

SEP/FRAND Licensing Policy Priorities & Actions Memo for Biden-Harris Administration

Background:

Emerging technologies like 5G, Internet of Things (IoT), and artificial intelligence will play a critical role in achieving President-elect Biden's promise to support American manufacturing, jobs, and innovation, and to ensure that the future is "Made in All of America." These emerging technologies will be built upon the foundations laid by technical standards. Indeed, standards already play a central role in technologies that impact our daily lives by allowing products like cellular phones, advanced manufacturing tools, and connected vehicles to interoperate.

But the transformative power of these technologies to consumers, industry, and the U.S. economy can only be achieved if the underlying standards can be used by all interested stakeholders on reasonable terms. It is critical for the Biden-Harris Administration to ensure that all manufacturers – big or small, regardless of where they are in a supply chain – can use these standards to build new products, develop new technologies, innovate and compete. To do so, the Administration needs to ensure a fair and balanced framework to allow manufactures to license patents essential for these standards, known as Standards Essential Patents (SEPs), when their owners voluntarily have promised to license these SEPs on fair, reasonable and non-discriminatory (FRAND) terms.

Policy Change Needed:

We recommend that the Biden Administration implement policies for standards, competition law, and patent law that promote innovation. These policies should highlight the long-standing and successful core principle that all patents, including SEPs, are granted with inherent limits so as to promote the best interests of society. In contrast, the Trump Administration's policies, including the "New Madison" approach, advocated extending these inherent limits to maximizing returns to individual patent holders, while forsaking the broader economic benefits to the common good of standardization and competition that also promotes innovation.

A balanced approach would take into account the fundamental purpose of the FRAND commitment voluntarily given to standard setting organizations (SSOs) to promote broad standards adoption by all interested parties -- a powerful engine of the economy. The FRAND commitment helps prevent a small number of SEP owners from using the power they gain when their patents are incorporated into a standard to exclude or exact unfair terms from the broad universe of standards adopters, and as a result, consumers and the U.S. economy (a practice called "hold up"), while also providing appropriate compensation for those who contribute their patents to standards.

Trump Administration Policies and their Consequences:

The Trump Administration's policies over the past four years have tilted the scales of leverage in licensing negotiations to drastically favor royalty-seeking SEP licensors. These policies have undercut the checks and balances aimed at inhibiting abusive licensing behavior. As a consequence, some SEP licensors are seeking judicial decisions to ban product sales and to pressure licensees into accepting unreasonable licensing terms that extend beyond the value of the patented technology. These SEP licensors are also denying willing licensees needed licenses and engaging in forum shopping in pursuit of these goals.

Willing licensees harmed by these practices include large, medium and small enterprises whose ability to innovate and compete is hindered. High litigation costs and business risk can cause licensees to accept excessive and abusive licensing terms because the alternative would be to exit the market. These excesses take a toll on the ability of companies to innovate in their own fields and often eventually lead them to exit the market over profitability concerns. The impact of such decisions is felt by consumers in the form of reduced choices and higher costs.

These policies are also creating uncertainty at SSOs. SSOs offer neutral platforms to develop standards. Their IPR policies vary depending upon the SSO's focus of standardization and the participants. This diversity provides participants the choice to engage in SSOs that are most appropriate for their needs, within the bounds of antitrust and patent law. In order to continue to promote economic growth, these diverse and innovative standards-setting approaches need to be preserved and strengthened.

Recommended Policy Objectives and Actions:

To support the pro-innovation, economics-based policy approach we recommend above, we urge consideration of the following objectives and associated actions as priorities for the Biden-Harris Administration:

Policy Objective I: Promote innovation by supporting fair SEP licensing practices and by actively combatting anticompetitive SEP/FRAND licensing practices.

