PUTTING TOGETHER A COMPETITIVE PUZZLE: HOW TO UNDERSTAND AND ASSEMBLE THE PIECES OF THE NEW MADISON APPROACH

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Putting Together a Competitive Puzzle: How to Understand and Assemble the Pieces of the New Madison Approach

By Kristen Osenga

The New Madison Approach, championed by former Assistant Attorney General Makan Delrahim, sets forth a framework for understanding how antitrust law, patent law, and contract law intersect and interrelate in the field of technology standards. Commentators often conflate these divergent, but complementary, areas of law and seek to substitute one for the other, especially in disputes involving standard essential patents. In doing so, they often arrive at the conclusion that the puzzle is missing some pieces. By recognizing the work that each of these doctrines can and should do, the New Madison Approach solves the puzzle and presents an appealing picture of competition in the innovation age.

At a time when our world is becoming increasingly interconnected – where 5G and the Internet of Things are both the technologies of the present and provide a glimpse of the future – the importance of technological standards can hardly be exaggerated. What is, however, often overstated are the anticompetitive aspects associated with standardization. Worse still, what is overlooked are the competitive, and even hyper-competitive, outcomes that spring from standards development. Understanding the pro-competitive benefits of standardization comes in part from a clear grasp of the standardization process and in part from recognizing the intersection and interrelationship of antitrust law, patent law, and contract law where technology standardization comes together. The New Madison Approach helps sort out these pieces at the intersection, fitting each into its proper place to form a complete and appealing puzzle.

I. AN OVERVIEW OF THE PUZZLE

It is easy to look at the realm of technology standards as an intractable problem, not one that you would want to solve for fun on a rainy day. There are literally thousands of moving parts – from companies that develop technology for incorporation into technology standards (contributors), to companies that make and sell standards-compliant goods and services (implementers), to organizing institutions (standards development organizations or "SDOs," also referred to as standards setting organizations or "SSOs"), to consumers. Adding to the complexity of the puzzle, at least as far as antitrust law is concerned, is the fact that standards development organizations are generally comprised of industry rivals. This alone is sufficient to raise competitive concerns, but then added to the mix is the notion that these firms that are typically competitors are making group decisions about the future direction of a given technology and then also generally hold property rights implicated in those decisions. Unfortunately, this is the point at which much criticism in this arena attaches; the outlook is bleak, the puzzle pieces are all dark and do not fit together – except as collusion.

There is, however, a more appealing picture that could emerge if the pieces of the puzzle are properly assembled. The image is not dark, but hopeful. This rosy picture is one where the standardization process is seen, in itself, as a pro-consumer, pro-innovation, and pro-competitive activity. Consumers benefit from the guaranteed interoperability and interconnectivity provided by standardization, as well as the ability to pick and choose from a multitude of standards-compliant products and services offered by variety of different companies. Innovation is encouraged when technologically savvy companies bring together their best solutions to technical problems and innovation is enhanced when, through iterative discussion and collaboration during the standards development process, these technical solutions are combined and improved. The entire process of standardization is a competitive process that requires scientific and technological experts to sort through a variety of technical alternatives to come up with an optimal solution given the available possibilities. Because the technical alternatives are offered up from a variety of innovative companies and combined and refined during the standards development process, there is inherent competition to have submitted contributions selected for incorporation into the standard. This competitive push drives innovation within these companies and forces expenditures under uncertainty in research and development, as well as participation at SDOs. This ex ante competition and incentive to innovate are good things that are rarely acknowledged as pro-competitive by critics of standardization. Moreover, there is competition that happens on the backend of standardization – that of implementers who, because they have the ready-made solution encompassed in the standard, can spend their research and development efforts differentiating their products on extra-standard features, services, and quality. This competition and innovation, even though more visible, is too often overlooked.

