



# DEPARTMENT OF JUSTICE

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## **IP, Antitrust and Looking Back on the Last Four Years**

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Good morning and thank you for inviting me to speak today. It is a great honor to be here at the Global Competition Review Law Leaders' Forum, and I am happy to see so many familiar faces from the extended antitrust community.

This January marked the beginning of the second term for the Obama Administration. In the first term, the division's talented staff worked tirelessly and effectively with former Assistant Attorney General Christine Varney and former Acting Assistant Attorneys General Sharis Pozen, Joe Wayland, and me to vigorously enforce the antitrust laws. With the beginning of a new presidential term, the division is very excited to welcome our new Assistant Attorney General, Bill Baer.

The start of a new term is a good time to take stock, to look back at what we set out to do and what we have accomplished over the past four years. With that in mind, I will open my remarks today by describing what I view as the major themes that defined the past four years at the division. In the second part of my talk, I will discuss some of the issues that we have been thinking about on the intellectual property front.

## **I. Looking Back**

I will begin by looking back. Our approach to antitrust enforcement and policy during the first four years of the Obama Administration was marked by four key themes: vigorous enforcement, enhanced cooperation—with international enforcers, other U.S. government

components, and the states—thought leadership on competition policy, and good governance, including increased transparency and outreach to the public and the business community.

### **A. Vigorous Enforcement**

Vigorous and prudent enforcement is perhaps the most important of these themes. In 2007, then candidate Barack Obama promised that he would “direct [his] administration to reinvigorate antitrust enforcement” and that, under his watch, the antitrust agencies would “step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.”<sup>1</sup> Looking back on the past four years, it is clear that the division has made good on this pledge. We took action, but we did so prudently. When we identified an anticompetitive transaction or conduct we challenged it. But we also were quick to clear deals that did not threaten competition.

Key to the division’s vigorous enforcement has been our willingness to litigate cases and our ability to win them. Of course, the division has long been filled with remarkably talented litigators. The division recently made two institutional changes that further enhanced our capabilities. First, early on we created a litigating Deputy position, initially filled by Bill Cavanaugh and later by Joe Wayland. Having a seasoned trial lawyer in the front office sharpened the division’s thinking on preparing cases for trial and provided important support and professional development opportunities for our litigating teams. Second, the division appointed its first career Director of Litigation, Mark Ryan, a well-regarded litigator who joined us last year. The Director can provide consistent litigation leadership over time, enhancing the

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<sup>1</sup> Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* [http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

division's litigating capacity and abilities no matter who is sitting in the front office. We also hired career lawyers with significant litigation experience, adding to our already deep bench of litigation-ready talent.

These institutional changes helped prepare us to bring cases, but preparation is not enough; willingness to go to the mat on anticompetitive deals or conduct is also necessary. We showed that willingness on multiple matters over the past few years. I think two of those cases are particularly illustrative of our approach to litigation: the H&R Block/TaxAct merger challenge and the AUO criminal trials.

In May 2011, the division sued to block H&R Block's proposed acquisition of TaxAct, a provider of digital, do-it-yourself tax preparation software. H&R Block and TaxAct were, respectively, the second- and third-largest providers of this type of software, in a market in which the top three firms had 90 percent of all sales. Further, TaxAct was a particularly aggressive competitor, both on price and in terms of innovation. Had the merger gone through, American taxpayers would have been left with only two major providers of digital, do-it-yourself tax software, which would have resulted in higher prices, lower quality products, and less innovation.

We took the case to trial and, after hearing the evidence, the court agreed with the division's analysis and found that the proposed merger violated Section 7 of the Clayton Act. This was the division's first courtroom victory in a merger matter since 2003.

H&R Block is a good example of why being prepared to defend consumer interests in court is important for the division. First, the case put down a marker: parties should be aware that the division means it when we say we are prepared to go to court—we are—and the quality

of division trial lawyering also should be clear. Second, the H&R Block opinion now serves as a helpful precedent for the antitrust agencies to rely on in future merger challenges. In particular, the court cited extensively to the 2010 DOJ/FTC Horizontal Merger Guidelines and it reaffirmed many of the tenets of merger analysis embodied in the guidelines, including the importance of maverick competitors.

