

Availability of Injunctive Relief for Standard-Essential Patent Holders

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Summary

An "industry standard" is a set of technical specifications that provides a common design for a product or process. Standardization is crucial to the functioning of the modern innovation-based economy and in particular to the efficient interoperability of technologically complex consumer electronic devices. Standards allow several firms to supply services and products that incorporate the standard, which may help to lower prices and provide greater consumer choices. Standard-setting organizations (SSOs) are voluntary membership organizations in which industry participants collaboratively select particular technical standards to be used by products in that industry. Many SSOs require their members to adhere to licensing policies and bylaws that try to preempt the potential conflict between industry standards and patent rights; such policies generally require that members of the SSO (1) disclose patent rights that are pertinent to a proposed standard and (2) license the patented invention within a standard to others on "fair, reasonable, and nondiscriminatory" terms, a standard commonly known as "FRAND licensing."

In the past several years, there has been considerable debate over whether injunctive relief in a patent infringement lawsuit (or exclusionary relief at the International Trade Commission (ITC)) should be available to companies that own patents that cover a particular industry standard (so-called "standard-essential patent" or SEP), when those companies have previously committed themselves to license their patented technology to anyone (corporate partners or competitors) on FRAND terms. The question particularly impacts the computing and telecommunications industries, as consumer electronic products such as smartphones, GPS devices, tablets, and gaming consoles incorporate a number of industry standards that include patented technology. Many high technology companies have been involved in patent infringement lawsuits and cases before the ITC that concern disputes over SEPs and FRAND licensing. Some of the electronic device manufacturers object to what they believe are unreasonably excessive royalty requests by the SEP holder and thus do not reach an agreement to license the SEP. In such a situation, the SEP holder has sought out a judicial determination of the royalty rate or even an injunction (from federal courts) or exclusion order (from the ITC) against the sale or importation of products made by companies that did not obtain a license.

Some argue that a company that owns an SEP and that has promised to license such patent on FRAND terms essentially waives its right to seek an injunction against another company that implements the standard but fails to reach a license agreement with the SEP holder. They raise concerns about the potential negative effects on competition and U.S. consumers of allowing injunctive or exclusionary relief in cases involving FRAND-encumbered SEPs. They also believe that the threat of an injunction weighs heavily in negotiations over SEP licensing in a way that disproportionately rewards the SEP holder. However, others argue that an SEP holder is entitled to injunctive relief because an SSO's FRAND agreement does not include a promise not to seek an injunction in appropriate circumstances. Yet, they assert that if an SSO required its members to give up their right to exclude others (which is the primary right that a patent confers), participation in the voluntary standard-setting process may diminish. Furthermore, if SEP holders were limited to only damages and not injunctive relief, implementers of the industry standard may forgo negotiating a license before introducing a product and then wait for a federal court to decide on an award of damages for the infringement.

Contents

Introduction 1
Background 1
Patent Law Fundamentals 1
IT Industry Products and Patents 2
Standard-Setting Organizations and FRAND Licensing 3
Patent Hold Up 5
Calculating a Reasonable Royalty for a FRAND-Encumbered SEP 5
International Trade Commission 7
Injunctive Relief in the Federal Courts and at the ITC: Applicable Standards 9
Standards for Injunctive Relief in the Federal Courts 9
Standards for Exclusionary Relief in the ITC 11
Recent Developments Relating to Standard-Essential Patents and FRAND Licensing 13
U.S. Department of Justice Antitrust Division's Review of Patent Portfolio Acquisitions 13
Recent Federal Court Cases Involving Standard-Essential Patents 14
Recent Cases Before the ITC Involving Standard-Essential Patents 15
Hearings in the 112th Congress 19
June 20, 2012, Senate Judiciary Committee 19
July 11, 2012, Senate Judiciary Committee 20
July 18, 2012, House Judiciary Subcommittee on Intellectual Property, Competition and the Internet 21
The FTC's Investigation of Google's Business Practices and the Consent Order 23
DOJ/USPTO's Policy Statement on Remedies for FRAND-encumbered SEPs 24

Contacts

Author Contact Information 25

Introduction

This report provides an overview of the current debate over whether a holder of a patent essential to an industry standard, who has promised to license such patented technology on fair, reasonable, and non-discriminatory (FRAND) terms, may nevertheless obtain an injunction from a federal court or an exclusion order from the International Trade Commission against infringing products that implement the industry standard. The report first summarizes several fundamental principles of patent law, then discusses the relationship between standard-setting organizations and FRAND licensing. It continues with an explanation of the role and duties of the International Trade Commission (ITC) and how there are different legal standards that apply to the award of injunctive relief in federal courts and in the ITC. Finally, the report closes with an overview of recent developments relating to standard-essential patents and FRAND licensing that have occurred in several settings, including: (1) federal agencies responsible for antitrust enforcement, (2) the ITC, (3) federal courts, and (4) congressional hearings.

Background

Patent Law Fundamentals

The U.S. Patent and Trademark Office (PTO) issues a patent to an inventor after PTO examiners approve the submitted patent application for an allegedly new invention.[1] An application for a patent consists of two primary parts: (1) a "specification," which is a written description of the invention enabling those skilled in the art to practice the invention, and (2) one or more claims that define the scope of the subject matter which the applicant regards as his invention.[2] Therefore, these claims define the scope of the patentee's rights under the patent.[3]

According to Section 101 of the Patent Act, one who "invents or discovers any new and useful process, machine, manufacture, or any composition of matter, or any new and useful improvement thereof, may obtain a patent therefore, subject to the conditions and requirements of this title."[4] Thus, in order for an invention to qualify for patent protection, it must fall within one of the four statutory categories of patent-eligible subject matter: processes, machines, manufactures, and compositions of matter. However, the U.S. Supreme Court has articulated certain limits to § 101 of the Patent Act, stating that "laws of nature, natural phenomena, and abstract ideas" may not be patented.[5]

Before a patent may be granted, the PTO examiners must find that the new invention satisfies several substantive requirements that are set forth in the Patent Act.[6] For example, one of the

[1] 35 U.S.C. § 131.

[2] 35 U.S.C. § 112.

[3] 3-8 DONALD S. CHISUM, CHISUM ON PATENTS § 8.01 (2006).

[4] 35 U.S.C. § 101.

[5] Diamond v. Diehr, 450 U.S. 175, 185 (1981).

[6] 35 U.S.C. §§ 102, 103(a).

statutory requirements for patentability of an invention is "novelty."[7] For an invention to be considered "novel," the subject matter must be different than, and not be wholly "anticipated" by, the so-called "prior art," or public domain materials such as publications and other patents. Another statutory requirement is that the subject matter of an alleged invention must be "nonobvious" at the time of its creation. A patent claim is invalid if "the differences between the subject matter sought to be patented and the prior art[8] are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains."[9] Finally, the invention must also be "useful," which means that the invention provides a "significant and presently available," "well-defined and particular benefit to the public."[10]

The Patent Act grants patent holders the exclusive right to exclude others from making, using, offering for sale, or selling their patented invention throughout the United States, or importing the invention into the United States.[11] Whoever performs any one of these five acts during the term of the invention's patent, without the patent holder's authorization, is liable for infringement.[12] A patent holder may file a civil action against an alleged infringer in order to enjoin him from further infringing acts (by securing an injunction, also referred to as injunctive relief).[13] The patent statute also provides federal courts with discretion to award damages to the patent holder that are "adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer."[14] The usual term of patent protection is 20 years from the date the patent application is filed.[15] At the end of that period, others may use the invention without regard to the expired patent.

The U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") is a specialized tribunal established by Congress that has exclusive appellate jurisdiction in patent cases.[16] Parties dissatisfied with the Federal Circuit's rulings may petition the U.S. Supreme Court to review the appellate court's decision. However, the Supreme Court is not required to entertain the appeal; it has discretion to decide whether to grant certiorari to review the case.[17]

IT Industry Products and Patents

Products in the information technology (IT) industry usually incorporate many component parts that could be subject to hundreds or thousands of patents, "with no one company holding all the

[7] 35 U.S.C. § 102.

[8] "Prior art" is a legal term of art that refers to the materials (usually called "references" in patent law) that comprise the available knowledge regarding the subject matter of the invention sought to be patented, such as other issued patents, publications, and evidence of actual uses or sales of the technology. ROGER SCHECHTER & JOHN THOMAS, PRINCIPLES OF PATENT LAW 4-1 (2d ed. 2004).

[9] 35 U.S.C. § 103(a).

[10] In re Fischer, 421 F.3d 1365, 1371 (Fed. Cir. 2005).

[11] 35 U.S.C. §§ 154(a)(1), 271(a).

[12] 35 U.S.C. § 271(a).

[13] 35 U.S.C. § 283.

[14] 35 U.S.C. § 284.

[15] 35 U.S.C. §154(a)(2).

[16] 28 U.S.C. § 1295(a)(1).

[17] 28 U.S.C. § 1254(1).

