CPI's IP Column Presents:

DOJ Reaffirms Borders on Antitrust-IP Intersection

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CPI COMPETITION POLICY INTERNATIONAL

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The Antitrust Division has taken definitive steps in the past several years to delineate the relationship between the antitrust laws and intellectual property rights. The most recent of these steps was to supplement the Business Review Letter ("BRL") the Division originally issued to the Institute of Electrical and Electronics Engineers ("IEEE") in 2015. This clarification harmonized the IEEE BRL with the principles set forth by the Division in the Avanci BRL, issued just a few weeks earlier. Both statements underscored the principle that a field of use license feature limiting the licensing of standard essential patents ("SEPs") to the end-use level of the supply chain does not itself violate the antitrust laws. These are just two pronouncements, among other equally important DOJ actions that we review below, that reveal a consistent effort to advance the law on the antitrust-IP debate that has permeated technology industries over the past decade. Consistency has been a hallmark of these efforts, in each case, balancing the need to prevent potential harms from the collective action of competitors with the need to allow innovators to enforce their right to exclude others and capture a fair return for their invention. And, as we review, these positions largely have been endorsed by courts in recent decisions. The sum total of this effort is a balancing of competition interests with a focus on the net effect on consumer welfare.

Allegations regarding IP Holders' Obligation to License to All Levels of the Supply Chain

Recent years have seen litigated disputes asserting an antitrust duty to deal on patent holders that have made commitments to standards development organizations to license SEPs on fair, reasonable, and non-discriminatory ("FRAND" or "F/RAND") terms. Although no such duty historically existed under antitrust law[1] and the procompetitive benefits of field-of-use clauses have been acknowledged by U.S. antitrust agencies for decades,[2] plaintiffs recently have argued that FRAND commitments to certain standards development organizations ("SDOs") create an antitrust duty to license SEPs at the component level, as opposed to the longtime industry practice of licensing exclusively at the OEM level.[3] Current Division leadership actively has voiced concern that such an application of antitrust law will harm the balance between inventors and implementors, to the detriment of innovation. The Division has enunciated that a "patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or refusing to license."[4] This concept is central to Assistant Attorney General Delrahim's "New Madison" approach to antitrust and intellectual property, which maintains that "standard setting organizations and courts should have a very high burden before they adopt rules that . . . amount to a de facto compulsory licensing scheme."[5]

The Division reaffirmed its position that a FRAND commitment does not create an antitrust duty to license SEPs at the component level in *FTC v. Qualcomm*. In a rare move, the Division filed an amicus brief with the court of appeals that was at odds with the FTC's case theory.[6] The brief argued the district court ruling requiring the defendant to license SEPs to rival component suppliers was legally flawed and misapplied Supreme Court precedent.[7] The Ninth Circuit Court of Appeals decision, without expressly referring to the Division's brief, endorsed the Division's approach by reversing the district court and holding the defendant had no antitrust duty to deal with rivals resulting from its FRAND commitments.[8]

In light of its prior statements in this area, it was no surprise when the Division reasserted this principle in two recent BRLs. The first was issued to the Avanci licensing pool on July 28, 2020.[9] In it, the Division opined that licensing only to OEMs was efficient and legitimate because the automotive supply chain is complex and it could be difficult to track which components from the various tiers of suppliers are licensed. The BRL went on to say that the Division "understands that many cellular SEP holders choose to license at the end-device level for many of the same reasons, and thus, they may be more likely to join the Platform. Broad licensor participation benefits the Platform's licensees."[10] Additionally, the Division noted that the practice may support innovation by helping "to ensure licensors are appropriately compensated for their innovation."[11] And on September 10, 2020, the Division took the step of supplementing its 2015 BRL regarding the IEEE Patent Policy, noting concerns that the initial BRL was cited "frequently and incorrectly" as an endorsement of that policy.[12] Among other things, the supplemental BRL retreats from the Division's short-lived position that the IEEE policy's recommended use of the smallest saleable patent practicing unit (SSPPU) as the appropriate royalty base for SEPs was "'not out of step with the direction of current U.S. law interpreting [F]RAND commitments' or U.S. patent damages law."[13] In rebuking that statement, which has been misused to support the position that SEP licenses must be made available at the component level, the Division explained that its 2015 assessment of the direction of U.S. law interpreting the meaning and implications of FRAND commitments was "not well-supported and has not proven accurate."[14] Rather than mandating an approach that requires reasonable royalties to be based on the component price, the Division recommends "parties should be given the flexibility to fashion licenses that reward and encourage innovation."[15]

