

Kathi Vidal Weighs in on the DOJ's SEP Injunction Speech

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Intellectual Property Partner Kathi Vidal is quoted in the Law360 article titled "Antitrust Chief's SEP Injunction Speech Puts Focus on Courts."

A recent speech by Assistant Attorney General Makan Delrahim, the head of the U.S. Department of Justice's Antitrust Division, announced his division was withdrawing from a 2013 joint policy statement with the U.S. Patent and Trademark Office that warned allowing owners of patents essential to industry standards to obtain injunctions on infringing products could harm competition.

Taking a more favorable position than his predecessors in the previous administration to patent owners, he suggests that owners of essential patents who pledge to license them on terms that are fair, reasonable, and nondiscriminatory (FRAND), should still be able to win injunctions.

Owners of patents subject to a FRAND commitment may start seeking injunctions because of the DOJ's views even though some agreements between patentees and standard-setting organizations include provisions restricting their ability to do so, Kathi explains to Law360.

In that case, patent owners will "either have to argue that [those provisions] are unconscionable or that there's some other reason that they're unenforceable," she said. "Or they could assert claims that they violate the antitrust laws and therefore should not be enforced. That's the mechanism that somebody would have to pursue at this point."

Kathi said that companies that use standard-essential patents in their products are worried that the tone of Delrahim's speech could be read to suggest that owners of standard-essential patents should almost always be entitled to injunctions, regardless of their FRAND commitments. She explains that that could upend contracts that limit injunctions and raise the specter of the government undoing agreements that do not align with its views.

"To me, one of the biggest concerns is that these are contractual obligations that companies have fairly relied upon," Kathi said. "Companies have developed technology presuming that they can apply the standard and that they'll be at worst required to license the technology and that they won't be precluded from the market. There's also a concern with the government interfering with these types of contracts."

Kathi is managing partner of Winston’s Silicon Valley office. She tries high-profile, high-stakes, and high-tech patent disputes for the region’s leading companies.

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