



DEPARTMENT OF JUSTICE

The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement

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Introduction

Good afternoon. It is great to be here at the Leadership IP conference. This conference for many years now has brought together a broad network of experts and policymakers with diverse viewpoints to discuss what I view as some of the most important issues of our day. Thanks to the organizers, and especially to my friend, the Honorable Jim Rill, for inviting me to speak.

As I look out from this lectern, I am humbled to be in the company of the most sophisticated and knowledgeable people in the world in the areas of antitrust and intellectual property. I know that all of you follow developments in this area closely, and that you are likely already aware of the views I have shared in my recent speeches on antitrust and IP, first at the University of Southern California last November¹, and more recently, at the University of Pennsylvania in March.² Having provided much detail on my policy views already, today I thought it would be most useful to expand on the Division's role—or roles—when it comes to issues at the intersection of antitrust and IP.

As I see it, the Division wears two hats in this space. One is the hat of the competition advocate; the other is the hat of the competition enforcer. Both important, but distinct, roles.

As an agency with more than 125 years of experience observing and analyzing markets in this country, more than 300 lawyers who spend countless hours poring over business documents

¹ Makan Delrahim, Assistant Attorney General – Antitrust Division, “Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law” (November 10, 2017), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center>.

² Makan Delrahim, Assistant Attorney General – Antitrust Division, “The ‘New Madison’ Approach to Antitrust and Intellectual Property Law” (March 16, 2018), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university>.

and interviewing executives in various industries, and another 50 PhD economists who are thought leaders in the field of competition, we are well-positioned to consider what effect a given policy is likely to have on the U.S. market. Naturally, given our mission of protecting and promoting competition, we aim to bring our resources and experience to bear in encouraging, or advocating for, policies that will incentivize innovation for the benefit of American consumers.

In our role as competition enforcer, we take action when we have sufficient evidence to suspect the existence of an anticompetitive restraint of trade that undermines our free market, or when we determine that a proposed merger may substantially lessen competition in violation of the Clayton Act. In our enforcement role, we bring cases against conduct that has been outlawed by Congress, and we prove those cases in U.S. courts.

Both of these roles are important to the Division's core mission of protecting and promoting competition, but they are distinct, to be sure. So in the interest of transparency, let me elaborate on how we carry out our dual roles in the area of antitrust and IP; and then I will highlight a few risks associated with conflating the Division's advocacy and enforcement work in this area, with the goal of avoiding such risks.

Competition Advocacy

There is a great deal of work that we do in our role as an advocate for competition. A primary method of advocacy is giving speeches. Conferences like today's allow us to share with the public—in person and on our website, where many of the Division leadership's speeches are published—the Division's views about what conditions will make the market most dynamic, innovative and competitive. Although we speak often about the application of the antitrust laws, our advocacy extends more broadly. For example, when I spoke at USC, I addressed remedies in patent infringement litigation, and described my concern that by denying injunctive relief to

standard essential patent holders except in the rarest circumstances, courts in the U.S. run the risk of turning a FRAND commitment into a compulsory license. As a defender of competitive markets, I am concerned that these patent law developments could have an unintended and harmful effect on dynamic competition by undermining important incentives to innovate, and ultimately, have a detrimental effect on U.S. consumers.

Another advocacy position we have taken relates to how patent holders are held to their commitments to license on FRAND terms. At Penn last month, I noted that so-called unilateral patent hold-up is not an antitrust problem. Where a patent holder has made commitments to license on particular terms, a contract theory is adequate and more appropriate to address disputes that may arise regarding whether the patent holder has honored those commitments. The Division will not hesitate to bring a sound antitrust case, but as competition advocates, we must strive to ensure that we use the antitrust laws for their intended purpose, which is to address practices that harm competition. Using the antitrust laws to impugn a patent holder's efforts to enforce valid IP rights risks undermining the dynamic competition we are charged with fostering. So when it comes to disputes that arise between intellectual property holders and implementers regarding the scope of FRAND commitments, we advocate for the application of more appropriate theories, other than the blunt instrument of antitrust.

