

**FRAND AND INJUNCTIONS:
THE GOVERNMENT PERSPECTIVE**
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The Government Perspective

Policy Concerns

- Standard Setting Process: Enhanced Market Power Through Competitor Collusion
- Increases Risk of Patent Hold-Up: Extract Excessive Royalties; Inhibit Innovation; Compelled Cross Licenses
- Government Tolerates SSO Collusion, In Part, Because FRAND Commitment Limits Risk Associated with Collusion

Policy Concerns (2)

**Smart Phones: Extraordinary Volume of
Commerce At Risk**

Effect of Exclusion Order/Injunction:

- Threatened: Reclaim Enhanced Market Power After Inducing Firms to Rely on FRAND Commitment.
- Granted: Preclude Direct Competitor in Concentrated, Multi-Billion Dollar Markets.

Policy Responses

Presumption Against Injunctive Relief

Exceptions:

- Party not subject to US Court jurisdiction
- Party refuses to pay/negotiate in good faith

**Possible DOJ/FTC Action Against Party
Engaged in Patent Hold-Up**

Scrutiny of SSO

Policy Responses (2)

Encourage SSO Response

- No Mandatory Cross-Licensing of Non-SEPs; Cash Option
- Limits on Injunctions
- Efficient, Quick, Final Procedure for Determining FRAND Rate
- Set FRAND Rate Up-Front
- Ensure SSO FRAND Commitment Travels with Patent

The Government Perspective

Policy Concerns

- Agency Uncertainty Re Industry Activity and Effect on Competition (Actively Seeking Industry Input)
- Policing the FRAND Process: Unreasonable Licensee and Licensor Behavior
- Different Rules for Non-Practicing Entities?
- Interagency Coordination: DOJ, FTC, PTO, ITC, WH