



DEPARTMENT OF JUSTICE

“Telegraph Road”*: Incentivizing Innovation at the Intersection of Patent and Antitrust Law

MAKAN DELRAHIM
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

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Thank you Jim for that introduction, and for inviting me today to participate in the Advanced Patent Law Institute.

As the Assistant Attorney General of the Antitrust Division, I spend most of my time with antitrust lawyers and economists. Being among this talented group of patent lawyers today brings me back to my earlier career, when I worked on patent transactions and the enforceability of intellectual property rights for the National Institutes of Health and, later, the U.S. Trade Representative. So thank you for letting me reminisce a little and for the honor of being with you.

The title of my remarks today is “Telegraph Road: Incentivizing Innovation at the Intersection of Patent and Antitrust Law.” As you may know, Telegraph Road is a song by Dire Straits that came out in 1982.

It is about a pioneer who makes a home in the wilderness. His entrepreneurship and hard work attract other people and he soon finds himself in the midst of a bustling town building up around him. The lyrics describe the on-slaught of infrastructure:

Then came the churches, then came the schools
Then came the lawyers, then came the rules
Then came the trains and the trucks with their load
And the dirty old track was the Telegraph Road.

This transformation is an apt metaphor for the history of our envied innovation economy here in the United States—especially the part about lawyers and rules.

Ingenuity and entrepreneurship are fundamental to our free-market economy. Like the entrepreneur in Telegraph Road, countless American inventors have done the hard work of

* DIRE STRAITS, *Telegraph Road*, on LOVE OVER GOLD (Vertigo 1982).

creating something from nothing: from electronics, to biotech, to microchips and software.

Over the years, an infrastructure has built up around those inventors to capitalize on their ingenuity. The American inventor is no longer alone in the wilderness. He is surrounded by business people and lawyers, with their strategies and their rules.

With all these interests pulling the inventor in different directions, the question is whether we are doing everything we can to preserve the fundamentals that encouraged innovation in the first place. I fear that at the intersection of patent and antitrust law, some have lost sight of that goal.

Today, I will discuss how standard-setting organizations have formed around innovators. When they work well, they translate ingenuity into usable, commercialized technologies. When they don't, they can run the risk of stifling innovation.

First, I will address the reasons to protect the patent holder's right to seek an injunction against infringing uses of its technology, even when the patent is essential to the practice of a technological standard.

Second, I will discuss my concerns that standard-setting organizations have been given too little scrutiny when they have acted as a forum to slow down, rather than to facilitate, the adoption of disruptive innovations.

Third, I will discuss how standard-setting organizations can affect incentives to innovate when they set patent policies that govern participation in the forum.

I. The Legal Limits of a FRAND Commitment

I will start where lawyers often do: with the text of the U.S. Constitution. As I have observed before, there is only one place in that founding document where the word "right" is

used, and that is in Article 1, Section 8, Clause 8, otherwise known as the Copyright and Patent clause.

It provides that “[t]he Congress shall have the Power...to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries...” And it bears emphasis that the authors of the Constitution not only used the word “right,” but they also preceded it with the equally important word “exclusive.”

Our forefathers thought that patent rights—including the ability to exclude competitors—are critical to promoting innovation in our country.

So where do we, at the Antitrust Division, fit in? Our job is to protect free-market competition from abuses including the unwarranted exclusion of competitors. We enforce the antitrust laws for the benefit of consumers, who win when companies have to out-perform one another in order to earn the business of those individual consumers.

In the past, people talked about a tension between the patent laws and the antitrust laws. According to that view, the patent laws grant monopolies and limit competition, while the antitrust laws prohibit monopolies and promote competition. That was overly simplistic.

Now, the prevailing view is that the increase in innovation spurred on by the patent laws leads to expanded consumer choice and enhanced competition in the long run. These benefits are achieved when innovators try to out-perform one another in order to earn the exclusive business of consumers for some temporary period.

These were the insights of the great economist Joseph Schumpeter. Schumpeter observed that a perfectly competitive market may not allow for the capital accumulation and investment necessary to achieve optimal levels of innovation and dynamic efficiency.¹

His insight was enshrined into antitrust law in the D.C. Circuit’s opinion in *United States v. Microsoft*. The court explained there that “Schumpeterian competition . . . proceeds sequentially over time rather than simultaneously across a market” and that “[c]ompetition in [technologically dynamic] industries is ‘for the field’ rather than ‘within the field.’”²

In the more recent past, we have seen somewhat of a shift toward the view that patents might confer too much power, particularly if those patents are essential to a technical interoperability standard. The fundamental right of the patent holder to exclude competitors has been questioned in this context.

