

INTRODUCTION

Antitrust and Intellectual Property in a Neo-Populist Age

BY MICHAEL A. LINDSAY

WHATEVER ONE THINKS OF THE Trump administration's antitrust policies, antitrust lawyers can take pride in the fact that antitrust is both "cool" and "sexy" again.¹ But when the rush of pride wears off, antitrust lawyers still must ask what the Trump administration's antitrust policy really is, and what it means for counseling and litigation. This issue of *ANTI-TRUST* offers one article that broadly overviews Trump antitrust enforcement policies, along with five articles covering different aspects of antitrust enforcement and case law in the last few years, particularly with reference to the intersection of antitrust and intellectual property.

Overview of Antitrust Enforcement in the Trump Administration

Is there a philosophy that underlies and unifies antitrust enforcement in the Trump Administration? John Harkrider tries to answer this question. He surveys more than a dozen aspects of antitrust enforcement, ranging from merger enforcement to international cooperation. He rejects the hypothesis that antitrust enforcement under Trump will be substantially more lax or permissive than it has been under Democratic administrations. Indeed, he sees evidence that the Trump's administration will continue the vigorous enforcement of antitrust laws.

Harkrider does identify one notable difference between Obama and Trump antitrust enforcement. In the past, some administrations have been willing to accept remedies that regulate a party's conduct ("behavioral" remedies) instead of changing a party's structure (e.g., through an asset divestiture). Trump's Assistant Attorney General Makan Delrahim has made clear his view that antitrust enforcement should take a

less "regulatory" approach and instead be more "enforcement"-oriented (by seeking to change structures, and then letting the market function). In addition to a stated preference for structural remedies instead of behavioral remedies,² AAG Delrahim has also launched an initiative to review and potentially eliminate scores of consent judgments dating back as far as the 1920s.³

Specifically in the realm of antitrust and intellectual property, Harkrider describes one other area where Trump enforcement may differ not only from Obama enforcement but from competition law enforcement in other jurisdictions as well: standards development. Harkrider suggests that the Trump administration (or at least the Antitrust Division's portion of the administration) seems to be pulling back from policies of the Obama administration (and of agencies in other jurisdictions) toward standards development organizations, although he questions the practical significance of the Antitrust Division's shift, given recent Federal Circuit precedent on the limited ability of standards-essential patent holders to obtain injunctions.

Standards, Patents, and Antitrust

As consumers, we are all happy that our computers and smartphones can talk with each other and with all manner of websites. And we all have an interest in ensuring that our systems of incentives will encourage the development and commercialization of new technology that can be incorporated into interoperability standards without imposing avoidable costs that are then passed on to consumers.

But what role, exactly, should antitrust law play in regulating the conduct of the various players in standards development organizations (SDOs)? This question is not new, and over the last decade *ANTI-TRUST* has dedicated many pages to the debate. Developments in the last year (including the arrival of AAG Makan Delrahim), however, warrant another episode of this continuing debate. Three of the articles in this issue address topics in the standards area.

Standards-Essential Patents, Hold-Up, and Hold-Out. Creating a market for interoperable products requires standards for interoperability. This means that companies (often competitors) or individuals must come together and reach

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agreement on what technology to include in a standard. Sometimes the choice can be from among relatively fungible technologies, and the act of choosing one is more important than the one chosen. At other times one technology might offer a technically more elegant solution, but if that technology is covered by patents, then it may not be the most appropriate technology for the standard (because patents may add to the expected cost of adopting that technology). Then again, it may be exactly the right technology for the standard, because the expected royalty costs are outweighed by superior performance or by cost-savings in other inputs. If a standard incorporates patented technology, then it becomes impossible to implement the standard (or at least that portion of the standard) without infringing the patent. This has become known as a “Standard-Essential Patent” (SEP).

