

THE INTELLECTUAL
PROPERTY AND
ANTITRUST
REVIEW

SIXTH EDITION

Editor
Thomas Vinje

THE LAWREVIEWS

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Editor
Thomas Vinje

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PREFACE

Intellectual property is taking a more and more central position in the global economy, and this is true not only in highly developed economies, but also in emerging ones. China and India, to take just two examples, are moving rapidly up the value chain and now have world-class technology companies for which intellectual property protection is crucial.

As the significance of intellectual property grows, so too does the relationship between intellectual property and antitrust law. Antitrust law constrains the exercise of intellectual property rights in certain circumstances, and both owners and users of intellectual property rights need to know how the two bodies of law interact and where antitrust draws lines for intellectual property. Intellectual property practitioners need to look beyond intellectual property laws themselves to understand the antitrust limits on the free exercise of rights.

The task of this book is, with respect to key jurisdictions globally, to provide an annual concrete and practical overview of developments on the relationship between antitrust and intellectual property. This sixth edition provides an update on recent developments, as well as an overview of the overall existing lay of the land regarding the relationship between the two bodies of law.

Key topics covered in this and future editions include the constraints imposed by antitrust on licensing, the circumstances under which a refusal to license intellectual property rights can be unlawful, the imposition of antitrust obligations on owners of standard-essential patents, the application of antitrust law to cross-border e-commerce, the growing importance of intellectual property issues in merger cases and the intense disputes regarding the application of antitrust law to patent settlements in the pharmaceutical industry.

As intellectual property continues to gain importance in the world economy, and as the number, resources and sophistication of antitrust authorities grows across the globe, new battles will be fought over the circumstances in which antitrust constrains intellectual property. Existing differences in the application of antitrust to intellectual property – already significant, and perhaps even greater than in intellectual property laws themselves – may grow, perhaps especially as more net intellectual property-consuming countries devote resources to antitrust enforcement. Future editions of this book will analyse these developments, and we hope the reader will find this to be a useful compilation and oft-consulted guide.

Finally, I would like to thank my team at Clifford Chance for their important contributions to this sixth edition of *The Intellectual Property and Antitrust Review*.

Thomas Vinje
Clifford Chance LLP
Brussels
June 2021

UNITED STATES

*Susannah P Torpey and Aldo A Badini*¹

I INTRODUCTION

In the United States, 2020 was an extraordinary year with respect to the intersection of antitrust and intellectual property (IP), and 2021 may likewise bring significant developments. The Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) (together, the Agencies) both have responsibility for enforcing the federal antitrust laws.² Last year, the DOJ took the highly unusual step of filing statements of interest in the FTC's *Qualcomm* litigation for the express purpose of disagreeing with the FTC's positions and district court victory prior to Qualcomm obtaining a reversal on appeal. The disagreement between the Agencies focused on whether breaches of fair, reasonable, and non-discriminatory (FRAND) licensing obligations state antitrust claims or merely breaches of contract law.

Under the leadership of Makan Delrahim, the Antitrust Division pursued what he described as the 'New Madison' approach to the application of antitrust law to intellectual property rights that was aimed at ensuring patent holders have adequate incentives to innovate.³

- 1 Susannah P Torpey and Aldo A Badini are litigation partners and co-chairs of Winston & Strawn LLP's technology antitrust group. The authors would like to thank Winston & Strawn associates Garrett Windle, Brittany Liesman and Adam Joseph Smith for their assistance in drafting this chapter.
- 2 See, e.g., FTC Guide to Antitrust Laws, The Enforcers, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers>. Given the DOJ's prosecutorial focus on per se unlawful claims and unique authority to bring criminal cases, as well as the FTC's focus on areas frequently intersecting with IP rights, such as pharmaceuticals, the FTC has traditionally been the agency that most frequently pursues litigation in this area. In the United States, private litigation in this area by either competitors and/or consumers is also common.
- 3 Statement of Interest of the United States at 3, *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, No. 19-02933 (N.D. Tex.), available at <https://www.justice.gov/atr/case-document/file/1253361/download> (patent and antitrust laws could be complementary by seeking 'to achieve the same goal of protecting and promoting the reinforcing cycle of competition and innovation, which generates dynamic competition in the marketplace and ultimately allows consumers to reap the rewards of new products'); see also Don't Stop Thinking About Tomorrow: Promoting Innovation by Ensuring Market-Based Application of Antitrust to Intellectual Property, Assistant Attorney General Makan Delrahim Delivers Remarks at the Organisation for Economic Co-Operation and Development In Paris, 6 June, 2019, available at <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-organisation-economic-co>; Antitrust Law and Patent Licensing in the New Wild West, Makan Delrahim, Assistant Attorney General, Antitrust Division, US Department of Justice Delivers Remarks at IAM's Patent Licensing Conference in San Francisco, 18 September 2018, available at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-iam-s-patent-licensing; The 'New Madison' Approach to Antitrust and Intellectual Property Law, Makan Delrahim Delivers Keynote Address at University of Pennsylvania Law School, 16 March 2018, available at www.justice.gov/opa/speech/assistant-attorney-general-makan

Central to this approach is the view that antitrust law had been improperly expanded to curb power conferred by patents in favour of implementers who seek licences to practise patented technologies.⁴ Marking the shift in policy, the DOJ withdrew assent in 2018 to the 2013 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments issued jointly with the US Patent and Trademark Office (PTO). In doing so, Delrahim voiced concern that participants in standard-setting organisations could cloak anticompetitive conduct behind IP policies that purport to increase competition.⁵ In 2020, the DOJ further took the ‘extraordinary step’ of updating a prior business review letter to stress that injunctive relief is available under US law for patents encumbered with FRAND commitments; the smallest saleable patent practising unit is not the only appropriate base for determining a reasonable royalty; and there is a risk of anticompetitive effects from ‘hold out’ by implementers as well as from ‘hold up’ by patentees.⁶

With the end of the Trump administration, leadership at both the DOJ and FTC is changing hands. Although President Biden has not yet selected someone to lead the Antitrust Division, a significant shift may be on the horizon for antitrust-IP policy. A few months after Delrahim stepped down, the 2020 IEEE business review letter update was quietly moved from the business review section of the DOJ’s website to its advocacy section. While acting Assistant Attorney General Richard A Powers stated that the move signified ‘a return to previous practice that is consistent with existing department regulations’, some suspect the move may signal a more significant departure to come from the Trump administration’s approach to antitrust-IP intersection issues.⁷

While new administration policy may be in flux, the general antitrust framework in which antitrust-IP intersection issues are analysed in the United States is not. Standard-setting and licensing activities are typically considered to be pro-competitive in the United States, but are not exempt from federal or state antitrust laws and cannot be used to cover up collusive conduct such as price-fixing or market allocation schemes.⁸ As in other areas, the Sherman Act applies to conduct implicating IP rights, with Section 1 of the Sherman

delrahim-delivers-keynote-address-university; Makan Delrahim Delivers Remarks at the USC Gould School of Law’s Center for Transnational Law and Business Conference, 10 November 2017 (the 2017 AAG Delrahim Speech), available at www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-remarks-usc-gould-school-laws-center.

- 4 See The ‘New Madison’ Approach to Antitrust and Intellectual Property Law, Makan Delrahim (16 March 2018), available at <https://www.justice.gov/opa/speech/file/1044316/download>.
- 5 See DOJ Withdraws Assent to Key IP Policy, K. Vidal, A. Grossman, S. Torpey, & I. Papendick, Today’s General Counsel (Spring 2019), available at https://issuu.com/todaysgc/docs/tgc_spr19_issuu/24.
- 6 See With a Focus on Promoting Innovation, DOJ takes ‘Extraordinary Step’ to Update and Clarify Its 2015 IEEE Business Review Letter, S. Torpey, I. Papendick, P. Opdyke (15 September 2020), available at <https://www.winston.com/en/competition-corner/with-a-focus-on-promoting-innovation-doj-takes-extraordinary-step-to-update-and-clarify-its-2015-ieee-business-review-letter.html>.
- 7 See, e.g., Does DOJ’s Rebranding of Patent Policy Letter Hint at More?, Matthew Perlman, Law360 (5 May 2021), available at <https://www.law360.com/articles/1376134>.
- 8 See, e.g., Antitrust Guidelines for the Licensing of Intellectual Property, Dept. of Justice, FTC (12 January 2017), <https://www.justice.gov/atr/IPguidelines/download> (last accessed April 28, 2021) (hereinafter ‘Antitrust Guidelines for the Licensing of Intellectual Property’); *U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967) (licensor conspired with licensees to fix prices and divide markets); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 435 (4th Cir. 2015) (standard-setting can have ‘decidedly procompetitive effects by encouraging greater product interoperability, generating network effects, and building incentives to innovate’).