Given this more positive view of technology standards and the standards development process, it would be expected that standardization would be viewed favorably within the competition policy space – and yet, over the last five to ten years, there have been efforts on a variety of fronts to impede standards development, from implementers, from standards development organizations, from competition agencies, and from courts. Rather than recognizing standards development as fertile ground for competitive activity, a number of policies were proposed that could – and in some cases, did – negatively impact the desire of innovative companies to participate in standards development organizations. The Federal Trade Commission took Qualcomm to court based on its licensing program of computer chips. Multiple courts have refused to enjoin companies found liable for infringing valid patents covering technology incorporated into standards. The IEEE (Institute of Electrical and Electronics Engineers) amended its intellectual property rights policy to disallow the seeking of injunctive relief, as well as making a number of other changes that favored implementers and disfavored contributors. These outcomes and more are squarely based on the negative image of standardization, and particularly owners of standard essential patents.

II. LOOKING CLOSELY AT THE PIECES

Antitrust law, patent law, and contract law are all puzzle pieces in the standardization ecosystem, each having a vital role to play to encourage desired competitive and innovative behavior. Patent law provides, through its exclusive rights, the incentive to invent and innovate as well as the tools to provide for efficient transactions, such as licensing or transfer of the technology which is patented. Contract law provides a framework for agreement between firms, seeking fair negotiations that are to the benefit of both parties. Antitrust law protects competition within and without the standards field, between contributors, between contributors and implementers, and amongst implementers, all to the benefit of consumers. These pieces each have separate, but complementary, roles.

Critics argue that some of these pieces are not fulfilling their role. As one example, some state that patents being declared as standard essential are "weak;" essentially the claim is that patent law is not doing its job. As another example, commentators claim that patent holders are seeking unreasonably high royalty rates to use standard essential patents; the claim is that contract law, in the form of the contributor's agreement to license on fair, reasonable, and non-discriminatory ("FRAND") terms, is insufficient. To complete the puzzle without these allegedly missing pieces, these commentators suggest that antitrust should step in to the void.

However, when one of those pieces – such as antitrust law – is given an outsized role, the sought-for outcome of innovation is threatened. For example, if antitrust law is given precedence over patent law, the incentives that the patent system provides are devalued. Eviscerating the patent's right to exclude takes away the value of that patent. If antitrust law is given precedence over contract law, the desire to bargain in good faith and to participate in the iterative, negotiated process which is standards development is diminished. A puzzle composed only of edge pieces or only of center pieces – or worse, a 1000-piece puzzle where each of the pieces is the same – is not going to produce a desirable image.

It is in front of this backdrop that Mr. Delrahim set forth the New Madison Approach in 2018. In promoting and fleshing out the Approach throughout the rest of his tenure, he was setting the stage for viewing standards development as competitive behavior and encouraging contributors and implementers alike to engage with standardization. Specifically, the Approach explains the appropriate role, as well as the correct level of interaction between patent law, contract law, and antitrust law, particularly in the case of standards essential patents.

The Approach has four primary tenets. First, patent holdup is not an antitrust problem. Second, standards development organizations should not allow collective action by standard-implementers to disfavor patent holders in setting the terms of patents that cover a new standard. Third, given that a fundamental right of patent holders – in fact the only right – is the right to exclude, SDOs and courts should not readily restrict the ability of patent owners to seek injunctive relief or exclusion orders. Fourth, unilateral decisions by patent owners to not license a patent should be *per se* legal. Each of these tenets properly situates the role of the various pieces in the standardization ecosystem puzzle.

III. PATENT HOLDUP IS NOT AN ANTITRUST CONCERN

Patent holdup is the notion that patent holders regularly exploit their intellectual property rights to demand supra-competitive licensing fees, particularly in the case of standard essential patents. Recent empirical work refutes the extent, and even existence, of patent holdup. But even assuming that patent holdup can and does negatively affect implementers of standardized technology, the Approach recognizes the roles of the various puzzle pieces by demarcating patent holdup as a contract problem, not an antitrust issue. Specifically, a patent holder's demand for supra-competitive licensing is a breach of that patent holder's commitment to license the patent on FRAND terms. If the breach is in contract, then the solution also lies in contract – by forcing the patent holder to abide by its side of the agreement.

