DEPARTMENT OF JUSTICE

Ensuring the Proper Application of Antitrust Law to Standards Development

Alexander Okuliar
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for Delivery
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Thank you for inviting me to speak at this meeting of the Intellectual Property Rights Policy Advisory Group and for that kind introduction.[1] I am happy to address the role of antitrust law in standards development. Today, I would like to focus on some key accomplishments of the Antitrust Division over the last year as they relate to antitrust law, intellectual property, and standards, as well address the importance of openness, balance, and transparency in standards development.

But first I would like to talk a little bit about history, which I think will illustrate the importance of principles like balance and consensus in any type of collaborative process. I will start back in the summer of 1787 at the Constitutional Convention. In that moment, delegates gathered in Philadelphia to amend the Articles of Confederation. They came from big states and small ones, Northern States and Southern ones. They agreed about very little, including what they needed to change about the Articles or how. But, as Thomas Jefferson later said, they had assembled wise men rather than armies to have this debate.[2]

Their first task was to agree on the rules of the convention. In a preview of what was to come, larger states like Pennsylvania insisted that they should not vote on equal footing with smaller states like Delaware.[3] James Madison pushed for and obtained a procedure by which proposals would be voted on by states as a whole, represented by their delegates, with each state, big or small, having one vote.

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[1] My thanks to Jennifer Dixton, Special Counsel for Policy & Intellectual Property, and Eric Dunn, Attorney Advisor, of the Antitrust Division for their tremendous assistance in preparing these remarks.

[2] Nat'l Archives, *From Thomas Jefferson to David Humphreys, 18 March 1789*, Founders Online, https://founders.archives.gov/documents/Jefferson/01-14-02-0422 (last visited May 22, 2020).

[3] Avalon Project at Yale L. Sch., Contents of the *Madison Debates* on May 28, 1787, Lillian Goldman L. Library, https://avalon.law.yale.edu/18th_century/debates_528.asp (last visited May 22, 2020).

His aim was a process that demanded consensus; big states could not dictate terms to small ones, Northern states would need support from their Southern counterparts. In doing so, Madison also achieved balance. He understood that, in his words, small states would not "throw themselves on the mercy of the large States," and so he pushed for rules that would encourage small states to participate in the convention.[4] This meant that the consensus achieved in Philadelphia would be meaningful. It could (and did) win support in New York, in Maryland, and across the rest of the fledgling country.

The election of George Washington to oversee the convention followed the same pattern. The delegates recognized that Washington had the unique power to forge consensus and maintain a balanced discourse between different factions. And he did exactly that.

There are many lessons we can learn from the summer of 1787. For example, a system with separated powers, with ambition "made to counteract ambition," is the most secure form of government.[5] But I want to suggest that another key lesson is that rules should be adopted through a balanced process aimed at achieving consensus. The Constitutional Convention was not perfectly balanced, of course, nor did it achieve perfect consensus, but it was mindful of these goals. Indeed, a key principle that the convention incorporated into the Constitution is the idea of "checks and balances" to ensure that a narrow faction cannot control the direction of an entity, such as the federal government, that should aim to advance common interests. Indeed, we strive for balanced decision making in many aspects of governance and other aspects of our lives.

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[4] *Id.*

[5] The Federalist No. 51 (James Madison), available at https://avalon.law.yale.edu/18th_century/fed51.asp.

Of course, these principles are familiar to those assembled here. Most standards developed and used in the United States are voluntary, consensus-based standards created through private sector leadership, and many are ANSI-accredited.[6] We understand that ANSI's Essentiality Requirements or due process considerations call for standards development organizations to adhere to principles that 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.[7] Similarly, the Office of Management and Budget Circular A-119, providing guidance on government engagement in the development of voluntary consensus standards, says that standards development should include the attributes of "openness," "balance" and "due process."[8] From an antitrust perspective, these requirements are central. As the Supreme Court explained in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, when private associations promulgate standards "through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages."[9] In contrast, when the standards development process is stacked in favor of or against a particular group, or the process is manipulated in a way to gain competitive advantage over rivals, antitrust concerns arise.[10] I will

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[6] Off. of Mgmt. and Budget, Revision of OMB Circular No. A-119, "Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities," 81 Fed. Reg. 4673 (Jan. 27, 2016), https://www.nist.gov/document/revisedcircularа-119asof01-22-2016pdf [hereinafter OMB Cir. A-119].