[patent] rights necessary to manufacture a product."[18] Commentators indicate that the IT sector is mired in what they call a "patent thicket," meaning a "dense web of overlapping [patent] rights that a company must hack its way through ... to actually commercialize new technology."[19] According to many observers, the set of potentially relevant patents for any IT product is overwhelming due to both the number of (overlapping and possibly invalid) patents *granted* in this area and the number of components *incorporated* in each product.[20]

Smartphones, tablets, and other wireless devices comprise many patented technologies that are made to comply with a large number of industry standards that relate to cellular communications, wireless Internet connectivity, and video and audio compression technology.

Standard-Setting Organizations and FRAND Licensing[21]

An "industry standard" is a set of technical specifications that provides a common design for a product or process.[22] Standards sometimes arise through government action (such as the Federal Communications Commission) or through the operation of the marketplace (such as a large majority of consumers that choose one product over another). However, private industry groups called standards setting organizations (SSO) or standards developing organizations (SDO) have long been active in promulgating standards for their members. Many technology companies are members of dozens of standards bodies.[23]

Standards bodies and their members have increasingly encountered claims that a patent covers an industry standard. If the patent is valid and enforceable, it is possible that the standard cannot be employed without infringing that patent.

Industry standards potentially bring economic benefits ranging from a broad range of interoperable products to more robust, competitive markets. In turn, patent rights may promote innovation, the disclosure of new inventions, and technology transfer. Conflicts between industry standards and patent rights require a careful weighing of these competing interests.

Many standards bodies have established disclosure and licensing polices to attempt to preempt the potential conflict between industry standards and patent rights. Although these policies vary, they generally require that members of the standards body (1) disclose patent rights that are pertinent to a proposed standard and (2) license the patented invention that is essential to an adopted standard to others, often on "reasonable and nondiscriminatory" terms, a standard

[18] Federal Trade Commission, *The Evolving IP Marketplace* (March 2011), *available at* http://www.ftc.gov/os/2011/03/110307patentreport.pdf, at 221 (hereinafter "FTC Report").

[19] Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, *in* INNOVATION POLICY AND THE ECONOMY 119, 125 (2001).

[20] JAMES BESSEN AND MICHAEL J. MEURER, PATENT FAILURE 8 (2008).

[21] Portions of this section of the memorandum have been borrowed and adapted from an earlier CRS report that examines the potential conflicts between industry standards and intellectual property, *see* CRS Report RL31951, *Innovation, Intellectual Property, and Industry Standards*, by John R. Thomas.

[22] Mark A. Lemley, "Intellectual Property Rights and Standard-Setting Organizations," 90 CALIFORNIA LAW REVIEW (2002), at 1889.

[23] *Id.* at 1907.

commonly known as "RAND licensing" or "FRAND licensing" (some policies call for fair, reasonable, and nondiscriminatory terms). FRAND commitments "facilitate the bilateral licensing of patents that are needed to allow a standard to become successful and to provide assurances to implementers of the standard that the patented technologies will be available to those willing and able to license them."[24]

However, SSO policies often do not provide a specific royalty rate for a FRAND license nor do they define what would be considered "reasonable" license terms. As the Federal Trade Commission has observed, "No court has yet directly addressed the definition of FRAND, but a manufacturer that believes a patentee's license offer is unreasonable may raise the issue in a contract dispute."[25] SSO policies regarding FRAND also do not apply or bind patent holders that are not participating in the standard setting process.[26]

In the information technology (IT) industry, "products use industry standards to ensure interoperability, necessitating that manufacturers license technology that is essential to the standard."[27] Standard-essential patents (SEPs) are those patents that disclose and claim one or more inventions that are required in order to implement a particular industry standard. SEPs that are subject to a promise by the patent holder to license the technology on FRAND terms will often be referred to in this report as "FRAND-encumbered SEPs."

One federal court has explained SEPs and FRAND licensing as follows:

> Standards are important for several reasons. First, they facilitate the adoption and advancement of technology as well as the development of products that can interoperate with one another. Standards also lower costs by increasing product manufacturing volume, and they increase price competition by eliminating "switching costs" for consumers who desire to switch from products manufactured by one firm to those manufactured by another. They also lead to earlier adoption of new technology. There is, however, one downside to standards: they create "essential patents." The term "essential patents" refers to patents that are essential to a standard – i.e., patents that claim technologies selected by a standards development organization ("SDO"). Once a patent becomes an essential patent, it gains undue significance as a result. Companies that produce products governed by a standard become "locked in" to the technologies included in the standard. Customers have no practical choice other than to buy products that comply with the standard. Thus, the owners of essential patents gain market power.... "FRAND commitments" are intended to prevent owners of essential patents from acquiring too much of the market power that would otherwise be inherent in owning an essential patent.[28]

[24] *Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-Essential Patents: Hearing Before the Senate Judiciary Committee,* 112th Cong., 2d Sess., July 11, 2012 (statement of Joseph F. Wayland, Acting Assistant Attorney General, Antitrust Division, U.S. Department of Justice), at 5 (hereinafter "SEP Hearing").

[25] FTC Report, *supra* note 18, at 194.

[26] *Id.* at 192-93.

[27] *Id.*

[28] Research in Motion Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788, 790-91 (N.D. Tex. 2008) (internal quotations and citations omitted); *see also* Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 210 (3rd Cir. 2007) ("Industry participants who have invested significant resources developing products and technologies that conform to the standard will find it prohibitively expensive to abandon their investment and switch to another standard. They will have become 'locked in' to the standard. In this unique position of bargaining power, the patent holder may be able to extract supracompetitive royalties from the industry participants.").

Patent Hold Up

Concerns have been raised by several parties and commentators, including the U.S. Department of Justice and the Federal Trade Commission (FTC), that companies that own FRAND-encumbered SEPs may opportunistically use the threat of an injunction as leverage against other firms (colloquially referred to as a "hold up") in demanding higher royalties after the patented technology has been incorporated into an industry standard than they could have otherwise obtained had the technology not been used in the standard.[29] SEP holders could also try to use its patent to exclude a potential competitor from the U.S. market. As recently explained in a court opinion written by federal Judge Richard Posner, "[O]nce a patent becomes essential to a standard, the [SEP patent holder's] bargaining power surges because a prospective licensee has no alternative to licensing the patent; he is at the patentee's mercy."[30] Patent hold-up can also lead to other problems, such as inducing companies to delay or "avoid incorporating standardized technology in their products" and harming consumers "to the extent that companies implementing the standard pass on higher royalties in the form of a higher price."[31]

Calculating a Reasonable Royalty for a FRAND-Encumbered SEP

The FTC has stated that when a court decides to deny an injunction to a patent holder,

> the question naturally arises of what [monetary] remedy to apply. The court opinions that address the question most commonly require ongoing royalties that allow the manufacturer to continue making the infringing product. The Federal Circuit has held that this remedy can be appropriate in lieu of an injunction.... No consensus on how to set the royalty rate has emerged from the case law, however. The Federal Circuit has stated that district courts must articulate a reasonable basis for determining the amount, and that the award should account for the changed relationship of the parties resulting from an adjudicated finding of infringement of a valid patent.[32]

Furthermore, the FTC notes that in the specific context of SEPs, "[w]hen a patentee and implementer of standardized technology bargain for a licensing rate, they do so within a framework defined by patent remedies law. That law sets the implementer's liability if negotiations break down and the parties enter patent litigation, and therefore heavily influences the negotiated amount."[33] Yet, marketplace circumstances often make the determination of an appropriate damages award in patent litigation very difficult. In some cases, the product or process that is found to infringe may incorporate numerous additional elements beyond the patented invention. In such circumstances, a court may apply "the entire market value rule," which "permits recovery of damages based upon the entire apparatus containing several features, where the patent-related feature is the basis for consumer demand."[34] On the other hand, if the court determines that the infringing sales were due to many factors beyond the use of the patented

[29] SEP Hearing, *supra* note 24, statement of Edith Ramirez, Commissioner of the FTC, at 1.

[30] Apple, Inc. v. Motorola, Inc., No. 1:11-cv-08540 (N.D. Ill.), Opinion and Order of June 22, 2012, slip op. at 18, *available at* http://betanews.com/wp-content/uploads/2012/06/Posner-June-22-Apple-order.pdf.

[31] SEP Hearing, *supra* note 24, statement of Joseph F. Wayland, at 4.

[32] FTC Report, *supra* note 18, at 236.

[33] *Id.* at 193.