The Division has been unpersuaded by the recent attempts of a few litigants to create conflict between intellectual property and antitrust laws with respect to whether, and how, a patent holder licenses its inventions. This reiterates past expressions of the Division on the respective roles of antitrust and intellectual property and the effect of licensing on incentives to innovate.[16]

FRAND Commitments as a Contractual Issue

The Division also has been actively highlighting that an overapplication of antitrust laws to FRAND licensing disputes poses a risk to standard-development participation and the pro-consumer benefits delivered by SDOs. As stated by the Division, violating a FRAND commitment, without more, does not amount to an antitrust violation. An antitrust claim based solely on a FRAND violation is inconsistent with the Sherman Act, which imposes no antitrust duty for SEP holders to license on FRAND terms even if the SEP holder has made a contractual commitment to do so. To be sure, the violation of a FRAND commitment may be actionable under contract law, providing implementers with contractual remedies if a SEP holder charges supra-FRAND rates or fails to license according to the requirements of the SDO. But, the Division has emphasized, it is not the job of antitrust law to interpret contract clauses, to become rate setters by determining the reasonableness of royalties, or to convert a contractual FRAND commitment into a compulsory licensing system.[17] As stated by AAG Delrahim, imposing Sherman Act liability for a FRAND violation "would create an unacceptable risk of 'false positives' or condemnations of lawful procompetitive conduct."[18] "The prospect of antitrust liability and treble damages for breaching a potentially vague FRAND term—or allegedly 'misrepresenting' one's intentions to offer some FRAND rate—threatens to chill incentives for innovators to develop new technologies that fuel dynamic competition."[19]

The Division filed a Statement of Interest in a number of recent cases to make clear to courts the United States' view that the application of antitrust laws to simple FRAND disputes is improper and could undermine innovation. Most recently, the Division expressed such a concern in *Lenovo & Motorola vs. InterDigital*.[20] In discussing the inapplicability of Section 1 of the Sherman Act,[21] the Division noted that plaintiff Lenovo's allegations centered on defendant InterDigital's alleged unilateral breach of its FRAND commitment. Lenovo pointed to the collective action of standard-development and the resulting standards but did not claim any other SDO participant entered into an agreement with InterDigital relating to the alleged FRAND breach. In addition to being legally insufficient because purely unilateral conduct is not actionable under Section 1, the Division further observed that Section 1 liability based on one firm's *ex post* actions would create great uncertainty and risk of discouraging participation in procompetitive standard-development activity.[22] The Statement of Interest then addressed Lenovo's claims that InterDigital violated Section 2 by over-disclosing the number of patents that could be essential to the standard *ex ante* and by charging supra-FRAND prices *ex post*.[23] The Division again identified defects with the allegations, stressing that successful Section 2 claims require a showing of exclusionary conduct that harms the competitive *process*. Lenovo's contention that InterDigital demanded supra-FRAND rates, without more, was not sufficient; even if InterDigital abandoned its FRAND commitment, the Division noted, that would not establish that the standards-development process itself was prejudiced or anticompetitive.[24] Likewise, disclosing too many patents as potentially essential—an inherently uncertain process—does not harm competition or bias the standards-development process in the discloser's favor. Imposing antitrust liability for an inventor that misidentifies which of its patents ultimately will become standard-essential presents another risk to innovation and competition by jeopardizing patent disclosures and deterring participation in the standard-development process altogether.

