May 17, 2018

BY OVERNIGHT MAIL AND E-MAIL
Assistant Attorney General Makan Delrahim
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
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Re: *Speeches on Patents and Holdup*

Dear Assistant Attorney General Delrahim:

We, 77 former government enforcement officials and professors of law, economics, and business, write to express concern with recent speeches[1] you have made that we do not believe are consistent with the broad bipartisan legal and economic consensus that has existed for over a decade regarding standard setting. We would like to raise eight issues in particular.

First, the anticompetitive harms from patent holdup have been consistently acknowledged by officials in Republican and Democratic administrations. The unanimously adopted 2007 joint agency Report, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition*, explained the difference between a patentee's power *ex ante* (when "multiple technologies may compete to be incorporated into the standard") and *ex post* (when "the chosen technology may lack effective substitutes precisely because the SSO chose it as the standard"). This disparity can allow the patentee to "extract higher royalties or other licensing terms that reflect the absence of competitive alternatives." *Id.* at 35-36. The FTC also unanimously endorsed the 2011 Report, *The Evolving IP Marketplace*, which highlighted how "an entire industry" could be "susceptible" to the "particularly acute" concern of holdup, which can result in "higher prices" and "discourage standard setting activities and collaboration, which can delay innovation." *Id.* at 234.[2] And the National Research Council of the National Academies concluded in its Report on *Patent Challenges for Standard-Setting in the Global Economy* that "a FRAND commitment limits a licensor's ability to seek injunctive relief." *Id.* at 9.

Second, the holdup problem has been recognized by courts and standard setting organizations themselves.[3] As one court stated, patent holdup is not a theoretical concern,

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[1] *The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement*, Apr. 10, 2018; *The "New Madison" Approach to Antitrust and Intellectual Property Law*, Mar. 16, 2018; *Good Times, Bad Times, Trust Will Take Us Far: Competition Enforcement and the Relationship Between Washington and Brussels*, Feb. 21, 2018; *Assistant Attorney General Makan Delrahim Delivers Remarks at the USC Gould School of Law's Center for Transnational Law and Business Conference*, Nov. 10, 2017.

[2] As you recognized in your March 16, 2018 speech, the decision to include a patent in a standard "gives the patent holder some bargaining power" and "would require the patent holder to live up to commitments as they would have bargained for it."

[3] The studies cited to show the absence of holdup do not consider the counterfactual scenario: that prices could have fallen faster and output/diversity risen faster absent holdup. After all, few would argue that the Sherman Act was not necessary because, during the decade prior to enactment, "U.S.

but instead "is a substantial problem that [F]RAND [fair, reasonable, and nondiscriminatory licensing] is designed to prevent." *In re Innovatio IP Ventures*, 2013 WL 5593609, at *9 (N.D. Ill. Oct. 3, 2013).[4] As former FTC Commissioner Terrell McSweeney recently pointed out, courts in two cases awarded patentees only 1/150 and 1/500 of the royalties the patentholder sought. Commissioner Terrell McSweeny, *Holding the Line on Patent Holdup: Why Antitrust Enforcement Matters*, Mar. 21, 2018. The fact that SSOs—those with the most knowledge of the issues—adopt FRAND policies is itself telling proof that holdup is a problem; otherwise, why would they adopt contractual practices to prevent holdup?[5] In addition to higher royalties, expenditures can escalate as holdup increases the costs to SSOs and to those who oppose FRAND clarification. Timothy J. Muris, *Bipartisan Patent Reform and Competition Policy, American Enterprise Institute Report* 9 (2017).[6]

Third, we agree that "the hold-up and hold-out problems are not symmetric." *Nov. 10, 2017 speech*. But we believe that it is *holdup* that presents the more serious antitrust concern. As an initial matter, the risks faced by innovators are consistent with the "speculative investments" always made by technology and product developers; in contrast, implementers are vulnerable to paying supra-competitive royalties based on the entire value of the product, not on the value of the patented technology. A. Douglas Melamed & Carl Shapiro, *How Antitrust Law Can Make FRAND Commitments More Effective*, at 7-8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075970, 127 YALE L.J. __ (forthcoming 2018). While we agree that coordinated action can implicate antitrust, these concerns are not presented in licensing disputes at the core of holdout. The potential for holdout exists on both sides of contracts, occurring "when one side refuses to perform in good faith or negotiate reasonably." Muris, at 9. In contrast, the holdup problem and accompanying lock-in value exist only on one side of the exchange.

