



State of intellectual property in third countries

Please describe the effectiveness of the current IPR protection and enforcement situation for each country and IP right you are commenting on.

In your contribution, please be as detailed and precise as possible so that legal problems and practical challenges can be addressed with relevant authorities. To that end, please include the following information where available:

- In general, how has the level of IPR protection and enforcement in this country changed over the last two years (improved, has not changed, worsened)?
- Legal provisions (with the titles of legal acts as well as their respective articles and paragraphs) which, in your view, are not compatible with international norms and standards in the area of intellectual property or which otherwise negatively affect the commercial exploitation of IP rights;
- Practical challenges and limitations (such as procedural deficiencies, backlogs, non-deterrent level of sanctions, lack of expertise, corruption, lack of political will, lack of awareness and lack of transparency) which have a negative impact on IP protection and enforcement;
- Concrete examples of deficiencies of administrative and judicial mechanisms in the area of IPR (e.g. IP offices, customs, police and courts);
- Any other systemic problems in the country concerned, including information on the nature, scope and economic dimension of counterfeiting and piracy as well as on the level of cooperation between enforcement authorities and rightholders;
- Any action or measure taken by the respondent to address the problems identified and the outcome of such efforts;
- Concrete suggestions on how the problems and challenges identified could be addressed by the EU.
- Please describe whether and to what extent progress has been made over the last 2 years by the countries listed (e.g. legislative or administrative reforms, structural reorganisations such as the establishment of specialised IP courts, new IP strategies, training programmes, awareness raising campaigns and cooperation with rightholders).

Country: USA

Description:

The Fair Standards Association ('FSA'; see fair-standards.org) limits its comments to the status of intellectual property protection for patents that are essential to industry standards ("Standards Essential Patents" or "SEP's"). While there have been a number of positive developments with respect to the appropriate intellectual property protections for SEPs in the United States, including a decision by the United States District Court for the Northern District of California holding certain SEP licensing practices to be violations of the antitrust laws, in other respects, certain developments around the level of IPR protection and enforcement have raised concerns.



On December 8, 2018, the Assistant Attorney General for the Antitrust Division at the Department of Justice (AAG) announced in a speech that the Antitrust Division is withdrawing its assent to the 2013 joint DOJ-U.S. Patent & Trademark Office “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments” (2013 Policy Statement), and further indicated that the Antitrust Division will investigate and bring enforcement actions to address alleged collusion in standard setting organizations (SSOs).

As the FSA explained in a multi-organization letter to the USPTO and the U.S. Department of Commerce, the 2013 Policy Statement represents a thoughtful and deliberate multi-agency approach to standardization, patents, and competition. It explains that injunctive relief may be limited in light of the FRAND commitments made by SEP licensors. The 2013 Policy Statement provides much-needed guidance regarding the intersection of standardization, intellectual property, and the vital role of competition law; and it has discouraged abusive tactics. The 2013 Policy Statement is also supported by a strong (and still growing) body of precedent, which affirms the role of competition law in upholding FRAND licensing commitments to maintain competition and incentivizing innovation.

Competition authorities around the world have long recognized that clear, enforceable rules regarding the ability of a SEP owner to exploit the market power created by the inclusion of its SEP in a popular standard are necessary to realize successful pro-competitive standardization. Reducing competition law’s role from the SEP licensing ecosystem would harm those that utilize standards to innovate as well as the entire ecosystem that builds on such a standard.

Standards participants voluntarily agree to FRAND commitments in return for their technology being included in a widely adopted global standard and are free to withhold their patented technologies from standards. The AAG’s assertion that FRAND licensing is compulsory contradicts the reality of enforcement of voluntary licensing in both definitions. Further, SSOs need the ability to make policy changes in response to their members’ needs to foster collaboration, support, and inspiration, ultimately benefiting consumers who enjoy increased access to cutting-edge products and services at lower costs. We are therefore concerned with the AAG’s stated focus on investigating alleged collusion within SSOs in response to SSOs making policy changes in response to membership.

Finally, any suggestions that the 2013 Joint Statement is contrary to the WTO’s TRIPS agreement are not well-founded. As noted, SEP owners voluntarily choose to participate in standards development and to contribute their patented inventions for use in a standard. No one doubts that a patent holder may voluntarily agree to limit the scope of its patent rights by promising to license rather than exclude. Holding a patent owner to its own promise is entirely consistent with the WTO TRIPS agreement.

In the interest of continued growth and innovation in Europe, the EU could address these challenges by (1) itself supporting appropriate limits on injunctive and other exclusionary relief for SEPs within the EU as a model for international behaviour, and (2) in trade and other engagements with the United States, raising and emphasizing the points made above.

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