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DOJ and FTC Signal Shifts in Antitrust Enforcement of Essential Patent Disputes

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Recent public statements from Makan Delrahim, Assistant United States Attorney General for the Antitrust Division at the U.S. Department of Justice (DOJ), and Joseph Simons, Federal Trade Commission (FTC) Chairman, indicate that the two United States antitrust enforcement agencies may be shifting their attention from whether standard essential patent (SEP) owners have breached a commitment to license essential technology on fair, reasonable, and non-discriminatory (FRAND) terms to whether the standard setting organizations (SSOs) are stifling innovation by imposing FRAND requirements on the patent holders.

Delrahim has outlined the DOJ's "New Madison Approach" in several public statements since taking over as the DOJ's antitrust chief last year, including most recently at a September 18 speech, during the IAM's Patent Licensing Conference in San Francisco[1] and in remarks before the Senate Committee on the Judiciary Antitrust Subcommittee on October 3.[2] His approach suggests a departure from past practices of using antitrust enforcement powers to ensure royalties for SEPs are fair, reasonable, and non-discriminatory. Delrahim's comments also represent a break from the approach adopted over the past decade by antitrust authorities around the world on antitrust enforcement in the field of SEPs.

Simons' recent statements, made at an event held in Washington on September 25, suggest that at least one of the new FTC commissioners shares Delrahim's view that FRAND enforcement is not primarily an antitrust issue, marking a change from at least some predecessors. In fact, as recently as March 2018, former Commissioner Terrell McSweeny (who stepped down in April 2018) commented that the adoption of the New Madison Approach by the FTC would be contrary to sound economic principles and an abdication of its antitrust enforcement mission.

SEPs, SSOs, and FRAND

As a result of the need for technology to function properly and various components to interact, *standard setting organizations* (SSOs) have adopted certain technological standards. The Institute of Electrical and Electronic Engineers and the International Telecommunications Union represent two such SSOs.

Patents for technology that are necessary to meet a standard are known as *standard essential patents* (SEPs). In order to prevent a patent holder from manipulating the standard setting system to extract high royalties after receiving SEP status, SSOs often require that the owner of an SEP license the technology on *fair, reasonable, and non-discriminatory* (FRAND) terms to other members of the SSO.

Until recently, antitrust law has been viewed as one way to enforce these FRAND requirements in the United States.

DOJ's New Madison Approach to FRAND Violations

Inspired by founding father James Madison's views on the necessity for strong patent protection, the DOJ's *New Madison Approach* has four basic premises "aimed at ensuring that patent holders have adequate incentives to innovate and create exciting new technologies, and that licensees have appropriate incentives to implement those technologies."[3]

According to the New Madison Approach:

1. Antitrust law should not be used as a tool to police FRAND commitments that patent holders unilaterally make to standard setting organizations.
2. SSOs should not become vehicles for concerted actions by market participants to skew conditions for patented technologies' incorporation into a standard in favor of implementers.
3. SSOs should have a very high burden before they adopt rules that severely restrict the right of patent holders to exclude or amount to a *de facto* compulsory licensing scheme.
4. A unilateral and unconditional refusal to license a patent should be considered *per se* legal from the perspective of antitrust law.

Delrahim's New Madison principles flow from his view that the "hold-up problem" – where SEP-holders refuse to give licenses unless their demands, like seeking higher royalties, are met – is "fundamentally not an antitrust problem." He believes that allowing SSOs to force holders of SEPs to grant licenses on FRAND terms dramatically favors implementers (i.e., SEP-users) and can "reduce incentives to innovate and encourage patent hold-out," because SEP-users threaten to withhold their investment in a new standard. Further, Delrahim believes that the right to exclude is a key feature of patent rights; thus, there is nothing inherently wrong when a patent holder decides not to license its patent.

During the September 18 IAM speech, Delrahim stated that an SEP-holder has no antitrust duty to deal with implementers, even after it has unilaterally committed to license its SEPs on FRAND terms. He also said that any antitrust cause of action premised merely on a failure to abide by FRAND commitments would be inconsistent with Section 2 of the Sherman Act. Delrahim explained that this is, in part, because Section 2 of the Sherman Act is agnostic to the price that a SEP-holder charges for its SEPs and "indifferent" to price discrimination. In other words, the Act does not "police" prices but instead protects the competitive process. The Sherman Act has no place in determining what is a "fair" or "non-discriminatory" price, nor does the Sherman Act authorize a court to determine "reasonable" royalty rates, another component of a FRAND commitment.