Act governing agreements alleged to unreasonably restrain trade, which may take place in the context of licensing, standard-setting activities, or other joint conduct.⁹ Section 2 of the Sherman Act governs unjustified exclusionary conduct used to obtain or maintain a monopoly, for example by procuring IP rights by fraud on the PTO, wrongfully asserting IP rights beyond their scope to exclude a competitor from the market or engaging in serial acquisitions.¹⁰ Acquisitions of IP rights may also implicate Section 7 of the Clayton Act, which governs mergers and acquisitions that may substantially lessen competition or tend to create a monopoly.¹¹ The FTC may further assert Section 5 of the FTC Act, which more broadly prohibits unfair or deceptive methods of competition.¹²

The most recent FTC and DOJ antitrust enforcement policies in this area are further outlined in the Antitrust Guidelines for the Licensing of Intellectual Property, last updated by the Agencies in 2017; the 2010 Horizontal Merger Guidelines; the 2020 Merger Remedies Guidance; and the Agencies' 2007 and 2011 reports on the intersection of antitrust and IP.¹³ The Agencies' general approach is to 'apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right'.¹⁴ The Agencies have recognised, however, that intellectual property does have some characteristics, such as ease of misappropriation, that distinguish it from other forms of property.¹⁵

Although facially anticompetitive agreements relating to IP rights may still be summarily struck down under what is known as the per se rule, the majority of agreements related to intellectual property are assessed under the mode of analysis known as the rule of reason. Under the rule of reason, a court will balance anticompetitive and pro-competitive effects and assess whether pro-competitive justifications asserted by a defendant could have been achieved through less restrictive alternatives. Absent contractual commitments to the contrary, those who own IP rights in the United States are generally free to choose whether or not to license their rights, to whom to license and if so at what price.¹⁶

Fundamentally, there is a tension inherent in the relationship between intellectual property rights and antitrust law in that the former grants the right to exclude competitors from practising an invention and the latter prohibits a competitor from engaging in unjustified exclusionary conduct used to gain or maintain a monopoly. The two bodies of law, however, are increasingly viewed as serving the same complementary goals of incentivising innovation, promoting vigorous competition and promoting consumer welfare, which flows from the

9 15 U.S.C. § 1.

10 15 U.S.C. § 2.

11 15 U.S.C. § 18.

12 15 U.S.C. § 45; *see generally* Antitrust Guidelines.

13 *See generally* Antitrust Guidelines for the Licensing of Intellectual Property; Horizontal Merger Guidelines, Dept. of Justice, FTC (19 August 2010), <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> (last accessed 8 May 2021) (hereinafter 'Merger Guidelines'); U.S. Dep't of Justice Antitrust Div., Merger Remedies Manual at 6-7 (2020); Press Release, Dept. of Justice, DOJ and FTC Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property (13 January 2017), <https://www.justice.gov/opa/pr/doj-and-ftc-issue-updated-antitrust-guidelines-licensing-intellectual-property>.

14 Antitrust Guidelines for the Licensing of Intellectual Property § 2.

15 Antitrust Guidelines and Policy Statements § 110; Antitrust Guidelines for the Licensing of Intellectual Property.

16 *See, e.g., FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

creation of new technology.¹⁷ Although courts used to assume a patent granted the patentee monopoly power, more sophisticated economics have generally prevailed to provide a better understanding that the right to exclude may be narrow or competitively insignificant where multiple products can compete effectively regardless of the rights at issue. Caution thus must be taken carefully to delineate where a lawful right to exclude ends and anticompetitive exclusionary conduct subject to antitrust scrutiny begins. With the ever-growing importance of patented technologies to the economy, the prevalence of antitrust-IP intersection cases appear poised to continue to grow as well, offset only by the current trend in courts increasingly to hold breaches of FRAND commitments to be governed by contract law, rather than antitrust.

This chapter on the application of antitrust law to intellectual property rights in the United States details recent developments in US antitrust litigation, provides an overview of common antitrust issues that arise at the intersection of intellectual property and antitrust law, and provides guidance on how to lessen the risk of antitrust scrutiny.

II YEAR IN REVIEW

Despite the outbreak of the covid-19 pandemic and the worldwide economic shutdown it precipitated, 2020 proved to be a remarkably busy year for antitrust-IP matters. Assistant Attorney General Delrahim continued to vigorously advocate the New Madison approach to antitrust and IP enforcement by filing statements of interest and amicus petitions in private litigations, culminating with several victories for defendants whose licensing practices were alleged to have violated the antitrust laws.¹⁸ In August 2020, with a potential change in presidential administrations only a few months away, Delrahim further undertook a major reorganisation of the Antitrust Division's civil enforcement programme in part to focus civil enforcement more effectively outside of the merger context on technology markets that may result in an increase in antitrust-IP enforcement matters going forward.¹⁹

Much of the Antitrust Division's docket in 2020 concerned the antitrust implications of patentees or their licensing agents charging purportedly supra-competitive royalties that were alleged to breach FRAND licensing commitments. The DOJ intervened in several prominent litigation cases involving allegedly supra-FRAND royalties to set forth the DOJ's view that a violation of a FRAND commitment, without more, does not run afoul of the federal antitrust laws.

Its first major intervention of the year came in Intel and Apple's lawsuit against Fortress Investment Group and what they asserted to be a 'web' of patent assertion entities (PAEs) with which Fortress was associated.²⁰ The plaintiffs alleged that Fortress had engaged in a 'campaign of anticompetitive patent aggregation' and 'endless, meritless litigation' asserting patent rights against potential licensees.²¹ By Apple and Intel's account, these practices

17 See, e.g., Antitrust Guidelines § 110.

18 See, e.g., Statement of Interest of the United States at 3, *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, No. 19-02933 (N.D. Tex.).

19 U.S. Dep't of Justice, *Assistant Attorney General Makan Delrahim Announces Re-Organization of the Antitrust Division's Civil Enforcement Program* (20 August 2020), available at <https://www.justice.gov/opa/pr/assistant-attorney-general-makan-delrahim-announces-re-organization-antitrust-divisions-civil>.

20 *Intel Corp. and Apple Inc. v. Fortress Inv. Grp., LLC, et al.*, No. 19-07651 (N.D. Cal.).

21 Complaint at 5, *Intel Corp. and Apple Inc. v. Fortress Inv. Grp., LLC, et al.*, No. 19-07651 (N.D. Cal. 20 November 2019).

enabled Fortress and the PAEs to evade commitments made to standard-setting organisations to license the relevant standard-essential patents (SEPs) on FRAND terms.²² In its statement of interest, the DOJ argued that Fortress's allegedly anticompetitive conduct could not give rise to an antitrust claim.²³ Rather, in the DOJ's view, an allegation that a patent owner unlawfully refused to license its SEPs on FRAND terms is more properly asserted as a breach of contract.²⁴ In July, the US District Court for the Northern District of California dismissed the lawsuit, finding that Apple and Intel's federal and state antitrust claims were so 'vague and overbroad' as to fall short of federal pleading standards.²⁵ Judge Edward Chen concluded that the 'high-tech' patent market allegedly undermined by Fortress's conduct was 'so implausibly vast that it provides no meaningful boundaries at all given the wide variety of technologies, products, and customers it allegedly encompasses.'²⁶ Judge Chen did, however, provide Apple and Intel with leave to amend their complaint and craft a less speculative antitrust claim.²⁷ In January, after the plaintiffs' amended complaint again failed to pass muster, Judge Chen granted them a third (and likely final) attempt.²⁸

In a highly unusual development, the Delrahim DOJ position that breaches of FRAND commitments do not violate the antitrust laws placed it at odds with the FTC when the two sister Agencies took diametrically opposed positions in the FTC's litigation against the chipmaker Qualcomm.²⁹ The FTC alleged that Qualcomm had maintained an unlawful monopoly in the manufacture of baseband processors for cell phones and other mobile-computing devices, in violation of Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act.³⁰ Among other purportedly anticompetitive conduct, Qualcomm allegedly (1) refused to license its SEPs to chipset manufacturer competitors, (2) refused to supply chipsets to manufacturers unless they first agreed to license Qualcomm's SEPs, and (3) required exclusivity from Apple in exchange for reduced royalties.³¹

In a 2019 bench decision, Judge Lucy Koh found Qualcomm's royalty rates and licensing practices unlawful in the aggregate.³² Judge Koh concluded that Qualcomm unlawfully used contracts with critical customers to exclude rivals from the modem chip market.³³ Notably, Judge Koh held that Qualcomm had an antitrust and FRAND duty to license rivals for the manufacture and sale of modem chips in part because it previously had done so.³⁴ She found as well that Qualcomm improperly coerced its modem chip customers to take licences to its

22 *Id.*

23 Statement of Interest of the United States at 4–5, *Intel Corp. and Apple Inc. v. Fortress Inv. Grp., LLC*, No. 19-07651 (N.D. Cal.).