Over the last 70 years, SDOs have taken different views on whether a standard could include patented technology at all. For example, the original patent policy of the American National Standards Institute (now just called ANSI) in 1932 provided that “as a general proposition patented designs or methods should not be incorporated in standards,” but it recognized that “each case should be considered on its merits and if a patentee is willing to grant such rights as will avoid monopolistic tendencies, favorable consideration to the inclusion of such patented designs or methods in a standard might be given.”⁴

What is a “monopolistic tendency”? Including a patented technology in a standard creates the risk that the patent holder will refuse to license its SEP (and thus “monopolize” by being the sole implementer of the standard) or license it only on terms that unreasonably favor the patent holder (thus extracting “monopoly” rents from other firms). In the contemporary debate, this phenomenon has been referred to as the “hold-up” problem: the concern that a patent holder will extract royalties greater than what it could have obtained had its technology not been incorporated in the standard. More recently, the debate has expanded to include the concept of “hold-out”—the unwillingness of implementers to negotiate or accept licenses from the holders of ostensibly essential patents.

These two phenomena—claims of “hold-up” and “hold-out”—reflect the twin uncertainties that have plagued standards development. The first uncertainty (referenced in the Simmons-Celli-Hendricks-Nogues article in this issue) is the vagueness of a commitment to license an SEP or portfolio of SEPs at “reasonable” rates and on reasonable terms and conditions. In discussing the issue of patent hold-up this spring, then-FTC Commissioner Terrell McSweeney noted that in two recent cases “F/RAND royalty rates offered by SEP-holders were *orders of magnitude* higher than what a neutral arbitrator found to be fair and reasonable.”⁵ Even assuming that the patent holders in these two cases were acting in good faith, the fact that parties viewing the same evidence can have such disparate valuations confirms that a

commitment to license on “reasonable” rates is not a good or accurate predictor of future royalty costs.

The second uncertainty (also referenced in the Simmons, Hendricks, and Nogues article) is the problem of identifying true SEPs—that is, determining which patents or patent claims are in fact valid, infringed by, and essential to an implementation of the standard. It is rare that a standard will expressly state “practice the art claimed in Patent No. XYZ.” Rather, the standard specifies a technological path that may or may not be covered by a patent. The patent holder may well claim that the standard cannot be implemented without infringing the patent, but that claim does not always prove true.⁶

In a recent working paper, Professors Lemley and Simcoe reported what they considered a surprising result from their study of SEPs that go into infringement litigation. They had “expected that proving infringement of a SEP would be easy—they are, after all, supposed to be essential—but that the breadth of the patents might make them invalid.”⁷ In fact, however, they found exactly the opposite: “SEPs are more likely to be held valid than a matched set of litigated non-SEP patents, but they are significantly less likely to be infringed. Standard-essential patents, then, don’t seem to be all that essential, at least when they make it to court.”⁸ Faced with a claim for infringing an ostensibly essential patent, a standard’s implementer may well doubt that the claimed SEP is in fact infringed. Likewise, a patent holder acting in good faith could be mistaken in believing that its patent is essential and infringed.

Madison and Schumpeter. David Teece reviews and analyzes several speeches that AAG Delrahim has delivered over the last six months dealing with several antitrust issues, including the intersection of antitrust and standards. Delrahim himself describes his view as Madisonian (as opposed to Jeffersonian), and without denying that characterization, Teece argues that Delrahim’s approach is also “Schumpeterian” (after economist Joseph Schumpeter). Teece discusses the distinction between static (that is, short-run) and dynamic (longer-run) competition, along with the importance of fostering innovation in order to enable dynamic competition.

Teece (along with Delrahim) argues below that there is no hold-up problem and that, in any event, the hold-out problem is greater. Of course, one can hardly disagree with the general proposition that incentives matter (to innovators and everyone else) or that a society that under-incentivizes innovation (or anything else) is going to see less of it. But these general principles tell us nothing about whether our current patent system as it actually functions in the real world sets incentives at an appropriate level. Nor does it address the risk that over-rewarding holders of SEPs might reduce other firms’ incentives to innovate in non-essential product features.