We have proven our trial capabilities on the criminal side as well. A good example are our two recent trial victories against AU Optronics, Taiwan's largest manufacturer of liquid crystal displays, its American subsidiary, and three top executives. In March, 2012, after an eight-week trial, a jury returned guilty verdicts against AUO, AUO America, and two top executives. During the trial, division attorneys showed that the companies and former executives used monthly covert meetings with their competitors to fix the prices of LCD panels sold into the United States. The jury also broke new ground by finding, for the first time in a division case, that the defendants' illegal gain was at least \$500 million, increasing the potential fine from a statutory maximum of \$100 million to \$1 billion. The jury failed to return a verdict as to one AUO America executive, but the division re-tried him and he was found guilty in December, 2012. In the wake of these convictions, the judge ordered the two corporations to pay a \$500 million fine and sentenced the two executives convicted in March to serve three years in prison and to pay \$200,000 each in criminal fines. The executive convicted in December 2012 has not yet been sentenced.

Like H&R Block in the civil realm, the AUO victories should send a message that the division will not hesitate to go to court to pursue a criminal conviction. This lesson was brought home again just last week, when a division trial team secured the conviction of a former

executive of a Florida-based coastal water freight transportation company for his participation in a conspiracy to fix shipping rates between the continental United States and Puerto Rico.

TaxAct and AUO are just two examples among many of the cases the division has litigated over the past few years or is litigating currently. Other notable matters include the AT&T/T-Mobile transaction, which the parties abandoned in the face of our challenge, and current challenges against the Anheuser-Busch InBev/Grupo Modelo merger and the Twin America tour bus joint venture in New York. The division currently has a record seven civil cases in active litigation and obtained 6 favorable jury verdicts in just the last two years.

## **B. Cooperation**

A second theme that strikes me from these past four years is the division's emphasis on expanding cooperation along several axes: internationally, with other federal government components, and with the state attorneys general. Each of these forms of cooperation makes antitrust enforcement and competition policy more effective.

Many of the division's international cooperation efforts are already well known. The division coordinates with its international counterparts on many individual matters and it works toward policy and procedural convergence through multilateral organizations, like the Organization for Economic Cooperation and Development and the International Competition Network, and through its many bilateral relationships.

International case cooperation has been frequent and fruitful during the past few years. Our e-books matter is a good example. In April 2012, the division sued Apple and five of the largest book publishers in the United States, alleging that they had conspired to increase the

prices consumers pay for e-books. Four of the publishers have since settled with the division and agreed to grant retailers the freedom to reduce their e-books prices. We continue to litigate against Apple and Macmillan, the remaining publisher.

Throughout this investigation, division staff and leadership cooperated with their counterparts from the European Commission (EC). As former Acting Assistant Attorney General Sharis Pozen put it, this was “truly” a “global enforcement” effort, and “[n]ever before have we seen this kind of cooperation on a civil antitrust enforcement matter.”<sup>2</sup> Attorney General Holder also recognized our work with the EC, thanking “our partners at the European Commission ... for their hard work and close cooperation.”<sup>3</sup>

Last year’s United Technologies/Goodrich Corporation transaction is another good example of the benefits of international case cooperation. The division determined that, as proposed, this merger would have resulted in higher prices, less favorable contract terms, and reduced innovation for several critical aircraft components. In July 2012, the parties agreed to a settlement that, if approved by the court, will address the division’s competitive concerns.<sup>4</sup>

The division cooperated closely throughout this investigation with the EC and the Canadian Competition Bureau. The EC also approved the merger, subject to certain conditions, and the Canadian Competition Bureau stated that it would take no action regarding the deal because the U.S. and EC remedies “appear to sufficiently mitigate the

