Do New DOJ Leadership Statements on SEPs Signal A Change of Direction for Antitrust Enforcement Policy?

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Introduction

For years, there has been robust debate among legal scholars, practitioners, and enforcers over whether and how the antitrust laws should be applied in the context of industry standard setting, and, in particular, with regard to violations of FRAND licensing commitments made by holders of standard-essential patents (SEPs). Historically, the Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) have taken the position that the antitrust laws may reach such violations. However, statements made last week by DOJ senior leadership appear to signal a major shift in enforcement policy at DOJ. AAG Makan Delrahim expressed the view that FRAND violations are better addressed via contract remedies, and indicated that under his watch, the DOJ would focus on potential antitrust violations by SEP licensees and the Standard-Setting Organizations (SSOs) themselves.

Background

Standard setting can be procompetitive. Standards may facilitate interoperability, for example, by allowing a product to interact seamlessly with devices and technologies produced by other manufacturers, and by increasing competition among innovators to be included in the industry standard. The antitrust agencies have long recognized that standards can make "products less costly . . . more valuable to consumers . . . increase innovation, efficiency, and consumer choice; foster public health and safety; and serve as a 'fundamental building block for international trade.'"[1]

SSOs, however, by their very nature, also create antitrust risk. They are, after all, groups of competitors, among others, agreeing on the technological basis for competition. In practice, they routinely adopt standards incorporating patented technology, thus creating or enhancing market power for the holders of those "Standard Essential Patents." If the adopted standard becomes successful, SEP owners may well be able to garner increased income from license fees, due to much increased sales volumes. As well, they may extract higher license fees than they would have received absent the standard. Especially when done deliberately to extract supra-competitive license fees, this is referred to as patent "hold-up." To address this potential risk, SSO's have typically required any would-be SEP patent holders to agree to make licenses to their patented technology available on fair, reasonable, and non-discriminatory (FRAND) terms. In recent years, both antitrust agencies have focused on the concerns regarding hold-up.

Antirust Agency Actions on Patent Hold Up

The FTC has taken numerous enforcement actions against violations of

[1] DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION 33 (Apr. 2007), https://www.justice.gov/atr/chapter-2-competition-concerns-when-patents-are-incorporated-collaboratively-set-standards.

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FRAND commitments, beginning more than 20 years ago[2] and continuing in several recent cases.

For example, in January 2013, the FTC published a proposed consent order resolving its complaint that Google-Motorola Mobility had violated Section 5 of the FTC Act by ignoring its obligation to offer FRAND terms to willing licensees and instead seeking injunctions against them. The FTC alleged that this conduct violated Google's FRAND commitments to various SSOs, and asserted that the threat of injunction distorted the negotiating process, undermining the integrity and efficiency of the standard-setting process, raising prices to consumers, and injuring competition.[3]

More recently, in January 2017, the FTC filed suit against Qualcomm, Inc., alleging that Qualcomm had used anticompetitive means to maintain a monopoly in the supply of baseband processors. One of the FTC's allegations was that Qualcomm used its monopoly in baseband processors to extract non-FRAND rates on SEP patents in cellular standards. Additionally, the FTC alleged that Qualcomm violated its FRAND commitments by refusing to license SEPs to its competitors in the market for baseband processors. The FTC alleged that this conduct violated the Sherman Act and also constituted a "standalone" violation of Section 5 of the FTC Act.[4] Qualcomm's motion to dismiss was denied on June 17, 2017.

Although the DOJ has not taken antitrust enforcement action against a violator of FRAND commitments, the agency historically has articulated similar policy and enforcement views to the FTC's. For example, last year, former Acting Assistant Attorney General Renata Hesse noted that antitrust was "one of the tools in the toolbox"[5] to address potentially anticompetitive conduct in the context of FRAND disputes. According to Hesse the DOJ focused on the potential for competitive harm "when the value of a patent is enhanced by becoming essential to a standard and patent holders seek to exploit that added value when they don't abide [by licensing] commitments they voluntarily make."[6] The DOJ, according to Hesse, would "investigate and take appropriate enforcement action on misconduct that … is likely to harm … competition under the antitrust laws."[7]

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[2] *E.g.* Matter of Dell Computer Corp., 121 F.T.C. 616 (F.T.C. 1996); *see also*, Press Release, Fed. Trade Comm'n, FTC Issues Complaint Against Rambus, Inc. (June 19, 2002), https://www.ftc.gov/news-events/press-releases/2002/06/ftc-issues-complaint-against-rambus-inc.