[34] State Indus., Inc. v. Mor-Flo Indus., Inc., 883 F.2d 1573, 1580 (Fed. Cir. 1989).

invention, the court may apply principles of "apportionment" to measure damages based upon the value of the patented feature alone.[35]

But as American University Washington College of Law Professor Jorge L. Contreras has explained, "the actual scope and contours of FRAND licenses have puzzled lawyers, regulators and courts for years, and past efforts at clarification have never been very successful."[36] He has also further described FRAND as follows:

> [T]here continues to be significant disagreement among market participants over the meaning of FRAND. This disagreement arises both in reference to the level of royalties that should be considered "reasonable," and whether other tactics, such as seeking injunctive relief, are fair game when FRAND commitments have been made. Such disagreements have serious consequences because a commitment to grant a license on FRAND terms is not itself a license. A license to operate under a patent is not granted until the parties can agree on those "fair, reasonable and non-discriminatory" terms. So, if the parties can't agree on the terms of the FRAND license for a particular "standards-essential" patent, the frustrated licensee must either refrain from implementing the standard (and lose a significant market opportunity) or risk infringing the patent. The typical result: litigation.[37]

In a June 22, 2012, ruling by federal Judge Richard Posner that dismissed with prejudice a patent infringement lawsuit between Apple and Motorola, Judge Posner offered his guidance to courts on how to calculate an appropriate royalty for a FRAND-encumbered SEP:

> The proper method of computing a FRAND royalty starts with what the cost to the licensee would have been of obtaining, just before the patented invention was declared essential to compliance with the industry standard, a license for the function performed by the patent. That cost would be a measure of the value of the patent qua patent.... The purpose of the FRAND requirements ... is to confine the patentee's royalty demand to the value conferred by the patent itself as distinct from the additional value—the hold-up value—conferred by the patent's being designated as standard-essential.[38]

In a July 18, 2012, letter from Apple to Senators Leahy and Grassley (the chairman and ranking Member of the Senate Judiciary Committee, respectively), Apple offered its opinion on the proper determination of FRAND royalties:

> [I]t is wrong to charge FRAND royalties on the end price of a device like the iPhone, whose value arises more from product-differentiating technology than standardized technology, and whose price reflects this. A FRAND royalty on an iPhone should be no higher than a FRAND royalty on any other 3G phone. It is akin to a toll on a highway: the toll is identical for a jalopy and a new sports car—the sports car does not pay more just because it is faster, more stylish, and has a better sound system. Nor is it FRAND to seek royalties based on the mere fact that a particular technology was standardized; a FRAND royalty should be limited

[35] Dowagiac Mfg. Co. v. Minn. Moline Plow Co., 235 U.S. 641 (1915).

[36] Jorge L. Contreras, *The February of FRAND,* Mar. 6, 2012, Patently-O Patent Law Blog, *at* http://www.patentlyo.com/patent/2012/03/february-of-frand.html.

[37] Jorge L. Contreras, *The Frand Wars: Who's on First?,* April 17, 2012, Patently-O Patent Law Blog, *at* http://www.patentlyo.com/patent/2012/04/the-frand-wars-whos-on-first.html.

[38] Apple, Inc. v. Motorola, Inc., No. 1:11-cv-08540 (N.D. Ill.), Opinion and Order of June 22, 2012, slip op. at 18, *available at* http://betanews.com/wp-content/uploads/2012/06/Posner-June-22-Apple-order.pdf.

> to the true technical value of a patented technology, not the artificially inflated value based on the fact that it has been included in a mandatory industry standard.[39]

In a policy statement issued on January 8, 2013, the U.S. Department of Justice, Antitrust Division (DOJ), and the U.S. Patent & Trademark Office (USPTO) offered their opinion on the amount of monetary compensation for a FRAND-encumbered SEP:

> Although we recommend caution in granting injunctions or exclusion orders based on infringement of voluntarily F/RAND-encumbered patents essential to a standard, DOJ and USPTO strongly support the protection of intellectual property rights and believe that a patent holder who makes such a F/RAND commitment should receive appropriate compensation that reflects the value of the technology contributed to the standard. It is important for innovators to continue to have incentives to participate in standards-setting activities and for technological breakthroughs in standardized technologies to be fairly rewarded.[40]

International Trade Commission

Besides seeking legal relief for infringement in the federal courts, U.S. patent holders may also obtain an order from the U.S. International Trade Commission (ITC or Commission) preventing the importation of foreign goods that infringe their rights. The ITC is an independent, nonpartisan, quasi-judicial federal government agency responsible for investigating and arbitrating complaints of violations of Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), which prohibits unfair methods of competition or other unfair acts in the importation of products into the United States. Section 337 also prohibits the importation of articles that infringe valid U.S. patents, copyrights, processes, trademarks, or protected design rights. (The majority of unfair competition acts asserted under Section 337 involve allegations of patent infringement.[41]) However, a patent holder must satisfy Section 337's "domestic industry" requirement in order for the ITC to adjudicate a patent dispute. That is, Section 337 declares unlawful the importation into the United States of articles that infringe a U.S. intellectual property right, but *only if* "an industry in the United States, relating to the articles protected by the patent, copyright, trademark, mask work, or design concerned, exists or is in the process of being established."[42] As the Federal Circuit has explained, Congress included the domestic industry requirement because it "recognized that the Commission is fundamentally a trade forum, not an intellectual property forum, and that only those intellectual property owners who are actively engaged in steps leading to the exploitation of the intellectual property should have access to the Commission."[43] A patent holder can satisfy the domestic industry requirement by showing one of the following:

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[39] Letter from Bruce Sewell, General Counsel, Apple, Inc., to Senators Leahy and Grassley, July 18, 2012,at 3, *available at* http://www.scribd.com/doc/100758337/Apple-to-Senate-Google-Abuses-FRAND.

[40] U.S. Dep't of Justice and U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments,* Jan. 8, 2013, at 8, *available at* http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

[41] Colleen V. Chien, *Patently Protectionist,* 50 WILLIAM & MARY L. REV. 63, 70 (2008 (patent cases comprise 85% of the ITC's Section 337 docket). For more information about Section 337 proceedings, *see* CRS Report RS22880, *Intellectual Property Rights Protection and Enforcement: Section 337 of the Tariff Act of 1930*, by Shayerah Ilias.

[42] 19 U.S.C. § 1337(a)(2).

[43] John Mezzalingua Assocs. v. ITC, 660 F.3d 1322, 1327-28 (Fed. Cir. 2011) (internal quotations and citation omitted).

1. significant investment in plant and equipment;
2. significant employment of labor or capital; or
3. substantial investment in its exploitation, including engineering, research and development, or licensing.[44]

Congress added the third provision listed above in 1988[45] in order to help more companies satisfy the domestic industry requirement, including those that lack manufacturing activities but instead engage in licensing and research.[46] The ITC has *in rem* jurisdiction over accused imported products, and the ITC need not have personal jurisdiction over accused manufacturers or meet venue requirements.[47]

The ITC's Administrative Law Judges (ALJs) manage litigation, preside over evidentiary hearings, and make an initial determination (ID) in the agency's investigations involving unfair practices in import trade. The ID as to whether Section 337 has been violated is certified to the Commission (a six-member decision-making body that heads the ITC); the Commission may then review and adopt, modify, or reverse the ALJ's ID; if the Commission declines to review the ID, then the ID becomes the determination of the Commission.[48]

The Commission's determination is sent to the President; he may veto such determination "for policy reasons" within a 60-day review period.[49] If the President notifies the Commission of his disapproval of the determination, the determination "shall have no force or effect."[50] If the President does not veto the determination within the 60-day review period, the determination becomes final on the day after the close of the period, or the day on which the President expressly notifies the Commission of his approval.[51]

Anyone adversely affected by a decision of the ITC may appeal the decision, within 60 days after the determination becomes final, to the Federal Circuit.[52] The agency's decisions are reviewed in accordance with the standards of judicial deference provided by the Administrative Procedure Act.[53] The largely deferential review standards provide that the court shall uphold the agency's factual findings when the court determines that they are supported by substantial evidence[54] on the record as a whole, and that the agency's action is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. However, the Federal Circuit has held that the construction and interpretation of patent claims are a matter of law that receive de novo review by

[44] 19 U.S.C. § 1337(a)(3)(A)-(C).

[45] Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107 (1988).

[46] *John Mezzalingua Assocs.,* 660 F. 3d at 1327.

[47] Russell E. Levine, *The Pro's and Con's of Patent Litigation Before the International Trade Commission,* at 2, *available at* http://apps.americanbar.org/litigation/committees/intellectual/roundtables/1106_outline.pdf.

[48] See U.S. Int'l Trade Comm'n, *Section 337 Investigations: Answers to Frequently Asked Questions* (March 2009), *available at* http://www.usitc.gov/intellectual_property/documents/337_faqs.pdf.

[49] 19 U.S.C. § 1337(j).

[50] 19 U.S.C. § 1337(j)(2).

[51] 19 U.S.C. § 1337(j)(4).

[52] 19 U.S.C. § 1337(c).

[53] 5 U.S.C. § 706(2)(E).