By situating patent licensing disagreements in contract law, especially in cases where there is a FRAND commitment in place, the underlying investments in research and development and competition to be incorporated into a standard are not disturbed or diminished. Antitrust remedies, by design, are more onerous to serve as a deterrence. Particularly because claims of patent holdup are often simply a matter of disagreement as to price, to then impose a heightened penalty would have the effect of deterring not just seeking what the patent holder considered a fair price, but also discouraging an innovative company from engaging in the underlying development and standards-development activities. A contractual remedy for implementers also protects hearty competition amongst implementers for consumers. At the end of the day, each implementer is paying a FRAND price to use the technology underlying the standard; while each implementer may not be paying an identical price, the ability of each implementer to fairly compete is made possible because every implementer has been able to obtain the technology on fair terms.

Critics claim patent holdup is due to additional market power that is conferred artificially by being incorporated in a technology standard. The claim of artificially created market power ignores the very process of standardization. Contributors develop technology and then compete, against other innovative companies, to have that technology incorporated into a standard. By the time the standard is adopted and an implementer is providing standards-compliant goods and services, the underlying technology has already been developed in uncertainty and selected through an iterative and competitive process. Any reward associated with being selected for incorporation in a standard is first, an acknowledgement of a technology that made it through the gauntlet of standards development and was eventually selected, and second, an offset for the many other technologies developed and submitted by the contributor that were not selected for incorporation. The idea that a company would engage in supra-competitive pricing also ignores the fact that standards development is an iterative and ongoing process. There are repeat-player dynamics that would be negatively affected were any patent owner to truly engage in patent holdup.

Additionally, these critics point to "weak patents" as exacerbating the problem. The existence of weak patents is also not an antitrust problem, but is instead, if it is actually an issue, a patent problem. On this front, the patent system has ample options for an implementer to challenge weak patents, whether it be through administrative proceedings at the Patent Office or as part of litigation in court. It is interesting, although perhaps telling, that few standard essential patents have been deemed invalid by courts, even when the same court uses the threat of patent holdup in determining the remedy for an implementer's infringement of that patent.

IV. SDOS CANNOT ALLOW IMPLEMENTERS ALONE TO DETERMINE THE TERMS

Standards development organizations must recognize the contract aspects of their intellectual property rights policies. Not only does a company's FRAND commitment represent a contractual obligation that must be satisfied, but the very nature of standards development participation is a bargained-for exchange. In exchange for membership fees and time commitments, a company can be represented during the discussions and decisions that are involved in standards development. In exchange for submitting technological solutions to the standards development organization to be considered for incorporation into a technology standard, a company agrees that, if their technology is selected, it will be made available for license to implementers on some set of terms set by the organization. Implementers similarly participate in standards development, recognizing that they will be able to help determine the direction of a technology standard and then have access to the incorporated technology on some set of terms. This is, very clearly, a set of agreements negotiated by a subset of a standards development organization to apply to all of its members.

The problem, however, is when a standards development organization empanels a subset of its members to negotiate its intellectual property rights policy and that entire subset represents only one type of member – the implementer. This was true for what became the 2015 Amendments to IEEE's intellectual property rights policy. Over objection and despite requests for contributor representation on the committee that was overseeing the amendments, the IEEE crafted an intellectual property rights policy that, not surprisingly, was extremely favorable to implementers and unfavorable to contributors. Essentially, a contract – which would have some retroactive effect – was drafted by only one party to the agreement – over the objections of and without the participation of the other. This is not the type of fair, balanced, and open negotiations between adverse parties that contract law is meant to encourage.

Moreover, as the Approach contends, in allowing an aligned, but competitive, set of firms to meet and make decisions for a larger group, the standards development organizations are running into the issue of antitrust. While critics are quick to see antitrust concerns where the matter is more properly addressed under contract law or patent law, they have been less willing to see potential antitrust violations committed by the standards development organizations. Allowing a set of implementers to collectively decide the terms of intellectual property rights for standards essential patents, and worse still, implying if not outright stating that ex ante pricing decisions may be more preferable to ex post FRAND negotiations smacks of anticompetitive behavior. Antitrust law does have a role to play in the standardization puzzle, and one primary role is ensuring that competition is protected at the standards development organizations.

