



March 13, 2019

The Hon. William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

The Hon. Wilbur Ross
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Dear General Barr and Secretary Ross:

The undersigned Alliance of U.S. Startups and Inventors for Jobs (“USIJ”) writes in support of the decision by Assistant Attorney General for the Antitrust Division Makan Delrahim to withdraw the 2013 joint DOJ-USPTO “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments” (the “2013 Joint Policy Statement”). This decision by Assistant Attorney General Delrahim corrects a misguided and biased policy statement made by the previous Administration that was designed to benefit a handful of large, incumbent technology companies at the expense of smaller companies who are often more innovative and nimble in the marketplace.

Assistant Attorney General Delrahim and Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent and Trademark Office Andrei Iancu have repeatedly noted that the U.S. patent system has been one of the crown jewels of our country’s economic policy for more than 200 years and has fostered a level of creativity and productivity that has made American technological prowess and our economy the envy of the rest of the world. We strongly agree with them and believe it is essential that all branches of our government examine critically a large portion of patent related policies and decisions adopted by the prior Administration and the U.S. Supreme Court over the last decade. Withdrawal of the 2013 Policy Statement is an important step in the right direction.

USIJ comprises over 30 small companies, inventors and venture capital investors involved in a wide variety of industries and technologies for whom patents are critical. USIJ was formed in 2012 amidst a tidal wave of government policies and decisions, each of which undermined incrementally the fundamental objectives of the U.S. patent system, but which collectively weakened our patent system to the point of irrelevance. Legislation introduced in 2014 would have made the problem even worse. Based on the personal experiences of our members and supporters, it became clear that twenty or so Supreme Court rulings against

patent owners combined with exceptionally high “kill rates” in post-grant proceedings in the USPTO were destroying the willingness of investors and entrepreneurs to commit time and risk capital to those sectors of our economy that depend on patents for survival. These sectors comprise many of the most important strategic technologies that are essential to national security and the well-being of Americans. Our country cannot afford to maintain policies that suppress the incentives for startups and entrepreneurs to take long term risks that require enforceable and reliable patents.

The 2013 Policy Statement benefits some of the largest and most powerful users of intellectual property at the expense of these innovators who are so essential to the development of new technologies. The Statement purports to be merely a “suggestion” by DOJ to the courts and ITC that, for reasons rooted in antitrust law, they should not consider granting injunctions for patent infringement unless the infringer is refusing to take the same license that others have taken previously. If that innocuous characterization were accurate, however, the large corporate infringers would not be arguing for its retention. The mere fact that the Policy Statement comes from DOJ renders it tantamount to a directive and a reflection of DOJ policy. USIJ submits that there is no rational basis for the imposition of antitrust inspired constraints on the freedom of a patent owner to exercise the full measure of exclusivity accorded it by the U.S. Constitution, the U.S. Patent Act and the statutes governing the International Trade Commission, irrespective of whether such patents are essential for the implementation of a standard, except to the extent the patent owner’s rights are limited by contractual arrangements to which such patent owner has previously agreed. The 2013 Policy Statement was, at bottom, an effort by the prior Administration to undermine this basic tenet of patent law for the benefit of a few politically powerful technology companies.

Most standard setting organizations (“SSOs”) today operate on what is essentially a set of express or implied contracts, wherein companies desiring to participate in establishing the technical requirements for an interoperability standard are required to agree that if they own patents that will be infringed by implementation of whatever standard ultimately is adopted, either they will not enforce any such patents or they will license the patents to others for a “Fair, Reasonable and Non Discriminatory (“FRAND”) royalty. Although there was a time when most SSOs did not have policies defining the rights, obligations and expectations of the participants in standard setting processes, the last twenty years have seen considerable clarification of what the parties can expect. Even still, the process is far from perfect, and determining a FRAND royalty can require extensive negotiations. In most situations, however, royalties are arrived at through an arms-length agreement between patent owner and licensee as a matter of contract law. It is only when the patent owner and an implementer of the standard are not able to agree on a royalty that the patent owner is relegated to its patent rights and forced to sue the infringer. In this situation, large well-funded companies using the intellectual property of smaller companies can refuse to pay a FRAND royalty, believing there is no downside to their refusal because the worst case outcome is that they will end up having to pay the FRAND royalty many years later, with the distinct possibility that they can do even

better by forcing a smaller innovative company into expensive and lengthy litigation it cannot afford. The realistic threat of an injunction against further infringement is essential to encourage infringers to act in a socially responsible and economically appropriate manner. Property rights are valuable only to the extent they are widely respected.

The 2013 Policy Statement itself is rooted in purely hypothetical scenarios, none of which is based on real data or shown to inhibit competition in any meaningful way. The Statement concludes with a recommendation that the ITC and district courts consider carefully whether an exclusion order or injunction as to SEPs is justified, as if those entities would not ordinarily do so as a matter of course. One can search the Policy Statement in vain to find a genuine antitrust concern that should override patent rights created by statute and the intention of the parties to a lawful contract.¹ In this respect, we call to your attention a comment submitted to the Federal Trade Commission on December 21, 2018 and signed by 18 experts on the law and economics of patent protection and the role that patents play in on enhancing competition. The comment was sent to the FTC as a follow up to its hearings on "Competition and Consumer Protection in the 21st Century." Appendix A to the comment identified 58 studies based on actual economic data and real world transactions demonstrating the need for a more patent-friendly approach than current policies reflect. The collection of data-driven studies identified in the comment stands in stark contrast to the hypothetical conjecture about "patent holdup" and "royalty stacking" on which the 2013 Policy Statement purports to be based. Indeed, a series of careful academic studies published in peer-refereed journals has shown that the "patent holdup" and "royalty stacking" conjectures fail tests for logical consistency and completeness and are irreconcilable with systematic empirical evidence.

