jurisdictions.[5] As it stands, because Chinese companies overwhelmingly manufacture products using others' innovations (although some Chinese companies also contribute to standards), the Chinese government has an interest in setting rates that fall below market value. Because innovative Chinese companies may heavily benefit from state support, moreover, they are not as reliant on revenue from patent licensing as companies based in the United States. The Chinese government clearly sees a national benefit in undermining the current SEP system for the most cutting-edge technologies.

Protecting the current market-based SEP framework falls to American policymakers. The United States must urge its European counterparts to abandon the proposed government takeover of SEP licensing. If they fail to do so, China will only feel more emboldened to devalue Western-developed technologies to advance its own agenda and interests. The United States must demand that all jurisdictions — including, importantly, China — properly respect and value American intellectual property.

To successfully make these demands of governments abroad, we must also live up to those standards at home. In recent decades, monetary damages have replaced injunctions as a presumptively sufficient remedy for patent infringement following the 2006 Supreme Court decision in *eBay v. MercExchange*. To ensure a functioning IP marketplace, U.S. lawmakers and courts must address the innovation-depressing impact of this decision and ensure SEP owners can readily defend their IP rights in court and obtain appropriate relief when they prevail, including by securing injunctive relief in cases where there was a lack of good faith negotiations by the implementer and proven patent infringement.

While monetary damages are certainly better than nothing, they have the pernicious effect of signaling to domestic and foreign IP infringers that they do not need to promptly and diligently negotiate good-faith licenses with SEP owners. Absent ultimately facing an injunction at the end of a court case, it is too easy for infringers to simply dare patent owners to sue, secure in the knowledge that they are likely to face only a monetary fine years later, and one that is not likely to recuperate the losses caused by the infringers failure to do the right thing and take a license in the first instance.

[5] *Id.*

This dynamic ironically drives more patent owners to resort to slow and expensive infringement actions when their attempts to enter into licensing arrangements fall on unresponsive infringers, unnecessarily draining our legal system's resources. In addition, when inventors do not have confidence that courts will enforce existing SEPs — including by issuing injunctions because implementors refuse to enter into good-faith negotiations — they will be less likely to invest in the development of new innovations that can become standards in the future.

Finally, we urge the Department of Justice, the U.S. Patent and Trademark Office, and the National Institute of Standards and Technology to reinstate their previous position, outlined in a 2019 joint statement, clarifying that SEPs owners should have access to the same legal remedies as other patent owners do, including the right to enjoin infringement of their patented inventions.[6] This continuity and reliability would protect risky R&D throughout the U.S. economy and ensure our legal system doesn't inadvertently discourage investment in fields reliant on shared technological standards.

The U.S. economy is the most vibrant and innovative in the world. To maintain this competitive edge, we must do everything we can to ensure the technological standards of tomorrow are developed here in America without increased government regulation or intervention in the free market.

Thank you for your attention to this timely matter. We are available to answer any questions you may have.

Sincerely,

Frank Cullen
Executive Director
Council for Innovation Promotion (C4IP)

[6] Walter Copan, Under Secretary of Commerce for Standards and Technology and Director of the National Institute of Standards and Technology, Markan Delrahim, Assistant Attorney General, Antitrust Division, US. Department of Justice, and Andrei Iancu, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/Rand Commitments* (2019) (withdrawn), https://www.justice.gov/atr/page/file/1228016/dl.

cc:

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Rep. Scott Fitzgerald, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
Rep. Cliff Bentz, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
Rep. Lance Gooden, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
Rep. Ben Cline, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
Rep. Kevin Kiley, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
Rep. Nathaniel Moran, Member, House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet
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