In particular, I have criticized the argument that it ought to be a violation of antitrust law for a holder of a standard-essential patent, or SEP, to exclude competitors from using the technology, including by seeking an injunction against the sale of infringing goods—I think that argument is wrong as a matter of antitrust law and bad as a matter of innovation policy.

While the nature of these arguments vary, they all depend in some part on the contractual commitment that some SEP-holders make when their technology is accepted to a standard, what is known as the FRAND commitment. I have spoken elsewhere about the sufficiency of contract law to deal with FRAND commitments.³ Today, I want to emphasize the role of patent law.

¹ JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY chs. VII & VIII (3d ed. 1950).

² *United States v. Microsoft*, 253 F.3d 34, 49-50 (D.C. Cir. 2001) (quotation marks omitted).

³ Remarks of Assistant Attorney General Makan Delrahim at the USC Gould School of Law (November 10, 2017), available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center>.

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, for the benefit of the public. The test was articulated by the Supreme Court in *eBay v. MercExchange*.⁴

It says that a patent holder seeking an injunction must demonstrate (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

A court applying the *eBay* test is thus allowed to consider effects in the market, including (as Justice Kennedy noted in concurrence) how significant the patented invention is to the use of the product, and whether the patent holder can be properly rewarded for that contribution without the ability to exclude competitors.⁵

When this test is used to maintain appropriate incentives to innovate, it thus facilitates the goals of antitrust law and patent law alike.

I fear that we at the Antitrust Division gave some observers the opposite impression, however, with the confusion created by the joint statement issued by the Department of Justice and the U.S. Patent & Trademark Office in early 2013, entitled “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.”

That Policy Statement purported to offer the agencies’ perspectives on the propriety of a federal court issuing an injunction, or the International Trade Commission’s issuing an exclusion order, “when a patent holder seeking such a remedy asserts standards-essential patents that are

⁴ *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

⁵ *Id.* at 396-97 (Kennedy, J., concurring).

encumbered by a RAND or FRAND licensing commitment.” In particular, the statement discusses what is in the “public interest” because the *eBay* test and the Tariff Act governing the ITC name the public interest as a relevant factor.

As I have said before, this joint statement should not be read as a limitation on the careful balance that patent law strikes to optimize the incentive to innovate.⁶ There is no special set of rules for exclusion when patents are part of standards. A FRAND commitment does not and should not create a compulsory licensing scheme.

In those cases, as in all cases, the question is what result will optimize the incentives to innovate for the benefit of the public. Since injunctions against infringement frequently *do* serve the public interest in maintaining a patent system that incentivizes and rewards successful inventors through the process of dynamic competition, enforcement agencies without clear direction otherwise from Congress should not place a thumb on the scale against an injunction in the case of FRAND-encumbered patents.

Despite my clarification of the Antitrust Division’s position on the propriety of these types of injunctions, the potential for confusion remains high because the joint statement from 2013 indicates that an injunction or exclusion order “may harm competition and consumers,” seeming somehow to suggest an antitrust inquiry that is distinct from the goal of optimizing the incentives for innovation—namely, dynamic competition.

This potential for confusion has lead me to a conclusion that I would like to announce here today, in the interest of clarity and predictability of the laws, and among the patent law community with whom we share the goal of incentivizing innovation: The Antitrust Division is

⁶ Remarks of Assistant Attorney General Makan Delrahim at the Federal Circuit Bar Association Global Series (October 10, 2018), *available at* <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-deliver-remarks-federal-circuit-bar-association>.

hereby withdrawing its assent to the 2013 joint “Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.”

The 2013 statement has not accurately conveyed our position about when and how patent holders should be able to exclude competitors from practicing their technologies. We will be engaging with the U.S.P.T.O. to draft a new joint statement that better provides clarity and predictability with respect to the balance of interests at stake when an SEP-holder seeks an injunctive order.

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. Additionally, a balanced discussion should recognize that some standard-setting organizations may make it too easy for patent implementers to bargain collectively and achieve sub-optimal concessions from patent holders that undermine the incentive to innovate. That is the topic I want to turn to next.

II. Abuse of Standard-Setting Processes

Although standard-setting organizations can undoubtedly offer enormous benefits to consumers, there are antitrust risks associated with any activity that involves competitors making joint decisions. When there is evidence that participants in a standard-setting organization have engaged in collusion, which is the “supreme evil” of antitrust law, according to the Supreme Court in *Trinko*⁷, the Division will be inclined to investigate.