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<sup>2</sup> Remarks as Prepared for Delivery by Acting Assistant Att’y Gen. Sharis A. Pozen at the E-Books Press Conference (Apr. 11, 2012), *available at* <http://www.justice.gov/atr/public/speeches/282147.htm>

<sup>3</sup> *Id.*

<sup>4</sup> See Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Order for United Technologies Corporation to Proceed with its Acquisition of Goodrich Corporation (July 26, 2012), *available at* [http://www.justice.gov/atr/public/press\\_releases/2012/285420.pdf](http://www.justice.gov/atr/public/press_releases/2012/285420.pdf).

potential anti-competitive effects in Canada.”<sup>5</sup> The three agencies announced their decisions on the same day. As we observed in our press statement at the time, “the division’s close cooperation with the European Commission and the Canadian Competition Bureau resulted in a coordinated remedy that will preserve competition in the United States and internationally.”<sup>6</sup>

International case cooperation is also important to our criminal enforcement program. When cartels operate across borders, cooperation among enforcers helps put us on an even footing with the conspirators. For example, cooperation with our sister agencies around the world allows for coordinated raids in international cartel investigations, helping to preserve crucial evidence. Recent criminal investigations where we have worked with international enforcers include our auto parts investigation, where we are working with our counterparts in Japan, the EC, and Canada, among others, and our air cargo cases, where we have worked with the Australian Competition and Consumer Commission, the EC, the New Zealand Commerce Commission, the U.K. Office of Fair Trading, and other agencies.

International cooperation, of course, goes beyond partnership on individual matters. The division also works to deepen and expand its relationships with enforcement agencies around the world. We have been particularly successful in recent years in building relationships with important, recently established agencies. In 2011, for example, the division and the Federal Trade Commission (FTC) entered into a memorandum of understanding (MOU) with China’s three antitrust agencies. This agreement calls for periodic high-level consultations between the

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<sup>5</sup> Canadian Competition Bureau, Competition Bureau Statement Regarding United Technology Corporation’s Acquisition of Goodrich Corporation (July 26, 2012), *available at* <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03483.html>.

<sup>6</sup> Press Release, U.S. Dep’t of Justice, *supra* note 4.



agencies and lays the groundwork for further cooperative efforts. In September 2012, we met with the heads of all three Chinese agencies in Washington, D.C., for the first of what we anticipate will be annual bilateral meetings to discuss issues of mutual interest. Also in September 2012, the division and the FTC entered into an MOU with the Indian antitrust authorities that establishes a framework for ongoing cooperation and communication between our respective agencies. In addition to these budding new relationships, we continue to cultivate our longstanding close relationship with the EC and with other agencies, like the JFTC.

In sum, the division has invested heavily in international cooperation over the past few years, and that investment has paid off handsomely in terms of enhanced enforcement and opportunities for increased dialogue.

Cooperation at home is also a division priority. During the past four years the division has worked hard to enhance its cooperation with other federal government components. Of course, the division has for many years worked closely with its sister agency, the FTC, on many fronts, particularly on formulating antitrust policy. Recent cooperation with the FTC includes the 2010 revisions to the Horizontal Merger Guidelines and several public workshops. Less well known, perhaps, is the division's work with other federal agencies. The division shares the task of reviewing certain kinds of mergers with sector regulators, including the Federal Communications Commission (FCC), the Federal Reserve and other banking agencies, and the Department of Transportation. When the division is reviewing a merger that is also before one of these other agencies, we believe it is a best practice to maximize communication and cooperation with that other agency. The advantages of this type of contact are many. For example, the division can share its competition expertise with the sector regulator and the sector

regulator can share its detailed industry experience with the division. Further, where possible, it is helpful for the division and the sector regulator to avoid contradictory outcomes or conflicting remedies. This type of cooperation is good for the division and the regulatory agency, but it is also good for the public and for the parties, as it increases the chances that the parties will receive a consistent message from the agencies.