Delrahim acknowledged, however, that a commitment to license SEPs on FRAND terms may create duties under contract law but added that "[t]ransforming such a contract obligation into an antitrust duty would undermine the purpose of the antitrust laws and the patent laws. . . ."

In his testimony before the Senate Subcommittee, Delrahim cautioned that "[t]he misapplication of antitrust laws could take away the incentive for dynamic competition" while expressing his concern that concerted action by patent users may create a monopsony effect that lowers the return on research and development.
During his IAM remarks, Delrahim also made clear that, under the New Madison Approach, the DOJ is looking to modernize its antitrust policy with respect to the treatment of intellectual property. This includes increasing its advocacy efforts both in the United States and abroad regarding key issues in this space, such as FRAND commitments. Nonetheless, Delrahim emphasized that it will ultimately be for courts to implement the Sherman Act's principles in the context of legal disputes over these issues and encouraged courts, private litigants, and foreign enforcement bodies to utilize the DOJ's New Madison Approach where the antitrust laws are invoked to deal with FRAND violations.

FTC's Approach to FRAND Violations

Although the DOJ's New Madison Approach has attracted considerable publicity, historically the FTC, and not the DOJ, intervened most frequently on behalf of implementers in FRAND disputes over the past two decades. Accordingly, Chairman Simons' recent comments – even if representing his personal views – may mark a more significant change in enforcement actions in the United States.

Speaking to the Global Antitrust Enforcement Symposium at Georgetown University Law Center,[4]Simons echoed his counterpart at the DOJ, stating, "We agree with the division leadership that a breach of a FRAND commitment standing alone is not sufficient to support a Sherman Act violation. The same is true even for a fraudulent promise to abide by a FRAND commitment. More is needed."

Simons recognized that antitrust law still has a role to play if SEP-holders breach their FRAND obligations for "the acquisition or maintenance of monopoly power in a properly-defined market, or involve an agreement that unreasonably restrains trade."

Simons went on to state that "hold-out in the standard-setting process can raise serious concerns under antitrust law when such hold-out is the result of collusion among potential adopters/licensees." He also recognized that

"hold-up raises potential anti-trust issues" and that if either hold-up or hold-out occurs, "FTC will continue our economically grounded and fact-based enforcement of antitrust laws" in those areas.

Simons reiterated those positions in his Senate testimony, telling the Antitrust Subcommittee that "there has to be an antitrust problem in addition to a problem with the standard-setting context" in order to invoke antitrust law and that such competition issues may exist in both the hold-out and hold-up contexts. Simons noted that when there is no real competition for which standard to adopt, antitrust law need not be invoked.

Simons' remarks reflect a difference from those of former Commissioner McSweeny, who released a statement in March of this year, prior to her departure from the FTC,[5] stating that "[i]t would be unfortunate if the antitrust agencies were to unlearn the lessons of over 15 years of scholarship and bipartisan study and question their long-standing support for combating hold-up based on vague concerns about overdeterrence."

McSweeny noted that FTC challenges to hold-up on antitrust grounds have been relatively rare,[6] with only seven significant actions since 1996 across both Republican and Democratic administrations. She also said that they have been important to protecting the integrity of the standard-setting process and concluded by writing that it is "imperative that the FTC continue to take hold-up seriously and not abdicate its antitrust enforcement mission."

Conclusion

The New Madison Approach has been reported as representing a dramatic change to the enforcement of patent hold-up disputes, but its application remains to be seen. The agencies recognize that a claim for breach of contract may arise but intend to focus on the presence of market power or monopoly power before concluding that an antitrust claim arises. Further, both Delrahim and Simons have suggested a potential role for their agencies in supporting the rights of SEP-holders against SSOs in some situations. How the FTC litigates future matters concerning SEPs and FRAND commitments will merit close watching for any signals it sends regarding changing enforcement priorities, as will any intervention by either agency on behalf of SEP-holders.

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[1] A full text of the speech can be found here: https://www.justice.gov/opa/speech/file/1095011/download

[2] Video of testimony from both Delrahim and Simons before the subcommittee can be found here: https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws

[3] Makan Delrahim, Keynote Address at University of Pennsylvania Law School Philadelphia, PA, Friday, March 16, 2018, https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-university

[4] Full text of the speech can be found here: https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf

[5] Full text can be found here: https://www.ftc.gov/system/files/documents/public_statements/1350033/mcsweeny_-_the_reality_of_patent_hold-up_3-21-18.pdf

[6] She also notes that the Department of Justice has not brought an enforcement action related to patent hold-up