[3] The FTC majority cited several litigations brought under the Sherman Act as support for the complaint. *See* Analysis of Proposed Consent Order To Aid Public Comment, In the Matter of Motorola Mobility LLC and Google Inc., File No. 121-0120, at 4 n.6 (Jan. 3, 2013) (citing Broadcom Corp. v. Qualcomm, Inc., 501 F.3d 297 (3d Cir. 2007); In re Rambus, Inc., No. 9302, 2006 WL 2330117 (F.T.C. Aug. 2, 2006), *rev'd on other grounds*, Rambus v. F.T.C., 522 F.3d 456 (D.C. Cir. 2008); Research in Motion, Ltd. v. Motorola, Inc., 644 F. Supp. 2d 788 (N.D. Tex. 2008); Apple Inc. v. Samsung Elecs. Co., No. 11-CV-01846, 2012 U.S. Dist. LEXIS 67102 (N.D. Cal. May 14, 2012)).

[4] Compl. ¶¶ 3, 147, FTC v. Qualcomm Inc., No. 5:17-cv-00220 (N.D. Cal. Jan. 17, 2017). Then-Commissioner, now Acting Chairman, Maureen Ohlhausen dissented, arguing that the FTC's legal theory was "flawed" and "lack[ing in] economic and evidentiary support." Dissenting Statement of Commissioner Maureen K. Ohlhausen at 1, In the Matter of Qualcomm, Inc., File No. 141-0199 (Jan. 17, 2017).

[5] Jimmy Hoover, *FRAND Regime 'Not Working Very Well,' DOJ Official Says*, LAW360 (Apr. 14, 2015), https://www.law360.com/articles/643285/frand-regime-not-working-very-well-doj-official-says.

[6] Ron Lubosco, *US Antitrust Agencies Seek To Balance Enforcement With Competition Advocacy, Including In Areas Such As SEPs, DoJ's Hesse Says*, MLEX (Mar. 16, 2016).

[7] *Id*.

The DOJ more formally expressed a view on SEP and FRAND issues when it published a business review letter evaluating proposed changes to the policies of the Institute of Electrical and Electronics Engineers, Incorporated (IEEE), an SSO.[8] The updated IEEE policy would have expressly required SEP holders not to seek injunctive relief against willing licensees, and dictated several factors to be considered in determining an appropriate FRAND rate.

The DOJ concluded that the IEEE provisions would further the "procompetitive goal of providing greater clarity regarding" FRAND commitments, "which could facilitate licensing negotiations, limit patent infringement litigation, and enable parties to reach mutually beneficial bargains that appropriately value patented technology."[9] The business review letter was widely considered to be an endorsement of SEP policies designed to limit the potential for patent hold-up, consistent with past DOJ statements and FTC enforcement efforts.

DOJ's Current Position

On November 10, 2017, Assistant Attorney General Makan Delrahim delivered remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference, which marked a clear shift in the DOJ's position on the antitrust treatment of FRAND violations.

AAG Delrahim indicated his disagreement with prior enforcement actions against SEP holders that sought injunctions and stated that he thought such actions undermined the very foundation of patent rights. He noted his concerns that using antitrust laws in the context of SSO interactions and licensing practices "threatens to disrupt the free-market bargain, which could undermine the process of dynamic innovation itself."[10]

Moreover, AAG Delrahim noted his view that the antitrust laws, to the extent they are appropriately applied in the SSO context, should focus less on the risk of patent "hold-up" by SEP holders and more on what he considers a serious risk to innovation—patent "hold-out" by SEP implementers. "The hold-out problem arises when implementers threaten to under-invest in the implementation of a standard, or threaten not to take a license at all, until their royalty demands are met." In the view of the AAG, hold-out creates a greater risk than hold-up because "the hold-up and hold-out problem are not symmetric…. The risk of failing to implement a new technology does not fall equally on innovators and implementers. The prospect of hold-out offers implementers a crucial bargaining chip. Unlike the unilateral hold-up problem, implementers can impose this leverage before they make significant investments in new technology."[11]