The Division's position in *Lenovo* echoed the arguments it set forth in its Statement of Interest filed in *Continental Automotive Systems, Inc. v. Avanci, LLC*, filed earlier this year.[25] There, too, the Division made clear its view that Section 2 liability does not attach to mere breaches of FRAND commitments. Breaches of FRAND commitments, it said, are governed by contract law issues and do not give rise to antitrust violations unless plaintiffs can establish harm to the competitive process. Expanding antitrust liability to contractual disputes would: (1) contradict the policies underlying antitrust laws that encourage market-based pricing; (2) risk distorting licensing negotiations for SEPs; and (3) threaten to chill procompetitive or competitively neutral conduct.[26] On September 10, 2020, the district court dismissed Continental's antitrust claims with prejudice in a decision consistent with Division's arguments.[27] In particular, the court stated that "a violation of this [FRAND] contractual obligation is not an antitrust violation," warning that the use of antitrust remedies to address FRAND contractual issues risks "inhibiting the achievement of the procompetitive goals of the standard setting process."[28]

SDO Policies Relating to Patent Holders and Implementers

Recognizing the critical role played by SDOs, the Division has emphasized the need for balanced patent policies in standard-development organizations to promote innovation and consumer welfare. The value the Division places on SDOs is clear, with its leadership often citing the tremendous consumer benefits generated by the interoperability that results when industry designers and manufacturers are permitted to collaborate.[29] Equally clear, however, is the reality that SDOs are only effective at delivering innovation, better performance and interoperability, and the coinciding consumer benefits, when patent holders and patent implementers have commensurate incentives to take part in the standard-development process.[30]

The Division advocates for SDO policies that result in "greater symmetry" between the conflicting risks of hold up by patent holders and hold out by patent implementers.[31] Because both patent holders and patent implementers contribute to innovation, the Division has recognized that both hold up and hold out threaten innovation through underinvestment in new technologies.[32] But the Division's advocacy for balanced patent policies grew from concerns that standards implementers have attempted "'to skew the rules of standard-setting organizations in their favor in a way that . . . ultimately would discourage innovation.'"[33] The Division has cautioned that SDOs should not overindulge patent hold up theories at the expense of patent rights. In doing so, it has emphasized the lack of empirical evidence of actual hold up.[34] Further, to the extent SDOs must grapple with the dueling threats of hold out and hold up, the Division advocates the resulting patent policies should take into account that hold out is more harmful to innovation and consumer welfare than innovator hold up. According to the Division, without the ability to recoup and profit from their large and uncertain upfront investments in a technology, patent holders are disincentivized from investing in further innovations.[35]

Despite its procompetitive desire to encourage innovation by protecting the rights of patent holders, the Division opposes one-sided SDO policies that fail to also protect the interests of implementers. Policies that heavily favor one group over another ultimately will discourage participation in SDOs, diminishing the pro-consumer benefits of standards development.[36] Accordingly, the Division has urged the adoption of balanced patent policies that (1) reflect a diversity of views within the SDO; and (2) allow flexibility, both to accommodate the varying needs of different industries or to encourage SDO competition within a single industry.[37] This position, as the Division noted together with two other executive branch agencies, is also supported by the Office of Management and Budget Circular A-119.[38] To that end, in 2018 the Division provided recommendations to the American National Standards Institute (ANSI), the organization that oversees standards-development in the U.S., "urging it to adopt balanced policies that will allow standard-setting organizations to be flexible."[39]

Advising on whether ANSI should require Accredited Standards Developers to continue providing F/RAND statements of assurance, and if so, whether ANSI should create a standardized form of assurance, the Division appealed for fairness and transparency.[40] Warning that "check the box" options in standardized forms could materially impact the rights of patent holders and implementers alike depending on how they are worded, the Division underscored the need to avoid shifting bargaining leverage from IP creators to implementers or vice versa.[41] Additionally, because SDOs are most effective when led by those within the industry and when those parties are given the freedom to experiment and compete with one another, flexibility is encouraged with respect to statements of assurance and patent policies.[42] To ensure a consensus-driven and balanced result, ANSI, like the SDOs themselves, should "have balanced representation in its decisional bodies so that their actions are not susceptible to the outsized influence of one group or another."[43] Such an approach is more likely to make standard development attractive to both patent holders and implementers, which can only benefit consumers. The Division reiterated this position in its recent IEEE BRL letter, emphasizing the "need for an open, balanced, and transparent" standards development process that remains unbiased in favor of one set of interests and allows all members meaningful opportunities for input.[44] It also highlighted this position in September 2020 comments filed with ANSI.[45]

