Protecting American Innovation Leadership and Competitiveness

American leadership in emerging technologies like the Internet of Things (IoT) and artificial intelligence is key to achieving President Trump's America First agenda. But American leadership in these strategically important areas can be achieved only if American businesses can predictably use the technical standards that support them.

Collaboratively developed voluntary standards, such as 5G and Wi-Fi, are what products like mobile phones, medical devices, cars, and advanced manufacturing systems rely on to interoperate. But innovative American manufacturers who make products that use these standards are being extorted by weaponization of the legal system here and abroad by entities claiming to hold patents that cover the standard. These manufacturers risk having their product sales blocked entirely unless they pay excessive, unreasonable fees, which are tantamount to a foreign tax on these American businesses.

It is critical that the Trump Administration stop foreign companies, and abusive patent holders more generally, from unfairly and unreasonably holding standardized technologies hostage and depriving American businesses and citizens of their benefits. The Trump Administration should ensure that these patent holders comply with the voluntary but irrevocable commitments they made up-front during standards development to license their patents essential to these standards (standard essential patents, or SEPs) on fair, reasonable and non-discriminatory (FRAND) terms.

We urge the Trump Administration to promote American business innovation and continued technological leadership by pursuing policies to curtail abusive use of SEPs:

I. Protect American businesses and prevent foreign companies and other SEP abusers from driving up costs for Americans
II. Strengthen American investment in cutting-edge industries through predictability in SEP licensing
III. Deter SEP abusers that weaponize their SEPs to harm American businesses

These issues are discussed in detail in the attached document.

SEP/FRAND Licensing Policy Priorities & Actions Memo for the Trump-Vance Administration

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Policy Objective I: Protect American businesses and prevent foreign interests from driving up costs for Americans.

RECOMMENDATIONS:

- ***Work with Congress to pass legislation and explore other means to create consequences for SEP holders who seek to use foreign SEP injunctions to coerce excessive royalties*** on products sold in the United States.
- ***Advocate to foreign governments to limit the availability of SEP injunctions in foreign courts*** to protect American businesses and consumers from unfair and unreasonable demands by SEP holders.
- ***File amicus briefs supporting limits on obtaining foreign injunctions*** to eliminate the influence of foreign SEP injunctions and huge "security deposit" demands on American businesses.

BACKGROUND:

Emerging technologies like advanced wireless communications, IoT, and AI promise a new era of economic opportunity. If American companies fail to maintain their lead in these technologies now, foreign adversaries may gain a generational advantage over American industry. These emerging technologies rely heavily on collaboratively developed industry technical standards.

The nature of the standard-setting process—where multiple companies voluntarily collaborate to develop standardized technological approaches—comes with the requirement that participants license any patents essential to the technology on FRAND terms. The FRAND commitment is meant to ensure that (i) SEP holders are fairly and reasonably compensated, and (ii) SEPs holders do not exclude companies from using technical standards, cutting off manufacturers from the market after a technical standard is the only viable solution, or using injunctions or other leverage against product companies to extract more than the fair and reasonable value of their patented technologies. In return, SEP owners garner a large base of licensees as the standard is widely used.

Reasonable limitations on the availability of injunctions is particularly important for the increasing number of industries that rely on standardized technologies. Hundreds of thousands of patents have been declared essential to technologies such as 5G and Wi-Fi, though many of these patents are not essential or valid.

Without reasonable limitations on injunctions, any SEP holder can block billions of dollars of product sales through an injunction on a single voluntarily declared SEP. This threat has the potential to chill investment in innovative products and creates a disproportionate burden on the innovators who assume the bulk of the risk associated with designing, manufacturing, and selling new products, while providing rent-seeking SEP abusers who violate their licensing commitments with a low-cost and low-risk tool to hold Americans hostage to high prices.

Unfortunately, some SEP holders try to evade their voluntary FRAND commitments by misusing foreign court proceedings that offer fast injunctions against American businesses, or by arming opaque foreign-backed assertion entities to do the same. For example, some courts in Europe, India, Colombia, and Brazil are issuing national injunctions on FRAND-committed SEPs without evaluating whether the SEP holder has complied with its FRAND obligations, or whether the SEPs being litigated are even essential to the standard.

Foreign companies like Huawei, ZTE, Ericsson, Nokia and others, including some patent assertion entities closely associated with foreign sovereign wealth funds, are increasingly using foreign SEP injunctions to force American businesses into one-sided, non-FRAND global license terms. Businesses like Ford, Tesla, HP, and Amazon have all been targeted by these suits. American businesses face a stark choice: accept grossly unfair terms or lose access to key markets.