24 *Id.* at 20.

25 *Intel Corp. v. Fortress Inv. Grp. LLC*, No. 19-CV-07651-EMC, 2020 WL 6390499 at *8 (N.D. Cal. 15 July 2020).

26 *Id.* at *8.

27 *Id.* at *39–*41.

28 *Intel Corp. v. Fortress Inv. Grp. LLC*, No. 19-CV-07651-EMC, 2021 WL 51727, at *18 (N.D. Cal. 6 January 2021).

29 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019), *rev'd*, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

30 *See* 411 F. Supp. 3d at 669.

31 *Id.* at 675–76.

32 *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019).

33 *Id.* at 690–91.

34 *Id.* at 751.

patents and extracted excessive royalty rates. The sum of these practices, according to Judge Koh, was that Qualcomm was able to exclude rivals and charge excessive royalties for its patent portfolio in violation of Sections 1 and 2 of the Sherman Act.

Shortly before Judge Koh's ruling on the merits, and in what observers termed an 'unusual'³⁵ and even 'unprecedented'³⁶ intervention, the DOJ filed a statement opposing the FTC's proposed penalty – a compelled renegotiation of Qualcomm's existing licensing agreements.³⁷ Instead, it urged the court to hold hearings before fashioning an 'overly broad remedy' that 'could reduce competition and innovation in markets for 5G technology and downstream applications that rely on that technology'.³⁸ The US Court of Appeals for the Ninth Circuit, in a move urged by the DOJ and opposed by the FTC, partially stayed the ruling pending appeal. And in its third and final intervention, the DOJ filed an amicus brief on appeal in support of Qualcomm, arguing that Judge Koh had mischaracterised as 'anticompetitive malice' the sort of profit-maximising behavior the Supreme Court explained is what attracts business acumen in the first place.³⁹

In August 2020, the Ninth Circuit reversed the ruling below.⁴⁰ The Ninth Circuit held that Judge Koh erred both in finding that Qualcomm had a duty to deal with its competitors and in insisting that Qualcomm's royalties needed to be based on the smallest saleable patent-practicing unit (SSPPU), rather than on the end product (the cell phone).⁴¹ Rather, the Ninth Circuit ruled that the FTC failed to prove that Qualcomm engaged in anticompetitive conduct because Qualcomm's 'no license, no chips' policy was 'chip-supplier neutral' in that it applied to all sales, regardless of which supplier sold a customer chips such that no rivals were disadvantaged.⁴² Because the policy effectively gave Qualcomm's rivals indemnification agreements, the Ninth Circuit instead described Qualcomm's policy as 'no license, no problem' for rival chip makers.⁴³ Appearing to have adopted the DOJ's reasoning over the FTC's, the Ninth Circuit noted that to the extent Qualcomm had breached FRAND commitments, a conclusion the court did not reach, the remedy for such a breach could be found in contract and patent law.⁴⁴

In 2020, the Northern District of Texas also dismissed an action brought by Continental Automotive Systems against Avanci, a licensing platform, and Nokia and other patentees alleging defendants conspired to deprive Continental of FRAND licences for SEPs.⁴⁵ As in the cases above, the DOJ filed another statement of interest in the district court proceeding

35 See Ben Remaly, *DOJ submits unusual intervention in FTC's Qualcomm suit*, Global Comp. Rev. (18 July 2019), available at <https://globalcompetitionreview.com/doj-submits-unusual-intervention-in-ftcs-qualcomm-suit>.

36 See American Enterprise Institute, *The Justice Department's unprecedented intervention in the Federal Trade Commission case against Qualcomm: Implications for 5G* (10 May 2019), available at <https://www.aei.org/technology-and-innovation/innovation/the-justice-departments-unprecedented-intervention-in-the-federal-trade-commission-case-against-qualcomm-implications-for-5g/>.

37 Statement of the United States at 3, *FTC v. Qualcomm Inc.*, No. 17-00220 (N.D. Cal. 2 May 2019).

38 *Id.* at 5.

39 Br. of the United States as Amicus Curiae in Support of Appellant and Vacatur at 25, *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

40 *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

41 *Id.* at 998–99.

42 *Id.* at 984–85.

43 *Id.* at 995.

44 *Id.* at 995–96.

45 *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, 485 F. Supp. 3d 712 (N.D. Tex. 2020).

stressing that alleged breaches of contractual FRAND commitments in the standard-setting context do not sound in antitrust law.⁴⁶ The district court dismissed the complaint given Continental's failure to allege facts supporting an agreement among defendants not to license Continental, as opposed to mere parallel conduct, and failure to allege any exclusionary conduct.⁴⁷ The case is currently on appeal before the Fifth Circuit.

The DOJ further asserted its position on FRAND issues in business review letters – advisory opinions issued by the department that are intended to scrutinise proposed business practices for potential antitrust violations.⁴⁸ As noted above, in September 2020, the DOJ updated its 2015 Business Review Letter to the Institute of Electrical and Electronics Engineers (2015 BRL),⁴⁹ which has been cited by some to argue that the Obama-era DOJ concurred with the IEEE's position that SEP owners should not seek injunctions against implementers. The DOJ's 2020 update explained that the 2015 BRL 'has been cited, frequently and incorrectly, as an endorsement of the IEEE Policy', in which the industry group set out its articulation of FRAND principles.⁵⁰ The Delrahim DOJ noted that, rather than producing any of the pro-competitive benefits expected to come from the 2015 BRL, the IEEE policy 'seems instead to have dampened enthusiasm for the IEEE process.'⁵¹ The 2020 update sought to clarify that (1) injunctive relief is available under US law for patents encumbered by a contractual commitment to license on FRAND terms;⁵² (2) the SSPPU is not the only appropriate base for determining a reasonable royalty, and using the end product as the royalty base is also appropriate;⁵³ and (3) the primary focus on anticompetitive risks from 'hold up' by patent owners ignores incentives for equally harmful 'hold out' by implementers.⁵⁴ Given the Acting Attorney General's decision to move the Delrahim update to the 2015 BRL to the advocacy section of the DOJ website, practitioners will be watching closely to see if the move was foreshadowing a shift in policy now that AAG Delrahim has stepped down.

The vigorous debate over FRAND principles seemed the year's predominant topic of discussion within the antitrust-IP bar. However, a series of class action antitrust litigation cases bear mention as well. Of particular note were several high-profile lawsuits brought by purchasers of pharmaceuticals and medical products alleging that manufacturers had stifled generic and biosimilar competition.

46 Statement of Interest of the United States at 3, *Cont'l Auto. Sys., Inc. v. Avanci, LLC*, No. 19-02933 (N.D. Tex.)

47 See 485 F. Supp. 3d at 725–27.

48 See generally U.S. Dep't of Justice, *What is a Business Review Letter?* (last updated 25 June 2015), available at <https://www.justice.gov/atr/what-business-review>. See also, e.g., Letter from Makan Delrahim, Assistant Att'y Gen. U.S. Dep't of Justice, to Mark Hamer, Esq., Baker & McKenzie (28 July 2020) (reviewing Avanci's proposed joint patent-licensing 'pool').

49 Letter from Renata B. Hesse, Acting Assistant Att'y Gen. U.S. Dep't of Justice, to Michael A. Lindsay, Esq., Dorsey & Whitney LLP (2 February 2015).

50 Letter from Makan Delrahim, Assistant Att'y Gen. U.S. Dep't of Justice, to Sophia A. Muirhead, Esq., Inst. of Electrical and Electronics Eng'rs, Inc. (10 September 2020), at 1.

51 *Id.* at 9.

52 *Id.* at 3–4.

53 *Id.* at 6–7.

54 *Id.* at 8–9.

In the *in re Suboxone* litigation,⁵⁵ a putative class of direct purchasers of Suboxone opioid-addiction pharmaceuticals alleged that a manufacturer replaced the tablet form of the treatment with an under-the-tongue film version to maintain its monopoly power by coercing prescribers to prefer the branded film version over generic tablets that would no longer be rated by the FDA as bioequivalent to the brand version.⁵⁶ The purchasers alleged that the transition to film, coupled with other anticompetitive conduct such as falsely disparaging tablets as more dangerous and manipulating the FDA's Risk Evaluation and Mitigation Strategy, shifted the market to film by the time generic tablets entered the market in order to suppress generic competition. In 2019, the US District Court for the Eastern District of Pennsylvania certified the class of purchasers,⁵⁷ a decision the Third Circuit affirmed in a July 2020 ruling. Holders of name-brand pharmaceutical patents will no doubt keep a close eye on the substantive disposition of *in re Suboxone*, as a ruling against the brand manufacturer may portend increased scrutiny of 'product hopping' conduct in the United States going forward.