Preserving Remedies for Infringement of IP Rights

Finally, the desire to foster innovation while protecting consumer welfare also drove the Division's decision in recent years to clarify its stance regarding the availability of remedies to IP holders. Specifically, the Division clarified its position on whether it may be inappropriate for holders of FRAND-committed patents to seek injunctions or other exclusionary remedies. In December 2019, the Division combined forces with the U.S. Patent and Trademark Office and the National Institute of Standards and Technology to issue the joint *Policy Statement on Remedies for Standard-Essential Patents Subject to F/RAND Commitments*.[46] In doing so, the Division expressly withdrew its support for a narrower 2013 policy statement on remedies for FRAND-committed patents,[47] citing concerns that the earlier policy was being used to discourage injunctions to the detriment of innovation and, ultimately, consumers.[48]

The 2013 policy statement on remedies suggested the holder of a FRAND-committed patent "may harm competition and consumers" merely by seeking injunctive relief.[49] Such competitive harm could occur where the patent holder engaged in hold up and "attempted to use an exclusion order to pressure an implementer of a standard to accept more onerous licensing terms than the patent holder would be entitled to receive consistent with the F/RAND commitment."[50] Although the statement also noted an "exclusion order may still be an appropriate remedy in some circumstances, such as where the putative licensee is unable or refuses to take a F/RAND license,"[51] some infringers argued the 2013 statement indicated that seeking an injunction for a FRAND-committed patent is necessarily anticompetitive. Despite statements from the Division to the contrary, some saw the policy statement as establishing a separate set of rules for SEPs,[52] endorsing the application of antitrust law to any attempts to seek SEP injunctions or, indeed, fail to license on F/RAND terms.[53]

Acknowledging that its own 2013 policy statement may have contributed to confusion regarding its position on remedies, the Division withdrew its assent for the policy statement.[54] Announcing its decision to issue a new policy statement, Division leadership noted that any guidelines regarding SEP injunctive relief should take into account not only the possibility of hold up by patent holders, but the equally likely possibility of hold out by patent implementers.[55] By denying any right to an injunction—which would equate to compulsory licensing—opportunistic licensees have reduced incentives to negotiate in good faith, leading to reduced incentives for patent holders to continue innovating.[56] In the months preceding the new policy statement's release, the Division also underscored the need to heed the role of patent law itself and the careful balance patent law already strikes to optimize the incentive to innovate for the public benefit, thereby advancing the goals of antitrust law and patent law alike.[57]

The 2019 *Policy Statement on Remedies* makes clear the U.S. executive branch view that patent law, not antitrust law, should govern whether injunctions or other exclusionary orders are an appropriate remedy for infringement, regardless of whether the patents are FRAND-committed. Although the existence of a FRAND commitment is one relevant factor when assessing the availability or appropriateness of a particular remedy, the overall framework for analyzing remedies should be no different than in other patent infringement suits.[58] The terms of the FRAND commitments and a review of both parties' conduct is taken into account within this framework without completely preempting the ability to secure an injunction and thereby resorting to a compulsory licensing requirement that disincentivizes innovation. Instead, patent law's use of a "balanced, fact-based analysis, taking into account all available remedies, will facilitate, and help to preserve competition and incentives for innovation and for continued participation in voluntary, consensus-based, standards-setting activity."[59] The Division reiterated this position in its Statement of Interest filed in *Lenovo (United States) Inc. & Motorola Mobility, LLC v. IPCOM GMBH & Co.*, stating the Supreme Court has confirmed injunctions for patents infringements are governed by equitable principles and arguing courts therefore should not apply a categorical exemption on the right of SEP holders to seek this remedy.[60] And most recently, the Division underscored this viewpoint in its supplemental IEEE BRL. Discussing the rationale for the 2019 joint *Policy Statement on Remedies*, the BRL states that injunctive relief (subject to traditional equity principles) is critical to helping patent holders secure a fair return when licensees are unwilling to negotiate reasonable terms; denying SEPs holders access this enforcement tool risks lessening returns for inventors thus harming incentives for future innovation.[61]

Conclusion

The Antitrust Division's steps over the past several years have moved the needle on the antitrust-IP debate. These steps reflect a comprehensive harmonized approach to the considerations of collective action through standard development activity, enforcement of IP rights, promotion of innovation, and the welfare of consumers in the long run. The DOJ approach has been forceful and has found favor with courts reviewing similar issues. As a result, these DOJ policies are likely to have enduring influence on the direction of antitrust-IP law and policy.