Supporting Actions:

- Undertake policy advocacy (e.g., through speeches, papers, conferences, etc.) to promote fair and procompetitive FRAND licensing.
 - Highlight and address the innovation-inhibiting challenges of patent hold-up to undo the damage inflicted on the vast majority of innovators, manufacturers and consumers by the Trump administration's exaggerated focus on "hold-out."
 - Undertake advocacy to clarify that reasonable royalty rates for SEPs should be properly apportioned, and that the "smallest saleable patent practicing unit" (SSPPU) is important to ensure that royalties do not capture value beyond the scope of the patent claims.
 - Undertake advocacy to clarify that a FRAND commitment means making SEP licenses available to all parties that seek to make, use, or sell products that support a standard, regardless of their position in a supply chain.

- Clarify that because the “New Madison” policy developed by the Trump administration is contradictory to this economics-based approach, it does not represent the Biden administration’s policy, and acknowledge the role of competition concerns and antitrust law in FRAND disputes.
- Pursue enforcement of SEP/FRAND-related conduct that violates U.S. antitrust laws or U.S. laws governing unfair or deceptive acts or practices.
- Restore a balanced message and procedure for *amicus* briefs in FRAND cases. The Trump administration filed an unprecedented number of statements of interest in district courts, in addition to appellate *amicus* filings, that favor some SEP licensors.
 - In pending cases, withdraw *amicus* briefs and statements of interest filed in SEP/FRAND disputes by federal government components (DOJ Antitrust and USPTO) during the Trump administration. File corrective briefs in subsequent and new proceedings where appropriate.
- Update or withdraw the 2019 *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/FRAND Commitments*, issued jointly by the U.S. Dept. of Justice (DOJ) and the U.S. Patent and Trademark Office, as U.S. federal government policy because it does not adequately protect competition, innovation, and consumers. If the 2019 Policy is withdrawn, update the 2013 *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/FRAND Commitments*.
- Restore the integrity of the Department of Justice Antitrust Division’s process for issuing Business Review Letters (BRLs) to avoid misuse of BRLs to pursue partisan agendas on SEPs. DOJ Antitrust BRLs provide businesses and stakeholders clarity, and should be based on sound competition principles and evidence.
 - Withdraw the 2020 “supplement” to the DOJ BRL originally issued to IEEE in 2015 analyzing proposed revisions to the IEEE Patent Policy, because it was not properly issued under the procedures in the governing regulation. The supplement also represents an effort by a government agency to dictate a private SSOs patent policy to it, and amounts to the government putting its thumb on the scale of the balance of interests in the SSO regardless of the expressed interests of the SSOs members.
 - Withdraw the improperly-issued DOJ Avanci BRL due to its emphasis on current rather than prospective conduct, and the potential misuse of the BRL in pending litigation.
 - Revise the BRL governing regulation to preclude the BRL process’s misuse, e.g., by issuing a “supplement” to a previously issued BRL.
- Oppose efforts to overrule the Supreme Court’s correct decision in *eBay Inc. v. MercExchange LLC*, to preserve the correct standard for issuing an injunction, which appropriately balances the interests of the parties in patents cases, including those involving SEPs, and promotes innovation and competition.

Policy Objective II: Promote the ability of U.S. companies that are parts of global supply chains to innovate and compete in markets around the world.

Supporting Actions:

- Champion the U.S. government's opposition to forced global portfolio-based licensing for SEPs by foreign courts, emphasizing the necessary jurisdictional nature of patents and the judicial determinations as to their validity. Work with foreign governments to find amicable solutions that counter extraterritorial efforts by foreign courts to set global rates for U.S.-issued patents under the threat of injunction to the SEP licensee.
- Reinforce and, where appropriate, further clarify, that public interest factors disfavor International Trade Commission (ITC) exclusion orders in SEP/FRAND cases, and consider legislation to focus its resources on protecting genuine domestic industries and prevent the abuse of the ITC.