[54] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951).

a reviewing court.[55] In addition, federal district courts do not give *res judicata* or collateral estoppel effect to ITC decisions; thus, patent holders that win a case before the ITC must relitigate the issue of patent infringement liability before the federal courts.[56]

The ITC has the power to order several forms of prospective injunctive relief, including ordering the U.S. Customs and Border Protection (CBP) to stop imports from entering U.S. borders (an exclusion order), or issuing cease and desist orders that prohibit parties from distributing or selling infringing articles from existing U.S. inventory. However, unlike the federal courts, the ITC lacks the statutory authority to award monetary damages for patent infringement (past or future).[57]

Injunctive Relief in the Federal Courts and at the ITC: Applicable Standards

Standards for Injunctive Relief in the Federal Courts

To prevent the violation of any right secured by a patent, the Patent Act provides that a federal court "may grant injunctions in accordance with the principles of equity ... on such terms as the court deems reasonable."[58] An injunction prevents the adjudicated infringer from practicing the patented invention until the patent expires. Without the right to obtain injunctive relief, "the right to exclude granted to the patentee would have only a fraction of the value it was intended to have, and would no longer be as great an incentive to engage in the toils of scientific and technological research."[59]

In practice, for much of its history the U.S. Court of Appeals for the Federal Circuit routinely granted injunctions to patent owners that prevailed in infringement litigation, in keeping with its opinion that "[b]ecause the right to exclude recognized in a patent is but the essence of the concept of property, the general rule is that a permanent injunction will issue once infringement and validity have been adjudged."[60] However, the U.S. Supreme Court in its May 2006 opinion, *eBay v. MercExchange,*[61] unanimously vacated the Federal Circuit's "general rule" calling for a permanent injunction upon a finding of patent infringement. Writing for the Court, Justice Clarence Thomas explained that traditional principles of equity that govern issuance of injunctive relief "apply with equal force to disputes arising under the Patent Act."[62] Thus, in order for a court to grant injunctive relief, a plaintiff must satisfy a four-factor test by demonstrating

[55] Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1454 (Fed. Cir. 1998).

[56] Tandon Corp. v. Int'l Trade Comm'n, 831 F.2d 1017 (Fed. Cir. 1987); Texas Instr. v. Cypress, 90 F.3d 1558 (Fed. Cir. 1996).

[57] FTC Report, *supra* note 18, at 239.

[58] 35 U.S.C. § 283.

[59] Smith Int'l, Inc. v. Hughes Tool Co., 718 F.2d 1573, 1578 (Fed. Cir. 1983) (citation omitted).

[60] MercExchange, L.L.C. v. eBay, Inc., 401 F.3d 1323, 1338 (Fed. Cir. 2005) (citation and internal quotations omitted).

[61] eBay, Inc. v. MercExchange, L.L.C., 547 U.S. 388 (2006). For a more detailed explanation and analysis of the *eBay* case, *see* CRS Report RL33429, *Availability of Injunctive Relief in Patent Cases: eBay, Inc. v. MercExchange, L.L.C.*, by Brian T. Yeh.

[62] *eBay,* 547 U.S. at 391.

1. that it has suffered an irreparable injury;
2. that remedies available at law, such as monetary damages, are inadequate to compensate for that injury;
3. that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and
4. that the public interest would not be disserved by a permanent injunction.[63]

Two concurring opinions, written by Chief Justice John Roberts, Jr., and Justice Anthony Kennedy, were filed in *eBay* and reveal an apparent disagreement among the Justices. Chief Justice Roberts' concurring opinion, joined by Justices Antonin Scalia and Ruth Bader Ginsburg, predicted that injunctive relief will likely continue to be the usual remedy for patent infringement, consistent with the "long tradition of equity practice."[64] A district court's equitable discretion in granting or denying an injunction in patent cases, therefore, is not unfettered, in the view of these three Justices.

While agreeing with Chief Justice Robert's concurrence that "history may be instructive" in applying the traditional four-factor test for deciding whether an injunction should issue or not in patent infringement cases, Justice Kennedy's concurring opinion, joined by Justices John Paul Stevens, David Souter, and Stephen Breyer, suggested that historical practice might not necessarily be helpful for courts to follow when dealing with some patent infringement suits in the current business environment: "[T]rial courts should bear in mind that in many instances the nature of the patent being enforced and the economic function of the patent holder present considerations quite unlike earlier cases."[65] Justice Kennedy acknowledged the emergence of patent holding companies (so-called "patent trolls")[66] and their impact on patent litigation today:

> An industry has developed in which firms use patents not as a basis for producing and selling goods but, instead, primarily for obtaining licensing fees.... For these firms, an injunction, and the potentially serious sanctions arising from its violation, can be employed as a bargaining tool to charge exorbitant fees to companies that seek to buy licenses to practice the patent.... When the patented invention is but a small component of the product the companies seek to produce and the threat of an injunction is employed simply for undue leverage in negotiations, legal damages may well be sufficient to compensate for the infringement and an injunction may not serve the public interest.[67]

The *eBay* case "represented a sea change in patent litigation" and helped reduce the problem of patent holdup.[68] Before *eBay,* "[p]atentees who owned rights in very small pieces of complex, multi-component products could threaten to shut down the entire product. As a result, even a very weak patent could command a high royalty in settlement from defendants afraid of gambling their

[63] *Id.*

[64] *eBay,* 547 U.S. at 395 (Roberts, C.J., concurring).

[65] *Id.* at 396 (Kennedy, J., concurring).

[66] For more information on patent trolls, *see* CRS Report R42668, *An Overview of the "Patent Trolls" Debate*, by Brian T. Yeh.

[67] *eBay,* 547 U.S at 396-97.

[68] Colleen V. Chien and Mark A. Lemley, *Patent Holdup, the ITC, and the Public Interest,* at 9, *available at* https://www.law.stanford.edu/display/images/dynamic/events_media/Panel%202%20-%20Chien%20&%20Lemley%20-%20Patent%20Holdup,%20the%20ITC,%20and%20the%20Public%20Interest.pdf.

entire product on a jury's decision."[69] However, in following Justice Kennedy's concurrence in *eBay,* federal courts have rarely issued injunctions to patent holding companies.[70] In addition, *eBay* has impacted the availability of injunctive relief for SEP holders that promised to license on FRAND terms. The commissioner of the FTC has observed that because federal courts must apply the *eBay* equitable analysis in deciding whether to grant injunctive relief, "it may be difficult for RAND-encumbered SEP holders to show that money damages are inadequate because they have already committed to license their intellectual property on RAND terms."[71]

Standards for Exclusionary Relief in the ITC

As an administrative agency and not an Article III court, the ITC has asserted that the Supreme Court's *eBay* decision does *not* apply to ITC remedy determinations under Section 337; thus, the ITC is not required to apply the traditional four-factor test for injunctive relief used by federal district courts. This position was upheld by the Federal Circuit in its December 2010 opinion, *Spansion, Inc. v. ITC*.[72] According to the Federal Circuit:

> The legislative history of the amendments to Section 337 indicates that Congress intended injunctive relief to be the normal remedy for a Section 337 violation and that a showing of irreparable harm is not required to receive such injunctive relief. This is shown by two distinct actions of Congress. First, in passing the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, Congress eliminated the monetary remedy for intellectual property import violations, representing a legislative determination that an injunction is the only available remedy for violations of Section 337. Second, in 1988, Congress amended Section 337 by passing the Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107, explicitly removing the requirement of proof of injury to the domestic industry and making it unnecessary to show irreparable harm to the patentee in the case of infringement by importation.
>
> As contrasted with the remedial scheme established by Congress for proceedings before the Commission, the statutory remedies available in proceedings before the district courts are quite different. In addition to the remedy of damages under 35 U.S.C. § 284, Congress gave district courts the discretion to grant injunctive relief and in doing so made explicit that such discretion is to be exercised "in accordance with the principles of equity ... on such terms as the court deems reasonable."[73]

Section 337 of the Tariff Act of 1930 permits the ITC, in deciding whether to issue an exclusion order, to consider the effect of such exclusion upon

1. the public health and welfare,
2. competitive conditions in the United States economy,

[69] *Id.*

[70] *Id.* at 11.

[71] SEP Hearing, *supra* note 24, statement of Edith Ramirez, at 7.

[72] 629 F.3d 1331 (Fed. Cir. 2010).

[73] *Spansion,* 629 F.3d at 1358-59 (internal citations and quotations omitted).

3. the production of like or directly competitive articles in the United States, and
4. United States consumers.[74]

Law professors Colleen Chien and Mark Lemley note that although the ITC appears to have sufficient statutory authority to take into account a variety of public interest factors (including consumers and competition) when deciding whether to grant an exclusion order, the ITC rarely has exercised that power.[75] The ITC has refrained from imposing an exclusion order based on these considerations on only three previous occasions, and none in the past quarter century. These cases, however, involved products that are important to human health or other critical national policy goals, including "car parts necessary for improved fuel efficiency, scientific equipment for nuclear physics research, and hospital burn beds."[76] The law professors surmise that the reason the ITC rarely finds that an exclusion order would threaten the public interest is because "the ITC views enforcing patents as in the public interest, with the result that the public interest analyst starts out with a thumb on the scale in favor of the patentee."[77]

The Federal Trade Commission (FTC) has observed that "unlike the situation in district court, a finding of infringement in the ITC leads to a nearly automatic exclusion order."[78] Thus, the FTC explained that some parties are "worried that patentees might bring suit in the ITC more frequently in the future in the hope of obtaining exclusion orders in circumstances where injunctions might not have been granted in federal district court."[79] Law professors Chien and Lemley argue that in the aftermath of *eBay,* patent assertion entities (so-called "patent trolls") "are flocking to the ITC" in search of an injunction or the threat of one.[80] However, in June 2012, the ITC published an analysis of its caseload data that it claims does not support the suggestion that *eBay* has greatly contributed to an increase in complaint filings by patent trolls at the ITC.[81]

Chien and Lemley have noted that "[l]egislative and judicial improvements made to patent law procedures and remedies simply don't apply in the ITC,"[82] citing the *eBay* example as well as the recently enacted Leahy-Smith America Invents Act of 2011 (AIA). The AIA restricts the ability of plaintiffs to sue multiple unrelated defendants for infringement in the same case or same trial "based solely on allegations that they each have infringed the patent or patents in suit,"[83] which is a common practice among patent assertion entities ("patent trolls"). However, Congress did not extend this joinder limitation to the ITC, the law professors observed. Thus, "[w]hile the number of defendants per case declined in the district court immediately following passage of the [AIA], it has stayed steady in the ITC."[84]

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[74] 19 U.S.C. § 1337(d)(1).

