

Statement of Senator Dick Durbin
Hearing before the Senate Judiciary Committee
Oversight of the Impact on Competition of Exclusion Orders to Enforce Standard-
Essential Patents
July 11, 2012

Mr. Chairman, thank you for holding this hearing. I appreciate the opportunity to submit a statement for the record.

In recent months a number of commenters have urged the U.S. International Trade Commission (“ITC”) not to issue exclusion orders in cases where standard essential patents (“SEPs”) have been found to be infringed. To justify their position, these commenters have typically cited concerns about the possibility of “patent hold-up” by holders of SEPs. While there is indeed always a possibility that such patent hold-up might occur, any calls to limit the availability of ITC exclusion orders for SEPs or to limit the use of the ITC as a forum for disputes involving imported products that allegedly infringe on SEPs should be made based on actual data that demonstrates that our current system has a problem – and not on the mere possibility of a problem. There is legitimate concern that any changes made to our current system in the absence of such data could unduly favor infringers and prove detrimental to innovators, consumers, and competition at large.

Our current system of patent protection, with ITC playing its key enforcement role, has a long history of working well to encourage innovation and stimulate competition. When complaints of unfair practices arise, case-by-case adjudication of such complaints, including adjudication by the ITC, has been effective in striking the right balance between the interests of patentholders, alleged infringers and the public. Any significant changes to the current system should be cautiously considered in order to ensure that this balance is not unsettled.

The complexities involved in maintaining this balance are evident when it comes to SEPs. When a company agrees to contribute its patented technology to an industry standard, the company commits to negotiate to license the patent on fair, reasonable and nondiscriminatory (F/RAND) terms. While in those negotiations there is always a possibility that a company that has made a F/RAND commitment will seek to use the availability of an exclusion order as leverage to try to obtain better licensing terms, there is an equivalent concern that without the availability of an exclusion order a company using a SEP will hold out for less-than-reasonable licensing terms or will simply infringe on the patent and engage in protracted infringement litigation in court while avoiding paying royalties until the litigation is over. In fast-moving sectors such as the consumer technology sector, such potentially bad-faith behavior by user companies could significantly harm patentholding companies or could incent patentholders not to participate in standard setting processes in the future. Competition and consumers could be detrimentally impacted as a result. For reasons such as these, we should tread carefully when considering changes to the current system of SEP enforcement.

As this Committee proceeds with its consideration of this issue, I hope we will ask for and obtain hard data from our witnesses and from other stakeholders. I also hope we will solicit the views of stakeholders who are not represented at the witness table today, such as the ITC, the Patent and Trademark Office, the U.S. Trade Representative, small technology companies, standard-setting organizations, and consumer groups. Such data and views will help inform our analysis as we consider potential changes to the current patent protection system.