[7] Am. Nat'l Standards Inst., *ANSI Essentiality Requirements* 4-10 (Jan. 2020), https://share.ansi.org/Shared%20Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2020_ANSI_Essential_Requirements.pdf [hereinafter ANSI].

[8] *See* OMB Cir. A-119, *supra* note 6, § 2.e.

[9] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988) (internal citation omitted).

[10] *See Allied Tube*, 486 U.S. at 509-11.

return to this topic in a moment, but first let me provide some background on the Division's recent work that relates to intellectual property and standards.

Going back to lessons learned from history, the Antitrust Division, under Assistant Attorney General Delrahim, developed the "New Madison" approach for analyzing issues at the intersection of antitrust and intellectual property. This approach is based on the understanding that intellectual property rights are drivers of innovation—a position originally advocated by James Madison, who as I mentioned earlier, was a key participant in the Constitutional Convention, and indeed, the principal architect of the U.S. Constitution.[11] The New Madison approach is based on a deep respect for intellectual property rights as drivers of innovation and dynamic competition. The right to exclude is one of the most fundamental bargaining rights a property owner possesses, and unnecessary restrictions on this right can undermine innovation and dynamic competition. Pursuant to this view, the Division believes a patent holder cannot violate the antitrust laws by properly exercising the rights patents confer, such as seeking an injunction or unilaterally choosing not to license a patent. Moreover, the Antitrust Division believes that reliance on antitrust law, rather than contract or patent law remedies, to resolve licensing disputes between standard-essential patent holders and implementers of a standard is inefficient, can lead to bad results, and threatens to disrupt innovation incentives. Therefore, through the Antitrust Division's active amicus program, we have urged courts to be mindful of

[11] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't Justice, The "New Madison" Approach to Antitrust and Intellectual Property Law, Keynote Address at University of Pennsylvania Law School (Mar. 16, 2018), https://www.justice.gov/opa/speech/file/1044316/download [hereinafter Delrahim, New Madison].

the proper application of antitrust law to transactions and other activity involving intellectual property, particularly in the standards-development context.

Amicus Participation

A good example of this advocacy is our recent Statement of Interest in *Continental v. Avanci*,[12] filed this past February. For those not familiar with the case, Continental, an automotive supplier, has alleged, among other claims, that certain defendants that hold standards-essential patents relevant to cellular connectivity in cars violated Section 2 of the Sherman Act (which prohibits unlawful monopolization or monopoly maintenance), by charging "inflated and non-FRAND royalty rates."[13] The Division filed the Statement to explain that an antitrust cause of action premised solely on the refusal to abide by a commitment to license on fair, reasonable and non-discriminatory terms would be inconsistent with U.S. antitrust law. This is because antitrust law does not prevent maximizing prices or charging allegedly "high" prices in isolation, but rather it focuses on whether conduct by a patent holder harmed competition. In our view, alleged breaches of contractual FRAND commitments, by charging what some perceive to be high licensing rates, do not sound in antitrust law. We believe that "[r]ecognizing such claims . . . inappropriately would turn breach of contract claims into a basis for antitrust liability despite an absence of harm to competition."[14] The Division also explains that the standards development process itself is a form of competition that should be recognized. As the Division noted in its Statement, the "reduction in consumer choice that occurs when a

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[12] Statement of Interest of the United States, *Continental Auto. Sys., Inc. v. Avanci, LLC*, No. 3:19-CV-02933-M (N.D. Tex. Feb. 27, 2020) [hereinafter Continental Brief].

[13] Compl. at ¶ 8, *Continental Auto. Sys., Inc. v. Avanci, LLC*, No. 3:19-CV-02933-S (N.D. Cal. May 10, 2019). The Antitrust Division's brief did not address the Section 1 claims at issue.

[14] Continental Brief, *supra* note 12, at 8.

winning technology is selected for inclusion in a standard can be offset by the standard's many procompetitive benefits, including enhanced interoperability of products and services and follow-on innovation. Standardization sacrifices marketplace competition in favor of these benefits, achieved through an *ex ante* process in which rival technologies compete for inclusion in the standard. It shifts the timing and dimensions of competition; it does not eliminate competition. It would therefore be improper to infer harm to the competitive process from the lack of competitive constraints *ex post*, at the time of individual purchasing decisions."[15] The statement further explained that Continental's allegations that patent holders engaged in "deception" during the standard-development process do not meet the thresholds established under the DC Circuit's analysis in *Rambus*.[16] We base this view in large part on the ground that generalized commitments to license at a "fair" and "reasonable" rate are too indefinite to be capable of being misrepresented in a way that can materially harm the competitive process. For instance, if the SSO would have adopted the same standard anyway, then a harm to competition is very difficult to see, particularly in light of the Supreme Court's understanding in *NYNEX* that deceit is not anticompetitive if it impacts only prices solely through a mechanism other than harm to competitive structure.[17]

The Division also recently filed a Statement of Interest in *Intel v. Fortress*, in which Intel and Apple filed suit against several patent holders and Fortress, an investment management firm.[18] Fortress maintains a large portfolio of patents that it had acquired from other patent

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[15] *Id.* at 12.