Fourth, patentees that obtain or maintain monopoly power *as a result of* breaching a FRAND commitment present a standard monopolization case. *E.g.*, *Broadcom v. Qualcomm*, 501 F.3d 297, 314 (3d Cir. 2007); *Microsoft Mobile v. Interdigital*, 2016 WL

output of salt, petroleum, steel, and coal all increased significantly, and prices of steel, sugar, and lead all dropped significantly." Jorge L. Contreras, *Much Ado About Hold-Up*, at 22, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123245.

[4] *See also Microsoft v. Motorola*, 2013 WL 5373179, at *7 (W.D. Wash. Sept. 24, 2013) (rejecting argument that "hold up does not exist in the real world" and finding that such an argument "does not trump the evidence presented by Microsoft that hold up took place in this case").

[5] As Richard Epstein has recognized, "[t]he intellectual history of rate regulation beg[an] with the writings of Sir Matthew Hale in the late seventeenth century," and the "[F]RAND formula" is "the best, indeed the only, approach" for "mimic[king] the performance of competitive markets" while not "undercutting their operation," which is needed since a "monopolist knows that he can extract at least some concessions from higher demanders precisely because they have nowhere else to go." Richard A. Epstein, *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J. SUP. CT. HIST. 345, 346, 348, 366 (2013).

[6] It also bears mention that one cannot conclude that the "winning technology" is inherently "better than its rivals" without considering the FRAND commitment that can be critical to the standard-selection decision and can avoid an industry being locked into a non-FRAND-restricted technology. MICHAEL A. CARRIER, INNOVATION FOR THE 21ST CENTURY: HARNESSING THE POWER OF INTELLECTUAL PROPERTY AND ANTITRUST LAW 328-29 (2009); Byeongwoo Kang & Rudi Bekkers, *Just-in-Time Inventions and the Development of Standards: How Firms Use Opportunistic Strategies to Obtain Standard-Essential Patents (SEPs)*, Aug. 28, 2013, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2284024.

1464545, at *2 (D. Del. Apr. 13, 2016).[7] FRAND breaches could satisfy the section 2 elements of exclusionary conduct by demonstrating an exclusion of competitors (the exclusion of rival competitive technologies not chosen by the SSO) that results in competitive injury (price increases and innovation harms from the breach) and acquisition or maintenance of monopoly power (obtained through the breach). Moreover, the conduct here is not protected under the "absolutist position" that *Noerr-Pennington* "immunizes every concerted effort that is genuinely intended to influence governmental action," as this would allow parties to violate the antitrust laws, for example by being "free to enter into horizontal price agreements." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 503 (1988). Instead, a breach of a FRAND promise is "distinguish[able] from *Noerr* and its progeny" because it is "the type of commercial activity that has traditionally had its validity determined by the antitrust laws themselves." *Id.* at 505; *see also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990).

Fifth, while we agree that patents are important for innovation and that injunctive relief often is appropriate, we do not agree that patents provide an unqualified "property right to exclude" that is accompanied by an injunction and a conclusion that "unilateral patent hold-up" is "per se legal." *Mar. 16 speech*. Hornbook law does not give property owners absolute rights to exclude. There are at least 50 doctrines (such as adverse possession, easements, eminent domain, nuisance, and zoning) that limit property owners' rights. Michael A. Carrier, *Cabining Intellectual Property Through a Property Paradigm*, 54 DUKE L.J. 1 (2004). Landowners, for example, cannot exclude others from entering their land to save lives or property or to avoid some other serious harm.[8] Relatedly, in upholding the inter partes review process for administratively reconsidering patents, the Supreme Court recently held that "[p]atents convey only a specific form of property right—a public franchise." *Oil States Energy Servs. v. Greene's Energy Group*, 2018 WL 1914662, at *8 (U.S. Apr. 24, 2018).

