DOJ Should Withdraw Improper Intervention In SEP Cases

By **Jay Jurata and Emily Luken** (August 24, 2021)

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During the Trump administration, the Antitrust Division of the U.S. Department of Justice forcefully advocated against the application of competition law to disputes involving standard-essential patents subject to a commitment to license on fair, reasonable and nondiscriminatory terms.

Spearheaded by former Assistant Attorney General for Antitrust Makan Delrahim, the prior DOJ pursued an aggressive campaign to advance its "New Madison" approach. This approach argued, among other things, that antitrust law was not an appropriate vehicle through which to address an SEP holder's breach of FRAND.

The prior DOJ's advocacy campaign included intervening in multiple district court cases under Title 28 of the U.S. Code, Section 517, which permits "any officer of the Department of Justice ... to attend to the interests of the United States in a suit pending in a court of the United States."

The DOJ's intervention in many of these cases was an abuse of process under Section 517 because the cases involved disputes between private, highly sophisticated parties, and there was no obvious government interest.

Prior to the last administration, the DOJ — both the Antitrust Division and the agency as a whole — historically did not use its authority under Section 517 to intervene in disputes of this nature. Because the prior administration's use of Section 517 was improper, the current DOJ should withdraw all statements of interest filed by the previous administration in cases that are still pending.[1]

Prior to 2017, the DOJ submitted approximately 130 statements in cases in which there was a clear government interest and/or the district court explicitly solicited the statements.

Examples of such submissions pursuant to Section 517 include:

- Disputes involving the potential immunity of foreign officials;[2]
- Other cases implicating foreign affairs and national security concerns;[3]
- Cases involving election and voter rights;[4]
- Cases involving other civil rights;[5]
- Qui tam actions brought under the False Claims Acts;[6]
- Cases presenting questions of constitutional and administrative law;[7]
- Cases in which the government was a defendant;[8]
- Cases involving a government program, property or platform;[9] and
- Civil actions with parallel pending criminal proceedings.[10]

Each of these situations involves disputes in which there was an obvious government interest.

Delrahim turned those norms and precedents on their head when he took the helm of the Antitrust Division in 2017. He was explicit in his intention to break with prior practice and

intervene in district court cases to advance the New Madison policy approach.

In a 2018 speech, he touted the Division's "recent effort to expand our amicus program to increase our participation in private litigation not only in the Supreme Court, but at the district ... courts as well."[11] He specifically mentioned "issues involving the interface between antitrust an IP" as those "attracting our interest as an amicus."[12]

As a result of these efforts, the DOJ intervened through Section 517 at the district court level in multiple cases. These included Continental Automotive Systems Inc. v. Avanci LLC in the U.S. District Court for the Northern District of Texas in 2020,[13] Lenovo (United States) Inc. v. IPCom GmbH & Co. in the U.S. District Court for the Northern District of California in 2019,[14] and Intel Corp. v. Fortress Investment Group LLC in the Northern District of California in 2020.[15]

The DOJ also filed a notice of intent to file a statement of interest in U-Blox AG v. InterDigital Inc. in the U.S. District Court for the Southern District of California in 2019[16] but did not file a statement after the plaintiffs agreed to withdraw reliance on their antitrust claim solely for purposes of their request for a temporary restraining order. Again, these interventions were a departure from historical norms because these cases were private disputes between highly sophisticated parties in which there was no obvious government interest.

These interventions in furtherance of the New Madison approach also establish a dangerous precedent enabling the DOJ to insert itself in any case involving any issue. The absence of any limiting principle frustrates the purpose of Section 517, which is to "attend to the interests of the United States."

The current DOJ should withdraw these inappropriately filed statements of interest in pending cases because they never should have been filed.

This includes the appeal of Continental v. Avanci in the U.S. Court of Appeals for the Fifth Circuit, in which the DOJ took the welcome step of writing to the appellate court to emphasize that it did not file any submission at the appellate level "expressing its current views of the antitrust issues raised by this case" even though Avanci and its co-defendants repeatedly cited the district court statement of interest in their appellate brief.

Although this letter is certainly a positive development, the current DOJ should eliminate any remaining uncertainty by explicitly withdrawing the previously filed statement of interest.

In addition to being inappropriate because they were inconsistent with the underlying purpose of Section 517 and historical DOJ practice, the statements of interest filed by the prior DOJ's Antitrust Division may not reflect the views on the merits of the current DOJ.

In each of the prior submissions, the DOJ argued the central thesis of the New Madison position: that an SEP-holder's breach of a FRAND obligation does not violate antitrust law.

Notably, this position conflicts with numerous well-reasoned cases[17] and sound economics. Competition law absolutely should apply to breaches of FRAND. The FRAND commitment preserves and protect the benefits of ex ante competition between technologies — both patented and public domain — that occurs before the standard is set. The breach of a FRAND commitment may eliminate that benefit by harming consumers through higher prices, lower output, and/or reduced innovation.

Moreover, through the FRAND commitment, an SEP holder voluntarily waives some limited statutory patent rights — specifically, the right to exclude and the right to charge whatever the market will bear, including monopoly-level pricing — to limit its ability to exercise the additional market power conferred by the act of standardization.