Other antitrust class-actions waded – with less success – into the 'patent thicket'. In the *in re Humira* litigation,⁵⁸ a class of indirect purchasers of the blockbuster arthritis drug Humira brought a private antitrust suit against its manufacturer, AbbVie. The putative class alleged that AbbVie had impeded competition from biosimilar manufacturers by laying a 'minefield' of patents issued from applications filed after Humira's launch.⁵⁹ In June, however, the Northern District of Illinois dismissed the suit, holding plaintiffs' antitrust claims too speculative to assert a plausible case of competitive harm.⁶⁰ Judge Manish Shah concluded that even facially aggressive patent-enforcement practices – including the use of patent thickets – cannot constitute antitrust violations without proof of some other factors, such as those patents' invalidity.

III LICENSING AND ANTITRUST

Because patents confer the right to exclude others from practising an invention, licensing those rights is generally pro-competitive in that it increases the opportunities for others to make, sell or use technology, thereby creating competition where none might otherwise exist, clearing blocking positions that could otherwise restrain innovation, creating efficiencies in production and thus increasing consumer welfare.⁶¹ The Antitrust Guidelines for the Licensing of Intellectual Property reflect the Agencies' acknowledgement that licensing and cross-licensing frequently offer substantial pro-competitive efficiencies, promote innovation and enhance competition.⁶² To provide businesses with a degree of certainty and thus encourage pro-competitive licensing activities, the Agencies established an antitrust 'safety zone' pursuant to which they ordinarily will not challenge a restraint in an IP licensing

55 *In re Suboxone (Buprenorphine Hydrochlorine & Naloxone) Antitrust Litig.*, 967 F.3d 264 (3d Cir. 2020).

56 *Id.* at 264, 268.

57 *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig. (Class Certification)*, 421 F. Supp. 3d 12, 26 (E.D. Pa. 2019).

58 *In re Humira (Adalimumab) Antitrust Litigation*, 465 F. Supp. 3d 811 (N.D. Ill. 2020).

59 *Id.* at 820.

60 *Id.* at 819.

61 See, e.g., Richard Gilbert and Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 28 Brookings Papers On Econ. Activity 283, 287 (1997).

62 *Id.* at 287 (referencing the Antitrust Guidelines for the Licensing of Intellectual Property § 2.3).

arrangement if (1) the restraint is not facially anticompetitive; and (2) the licensor and its licensees collectively account for no more than 20 per cent of each relevant market significantly affected by the restraint.⁶³ Facially anticompetitive restraints generally include price-fixing, the allocation of markets or customers, agreements to reduce output, and certain group boycotts, which may merit condemnation under the per se rule without an elaborate inquiry into the restraint's likely anticompetitive effects.⁶⁴ However, in light of the benefits and efficiencies created through licensing, licensing agreements are generally scrutinised under a rule of reason analysis rather than a per se rule of illegality.⁶⁵

Although the Agencies recognise the pro-competitive benefits of licensing, the US Supreme Court has warned that licensors cannot hide behind these benefits to conceal anticompetitive conduct.⁶⁶ If terms embedded in the licensing arrangement are blatantly anticompetitive, have clear anticompetitive effects or are not reasonably necessary to achieve the efficiencies gained, the agreement could very well be analysed as a per se restraint.⁶⁷ The Agencies will assess whether licences impose horizontal or vertical restraints on competition, with agreements drawing heightened scrutiny where a licensor and licensee (or two or more licensees) would have been actual or likely horizontal competitors absent the challenged licensing arrangement.⁶⁸

Horizontal licensing arrangements may be challenged in the United States when they include output restraints, territorial restrictions, and field-of-use licensing.⁶⁹ Territorial restraints assign exclusive territories or regions to each competitor, which eliminates competition between parties that would have occurred but for the licensing agreement.⁷⁰ These arrangements raise antitrust concerns when they involve competitors that possess market power in the aggregate or are a part of a larger scheme of restraints.⁷¹ As the Supreme Court held in *US v. Sealy*, territorial restrictions that are part of 'an aggregation of trade restraints including unlawful price-fixing and policing' are unlawful under Section 1 of the Sherman Act.⁷² Fitting into the *Sealy* framework, the recent *in re Blue Cross Blue*

63 Antitrust Guidelines § 4.3.

64 *Id.* § 3.4.

65 Richard Gilbert and Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 28 Brookings Papers On Econ. Activity 283, 287 (1997).

66 *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

67 American Bar Assoc. Press, *Intellectual Property and Antitrust Handbook*, § 2 (2d ed. 2015).

68 Vertical restraints, in contrast, are those restraints imposed by a firm at one level of the distribution chain on a firm at another level (for example, when a manufacturer restricts where its distributor may sell products). See, e.g., *Leegin Creative Leather Prods. v. PSKS, Inc.* 551 U.S. 877, 888 (2007) ('Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements.');

American Bar Assoc. Press, *Intellectual Property and Antitrust Handbook*, § 2.A.I (2d ed. 2015).

69 American Bar Assoc. Press, *Intellectual Property and Antitrust Handbook*, § 2 (2d ed. 2015). Field-of-use restrictions involve limiting a license to one or more technical fields of application, or to a particular product market or industrial sector. Richard Gilbert and Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties*, 28 Brookings Papers On Econ. Activity 283, 287 (1997).

70 *Licensing of IP Rights and Competition Law*, Organisation for Economic Co-operation and Development, 29 April 2019, available at: [https://one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf).

71 *Licensing of IP Rights and Competition Law*, Organisation for Economic Co-operation and Development, 29 April 2019, available at: [https://one.oecd.org/document/DAF/COMP\(2019\)3/en/pdf](https://one.oecd.org/document/DAF/COMP(2019)3/en/pdf).

72 *United States v. Sealy, Inc.*, 388 U.S. 350, 357 (1967).

Shield Antitrust Litigation case likewise involved allegations of both territorial restraints and output restrictions. Plaintiffs alleged that Blue Cross Blue Shield (BCBS) imposed territorial restrictions in members' licensing agreements as well as rules that limited how much revenue each member could derive from other lines of business outside of those using BCBS's trademark (a form of output restriction). In effect, this meant that while members could compete in others' territories with brands that did not include the BCBS trademark, there was a cap on the amount of business that could be generated this way, which plaintiffs alleged reduced competition among members. The Northern District of Alabama determined that BCBS's overall scheme, including the territorial and output restrictions, must be analysed under the per se rule, which precipitated a large settlement of US\$2.67 billion among the parties in 2020.⁷³

Vertical licensing arrangements can also raise antitrust concerns in the United States, such as those that implicate tying and exclusive dealing. Tying may violate the antitrust laws as well as constitute patent misuse when the licensor conditions the licensing of intellectual property on the purchase of another good, service or IP right.⁷⁴ Exclusive dealing may also raise antitrust concerns where a licensing agreement prevents a licensee from selling, distributing, licensing, or using competing technologies from another licensor.⁷⁵

Recently, several cases have focused on a licensor's decision to license exclusively at one level of the supply chain, particularly in the context of SEPs subject to FRAND commitments.⁷⁶ In the United States, however, the Supreme Court has repeatedly held that competitors have no general antitrust duty to aid their rivals and can generally choose with whom to deal.⁷⁷ In 2020, the Ninth Circuit explicitly extended this doctrine to the licensing context in *FTC v. Qualcomm*.⁷⁸ While licensing at the end product level of the supply chain may enable the patentee to charge higher prices, as opposed to licensing at the component level, the Ninth Circuit held that profit-seeking behavior alone is insufficient to support antitrust liability.⁷⁹ Indeed, absent contractual commitments to the contrary, a patentee may

73 *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1268 (N.D. Ala. 2018) (In addition, the court found that the restrictions at issue here were 'at least as anticompetitive as the exclusive sales areas at issue in *Sealy*.'); *In re Blue Cross Blue Shield*, No. 2:13-CV-20000-RDP, 2020 U.S. Dist. LEXIS 248401, at *24 (N.D. Ala. 30 November 2020) (approving the settlement agreement).