I personally have seen this process in action from both sides. Before re-joining the division, I was senior counsel to the Chairman for Transactions at the FCC, where my main job was to lead the agency's review of the AT&T/T-Mobile transaction. As you may remember, the parties to that transaction were required to file for FCC approval and to make an antitrust filing, which the division handled. During the agencies' parallel reviews of the transaction, our investigatory staffs worked closely together to analyze the acquisition's competitive impact. Aided by appropriate waivers from the parties, DOJ lawyers and economists were in close contact with FCC lawyers and economists throughout our investigations. The division filed its lawsuit challenging the proposed merger in August of 2011. FCC staff ultimately issued an extensive report recommending that the FCC challenge the transaction because, among other reasons, we concluded that "significant harms to competition" were "likely to result".<sup>7</sup> At about the same time the FCC issued this report, the parties withdrew their FCC application. The division's court challenge to the deal continued, but the parties soon abandoned the transaction altogether.

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<sup>7</sup> FCC, *In the Matter of Applications of AT&T and Deutsche Telekom AG*, WT Dkt. No. 11-65, Bureau Staff Analysis and Findings 111 (2011), available at [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DA-11-1955A2.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2.pdf).

The AT&T/T-Mobile deal is a great example of constructive inter-agency cooperation and the benefits it can have for agency analysis and protecting the public from anticompetitive transactions.

Before moving on from cooperation, I also want to mention our ongoing collaborative relationships with state attorneys general offices around the country. The division has worked with state attorneys general on many matters over the years and we continue to welcome collaboration with the states. Currently, the division is cooperating with the states on a number of litigations, including our American Express case, where we are working with 18 state attorney general's offices, and our challenge to the Twin America tour bus joint venture, where we are working with the New York State AG's office. Mark Tobey continues to serve as the division's special counsel for state relations and we look forward to future collaborations with the states on important matters.

### **C. Thought Leadership**

A third theme I see when I look back at the last four years at the division is strong thought leadership on important competition policy issues. Although we are a law enforcement agency, the success of the division's mission depends not only on investigations and cases, but also on competition advocacy and advancing competition policy. Our advocacy and policy work takes a number of forms, including written guidance on important competition issues and public workshops. The division has been very active on both these fronts.

The division's recent policy work has focused on three goals: revising or updating division guidance to make it consistent with the latest and best thinking on competition policy,

offering a forum to tackle cutting-edge issues, and encouraging open dialogue on and visibility into the division's priorities and policy direction.

The 2010 revision of the Horizontal Merger Guidelines is a good example of these considerations. The division and the FTC initiated a review of the guidelines because leaders in both agencies believed that the 1992 guidelines no longer accurately reflected current agency practice. We ensured that the review process itself was open and transparent. We held public workshops on the guidelines and invited public participation. The division and the FTC also issued draft guidelines for public comment. This process allowed the best outside thinkers and interested stakeholders to offer input on our deliberations. I believe that this input improved the final product. The revised guidelines now accurately reflect how the agencies perform their merger analysis, granting parties, the antitrust bar, and the public more visibility into our process. And the guidelines are already having an important impact on the merger landscape. For example, as I mentioned earlier, the H&R Block court relied on and cited extensively to the guidelines in its decision blocking that merger.

The division's updated Policy Guide to Merger Remedies and the joint DOJ/FTC Accountable Care Organizations (ACO) policy statement, both released in 2011, are further examples of the division's thought leadership on key competition issues. The updated merger remedies policy guide more accurately reflects current division practice and priorities in the kinds of remedies we will accept, giving parties and their counsel increased insight into the division's thinking. The ACO policy statement provides a detailed blueprint for health care providers to understand how the agencies will evaluate ACOs, removing much of the uncertainty from the process and helping health care providers to form procompetitive ACOs.