⁷ Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 408 (2004).

For instance, there is a potential antitrust problem where a group of product manufacturers within a standard-setting organization come together to dictate licensing terms to a patent holder as a condition for inclusion in a standard because it may be a collective exertion of monopsony power over the patent holder.⁸

In *American Needle*, the Supreme Court articulated that “the key” to establishing the concerted action element required in Section 1 cases is whether the decision “deprives the marketplace of independent centers of decision-making and therefore of diversity of entrepreneurial interests.”⁹ The Court went on to cite an antitrust treatise by Areeda & Hovenkamp for the touchstone principle that “the central evil addressed by Sherman Act § 1 is the elimination of competition that would otherwise exist.”¹⁰

The Antitrust Division will therefore investigate and bring enforcement actions to end practices that eliminate the independent centers of decision-making and thereby harm competitive processes, including price competition and innovation competition. Often a single maverick firm may be willing to take a chance on a new and innovative technology or business model that the rest of its competitors would rather see killed off in its incipiency. Antitrust law recognizes the consumer benefit of those entrepreneurial and innovative tendencies and their vulnerability to collusion.

⁸ See *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 322 (2007) (calling monopsony the “mirror image” of monopoly, and concluding that “similar legal standards” therefore apply to monopsony).

⁹ *American Needle, Inc. v. National Football League*, 560 U.S. 183, 195 (2010) (quotation marks, citations, and modifications omitted).

¹⁰ *Id.* (quotation marks and modifications omitted).

Although there are certain best practices for guarding the process of standard setting against such abuses, we are concerned that some standard-setting organizations may not even attempt to adopt these safeguards.

ANSI, the American National Standards Institute, publishes a set of essential requirements for due process. These safeguards are ANSI's view of what "the minimum acceptable" requirements are to ensure that every person or organization with a "direct and material" interest in the outcome of a standard has a right to participate in the development of that standard.¹¹

The principles include openness to all interested parties, a balance of interests, a lack of dominance, the adoption of written procedures, and a formalized and impartial appeals process.¹² Although these due process requirements may not eliminate the opportunity for anticompetitive behavior within a standard-setting organization, they certainly reduce it.

These safeguards additionally ensure a more efficient investigation by antitrust enforcers when we have reason to suspect that the standard-setting activity may have drifted from a procompetitive purpose. Where the procedures are written and published, the interests are well-balanced, and the losing side can appeal, a standard-setting organization is very likely to have a good record of anything of concern. This benefits both the enforcers and the participants, who certainly have an interest in predictability and that any antitrust concern is resolved quickly and with minimal resources.

¹¹ American National Standards Institute, *ANSI Essential Requirements: Due process requirements for American National Standards* (Jan. 2018 ed.), available at <https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures%2C%20Guides%2C%20and%20Forms/ANSI-Essential-Requirements-2018.pdf>.

¹² *Id.*

When a group of competitors fails to adopt due process safeguards before engaging in an activity they call standard setting, they run a high risk that the mission will creep away from procompetitive purposes and, even worse, will go unnoticed internally as the sort of problematic collusive behavior that it is. As the Supreme Court warned in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, “a standard-setting organization like ASME can be rife with opportunities for anticompetitive activity” especially when “some [of the members] may well view their positions with ASME, at least in part, as an opportunity to benefit their employers.”¹³

Hydrolevel, moreover, gives standard-setting organizations an added reason to want to adopt policies designed to prevent anticompetitive activities by their members—those organizations can be held liable for acts taken by members with mere apparent authority from the organizations.

Calling your meetings a standard-setting organization, or even in fact publishing some standards necessary for interoperability, is not a free pass for coordination designed to reduce common competitive threats or forestalling innovative developments in the industry that put a legacy business model at risk.

The Supreme Court case *Allied Tube* showcases the principles I have been discussing.¹⁴ In that case, the standard-setting organization at issue was the National Fire Protection Association. The National Electric Code promulgated by that organization established fire safety standards for electrical wiring and was widely adopted, including by many state and local governments as code.

¹³ 456 U.S. 556, 571 (1982).

¹⁴ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

One of the specifications in the code called for the tubing around wiring to be made of steel. The plaintiff in the case wanted to offer a new, disruptive product: tubing made of PVC. This product was superior to steel in some respects, including that it cost less to install; but the legacy steel interests claimed it wasn't as safe.