[75] Chien and Lemley, *supra* note 68 at 23.

[76] *Id.*

[77] *Id.*

[78] FTC Report, *supra* note 18, at 240.

[79] *Id.*

[80] Chien and Lemley, *supra* note 68 at 3, 30.

[81] U.S. International Trade Commission, *Facts and Trends Regarding USITC Section 337 Investigations,* June 18, 2012, *available at* http://www.usitc.gov/press_room/documents/featured_news/337facts.pdf.

[82] Chien and Lemley, *supra* note 68 at 18.

[83] P.L. 112-29, § 19 (2011).

[84] Chien and Lemley, *supra* note 68 at 18.

Recent Developments Relating to Standard-Essential Patents and FRAND Licensing

The question arises, and has been the subject of much debate in federal courts, government agencies, scholarly publications, mass media, and congressional hearings, whether the incorporation of a patent into an industry standard should be regarded as limiting the SEP holder's ability to obtain injunctive or exclusionary relief from federal courts and the ITC against alleged infringers. Few would disagree that the SEP holder should be entitled to *monetary* damages in a situation where an SEP holder offers a FRAND license to an implementer of a standard, but the implementer (believing that the proposed royalty rates are too excessive) refuses to license the SEP and produces the infringing product anyway. However, in such a situation, is injunctive or exclusionary relief appropriate for the SEP holder against any party that wants to practice the standard but does not agree to the SEP holder's licensing terms? The debate on this question generally centers around the "appropriateness" of such relief—those who favor limiting injunctions in this situation would like to see injunctive relief rarely awarded to an SEP holder unless there were extraordinary circumstances.[85] On the other side of the debate are those who oppose a diminishment of the patent holder's right to exclude others from making, using, or selling a patented invention without the patent holder's express authorization, fearing that it would "tip the balance in favor of infringers to the detriment of innovation and ultimately consumers."[86]

U.S. Department of Justice Antitrust Division's Review of Patent Portfolio Acquisitions

The U.S. Justice Department Antitrust Division has noted that the acquisitions of substantial patent portfolios by prominent technology companies (Google, Apple, and Microsoft) in 2011 which include SEPs "highlight the complex intersection of intellectual property rights and antitrust law and the need to determine the correct balance between the rightful exercise of patent rights and a patent holder's incentive and ability to harm competition through the anticompetitive use of those rights."[87] A partnership that included Apple and Microsoft purchased 6,000 patents from Nortel Networks in a June 2011 bankruptcy auction, many of which covered wireless communication standards and to which that Nortel had committed to license on FRAND terms. Google entered into an agreement in August 2011 to acquire Motorola Mobility, which holds

[85] *See, e.g.,* July 9, 2012, Submission to the U.S. International Trade Commission by 19 Economics and Law Professors, *Re: In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, at 2, *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1436&context=facpubs.

[86] *The International Trade Commission and Patent Disputes: Hearing Before the House Judiciary Committee, Subcommittee on Intellectual Property, Competition and the Internet,* 112th Cong., 2d Sess., July 18, 2012 (statement of Bernard J. Cassidy, Executive Vice President & General Counsel, Tessera Technologies, Inc.), at 9 (hereinafter "ITC and Patents Hearing").

[87] U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion LTD.,* Feb. 13, 2012, *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

17,000 patents, several hundreds of which pertain to wireless Internet and cellular communication standards and to which Motorola Mobility had committed to license on FRAND terms.

The Antitrust Division of the Justice Department approved the acquisition of these patent portfolios because it believed that "neither acquisition was likely to substantially lessen competition for wireless devices."[88] Furthermore, the division was reassured by these companies' public commitments to adhere to FRAND licenses, which are excerpted below:

> Microsoft: "Industry standards are vitally important to the development of the Internet and to interoperability among mobile devices and other computers. The international standards system works well because firms that contribute to standards promise to make their essential patents available to others on fair, reasonable and nondiscriminatory terms. Consumers and the entire industry will suffer if, in disregard of this promise, firms seek to block others from shipping products on the basis of such standard essential patents."[89]
>
> Apple: "A party who made a FRAND commitment to license its cellular standards essential patents or otherwise acquired assets/rights from a party who made the FRAND commitment must not seek injunctive relief on such patents. Seeking an injunction would be a violation of the party's commitment to FRAND licensing."[90]

The Antitrust Division noted that Google's commitment to FRAND is not as straightforward as Apple's and Microsoft's, explaining that "Google has stated ... that its policy is to refrain from seeking injunctive relief for the infringement of SEPs against a counter-party, but apparently only for disputes involving future license revenues, and only if the counterparty: forgoes certain defenses such as challenging the validity of the patent; pays the full disputed amount into escrow; and agrees to a reciprocal process regarding injunctions."[91] Thus, in the Antitrust Division's view, Google "does not directly provide the same assurance as the other companies' statements concerning the exercise of its newly acquired patent rights."[92]

Nevertheless, the Antitrust Division concluded, "[i]f adhered to in practice, these positions could significantly reduce the possibility of a [patent] hold up or use of an injunction as a threat to inhibit or preclude innovation and competition."[93]

Recent Federal Court Cases Involving Standard-Essential Patents

Two federal court cases have directly addressed the issue of whether injunctive relief should be available to SEP holders. The first was a patent lawsuit between Apple and Motorola involving Motorola-owned SEPs for which Motorola had made a RAND commitment to license. Circuit

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[88] SEP Hearing, *supra* note 24, statement of Joseph F. Wayland, at 8.

[89] Microsoft's Support for Industry Standards, Feb. 8, 2012, available at http://www.microsoft.com/about/legal/en/us/IntellectualProperty/iplicensing/ip2.aspx.

[90] U.S. Dep't of Justice, *Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigations of Google Inc.'s Acquisition of Motorola Mobility Holdings Inc. and the Acquisitions of Certain Patents by Apple Inc., Microsoft Corp. and Research in Motion LTD.,* Feb. 13, 2012, *available at* http://www.justice.gov/atr/public/press_releases/2012/280190.htm.

[91] *Id.*

[92] *Id.*

[93] *Id.*

Judge Richard Posner, sitting by designation on the U.S. District Court for the Northern District of Illinois, dismissed the lawsuit with prejudice. He opined:

> To begin with Motorola's injunctive claim, I don't see how, given FRAND, I would be justified in enjoining Apple from infringing the '898 unless Apple refuses to pay a royalty that meets the FRAND requirement. By committing to license its patents on FRAND terms, Motorola committed to license the '898 to anyone willing to pay a FRAND royalty and thus implicitly acknowledged that a royalty is adequate compensation for a license to use that patent. How could it do otherwise? How could it be permitted to enjoin Apple from using an invention that it contends Apple *must* use if it wants to make a cell phone with UMTS telecommunications capability—without which it would not be a cell *phone*.[94]

Judge Posner cited Federal Circuit case law that permits an injunction "only when damages would not provide complete relief."[95] In this case, he concluded that "[a] FRAND royalty would provide all the relief to which Motorola would be entitled if it proved infringement of the '898 patent, and thus it is not entitled to an injunction."[96]

In a case involving Microsoft's use of SEPs owned by Motorola relating to the H.264 video compression standard, the Ninth Circuit Court of Appeals stated that "injunctive relief against infringement is arguably a remedy inconsistent with the [FRAND] licensing commitment."[97] In addition, the Ninth Circuit held that when an SEP holder makes a commitment to a standard setting organization (SSO) to license such patent on FRAND terms, such a commitment creates a contract enforceable by the members of the SSO and third parties implementing the standard.[98] Thus, such third party beneficiaries have the right to sue for breach of that commitment. The Ninth Circuit found that "[i]mplicit in such a .... promise [to license the SEP on FRAND terms] is, at least arguably, a guarantee that the patent-holder will not take steps to keep would-be users from using the patented material, such as seeking an injunction, but will instead proffer licenses consistent with the commitment made."[99]

Recent Cases Before the ITC Involving Standard-Essential Patents

Several cases before the ITC involve whether a FRAND-encumbered SEP holder is entitled to exclusionary relief.