Policy Objective III: Create a conducive environment within the U.S. government for federal agencies' support of, adoption and use of emerging connected technologies:

Supporting Actions:

- Consistent with the public-private partnership nature of the U.S. approach to standards, enable SSOs to develop and adopt balanced and reasonable intellectual property policies that best address that organization's needs. Establish effective procedures to prevent federal agencies from unduly interfering in the pro-competitive practices adopted by SSOs.
- Provide regulatory and procurement guidance to prioritize federal government use of those standards for connected technologies where royalties are properly apportioned.

We look forward to working with you to help deliver on President-elect Biden's promise to Build Back Better.

About the co-signing organizations:



**ACT | The App
Association**

The App Association represents more than 5,000 app makers and connected device companies in the mobile economy, a \$1.7 trillion ecosystem. Organization members leverage the connectivity of smart devices to create innovative solutions that make our lives better. The App Association is the leading industry resource on market strategy, regulated industries, privacy, and security. App Association members are located around the world, in all 27 member countries of the European Union and in all 435 congressional districts of the United States, showing that with coding skills and an internet connection, an app maker can succeed from anywhere. Through its All Things FRAND initiative, the App Association works to preserve and promote innovation generally, as well as to accelerate the growth of technology markets through robust standards development and a balanced intellectual property system.

For more: <http://www.actonline.org/> & <https://allthingsfrand.com/>



**Computer &
Communications
Industry Association
(CCIA)**

The Computer & Communications Industry Association (CCIA) is a not-for-profit membership organization for a wide range of companies in the computer, internet, information technology, and telecommunications industries, represented by their senior executives. Created over four decades ago, CCIA promotes open markets, open systems, open networks, and full, fair, and open competition. CCIA serves as the eyes, ears, and voice of the world's leading providers of technology products and services in Washington and Brussels. CCIA members include computer and communications companies, equipment manufacturers, software developers, service providers, re-sellers, integrators, and financial service companies. Together they employ almost one million workers and generate more than \$540 billion in annual revenue.

For more: www.ccianet.org.



Fair Standards Alliance

The Fair Standards Alliance (FSA) is a key contributor to the debate around standard essential patents (SEPs). The FSA advocates for an open and collaborative approach to the licensing of SEPs that are needed for the creation of the next generation of wireless technology products. The Fair Standards Alliance is an association created in 2015 to strengthen the voice of innovative technology companies of all sizes to ensure that licensing of SEPs required by so many smart devices is done on a fair, reasonable and non-discriminatory basis (FRAND).

For more: <https://fair-standards.org/>.



High Tech Inventors Alliance (HTIA)

High Tech Inventors Alliance (HTIA) members are some of the most innovative technology companies in the world, creating the computer, software, semiconductor and communications products and services that support growth in every sector of the economy. HTIA members rely on a well-functioning patent system as they collectively invest about \$75 billion in R&D each year, generating technological advances protected by their more than 175,000 patents. HTIA companies also contribute significantly to employment and the economy, providing more than 1.3 million jobs and generating more than \$600 billion in annual revenues. HTIA's mission is to promote balanced patent policies that preserve critical incentives to invest in innovation, R&D, and American jobs.

For more: <https://www.hightechinventors.com/>.



Public Knowledge

Public Knowledge is a nonprofit organization that is dedicated to preserving the openness of the Internet and the public's access to knowledge, including diverse sources of news and information. Public Knowledge is working to reform patent law in order to enhance patent quality, reduce litigation, and make the patent system fair and balanced for the sake of innovation.

For more: <https://www.publicknowledge.org/>.



**Software & Information
Industry Association
(SIIA)**

The Software & Information Industry Association (SIIA) is the leading organization representing financial information, education technology, specialized content and publishing, and health technology companies and associations. SIIA's diverse members help learners of all ages prepare to succeed in their future, manage the global financial markets, develop software that solves today's challenges through technology, provide critical information that helps inform global businesses large and small, and innovate for better health care and personal wellness outcomes. SIIA aggressively promotes and protects the interests of its member companies in legal and public policy debates by working with state, federal and international policymakers and participating in landmark legal decisions.

For more: www.sii.net/.