Instead of letting the debate play out fairly among the safety-minded members of the organization, the nation's largest producer of steel tubing, Allied Tube, met with other interested members of the steel industry and agreed to prevent the PVC option from gaining approval. It agreed to pack the annual meeting with new Association members whose only function would be to vote against the new disruptive technology and it admitted that it had a pecuniary interest to do so.

The question before the Supreme Court was whether the standard's inclusion in government codes put the standard-setting activity outside the reach of antitrust law. The Court held the answer was no, but also took the opportunity to speak more broadly about how private standard setting can eliminate competition in violation of the antitrust laws.

It first acknowledged an ever-present risk: "There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." It warned that such incentives might result in "depriv[ing] some customers of a desired product," "eliminat[ing] quality competition," or "exclud[ing] rival producers" unless there are safeguards designed to protect "objective expert judgements" and "prevent the standard-setting process from being biased by members with economic interests in stifling product competition."¹⁵

¹⁵ *Id.* at 501.

When competitors meet and agree on a measure they call a standard, and the measure persuades or coerces economic actors to abandon versions of the product that consumers might want, then antitrust law demands there be some need for the standard to solve a problem subject to expert judgment, like safety or interoperability.¹⁶

III. SSO Patent Policies and the Incentives for Innovation

Thus far, I have been focusing on the processes by which SSOs select a specific standard or certify a particular product, but we at the Antitrust Division also are looking more broadly at how SSOs adopt and implement their patent policies. Those are the policies that govern how participants in SSOs are expected to license their patents, and they can materially affect the rights of both patent holders and patent implementers.

Patent policies affect the incentives for innovation. If an SSO's policy is too restrictive for one side or the other, it also risks deterring participation in procompetitive standard setting.

Just as competition in the marketplace results in better outcomes for the consumers of goods and services, competition among standard-setting organizations to adopt better patent policies can result in better outcomes for the consumers of standard-setting activities (that is, for the participants themselves).

It is for this reason that we will take a dim view of any coordinated effort by competitors to stifle competition among standard-setting organizations, including competition to offer the patent policy that brings the most participants to the table. For instance, competitors would

¹⁶ Cf. *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1335 (Fed. Cir. 2010) (“procompetitive effects” include “greater product interoperability,” generating “network effects,” and building “incentives to innovate”).

come under scrutiny if they orchestrated a group boycott of an SSO with a patent policy that is unfavorable to their commercial interests.

Recently, ANSI has been considering how SSOs with different patent policies can achieve the due process goal of transparency. ANSI recommends that patent holders who contribute technology to a standard declare, through a letter of assurance, whether and on what terms they will license the technology. ANSI is currently considering publishing a Sample Patent Letter of Assurance form that standard-setting organizations could use if they want assurance that they comply with ANSI's essential requirements.

We at the Antitrust Division have been in communication with ANSI on this proposal to ensure ANSI's efforts do not stifle competition among the standard-setting organizations.

Although the Antitrust Division takes no position on whether ANSI should issue a model LOA form, we have encouraged ANSI to be mindful that a model form is an opportunity for interested parties to lobby for a default rule and stifle competition among different approaches. If standard-setting organizations are likely to adopt the model without adaptation, then any "check the box" options on the form could affect the rights of patent holders and implementers.

We have therefore encouraged ANSI to foster independent decision-making by communicating clearly that any model form does not foreclose individual organizations from using their own patent policies and their own LOA forms, as long as the approach is consistent with ANSI's due process requirements. For instance, ANSI's due process requirements allow patent holders to disclose additional information about the terms they are willing to offer, not encompassed by "check the box" options. If organizations are encouraged to compete on the

best approach to patent policies, they will be more likely to achieve the procompetitive benefits of standard setting.

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In conclusion, the Antitrust Division is committed to enforcing the antitrust laws for the benefit of fostering innovation. With care, we can prevent unbridled opportunists from stifling that entrepreneurial spirit that Dire Straits sang about in Telegraph Road.

I believe our job is to serve American consumers by ensuring that fledgling ideas can become tomorrow's life-changing or life-saving technologies. With that principle in mind, we are committed to ensuring that patent holders maintain their full constitutional right to seek an injunction against infringement, and that standard-setting organizations do not facilitate collusion of the sort that undermines innovative new technologies.

Thank you once again for inviting me here to address the common ground between antitrust and patent law; and thank you for all you do in the field of patent law to promote incentives for innovation and competition on the merits.