[94] Apple, Inc. v. Motorola, Inc., No. 1:11-cv-08540 (N.D. Ill.), Opinion and Order of June 22, 2012, slip op. at 18-19, *available at* http://betanews.com/wp-content/uploads/2012/06/Posner-June-22-Apple-order.pdf (emphasis in original).

[95] *Id.* at 34, *citing* Stickle v. Heublein, Inc., 716 F.2d 1550, 1563 (Fed. Cir. 1983).

[96] *Id.* at 21.

[97] Microsoft Corp. v. Motorola, Inc., 696 F.3d 872, 885 (9th Cir. 2012).

[98] *Id.* at 884 ("But we do hold this much: The district court's conclusions that Motorola's RAND declarations to the ITU created a contract enforceable by Microsoft as a third-party beneficiary (which Motorola concedes), and that this contract governs in some way what actions Motorola may take to enforce its ITU standard-essential patents ... were not legally erroneous.").

[99] *Id.*

In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof

The ITC is currently investigating a case involving Motorola Mobility's claims of patent infringement against Microsoft's Xbox 360 gaming console; at issue is whether to grant an exclusion order in favor of Motorola Mobility,[100] a holder of standard-essential patents relating to video transmission and compression and wireless connectivity, that has previously agreed to license its technologies on FRAND terms and yet has not reached an agreement with Microsoft on reasonable license terms.[101] In May 2012, the ALJ assigned to the case recommended a ban on the importation of Xbox consoles[102] after he had made an earlier determination that the device infringed four patents owned by Motorola.[103]

In the wake of the ALJ's initial determination in the Xbox case, several Members of Congress submitted letters to the chairman of the ITC to express their concerns over the potential exclusionary order against the gaming console, while other Members have urged the ITC to protect Motorola's patent rights.[104] A June 7, 2012, letter from the House Judiciary Committee to the ITC signed by Representatives Lamar Smith, John Conyers, and Melvin Watt argued that

> A party making a RAND commitment for SEPs promises not to deny a license to anyone who implements the standard. Patent owners agree that they will seek reasonable royalties and not pursue a court order or an exclusion order to prevent the importation or sale of an implementer's product. The aims underlying RAND arrangements may be undermined when a patent owner either petitions the Commission for an exclusion order or makes an unreasonable royalty demand. ...
>
> In our view, a failure to honor a RAND commitment undermines confidence in the standards system and disrupts competition and innovation. If companies refuse to comply with their RAND commitments and instead treat their SEPs as a weapon to block others from distributing products that implement key standards, they will prevent and inhibit innovation and competition. Ultimately, this behavior threatens to disrupt competition and undermines the creation and adoption of standards that are at the heart of modern communications technologies and the digital networks that are critical to the global economy. Technological innovation, predictable and stable commerce, and strong competition may be harmed by inappropriate assertions of SEP rights through exclusion orders.[105]

Several Members of Congress from Illinois, where Motorola is based, wrote in their letter to the ITC:

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[100] Motorola Mobility was acquired by Google on May 22, 2012. *See* Press Release: Google Acquires Motorola Mobility, *at* http://mediacenter.motorola.com/Press-Releases/Google-Acquires-Motorola-Mobility-3aeb.aspx.

[101] John Letzing, *Motorola Seeks New Licensing Deal with Microsoft,* WALL ST. JOURNAL, June 21, 2012.

[102] U.S. Int'l Trade Comm'n, *In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof,* Inv. No. 337-TA-752, Recommended Determination on Remedy and Bonding, May 18, 2012, *available at* http://www.wired.com/images_blogs/gadgetlab/2012/05/748131-480637.pdf.

[103] U.S. Int'l Trade Comm'n, *In the Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof,* Inv. No. 337-TA-752, Notice, April 23, 2012, *available at* http://www.usitc.gov/press_room/documents/337_752_ID.pdf.

[104] *Members of Congress Write to ITC to Express Concern About Potential Xbox Ban,* FOSS PATENTS Blog, June 12, 2012, *at* http://www.fosspatents.com/2012/06/members-of-congress-write-to-itc-to.html.

[105] *Id.*

> We strongly support vigorous intellectual property right protection, including injunctive and exclusionary relief, that appropriates and reasonably rewards past innovation and encourages new development, which has been and must continue to be the foundation of this country's economic success. Indeed, to maintain a level playing field in circumstances in which entities are found to be infringing U.S. intellectual property rights but will not provide reasonable compensation to the owner and developer of these rights, injunctive and exclusionary relief must be available and rigorously enforced. Denying legitimate patent protection adversely affects domestic commerce and business in a very meaningful way by preventing domestic companies from protecting their innovations, and thus discouraging domestic companies from investing in future innovation.[106]

A June 19, 2012, letter to the ITC from Senators Herb Kohl, Mike Lee, Jon Kyl, John Cornyn, Jim Risch, and John Hoeven urged the ITC to consider the public interest arguments carefully in cases in which SEPs are at issue:

> Any precedent that would enable or encourage companies to include their patented technology in a standard, commit to license included patents on RAND terms, and then seek to secure an exclusion order despite a breach of that commitment would thus implicate significant policy concerns. Such an outcome would severely undermine broad participation in the standards-setting process, which would in turn threaten the meaningful benefits these standards provide for both industries and consumers.[107]

On June 29, 2012, the Commission ordered a remand of the Xbox investigation to the ALJ with instructions for the ALJ to apply newly issued Commission opinions that some observers predict may change the ALJ's determination in favor of Microsoft.[108] On January 8, 2013, Motorola asked the ITC to drop the patent claims against Microsoft that involved Motorola's SEPs, thus leaving only one non-standard-essential patent in the Xbox investigation.[109] Motorola made this request as required by an FTC consent order to which Google agreed on January 3, 2013, which is discussed at the end of this report.

In the Matter of Certain Wireless Communications Devices, Portable Music and Data Processing Devices, Computers, and Components Thereof

At issue in this investigation by the ITC is whether Apple infringes certain patents pertaining to 3G wireless technology that are held by Motorola Mobility with its importation into the United States and sale within the United States of iPhone and iPad devices. The ALJ made an initial determination in April 2012 that Apple infringed one of Motorola's patents, which is a FRAND-encumbered SEP.[110] On June 25, 2012, the Commission provided notice that it was planning on reviewing the ALJ's initial determination and requested written submissions from parties (and non-parties) on several questions relating to FRAND, including:

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[106] *Id.*

[107] *Six Republican Senators Oppose Exclusion Orders Over Standard-Essential Patents,* FOSS PATENTS Blog, June 28, 2012, *at* http://www.fosspatents.com/2012/06/six-republican-senators-oppose.html.

[108] *No Xbox Import Ban in 2012: ITC Remands Investigation of Motorola Complaint,* FOSS PATENTS Blog, June 29, 2012, *at* http://www.fosspatents.com/2012/06/no-xbox-import-ban-in-2012-itc-remands.html.

[109] Stewart Bishop, *Google Drops ITC Essential-Patent Claims Against Microsoft,* Law360.com, Jan. 9, 2013.

[110] *In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, Notice Regarding Initial Determination on Violation of Se4ction 337, April 24, 2012, *available at* http://www.usitc.gov/press_room/documents/337_745_ID.pdf.

1. If the record of an investigation lacks evidence sufficient to support a RAND-based affirmative defense (e.g., equitable estoppel, implied license, waiver, etc.), under what circumstances (if any) should a RAND obligation nonetheless preclude issuance of an exclusion order?
2. Does the mere existence of a RAND obligation preclude issuance of an exclusion order?
3. Should a patent owner that has refused to offer a license to a named respondent in a Commission investigation on a RAND obligated patent be able to obtain an exclusion order?
4. Should a patent owner that has refused to negotiate a license on RAND terms with a named respondent in a Commission investigation be precluded from obtaining an exclusion order?
5. Should a patent owner who has offered a RAND license that the named respondent in a Commission investigation has rejected be precluded from obtaining an exclusion order?[111]

The FTC submitted a statement to the ITC that sets forth the potential economic and competitive impact of injunctive relief on disputes involving SEPs:

> ITC issuance of an exclusion or cease and desist order in matters involving RAND-encumbered SEPs, where infringement is based on implementation of standardized technology, has the potential to cause substantial harm to U.S. competition, consumers, and innovation.... [W]e are concerned that a patentee can make a RAND commitment as part of the standard setting process, and then seek an exclusion order for infringement of the RAND-encumbered SEP as a way of securing royalties that may be inconsistent with that RAND commitment.[112]

A submission to the ITC by 19 economics and law professors argued that "ITC exclusion orders generally should not be granted under § 1337(d)(1) on the basis of patents subject to obligations to license on 'reasonable and non-discriminatory' (RAND) terms" because such an exclusion "would undermine the significant pro-competitive and pro-consumer benefits that RAND promises produce and the investments they enable."[113] The submission contends that "[t]hrough their promises [to license on FRAND terms], [SEP] patent holders have traded the right to exclude for the privilege of being declared essential to the standard."[114] However, the professors

[111] *In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, Notice of Commission Decision to Review in Part a Final Initial Determination Finding a Violation of Section 337; Request for Written Submissions, June 25, 2012, at 4-5, *available at* http://www.usitc.gov/secretary/fed_reg_notices/337/337_745_Notice06252012sgl.pdf.