In addition, AAG Delrahim endorsed close scrutiny of the conduct of the SSOs themselves. "When implementers act together within a standard-setting organization as the gatekeeper to sales of products including a new technology, they have both the motive and means to impose anticompetitive licensing terms. At the extreme, they can shut down a potential new technology in favor of the status quo, all to

[8] Letter from Renata B. Hesse, Acting Assistant Attorney General, to Michael A. Lindsay, Dorsey & Whitney LLP (Feb. 2, 2015), https://www.justice.gov/atr/response-institute-electrical-and-electronics-engineers-incorporated.
[9] *Id*.
[10] Makan Delrahim, Assistant Attorney General., Antitrust, Dep't of Justice, Take it to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law (Nov. 10, 2017), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center.
[11] *Id.*

the detriment of consumers." To remedy the imbalance he believes existed in prior enforcement—i.e., in the focus on potential hold-up, AAG Delrahim noted that the Antitrust Division will "be skeptical of rules that SSOs impose that appear designed specifically to shift bargaining leverage from IP creators to implementers, or vice versa," including rules for clarifying the meaning of FRAND terms. Going forward, the Antitrust Division "will carefully scrutinize what appears to be cartel-like anticompetitive behavior among SSO participants, either on the innovator or implementer side."[12] While his speech briefly acknowledges the continuing potential for antitrust risks on the patent-holder side, they appear to be a clear departure from prior agency policy and enforcement views, and a refutation of the DOJ IEEE Business Review letter.

The AAG's comments expanded on similar themes from Principal Deputy Assistant Attorney General Andrew Finch earlier the same week. PDAAG Finch noted his view that FRAND violations should not be the subject of antitrust enforcement, but rather were more appropriately redressed through statutory and common law actions by patent implementers. According to PDAAG Finch, it is not Antitrust Division's role "to police and decide whether patent holders are living up to their commitments, or to engage in price regulation and regulate patent royalties."[13]

Implications For Future Enforcement?

The perspectives of both AAG Delrahim and PDAAG Finch are not new to the debate over how best to navigate the intersection of antitrust and intellectual property. Nor are they without precedent in the agencies - being consistent with views previously expressed by now Acting FTC Chairman Maureen Ohlhausen and Former FTC Commissioner Josh Wright.[14] They are notable, however, as a dramatic shift in perspective for DOJ—though it remains to be seen whether these views will translate into specific DOJ enforcement actions or official policy statements, or instead merely lead DOJ largely to cede the field to private litigants.

Even more important, it is not clear whether, or to what extent, the new DOJ leaders' views will be shared by the incoming FTC Commissioners, particularly Joseph Simons, whom President Trump as nominated to be the new FTC Chair. A divergence in enforcement policy between the DOJ and the FTC would likely result in confusion in the standard-setting community and uncertainty among international competition enforcers regarding how US enforcers view the applicable legal standards in the standard-setting arena. Accurately gauging the full impact of these new DOJ policy statements will take some time, but if in fact they do signal a shift in policy, they will likely have a significant impact on standard-setting activities going forward.

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[12] *Id.*

[13] Pallavi Guniganti, *US DOJ Official: Antitrust Shouldn't Interfere in SEPs if Other Laws are Available*, GCR (Nov. 8, 2017), http://globalcompetitionreview.com/article/1149857/us-doj-official-antitrust-shouldn%E2%80%99t-interfere-in-seps-if-other-laws-are-available.

[14] Douglas Ginsburg, Taylor Owings, & Joshua Wright, *Enjoining Injunctions: The Case Against Antitrust Liability for Standard Essential Patent Holders Who Seek Injunctions*, THE ANTITRUST SOURCE, Oct. 2014, at 1-7. http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct14_ginsburg_10_21f.authcheckdam.pdf; Maureen Ohlhausen, Commissioner, Fed. Trade Comm'n, Special Address at the Standards and Patent Conference (Dec. 4, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/pragmatists-approachnavigating-intersection-ip-antitrust/131204ukantitrust.pdf .