[16] *Id.* at 15.

[17] *See id.* at 10, 17-18.

[18] Statement of Interest of the United States, *Intel Corp. v. Fortress Inv. Grp.*, No. 3:19-cv-07651-EMC (N.D. Cal. Mar. 20, 2020).

holders seeking to monetize their innovation. Apple and Intel alleged that this acquisition and subsequent enforcement violated the antitrust laws (under Section 1 of the Sherman Act and Section 7 of the Clayton Act). The Antitrust Division's brief took the opportunity to explain how we analyze technology markets, that is, markets involving patents, in assessing whether an acquisition violates the antitrust law. We define technology markets in much the same way as we define product markets—applying concepts like interchangeability and the hypothetical monopolist test.[19] Using that framework, we argued that Apple and Intel's proposed market—essentially all patents relating to electronics—was overbroad. As in our *Continental* Statement of Interest, we also emphasized the importance of identifying harm *to competition* in an antitrust claim. We stated that aggregating substitute, competing patents might reduce competition, just like eliminating competing companies from the marketplace, but Apple and Intel did not identify any patents owned by Fortress that competed with each other. Finally, the Division also made important points about the *Noerr-Pennington* doctrine, which protects a patent holder from antitrust liability when it legitimately enforces its existing intellectual property rights through litigation, but does not protect a patent acquirer from liability for an anticompetitive patent acquisition, even if the patent is later enforced through litigation.[20]

The Antitrust Division is aware that patent valuation is an important issue for patent holders and implementers of standards-essential patents. Patent valuation also affects innovation incentives and dynamic competition, so it is an important issue for our economy and consumers

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[19] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 3.2.2 (Jan. 12, 2017), https://www.justice.gov/atr/IPguidelines/download; U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.1.1 (Aug. 19, 2010), https://www.justice.gov/atr/file/810276/download.

[20] *See also* Brief for the United States & Fed. Trade Comm'n as Amici Curiae in Support of Neither Party, *Intellectual Ventures I LLC v. Capital One Fin. Corp.*, 943 F.3d 1383 (Fed. Cir. 2019) (No. 18-1367).

as well. Fortunately, the Division was able to weigh in on this issue along with the U.S. Patent and Trademark Office in *HTC v. Ericsson*.[21] Our brief emphasized that parties must be given sufficient flexibility to negotiate a FRAND license. Our brief (filed in support of neither party) urged the Court of Appeals for the Fifth Circuit not to adopt a rigid component-based licensing rule that would diminish that flexibility and potentially harm competition or innovation. We explained that market-based evidence, such as prior comparable licenses, is sometimes the best evidence of a patent's value. For this reason, we explained, "[t]here is no requirement under contract or patent law requiring any particular royalty structure or valuation methodology for SEPs," and particularly no requirement that licenses be tied to a component.[22] Going back to the importance of balance, which I talked about before in a related topic, the agencies also observed that "the rights of both SEP holders and implementers of standards must be balanced" and recognized that "[i]ncorrect interpretations of patent laws and related doctrines . . . may result in SEP holders receiving lower revenue streams for their inventions or implementers paying too much for the use of a patented technology . . . ."[23]

The final piece of advocacy I would like address is *FTC v. Qualcomm*. First, I would like to acknowledge that it is unusual for the Antitrust Division to be on the opposite side of an issue from our colleagues at the FTC; much more typically we are working side by side to protect competition and American consumers. But the *Qualcomm* case is unique. The complaint advanced a novel theory involving Qualcomm's refusal to license component makers and

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[21] Brief for the United States as Amicus Curiae in Support of Neither Party, *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, No. 19-40566 (5th Cir. Oct. 30, 2019).

[22] *Id.* at 16-17.

[23] *Id.* at 2.