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[1] It is a generally accepted principle that even a monopolist, absent rare circumstances, is under no obligation to deal with competitors or customers. *See U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("[A monopolist is] free[] to exercise his own independent discretion as to parties with whom he will deal."); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408-409 (2004) (noting that requiring monopolists to deal with rivals "may lessen the incentive" to innovate and "invest in [] economically beneficial facilities").

[2] Dep't of Justice and Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (Jan. 12, 2017) at 5-6, citing principles that were also recited in the earlier, 1995 edition of the guidelines ("U.S. IP Licensing Guidelines") https://www.justice.gov/atr/IPguidelines/download ("Field-of-use . . . limitations on intellectual property licenses may serve procompetitive ends by allowing the licensor to exploit its property as efficiently and effectively as possible. These various forms of exclusivity can be used to give a licensee an incentive to invest in the commercialization and distribution of products embodying the licensed intellectual property and to develop additional applications for the licensed property. The restrictions may do so, for example, by protecting the licensee against free riding on the licensee's investments by other licensees or by the licensor. They may also increase the licensor's incentive to license, for example, by protecting the licensor from competition in the licensor's own technology in a market niche that it prefers to keep to itself. These benefits of licensing restrictions apply to patent, copyright, and trade secret licenses, and to know-how agreements").

[3] *See, e.g.*, *Continental Auto. Sys., Inc. v. Avanci, LLC, et al.*, No. 3:19-CV-02933 (N.D. Tex. 2019). The Division submitted an amicus brief in this matter discussing its concerns with finding antitrust liability in what amounts to FRAND contractual claims. *See* Statement of Interest of the United States, *Continental Auto. Sys., Inc. v. Avanci, LLC, et al.*, No. 3:19-CV-02933 (N.D. Tex. 2019), *available at* https://www.justice.gov/atr/case-document/file/1253361/download [hereinafter Avanci Statement of Interest].

[4] Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law, Address Before the USC Gould School of Law—Application of Competition Policy to Technology and IP Licensing 8 (Nov. 10, 2017), *available at* https://www.justice.gov/opa/speech/file/1010746/download [hereinafter Delrahim, Take It to the Limit].

[5] Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The "New Madison" Approach to Antitrust and Intellectual Property Law, Address Before the University of Pennsylvania Law School 5 (Mar. 16, 2018), *available at* https://www.justice.gov/opa/speech/file/1044316/download [hereinafter Delrahim, New Madison Approach]. *See also*, Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., The times they are a'changin': The Nine No-No's in 2019, Address Before the Licensing Executives Society (LES) 2019 Annual Meeting 7 (Oct. 21, 2019), *available at* https://www.justice.gov/opa/speech/file/1213831/download [hereinafter Delrahim, The times] ("Yet, as I have expressed, the value of a patent stems primarily from the right to exclude, which is contemplated by the text of the U.S. Constitution itself. Questioning that right and suggesting that simply exercising it may violate antitrust law can severely threaten the incentives to innovate.")

[6] Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur, *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), *available at* https://www.justice.gov/atr/case-document/file/1199191/download.

[7] *Id.* at 18-24 (asserting the district court (1) wrongly interpreted Qualcomm's decision to commit to FRAND licensing as obligating Qualcomm to provide its rivals exhaustive licenses; and (2) incorrectly applied the requirements of *Aspen Skiing*) (internal citations omitted).

[8] *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020), *available at* http://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/11/19-16122.pdf.

[9] Letter from Makan Delrahim, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Mark H. Hamer, Baker & McKenzie, re Business Review Letter to Avanci LLC (July 28, 2020), *available at* https://www.justice.gov/atr/page/file/1298626/download.

[10] *Id* at 19 (internal citations omitted).

[11] *Id.* at 20.

