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	D971.234	D923.42		A		2096- 6180	2023	06- 0086- 15	

standard essential patent SEP
fair reasonable and non-discriminatory FRAND

SEP

Justice DOJ United States Patent and Trademark Office USPTO Department of
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National Institute of Standards and Technology NIST SEP
 2021 SEP SEP
 2019 SEP 2019 SEP
 2021 SEP 2022 6 8 2019 SEP
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 2013 SEP
 FRAND SEP injunctive relief
 1930 337 exclusion order ¹
 2013 SEP United States International Trade
 Commission USITC 2013 337 ² USITC
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 Office
 of the United States Trade Representative USTR USITC ⁴

¹ USPTO, NIST & DOJ, *Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, U.S. Department of Justice (19 December 2019), <https://www.justice.gov/atr/page/file/1228016/download>. The U.S. Department of Justice(DOJ), Antitrust Division, and the U.S. Patent & Trademark Office (USPTO), an agency of the U.S. Department of Commerce, provide the following

2013 SEP 5
2013 SEP National
Institute of Standards and Technology NIST 2019 2021 2013 SEP

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patent holdup

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“As the USITC has observed, these public interest factors are not meant to be given mere lip service, but rather public health and welfare and the assurance of competitive conditions in the United States economy must be the overriding considerations in the administration of this statute. The USITC may conclude, after applying its public interest factors, that exclusion orders are inappropriate in the circumstances described in more detail above. Alternatively, it may be appropriate for the USITC, as it has done for other reasons in the past, to delay the effective date of an exclusion order for a limited period of time to provide parties the opportunity to conclude a F/RAND license.”

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“As a result, the owner of that patented technology may gain market power and potentially take advantage of it by engaging in patent hold-up, which entails asserting the patent to exclude a competitor from a market or obtain a higher price for its use than would have been possible before the standard was set, when alternative technologies could have been chosen. This type of patent hold-up can cause other problems as well. For example, it may induce prospective implementers to postpone or avoid making commitments to a standardized technology or to make inefficient investments in developing and implementing a standard in an effort to protect themselves. Consumers of products implementing the standard could also be harmed to the extent that the hold-up generates unwarranted higher royalties and those royalties are passed on to consumers in the form of higher prices.”

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24 Apple, 757 F. 3d at 1342; Core Wireless Licensing S.A.R.L. v. LG Electronics, Inc., No. 2:14-cv-912, ECF No. 47 (E.D. Tex. 1 November 2016); Optis Wireless Tech., LLC v. Huawei Device USA, Inc., 421 F. Supp. 3d 410, 412 (E.D. Tex. 2019).

25 Lemley M A & Weiser P J, *Should Property or Liability Rules Govern Information?*, 85 Texas Law Review 783, 783 (2007).

Microsoft v. Motorola, TCL v. Ericsson, Apple v. Qualcomm, Huawei v. Samsung, Huawei v. Conversant, Oppo v. Sharp, Xiaomi v. InterDigital, Samsung v. Ericsson.

26 FRAND

OMB A-119

OMB A-119 U.S. Office of Management and Budget, *Revision of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities"*, Federal Register (27 January 2016), <https://www.federalregister.gov/documents/2016/01/27/2016-01606/revision-of-omb-circular-no-a-119-federal-participation-in-the-development-and-use-of-voluntary>.

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29 Antitrust Division, *Draft Policy Statement on Licensing Negotiations and Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments*, Regulations, <https://www.regulations.gov/docket/ATR-2021-0001/comments>.

30 2013 SEP FRAND SEP
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31 2018 12 SEP

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33 DOJ will review conduct by SEP holders or standards implementers on a case-by-case basis to determine if either party is engaging in practices that result in an anti-competitive use of market power or other abusive process that harm competition.

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forum shopping

34 *Executive Order on Promoting Competition in the American Economy*, The White House (9 July 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

35 Mark A. Lemley & Philip J. Weiser, *Should Property or Liability Rules Govern Information?*, 85 *Texas Law Review* 783, 783 (2007).



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36 *Standard Essential Patents Portal Site*, https://www.jpo.go.jp/e/support/general/sep_portal/index.html.