Qualcomm's other SEP licensing practices. The FTC had filed the case following a divided 2-1 Commission vote on January 17, 2017 and the FTC's current Chairman has been recused from the case.[24]

It was important for the Antitrust Division to intervene for two reasons. First, the Antitrust Division's filings have explained that the United States has a strong interest in the correct application of the antitrust law to intellectual property rights and that several aspects of the district court's decision, including the court's analysis of Qualcomm's refusal to deal in patented technologies, and its premising liability on the charging of "unreasonably high" prices, improperly applied antitrust law, and disserved competition and innovation.[25]

Second, as elaborated in affidavits filed in the Ninth Circuit by officials at both the Department of Defense and Department of Energy, the U.S. government is concerned that the district court's expansive global remedy (requiring the compulsory licensing of Qualcomm's patents) could diminish Qualcomm's competitiveness in emerging 5G technologies and impair national security.[26] The district court did not hold an evidentiary hearing on a remedy before imposing one, and thus it did not consider these important aspects of the public interest in fashioning equitable relief. As the Department of Justice, our job is to represent the interests of the Executive Branch as a whole. Our briefs explained that in imposing an overly broad remedy,

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[24] *See* Cmm'r Christine Wilson, *A Court's Dangerous Antitrust Overreach*, Wall Street Journal (May 28, 2019), https://www.wsj.com/articles/a-courts-dangerous-antitrust-overreach-11559085055.

[25] Statement of Interest of the United States, *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 17-CV-00220-LHK (N.D. Cal. May 2, 2019); United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal, *FTC v. Qualcomm*, No. 19-16122 (9th Cir. July 16, 2019); Brief of the United States as Amicus Curiae in Support of Appellant and Vacatur, *Fed. Trade Comm'n v. Qualcomm Inc.*, No. 19-16122 (9th Cir. Aug. 30, 2019).

[26] United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal at 12-13, *supra* note 25; Brief of the United States as Amicus Curiae in Support of Appellant and Vacatur at 3, *supra* note 25.

the district court's decision threatened to harm innovation and national security. The Department participated in oral argument to convey these significant concerns. We did not argue that a company should be shielded from any financial consequences when other significant policy concerns are at play; we argued instead that, when a narrower remedy—which does less harm to other important public policies than a broader one—is available to address a harm to competition, the district court should choose the narrower remedy. Oral argument was held in February and the appeal is currently pending.

Joint Policy Statement on Remedies

In addition to our amicus program, the Division has engaged in other competition advocacy related to standards essential patents as well. In December of last year, the Antitrust Division, the USPTO, and the National Institute of Standards and Technology issued a Joint Policy Statement on remedies for standards-essential patents that are subject to a FRAND or a RAND commitment. It clarifies that a patent owner's promise to license a patent on F/RAND terms should not be a bar to obtaining any particular remedy, including injunctive relief. Consistent with Federal Circuit caselaw, the agencies made clear that no "special set of legal rules" applies to SEPs.[27]

The Statement was an effort by DOJ, PTO, and NIST (the relevant executive branch agencies) to articulate a policy position on these issues. As you may be aware, in December 2018, the Division withdrew DOJ support for the 2013 Joint DOJ-PTO Policy Statement on SEP

[27] U.S. Dep't of Justice, U.S. Pat. & Trademark Off., and Nat'l Inst. of Sci. & Tech., Joint Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments, at 6 (Dec. 19, 2019), https://www.justice.gov/atr/page/file/1228016/download; *see also Apple Inc. v. Motorola, Inc*., 757 F.3d 1286, 1331-1332 (Fed. Cir. 2014), *overruled on other grounds by Williamson v. Citrix Online, LLC*, 792 F.3d 1339 (Fed. Cir. 2015) (en banc).

remedies because it had been misinterpreted to suggest that a special set of legal rules applied to SEPs and that certain remedies (injunctions or exclusionary remedies) would, on balance, harm competition. After the withdrawal, the agencies heard from a number of external constituencies, outside groups, and academics about this issue. Some supported the withdrawal and others supported the 2013 Statement. All of the input was helpful.

One of the agencies' principal goals was to eliminate confusion as to how the U.S. views injunctive relief for SEP holders. It was important for the agencies—DOJ, PTO, and NIST—collectively to send a clear message on the scope of remedies available to them under U.S. law. Intellectual property issues have a significant impact on international commerce, where other agencies and enforcers can benefit from the U.S. speaking with a clear voice. Under Article II of the Constitution, the executive branch speaks with that voice on matters involving foreign affairs; standard essential patent policy is one of those areas. The Department intends to continue to work in partnership with the USPTO, NIST, and other Executive Branch agencies to ensure that Executive Branch policies that affect SEPs are indeed balanced, clear, and provide appropriate incentives for competition and innovation.