A group of 77 antitrust scholars and former antitrust enforcers recently took issue with the views that AAG Delrahim has been expressing in his speeches on SEP issues—the same speeches that the Teece article discusses.⁹ These

scholars argue that the hold-up problem is real and has been recognized by both courts and SDOs—and by both Republican and Democratic administrations. They also reject Delrahim’s ranking of hold-out as the greater problem; they argue that hold-up is a greater problem because the risk is asymmetric—“implementers are vulnerable to paying supra-competitive royalties based on the entire value of the product, not on the value of the patented technology.”¹⁰ They also take issue with AAG Delrahim’s views on related issues, such as the sufficiency of contract remedies as the exclusive remedy for breaching a FRAND commitment and the availability of injunctions for infringing SEPs (where the views that AAG Delrahim seems to be expressing are, “for good reason, no longer the law”¹¹).

Reasonableness of Reasonable Rates. No one questions that the holder of a patent that is valid, infringed, and essential to an implementation of standard is entitled to receive a reasonable royalty (unless the holder has waived that right, of course, by committing to non-assertion or royalty-free licensing). Courts have critiqued SDOs for failing to explain what “reasonable” means in the context of an SEP,¹² and over the last five years, courts have tried to determine what “reasonable” means for specific SEPs.¹³

Patents are creatures of national law, as are the rights that the patents confer, and a royalty in one jurisdiction might not be reasonable in another. (Indeed, an Antitrust Division official recently reiterated that the Division “would have concerns . . . where a [non-US] court imposes a [worldwide] license . . . using theories that aren’t supportable under US law,” although she added that the circumstances in which this concern might arise are narrow.¹⁴) Courts in different jurisdictions might reach different results as to the appropriate royalty for a given SEP for any number of reasons, either procedural (such as differences in evidentiary rules) or substantive (different market value in different countries).

Deng, Leonard, and Lopez offer a careful review of how courts in different jurisdictions reached somewhat different results for one company’s SEP portfolio for LTE technology. Although the determination of royalty rates is not itself an antitrust issue, a patent system that predictably and efficiently determines such rates is less likely to create room for antitrust concerns about potential use of SEPs to extract supra-competitive royalties.

International Divergence or Convergence? Of course, substantive rules and nonmonetary remedies can vary across jurisdictional lines as well. Simmons, Celli, Hendricks, and Nogues consider one such area of potential divergence—the European Commission’s November 2017 communication on SEPs. In some areas, there is convergence without clarity. The EC Communication’s set of “signposts” for reasonableness in FRAND rates contains no surprises or substantial differences from U.S. law, but it also does not provide much additional clarity.

Other parts of the statement suggest both convergence and divergence. For example, the EC Communication agreed

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with AAG Delrahim’s emphasis on the importance of enforcement tools as a key aspect of intellectual property, but the Communication also recognizes that a FRAND commitment imposes limits on the SEP holder’s enforcement rights.

Finally, some parts of the EC Communication suggest—through silence—areas of potential divergence from U.S. policy (or at least from the direction in which AAG Delrahim seems to want to take it). For example, the EC Communication says nothing about relying on contract law (instead of competition law) to enforce FRAND commitments—which AAG Delrahim has said should be the primary or even exclusive tool for enforcing FRAND commitments.

Pharmaceutical Patents and Antitrust

If standards development involves the collision of two legal regimes (patent law and antitrust), then the pharmaceutical industry is more of a pile-up of three regimes: patent law, antitrust, and drug regulation. Years ago Congress tried to solve one set of problems through the Hatch-Waxman Act. But the law of unintended consequences has never been repealed, and two unintended consequences are “reverse settlements” and “product-hopping.”

Post-Actavis Decisions on Reverse-Payment Settlements. In its 2013 *Actavis* decision, the Supreme Court seemingly resolved a tension between patent law and antitrust. In a patent infringement suit, the prevailing patent holder can seek and sometime obtain an injunction excluding a rival from selling an infringing product. Since the law encourages settlements, it stands to reason that the parties could settle the litigation by compromise—the parties agree to an injunction, but with a shorter term than the maximum that the patent holder might have won. In the weird world of Hatch-Waxman, however, that also means that a second or third rival would be barred from entering the market, so the stipulated injunction creates or preserves a noncompetitive market. The patent holder and its rival have an incentive to preserve and divide the monopoly rents. *Actavis* found that patent settlement agreements could violate the antitrust laws under the rule of reason if there is a “large and unjustified payment” flowing from the patent holder to the infringer.