The most favored nation (MFN) clauses and patent assertion entity (PAE) activities workshops that the division and FTC held in 2012 are also good examples of our thought leadership on competition policy. These workshops brought together leading lawyers, economists, and business people to discuss the complex competition issues raised by MFNs and PAE activities. They provided a forum for open discussion of what are among the most challenging and cutting-edge competition issues of the day and offered visibility into the agencies' policy priorities and concerns.

#### **D. Good Governance**

The concepts of openness and visibility bring me to the last of my four themes from the past four years: the division's dedication to good governance, which includes this increased openness, as well as division efforts to become a more efficient and effective organization. I mentioned earlier the steps we have taken to vigorously enforce the antitrust laws in recent years. If your deal or conduct is anticompetitive, we will take action. However, most mergers are not anticompetitive and we believe we have a duty to move those transactions through our process as quickly as possible, consistent with ensuring that we have adequately analyzed a deal's potential impact. The same idea applies to requests for business review letters analyzing proposed conduct or transactions. We do not want businesses to be held up unnecessarily by our review—delays of that type are not good for competition.

The guidelines I discussed earlier are part of that effort. By giving parties and their counsel a more accurate and up-to-date idea of how we analyze transactions and proposed remedies, the division helps ensure that deals are better structured and proposed remedies are appropriate and effective.

Another innovation we have been testing over the past several years to help streamline our process is allowing parties to use predictive coding in their document productions. When it works well, predictive coding reduces the document review and production burden on parties while still providing the division with the documents it needs to fairly and fully analyze transactions and conduct. Of course, for predictive coding to work for the division, we require a high degree of cooperation and transparency about the implementation and structure of the predictive coding process. That being said, we have allowed parties to use predictive coding in some matters already.

## **II. Continued Focus on Antitrust and Intellectual Property**

I want to turn now to one topic that receives a great deal of public attention: patents in high technology industries. Discussion of the perceived tension between competition law and intellectual property recurs every few years in the antitrust bar. The discussion now is reaching a new crescendo with the rise of smartphones, the prevalence of technology in our daily lives, concerns over so-called “patent trolls,” and the news coverage devoted to the so-called “patent wars.” In light of how our innovation-driven economy is evolving, and the role of intellectual property in these dynamic industries that drive growth, IP issues will continue to be central to competition.

Antitrust law and intellectual property rights have long coexisted quite well. The joint DOJ and FTC Antitrust Guidelines for the Licensing of Intellectual Property lay out how the two areas of law interact and, although they are now almost 20 years old, they have truly withstood

the test of time.<sup>8</sup> As the guidelines acknowledge, “[i]ntellectual property law bestows on the owners of intellectual property certain rights to exclude others.”<sup>9</sup> We recognize exclusion from practicing a patent is different in nature from excluding trespass on real property.

Notwithstanding this distinction, the Antitrust Division applies the same general antitrust principles to mergers and conduct matters involving intellectual property that it applies to any other type of property. That stance will continue. The division will stay active in the promotion of competition even when patents are at issue, both by enforcing our antitrust laws where appropriate and providing guidance to the bar, industry, and other agencies and organizations.

### **A. Advocacy Efforts Regarding Intellectual Property**

Let me start by highlighting two of our recent actions on promoting competition in IP-enabled industries. First, I mentioned earlier our recent joint workshop with the FTC on patent assertion entity activities. The workshop covered topics such as PAE behavior, the economics of IP licensing, and the potential effects on competition that PAE activity may generate.<sup>10</sup> The workshop is an example of our efforts to further the discussion on the impact PAE activities may have on competition and innovation and the role antitrust law should play with respect to PAE behavior when their conduct injures the competitive process.

Second, the division participated in the PTO’s roundtable on its proposed regulations requiring periodic and timely recordation of a patent’s real-party-in-interest. After that roundtable, we submitted joint comments with the FTC supporting the Patent and Trademark

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<sup>8</sup> U.S. Dep’t of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), available at <http://www.justice.gov/atr/public/guidelines/0558.htm>.

<sup>9</sup> *Id.* at § 2.1.