Policy Objective II: Strengthen American investment in cutting-edge industries through predictability in SEP licensing

RECOMMENDATIONS:

- ***Strongly oppose any legislation that would roll back eBay***, the unanimous Supreme Court decision that got rid of special injunction rules for patents, and would allow foreign and other companies to prevent American companies from making or selling innovative products.
- ***Reform the U.S. International Trade Commission*** to limit foreign and other entities from threatening import bans to extract excessive, non-FRAND royalties, which increase costs for Americans and U.S. businesses.
- ***Publish guidance providing predictable standards for SEP royalties*** to reward inventors only for the fair value of their patents and not, for example, for technologies they did not invent.
- ***Maintain cost effective avenues to correct agency errors*** in issuing invalid patents through the Patent Trial and Appeal Board.

BACKGROUND:

American leadership in emerging technologies depends on an environment that fosters private investment in these areas. American law limiting the availability of injunctions has been particularly effective in encouraging investment in new products and technologies. The Supreme Court's unanimous *eBay* decision, authored by Justice Thomas, held that the same law that applies to other legal remedies applies to patents: injunctions should only be awarded if monetary payments are not adequate to compensate the patent holder for use of its patents.

This standard means American companies are protected from the coercive threat of SEP injunctions in the United States—except for the U.S. ITC (*more below*)_because money is sufficient to compensate SEP holders who have voluntarily agreed to license their SEPs broadly on FRAND terms. Without *eBay*, SEP holders could easily walk away from their FRAND commitments and hold up American companies through the threat of injunctions. Nevertheless, two areas of risk continue to threaten the investment of American product businesses.

First, while the *eBay* standard provides clear limits on the availability of injunctions in U.S. courts, the U.S. International Trade Commission (ITC) operates under a different legal standard, which the ITC has interpreted to make product bans the default remedy. While the ITC was supposed to protect American companies from foreign companies' flooding the U.S. market with goods that infringe American intellectual property, it has become a tool used by foreign companies and abusive SEP holders against American product companies. The ITC duplicates a function already served by the U.S. courts and should significantly be scaled back to avoid inefficiency and government duplication, and to prevent the harms from unnecessary product bans.

Second, although courts are supposed to set reasonable royalties, there is no clear framework for what that should be. This lack of clarity is particularly problematic in cases involving complex products that may incorporate hundreds of standards and thousands of other non-standardized features. Inventors should be awarded for the value of their innovation, but should not be able to raise prices on American businesses and consumers by seeking value from features and technologies they did not invent.

Foreign SEP abusers have exploited these ambiguities to use U.S. courts and the ITC against American companies. Adopting a consistent methodology for determining FRAND royalties for SEPs would spur investment by reducing uncertainty regarding licensing costs.

Policy Objective III: Deter SEP abusers that weaponize their SEPs to harm American businesses

RECOMMENDATIONS:

- ***Prioritize enforcement actions*** against foreign companies and others that violate U.S. antitrust law or engage in unfair or deceptive acts or practices against American businesses by engaging in SEP abuse.
- ***Work with stakeholders*** to identify the extent to which component manufacturers are denied licenses on FRAND terms, and develop and implement recommendations to remedy the situation.
- ***Support litigation transparency legislation*** to require disclosure of third-party litigation financing and investigate the involvement of foreign adversaries as litigation funders.

BACKGROUND:

Foreign companies excluded from the American market due to national security concerns—and other companies who are no longer as competitive or innovative as they were in the past—have sought to strategically replace revenue streams lost due to declining product sales by improperly leveraging their large SEP portfolios to unfairly inflict competitive harm on American companies. Although some American businesses have fought back with civil litigation, this is a costly stopgap. To stop this abusive conduct and protect American businesses, the Trump Administration should begin investigating foreign companies and other abusive SEP holders for their anticompetitive, non-FRAND practices and initiate enforcement actions where appropriate.

Foreign companies, non-practicing entities sometimes backed by foreign sovereign wealth funds, other third-party litigation funders, and other SEP abusers have also begun to weaponize our courts and patent system to target American companies. Third-party litigation funding allows foreign nations to engage in lawfare against American companies while hiding their identities behind opaque funding agreements. These hidden deals raise costs for Americans, can force American innovators out of business, and can expose proprietary details about American businesses to foreign adversaries. Much of this activity goes unchecked because of the lack of disclosure requirements around the identity of funders and nature of the funding arrangements.