[12] Letter from Makan Delrahim, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., to Sophia A. Muirhead, Gen. Counsel & Chief Compliance Officer, IEEE re Business Review Letter to IEEE 1 (Sept. 10, 2020), *available at* https://www.justice.gov/atr/page/file/1315291/download [hereinafter IEEE Business Review Letter].

[13] *Id.* at 6 (quoting 2015 Business Review Letter to IEEE).

[14] *Id.* at 6.

[15] *Id.* at 8. The Division's antitrust position is consistent with the patent damages law perspective as clarified by the recent Ninth Circuit opinion in *FTC v. Qualcomm*, *supra* note 8, at 42-43. There, the Ninth Circuit rejected the district court's determination that royalty rates were "unreasonable" if not based on the SSPPU as a "misinterpret[ation of] Federal Circuit law regarding . . . SSPPU." The Ninth Circuit concluded the district court's analysis was "fundamentally flawed" since "[n]o court has held that the SSPPU concept is a per se rule for 'reasonable royalty' calculations. . . Moreover, the Federal Circuit rejected the premise of the district court's determination: that the SSPPU concept is *required* when calculating patent damages." (quoting *Commonwealth Sci. & Indus. Research Org. v. Cisco Sys., Inc.*, 809 F.3d 1295, 1303 (Fed. Cir. 2015) ("The rule Cisco advances—which would require all damages models to begin with the [SSPPU]—is untenable [and] conflicts with our prior approvals of a methodology that values the asserted patent based on comparable licenses.").

[16] *See, e.g.*, Thomas O. Barnett, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., Interoperability Between Antitrust and Intellectual Property, Address Before the George Mason University School of Law Symposium (Sept. 13, 2006), *available at* https://www.justice.gov/atr/file/518386/download; U.S. IP Licensing Guidelines, *supra* note 2, at 5-6, 21-22.

[17] *See, e.g.,* Makan Delrahim, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., Antitrust Law and Patent Licensing in the New Wild West, Address Before the IAM's Patent Licensing Conference (Sept. 18, 2018), *available at* https://www.justice.gov/opa/speech/file/1095011/download [hereinafter Delrahim, New Wild West].

[18] *Id.* at 5.

[19] *Id.* at 11.

[20] Statement of Interest of the United States of America, *Lenovo Inc. et al v. InterDigital Tech. Corp. et al*, No. 20-cv-00493 (D. Del. July 17, 2020), *available at* https://www.justice.gov/atr/case-document/file/1295526/download; *see also* Unites States' Reply to Plaintiffs' Response to the United States' Statement of Interest (Aug. 12, 2020), *available at* https://www.justice.gov/atr/case-document/file/1306446/download.

[21] *Id.* at 10-14.

[22] *Id.* at 14.

[23] *Id.* at 15-20.

[24] *See id.* at 15-17; *see also* Ryan Davis, *Innovation Driving DOJ Patent Antitrust Policy, Official Says*, LAW360 (Apr. 15, 2019), *available at* https://www.law360.com/articles/1150171/innovation-driving-doj-patent-antitrust-policy-official-says [hereinafter LAW360 re Finch] (discussing the overuse of antitrust laws in the context of FRAND violations despite the lack of impact on competition, e.g., a patent owner that achieves market power because it offered the best technological solution to the SDO does not run afoul of antitrust laws).

[25] Avanci Statement of Interest, *supra* note3; *see also* Brief for the United States of America as Amicus Curiae in Support of Neither Party at 23, *HTC v. Ericsson Inc.*, No. 19-40566 (5th Cir. Oct. 30, 2019), *available at* https://www.justice.gov/atr/case-document/file/1214541/download (stating it is incorrect to allow antitrust claims to proceed on the basis that breaches of FRAND commitments give rise to antitrust liability and noting the potential of such liability could disrupt innovation incentives).

[26] Avanci Statement of Interest, *supra* note3, at 2.

[27] *Continental Auto. Sys., Inc. v. Avanci, LLC, et al.*, No. 3:19-CV-02933, 2020 WL 5627224 (N.D. Tex. Sept. 10, 2020). The court dismissed the antitrust claims based on lack of standing but concluded that even if plaintiff had established standing, it failed to plead antitrust violations.

[28] *Id.* at *11 (internal citations omitted).