[112] Federal Trade Commission's June 6, 2012, Submission to the U.S. International Trade Commission, *Statement on the Public Interest In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, *available at* http://www.ftc.gov/os/2012/06/1206ftcwirelesscom.pdf.

[113] July 9, 2012, Submission to the U.S. International Trade Commission by 19 Economics and Law Professors, *Re: In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, at 2, *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1436&context=facpubs.

[114] *Id.*

recognized that an exception to this general rule might be if "district court jurisdiction is lacking, the patent is valid and infringed, and the public interest favors issuing an exclusion order."[115]

On August 24, 2012, the Commission reversed the ALJ's determination that Apple infringed Motorola's SEP.[116] The decision, however, does not discuss the Commission's position on the questions it posed to the parties relating to FRAND and whether an exclusion order is appropriate in cases involving SEPs.

Hearings in the 112th Congress

In June and July 2012, the 112th Congress held several oversight hearings that examined the issue of SEPs and the ITC.

June 20, 2012, Senate Judiciary Committee

The U.S. Patent and Trademark Office Director David Kappos offered his views on standard-essential patents in response to questions posed by Senators Patrick Leahy and Mike Lee in a Senate Judiciary Committee hearing held on June 20, 2012.[117] Senator Leahy asked Director Kappos whether holders of SEPs that seek an exclusion order from the ITC after previously committing to FRAND licensing could have anti-competitive effects. Director Kappos stated that the situation is "cause for careful study," but nevertheless he stated that pledges by competitors to adhere to FRAND must be kept. Yet, he also emphasized that a FRAND commitment does not stand for licensing under any terms and conditions. Furthermore, he argued that FRAND should not eliminate all opportunities to enforce a patent because then no company will have any incentive to take a license for the patented technology in the first place. In response to a question posed by Senator Lee, Director Kappos further expressed his concerns about the use of exclusion orders in SEP cases before the ITC. But he noted that there is a need to find a proper balance that is beneficial to both patent owners and those that engage in standard setting.

On July 10, 2012, Google sent a letter to Senators Leahy and Grassley in which it urged caution in taking any steps to change the status quo in the area of FRAND-encumbered SEPs:

> Google agrees that courts and the International Trade Commission (the "ITC") may consider whether a patentee has complied with its licensing obligation as a relevant factor in determining whether the public interest supports awarding exclusionary relief based on a standard-essential patent ("SEP"). ... But at the same time, courts and regulators must avoid the temptation to adopt categorical rules that deprive patentees of the rights that Congress

[115] *Id.*

[116] *In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, Notice of Commission Decision Finding No Violation of Section 337 as to Three Patents and Remanding the Investigation to the ALJ as to One Patent, August 24, 2012, *available at* http://www.usitc.gov/secretary/fed_reg_notices/337/337_745_notice08242012sgl_1.pdf.

[117] *Oversight of the United States Patent and Trademark Office: Implementation of the Leahy-Smith America Invents Act and International Harmonization Efforts: Hearing Before the Senate Judiciary Committee,* 112th Cong., 2d Sess., June 20, 2012, *available at* http://www.judiciary.senate.gov/hearings/hearing.cfm?id=d1d944e8c0b3e2a582633afaeb6ba43a.

> and the Patent Office conferred on them and that the patentees did not intend to relinquish through their FRAND licensing promises."[118]

July 11, 2012, Senate Judiciary Committee

The Senate Judiciary Committee held a hearing on July 11, 2012, with the title, "Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents." The hearing had two witnesses, Joseph Wayland, the acting assistant attorney general, Antitrust Division of the U.S. Department of Justice, and Edith Ramirez, the commissioner of the Federal Trade Commission. Acting Assistant Attorney General Wayland noted that in the Antitrust Division's review of the 2011 patent portfolio acquisitions by the major technology companies, it "investigated whether patent acquisitions would change the incentives or abilities of the new owners to obtain higher royalties from their competitors, particularly by using the threat of an injunction or exclusion order."[119] In addition, he revealed that the Antitrust Division has "continued closely to monitor the use of F/RAND-encumbered standard-essential patents in the wireless device industry, particularly as they relate to smartphones and computer tablets, to ensure that they do not stifle competition and innovation in this important industry."[120] Commissioner Ramirez stated that SSO members do not typically negotiate licenses for SEPs *before* a standard is adopted, but rather require SEP owners to agree to license SEPs on FRAND terms "as a *quid pro quo* for the inclusion of their patents in a standard."[121] She observed, however, that while "[t]his [practice] makes it easier to adopt a standard, [it] also creates the potential for hold-up because it defers the negotiation on price until after the standard is adopted."[122] Commissioner Ramirez argued that the injunctive relief for a FRAND-encumbered SEP holder is likely inappropriate in most cases:

> "A royalty negotiation that occurs under threat of an injunction or an exclusion order may be weighted heavily in favor of the patent holder in a way that is in tension with the RAND commitment. High switching costs combined with the threat of an exclusion order could allow a patent holder to obtain unreasonable licensing terms despite its RAND commitment, whether or not the invention is highly valuable on its own, because implementers are locked into practicing the standard. This is an even bigger problem when the hold-up creates a very high cost for a very small component of the overall product. In these ways, the threat of injunctive relief, including an exclusion order, may allow the holder of a RAND-encumbered SEP to realize royalty rates that reflect patent hold-up, rather than the value of the patent relative to alternatives. This can raise prices to consumers, distort incentives to innovate, and undermine the standard setting process."[123]

Finally, Commissioner Ramirez asserted that the ITC possesses sufficient statutory authority to limit the possibility of hold-up under its obligation to consider several public interest factors before deciding whether to grant an exclusion order to an FRAND-encumbered SEP holder that has not complied with its FRAND obligation. However, she offered that if "the ITC finds that its public interest authority is not flexible enough to allow this analysis, then Congress should

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[118] Letter from Kent Walker, General Counsel of Google, to Senators Leahy and Grassley, July 10, 2012, at 1, *available at* http://www.scribd.com/doc/99843544/Leahy-Grassley-Letter-Final-1-Copy.

[119] SEP Hearing, *supra* note 24, statement of Joseph F. Wayland, at 8.

[120] *Id.* at 9-10.

[121] SEP Hearing, *supra* note 24, statement of Edith Ramirez, at 5.

[122] *Id.*

[123] *Id.* at 6-7.

consider whether it should amend Section 337 to give the ITC more flexible authority to prevent hold-up."[124]

July 18, 2012, House Judiciary Subcommittee on Intellectual Property, Competition and the Internet

The House Judiciary Subcommittee on Intellectual Property, Competition and the Internet held a hearing on July 18, 2012, entitled "The International Trade Commission and Patent Disputes." Witnesses included Professor Colleen Chien of Santa Clara University School of Law as well as general counsels from several U.S. companies. Unlike the July 11th Senate Judiciary Committee hearing on SEPs and the ITC, this hearing focused primarily on the impact of non-practicing entities (which include "patent trolls") on the ITC's docket; however, the topic of SEPs was discussed by some of the witnesses. First, Professor Chien explained that "now that most technology products are manufactured abroad and Congress has relaxed the domestic industry requirement [in 1988], nearly every patentee is a potential ITC complainant and nearly every patent defendant is a potential ITC respondent."[125] Furthermore, because many patent holders in the high technology industry are filing complaints with the ITC in the hopes of obtaining injunctive relief that is more difficult to find in federal courts, this litigious behavior "undoes the progress that *eBay* represents, and it contributes to the favorable climate for patent trolling and holdup present in today's patent system."[126] Finally, she suggested that the ITC could change the way it issues exclusion orders in a way that "minimizes disruption to consumers and the holdup to manufacturers;" for example, the ITC could carefully tailor the scope of the injunction and also delay the effective date of an injunction in order to give time to the infringer to "design around" the patent (if that is a feasible option).[127] However, "designing around" a patent may not be possible in the case of a SEP because doing so may mean that the product does not comply with the standard:

> Critically, SEPs cannot, by definition, be designed around without sacrificing compliance with the standard. This makes them different than non-SEP patents that, if they cover minor features, can be designed around without sacrificing key functionality. While inventing around does not eliminate the danger of patent hold-up, it does provide a check on the bargaining power wielded by patent holders that seek injunctive relief. This check is much weaker when the patents are standards-essential. There, disabling even a single feature to avoid infringement of an SEP can greatly detract from the value of a product by making it inoperable for its intended purpose, for example, a laptop that cannot connect to a Wi-Fi network. Furthermore, many consumers, counting on standards to provide the functionality they require, are unwilling to purchase noncompliant products. An exclusion order that forces manufacturers to produce noncompliant products would undermine the network effects associated with successful standards and harm consumers.[128]

[124] *Id.* at 14.