Enforcement

Now I would like to return to the topic of due process safeguards in standards development to highlight a recent enforcement action that demonstrates why these principles are important in ensuring that collective action by patent holders and standards implementers does

not harm competition.[28] In many contexts, a collaborative, consensus-based standard-development process that is open and balanced can produce substantial benefits, like improving product interoperability or health and safety. Therefore, consumer welfare improves even if competition to adopt a standard after the fact decreases when one standard or technology is chosen over several other ones. Nevertheless, joint conduct should not be aimed at manipulating the standards development process to exclude competitors, or at depressing or increasing licensing rates.

On the first topic, in November 2019, the Department issued a business review to the GSM Association (GSMA), a trade association for mobile network operators. After a two-year investigation, the Department determined that the GSMA used its industry influence to steer the design of eSIMs technology in mobile devices by excluding some stakeholders from the process. In response to the Department's investigation, the GSMA drafted new standard-development procedures that will incorporate more input from non-operator members of the mobile communications industry. Our review explained that maintaining a balance of interests in the standard-development process is a critical safeguard that helps to prevent competition concerns from arising in the standard-development process. Our letter stated that "[s]tandard setters are not allowed to create and leverage unbalanced processes to adopt favorable self-regulation that constitute a competitive advantage for the incumbent participants, to the detriment of consumer choice."[29] It is also pointed that "without balancing interests of different members there is little

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[28] Letter from Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, to Timothy Cornell, Esq., Clifford Chance US LLP, at 9 (Nov. 27, 2019), https://www.justice.gov/atr/page/file/1221321/download (stating that "it is imperative" that the standards development process "is designed with due process safeguards that promote competition on the merits during the process of setting the standard.")

[29] *Id.*

value in a group having openness, due process, or an appeals process, as there would be no diversity of opinion that would leverage such principles into reaching consensus."[30]

The improvements to GSMA's process are a positive outcome for consumers. As we explained in our letter "due process safeguards can prevent 'mission creep' that unnecessarily restricts consumer choices."[31] The changes may also promote dynamic competition and innovation. GSMA's new standard-development process will no longer allow mobile network operators to use the GSMA standard as a way to avoid new forms of disruptive competition in eSIMs.[32]

The GSMA matter illustrates the importance of due process safeguards. ANSI, through its Essentiality Requirements, requires accredited SDOs to implement these safeguards and they provide 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, and as mentioned, the process must include a balance of interests, a lack of dominance, a consensus vote and an appeals process.[33] Such safeguards are also required to mitigate the risk of antitrust liability under the Standards Development Organization Advancement Act ("SDOAA") should an antitrust problem occur.[34] The SDOAA provides for rule of reason treatment of a "standards development organization while engaged in a standards development activity" and limited

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[30] *Id.* at 9 n.20.
[31] *Id.* at 9.
[32] *Id.* at 9 n.20.
[33] ANSI, *supra* note 7, § 1.0.
[34] 15 U.S.C. § 4301(a)(8).

recovery in antitrust suits[35] based on "standards development activity engaged in by a standards development organization."[36] To benefit from these provisions, however, organizations must adhere to the principles of "openness," "balance of interest," "due process," an "appeals process" and "consensus".[37]

Indeed, the Antitrust Division's Statement of Interest in *NSS Labs* discussed the importance of these criteria and how they affect the SDOAA's guarantee of rule of reason treatment.[38] In *NSS Labs*, the plaintiff alleged that the Anti-Malware Testing Standards Organization's ("AMTSO") conduct related to developing an industry standard should be subject to *per se* scrutiny under Section 1. In response, AMTSO insisted that it was immune from *per se* treatment based on the SDOAA. The Division argued, however, that whether AMTSO could benefit from the SDOAA depended on whether its "standards development process" satisfied the criteria discussed above, *e.g.*, whether it "incorporate[d] the 'balance of interests' required by the SDOAA."[39] AAG Delrahim has separately pointed out that having due process safeguards "ensure a more efficient investigation by antitrust enforcers when we have reason to suspect that

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[35] To benefit from the detrebling provision parties must publish a notice in the Federal Register, which is reviewed by the government. 15 U.S.C. § 4305(a)(2).

[36] *See* 15 U.S.C. §§ 4302(2), 4303(a). Standards development activity includes "developing, promulgating, revising, amending, reissuing, interpreting, or otherwise maintaining a voluntary consensus standard, or using such standard in conformity assessment activities, including actions relating to the intellectual property policies of the standards development organization." 15 U.S.C. § 4301(a)(7). The SDOAA amended the National Cooperative Research and Production Act of 1993 (NCRPA), which provided similar treatment to joint research ventures.