Fales, Feinstein, and Varshovi review the case law over the five years since *Actavis*, subdividing the *Actavis* phrase into its component part: what is a “payment,” when is a payment “large,” and when is it “unjustified”? As Fales, Feinstein, and

Varshovi explain, lower courts have split on whether these questions place an initial burden on the plaintiff or are instead part of the rule of reason itself. In other words, must a plaintiff first demonstrate a large and unjustified payment before a court will even consider the rule of reason, or is the “large and unjustified payment” simply incorporated into the rule of reason analysis. They also discuss the role that the doctrine of antitrust injury has played in the analysis—after all, if the patent holder would probably have won its case and secured its injunction, then how has the antitrust plaintiff been injured by something prohibited under the antitrust laws?

Product Hopping. The Hatch-Waxman Act permits a generic drug manufacturer to launch a generic version of an already-approved drug by demonstrating that its generic drug is “bioequivalent” to the approved (branded) drug. But what happens when the branded manufacturer withdraws its product from the market and replaces it with a somewhat different version (protected, perhaps, by a more recent patent on the “improvement”), referred to as “product hopping”? Just as reverse-payment settlements present a clash of values (a policy favoring settlement vs. a policy against market allocations), so too does product hopping: we want to encourage innovation (and the replacement of older products with new and improved versions), but what if that has the effect of excluding generic competition?

Pace and Adams discuss the two product-hopping cases that have reached the appellate courts. In one case the Second Circuit affirmed issuance of a preliminary injunction preventing product discontinuation, and in the other case the Third Circuit affirmed summary judgment for a product-discontinuing defendant. Pace and Adams try to reconcile the law underpinning the outcomes in these two cases. They also explore courts’ use of the “coercion” concept derived from tying-arrangement cases, and they argue that a better test would be a requirement that a plaintiff show that a claimed improvement was a mere sham.

Conclusion

Is “populist” really the correct label for the current era, and if so, how do we reconcile that label with a “Madisonian” approach to intellectual property rights, and what role should antitrust play? Whatever political label one chooses for it, our era is still generating debate over antitrust treatment of intellectual property and forcing us to reflect deeply on the values underlying the antitrust and intellectual property regimes. ■

www.justice.gov/opa/speech/file/1012086/download) (“Antitrust is law enforcement, it’s not regulation. At its best, it supports reducing regulation, by encouraging competitive markets that, as a result, require less government intervention.”).