[29] *See, e.g.,* Delrahim, Take It to the Limit, *supra* note4, at 2 ("By allowing products designed and manufactured by many different firms to function together, interoperability standards create enormous value for consumers and fuel the creation and utilization of new and innovative technologies to the benefit of consumers.").

[30] Makan Delrahim, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement, Address Before the LeadershIP Conference 3-4 (Apr. 10, 2018), *available at* https://www.justice.gov/opa/speech/file/1050956/download [hereinafter Delrahim, The Long Run] ("But standard setting only 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.").

[31] Delrahim, New Wild West, *supra* note17, at 2.

[32] Delrahim, New Madison Approach, *supra* note5, at 10 (stating "innovation occurs at different levels of the supply chain in most industries, with patent holders and implementers each adding value that ultimately benefits consumers" and describing both patent hold up and hold out as a threat to this innovation).

[33] LAW360 re Finch, *supra* note24.

[34] *See, e.g.*, Delrahim, New Madison Approach, *supra* note5, at 9 (noting the lack of economic or empirical evidence that hold up is a real phenomenon) (internal citations omitted).

[35] *Id.* at 10-11 (discussing the asymmetrical threat to innovation caused hold out versus innovator hold up, noting that "innovators must make significant upfront investments in technology before they know whether it will pay off, whereas implementers can delay at least some of their investments in a technology until after royalty rates have been determined").

[36] Makan Delrahim, Asst. Att'y Gen., U.S. Dept. of Justice, Antitrust Div., Telegraph Road: Incentivizing Innovation at the Intersection of Patent and Antitrust Law, Address Before the 19th Annual Berkeley-Stanford Advanced Patent Law Institute 12 (Dec. 7, 2018), *available at* https://www.justice.gov/opa/speech/file/1117686/ download [hereinafter Delrahim, Telegraph Road] ("If an SSO's policy is too restrictive for one side or the other, it also risks deterring participation in procompetitive standard setting.").

[37] Delrahim, New Madison Approach, *supra* note5, at 11-12.

[38] *See* Policy Statement on Remedies for Standard-Essential Patents Subject to F/RAND Commitments, *infra* note 46, referencing 15 U.S.C. § 4301 Office of Management & Budget, Exec. Office of the President, OMB Circular No. A–119 §2e (Rev. Jan. 27, 2016) ("This application of best practices is consistent with the guidance of OMB Circular A-119, which states that intellectual property rights policies 'should be easily accessible, set out clear rules governing the disclosure and licensing of the relevant IPR, and take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard.'").

[39] LAW360 re Finch, *supra* note24.

[40] Letter from Andrew Finch, Dep. Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Patricia Griffin, Vice President & General Counsel, and Amy Marasco, Chair, IPRPC, American National Standards Institute (Mar. 7, 2018), *available at* https://www.justice.gov/atr/page/file/1043456/download [hereinafter March 2018 ANSI Letter].

[41] *Id.* (internal citations omitted).

[42] Letter from Andrew Finch, Dep. Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., to Patricia Griffin, Vice President & General Counsel, and Amy Marasco, Chair, IPRPC, American National Standards Institute (Oct. 11, 2018), *available at* https://www.justice.gov/atr/page/file/1100611/download (e.g., making clear that ANSI's model form does not prevent individual SDOs from adopting their own forms or policies regarding statements of assurance).

[43] March 2018 ANSI Letter, *supra* note 40, at 1.

[44] IEEE Business Review Letter, *supra* note12, at 9-10 (noting the potential for anticompetitive effects and harm to innovation where SDO processes fail to provide for balanced representation).

[45] U.S. Dep't of Justice comments on the U.S. Standards Strategy (Sept. 8, 2020), *available at* https://www. justice.gov/atr/page/file/1314196/download.

[46] U.S. Patent & Trademark Office, Nat'l Inst. of Standards & Tech. & U.S. Dep't of Justice, Antitrust Div., Policy Statement on Remedies for Standard-Essential Patents Subject to F/RAND Commitments (Dec. 19, 2019), *available at* https://www.justice.gov/atr/page/file/1228016/download [hereinafter 2019 Policy Statement on Remedies for SEPs].