<sup>10</sup> For more information, including panelist presentations and public comments, visit *Public Workshops: Patent Assertion Entity Activities*, <http://www.justice.gov/atr/public/workshops/pae/index.html>.

Office's (PTO) efforts and proposed regulations. The comments are posted on our website.<sup>11</sup>

One serious question—but by no means the only one—that technology companies confront is: Who owns the patents that I would like to use? The answer is often unclear because there is no requirement to use the PTO's system of recording patent assignments and transfers, and no requirement that the true, controlling, entity be disclosed.

Faced with uncertainty, companies designing new products may find it difficult to weigh the relative merits, likelihood of licensing, and licensing costs of competing technologies. Uncertainty increases the costs of deciding whether to license the patented technology. Given this uncertainty, companies also may not be able to assess adequately the need to develop non-infringing alternative technologies or whether they should even include the covered feature. Requiring the disclosure of the real-party-in-interest will help improve the efficiency of the IP licensing marketplace. Recordation will help reduce risk, increase transparency, and facilitate bilateral licensing. Advocacy in support of more efficient IP licensing furthers the division's mission to promote competition in the high-tech industry.

## **B. Section 2 and F/RAND Commitments**

In addition to the advocacy efforts that I have just described, the division has also been focused on the role that Section 2 of the Sherman Act might play in protecting competition in high-technology industries from certain exclusionary practices involving patent licensing. This is a challenging and complex area of the law but it is one that we feel is particularly worthy of thoughtful exploration.

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<sup>11</sup> U.S. Dep't of Justice & the FTC, *In the Matter of Notice of Roundtable on Proposed Requirements for Recordation of Real-Party-in-Interest Information Throughout Application Pendency and Patent Term*, Dkt. No. PTO-P-2012-0047 (Feb. 1, 2013), at <http://www.justice.gov/atr/public/comments/292147.pdf>.



Our innovation-led economy relies on standards. Firms—often competitors—routinely collaborate on technical standards that prove crucial for interoperability and the creation of new platforms on which innovation occurs. Standards are ubiquitous in modern life. They cover a broad range of products and services, such as the standard gauge for railway tracks, wired and wireless communication standards that support modern communications, and smart grid technologies that promise to make our nation’s electrical grid more reliable and efficient. We recognize that standards serve the public interest in many ways and collaboratively-set industry standards may substantially reduce transaction costs by helping firms avoid wars between competing standards.

While standards offer our economy great efficiencies and offer consumers and businesses new, advanced products, standard-setting is not without risks to competition. Most obvious are the risks inherent whenever competitors meet and discuss their trade. What I want to focus on today, however, are not Section 1 concerns, but unilateral actions by patent owners who participated in the standard-setting process.

When industry designs a standard that incorporates patented technology owned by participants in the standard-setting process, there is the risk of future patent hold-up. Once a standard becomes established, firms implementing the standard may find switching away more difficult and expensive. This lock-in confers market power on the owners of the incorporated patents. Because implementing the standard necessitates reading on the standard’s incorporated patents, those patents become standards essential patents or SEPs for short. Standards essential patent holders may seek to take advantage of the market power that standardization of their patented technology creates by engaging in hold-up. They may, for instance, exclude a

competitor from a market or obtain an unjustifiably higher royalty than would have been possible *ex ante*; that is, before the standard was set. This type of hold-up raises particular competition concerns when alternative technologies that could have been included in the standard were instead excluded from it.

Patent hold-up can cause other problems as well. It may induce users to postpone or avoid incorporating standardized technology in their products. Patent hold-up may slow the adoption of new standards or reduce the royalties other SEP owners earn because the standard is not as widely adopted as anticipated. Consumers could also be harmed when companies implementing the standard raise consumer prices to pass on increased royalty costs.