- ³ Press Release, U.S. Dep’t of Justice, Department of Justice Announces Initiative to Terminate “Legacy” Antitrust Judgments (Apr. 25, 2018), <https://www.justice.gov/opa/pr/department-justice-announces-initiative-terminate-legacy-antitrust-judgments>. One consent judgment proposed for termination dates back to 1913. See Judgements Proposed for Termination in Utah, District of, <https://www.justice.gov/atr/JudgmentTermination>.
- ⁴ The 1932 ANSI patent policy is quoted in relevant part in ANSI Executive Standards Counsel Summary Decision at p. 4 (Feb. 5, 2018), [https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ANSI%20Executive%20Standards%20Council%20\(ExSC\)%20Interpretations/ExSC_087_2017_091417_patent%20policy_022318%20amended.pdf](https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/ANSI%20Executive%20Standards%20Council%20(ExSC)%20Interpretations/ExSC_087_2017_091417_patent%20policy_022318%20amended.pdf).
- ⁵ Terrell McSweeney, Comm’r, Fed. Trade Comm’n, Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters, (Mar. 21, 2018) (transcript available at https://www.ftc.gov/system/files/documents/public_state_menets/1350033/mcsweeney_-_the_reality_of_patent_hold-up_3-21-18.pdf).
- ⁶ Professor Teece acknowledges this when he refers to patent holders having to resort to “risky patent litigation” to enforce their rights. See David J. Teece, *Pivoting Toward Schumpeter: Makan Delrahim and the Recasting of U.S. Antitrust Towards Innovation, Competitiveness, and Growth*, *infra* this issue, ANTITRUST, Summer 2018, at 32. That litigation is risky (from the patent holder’s perspective) precisely because the claim of a valid and infringed SEP may be wrong, and the patent holder’s claimed royalty may be excessive.
- ⁷ Mark A. Lemley & Timothy Simcoe, How Essential Are Standard-Essential Patents? 2 (Mar. 22, 2018) (unpublished working paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3128420&download=yes.
- ⁸ *Id.*
- ⁹ The Letter was reported in 77 *Bipartisan Former Antitrust Enforcers, Academics Critique Delrahim on Patent Holdup*, COMPETITION POL’Y INT’L (May 17, 2018), <https://www.competitionpolicyinternational.com/77-bipartisan-former-antitrust-enforcers-academics-critique-delrahim-on-patent-holdup/>; see also Letter from Professor Michael A. Carrier & Professor Timothy J. Muris, Former Chairman, Fed. Trade Comm’n to Makan Delrahim, Assistant Att’y Gen. for Antitrust (May 17, 2018), <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/DOJ-patent-holdup-letter.pdf> [hereinafter 77 Enforcers-Scholars]. AAG Delrahim’s response is reported at AAG *Makan Delrahim Responds to Critique on Patent Holdup*, COMPETITION POL’Y INT’L (May 22, 2018), <https://www.competitionpolicyinternational.com/us-delrahim-responds-to-critique-of-his-patent-holdup/>; see also Letter from Makan Delrahim, Assistant Attorney General for Antitrust, to Professor Michael A. Carrier & Professor Timothy J. Muris, Former Chairman, Fed. Trade Comm’n (May 18, 2018), <https://www.competitionpolicyinternational.com/wp-content/uploads/2018/05/2018-05-18-Delrahim-Letter-to-Carrier-and-Muris1.pdf>.
- ¹⁰ 77 Enforcers-Scholars, *supra* note 9, at 2.
- ¹¹ *Id.* at 3.
- ¹² *Ericsson Inc. v. D-Link Sys., Inc.*, No. 6:10-CV-473, 2013 WL 4046225, at *25 (E.D. Tex. Aug. 6, 2013) (“The paradox of RAND licensing is that it requires a patent holder to offer licenses on reasonable terms, but it offers no guidance over what is reasonable.”), *aff’d in part and rev’d in part*, 773 F.3d 1201 (Fed. Cir. 2014); *Microsoft Corp. v. Motorola, Inc.*, No. C10-1823JLR, 2013 WL 2111217, at *10, *99 (W.D. Wash. Apr. 25, 2013) (noting that IEEE’s 2007 patent policy does not clarify “what constitutes a reasonable royalty rate or what other terms and conditions are reasonable or nondiscriminatory for any license between interested parties”).
- ¹³ Deng, Leonard, and Lopez cite cases in their article *infra* this issue. See Fei Deng, Gregory K. Leonard & Mario A. Lopez, *Comparative Analysis of Court-Determined FRAND Royalty Rates*, ANTITRUST, Summer 2018, at 47.
- ¹⁴ Leah Nysten, *Court-Ordered Global Frand Rates May Raise US Concerns*, DOJ Official Says, MLEX (May 7, 2018).

¹ David Balto & Matthew Lane, “Hipster Antitrust” Movement Is All Action, No Plan, THE HILL (Mar. 16, 2018, 12:30 PM EDT), <http://thehill.com/opinion/judiciary/378788-hipster-antitrust-movement-is-all-action-no-plan> (“Antitrust is cool again”); Carl Shapiro, *Antitrust in a Time of Populism* (Oct. 24, 2017), <https://faculty.haas.berkeley.edu/shapiro/antitrustpopulism.pdf>, BERKELEY (“Antitrust is sexy again. Where does this take us?”).

² Makan Delrahim, Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Antitrust and Deregulation (Nov. 16, 2017) (transcript available at <https://>