74 The Agencies are more likely to challenge the arrangement when (1) the seller has market power in the tying product, (2) the arrangement harms competition in the defined market of the tying or tied product, and (3) the productive efficiencies do not outweigh the anticompetitive effects. Antitrust Guidelines for the Licensing of Intellectual Property § 5.3; *Princo Corp. v. ITC.*, 616 F.3d 1318, 1327-328 (Fed. Cir. 2010) (discussing patent misuses such as broadening the scope of the patent, requiring the purchase of an unpatented product as a condition for obtaining a license to the patent, and extracting extremely high royalties from the patent just to leverage a monopoly).

75 Antitrust Guidelines for the Licensing of Intellectual Property §§ 4.1.2-4.2. The Agencies' determination of whether exclusive dealing has anticompetitive effects depends on the degree of market foreclosure, duration of the exclusive dealing arrangement, and characteristics of the input and output markets, such as barriers to entry and concentration. *Id.*

76 *See, e.g., FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020).

77 *See, e.g., Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004); *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919).

78 *FTC v. Qualcomm, Inc.*, 969 F.3d 974 (9th Cir. 2020) (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

79 *FTC v. Qualcomm, Inc.*, 969 F.3d 974, 1003 (9th Cir. 2020).

ordinarily set a royalty however high the market will bear provided it is set unilaterally.⁸⁰ Exclusive licensing arrangements, however, should be entered with care because numerous factors bearing on exclusivity may be considered and the applicable rule of reason analysis is highly fact-specific. While exclusivity sometimes has recognised pro-competitive benefits, exclusive licensing may violate the antitrust laws, particularly where it substantially forecloses competition or access to markets or suppliers, raises competitors' costs of inputs, or facilitates anticompetitive pricing or other collusive conduct.⁸¹

Patent pools, portfolios, and cross-licensing arrangements, which involve agreements with or between patent owners in order to license patents to one another or to third parties, are also subjected at times to antitrust scrutiny in the United States.⁸² Pool and portfolio licensing have been repeatedly recognised by courts and the DOJ as pro-competitive due to the many benefits and efficiencies created by reducing transaction costs, creating economies of scale, integrating complementary technologies and avoiding costly patent infringement litigation, and thus are typically analysed under the more permissive rule of reason.⁸³ In extraordinarily rare circumstances, however, these arrangements may be subject to the *per se* rule where the 'only apparent purpose is naked price fixing'.⁸⁴ Litigation in this area has focused in recent years on whether the pool restrains the ability to obtain individual licences directly from the patent holders themselves. Courts have repeatedly held that a patent pool or portfolio licence does not restrain trade in violation of the Sherman Act if the plaintiff had a realistic opportunity to license independently from individual owners of patent rights available through the pool because the pool licence in such a case merely provides

80 *Cf. Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (charging monopoly prices not unlawful); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979) (monopolist 'may charge as high a rate as the market will bear').

81 *Cf. Antitrust Guidelines for the Licensing of Intellectual Property* §4.1.2.-4.2.

82 *Antitrust Guidelines for the Licensing of Intellectual Property* § 5.5.

83 *See, e.g., Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (rejecting that the blanket licensing agreement constituted illegal price fixing among copyright owners and applying the rule of reason to recognise offered benefits to competition, including creating a new product and reducing transactions costs); Letter from Joel I. Klein, Asst. Att'y Gen., Dep't of Justice re MPEG LA (26 June 1997) (concluding MPEG LA's licensing model has features designed to enhance the usual procompetitive effects and mitigate potential anticompetitive dangers and is likely to provide significant cost savings to licensors and licensees alike, substantially reducing the time and expense that would otherwise be required to disseminate the rights to each MPEG-2 Essential Patent to each would-be licensee), available at <https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-lucent>; *see also* Letter from Makan Delrahim, Assistant Att'y Gen. U.S. Dep't of Justice, to Mark Hamer, Esq., Baker & McKenzie (28 July 2020).

84 *See Nero AG v. MPEG LA, L.L.C.*, No. 10-cv-3672-MRP-RZ, 2010 U.S. Dist. LEXIS 119030 (C.D. Cal. Sep. 14, 2010) (a patent pool may be a *per se* unlawful restraint of trade when its 'only apparent purpose is naked price fixing').

an alternative competitive option.⁸⁵ In 2020, the Northern District of Texas followed this trend in dismissing an antitrust challenge to a portfolio licensing agreement that allows participating licensors to independently license SEPs outside the platform.⁸⁶

Finally, while intersection litigation frequently focuses on patents, antitrust scrutiny can also arise in the context of software and trademark licensing. In the software industry, monopolisation is a significant antitrust concern because of network effects, a form of demand-side economies of scale by which the value of a piece of software (such as an operating system) rises with the number of end users who ultimately use the software.⁸⁷ In contrast, antitrust claims rarely arise in connection with trademark licensing because trademarks greatly differ from patents in that they only provide the right to use a particular designation (symbol, name and so on), and thus are unlikely to confer monopoly or market power over a product.⁸⁸

IV STANDARD-ESSENTIAL PATENTS

In the United States, the contours of antitrust claims relating to SEPs, such as manipulation of the standard-setting process, standard-setting deception and subsequent breaches of FRAND commitments, have been evolving against the backdrop of the Delrahim DOJ's advocacy to realign antitrust policy with the incentives to innovate that are inherent in the patent grant. This is a developing area of law that may be further shaped by the change in the administration and the turnover of leadership at both the DOJ and the FTC. Notably, the Agencies' prior Guidelines are silent as to the application of the antitrust laws both with respect to SEPs and issues relating to FRAND commitments.

Corporations routinely rely on standards developed by hundreds of national and international standard-setting organisations (SSOs) and standard-developing organisations (SDOs).⁸⁹ To enable the production of new generations of technology, particularly those that require inter-operation, industry participants work together to develop technical specifications

85 *Sumitomo Mitsubishi Silicon Corp. v. MEMC Elec. Materials, Inc.*, No. 05-cv-2133 SBA, 2007 WL 2318903, at *15 (N.D. Cal. 13 August 2007) (collecting cases); *Matsushita Elec. Indus. Co., Ltd. v. Cinram Int'l, Inc.*, 299 F. Supp. 2d 370, 378-79 (D. Del. 2004) (no restraint of trade when plaintiff 'realistically could avail itself of individual licenses to [the essential patents]'); *Nero AG v. MPEG LA, L.L.C.*, No. 10-cv-3672-MRP, 2010 WL 4878835, at *4 (C.D. Cal. 24 November 2010) (no restraint of trade where patent pool does not restrict individual licensing); see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979) (reversing § 1 condemnation of a blanket license to pooled copyrighted compositions where the 'individual composers and authors [had not] agreed not to sell individually'); *Columbia Broad. Sys., Inc. v. Am. Soc'y of Composers, Authors & Publishers*, 620 F.2d 930, 935-36 (2d Cir. 1980) (blanket license could not violate §1 because 'the opportunity to acquire a pool of rights does not restrain trade if an alternative opportunity to acquire individual rights is fully available'); Antitrust Guidelines §§ 3.1, 4.1, 5.1, 5.5 (2017) (setting forth pro-competitive benefits of patent pools).

86 485 F. Supp. 3d 712.

87 Michael Katz and Carl Shapiro, *Antitrust in Software Markets*, 22 September 1999, available at: https://www.researchgate.net/publication/242429931_Antitrust_in_SoftwaSo_Markets.

88 See *Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir. 1997) ('[T]rademarks are by their nature non-exclusionary . . . [and] unlike other intellectual property rights, [do] not confer a legal monopoly on any good or idea.');

89 See, e.g., List of Standards Developing Organizations, American National Standards Institute, available at: https://www.standardsportal.org/usa_en/resources/sdo.aspx.

for consensus-driven standards based on scientific and engineering contributions that may come from a private group of companies or a broader collection of market participants, research organisations, government representatives or other international stakeholders. The US Supreme Court has recognised that ‘standards can have significant procompetitive advantages’, leading most courts to apply the rule of reason to standard-setting by private associations.⁹⁰ The Court simultaneously noted, however, that ‘[t]here 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.’⁹¹ Some courts in the United States have further held that a plaintiff may assert a potential monopolisation claim when a SEP holder obtains a monopoly by failing to disclose IP rights or by making fraudulent FRAND declarations in order to induce an SSO to adopt a particular standard.⁹² Courts have disagreed, however, as to whether deception alone is sufficient to state the exclusionary conduct element of a monopolisation claim or whether more must be done to show that the standard would not have been adopted but for the fraudulent misrepresentation or omission such that other technologies were excluded from the standard as a result of the conduct.⁹³

To encourage companies that invest in research and development to contribute their inventions to the advancement of standardised technologies, standards organisations generally enact IP policies recognising that contributors should be entitled to seek fair compensation for their inventions by enforcing patents that read on standards, known as standard-essential patents.⁹⁴ To strike a balance against concerns that incorporating patented technologies into a standard could increase a patentee’s market power and thus enable the patentee to

90 *Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501 (1988). Further, under the Standards Development Organization Advancement Act of 2004, the rule of reason applies to activities that are ‘reasonably required for the purpose of developing or promulgating a voluntary consensus standard’ by eligible SSOs. 15 U.S.C. §§ 4301-4305.