To reduce the occurrences of such opportunistic conduct, most standards bodies have adopted patent policies that seek commitments from participants to license the patents they own that are essential to the standard on “reasonable and non-discriminatory” (RAND) or “fair, reasonable, and non-discriminatory” (FRAND) terms. In many cases a F/RAND licensing commitment is a condition of participation in the standards body. Often, a patent holder’s failure to offer a F/RAND licensing commitment causes the standard-setting body to consider whether it should modify the proposed standard to exclude the patented technology. Or the organization may be able to select competing patented technology owned by firms that are willing to license under F/RAND terms. Standard setting organizations (SSOs) and their members rely on F/RAND licensing commitments to facilitate the bilateral licensing of patents that are needed for a standard to become successful and to assure implementers of the standard that the patented technologies contained in the standard will be available on reasonable terms and to all implementers.

Sometimes there are allegations that patent holders cannot resist the temptation to either seek excess royalties for their F/RAND encumbered SEPs or threaten competitors that want to implement a standard with injunctions. F/RAND violations may, for example, take the form of charging apparently unreasonable royalty rates as compared to past licensing practices, the perceived *ex ante* value of the patent to the standard, or the value of the patent to the end consumer device. Alternatively, patent holders may violate the discriminatory part of F/RAND by charging their competitors higher royalties than they impose on other firms implementing the standard.

Smartphones provide an excellent example of a product where the risks of F/RAND violations may arise. Smartphones combine multiple standards such as Wi-Fi, Bluetooth, and several wireless standards like 3G. They read on potentially thousands upon thousands of patents. What we have observed is that some participants in the wireless marketplace have begun to question the value of any one infringed patent to the end device. They may argue that, for example, the value of each small piece of technology inside the smartphone should be minimal. Such questions naturally implicate the larger issue of whether a F/RAND-encumbered SEP holder is pursuing unreasonably high royalties compared to the patent's value to the smartphone, on the assumption that, without a license to that SEP, the smartphone could be excluded from the market. And if the F/RAND-encumbered SEP holder makes smartphones or components, then it may seek to affect competition in those markets by charging competitors discriminatorily higher prices in breach of its F/RAND commitments. These actions have the potential to impact competition in an entire market, and not just a bilateral relationship between a single patentholder and a single potential licensee, because the market itself now depends on standardization in order to function.

This past October, I spoke alongside colleagues from the FTC and the EC's DG Comp about clarifying F/RAND licensing commitments. During my talk, I proposed half a dozen improvements that SSOs could consider that would mitigate the risks of patent hold-up.<sup>12</sup> The recommendations included: clarifying F/RAND commitments; making F/RAND encumbrances convey to subsequent owners; permitting cash-only licensing options; limiting injunction actions for F/RAND-encumbered SEP infringement claims; creating guidelines or arbitration provisions to determine F/RAND rates; and attempting to determine which patents are truly essential to the standard among the patents that owners claim are essential.<sup>13</sup> Competition advocacy can, however, only go so far. To stop owners of F/RAND-encumbered SEPs from harming consumers through arguably anticompetitive behavior, agencies and private parties may need to resort to judicial remedies.

With this background in mind, I would like to turn to a question that has been circulating in the background over the last several years. Is it potentially a violation of Section 2 when a F/RAND-encumbered SEP owner exercises the monopoly power that he or she acquired through participation in the standard-setting process in breach of the SEP owner's F/RAND commitment?

Some commentators have rejected this notion. F/RAND commitments are contracts, and some have argued that contract law is sufficient to enable prospective licensees to obtain the promised F/RAND royalty rates.<sup>14</sup> While the FTC has looked beyond contract law to enjoin SEP

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<sup>12</sup> Renata B. Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *Six "Small" Proposals for SSOs before Lunch: Remarks as Prepared for the ITU-T Patent Roundtable* (Oct. 10, 2012), available at <http://www.justice.gov/atr/public/speeches/287855.pdf>.

<sup>13</sup> *Id.* at 9-10.

<sup>14</sup> *See, e.g.*, Herbert J. Hovenkamp, *Standards Ownership and Competition Policy*, 48 B.C.L. REV. 87, 106 (2007).

hold-up in several recent decisions, the FTC based its authority to issue consent orders on Section 5 of the FTC Act.<sup>15</sup> Section 5 prohibits “unfair or deceptive acts or practices.”

