EXHIBIT D

UNITED STATES DEPARTMENT OF JUSTICE AND
UNITED STATES PATENT & TRADEMARK OFFICE

POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS

January 8, 2013

The U.S. Department of Justice, Antitrust Division (DOJ), and the U.S. Patent & Trademark Office (USPTO), an agency of the U.S. Department of Commerce, provide the following perspectives on a topic of significant interest to the patent and standards-setting communities: whether injunctive relief in judicial proceedings or exclusion orders in investigations under section 337 of the Tariff Act of 1930[1] are properly issued when a patent holder seeking such a remedy asserts standards-essential patents that are encumbered by a RAND or FRAND licensing commitment.[2]

The patent system promotes innovation and economic growth by providing incentives to inventors to apply their knowledge, take risks, and make investments in research and development and by publishing patents so that others can build on the disclosed knowledge with further innovations. These efforts, in turn, benefit society as a whole by disseminating knowledge and by providing new and valuable technologies,

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[1] Although the focus of the present policy statement is on exclusion orders issued pursuant to 19 U.S.C. § 1337, similar principles apply to the granting of injunctive relief in U.S. federal courts, which is governed by the standards set forth by the U.S. Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). The present policy statement is not, however, intended to be a complete legal analysis of injunctive relief under the *eBay* standard.

[2] For purposes of this statement, a patent is RAND- or FRAND-encumbered where a patent holder has voluntarily agreed to license the patent on reasonable and non-discriminatory (RAND) terms or fair, reasonable, and non-discriminatory (FRAND) terms while participating in standards-setting activities at a standards-developing organization (SDO). In the United States, SDO members may commit to license all of their patents that are essential to the SDO standard on RAND terms. In other jurisdictions, SDO members may commit to license such patents on FRAND terms. For the purposes of this letter, F/RAND refers to both types of licensing commitments. Commentators frequently use the terms interchangeably to denote the same substantive type of commitment.

lower prices, improved quality, and increased consumer choice.[3] The DOJ and USPTO recognize that the right of a patent holder to exclude others from practicing patented inventions is fundamental to obtaining these benefits. It is incorporated into section 337 of the Tariff Act of 1930 itself, which forbids the unlawful "importation into the United States . . . of articles that . . . infringe a valid and enforceable United States patent."[4] As noted in the Administration's 2010 Joint Strategic Plan on Intellectual Property Enforcement, "[s]trong enforcement of intellectual property rights is an essential part of the Administration's efforts to promote innovation and ensure that the U.S. is a global leader in creative and innovative industries."[5] Accordingly, as historically has been the case, exclusion typically is the appropriate remedy when an imported good infringes a valid and enforceable U.S. patent.

Standards, and particularly voluntary consensus standards set by standards-developing organizations (SDOs), have come to play an increasingly important role in our economy.[6] Voluntary consensus standards, i.e., agreements containing technical

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[3] *See, e.g.*, OFFICE OF THE U.S. INTELLECTUAL PROP. ENFORCEMENT COORDINATOR, OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, 2010 JOINT STRATEGIC PLAN ON INTELLECTUAL PROP. ENFORCEMENT 3 (2010) [hereinafter 2010 JOINT STRATEGIC PLAN], http://www.whitehouse.gov/sites/default/files/omb/assets/intellectualproperty/intellectualproperty_strategic_plan.pdf. ("Enforcement of intellectual property rights is a critical and efficient tool we can use, as a government, to strengthen the economy, support jobs and promote exports. Intellectual property supports jobs across all industries, and in particular where there is a high degree of creativity, research and innovation.").

[4] 19 U.S.C. § 1337(a)(1)(B)(i) (2006).

[5] 2010 JOINT STRATEGIC PLAN, *supra* note 3, at 4.

[6] Congress and the Executive Branch have recognized the benefits of voluntary consensus standards. SDOs play an essential role in the development of such standards. *See, e.g.*, National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 775, 783 (1996), 15 U.S.C. § 272 note (2006)); OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR A-119, FED. PARTICIPATION IN THE DEV. AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES (1998), www.whitehouse.gov/omb/circulars_a119; *see also* Mem. from the Exec.

specifications or other criteria, are generally produced by private-sector organizations engaged in the development of standards.[7]

Voluntary consensus standards serve the public interest in a variety of ways, from helping protect public health and safety to promoting efficient resource allocation and production by facilitating interoperability among complementary products.[8] Interoperability standards have paved the way for moving many important innovations into the marketplace, including the complex communications networks and sophisticated mobile computing devices that are hallmarks of the modern age. Indeed, voluntary consensus standards, whether mechanical, electrical, computer-related, or communications-related, have incorporated important technical advances that are

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Office of the President on the Principles for Fed. Engagement in Standards Activities to Address Nat'l Priorities for the Heads of Exec. Dep'ts and Agencies (Jan. 17, 2012), http://www.whitehouse.gov/sites/default/files/omb/memoranda/2012/m-12-08_1.pdf.

[7] Participation in their development is optional and the resulting standards are generally intended for voluntary use. U.S. Dep't of Commerce, Standards and Competitiveness: Coordinating for Results 5 (2004), http://www.ita.doc.gov/td/standards/pdf%20files/Standards%20and%20Competitiveness.pdf. In the United States alone, there are approximately 50,000 private-sector voluntary standards developed by more than 600 organizations. *See Overview of the U.S. Standardization System*, Am. Nat'l Standards Inst., http://www.standardsportal.org/usa_en/standards_system.aspx (last visited Dec. 7, 2012). The U.S. standards system is tremendously diverse, resulting in a system that is largely sectoral in focus. This is a logical approach because SDOs developing standards for use in each industrial sector, such as the information technology, telecommunications, automotive, medical devices, and building technology sectors, are most likely to understand that sector's needs and to know what standards best meet those needs. Many products, including those in the telecommunications sector, are based on multiple voluntary consensus standards developed by a number of different SDOs with different patent-licensing policies.

[8] Due to the important role of F/RAND-licensed intellectual property in the standards process, we understand that the National Science and Technology Council Subcommittee on Standards, which includes broad representation from stakeholder agencies, plans to study this issue to explore any broader potential impacts of this, and other, related policies.

fundamental to the interoperability of many of the products on which consumers have come to rely.[9]

However, collaborative standards setting does not come without some risks. For example, when a standard incorporates patented technology owned by a participant in the standards-setting process, and the standard becomes established, it may be prohibitively difficult and expensive to switch to a different technology within the established standard or to a different standard entirely. 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.[10]

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[9] *See* SUBCOMM. ON STANDARDS, NAT'L SCI. & TECH. COUNCIL, OFFICE OF SCI. & TECH. POLICY, EXEC. OFFICE OF THE PRESIDENT, FED. ENGAGEMENT IN STANDARDS ACTIVITIES TO ADDRESS NAT'L PRIORITIES: BACKGROUND AND PROPOSED POLICY RECOMMENDATIONS 1 (Oct. 10, 2011), http://standards.gov/upload/Federal_Engagement_in_Standards_Activities_October12_final.pdf.

[10] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 35-36 (2007), http://www.justice.gov/atr/public/hearings/ip/222655.htm.

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