91 *Id.* at 500 (citing *Am. Soc’y of Mech. Engr’s, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982)).

92 *Qualcomm Inc. v. Broadcom Corp.*, 501 F.3d 297, 314 (3d Cir. 2007) (‘Deception in a consensus-driven private standard-sting environment harms the competitive process by obscuring the costs of including proprietary technology in a standard and increasing the likelihood that patent rights will confer monopoly power on the patent holder.’); *u-blox AG v. InterDigital, Inc.*, No. 3:19-cv-001 CAB, 2019 WL 1574322, at *3 (S.D. Cal. 11 April 2019) (actionable anticompetitive conduct requires ‘a patent holder’s intentionally false promise to license essential proprietary technology on FRAND terms’); *Wi-LAN Inc. v. LG Elecs., Inc.*, 382 F. Supp. 3d 1012, 1023 (S.D. Cal. 2019) (‘Courts have recognized that fraudulent FRAND declarations that are used to induce SSOs to adopt standards essential patents can be monopoly conduct for the purposes of establishing a Section 2 claim.’); *Research In Motion Ltd. v. Motorola, Inc.*, 644 F. Supp. 2d 788, 796 (N.D. Tex. 2008) (denying a motion to dismiss Section 2 claim because plaintiff alleged defendant ‘obtained its position of power in the market not as a consequence of a superior product, business acumen or historic accident, but by misrepresenting its intentions’); *Apple Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK, 2011 WL 4948567, at *4 (N.D. Cal. 18 October 2011) (‘Thus, intentionally false promises to SSOs regarding licenses with FRAND terms can give rise to actionable claims under Section 2 of the Sherman Act.’).

93 *Rambus Inc. v. F.T.C.*, 522 F.3d 456, 466 (D.C. Cir. 2008); *Cont’l Auto. Sys., Inc. v. Avanci, LLC*, 485 F. Supp. 3d 712, 735-37 (N.D. Tex. 10 September 2020) (‘The Court does not agree with those cases concluding that deception of an SSO constitutes the type of anticompetitive conduct required to support a § 2 claim. ‘Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim.’) (quoting *Rambus*, 522 F.3d at 464).

94 *See, e.g.*, ETSI IPR Policy § 3.1 (‘IPR holders . . . should be adequately and fairly rewarded for the use of their IPRs in the implementation of STANDARDS and TECHNICAL SPECIFICATIONS.’).

demand excessive royalties, referred to as patent ‘hold up’, standards organisations frequently request those contributing patented technologies to a standard to commit to granting licences on FRAND terms.⁹⁵ What constitutes a FRAND rate ordinarily is not determined by the standards organisation itself, but is left to subsequent negotiations between licensors and licensees.

As discussed above, the New Madison approach espoused by the Delrahim DOJ sought to rebalance the emphasis previously placed on concern for patent ‘hold up’ by patentees versus patent ‘hold out’ by implementers who may seek to depress royalty rates or otherwise practice patented technologies without paying royalties.⁹⁶ There has also been much debate in the United States with respect to who is best suited to determine whether a rate is fair,⁹⁷ whether FRAND commitments require patentees to license at every level of the supply chain or base royalties on the smallest saleable practicing unit,⁹⁸ and whether breaching a FRAND commitment constitutes an antitrust violation or merely a contractual commitment as advocated by the Delrahim DOJ.⁹⁹

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- 95 See, e.g., ETSI IPR Policy §§ 3.1, 6.1. Some SSOs also require an agreement not to seek an injunction against any alleged infringers of the SEP. See IEEE SA Standards Board Bylaws § 6.2, available at <https://standards.ieee.org/about/policies/bylaws/sect6-7.html> (last accessed 5 May 2021).
- 96 See *supra*; see also *In re Certain Wireless Devices with 3G and/or 4G Capabilities and Components Thereof*, Inv. No. 337-TA-868, 2014 WL 2965327, at *112 (U.S.I.T.C. 13 June 2014) (‘It makes good business sense [for implementers], for as long as they hold out, they get the IPR for free, and in the end, they are counting on getting it at either no cost if they prevail in validity or infringement, or the price of a FRAND, the price they would have paid if they had followed the [ETSI] agreement in the first place.’); *Unwired Planet Int’l Ltd. v. Huawei Tech. Co.*, [2017] EWHC (Pat) 711[95] (Eng.) (‘The authorities and the economics literature have identified a countervailing factor called ‘reverse hold up’ or ‘hold out.’ The idea is that an unscrupulous licensee may use their economic strength to avoid paying anything to a patentee, unduly dragging out the process of license negotiation, thereby putting the patentee to additional cost and forcing it to accept a lower royalty rate than is fair.’).
- 97 While the law on this point is undeveloped in the United States, the trend appears to be headed in the direction of juries. See *TCL Commc’n Tech. v. Ericsson*, 943 F.3d 1360 (Fed. Cir. 2019) (remanding determination of SEP damages based on FRAND pursuant to the Seventh Amendment right to jury trial). The Supreme Court denied TCL’s petition for certiorari on October 5, 2020.
- 98 Courts appear to be trending in agreement that companies may choose to license at different levels of the supply chain and need not base the royalty on the SSPPU, even when the licensor is alleged to have made one or more FRAND commitments. See *F.T.C. v. Qualcomm*, 969 F.3d 974, 998-99 (9th Cir. 2020) (holding that SSPPU is not a required measure of patent damages, nor is it the per se basis for determining a reasonable royalty rate) (collecting cases); *Cont’l Auto. Sys., Inc. v. Avanci, LLC*, 485 F. Supp. 3d 712, 735-37 (N.D. Tex. 10 September 2020) (dismissing complaint where component supplier alleged conspiracy not to license based on portfolio license not offered to upstream component suppliers); see also *HTC Corp v. Telefonaktiebolaget LM Ericsson*, No. 6:18-cv-00243 JRG, 2019 WL 126980 (E.D. Tex., 7 January 2019) (holding under French law a FRAND commitment does not require royalty to be based on SSPPU).
- 99 Courts appear to be trending in the direction of holding that breaches of FRAND commitments alone do not constitute antitrust violations. See, e.g., *F.T.C. v. Qualcomm*, 969 F.3d 974 (9th Cir. 2020) (‘the antitrust laws are not well suited to govern contract disputes between private parties in light of remedies available under contract or patent law, [and] imposing antitrust remedies in pure contract disputes can have harmful effects in terms of dampening incentives to participate in standard-setting bodies and to commercialize innovation.’) (quoting former FTC Commissioner Joshua Wright); *Avanci*, 485 F. Supp. 3d at 734 (‘An SEP holder may choose to contractually limit its right to license the SEP through a FRAND obligation, but a violation of this contractual obligation is not an antitrust violation.’) (citing *Qualcomm*, 969 F.3d at 995).

V INTELLECTUAL PROPERTY AND MERGERS

In the modern high-tech economy, intellectual property rights can define the course and shape of markets. This has led antitrust authorities to view IP transfers as potential antitrust risks. The 2017 Antitrust Guidelines for the Licensing of Intellectual Property note that certain transfers of intellectual property rights are most appropriately analysed by applying the principles and standards used to analyse mergers, namely the 2010 Horizontal Merger Guidelines. Specifically, the Agencies:

will apply a merger analysis to an outright sale by an intellectual property owner of all its rights to that intellectual property and to a transaction in which a person obtains through grant, sale, or other transfer an exclusive license for intellectual property (i.e., a license that precludes all other persons, including the licensor, from using the licensed intellectual property).¹⁰⁰

Such transactions may be assessed under Section 7 of the Clayton Act, Sections 1 and 2 of the Sherman Act and Section 5 of the FTC Act. Notably, the FTC has asserted Section 5 of the FTC Act against several companies alleged to have repudiated FRAND commitments made by predecessor companies prior to acquisitions.¹⁰¹

Those acquiring IP rights should further note that all mergers and acquisitions in the United States, regardless of whether they include transfers of IP rights, must report transactions to the FTC and DOJ prior to consummation if they exceed minimum thresholds set forth pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976.¹⁰² Reportable transactions must adhere to a waiting period before closing to enable the Agencies to request further information or challenge the merger should they so choose. Failure to do so could result in a ‘gun-jumping’ violation where the acquiring entity impermissibly takes control of the target prematurely.¹⁰³

In September 2020, the DOJ also released its latest Merger Remedies Guidance, which further explains that a ‘critical asset may be intangible, such as when firms with alternative patent rights for producing the same final product are merging. In those cases, structural relief must provide one or more purchasers with rights to that asset, either by sale to a different owner or through a fully paid-up license’.¹⁰⁴ As the Guidance explains:

[w]hen a patent covers the right to compete in multiple product or geographic markets, yet the merger adversely affects competition in only a subset of these markets, the Division will insist only on the sale or license of rights necessary to maintain competition in the affected markets. In some cases, this may require that the purchaser or licensee obtain the rights to produce and sell only the relevant product.