[47] U.S. Dep't of Justice, Antitrust Div. & U.S. Patent & Trademark Office, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013), *available at* https://www.justice.gov/atr/page/file/1118381/download [hereinafter 2013 Policy Statement on Remedies for SEPs].

[48] 2019 Policy Statement on Remedies for SEPs, *supra* note 46, at 4.

[49] 2013 Policy Statement on Remedies for SEPs, *supra* note 47, at 6.

[50] *Id.* at 6.

[51] *Id*. at 7.

[52] *See, e.g.*, Makan Delrahim, Asst. Att'y Gen., U.S. Dep't of Justice, Antitrust Div., Protecting Free-Market Patent Bargaining, Competition, and the Right To Exclude, Address Before The Federal Circuit Bar Association Global Series 2018 12 (Oct. 10, 2018), *available at* https://www.justice.gov/opa/speech/file/1100016/download ("I worry that some have overread the [2013] Policy Statement as endorsing a special set of FRAND-specific rules for injunctions. To be clear, any such reading of our Policy Statement is wrong. There is one standard for obtaining injunctive relief against the infringement of patents, which the Supreme Court articulated in *eBay v. MercExchange*. That ruling does not create any FRAND-specific rules.").

[53] In line with the Division's 2019 Policy Statement on Remedies for SEPs, the United Kingdom's Supreme Court recently rejected the notion of a separate set of rules for SEPs. The ruling dealt simultaneously with the appellate decisions in three separate cases: *Unwired Planet v. Huawei [2018] EWCA Civ 2344*; *Huawei v. Conversant*, *[2019] EWCA Civ 38; and ZTE v. Conversant*, *[2019] EWCA Civ 38.* The UK Supreme Court declined to construe the SDO policy as prohibiting SEP holders from seeking an injunction in appropriate circumstances. In doing so, it described the possibility of an injunction as "a necessary component of the balance which the IPR Policy seeks to strike, in that it is this which ensures that an implementer has a strong incentive to negotiate and accept FRAND terms for use of the owner's SEP portfolio. The possibility of obtaining such relief if FRAND terms are not accepted and honoured by the implementer is not excluded either expressly or by necessary implication." *Unwired Planet v. Huawei, Huawei v. Conversant*, *ZTE v. Conversant [2020] UKSC 37, at 21, available at* https://www.supremecourt.uk/cases/docs/uksc-2018-0214-judgment.pdf.

[54] Delrahim, Telegraph Road, *supra* note36, at 6-7.

[55] *Id.* at 7 ("Any discussion regarding injunctive relief should include the recognition that in addition to patent holders being able to engage in patent 'hold up,' patent implementers are also able to engage in 'hold out' once the innovators have already sunk their investment into developing a valuable technology.").

[56] *See, e.g.*, Jorge Contreras, *A Brief History of FRAND: Analyzing Current Debates in Standard Setting and Antitrust Through a Historical Lens*, 80 ANTITRUST L.J. 39, 92 (2015) ("When facing hold-out, the most important question facing patent holders is whether, following the potential licensee's refusal to accept a license on the terms proffered, the patent holder is permitted, without violating its FRAND commitment, to sue the potential licensee for patent infringement and potentially seek injunctive relief to prevent further infringement.").

[57] Delrahim, Telegraph Road, *supra* note36, at 5 ("When it comes to the test for obtaining injunctive relief against infringement, patent law already strikes a careful balance that optimizes the incentive to innovate.") (citing test set forth in *eBay v. MercExchange*, 547 U.S. 388 (2006)); Delrahim, The times, *supra* note 5, at 7 ("[The test] the Supreme Court articulated in *eBay v. MercExchange* should govern whether an SEP holder gets injunctive relief—without our thumb on the scale against an injunction.").

[58] 2019 Policy Statement on Remedies for SEPs, *supra* note 46, at 5 (internal citations omitted).

[59] *Id.* at 7.

[60] Statement of Interest of the United States, *Lenovo (United States) Inc. & Motorola Mobility LLC v. IPCOM GMBH & Co.*, No. 5:19-cv-01389 (N.D. Cal. Oct. 25, 2019), *available at* https://www.justice.gov/atr/case-document/file/1213856/download.

[61] IEEE Business Review Letter, *supra* note 12 at 5-6.