A third topic I have addressed recently is the need for balanced patent policies in standard setting organizations. As I and others at the Division have said on many occasions, by allowing products designed and manufactured by many different firms to function together, interoperability standards create enormous value for consumers.³ But standard setting only

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In the three speeches, contract and other laws were "perfectly adequate," then the condition was "where contract or common law remedies would be adequate," and now contract law alone is adequate.

³ Makan Delrahim, "Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law" at 2; Submission of the United States to Working Party No. 3 on Competition DAF/COMP/WD (2014) at 5, available at [http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD\(2014\)116&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WD(2014)116&doclanguage=en);

works—and consumers only reap the benefits of innovative and interoperable products—when both patent holders and patent implementers have the incentives to participate in the process. To that end, I have encouraged standard setting organizations to think carefully about the patent policies they adopt, so that incentives are not skewed towards one group or the other.⁴

While I have focused so far today on speech-related advocacy work, the Division has many other mechanisms for promoting the discussion of pro-competitive policies.

Our business review letter process might, in one sense, be viewed as a mechanism to share our policies on competition. While a business review letter is, of course, a statement of our enforcement intentions with respect to the particular arrangement described in the request, others in the antitrust community look to these letters for insight about our prospective enforcement views. It is in that context that I include our business review letters as a facet of our advocacy function. And as many of you know, the Antitrust Division has had a number of occasions to opine on issues of antitrust and IP through the business review process over the years.⁵

The Division also represents the Department of Justice on the administration's trade policy staff committee. And, in that context, we engage with other executive branch agencies to discuss issues at the intersection of antitrust and IP in an effort to ensure that the promotion of

U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) (hereinafter 2007 IP Report), *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

⁴ Makan Delrahim, "The 'New Madison' Approach to Antitrust and Intellectual Property Law" at 10-12; U.S. Department of Justice Letter to American National Standards Institute (March 7, 2018), *available at* <https://www.justice.gov/atr/page/file/1043456/download>.

⁵ *See, e.g.*, Letter from Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Garrard R. Beene, Esq. (Dec. 16, 1998), *available at* <https://www.justice.gov/atr/public/busreview/2121.htm>; Letter from Thomas O. Barnett, Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, to Michael A. Lindsey, Esq., Dorsey & Whitney, LLP (April 30, 2007), *available at* <https://www.justice.gov/sites/default/files/atr/legacy/2007/04/30/222978.pdf>.

competition and innovation are key considerations in trade-related actions taken by the U.S. government.

A fourth facet of our competition advocacy, which I am excited to mention, is our recent effort to expand our amicus program to increase our participation in private litigation not only in the Supreme Court, but at the district and appellate courts as well. While this effort is certainly not limited to issues involving the interface between antitrust and IP, I can envision these issues attracting our interest as an amicus, given their relevance to our mission of promoting competition.

Competition Enforcement

Having described in more detail our competition advocacy role, let me turn to the Division's role as an enforcer. As I have said previously, in the context of antitrust and IP, we will be inclined to investigate and enforce when we see evidence of collusive conduct undertaken for the purpose of fixing prices, or excluding particular competitors or products. So what type of conduct in particular might attract enforcement scrutiny?

In the context of standard setting, cases like *Radiant Burners*⁶, *Hydrolevel*⁷, and *Allied Tube*⁸ provide helpful guidance regarding the kinds of collusive conduct that, naturally, would garner our attention. They are particularly helpful in illuminating our concern about situations in which competitors either corrupt the standard setting process so that decisions are not made by a balanced group of IP holders and implementers, or where competitors reach anticompetitive

⁶ *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

⁷ *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982)

⁸ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

agreements outside of the scope of a legitimate standard setting exercise, with a detrimental effect on competition.

Let me describe two related situations that would raise concerns in the context of voluntary consensus standards development. First, if a group of patent implementers were to engage in concerted efforts to exclude a patent holder from meaningful participation in standard setting unless the patent holder agreed to offer particular licensing terms dictated by the group of implementers, those facts would raise red flags. Similarly, if patent holders A, B and C were to agree to exclude from consideration for inclusion substitute technology owned by their competitor patent holder D—for the purpose of harming patent holder D, rather than as a result of good-faith efforts to incorporate the most effective technology—that would also raise concerns.