An SEP holder who fails to adhere to that commitment, while still reaping the benefits of standardization in the form of expanded market power as well as the benefits of a vastly expanded market for its patent licenses — if the standard if successful — abuses the market power conveyed as a result of that promise and distorts competition in both technology markets and downstream product markets.[18]

In keeping with these principles, and in contrast to the prior administration's New Madison approach, President Joe Biden's recent executive order on promoting competition in the American economy specifically acknowledges "the potential for anticompetitive extension of market power beyond the scope of granted patents" and the need "to protect standard-setting processes from abuse."[19] It also encourages the attorney general to "consider whether to revise [his] position on the intersection of the intellectual property and antitrust laws."[20]

In light of this guidance, the DOJ should withdraw previously filed statements of interest advocating in favor of the New Madison approach.

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Disclosure: Orrick and the authors represent Continental and Lenovo but are not litigation counsel of record in any of the cases in which the DOJ has filed a statement of interest. Orrick also represents Apple Inc., but not in the Intel v. Fortress litigation mentioned in this article.

[1] The DOJ has the power to withdraw previously filed statements of interest in pending cases. The current administration's DOJ has exercised this authority with respect to statements of interest filed by the previous administration. See Soule et al v. Connecticut Association of Schools, Inc. et al., 3:20-cv-00201 (D. Conn. Feb. 23, 2021), Doc. 171 (withdrawing statement of interest filed by previous administration in case concerning the application of Title IX to transgender student athletes).

[2] See, e.g., Koumoin v. Ki-Moon , 2016 WL 7243551, at *3 (S.D.N.Y. Dec. 14, 2016).

[3] See, e.g., S.E.C. v. Nacchio , 2008 WL 2756941, at *2 (D. Colo. Jul. 14, 2008); Kalantar v. Lufthansa German Airlines , 276 F. Supp. 2d 5, 8 n.4 (D.D.C. 2003).

[4] See, e.g., North Carolina State Conference of the NAACP v. North Carolina State Board of Elections , 2016 WL 6581284, at *5 n.5 (M.D.N.C. Nov. 4, 2016).

[5] See, e.g., T.R. v. School District of Philadelphia , 223 F. Supp. 3d 321, 327 n.5 (E.D. Pa. 2016).

[6] See, e.g., Berglund v. Boeing Company, Inc. , 2006 WL 1805965, at *1 (D. Or. June 22, 2006).

[7] See, e.g., Consolidation Coal Company v. United Mine Workers of America , 191 F. Supp. 3d 572, 576 (N.D.W. Va. 2016); MacWade v. Kelly , 2005 WL 3338573, at *3 n.4 (S.D.N.Y. Dec. 7, 2005).

[8] See, e.g., Cuyler v. Ley, 2013 WL 4776347, at *4 n.9 (N.D. Ga. Sep. 5, 2013).

[9] See, e.g., Liptak v. County , 2016 WL 5662082, at *4 n.5 (D. Minn. Aug. 24, 2016); Samuel C. Johnson 1988 Trust v. Bayfield County, Wis. , 634 F. Supp. 2d 956, 960 (W.D. Wisc. 2009); eSpeed, Inc. v. Brokertec USA, L.L.C. , 2004 WL 62490, at *1 n.2 (D. Del. Jan. 14, 2004); In re Diet Drugs Products Liability Litig. , 2001 WL 283163, at *3 (E.D. Penn. Mar. 21, 2001).

[10] See, e.g., Patridge v. J.K. Harris Co. , 2006 WL 1215189, at *2 (C.D. Ill. May 5, 2006).

[11] The Long Run: Maximizing Innovation Incentives Through Advocacy and Enforcement (Apr. 10, 2018), https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-leadership-conference.

[12] Id.

[13] No. 3:19-cv-02933 (N.D. Tex. Feb. 27, 2020), Doc. 278.

[14] No. 5:19-cv-01389 (N.D. Cal. Oct. 25, 2019), Doc. 46.

[15] No. 3:19-cv-07651 (N.D. Cal. Mar. 20, 2020), Doc. 148.

[16] No. 3:19-cv-00001 (S.D. Cal. Jan. 11, 2019), Doc. 27.

[17] Broadcom Corp. v. Qualcomm, Inc. , 501 F.3d 297, 318-19 (3d Cir. 2007); Lenovo v. InterDigital Tech. Co. , 2021 WL 1123101, at *8 (D. Del. Mar. 24, 2021); Wi-LAN Inc. v. LG Elecs., Inc. , 382 F. Supp. 3d 1012, 1022-23 (S.D. Cal. 2019); u-blox AG v. InterDigital, Inc. , 2019 WL 1574322, at *4 (S.D. Cal. Apr. 11, 2019); Funai Elec. Co. v. LSI Corp. , 2017 WL 1133513, at *5 (N.D. Cal. Mar. 27, 2017); Microsoft Mobile Inc. v. Interdigital, Inc. , 2016 WL 1464545, at *2 (D. Del. Apr. 13, 2016); Research In Motion, Ltd. v. Motorola, Inc. , 644 F. Supp. 2d 788, 796 (N.D. Tex. 2008).

[18] John "Jay" Jurata, Jr. & Emily N. Luken, Applying Section 2 to FRAND Violations: "It's Elementary, My Dear Watson," CPI Antitrust Chronicle (Jul. 2021), https://media.orrick.com/Media%20Library/public/files/insights/2021/cpi-july-2021-jurata-luken.pdf.

[19] Section 5(d) (Jul. 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

[20] Id.