



The Antitrust Division of the U.S. Department of Justice (DOJ), the U.S. Patent and Trademark Office (USPTO), and the National Institute of Standards and Technology (NIST) (the Agencies) [announced the withdrawal of a 2019 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments](#) (2019 Statement) on June 8, 2022.

Prior to the 2019 Statement, a standards-essential patent (SEP) holder generally could not obtain an injunction or exclusionary order against a willing licensee due to concerns that such orders would enhance the holdup power of SEP owners. During the Trump administration, the 2019 Statement conveyed that injunctions and exclusionary orders should be "equally available in patent litigation involving standards-essential patents" and nonessential patents. In other words, the prior administration's position was that "the general framework" for determining exclusionary remedies should be the same regardless of whether an SEP was involved.

Withdrawing the 2019 Statement suggests that a different framework could apply in cases involving SEPs subject to commitments to license technology on Fair, Reasonable, and Nondiscriminatory (FRAND) terms, compared to cases involving other kinds of patents. In short, the withdrawal of the 2019 Statement encourages courts and the U.S. International Trade Commission (ITC) to assess on a case-by-case basis whether an SEP holder's FRAND obligations preclude it from obtaining an exclusionary remedy.

These actions will come as no surprise to those familiar with [President Biden's Executive Order on Promoting Competition in the American Economy](#). Last year, the administration "encouraged" the U.S. attorney general and secretary of commerce to consider revising the 2019 Statement to "avoid the potential for anticompetitive extension of market power beyond the scope of granted patents, and to protect standard-setting processes from abuse." Heeding the president's call, the Agencies have now determined that withdrawing, rather than revising, the 2019 Statement is "[the best course of action for promoting both competition and innovation in the standards ecosystem](#)." According to Under Secretary of Commerce for Standards and Technology and NIST Director Laurie E. Locascio, withdrawing the 2019 Statement "will strengthen the ability of U.S. companies to engage and influence international standards that are essential to our nation's technology leadership and that will enable the global technology markets of today and tomorrow."

Channeling this sentiment in a written submission to the ITC last month, Federal Trade Commission (FTC) Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter stated that "[\[a\]s a general matter, exclusionary relief is incongruent and against the public interest where a court has been asked to resolve FRAND terms and can make the SEP holder whole](#)." The commissioners also conveyed their concern that SEP holders subject to FRAND commitments "are seeking exclusionary orders to ban products from the marketplace for the purpose of gaining leverage over existing or potential licensees" and encouraged the ITC to consider whether "the facts at hand present a case where exclusionary relief would not be in the public interest."

Additionally, in December 2021, the DOJ released [a draft policy statement](#) asking whether the 2019 Statement should be revised and proposing a draft SEP policy statement. But after evaluating more than 1,000 stakeholder comments, Assistant Attorney General Jonathan Kanter of the Antitrust Division concluded that evaluating conduct by SEP holders and implementers "on a case-by-case basis to determine if either party is engaging in practices that result in the anticompetitive use of market power or other abusive processes that harm competition" was the most effective means to "encourage good-faith efforts to reach F/RAND licenses and create consistency for antitrust enforcement policy so that competition may flourish in this important sector of the U.S. economy."

Withdrawing the 2019 Statement is not the first instance of the administration chipping away at Trump-era SEP policy, and it likely will not be the last. Companies that hold, enforce, and implement patents should keep abreast of these changes and consult with experienced counsel to understand how these developments may affect their businesses.

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