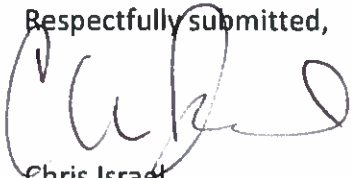
Furthermore, to the extent the Policy Statement is directed to district courts, it seems particularly inappropriate in light of the U.S. Supreme Court decision in *eBay, Inc. v. MercExchange LLC*, 126 S. Ct. 1837 (2006). There the Court abolished the presumptive right to an injunction that is strongly implied by the United States Constitution and that has been a foundational principle of U.S. patent law for more than 200 years. An injunction and the threat of an injunction are essential tools for a patent owner to recover the full value of its underlying technology once infringement is established and all validity attacks have been overcome. Particularly in the post-*eBay* world, there is ample opportunity without the intervention of antitrust enforcement agencies for the court to consider any public interest concerns that might

¹ Former Assistant Attorney General James F. Rill, Esq. has addressed this issue with a caution against injecting antitrust concepts into subject matter areas where they are not needed. See, Rill *et al.*, "Antitrust and FRAND Bargaining: Rejecting the Invitation for Antitrust Overreach into Royalty Disputes," *Antitrust Magazine*, Fall 2015, p. 72. The authors make a powerful argument against the creeping encroachment of antitrust theories into what are in essence contractual disputes, most often between entities of considerable power and sophistication. The authors flag the distinct possibility and concern that intrusion by the courts and the enforcement agencies may chill innovation and also deter participation in standard setting by innovative companies, both of which we believe have resulted from DOJ intervention into the standard setting arena.

arise from the entry of an injunction. And of course, any exclusion order entered by the ITC will also be examined automatically for its impact on the interests of the public, if there are any.

USIJ's support for withdrawing the 2013 Policy Statement is part of a far larger concern with the health of the U.S. patent system itself. For at least the last fifteen years, the U.S. patent system has been the victim of a malicious and predatory public relations campaign, financed largely from the extraordinary profitability of a handful of large technology companies whose profits result, at least in part, from a collective refusal to pay appropriate amounts for the technologies that they use and/or copy from smaller, more innovative companies. This carefully orchestrated PR campaign relied on coordinated and highly exaggerated complaints about "patent trolls" and has infected U.S. patent policy at every level. Dozens of Supreme Court decisions reflect hostility to the enforcement and licensing of patents. The American Invents Act, enacted by Congress in 2011, was implemented by the USPTO in a way that allows large defendants to bleed a smaller company dry, irrespective of the value of its technology, the risks that were taken to bring it to market or the propriety of its claims. As a result, the malaise in our patent system has metastasized to the point that many highly successful inventors and investors can no longer rely on U.S. patents to justify the risk and expenses of inventing new technologies and predictably have shifted their focus to other activities. Although there still may be risk capital available in the U.S. for some enterprises, this fact actually masks the full extent of the loss in strategic technologies, because risk capital is invested increasingly in other countries or in businesses that do not need patent protection – businesses such as restaurants, fashion, smartphone apps, social media, and the like – that do little to enhance our national security, maintain our lead in important technologies or improve the quality of life. USIJ sees the 2013 Joint Policy Statement as one of the many manifestations of this systematic campaign to undermine the enforceability of patents for the benefit of a few large companies, and we see its withdrawal as a small but important step in the direction of restoring a healthy protective environment for inventors and innovators.

Respectfully submitted,



Chris Israel
Executive Director
Alliance of U.S. Startups and Inventors for Jobs

Cc: Assistant Attorney General Makan Delrahim
Under Secretary of Commerce for Intellectual Property and Director of the U.S. Patent
and Trademark Office Andrei Iancu
The Hon. Jerrold Nadler, Chairman, House Judiciary Committee
The Hon. Doug Collins, Ranking Member, House Judiciary Committee

The Hon. Lindsey Graham, Chairman, Senate Committee on the Judiciary
The Hon. Dianne Feinstein, Ranking Member, Senate Committee on the Judiciary

USIJ Member Companies

- Aegea Medical
- Arrinex, Inc
- Autonomic Technologies
- BioCardia
- Ceterix Orthopaedics
- CyberHeart
- Direct Flow Medical
- EarLens Corporation
- EnterVault
- ExploraMed
- Fogarty Institute for Innovation
- ForSight Labs
- Headwater Research
- Lauder Partners, LLC
- Materna
- MedicalCue
- MiramarLabs
- Moximed
- Pavey Investments
- Precision Biopsy
- Prescient Surgical
- Pulsar Vascular
- Puracath Medical
- Rearden Studios
- Roxwood Medical
- Siesta Medical
- Sippl Investments LLC
- Solar Junction
- Soraa
- Tallwood Venture Capital
- TiVo
- The Foundry
- WillowZipline Medical