100 U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for the Licensing of Intellectual Property at § 5.7 (2017).

101 *See In re Motorola Mobility LLC & Google Inc.*, 156 F.T.C. 147, 2013 WL 12180882, at **4-5 (23 July 2013) (acquiring company liable for enforcing patents in violation of material commitments and representations made by predecessor); *Negotiated Data Solutions, LLC*, 51-0094, FTC No. C-4234, 2008 WL 4407246, at **3, 6 (22 September 2008) (violating Section 5 by enforcing patents that its predecessor committed to license to members of a standard-setting organization at a price certain).

102 15 U.S.C. § 18a (HSR Act).

103 15 U.S.C. § 18a(b); *see also, e.g.*, Complaint, *United States v. Smithfield Foods, Inc. and Premium Standard Farms, LLC*, No. 1:10-cv-00120 (D.D.C. 21 January 2010) (alleging a violation of the HSR Act where merging defendants shared operational decision-making during the statutory waiting period).

104 U.S. Dep’t of Justice Antitrust Div., Merger Remedies Manual at 6-7 (2020).

*In other circumstances, it may be necessary to give the purchaser or licensee the right to produce and sell other products (or use other processes), where doing so permits the realization of scale and scope economies necessary to compete effectively in the relevant market.*¹⁰⁵

In some instances, because patent rights are non-exclusionary (i.e., the practice by one does not require the non-practice by another), divestiture may be ordered with a required license-back.¹⁰⁶ On 17 September 2020, Alden Abbott, the General Counsel to the FTC, delivered the keynote address to the IP Watchdog 2020 Virtual Conference. In his remarks Abbott discussed this issue, observing that:

the FTC may weigh whether the divestiture of particular IP and research and development functions would be beneficial in maintaining incentives to innovate. Because so many of the issues surrounding potential, nascent, and future competition relate to IP-intensive issues, including innovative technologies that are under development, [FTC] will inquire whether efforts to preserve future competition may also serve to discourage and chill venture capitalist activities in some industries.

Abbott's comments are consistent with the Agencies' increased focus on nascent competitor acquisitions more generally.¹⁰⁷

VI OTHER ABUSES

Various other types of conduct can trigger enforcement action at the intersection of IP and antitrust, including sham or vexatious IP litigation, obtaining patents by fraud and even anticompetitive settlements. Sham litigation, including sham agency petitioning, can be used as a basis for an antitrust claim if, in addition to showing the other elements of a Section 2 monopolisation claim, the plaintiff can show that the lawsuit or petitioning was both objectively and subjectively baseless, although that standard may be loosened somewhat if the plaintiff can show a series of such sham actions.¹⁰⁸ A recent appellate case dealing with sham litigation issues was the *AbbVie* case where the Third Circuit considered appeals of sham litigation findings against both Teva and Perrigo, resulting in a split verdict demonstrating, again, that facts matter.¹⁰⁹ As to the litigation against Teva, the court considered the complex patent issues involved in concluding that the district court erred in holding that the litigation

105 *Id.* at n.25.

106 Final Judgment, *United States v. Thales S.A.*, No. 1:19-cv-00569 (D.D.C. 1 July 2019) (dividing certain 'shared' intangible assets, some of which were to be sold with the divested assets and licensed back to Thales, while others were required to be licensed for use with the divested assets).

107 *See, e.g.*, Joseph Simons, Chairman, Fed. Trade Comm'n, Remarks at Georgetown Law Global Antitrust Enforcement Symposium at 5 (25 September 2018), https://www.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf (stating 'one of our interests in this area will be mergers of high-tech platforms and nascent competitors').

108 *See Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

109 *See, e.g. Fed. Trade Comm'n v. AbbVie Inc.*, 976 F.3d 327, 369 (3d Cir. 2020), petition for cert. pending, No. 20-1293 (filed 18 March 2021); *In re Lantus Direct Purchaser Antitrust Litig.*, 950 F.3d 1 (1st Cir. 2020) (vacating lower court's dismissal and holding that defendant improperly submitted a patent for listing and is potentially liable under antitrust laws to drug purchasers who were allegedly harmed by the effective extension of its monopoly). *But see In re Wellbutrin XL Antitrust Litig.*, 868 F.3d 132 (3d Cir. 2017)

had been objectively baseless.¹¹⁰ By contrast, the Third Circuit affirmed the finding that the litigation against Perrigo was objectively baseless (notwithstanding the settlement of that litigation) based on the patent doctrine of prosecution history estoppel.¹¹¹ Having found objective baselessness, the Third Circuit went on to consider subjective baselessness, affirming the finding of the district court that subjective baselessness had been shown with respect to the case against Perrigo by circumstantial evidence of an intent to file litigation ‘for an improper purpose (i.e., in bad faith).’¹¹²

The First Circuit’s decision to vacate a lower court’s dismissal of a sham petitioning challenge in a Hatch-Waxman case, *in re Lantus Direct Purchaser Antitrust Litigation*, illustrates the importance of intent in the regulatory context.¹¹³ Here, the court held that a putative class of consumer purchasers asserting that Sanofi had unlawfully restrained competition in an insulin product market had in fact pleaded sufficient facts that demonstrated the defendant had improperly submitted its patent for listing in the FDA’s Orange Book, contrary to the statute and regulations.¹¹⁴ In response, Sanofi argued that even if the listing were improper it was not an antitrust violation because it was a ‘reasonable mistake’, invoking an objectively reasonable standard. The First Circuit panel found that there were also anticompetitive risks for failing to list relevant patents in the Orange Book, so there was a good reason to recognise an appropriate defence, but it held that the appropriate standard was that the conduct be both objectively reasonable and a good faith attempt to comply with the Hatch-Waxman regulatory framework.¹¹⁵

The doctrine of patent misuse is another basis for a potential antitrust claim, defined as conduct that either (1) has the effect of broadening the claimed coverage of the patent either temporally or in substantive scope, or (2) ties the use or purchase of the patented product or method to unpatented products or methods.¹¹⁶ Established in *Princo Corp. v. ITC*, courts consider the ‘key inquiry’ under the patent misuse doctrine to be ‘whether, by imposing the condition in question, the patentee has impermissibly broadened the physical or temporal scope of the patent grant and has done so in a manner that has anticompetitive effects’.¹¹⁷ Generally, a finding of patent misuse does not extinguish the patent, but precludes enforcement of the patent until the misuse has ceased.¹¹⁸ It is generally not considered patent misuse to base royalties on the sale of a product using a patented invention even if

(affirming the district court’s order granting summary judgement to the defendant and finding no evidence that the generic drug could have launched earlier as plaintiff claimed, effectively dismissing the sham litigation claims).

110 *AbbVie Inc.*, 976 F.3d 327 at 366.

111 *Id.* at 368.

112 *Id.* at 370.

113 *In re Lantus Direct Purchaser Antitrust Litig.*, 950 F.3d 1 (1st Cir. 2020).

114 *Id.* at 20.

115 *Id.* at 26-27; 30.

116 *See, e.g., Princo Corp. v. ITC.*, 616 F.3d 1318, 1327 (Fed. Cir. 2010); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (finding patentee misused its patent when it tied the lease of its patented machine to the purchase of unpatented machine materials).

117 *Princo Corp. v. ITC.*, 616 F.3d 1318 (Fed. Cir. 2010).