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Surely everyone would agree with this, but the key question is whether they really were "efforts to exclude" or if they were efforts to improve the workings of the markets.

While I believe in a very restrained approach to antitrust enforcement when it comes to the legitimate exploitation of valid IP rights, the Division will not hesitate to enforce against anticompetitive collusive conduct, particularly in an area as high-stakes for the American consumer as this one.

The Difference Between Advocacy and Enforcement

Over the years, the Division has made efforts to ensure that the advocacy positions we take are not misconstrued by the public. For example, when the Division issued the 2007 IP Report⁹, we, and the Federal Trade Commission, included in the chapter on patent pools—arrangements through which multiple patent owners collaborate to offer a single license to a package of their patents—a description of certain safeguards that patent pool participants had put

⁹ 2007 IP Report, available at <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

into place in various arrangements submitted to the Division for business review to ensure that efficiency would be enhanced, and that potential competitive harm would be mitigated.¹⁰ We were careful to note, however, that although the safeguards we described were a basis upon which we articulated our intention not to bring enforcement actions, “in an enforcement investigation examining a patent pool . . . failure to incorporate all the safeguards set forth in the pooling business review letters [would] not automatically lead to the conclusion that a pool is anticompetitive.” We stated that we would instead “evaluate the particular facts and circumstances to determine whether the actual conduct has an anticompetitive effect.”¹¹

I point out the distinction between advocacy and enforcement, and the Division’s efforts to highlight it, because I believe there are some risks associated with conflating the two. First, can be the case that advocacy positions lead to unsupportable or even detrimental legal theories when taken out of context. As I explained at Penn, as a result of past speeches and position statements about hold-up that may have been intended to be limited to the context of competitive advocacy, I worry that putative licensees have been emboldened to stretch antitrust theories beyond their rightful application, and that courts have indulged these theories at the risk of undermining patent holders’ incentives to participate in standard setting at all.¹²

Another risk of conflating advocacy positions with enforcement intentions is that industry leadership in standard setting could be stifled or undermined if business leaders are concerned that each decision they make will be called into question by antitrust enforcers in the context of an investigation. That is why our statements regarding antitrust and IP aim to clarify what

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Very true.

¹⁰ Id. at 72-73.

¹¹ Id.

¹² Makan Delrahim, “The ‘New Madison’ Approach to Antitrust and Intellectual Property Law” at 9.

conditions are ideal, and at the opposite end of the spectrum, what conduct might attract enforcement scrutiny. As a prior Division official said,

“The great strength of the competitive marketplace is its ability to experiment, recover from false starts, and seek an efficient equilibrium through an organic development process. We should not expect to be able to predict where the best ideas will come from, but with all respect to my colleagues in the enforcement community, I doubt they will be developed entirely from the top down by antitrust enforcers in the U.S. or elsewhere.”¹³

While the Division will not hesitate to advocate for the conditions that are most likely to attract robust participation in standard setting, we want standard setting bodies to be industry-led, and we encourage them to experiment, to compete with one another, and to be creative. This is a point we have supported making to foreign governments in the trade context—something I will be talking more about in the coming months.

With respect to the difference between advocacy and enforcement, a final point I want to make is how important it is that foreign enforcers are aware of our two distinct roles. Recently, I have noticed that some of the Division’s work, including business review letters, has been cited to support foreign enforcement actions that we would not bring under U.S. antitrust law. For example, while the Division decided that it would not challenge as unlawful the IEEE’s patent policy update in 2015¹⁴—including the portion of the policy that limits the availability of

¹³ Gerald F. Masoudi, Deputy Assistant Attorney General – Antitrust Division, “Efficiency in Analysis of Antitrust, Standard Setting and Intellectual Property” (January 18, 2007), *available at* <https://www.justice.gov/atr/speech/efficiency-analysis-antitrust-standard-setting-and-intellectual-property>.