37 2020 2020 19 24

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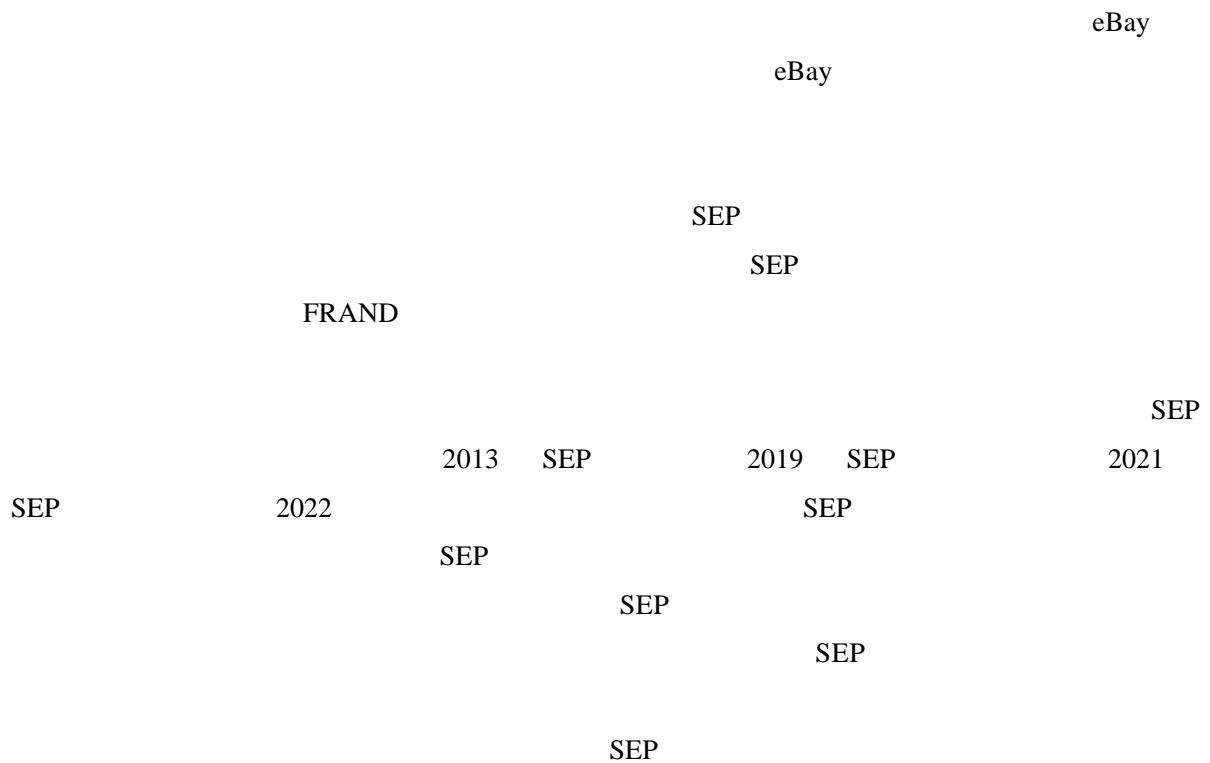
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REN Tianyi

Abstract: A critical issue relating to FRAND licensing is the availability of injunctive relief. Should injunctive relief be generally available, or should it be restricted, given the commitment to grant a FRAND license for SEPs? In judicial practice, different courts have different opinions, and even the same country has different positions at different times. Since the relevant administrative departments of the United States issued the policy statement on remedies for standards-essential patents subject to voluntary FRAND commitments in 2013, the attitude and position have been evolving, characterized by three main aspects: first, from focusing only on patent holdup to focusing on both patent holdup and patent holdout; second, pay more attention to the role of good-faith negotiation to achieve a more balanced infringement remedy mechanism; third, repeated changes in the attitude of antitrust enforcement. The U.S. SEP policy

statement greatly impacts the enterprises involved in SEP licensing trade in China and should pay close attention to its trend. The relevant administrative departments should act proactively and judge the development trend of the global response to SEP issues, develop guidance on what demonstrates good-faith negotiation, and further clarify the circumstances under which antitrust law liability would be raised.

Keywords: Standard Essential Patent; Injunctive Relief; Patent Holdup; Good-Faith Negotiation