[37] The SDOAA cites the OMB Cir. A-119 as revised February 10, 1998. OMB Cir. A-119 was subsequently revised in 2016 and further defined the foundational principles of "openness," "balance of representation," and "consensus." OMB Cir. A-119, *supra* note 6, § 2.e.

[38] Statement of Interest for the United States, *NSS Labs, Inc. v. Crowdstrike, Inc.*, No 5:18-cv-05711-BLF (June 26, 2019), https://www.justice.gov/atr/case-document/file/1178246/download.

[39] *Id.* at 1–2 (citing OMB Cir. A-119, *supra* note 6).

the standard-setting activity may have drifted from a procompetitive purpose."[40] He explained that "[w]here 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 [antitrust] concern."[41]

The principles of openness and balance of interests should extend to intellectual property policy development. In the Department's view, "[i]f an SSO's [intellectual property rights] policy is too restrictive for one side or the other, it also risks deterring participation in procompetitive standard setting."[42] More participation from industry stakeholders is likely to lead to better technical solutions. Consequently, the Division has urged ANSI itself to have balanced representation in its decisional bodies that are charged with implementing and revising ANSI's Patent Policy, so that diverse interests are represented, and so that their decisions do not shift bargaining leverage in favor of one set of economic interests, including the interests of either implementers or patent holders. The Division also encouraged ANSI to promote flexibility among standards development organizations to experiment and compete with one another on their policies.[43]

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[40] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law, Remarks as Prepared for the 19th Annual Berkeley-Stanford Advanced Patent Law Institute, at 9 (Dec. 7, 2018), https://www.justice.gov/opa/speech/file/1117686/download.

[41] *Id.*

[42] *Id.* at 12.

[43] *See* Letter from Andrew Finch, Principal Deputy Assistant Att'y General, Antitrust Div., to Patricia Griffin, Vice President and Gen. Counsel, Am. Nat'l Standards Inst. (Oct. 11, 2018), https://www.justice.gov/atr/page/file/1100611/download; Letter from Andrew Finch, Principal Deputy Assistant Att'y General, Antitrust Div., to Patricia Griffin, Vice President and Gen. Counsel, Am. Nat'l Standards Inst. (March 7, 2018), https://www.justice.gov/atr/page/file/1043456/download.

Our view is consistent with OMB Circular A-119, which provides that "in order to qualify as a 'voluntary consensus standard' . . . a standard that includes patented technology needs to be governed by [intellectual property rights] policies, which should be easily accessible, set out clear rules governing the disclosure and licensing of the relevant intellectual property*, and take into account the interests of all stakeholders, including the IPR holders and those seeking to implement the standard*."[44] It is also consistent with the SDOAA, which mitigates antitrust liability for "standards development activity," that includes "actions relating to the intellectual property policies of the standards development organization" when this activity is conducted in accordance with due process safeguards. [45]

Significantly, the House Judiciary Committee Report on the SDOAA recognized that intellectual property policies "are vitally important to ensuring a level playing field among all users of a standard that incorporates patented technology."[46] Further, it explains that the SDOAA was meant to "encourage[] discussion among intellectual property owners and other interested standards participants regarding the terms under which relevant intellectual property . . . would be made available for use in conjunction with the standard or proposed standard."[47] This all suggests that intellectual property rights policies are integral to developing procompetitive standards and their development must include principles of openness and balance.

Finally, I note that the United States is also committed to ensuring that standards development does not create barriers to international trade, consistent with our treaty obligations.

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[44] 2016 OMB Circular, *supra* note 6, § 2.d (emphasis added).
[45] 15 U.S.C. § 4301(a)(7).
[46] H.R. Rep. No. 108-125, pt. 1, at 9.
[47] *Id.* at 10.

Ensuring that the entire process of developing standards, including developing the intellectual property policies related to standards, remains balanced, open, and consensus-driven is a critical safeguard against standards development advantaging a particular country, region, or interest group.[48]

Conclusion

In conclusion, I want to thank you again for inviting me to speak today. I hope I have given you a high-level overview of both the Antitrust Division's views on intellectual property and standards development as well as some of our recent work in this area.

[48] Agreement on Technical Barriers to Trade, art. 15.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 120; World Trade Organization, Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 January 1995, at 6, WTO Doc. G/TBT/1/Rev.14 (Sept. 24, 2019).