[125] ITC and Patents Hearing, *supra* note 86, statement of Colleen V. Chien, Professor, Santa Clara University School of Law, at 1.

[126] *Id.* at 3.

[127] *Id.* at 6.

[128] July 9, 2012, Submission to the U.S. International Trade Commission by 19 Economics and Law Professors, *Re: In the Matter of Certain Wireless Communication Devices, Portable Music and Data Processing Devices, Computers and Components Thereof,* Investigation No. 337-TA-745, at 3, *available at* http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1436&context=facpubs.

Albert Foer, president of the American Antitrust Institute (AAI), testified that:

> Although it is not feasible to establish perfect rules on what price for licensing a SEP would be fair and reasonable, some minimal standards are appropriate. The AAI agrees with the FTC's promotion of two principles. First, the determination should rest on ex ante incremental value rather than ex post total market value. Second, the royalty base should be the smallest affected component rather than the entire device. Because FRAND commitments are today so generally vague that they do not provide adequate protection against holdup conduct, SSOs should be required to move in the direction of ex ante disclosure of proposed or maximum license terms.[129]

Furthermore, Mr. Foer argued that "[a]n injunction is not an appropriate remedy for SEP infringement as a matter of both good law and good policy" and that "SSO rules should make clear that the provider of a FRAND commitment in the course of a standard development proceeding waives any right to seek either injunctive relief in court or an exclusion order at the International Trade Commission."[130]

Bernard Cassidy, general counsel of Tessera Technologies, Inc., urged Congress not to make any changes to Section 337 that would weaken the ITC's jurisdiction or powers, because doing so, he claimed, "would benefit foreign economies, foreign competitors, and other foreign manufacturers to the detriment of the U.S. economy."[131] He also rejected arguments by some commentators that Congress apply the *eBay* case to the ITC because "[g]iven that the only remedy available to the ITC is exclusion orders, mandating application of *eBay* would substantially weaken the power of the ITC to deal with unfair trade practices."[132] Finally, he predicted that reducing or eliminating the availability of exclusion orders or injunctions for FRAND-encumbered SEP holders would mean that "fewer innovators would participate in SSOs with such IPR rules (or make FRAND commitments if they do participate) or engage in R&D for technologies that may be standardized. Reduced participation in SSOs or reduced funding of R&D would likely result in delay, technologically inferior standards, and reduced information about patents implicated by standards."[133]

In an August 2, 2012, letter sent by the American Intellectual Property Law Association (AIPLA) to Representatives Bob Goodlatte and Mel Watt (the chairman and ranking Member of the House Judiciary Subcommittee on Intellectual Property, Competition and the Internet, respectively), AIPLA argued against the application of the *eBay* rule for ITC proceedings and expressed several concerns about proposals to categorically deny injunctive or exclusionary relief to SEP holders:

> Like all patent owners, SEP owners should have the right to protect their intellectual property from infringement. Removing this patent enforcement option at the ITC may be harmful to the rapidly growing IT and telecommunications industries that often participate in the SSOs. Additionally, a categorical exclusion of SEPs from Section 337 proceedings would make it easier for foreign companies to import infringing goods into the U.S.[134]

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[129] ITC and Patents Hearing, *supra* note 86, statement of Albert Foer, president of the American Antitrust Institute, at 7.

[130] *Id.* at 9-10.

[131] ITC and Patents Hearing, *supra* note 86, statement of Bernard Cassidy, General Counsel of Tessera Technologies, Inc., at 3.

[132] *Id.* at 9.

[133] *Id.* at 10.

[134] Letter from AIPLA to the Honorable Bob Goodlatte and Mel Watt, Aug. 2, 2012, at 3-5, *available at*
(continued...)

The FTC's Investigation of Google's Business Practices and the Consent Order

On January 3, 2013, the FTC announced that it has accepted, subject to final approval, a consent agreement with Google that would settle an FTC investigation of the company regarding allegations that Google engaged in "anticompetitive conduct resulting from breaches ... of [its] commitments to license standard-essential patents ... on terms that are fair, reasonable and non-discriminatory..."[135] The Chairman of the FTC explained that under the proposed consent order, Google is required "to stop seeking to exclude competitors using essential patents that Motorola, which Google later purchased, had first promised, but then refused, to license on fair and reasonable terms."[136] As he described it, these particular standard essential patents are "the cornerstone of the system of interoperability standards that ensure that wireless internet devices and mobile phones can talk to one another."[137] He further explained that as part of the legally binding consent decree, Google must "abandon its claims for injunctive relief on any of its standard essential patents with a FRAND commitment, and ... offer a license on FRAND terms to any company that wants to license these patents in the future."[138]

Specifically, the FTC's proposed consent order specifies that, in general, Google (through its wholly owned subsidiary, Motorola) may not "obtain or enforce [an injunction or exclusion order] based on a claim of alleged Infringement of a FRAND Patent that is pending on the date this Order is issued, unless and until [Google has] made Qualified Offers to the Potential Licensee against whom the [injunction or exclusion order] is sought."[139] Furthermore, Google must "cease and desist from directly or indirectly making any future claims for" injunctive or exclusionary relief based on an alleged infringement of one of its FRAND patents.[140]

However, the proposed consent order provides several exceptions in which Google may still seek injunctive relief in SEP cases without violating the FTC's Order. For example, Google may seek an exclusion order issued by the ITC or an injunction order issued by a federal court against a potential licensee who:

1. is outside the jurisdiction of the U.S. district courts;
2. has stated in writing or in sworn testimony that it will not license the FRAND patent on any terms (although the Order provides that a challenge to the validity, value, infringement, or essentiality of the FRAND patent shall not constitute a statement that the potential licensee will not license the patent);

(...continued)

http://www.aipla.org/advocacy/congress/Documents/AIPLA%20Letter%20to%20the%20House%20Judiciary%20Subcommittee%20on%20ITC%20and%20Patent%20Disputes%20-%208.2.12.pdf.

[135] FTC, *Statement of the Federal Trade Commission In the Matter of Google, Inc.,* FTC File No. 121-0120, Jan. 3, 2013, at 1, *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.

[136] FTC, *Google Press Conference, Opening Remarks of FTC Chairman Jon Leibowitz As Prepared for Delivery*, Jan. 3, 2013, at 2, *available at* http://ftc.gov/os/caselist/1210120/130103googlemotorolastmtofcomm.pdf.

[137] *Id.*

[138] *Id.*

[139] FTC, *In the Matter of Motorola Mobility LLC, and Google Inc.,* Decision and Order, FTC File No. 121-0120, at 7, *available at* http://www.ftc.gov/os/caselist/1210120/130103googlemotorolado.pdf.

[140] *Id.*

3. refuses to enter a license agreement on terms that have been set in a final ruling of a court or through binding arbitration; or
4. fails to respond within 30 days of receiving a "FRAND Terms Letter" that Google sends to a potential licensee, in which Google requests that Google and the potential licensee agree to license each other's patents that are essential to complying with standards that each uses on terms that are FRAND and comply with each party's FRAND commitments.[141]

The proposed consent order does not prohibit Google from obtaining other forms of legal relief, such as damages for patent infringement. Finally, the proposed consent order states that it shall terminate 10 years after the date the order becomes final.[142] The proposed consent order is subject to public comment for 30 days by interested persons, beginning January 3, 2013 and continuing through February 4, 2013. After the comment period has ended, the Commission will again decide whether to make final the proposed consent order.[143]

DOJ/USPTO's Policy Statement on Remedies for FRAND-encumbered SEPs

In a joint policy statement released on January 8, 2013, the U.S. Department of Justice, Antitrust Division (DOJ), and the U.S. Patent & Trademark Office (USPTO) offered several "perspectives" on the issue of whether injunctive relief in judicial proceedings or exclusion orders by the ITC is proper in cases involving FRAND-encumbered SEP. Among other things, the policy statement opines that "the remedy of an injunction or exclusion order may be inconsistent with the public interest," especially "in cases where an exclusion order based on a F/RAND-encumbered patent appears to be incompatible with the terms of a patent holder's existing F/RAND licensing commitment to an [standard setting organization]."[144] However, the policy statement identifies several exceptions to this general rule, offering that an injunction or exclusion order may be appropriate in the following circumstances:

1. where the putative licensee is unable or refuses to take a FRAND license and is acting outside the scope of the patent holder's commitment to license on FRAND terms; for example, if the putative licensee refuses to negotiate with the patent holder to determine FRAND terms or if the putative licensee refuses to pay what has been determined to be a FRAND royalty; or

2. where the putative licensee is not subject to the jurisdiction of a court that could award damages.[145]

[141] *Id.* at 7-8.

[142] *Id.* at 14.

[143] FTC, *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, *available at* http://www.ftc.gov/opa/2013/01/google.shtm.

[144] U.S. Dep't of Justice and U.S. Patent & Trademark Office, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments,* Jan. 8, 2013, at 6, *available at* http://www.uspto.gov/about/offices/ogc/Final_DOJ-PTO_Policy_Statement_on_FRAND_SEPs_1-8-13.pdf.

[145] *Id.* at 7.

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