Arguments that Section 2 of the Sherman Act is inapplicable to certain instances of opportunistic SEP hold-up appear to rely on the Third Circuit’s *Broadcom* holding regarding the plaintiff’s unlawful monopolization claim.<sup>16</sup> Let me provide a little background for the case.

Qualcomm participated in the standard-setting process to design the third generation of the standard—the Universal Mobile Telecommunications System (UMTS)—used by AT&T and T-Mobile for their wireless networks.<sup>17</sup> Broadcom alleged that Qualcomm intentionally made false promises to license its patents on F/RAND terms if they were included in the UMTS standard. Broadcom further claimed that ETSI relied on Qualcomm’s F/RAND commitment when selecting the technologies to include in the standard, and that Qualcomm steered ETSI towards incorporating its patents over those alternatives.<sup>18</sup> According to Broadcom, once its patents became essential, Qualcomm violated its F/RAND commitments by seeking both unreasonably high and discriminatory royalty rates for its patents and chipsets. That is, Qualcomm exercised the monopoly power it acquired via standardization to raise royalty rates.

The Third Circuit agreed with Broadcom that—yes—a patent holder’s intentionally false promise to license the SEPs on F/RAND terms coupled with the SSO’s reliance on the F/RAND promise when selecting the patented technology over other available options runs afoul of

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<sup>15</sup> See *In the Matter of Motorola Mobility LLC*, File No. 121-0120, 2013 WL 124100, at \*37-39 & \*45-46 (F.T.C. Jan. 3, 2013); *In the Matter of Robert Bosch GmbH*, Dkt. No. C-4377, 2012 WL 5944820, at \*29 & FN 7 (FTC Nov. 21, 2012); *In the Matter of Negotiated Data Solutions LLC*, File No. 051-0095, 2008 WL 258308 (FTC 2008).

<sup>16</sup> *Broadcom Corp. v. Qualcomm, Inc.*, 501 F.3d 297 (3d Cir. 2007).

<sup>17</sup> *Id.* at 303-04.

<sup>18</sup> First Amended Complaint, *Broadcom Corp. v. Qualcomm, Inc.*, Civ. A. No. 05-3350, at ¶ 82-86 (D.N.J. 2005).

Section 2.<sup>19</sup> The court noted that such deception during the standard setting process “harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that the patent rights will confer monopoly power on the patent holder.”<sup>20</sup>

Commentators have suggested that Section 2 continues to retain vitality in this space even in the absence of deception during the standard setting process. They raise the question of whether it makes sense, from a competition standpoint, to limit Section 2 liability exclusively to instances in which the patent holder intentionally deceived the SSO while it designed the standard. For example, compare the fact pattern of *Broadcom* to a situation where the patent holder honestly promised to encumber its patents with F/RAND commitments but later changed course. For whatever business reason, the firm—now armed with SEPs—intentionally violates its F/RAND commitments after the standard is set. These commentators have argued that the competitive process may be equally disrupted if there were alternatives that the SSO would have included but were ultimately excluded because of the patent holder’s F/RAND commitment. Competition and consumers appear to suffer either way. This is an issue that we continue to look at and encourage members of the bar and academia to do so as well.

### **Conclusion**

These have been an eventful four years for the division. We have worked hard to fulfill our mission to vigorously enforce the antitrust laws for the benefit of American consumers. We have worked closely with the FTC and other enforcers to achieve those outcomes. We have taken on tough issues—like the intersection of intellectual property rights and the antitrust

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<sup>19</sup> *Broadcom*, 50 F.3d at 314.

<sup>20</sup> *Id.*

laws—as part of our ongoing effort to ensure that competition and free markets continue to drive the American economy. And we have worked to make sure that the division is as effective and efficient as possible. We look forward to continuing those efforts over the next four years.

Thank you.