¹⁴ Letter from Renata B. Hesse, Acting Assistant Attorney General, Antitrust Division, U.S. Dep’t of Justice, to Michael A. Lindsey, Esq., Dorsey & Whitney, LLP (February 2, 2015), *available at* <https://www.justice.gov/atr/public/busereview/311470.pdf>.

injunctions to holders of FRAND-encumbered patents—for the reasons I have just explained, this letter should never be cited for the proposition that what IEEE did is required, or that a patent holder who seeks an injunction is somehow in violation of the antitrust laws.

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Fair enough.

An Additional Word on International Enforcement

On the topic of international enforcement in the antitrust and IP context, let me make a few additional points. As I highlighted when I spoke at Penn, as enforcers, we have an obligation to ensure that antitrust policy remains sound, so that consumers enjoy the benefits of dynamic competition, and also so that we do not export unsound theories of antitrust liability abroad, where dubious enforcement actions would have harmful effects here in the U.S.

In pursuit of that ideal, we strive to be disciplined in our own analysis and enforcement procedures, not only because it is the right thing to do, but also because we want to lead the way as enforcers around the world grapple with the issues presented by today’s high-tech markets. For example, when we look at IP-related conduct, we do not simply assume that a patent confers market power.¹⁵ Even where market power may exist, we focus our analysis on the actual competitive effects of the conduct at issue. This was not always our approach. In the 1970s, U.S. antitrust law took a skeptical view of patent licensing, out of concern that the exclusive rights of a patent might be leveraged into monopolies over unpatented products, causing harm to consumers. As former Assistant Attorney General Rick Rule has written, “Fear that the patentee would exercise market power and harm consumers of the product overwhelmed recognition of the benefits that dynamism spurred by patents could create for all consumers.”¹⁶ Over time, we

¹⁵ U.S. DEP’T OF JUSTICE & FEDERAL TRADE COMM’N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY (2017) at 2, available at <https://www.justice.gov/atr/IPguidelines/download>. <https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/222655.pdf>.

¹⁶ Charles F. Rule, “Patent-Antitrust Policy: Looking Back and Ahead.” 59 ANTITRUST L.J. 729, 730 (1991).

came to understand the importance of dynamic competition, and that is a principle we want to share with our foreign enforcer colleagues.

We also strive to impose remedies that are carefully tailored to the harm we identify, whether in the context of a conduct or a merger investigation. Requiring remedies that go beyond that scope—particularly when those remedies relate to the exploitation of IP rights—risks unnecessarily undermining innovation incentives. With respect to remedies, we also give careful consideration to territorial scope, and we urge our enforcer colleagues to do the same. As Deputy AAG Roger Alford explained earlier this year in Korea, “In a world of concurrent authority, it behooves us to recognize that conduct we condemn abroad may affect international commerce and impact the power of other nations to grant rights to their subjects and regulate conduct within the scope of their authority.”¹⁷

Finally, we adhere to sound and transparent enforcement procedures, because doing so is a fundamental part of operating according to the rule of law, and also because providing parties with opportunities to test our evidence and to push back on our legal theories helps us refine our thinking. This ultimately allows us to reach the right substantive conclusions. As we engage with our foreign counterparts on this topic, we are considering some innovations of our own regarding how we and other jurisdictions might increase our mutual commitments to these principles.

¹⁷ Roger Alford, Deputy Assistant Attorney General – Antitrust Division, “Antitrust Enforcement in an Interconnected World,” (January 29, 2018), *available at* <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-roger-p-alford-delivers-remarks-american-chamber>.

Conclusion

Ultimately, it is the people in this room—who work for some of the most innovative companies in our country and the world—who will enable the next great technological leap. My responsibility is first, to ensure we don't implement policies that unduly limit your incentives; and second, to leverage actively all of the tools at the Division's disposal to ensure that you are motivated and able to thrive in a market-based system. As part of that responsibility, I want to ensure that our policies and enforcement intentions are clear and well-understood, so that you can proceed with the business of developing the next generation of technology for the benefit of all of us. I also want to ensure that our enforcement intentions are clear to our enforcer colleagues outside the U.S., given the interconnectedness of the world when it comes to high technology.

Thank you very much for inviting me to speak today.