Sixth, the position that patent infringement necessarily results in an injunction is, for good reason, no longer the law. More than a decade ago, the Supreme Court ruled unequivocally that courts must decide whether to grant injunctions "consistent with traditional principles of equity, in patent disputes no less than in other cases." *eBay v. MercExchange*, 547 U.S. 388, 394 (2006); *see also* 35 U.S.C. § 283 (patent statute provides that courts "may grant injunctions in accordance with the principles of equity to prevent the violation of any right secured by patent, on such terms as the court deems reasonable"). In fact, the Federal Circuit, not historically associated with insufficient protection of patent rights, has made clear that the *eBay* framework "provides ample strength and flexibility for addressing the unique aspect of FRAND committed patents and industry standards in general." *Apple v. Motorola*, 757 F.3d 1286, 1332 (Fed. Cir. 2015). Because there could be thousands of patents in a product today, it is not appropriate uniformly to apply standards from the 18th century.

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[7] Relatedly, seeking an injunction against a licensee willing to pay a FRAND rate—such as where LSI sought an exclusion order in the U.S. International Trade Commission before proposing a FRAND license to Realtek, *Realtek Semiconductor v. LSI*, 946 F. Supp. 2d 998, 1007-08 (N.D. Cal. 2013)—can constitute monopolization. Challenging behavior like this is not "hubris" (*Mar. 16 speech*); it is an appropriate application of antitrust.

[8] Analogously, specific performance, which has the same effect in contract law as injunctions do in patent law, is only available in limited, extraordinary, circumstances. *See* 12 *Corbin on Contracts* §§ 63.1, 63.20 (rev. ed. 2012).

Seventh, pointing to exclusive rights granted to patentees as a type of natural property right ignores the uncontroversial utilitarian framework for the patent grant. The Supreme Court has long made clear the primacy of the utilitarian justification. *E.g.*, *Graham v. John Deere*, 383 U.S. 1, 9 (1966). Exclusive rights exist not to bestow upon patentees a moral right to a reward but to promote the best interests of society. That is why patents, like other forms of intellectual property, are subject to doctrines (like novelty, nonobviousness, the written-description and enablement disclosure requirements, and a limited 20-year term) that ensure that protections for market competition balance patents' incentive effects. Relatedly, it tells only half the story to focus on the incentives relevant to the initial invention while ignoring follow-on innovation, which is just as important and may be undermined significantly when patent owners abuse their FRAND obligations.[9] Suggesting (without offering evidence) that any diminished return to patent holders reduces innovation and welfare "is inconsistent with both sound economic analysis and patent law," as "FRAND commitments that reduce excessive royalties further the policies of both the antitrust laws and the patent laws." Melamed & Shapiro, at 9. And it is also inconsistent with the Supreme Court's recent clear reminder (in a 7-2 ruling written by Justice Thomas) that patents "involv[e] public rights." *Oil States*, 2018 WL 1914662, at *6.

Eighth, we do not believe that holding patentees to their promise to license on FRAND terms "amount[s] to a troubling de facto compulsory licensing scheme." *Mar. 16 speech*. Compulsory licensing occurs when the government forces a patentee to license against its wishes. In contrast, here the holder of a standard essential patent voluntarily chooses to license on a FRAND basis, receiving in exchange the SSO's "seal of approval" and the potential for significantly increased volume that comes with that seal, which is well worth the FRAND promise. Unlike other patents, holders of standard essential patents are protected from competition and guaranteed to collect royalties.

We applaud the energy of your leadership of the Division and support the regular reexamination of key antitrust issues. But we do not believe that the case has been made for departing from the bipartisan consensus set out in this letter. Thank you for your consideration of these views.

Sincerely,

Professor Michael A. Carrier[*]
Rutgers Law School

Professor Timothy J. Muris
Antonin Scalia Law School
Former Chairman, Federal Trade Commission

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[9] A standards organization's rule restricting the owner of a standard essential patent that makes a FRAND commitment from seeking injunctions against willing licensees is an appropriate attempt to enforce the FRAND commitment, not a return to the "DOJ's enforcement policies in the 1970s" (*Mar. 16 speech*) that have rightly been criticized for punishing numerous forms of procompetitive or competitively neutral licensing conduct.

[*] The letter presents the views of the individual signers. Institutions are listed for identification purposes only.

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