118 *See, e.g., Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942).

it contains unpatented components,¹¹⁹ nor is it patent misuse for parties to set up for their mutual convenience a multi-patent licence that requires payment of royalties on the sale of all products covered by any of the patents.¹²⁰

A monopolisation claim may also be based in part on the enforcement of a patent that has been obtained by fraud on the Patent Office. Known as the Walker Process Doctrine, it stands for the principle that the enforcement of a patent obtained by fraud committed against the Patent Office is an unlawful exclusionary act.¹²¹ ‘Enforcement’ can include acts such as filing infringement actions in court, threats to sue, refusals to license, using the patent as a market entry deterrent device or communications to rivals’ customers declaring infringement and threatening contributory infringement actions against them.¹²² However, not every imperfection in the patent application process can make a patent unenforceable. Instead, the Federal Circuit requires an actual intent to deceive and a showing of ‘materiality’, meaning the Patent Office examiner would very likely not have issued the patent had she known the truth.¹²³ It is important to keep in mind, however, that mere fraud in obtaining the patent is not sufficient to state a viable antitrust violation. All of the other prerequisites for a Section 2 monopolisation claim will still need to be met including, for example, that the defendant has monopoly power in a relevant market.¹²⁴

Finally, anticompetitive settlements of intellectual property disputes such as ‘reverse payment settlements’ or ‘pay-for-delay’ cases typically involve the resolution of a patent infringement claim by means of a payment from the patent owner to the alleged infringer.¹²⁵ *FTC v. Actavis, Inc.*, the landmark US decision regarding reverse payments, established that these agreements are not presumptively unlawful and require a rule of reason analysis.¹²⁶ But, ‘large and unjustified’ reverse payments risk anticompetitive effects, and that is exactly what the FTC challenged in the *Impax* case, decided by the Fifth Circuit in 2021.¹²⁷ There, the Fifth Circuit concluded that Impax Laboratories had entered into a reverse-payment settlement agreement with Endo International that delayed the release of Endo’s generic opioid and

119 See, e.g., *Miller Insituform, Inc. v. Insituform of N. Am., Inc.*, 605 F. Supp. 1125, 1134 (M.D. Tenn. 1985) (noting that the Supreme Court has not questioned ‘the propriety of charging a percentage of sales royalty’ on products using licensed patents, even when the product contained ‘other competing patented and nonpatented parts’), *aff’d*, 830 F.2d 606 (6th Cir. 1987).

120 *Leesona Corp. v. Varta Batteries*, 522 F. Supp. 1304, 1341 (S.D.N.Y. 1981) (‘[I]t is not patent misuse per se for a multi-patent licensing agreement to base royalties on the sale of all products using any of the inventions covered by the patents.’).

121 *Walker Process Equip’t, Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174-175 (1965).

122 Herbert Hovenkamp, *The Walker Process Doctrine: Infringement Lawsuits as Antitrust Violations*, Penn Law: Legal Scholarship Repository, 1, 13-15, 45-46 (2008) (citing to, among others, *Johnson v. Con-Vey/Keystone, Inc.*, 856 F. Supp. 1443 (D. Or. 1994) (notifying rivals’ customers about patent infringement suit not protected by *Noerr*) and *Goss Int’l Americas, Inc. v. MAN Roland, Inc.*, 2006 WL 1575287, 2006-2 Trade Cas. &75392 (D.N.H. 2 June 2006) (finding mere threats to sue enough for a violation).

123 *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F. 3d 1276, 1288 (Fed. Cir. 2011).

124 *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act Chapter 1*, Dept. of Justice, available at <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1>.

125 Aaron Edlin, Scott Hemphill, Herbert Hovenkamp and Carl Shapiro, *The Actavis Inference: Theory and Practice*, 67 Rutgers L. Rev., 1 (2015); *Federal Trade Commission v. Actavis, Inc.*, 570 U.S. 136 (2013).

126 *Fed. Trade Comm’n v. Actavis, Inc.*, 570 U.S. 136 (2013).

127 *Id.*

paid Endo more than US\$100 million to drop its patent infringement claim.¹²⁸ Impax failed to prove that the settlement had any pro-competitive benefits, and the court held that the asserted benefits could have been achieved through less-restrictive means.¹²⁹ And in *AbbVie*, the Third Circuit reversed the district court's dismissal of the FTC's 'reverse payment' theory, finding that while the *Actavis* standard was that the payment or other consideration be 'large and unjustified', a plaintiff could meet this pleading standard 'without describing in perfect detail the world without the reverse payment, calculating reliably the payment's exact size, or preempting every possible explanation for it'.¹³⁰

VII OUTLOOK AND CONCLUSIONS

Following on the heels of the Delrahim DOJ's advocacy to adopt the 'New Madison' approach when applying the antitrust laws to intellectual property rights, a string of victories for defendants in antitrust-IP intersection cases reflects an overall trend realigning antitrust law with the right inherent in the patent grant to exclude competitors and charge market rates. While the historical disagreement between the Agencies in the *Qualcomm* litigation could be interpreted to signify a growing philosophical divide, the end of the Trump administration and changing leadership is likely to bring the Agencies closer together. Unlike Trump, President Biden is known for being an institutionalist, and has even floated the idea of creating a new White House 'antitrust czar' to help coordinate competition policy across the Agencies and beyond. The focus on antitrust-IP issues is likely to lessen at least to a certain extent given that the prior intensity was uniquely driven in part by the patent background of former AAG Delrahim.

A shift in focus is already occurring in the United States as the Agencies turn their attention to concerns relating to monopolisation in digital markets generally outside of the IP context. Having had limited success in the United States in recent years, implementers have increased lobbying efforts in Europe with the hope of ultimately obtaining the ability to bargain collectively for what they could not achieve unilaterally in the United States. Only time will tell where the balance will settle in the United States with a new administration, but it is likely to begin to recalibrate once again after all of the remaining FTC Commissioner positions and the new head of the DOJ Antitrust Division are confirmed.

128 *Impax Labs, Inc. v. Fed. Trade Comm'n*, No. 19-60394, 2021 WL 1376984 (5th Cir. 13 April 2021).

129 *Id.*

130 *AbbVie Inc.*, 976 F.3d 327 at 356.

ABOUT THE AUTHORS

SUSANNAH P TORPEY

Winston and Strawn LLP

Susannah Torpey is co-chair of Winston's technology antitrust group and a litigation partner who litigates cutting-edge issues at the intersection of antitrust, IP and technology. Susannah has more than 15 years of experience representing leading companies and competitors in the preparation, trial and appeal of complex antitrust cases. Susannah regularly represents major corporations in high-profile, multi-district and class action litigation and government investigations involving a wide array of federal and state antitrust issues, including monopolisation, monopoly leveraging, price-fixing, wage fixing, no-poach agreements, group boycotts, exclusive dealing, tying, price discrimination, unfair competition, anticompetitive product redesign, interoperability degradation, and mixed issues of antitrust and intellectual property law relating to fair, reasonable, and non-discriminatory obligations, standard-setting, patent licensing, patent misuse, and fraud on the PTO. Susannah also routinely counsels businesses regarding the minimisation of antitrust risk, pricing strategies, antitrust compliance and business issues relating to the use of tech and IP, many of which are key to a company's global strategy. She has been repeatedly recognised as a 'SuperLawyer', 'Top Woman Attorney' and as a 'Star' in antitrust and litigation for obtaining critical wins for her clients, whether at trial on behalf of plaintiffs or by winning complete dismissals on behalf of defendants. Along with Aldo, Susannah was counsel for MedImmune in its successful US Supreme Court case relating to patent licensing issues.

ALDO A BADINI

Winston and Strawn LLP

Aldo Badini is co-chair of Winston's Technology Antitrust Group and a first-chair trial lawyer with over 35 years of experience litigating antitrust and patent matters and the intersection of the two. Aldo's principal areas of practice include antitrust and unfair competition litigation, patent litigation, complex commercial litigation, arbitration and contract disputes. He has extensive experience litigating Sherman Act Section 1 and 2 cases in numerous industries, including the steel, coffee, pharmaceuticals, healthcare and electronics industries. Aldo has successfully defended clients against predatory pricing allegations and has had extensive involvement in Robinson-Patman and state antitrust cases. He served as trial counsel for a major pharmaceutical manufacturer in a landmark 10-week Sherman Act antitrust jury trial with potential damages in the tens of billions of dollars at stake, in which the court granted defendants' motion for judgment as a matter of law. He was counsel for MedImmune

in its successful US Supreme Court case relating to patent licensing issues. Aldo has also been involved in numerous software, semiconductor, biotechnology and medical device patent matters. His experience includes various *Markman* hearings, jury and judge trials, and intellectual property due diligence and licensing negotiations. He has experience with intellectual property issues relating to standard essential patents and standard setting organisations, including possible antitrust claims that may arise in that context.

WINSTON AND STRAWN LLP

200 Park Avenue
New York, NY 10166-4193
United States
Tel: +1 212 294 6700
Fax: +1 212 294 4700
abadini@winston.com
storpey@winston.com
www.winston.com

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