V. INJUNCTIVE RELIEF MUST BE AVAILABLE

The sole right provided by a patent is an exclusive right. To provide an innovative company a patent as a reward and then suggest that injunctive relief is unavailable is to essentially eviscerate any value that the patent would confer. Outside the technology standards arena (and historically), a denial of injunctive relief would only occur in cases involving public health and safety. The Supreme Court's *eBay* decision altered this analysis slightly, causing more courts to focus on the factor that asks whether money damages would make the patent holder whole. In cases of patent licensing firms (who do not make their own products) and standard essential patents, a prevailing view is that the patent holder has opted to license its technology in exchange for money and thus damages are all that is required to make the patent holder whole. This view, coupled with the IEEE Amendment to its intellectual property rights policy that forbids patent holders of standard essential patents from even seeking injunctive relief, has the effect of devaluing any patents covering standardized technology.

This is problematic for two reasons. First, it largely removes patent law from the set of pieces available to solve this puzzle. A picture missing this set of pieces will be obviously incomplete. Moreover, patents are understood to encourage innovation and facilitate transactions, both important to competition itself. If patents become valueless, they can no longer be counted on to perform these functions in the ecosystem. In the alternative, innovative companies who rely on the value of their patents may opt out of the standardization ecosystem. This is not a slippery slope, parade of horribles claim; after the IEEE amended its policy in 2015, a number of firms signaled they would be opting out of IEEE standards development activities. Patents, and their associated exclusive rights, are a critical part of ensuring that the most innovative firms are participating in standardization.

Second, the removal of injunctive relief – either through policy like the IEEE Amendment or through repeated denials by courts to issue injunctions – has exacerbated the problem of predatory infringement. Also misnamed "efficient infringement," the removal of ready injunctive relief has the effect of encouraging implementers to "infringe now, pay later," because, at worst, the only threat hanging over them will be the requirement to royalties for their past infringement. That is, they will be on the hook for the same royalties they would have been paying all along if they had accepted a license before infringing; worse still, there is a better-than-average chance that a court will arrive at a royalty rate less than they would have agreed to pay at the outset, providing a win for implementers on multiple levels, even though they are liable for patent infringement. The unavailability of relief under patent law thus has created a vacuum under contract law as well, removing any incentive for an implementer to participate in FRAND negotiations with a contributor. Essentially, the lack of injunctive relief creates a puzzle that is composed purely of antitrust pieces – not a very attractive picture at all.

VI. REFUSALS TO LICENSE A PATENT SHOULD BE *PER SE* LEGAL

Related to the third point of the Approach, the refusal to license a patent is inherently linked with the patent's right to exclude. Without being able to refuse to license, again, the patent right is eviscerated and the patent's associated incentives are diminished. This ability to refuse a license can be overridden in cases of a public health or safety emergency, or it can be negotiated away as part of a contractual obligation. This is precisely what the FRAND commitment does. A patent holder, in exchange for having its technology considered for incorporation in a standard, agrees to license that technology to anyone, on a non-discriminatory basis, on fair and reasonable terms. If a patent holder who has submitted to a FRAND commitment then refuses to license that patent, this is a breach of that agreement but not an antitrust violation. Making a refusal to license a patent an antitrust violation takes both patent law and contract law out of the picture, again resulting in either an unsolvable puzzle or an unpleasant image.

VII. CONCLUSION

Standardized technology is an increasingly important part of our world. Not only do we enjoy the use of really fabulous new technology, but we also benefit from the interoperability and interconnectivity standardization provides. And, although the picture may not be instantly clear to us, we also greatly profit from the competition that both underlies and springs from standards development. For this reason, it is critical to recognize and rely on all of the puzzle pieces that support standardization – patent law, contract law, and antitrust law. The New Madison Approach was based precisely on that idea. Going forward, it will continue to be essential that none of these pieces is lost or left behind, overemphasized or ignored. Each piece has an important role to play in ensuring the innovation and competition that we desire.

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